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

DANIEL F. POLSENBERG (SBN 2376)
J. CHRISTOPHER JORGENSEN (SBN 5382)
ABRAHAM G. SMITH (SBN 13,250)
MATTHEW R. TSAI (SBN 14,290)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway,
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

MATTHEW J. DOUGLAS (SBN 11,371)
1117 SOUTH RANCHO DRIVE
Las Vegas, Nevada 89102
WINNER & SHERROD
(702) 243-7059

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.

---

[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]

---

[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*
DANIEL F. POLSENBERG (SBN 2376)
ABRAHAM G. SMITH (SBN 13,250)
MATTHEW R. TSAI (SBN 14,290)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

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:

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

Attorneys for Respondent Cheyenne Nalder

Thomas F. Christensen
CHRISTENSEN LAW OFFICES
1000 S. Valley View Blvd.
Las Vegas, Nevada 89107

E. Breen Arntz
E. BREEN ARNTZ, ESQ.
5545 Mountain Vista, Suite E
Las Vegas, Nevada 89120

Attorneys for Respondent Gary Lewis

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

EXHIBIT A

EXHIBIT A

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

MATTHEW J. DOUGLAS
Nevada Bar No. 11371
ATKIN WINNER & SHERROD
1117 South Rancho Drive
Las Vegas, Nevada 89102
Phone (702) 243-7000
Facsimile (702) 243-7059
mdouglas@awslawyers.com
Attorneys for Intervenor United Automobile Insurance Company

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES NALDER,

Plaintiff,

vs.

GARY LEWIS and DOES I through V, inclusive,

Defendants,

UNITED AUTOMOBILE INSURANCE COMPANY,

Intervenor.

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

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

COMES NOW, UNITED AUTOMOBILE INSURANCE COMPANY (hereinafter referred to as "UAIC"), by and through its attorney of record, ATKIN WINNER & SHERROD and hereby brings its Motion for Relief from Judgment Pursuant to NRCP 60(b), asking that this Court declare as void the Amended Judgment entered on March 28, 2018, because the underlying Judgment expired on 2014 and is snot capable of being revived.

///

///

///

///

///

///

///

Case Number: 07A549111

ATKIN WINNER & SHERROD LTD
A NEVADA LAW FIRM

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

DATED this 19th day of OCTOBER, 2018.

ATKIN WINNER & SHERROD

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

NOTICE OF MOTION

TO: ANY AND ALL PARTIES AND THEIR COUNSEL OF RECORD:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing **MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO NRCP 60** for hearing before the above-entitled Department XXIX on the 12 day of December, 2018, at the hour of 9:00 a.m. in the forenoon of said date, or as soon thereafter as counsel can be heard.

DATED this 19th day of OCTOBER, 2018.

ATKIN WINNER & SHERROD

Matthew Douglas, Esq.
Nevada Bar No. 11371
117 South Rancho Drive
Las Vegas, Nevada 89102
Attorneys for Intervenor UAIC

ATKIN WINNER & SHERROD LTD
A NEVADA LAW FIRM

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This Court made a mistake of law based on incomplete/incorrect facts presented in and Ex Parte Motion to Amended Judgment, when entering the Oder granting the Motion on March 28, 2018. The judgment which Plaintiff, Cheyenne Nalder ("Cheyenne") moved to amend was entered on June 3, 2008. The judgment creditor, Cheyenne's guardian ad litem, James Nalder, did not renew the Judgment as required By Nevada Law before it expired on June 3, 2014, six (6) years after it was entered.

The Amended Judgment ostensibly revived the expired Judgment, despite the fact that Cheyenne presented this Court with no legal support for such revival. Cheyenne's Motion proposes that tolling provisions applicable to causes of action are also applicable to the deadlines to renew judgments. However, none of the authority cited in her Motion supports misappropriating tolling provisions applicable to certain causes of action to extend the time to renew a judgment, nor does any other authority. Pursuant to NRCP 60, the Court should declare that the Amended Judgment is void and that the original judgment has expired, and therefore is not enforceable.

II.

