In the Supreme Court of Nevada

CHEYANNE NALDER, and GARY LEWIS, 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 Judge, Respondents, and UNITED AUTOMOBILE INSURANCE COMPANY, Real Party in Interest.	Case 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 DAVID M. JONES, District Judge; and THE HONORABLE ERIC JOHNSON, District Judge, Respondents, and UNITED AUTOMOBILE INSURANCE COMPANY, Real Party in Interest.	Case No. 78243 District Court Case Nos. A549111 & A772220

OPPOSITION TO PETITIONERS' "MOTION FOR ATTORNEY FEES AND COSTS AND FOR RECONSIDERATION"

OPPOSITION TO PETITIONERS' "MOTION FOR ATTORNEY FEES AND COSTS AND FOR RECONSIDERATION"

Petitioners' bizarre motion is procedurally and substantively improper. Cheyenne Nalder and Gary Lewis had a chance to petition for rehearing but did not do that. They are in no position to seek attorney's fees while seeking to change the outcome of these writ proceedings. This Court should deny the motion.

A. The Motion Is Procedurally Improper

Nalder's and Lewis's problems begin with form.

1. It Is Not a Proper Petition for Rehearing

This motion fails all of the tests for a petition for rehearing. Its contention that this Court overlooked a material question of law (Mot. 2) is not supported by reference to any page of the original petitions. *See* NRAP 40(a)(2). Its complaints about factual errors are also largely unsupported by record citations.[1] *See id.*; *cf. also In re Discipline of Serota*, 129 Nev. 631, 637 n.5, 309 P.3d 1037, 1041 n.5 (2013) (disregarding counsel's "numerous factual assertions not supported by references to the record and references to facts that are outside the record altogether"). The motion does not comply with NRAP 32 or contain a

[1] All but footnotes 1 and 8 (at pages 4 and 10), which both cite the same settlement agreement.

certificate of compliance. *See* NRAP 40(b)(1), (4). Nalder and Lewis did not pay the $150 filing fee. *See* NRAP 40(b)(5); *cf. also Weddell v. Stewart*, 127 Nev. 645, 648, 261 P.3d 1080, 1082 (2011) (emphasizing the "importance of following the rules pertaining to appellate procedure" and that "failure to pay required fees . . . is not without consequence"). Although Nalder and Lewis threaten UAIC with sanctions (Mot. 11, 14), it is their noncompliant motion that risks such an outcome. NRAP 40(g).

2. It Is Not a Proper Motion for Fees and Costs

Nor is the motion a proper request for fees and costs. It is six pages too long. NRAP 27(d)(2). And it seeks fees in costs in other docket numbers (Mot. 13 & n.9) without actually being filed in those other cases. In two of those cases (Docket Nos. 70504, 80965), this Court has already relinquished jurisdiction by issuing remittitur or an equivalent notice and closing the cases. As this Court has warned, without a request to reopen the appeal or recall remittitur, parties cannot seek relief in a closed case. *Weddell*, 127 Nev. at 652–53, 261 P.3d at 1085 (rejecting, unfiled, a motion for reconsideration in a closed appeal).

3. Petitioners' Disregard for the Rules Prejudices UAIC

Nalder's and Lewis's decision to flout NRAP 40 and NRAP 27 puts

UAIC in a bind. Were this a proper petition, UAIC would not be required (or even permitted) to respond unless the Court so ordered, and UAIC would ordinarily have 14 days and 4,667 words to do so. NRAP 40(b)(3), (d). But by mislabeling their petition a "motion for reconsideration"—and by seeking attorney's fees and costs—Nalder and Lewis seek to shorten both the time and the length for UAIC's response. *Cf.* NRAP 27(a)(3), (d)(2).

B. If Ordered, UAIC Would Oppose the Request for Rehearing

If this Court construes Nalder's and Lewis's motion as a Rule 40 petition and orders an answer, UAIC will oppose rehearing. NRAP 40(d). Their legal arguments are wrong.

1. This Court Correctly Held that UAIC Timely Intervened in the 2018 Action Before Judgment

This Court clarified that "a settlement agreement on its own" cannot "stand[] in the place of a judgment" to bar intervention. (Opinion 9.) "[I]t is the judgment that bars intervention, not the agreement itself reached by the parties." (Opinion 10.) Nalder and Lewis balk, arguing that it was enough that the settlement was "filed with the court" (Mot. 10), though not approved or entered as a judgment. Mere agreement without judgment has never been enough to bar intervention. *See Ryan*

v. Landis, 58 Nev. 253, 75 P.2d 734, 735–36 (1938) ("*judgment* . . . by agreement" (emphasis added)).

