

IN THE SUPREME COURT OF NEVADA
CASE NO. 79487

UNITED AUTOMOBILE INSURANCE COMPANY,

Appellant,

vs.

CHEYENNE NALDER; and GARY LEWIS,

Respondents.

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May 18 2020 03:28 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPEAL FROM DISTRICT COURT CASE 07A549111

RESPONDENTS' RESPONSE TO UAIC'S SUGGESTION OF MOOTNESS

I. INTRODUCTION AND FACTUAL HISTORY

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 taking action to protect its insured, Lewis, UAIC brought a baseless and untimely motion to dismiss the Ninth Circuit appeal. This was

promoted by an affidavit of counsel for UAIC suggesting that Nalder needed to renew her judgment. Nalder sought instead, through attorney David Stephens (see cases 07A549111 & 18-772220), to obtain a new judgment under the clear precedent in *Mandlebaum v. Gregovich*, 24 Nev. 154, 50 P. 849 (1897) which holds that the judgment is valid as a basis for an action on the judgment because of Lewis' absence from the state of Nevada for eight years. (The *Mandlebaum* judgment was still valid 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). Instead of being candid and acting in good faith by informing the Ninth 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.¹

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

UAIC refused to pay *Cumis*² counsel, E. Breen Arntz. UAIC went behind its

¹ These clearly improper rulings delayed the case caused greater expense and were eventually struck down by Writ in docket numbers 78085 & 780243.

² *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 Cal Rptr. 494(1984).

insureds 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.³ UAIC, in bad faith and without a reasonable basis, appealed. UAIC had no good faith basis to appeal the lower Court's ruling.⁴ This is also evident by UAIC's repetitive requests for extensions of time to file an Opening Brief in this baseless appeal.

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

The mediation of this appeal became an attempted global mediation of the entire dispute between the parties. The case was not resolved and originally the Opening Brief in this 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. NRAP 31(b)(2); NRAP 31(b)(3)(B)." Despite

³ The one ruling consistent with Nevada law in the case.

⁴ At the hearing in front of Judge Johnson on March 4, 2020 the court asked: What have you appealed? Mr Polsenberg responded (at timestamp 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."

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 this appeal.

D. UAIC Obtained an Extension in this 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 this very narrow issue in this 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 instant 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, the Writ and the 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 this 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 now files a “Suggestion of Mootness” requesting the Court delay briefing indefinitely by a request to “suspend the briefing.”⁵ UAIC should have filed a voluntary dismissal of this Appeal, or its opening brief, or both. The fact that it did not voluntarily dismiss this 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, without basis in law or fact, are grounds for an award of fees and costs. It was said in one of the Oppositions to the Request for Extension and it will be said again, **UAIC never intended to file an Opening Brief in this case.**

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⁵ See footnote three on page 6 of Appellant’s Suggestion of Mootness.

II. SUPPORTING LAW AND ARGUMENT

A. This appeal is frivolous and must be dismissed immediately.

UAIC suggests its 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 motions on anyone. At the time, UAIC was aware that CheyAnne was represented by David Stephens and Gary Lewis was represented by E. Breen Arntz.⁶

Both motions to intervene were granted. UAIC then filed its motion to set aside the judgment in the 2007 case. UAIC's Motion to set aside the judgment was correctly denied. This is the instant appeal before this Court. The ruling was made

⁶ UAIC has repeatedly misstated these representations to the Courts, leading this Court to misstate the representations in its Order dated April 30, 2020.

January 9, 2019, the Notice of Appeal was filed on August 21, 2019, and this Court still has had no briefs filed.

B. UAIC has multiplied and complicated these proceedings needlessly.

By repeatedly delaying the filing of the Opening Brief on this appeal, 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 this appeal. Recently, this Court determined that UAIC's intervention in the lower court action was improper, as Nalder and Lewis had stated all along. (See Dockets 78085 & 78243). Writ of Mandamus was issued on April 30, 2020.

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 this appeal and in the other docket numbers⁷ 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 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

⁷ Dockets 70504, 78085, 78243 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; however, this appeal, 79487, is pending so there is a question as to whether the lower court even has current jurisdiction prior to the disposition of this appeal.

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.”

Although the instant appeal is not an action for declaratory relief, UAIC’s improper filings, such as this appeal and 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 of itself, 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.⁸ 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.

⁸ 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 9th Circuit from considering the truth.

III. CONCLUSION

This frivolous appeal must be dismissed and UAIC should pay attorneys fees and costs related hereto to Real Parties in Interest, Lewis and Nalder.

Dated this 18th day of May, 2020.

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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

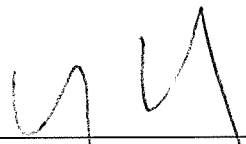
UAIC has refused to pay for this representation and in fact sued E. Breen Arntz for damages.)

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.