STATEMENT OF FACTS

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

UAIC, the putative insurer for Lewis, initially denied coverage due to a lapse in

coverage[1]. Lewis did not respond to the Complaint and a default was taken against him. *Id.* On June 3, 2008.[2] a judgment was entered against him in the amount of $3.5 million. See Judgment attached hereto as Exhibit "B". James Nalder as guardian ad litem for Cheyenne was the judgment creditor. *Id.* NRS 11.190(1)(a) provides that a judgment expires in six (6) years, unless it is timely renewed. As such, the Judgment expired on June 3, 2014.

On March 22, 2018 nearly 10 years after the Judgment was entered, and nearly four (4) years after it expired, Cheyenne filed an "Ex Parte Motion to Amend Judgment in the Name of Cheyenne Nalder, Individually" ("Ex Parte Motion") in her personal injury case, Case No. A-07-54911-C. *See* Exhibit "C." Her Motion did not advise the Court that the Judgment she sought to amend had expired. Rather, it cited two statutes, NRS 11280 and 11.300, without explaining why they were applicable to her request, and asked the Court to amend the Judgment to be in her name alone. In short, the Court was not put on notice that it was being asked to ostensibly revive an expired judgment. *Id.*

With an incomplete account of the issues presented, the Court granted Cheyenne's Ex Parte Motion and issued an Amended Judgment on March 28, 2018 which was filed with a Notice of Entry on May 18, 2018. *See* Exhibit "D."

As the judgment had expired and an Amended Judgment could not be issued to revive it. UAIC brings the instant Motion pursuant to NRCP 60(b), as it has now been found to be the insurer of Lewis under an implied policy and, thus, has an interest in this matter, and seeks to avoid the Amended Judgment and declare that the original Judgment has expired.

---

[1] Later, during the subsequent action against UAIC (which remains on appeal in the Ninth Circuit for the U.S. Court of Appeals and, currently, on a 2nd certified question to the Nevada Supreme Court) the Court found an ambiguity in the renewal statement for Lewis' policy and, accordingly, *implied* a policy of insurance for Lewis' $15,000 policy limits in December 2013. Importantly, the Ninth Circuit has affirmed their was no "bad faith" on the part of UAIC. Regardless, per the orders of the Federal District Court and Ninth Circuit, UAIC has now been found to be Lewis' insurer, under this implied policy.

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

ATKIN WINNER & SHERROD LTD
A NEVADA LAW FIRM

III.

ARGUMENT

A. The Judgment Expired on June 3, 2014

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

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

The Nevada Supreme Court, in *Leven v Frey*, 123 Nev.399,168 P.3d 712 (2007), held that judgment creditors must strictly comply with the procedure set forth in NRS 17.214 in order to validly renew a judgment. *Id.* At 405-408, 168 P.3d 717-719. There is no question that neither Cheyenne nor her guardian ad litem did so. Therefore the Judgment expired.

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

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

The introduction to NRS 11.090, the statute of limitation law, states that it applies to:

ATKIN WINNER & SHERROD LTD
A NEVADA LAW FIRM

"...actions other than those from the recovery of real property, unless further limited by specific statute..." The list which follows includes various causes of action for which suit can be brought. Nowhere in the list is renewing a judgment defined as or analogized to a cause of action.

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

///

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

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

> **Legal disability prevents running of statute. NRS 11.260 and 11.270 shall not apply to minors or others under any legal disability to sue at the time when the right of action first accrues, but all such persons may commence an action at any time within 1 year after the removal of the disability.**

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

On March 5, 2014, the deadline to file the Affidavit of Renewal, Cheyenne was still a

ATKIN WINNER & SHERROD LTD
A NEVADA LAW FIRM

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

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

If tolling of deadlines to amend judgments were sanctioned, title to real property owned by anyone who had ever been a judgment debtor would be clouded, as a title examiner would not know whether a judgment issued more that six years prior had expired pursuant to statute, or was still valid, or could be revived when a real party in interest who was a minor reached the age of majority. As the court held in *Leven,* one of the primary reasons for the need to strictly comply with NRS 17.214's recordation requirement is to "procure reliability of the title searches for both creditors and debtors since any lien on real property created when a judgment is recorded continues upon that judgment's proper renewal." *Id.* At 408-409, 168 P.3d 712, 719. Compliance with the notice requirement of NRS 17.124 is important to preserve the due process rights of the judgment debtor. *Id.* If a judgment debtor is not provided with notice of the renewal of a Judgment, he may believe that the judgment has expired and he need take no further action to defend himself against execution.