2. This Court Correctly Found that UAIC Has an Interest in the 2018 Case

Nalder and Lewis have waived any substantive objection to UAIC's intervention in the 2018 action. After electing in the petition to challenge only the timeliness of UAIC's intervention, in reply for the first time Nalder and Lewis asked this Court to consider UAIC's intervention "substantively improper." (Reply (Dkt. 85085), at 14–15.) Even then, Nalder and Lewis did not distinguish between the 2007 and 2018 action, stating only that "[b]oth actions were ended and settled to the satisfaction of the parties litigant." (*Id.* at 15.)

In any case, the argument to bar UAIC's intervention under California law fails. Criticizing this Court's application of *Allstate Ins. Co. v. Pietrosh*, 85 Nev. 310, 454 P.2d 106 (1969), Nalder and Lewis ask this Court to adopt *Hinton v. Beck*, 98 Cal. Rptr. 3d 612 (Ct. App. 2009), which bars an insurer from intervening in the same action where it has refused to defend its insured. (Mot. 11.) This Court need not decide whether to adopt such a categorical rule, however, because UAIC tendered a defense to Lewis in the 2018 where it intervened. (Mot. 5; 5 R.

App. 1064–65.) Lewis rejected UAIC's appointed counsel (1 R. App. 30, 165), instead expressing eagerness to have a multimillion-dollar judgment entered against himself[2]—notwithstanding signals from the Ninth Circuit[3] (and later confirmation from this Court)[4] that Lewis could escape all liability. UAIC had no one in the 2018 action to represent its interest in showing that the underlying judgment had expired.

C. While Challenging the Aspects of this Court's Opinion in UAIC's Favor, Are Not in a Position to Seek Fees

UAIC's positions were taken in good faith, vindicated in full by the district court, and vindicated in important part by this Court. Nalder and Lewis are seeking rehearing; UAIC is not. They are not entitled to fees in appellate proceedings, the outcome of which they still resist.

1. Attorney's Fees Are Reserved for Frivolous Appeals

Asking this Court to assess attorney's fees is an extraordinary sanction reserved for gross abuses of the appellate process. NRAP 38. Nalder and Lewis cite NRS 18.010 (Mot. 15), ignoring that this Court

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[2] *See*, *e.g.*, 1 R. App. 26 (motion to strike his appointed counsel's request to vacate the judgment against him); 1/22/19 acceptance of offer of judgment, Ex. A.

[3] *Nalder v. UAIC*, 878 F.3d 754, 757 (9th Cir. 2017) ("the statute of limitations [on the 2008 judgment] has passed" and "they have failed to renew the judgment").

[4] Ex. B, Order Answering Certified Questions, at 2–3 ("because the [2008] judgment expired . . . it is no longer enforceable against" Lewis).

has expressly rejected that standard for attorney's fees on appeal: "NRS 18 .010 does not explicitly authorize attorney's fees on appeal," while "NRAP 38(b) limits attorney's fees on appeal to those instances where an appeal has been taken in a frivolous manner." *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1356–57, 971 P.2d 383, 388 (1998).[5]

2. UAIC Prevailed in Significant Part

Fees may be assessed only against a party whose positions this Court rejected as frivolous. Here, however, it is Nalder and Lewis who are complaining that this Court, far from dismissing UAIC's arguments as frivolous, *accepted* many of them in a published opinion.

First, UAIC prevailed on the critical question of its intervention in the 2018 action. (Opinion 8–12.)[6] As this motion for reconsideration underscores, Nalder and Lewis wanted UAIC out of the litigation altogether, not merely out of the 2007 action. Indeed, in striking UAIC's intervention in the 2007 action and denying consolidation, this Court clarified that there is no pending issue in the 2007 case: an amendment to

[5] They also cite *City of Las Vegas v. Cragin Indus.*, 86 Nev. 933, 478 P.2d 585 (1970) (*see* Mot. 15), but attorney fees as damages must be pleaded and proved in the underlying action—not in a motion for reconsideration on appeal.

[6] This Court also rejected Nalder's and Lewis's due process arguments based on the service of the motions to intervene. (Opinion 11 n.7.)

substitute Cheyenne for her former guardian "was a ministerial change that did not alter the legal rights and obligations set forth in the original judgment or create any new pending issues." (Opinion 13.)[7] The parties' running dispute about enforceability of the 2008 judgment is presented in the 2018 action, to which UAIC is a proper party.

Second, UAIC prevailed in Nalder's and Lewis's attack on the district court's order vacating their Rule 68 judgment. (Opinion 13–16.) Rejecting their argument that a stay is ineffective until the entry of a written order, this Court "determine[d] that a minute order granting a stay operates like an administrative or emergency order that is valid and enforceable." (Opinion 15.) This Court also "reject[ed] Gary's argument that the district court vacating the parties judgment, ex parte, violated due process. We note that the district court could have *sua sponte* vacated the mistakenly entered judgment without notice to the parties." (Opinion 15 (citing NRCP 60(a)).)