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

Cheyenne's Ex Parte Motion next cites NRS 11.3000, which provides "If, when the cause of action shall accrue against a person, the person is out of State, the action may be commenced

ATKIN WINNER & SHERROD LTD
A NEVADA LAW FIRM

within the time herein limited after the person's return to the State; and if after the cause of action shall have accrued the person departs from the State, the time of the absence shall not be part of the time prescribed for the commencement of the action." Cheyenne's argument that the deadline to renew the Judgment are tolled by NRS 11.300 fails because, again renewing a judgment is not a cause of action. As the Supreme Court of North Dakota, a state with similar statutes to Nevada regarding judgments, held in *F/S Manufacturing v Kensmore*, 789 N.W.2d 853 (N.D. 2011), "Because the statutory procedure for renewal by affidavit is not a separate action to renew the judgment, the specific time period[provided to renew] cannot be tolled under [the equivalent to NRS 11.300] based on a judgment debtor's absence for the state." *Id.* At 858.

In addition, applying Cheyenne's argument that the time to renew a judgment was tolled because of the judgment debtor's absence from Nevada would have a similarly negative impact on the ability for property owners to obtain clear title to their property. Nothing on a judgment would reflect whether a judgment debtor was outside of the state and a facially expired judgment was still valid. Therefore, essentially, a responsible title examiner would have to list any judgment that had ever been entered against a property owner on the title insurance policy, because he could not be sure the judgments older that six years for which no affidavit of renewal had been filed were expired or the expiration was tolled.

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

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

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

Because the Ex Parte Motion was ex parte, it was not served on Lewis or UAIC nor did Lewis or UAIC have an opportunity to make the Court aware that the Judgment had already expired on its own terms, and that Cheyenne's position that the deadline to renew the judgment

ATKIN WINNER & SHERROD LTD
A NEVADA LAW FIRM

was tolled was inapt. The Ex Parte Motion did not advise the Court that the Judgment had expired in 2014 and had not been properly renewed. Had the court been fully apprised of the facts, it likely would not have granted the Ex Parte Motion. Since the Amended Judgment was entered on March 28, 2018, and the Notice of Entry not filed until May 18, 2018, a motion to set aside the amended judgment on the basis of mistake is timely as it is made within six months of the entry of the judgment. Accordingly, this Motion is timely and this Court should rectify the mistake and void the Amended Judgment in accordance with NRCP 60(b)(1).

2. The Amended Judgment is void.

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

IV.

CONCLUSION

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

DATED this 19th day of October, 2018.

ATKIN WINNER & SHERROD

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

ATKIN WINNER & SHERROD LTD
A NEVADA LAW FIRM

CERTIFICATE OF SERVICE

I certify that on this 19th day of October, 2018, the foregoing **UAIC'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO NRCP 60** was served on the following by [X] Electronic Service pursuant to NEFR 9 [ ] Electronic Filing and Service pursuant to NEFR 9 [ ] hand delivery [ ] overnight delivery [ ] fax [ ] fax and mail [X] mailing by depositing with the U.S. mail in Las Vegas, Nevada, enclosed in a sealed envelope with first class postage prepaid, addressed as follows:

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

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

Victoria Hall

An employee of ATKIN WINNER & SHERROD

ATKIN WINNER & SHERROD LTD
A NEVADA LAW FIRM

EXHIBIT "A"

COM
THOMAS CHRISTENSEN, ESQ.
Nevada Bar No. 2326
DAVID F. SAMPSON, ESQ.
Nevada Bar No. 6811
CHRISTENSEN LAW OFFICES, LLC
1000 S. Valley View Blvd.
Las Vegas, Nevada 89107
Attorneys for Plaintiffs

FILED
MAY 22 1 48 PM '09
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES NALDER, Guardian Ad Litem for minor Cheyanne Nalder, real party in interest, and GARY LEWIS, Individually;

Plaintiffs,

vs.

UNITED AUTOMOBILE INSURANCE CO, DOES I through V, and ROE CORPORATIONS I through V, inclusive

Defendants.