3. UAIC's Arguments Were in Good Faith

Even on the aspect of the opinion where Nalder and Lewis prevailed, UAIC maintained its position in good faith. UAIC had argued,

[7] Below, counsel for Lewis agreed: if the 2008 judgment had expired, "[i]t's an amendment of the expired judgment." (5 R. App. 1108:13–17.)

and the district court agreed, that the unusual posture of this case—with Nalder and Lewis straining to revive a decade-old judgment—was different from the ordinary case where a party seeks to vacate a facially valid, unexpired judgment. As the district court found, "we have new litigation" on whether "that judgment continue[s] to exist." (5 R. App. 1126:19–22.) Based on this Court's decisions that an expired judgment is void, *Leven v. Frey*, 123 Nev. 399, 410, 168 P.3d 712, 719 (2007), UAIC reasonably believed that after the time for enforcing a judgment has passed without renewal, "a judgment no longer exists to be renewed." (Answer (Dkt. 78085), at 19–20 (citing *Kroop & Kurland, P.A. v. Lambros*, 703 A.2d 1287, 1293 (Md. Ct. Spec. App. 1998)).) UAIC reconciled this with the Court's eighty-year-old decision in *Ryan v. Landis*, 58 Nev. 253, 75 P.2d 734 (1938) (Answer (Dkt. 78085), at 20–21 (citing *Seattle & N. Ry. Co. v. Bowman*, 102 P. 27, 28–29 (Wash. 1909))), and alternatively argued in good faith for its overruling. (*Id.* at 30–37.)

This Court disagreed that a judgment's expiration merits intervention. (Opinion 7–8.) But it never suggested that UAIC's argument was frivolous. Indeed, the Court in a sense mooted the necessity of intervention by clarifying that the amendment of the judgment in the

2007 action did not create any new issues, as the district court believed. (Opinion 12–13.) *See also Eckerson v. C.E. Rudy, Inc.*, 72 Nev. 97, 98–99, 295 P.2d 399, 399–400 (1956) (noting that "it would more accurately be said that there was no pending action to which the intervention might attach"). It was just a ministerial change, leaving the substantive questions for resolution in the 2018 action. (Opinion 13.)

D. UAIC's Filings in Other Cases Are Immaterial

Procedurally, Nalder and Lewis cannot seek fees in other cases. Regardless, UAIC did not abuse the appellate process in any other case.

1. UAIC Acted Properly in the Rule 60(b) Appeal

In Docket No. 79487, UAIC did "the ethical thing" (Mot. 7) in confessing that this Court's decision in these consolidated writ petitions rendered its appeal moot. As UAIC could not have known when or how this Court would resolve these writ petitions, UAIC's requests for extensions in that appeal are not evidence that UAIC "never intended to file a brief." (*Contra* Mot. 5.) As discussed in UAIC's reply to the suggestion of mootness in that case, UAIC would have had meritorious arguments for Rule 60(b) relief. (Ex. C, Reply Brief on Mootness.)

2. The Writ Petition Was Not Frivolous

Likewise, UAIC's writ petition in Docket No. 80965 was taken in

good faith. After the Ninth Circuit determined that the statute of limitations on the 2008 judgment had expired, and this Court adopted that assumption in its answers to the certified questions, UAIC believed that the state district court should abstain from hearing Nalder's and Lewis's argument to undermine that determination. *See* NRAP 5(h); *Nalder*, 878 F.3d at 758 (confirming that this Court's answers would be "res judicata as to the parties"). Although this Court denied the petition in a standard order, citing the purely discretionary nature of this Court's intervention (Order Denying Petition, Ex. D), that did not resolve any substantive issue in the petition.

3. UAIC Prevailed on a Certified Question

Strangest of all is Nalder's and Lewis's request for fees in prosecuting the certified questions in Docket 70504. The Ninth Circuit had warned that "Nalder and Lewis must prevail on both questions," *Nalder*, 878 F.3d at 758, but they prevailed on just one, losing the second. (Ex. B, at 7.) Then, as now, they petitioned this Court for rehearing, and this Court refused. (Order Denying Rehearing, Ex E.)

This Court should do the same here and deny petitioners' motion.

Dated this 26th day of May, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*
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Attorneys for Real Party in Interest

CERTIFICATE OF SERVICE

I certify that on May 26, 2020, I submitted the foregoing "Opposition to 'Motion for Attorney's Fees and Costs and for Reconsideration'" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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Attorneys for Petitioner Gary Lewis

A courtesy copy is also being provided to the respondent district court:

Honorable Eric Johnson
Department 20
EIGHTH JUDICIAL DISTRICT COURT
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/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP

EXHIBIT A

EXHIBIT A

NAO
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DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES NALDER, Plaintiff, vs. GARY LEWIS and DOES I through V, inclusive Defendants,	CASE NO: 07A549111 DEPT. NO: XX Consolidated with CASE NO: 18-A-772220
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.	