Case No.: A-09-590967-C
Dept No.: II

COMPLAINT

COME NOW the Plaintiffs, James Nalder, Guardian Ad Litem for minor, Cheyanne Nalder, real party in interest in this matter, and Gary Lewis, by and through their attorneys of record, DAVID SAMPSON, ESQ., of the law firm of CHRISTENSEN LAW OFFICES, LLC, and for Plaintiffs' Complaint against the Defendants, and each of them, allege as follows:

1. That Plaintiff, James Nalder, Guardian Ad Litem for minor, Cheyanne Nalder real party in interest, was at all times relevant to this action a resident of the County of Clark, State of Nevada.

2. That Plaintiff, Gary Lewis, was at all times relevant to this action a resident of the County of Clark, State of Nevada.

3. That Defendant, United Automobile Insurance Co. (hereinafter "UAI"), was at all times relevant to this action an automobile insurance company duly authorized to act as an insurer in the State of Nevada and doing business in Clark County, Nevada.

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

5. That, at all times relevant hereto, Gary Lewis was the owner of a certain 1996 Chevy Silverado with vehicle identification number 1GCEC19M6TE214944 (hereinafter "Plaintiff's Vehicle").

6. That Gary Lewis had in effect on July 8, 2007, a policy of automobile insurance on the Plaintiff's Vehicle with Defendant, UAI (the "Policy"); that the Policy provides certain benefits to Cheyanne Nalder as specified in the Policy; and the Policy included liability coverage in the amount of $15,000.00/$30,000.00 per occurrence (hereinafter the "Policy Limits").

7. That Gary Lewis paid his monthly premium to UAI for the policy period of June 30, 2007 through July 31, 2007.

8. That on July 8, 2007 on Bartolo Rd in Clark County Nevada, Cheyenne Nalder was a pedestrian in a residential area, Plaintiff's vehicle being operated by Gary Lewis when Gary Lewis drove over top of Cheyanne Nalder causing serious personal injuries and damages to Cheyanne Nalder.

9. That Cheyanne Nalder made a claim to UAI for damages under the terms of the Policy due to her personal injuries.

10. That Cheyanne Nalder offered to settle his claim for personal injuries and damages against Gary Lewis within the Policy Limits, and that Defendants, and each of them, refused to settle the claim of Cheyanne Nalder against Gary Lewis within the Policy Limits and in fact denied the claim all together indicating Gary Lewis did not have coverage at the time of the accident.

11. That Plaintiff, Gary Lewis has duly performed all the conditions, provisions and terms of the Policy relating to the loss sustained by Plaintiff, Cheyanne Nalder, and has furnished and delivered to the Defendants, and each of them, full and complete particulars of said loss and have fully complied with all of the provisions of the Policy relating to the giving of notice of said loss, and have duly given all other notices required to be given by the Plaintiffs under the terms of the Policy, including paying the monthly premium.

12. That Plaintiff, Cheyanne Nalder, is a third party beneficiary under the Policy as well as a Judgment Creditor of Gary Lewis and is entitled to pursue action against the Defendants directly under Hall v. Enterprise Leasing Co., West, 122 Nev. 685, 137 P.3d 1104, 1109 (2006), as well as Denham v. Farmers Insurance Company, 213 Cal.App.3d.1061, 262 Cal.Rptr. 146 (1989).

13. That Cheyanne Nalder conveyed to UAI her willingness to settle her claim against Gary Lewis at or within the policy limits of $15,000.00 provided they were paid in a commercially reasonable manner.

14. That Cheyanne Nalder and Gary Lewis cooperated with UAI in its investigation including but not limited to providing a medical authorization to UAI on or about August 2, 2007.

15. That on or about August 6, 2007 UAI mailed to Plaintiff, Cheyanne Nalders' attorney, Christensen Law Offices, a copy of "Renewal Policy Declaration Monthly Nevada Personal Auto Policy" for Gary Lewis with a note that indicated "There was a gap in coverage".

16. That on or about October 10, 2007 UAI mailed to Plaintiff, Cheyanne Nalders' attorney, Christensen Law Offices, a letter denying coverage.

17. That on or about October 23, 2007, Plaintiff, Cheyanne Nalder provided a copy of the complaint filed against UAI's insured Gary Lewis.

18. That on or about November 1, 2007, UAI mailed to Plaintiff, Cheyanne Nalders' attorney, Christensen Law Offices, another letter denying coverage.