NOTICE OF ACCEPTANCE OF OFFER OF JUDGMENT IN CASE NO 18-A-772220

TO: Cheyenne Nalder;

TO: David A. Stephens, Esq., attorney for Plaintiff:

COMES NOW the Defendant, Gary Lewis, by and through his attorney E. BREEN ARNTZ, ESQ., and hereby gives formal notice of acceptance of Plaintiff's Offer of Judgment in case 18-A-772220, a copy of which is attached hereto as Exhibit "1", in the sum of five million, six hundred ninety- six thousand eight hundred ten dollars and forty-one cents, ($5,696,810.41), plus interest at the legal rate from September 4, 2018. All court costs and attorney's fees are included in the above amount and none shall be added by the clerk.

Dated this 22nd day of January, 2019.

E. BREEN ARNTZ, ESQ.
Nevada Bar No. 3853
5545 Mountain Vista Ste. E
Las Vegas, Nevada 89120
T: (702) 384-8000
breen@breen.com

CERTIFICATE OF SERVICE

Receipt of a copy of this **NOTICE OF ACCEPTANCE OF OFFER OF JUDGMENT IN CASE 18-A-772220** is hereby acknowledged this 22 day of January, 2019.

David A. Stephens, Esq.
Nevada Bar No. 00902
Stephens, Gourley & Bywater
3636 N. Rancho Drive
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dstephens@sgblawfirm.com
Attorney for Cheyenne Nalder

EXHIBIT 1

OFFR (CIV)
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DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER,

Plaintiff,

vs.

GARY LEWIS,

Defendants.

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.

CASE NO.: 07A549111

DEPT NO.: XX

Consolidated with Case No. A-18-772220-C

PLAINTIFF'S OFFER TO ACCEPT JUDGMENT AGAINST GARY LEWIS

Date: n/a
Time: n/a

TO: Gary Lewis, Defendant;

TO: E. Breen, Arntz, Esq., attorney for Defendant:

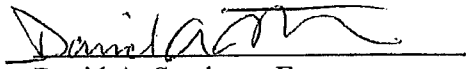
Pursuant to Rule 68 of the Nevada Rules of Civil Procedure, Cheyenne Nalder, through her attorneys, Stephens & Bywater, P.C., hereby offers to accept judgment against Gary Lewis, in the sum of five million six hundred ninety-six thousand eight hundred ten dollars and 41 cents, ($5,696,810.41), plus interest at the legal rate from September 4, 2018. This offer is inclusive of all court costs and attorney's fees incurred in this matter.

If this Offer to Accept Judgment is not accepted in writing within ten (10) days after it is made, it shall be deemed withdrawn, and cannot be given in evidence upon the trial.

If you accept this Offer to Accept Judgment and give written notice thereof within ten (10) days hereof, you may file this Offer to Accept Judgment with Proof of Service of Notice of Acceptance, and the Clerk of the above-entitled Court is thereupon authorized to enter judgment in accordance with the provisions of NRCP 68.

Dated this 11 day of January, 2019.

STEPHENS & BYWATER, P.C.



David A. Stephens, Esq.
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3636 N. Rancho Drive
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Attorney for Cheyenne Nalder

RECEIPT OF COPY

Receipt of this **PLAINTIFF'S OFFER TO ACCEPT JUDGMENT AGAINST GARY LEWIS** is hereby acknowledged this 11 day of January, 2019.

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

EXHIBIT B

EXHIBIT B

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES NALDER, GUARDIAN AD LITEM ON BEHALF OF CHEYENNE NALDER; AND GARY LEWIS, INDIVIDUALLY,
Appellants,
vs.
UNITED AUTOMOBILE INSURANCE COMPANY,
Respondent.

No. 70504

ORDER ANSWERING CERTIFIED QUESTIONS[1]

Appellant James Nalder previously sued appellant Gary Lewis in Nevada district court and obtained a $3.5 million default judgment. Nalder and Lewis then sued Lewis's insurance company, respondent United Automobile Insurance Company, for claims related to UAIC's failure to defend Lewis in the first action. UAIC removed this second action to federal court. The United States Court of Appeals for the Ninth Circuit certified two separate questions to this court related to Nalder and Lewis's action against UAIC. The first question is:

> 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?

The second question, as we rephrased it, is:

> In an action against an insurer for breach of the duty to defend its insured, can the plaintiff

[1]The Honorable Nancy M. Saitta, Senior Justice, was appointed to sit in place of the Honorable Ron Parraguirre, Justice, who recused.

> 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?

First certified question

Our recent decision in *Century Surety Co. v. Andrew*, 134 Nev., Adv. Op. 100, 432 P.3d 180 (2018), answers the first question. *Century Surety* held that "an insured may recover any damages consequential to the insurer's breach of its duty to defend" and that "an insurer's liability for the breach of the duty to defend is not capped at the policy limits, even in the absence of bad faith." *Id.* at 186. Despite the federal courts certifying identical questions in both cases, UAIC argues that *Century Surety* is "factually and legally distinguishable" from the present case and that we should not apply *Century Surety*'s holding to "cases where the complaint did not allege a loss within the policy period and an insurer's breach of a duty to defend is based on a reasonable, good faith determination that the insurance policy at issue was not in effect at the time of the loss." UAIC's argument—essentially that UAIC's refusal to defend in this case was more reasonable than the insurer's refusal to defend in *Century Surety*—is undermined by *Century Surety*'s holding "that good-faith determinations are irrelevant for determining damages upon a breach of [the duty to defend]." *Id.* at 182. We therefore decline to answer the question posed in *Century Surety* again, or differently, in this case.

Second certified question

To prevent the statute of limitations from barring enforcement of a default judgment after six years, a party normally must either bring "an action upon [the] judgment or decree" or obtain "the renewal thereof"

within that time period. NRS 11.190(1)(a)[2]; *Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007) ("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 limitations in six years."). UAIC argues that because Nalder did not bring an action upon the default judgment he obtained against Lewis within six years, or otherwise renew the judgment, the judgment has expired and is therefore not a consequential damage of its breach of the duty to defend Lewis. This second certified question therefore asks if Nalder and Lewis's action against UAIC in federal court was "an action upon [the] judgment" under NRS 11.190(1)(a). And, if it was not, and the state court judgment has expired, we must then determine whether Lewis and Nalder

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[2]NRS 11.190(1)(a):

> Except as otherwise provided in NRS 40.4639, 125B.050 and 217.007, actions other than those for the recovery of real property, unless further limited by specific statute, may only be commenced as follows:
>
> 1. Within 6 years:
>
> (a) Except as otherwise provided in NRS 62B.420 and 176.275, 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.

(as Lewis's assignee) can still seek consequential damages against UAIC in the amount of that judgment.

Nalder and Lewis's federal action for breach of the duty to defend is not "an action upon a judgment"

An "action upon a judgment" as referenced in NRS 11.190(1)(a) is a distinct cause of action under the common law. *See Mandlebaum v. Gregovich*, 24 Nev. 154, 161, 50 P. 849, 851 (1897) ("[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."); *Ewing v. Jennings*, 15 Nev. 379, 382 (1880) (addressing what facts are sufficient to state a cause of action upon a judgment); 47 Am. Jur. 2d Judgments § 722 (2017) ("Every judgment gives rise to a common-law cause of action to enforce it, called an action upon a judgment."). It is "not simply an action in some way related to the earlier judgment, but rather a specific form of suit—the common law action *on* a judgment." *Fid. Nat'l Fin. Inc. v. Friedman*, 238 P.3d 118, 121 (Ariz. 2010). This is because the goal of an action upon a judgment is to recover the amount left unsatisfied from the original judgment, not to litigate new claims against a new party. *See id.* ("[T]he defendant in an action on the judgment . . . is generally the judgment debtor, and the amount sought is the outstanding liability on the original judgment."); 47 Am. Jur. 2d Judgments § 723 ("The main purpose of an action on a judgment is to obtain a new judgment which will facilitate the ultimate goal of securing the satisfaction of the original cause of action.").

Nalder and Lewis's suit in federal court regarding UAIC's breach of its duty to defend is not an action upon Nalder's state court judgment against Lewis. The federal court complaint does "not simply

recite the amount owed and seek a judgment on that debt," but instead seeks remedies for UAIC's failure to defend Lewis in the original action between Nalder and Lewis. *See Friedman*, 238 P.3d at 123 (holding that a racketeering suit based on the judgment debtors' actions to frustrate collection of a judgment "clearly was not a common law action on the judgment"). That the action is not upon the default judgment is further illustrated by the fact that the suit was not filed solely by Nalder against Lewis—who is the judgment debtor in the state court action—but instead was filed by both Nalder and Lewis, and filed against UAIC, a third party to the state court action. *See, e.g., id.* at 121; *Apollo Real Estate Inv. Fund, IV, L.P. v. Gelber*, 935 N.E.2d 949, 961 (Ill. App. Ct. 2009) ("[G]enerally, an action on a judgment can only be brought against the defendant of record in the judgment or his successor in interest, not against an entity or person not named in judgment."). Nalder and Lewis's action alleging breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, fraud, and breach of NRS 686A.310 is not "an action upon [the state court default] judgment" that renewed the judgment under NRS 11.190(1)(a).