19. That UAI denied coverage stating Gary Lewis had a "lapse in coverage" due to non-payment of premium.

20. That UAI denied coverage for non-renewal.

21. That UAI mailed Gary Lewis a "renewal statement" on or about June 11, 2007 that indicated UAI's intention to renew Gary Lewis' policy.

22. That upon receiving the "renewal statement", which indicated UAI's intention to renew Gary Lewis' policy, Gary Lewis made his premium payment and procured insurance coverage with UAI.

23. That UAI was required under the law to provide insurance coverage under the policy Gary Lewis had with UAI for the loss suffered by Cheyenne Nalder, and was under an obligation to defend Gary Lewis and to indemnify Gary Lewis up to and including the policy limit of $15,000.00, and to settle Cheyyene's claim at or within the $15,000.00 policy limit when given an opportunity to do so.

24. That UAI never advised Lewis that Nalder was willing to settle Nalder's claim against Lewis for the sum of $15,000.00.

25. UAI did not timely evaluate the claim nor did it tender the policy limits.

26. Due to the dilatory tactics and failure of UAI to protect their insured by paying the policy limits when given ample opportunity to do so, Plaintiff, Nalder, was forced to seek the services of an attorney to pursue his rights under her claim against Lewis.

27. Due to the dilatory tactics and failure of UAI to protect their insured by paying the policy limits when given ample opportunity to do so, Plaintiff, Cheyanne Nalder, was forced to file a complaint on October 9, 2007 against Gary Lewis for her personal injuries and damages suffered in the July 8, 2007 automobile accident.

28. The filing of the complaint caused additional expense and aggravation to both Cheyanne Nalder and Gary Lewis.

29. Cheyanne Nalder procured a Judgment against Gary Lewis in the amount of $3,500,000.00.

30. UAI refused to protect Gary Lewis and provide Gary Lewis with a legal defense to the lawsuit filed against Gary Lewis by Cheyanne Nalder.

31. That Defendants, and each of them, are in breach of contract by their actions which include, but are not limited to:

a. Unreasonable conduct in investigating the loss;

b. Unreasonable failure to provide coverage for the loss;

c. Unreasonable delay in making payment on the loss;

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

e. Unreasonably compelling Plaintiffs to retain an attorney before making payment on the loss.

32. As a proximate result of the aforementioned breach of contract, Plaintiffs have suffered and will continue to suffer in the future, damages in the amount of $3,500,000.00 plus continuing interest.

33. As a further proximate result of the aformentioned breach of contract, Plaintiffs have suffered anxiety, worry, mental and emotional distress, and other incidental damages and out of pocket expenses, all to their general damage in excess of $10,000.00.

34. As a further proximate result of the breach of contract, Plaintiffs were compelled to retain legal counsel to prosecute this claim, and Defendants, and each of them, are liable for their attorney's fees reasonably and necessarily incurred in connection therewith.

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

36. That Defendants, and each of them, were unreasonable by refusing to cover the true value of the claim of Cheyanne Nalder, wrongfully failing to settle within the Policy Limits when they had an opportunity to do so, and wrongfully denying coverage.

37. That as a proximate result of the aforementioned breach of the implied covenant of good faith and fair dealing, Plaintiffs have suffered and will continue to suffer in the future, damages in the amount of $3,500,000.00 plus continuing interest.

38. That as a further proximate result of the aformentioned breach of the implied covenant of good faith and fair dealing, Plaintiffs have suffered anxiety, worry, mental and emotional distress, and other incidental damages and out of pocket expenses, all to their general damage in excess of $10,000.00.

39. That as a further proximate result of the aforementioned breach of the implied covenant of good faith and fair dealing, Plaintiffs were compelled to retain legal counsel to prosecute this claim, and Defendants, and each of them, are liable for their attorney's fees reasonably and necessarily incurred in connection therewith.

40. That Defendants, and each of them, acted unreasonably and with knowledge that there was no reasonable basis for its conduct, in its actions which include but are not limited to: wrongfully refusing to cover the value of the claim of Cheyanne Nalder, wrongfully failing to settle within the Policy Limits when they had an opportunity to do so and wrongfully denying the coverage.

41. That as a proximate result of the aforementioned bad faith, Plaintiffs have suffered and will continue to suffer in the future, damages in the amount of $3,500,000.00 plus continuing interest.