Nalder makes various alternative arguments for holding that the six-year statute of limitations has not expired. We decline to address the arguments because they exceed the scope of the certified question, require application of law to facts that are disputed, or involve alleged facts not included in the original or supplemental certified question orders. *See In re Fountainbleau Las Vegas Holdings, LLC*, 127 Nev. 941, 955-56, 267 P.3d 786, 794-95 (2011) (recognizing that "this court is bound by the facts as stated in the certification order" and will not apply the law to facts or resolve factual disputes, because it would "intrud[e] into the certifying

court's sphere"). When answering a certified question under NRAP 5, we accept the facts as given and therefore will not second-guess the certifying question's assumption that the statute of limitations has otherwise run on the default judgment. *See id.* (constraining review to the facts in the certification order when respondents contended that "the assumptions included in the certified questions [were] not true").

A plaintiff cannot continue to seek consequential damages for breach of the duty to defend based on an expired judgment

It is black letter contract law that an "injured party is limited to damages based on his actual loss caused by the breach." Restatement (Second) of Contracts § 347 cmt. e (1981); 24 Williston on Contracts § 64:12 (4th ed.) ("The proper measure of recovery for a breach of contract claim is the loss or damage actually sustained."). And "[t]he purpose of an award of damages is to put the nonbreaching party in as good a position as if the contract had been performed." *Covington Bros. v. Valley Plastering, Inc.*, 93 Nev. 355, 363, 566 P.2d 814, 819 (1977).

Based on what is before this court on the certified question presented, Lewis has not actually suffered a loss in the form of the $3.5 million state court judgment because the judgment expired and, thus, it is no longer enforceable against him. *See Riofrio Anda v. Ralston Purina Co.*, 959 F.2d 1149, 1153 (1st Cir. 1992) ("It is beyond cavil that a party must suffer actual loss before it is entitled to damages."). If Lewis is not liable to Nalder for the $3.5 million judgment, it follows that UAIC is not liable for that judgment as a result of breaching its duty to defend Lewis in the action that led to it; Lewis no longer needs UAIC to pay him $3.5 million to give him the benefit of his insurance contract. *See id.* at 1152 ("[T]he law does not allow awards for phantom injuries."). To hold otherwise would give Lewis (and his assignee, Nalder) a benefit greater than what he could have

expected had UAIC performed under the contract. *See id.* at 1153 ("To allow [plaintiffs] to recover for expenses that they did not incur would be tantamount to giving them a windfall, resulting in punitive damages against [the defendant]."). Without more, the expired state court judgment cannot form the basis for consequential damages from UAIC's breach of its duty to defend Lewis.

Accordingly, we answer the second certified question in the negative. In an action against an insurer for breach of the duty to defend its insured, a plaintiff cannot continue to seek consequential damages in the amount of a default judgment 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.

It is so ORDERED.

_____, C.J.
Gibbons

_____, J.
Pickering

_____, J.
Stiglich

_____, J.
Silver

cc: Eglet Adams
Prince Law Group
Christensen Law Offices, LLC
Atkin Winner & Sherrod
Cole, Scott & Kissane, P.A.
Lewis Roca Rothgerber Christie LLP/Las Vegas
Pursiano Barry Bruce Demetriades Simon, LLP
Laura Anne Foggan
Boyle Leonard, P.A.
Matthew L. Sharp, Ltd.
Clerk, United States Court of Appeals for the Ninth Circuit

CADISH, J., with whom HARDESTY, J., and SAITTA, Sr. J., agrees, concurring:

While I join the court's answer to the certified questions herein, I write separately to note that the parties did not raise, and we do not today decide, whether a common law action on the judgment still exists in Nevada after the adoption of the judgment renewal procedure under NRS 17.214. This court's opinion in *Leven v. Frey*, 123 Nev. 399, 402 n.6, 168 P.3d 712, 714 n.6 (2007), can be read to indicate that it does not.[1]

_____, J.
Cadish

We concur:

_____, J.
Hardesty

_____, Sr. J.
Saitta

[1]The Honorable Nancy M. Saitta, Senior Justice, participated in the decision of this matter under a general order of assignment.

EXHIBIT C

EXHIBIT C

Case No. 79487

In the Supreme Court of Nevada

UNITED AUTOMOBILE INSURANCE COMPANY,

Appellant,

vs.

CHEYENNE NALDER and GARY LEWIS,

Respondents.

Electronically Filed
May 26 2020 09:14 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPEAL
from the Eighth Judicial District Court, Clark County
The Honorable ERIC JOHNSON, District Judge
District Court Case Nos. A549111 & A772220

REPLY BRIEF ON SUGGESTION OF MOOTNESS

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Attorneys for Appellant

REPLY BRIEF ON SUGGESTION OF MOOTNESS

Respondents Cheyenne Nalder and Gary Lewis do not dispute that (1) this appeal is moot, and (2) the reason is this Court's April 30 opinion in Docket Nos. 7808 and 78243. Their further demand that "UAIC should be reprimanded and sanctioned" (Resp. 6) is improper.

A. The Appeal Is Moot Because of this Court's Opinion in Docket Nos. 78085 and 78243

UAIC had appealed from the denial of its Rule 60(b) motion in district court case number 07A549111. But this Court erased UAIC's intervention in that action, including its Rule 60(b) motion and the order denying it. *Nalder v. Eighth Judicial District Court*, 136 Nev., Adv. Op. 24, at 16, ___ P.3d ___, ___ (Apr. 30, 2020). So there is nothing left for UAIC to appeal. *See Degraw v. Eighth Judicial Dist. Court*, 134 Nev. 330, 332, 419 P.3d 136, 139 (2018). The appeal is moot for this reason alone, not because of anything that UAIC did to "string[] along opposing counsel and this Court." (*Contra* Resp. 8.)

B. The Appeal Was Meritorious

Until this Court's decision on intervention, UAIC had a meritorious appeal. UAIC intervened to keep Nalder from trying to revive her expired judgment against Lewis, UAIC's insured. Concerned that Nalder would consider her 2018 amendment (substituting Cheyenne Nalder for

her guardian) a new judgment, UAIC asked the district court to declare the amended judgment void and the original judgment expired. (Ex. A, at 3.) Nalder and Lewis opposed on grounds that the statute of limitations for renewing the judgment had been tolled. (Ex. B; Ex. C.) The district court did not address the substance of Nalder's and Lewis's opposition. In fact, the district court agreed that "moving the case from the name of the father to the name of the now adult plaintiff" was just "a ministerial thing." (Ex. D, at 47.)[1] But because the district court recognized that there was "new litigation" in Nalder's 2018 lawsuit on the question of "does that judgment continue to exist," the court denied UAIC's Rule 60(b) motion in the 2007 case. (Ex D, at 46; Notice of Appeal.)

On the substantive question,[2] Nalder and Lewis are wrong: the statute of limitations expired, and the 2007 judgment is unenforceable.

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[1] This Court likewise confirmed that the 2018 amendment did not affect the 2008 judgment's enforceability: that "was a ministerial change that did not alter the legal rights and obligations set forth in the original judgment or create any new pending issues." *Nalder*, 136 Nev., Adv. Op. 24, at 8, 12–13.

[2] Because these questions are presented to the district court in the ongoing 2018 lawsuit and before the Ninth Circuit in Nalder's and Lewis's appeal, UAIC at one point had considered emphasizing in this appeal the irrelevance of the district court's order, which did not reach those substantive issues. (*Cf.* Resp. 3 n.4.)

Nalder and Lewis conceded to the Ninth Circuit that "the statute of limitations has passed" and "they have failed to renew the judgment." *Nalder v. UAIC*, 878 F.3d 754, 757 (9th Cir. 2017). (Ex. E, ECF 45, at 11.) This Court accepted that determination in answering the certified questions, declining Nalder's and Lewis's invitation to "second-guess the [Ninth Circuit's] assumption that the statute of limitations has otherwise run on the default judgment." (Ex. F, at 2–3.) This Court therefore concluded that "because the [2008] judgment expired . . . it is no longer enforceable against" Lewis. (Ex. F, at 2–3.) After Nalder's and Lewis's unsuccessful petition for rehearing, this Court's answers became "res judicata as to the parties." NRAP 5(h); *Nalder v. UAIC*, 878 F.3d 754, 758 (9th Cir. 2017). Under controlling Ninth Circuit precedent, it is too late for Nalder and Lewis to retract their concession that the statute of limitations had expired. *Reinkemeyer v. SAFECO Ins. Co. of Am.*, 166 F.3d 982, 984 (9th Cir. 1999) (rejecting attempt to challenge the answers or record on certification after this Court's answers).

But even on their merits, the tolling arguments fail.

Cheyenne Nalder's minority at the time of the 2008 judgment did not toll the expiration of that judgment. NRS 11.250 gives a minor more

time to *bring* an action. But Cheyenne's guardian had already done so, and it was his duty to maintain it and to file the affidavit of renewal under NRS 17.214. That inaction does not toll the expiration of the judgment.

Nor does Lewis's purported absence from Nevada toll the limitations period: renewing the judgment did not require Lewis's presence at all, and regardless, Lewis remained available to Nalder for service, as he was even represented in the bad-faith litigation by Nalder's attorney. *See Simmons v. Trivelpiece*, 98 Nev. 167, 168, 643 P.2d 1219, 1220 (1982) (refusing to apply NRS 11.300 when defendant's presence is unnecessary).

Finally, the Ninth Circuit rejected the argument that UAIC acknowledged the validity of the 2008 default judgment. Nalder and Lewis had argued that UAIC's satisfaction of a federal district court judgment (obligating UAIC to pay its policy limits) showed that their bad-faith action was "an enforcement action on the judgment." (Ex. E, ECF 45, at 13.) But this Court concluded that it was not. (Ex. F, at 4–5.) Far less is that payment an acknowledgment of the separate, now-expired $3.5 million default judgment entered in the state district court,

proceedings to which UAIC was not even a party.

C. Nalder and Lewis Are Not Entitled to Fees

Nalder and Lewis have no basis for their reckless accusation that UAIC deliberately delayed its opening-brief deadline to coincide with this Court's decision on intervention. They complain that this Court should have denied UAIC's requests for extensions during these unprecedented circumstances. But this Court did not. And UAIC would have timely filed its brief had this Court's intervening opinion not mooted the appeal. The charge of delay or collusion with this Court is baseless.

Regardless, it is hard to see how Nalder and Lewis expended any recoverable attorney's fees.[3] They did not actually brief this appeal. They twice opposed UAIC's request for extensions that this Court later granted. Those unsuccessful oppositions are not a proper basis for fees.[4]

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[3] Nalder and Lewis also request fees and costs "in the other docket numbers." (Resp. 8.) Apart from its procedural impropriety, the request is meritless: in two (Docket Nos. 70504, 80965), this Court has already relinquished jurisdiction; and in two others (Docket Nos. 78085, 78243), Nalder and Lewis have sought rehearing on aspects of the petitions where UAIC prevailed.

[44] Their request for costs (limited to $500, NRAP 39(c)(5)) is premature and baseless: the only costs taxable in this Court are the "cost of producing necessary copies of briefs or appendices" (they filed none) and the cost of travel to oral argument (there was none). NRAP 39(b)(1), (2).

Dated this 26th day of May, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*
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Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that on May 26, 2020, I submitted the foregoing "Reply Brief on Suggestion of Mootness" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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Attorneys for Respondent Gary Lewis

/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP

EXHIBIT D

EXHIBIT D

IN THE SUPREME COURT OF THE STATE OF NEVADA

UNITED AUTOMOBILE INSURANCE COMPANY,
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
CHEYENNE NALDER; AND GARY LEWIS,
Real Parties in Interest.

No. 80965

FILED

APR 22 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING PETITION
FOR WRIT OF MANDAMUS OR PROHIBITION

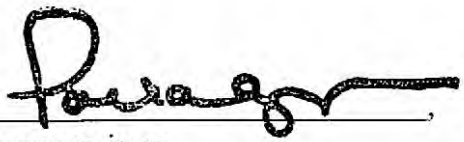
This original petition for a writ of mandamus or prohibition challenges the district court's decision to lift its stay of proceedings.

Having considered the petition and supporting documents, we are not persuaded that our extraordinary and discretionary intervention is warranted. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991); *see also Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004) (observing that the party seeking writ

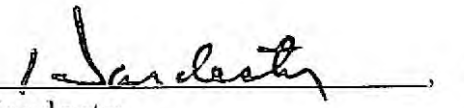
20-15174

relief bears the burden of showing such relief is warranted). Accordingly, we

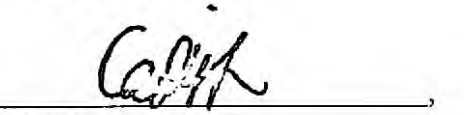
ORDER the petition DENIED.[1]



_____, J.
Parraguirre



_____, J.
Hardesty



_____, J.
Cadish

cc: Hon. Eric Johnson, District Judge
Lewis Roca Rothgerber Christie LLP/Las Vegas
Winner & Sherrod
Stephens & Bywater, P.C.
E. Breen Arntz, Chtd.
Christensen Law Offices, LLC
Eighth District Court Clerk

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[1]In light of this order, we deny as moot petitioner's emergency motion for stay and motion for judicial notice.

EXHIBIT E

EXHIBIT E

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

NOV 15 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING REHEARING[1]

Rehearing denied. NRAP 40(c).

It is so ORDERED.

Gibbons, C.J.

Pickering, J.
Pickering

Hardesty, J.
Hardesty

Stiglich, J.
Stiglich

Cadish, J.
Cadish

Silver, J.
Silver

Saitta, Sr. J.
Saitta

[1]The Honorable Nancy M. Saitta, Senior Justice, was appointed to sit in place of the Honorable Ron Parraguirre, Justice, who recused.

19-46892

cc: Prince Law Group
Eglet Adams
Christensen Law Offices, LLC
Lewis Roca Rothgerber Christie LLP/Las Vegas
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Clerk, United States Court of Appeals for the Ninth Circuit