42. That as a further proximate result of the aformentioned bad faith, Plaintiffs have suffered anxiety, worry, mental and emotional distress, and other incidental damages and out of pocket expenses, all to their general damage in excess of $10,000.00.

43. That as a further proximate result of the aforementioned bad faith, Plaintiffs were compelled to retain legal counsel to prosecute this claim, and Defendants, and each of them, are liable for their attorney's fees reasonably and necessarily incurred in connection therewith.

44. That Defendants, and each of them, violated NRS 686A.310 by their actions, including but not limited to: wrongfully refusing to cover the value of the claim of Cheyanne Nalder, wrongfully failing to settle within the Policy Limits when they had an opportunity to do so and wrongfully denying coverage.

45. That NRS 686A.310 requires that insurance carriers conducting business in Nevada adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies, and requires that carriers effectuate the prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear..

46. That UAI did not adopt and implement reasonable standards for the prompt investigation and processing of claims arising under its insurance policies, and did not effectuate the a prompt, fair and/or equitable settlement of Nalder's claim against Lewis in which liability of the insurer was very clear, and which clarity was conveyed to UAI.

47. That NAC 686A.670 requires that an insurer complete an investigation of each claim within 30 days of receiving notice of the claim, unless the investigation cannot be reasonably completed within that time.

48. That UAI received notice of Nalder's claim against Lewis, at the very latest, on or before August 6, 2007. That it was more than reasonable for UAI to complete its investigation of Nalder's claim against Lewis well within 30 days of receiving notice of the claim.

49. That UAI did not offer the applicable policy limits.

50. That UAI did failed to investigate the claim at all and denied coverage.

51. That as a proximate result of the aforementioned violation of NRS 686A.310, Plaintiffs have suffered and will continue to suffer in the future, damages in the amount of $3,500.000.00 plus continuing interest.

52. That as a further proximate result of the aforementioned violation of NRS 686A.310, Plaintiffs have suffered anxiety, worry, mental and emotional distress, and other incidental damages and out of pocket expenses, all to their general damage in excess of $10,000.00.

53. That as a further proximate result of the aforementioned violation of NRS 686A.310, Plaintiffs were compelled to retain legal counsel to prosecute this claim, and Defendants, and each of them, are liable for their attorney's fees reasonably and necessarily incurred in connection therewith.

54. That the Defendants, and each of them, have been fraudulent in that they have stated that they would protect Gary Lewis in the event he was found liable in a claim. All of this was done in conscious disregard of Plaintiffs' rights and therefore Plaintiffs are entitled to punitive damages in an amount in excess of $10,000.00.

WHEREFORE, Plaintiffs, pray for judgment against Defendants, and each of them, as follows:

1. Payment for the excess verdict rendered against Lewis which remains unpaid in an amount in excess of $3,500,000.00;

2. General damages for mental and emotional distress and other incidental damages in an amount in excess of $10,000.00;

3. Attorney's fees and costs of suit incurred herein; and

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

///

///

///

5. For such other and further relief as this Court deems just and proper.

DATED this 17 day of April, 2009.

CHRISTENSEN LAW OFFICES, LLC.

By: _____
Thomas Christensen, Esq.
David F. Sampson, Esq.
Nevada Bar No. 6811
1000 South Valley View Blvd
Las Vegas, Nevada 89107
Attorneys for Plaintiffs

EXHIBIT "B"

JUDG

FILED

Aug 26 11 00 AM '08

CLERK

DAVID F. SAMPSON, ESQ.,
Nevada Bar #6811
THOMAS CHRISTENSEN, ESQ.,
Nevada Bar #2326
1000 S. Valley View Blvd.
Las Vegas, Nevada 89107
(702) 870-1000
Attorney for Plaintiff,
JAMES NALDER As Guardian Ad
Litem for minor, CHEYENNE NALDER

DISTRICT COURT
CLARK COUNTY, NEVADA

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

NOTICE OF ENTRY OF JUDGMENT

PLEASE TAKE NOTICE that a Judgment against Defendant, GARY LEWIS, was entered in the above-entitled matter on June 2, 2008. A copy of said Judgment is attached hereto.

DATED this 5th day of June, 2008.

CHRISTENSEN LAW OFFICES, LLC

By: _____
DAVID F. SAMPSON, ESQ.
Nevada Bar #6811
THOMAS CHRISTENSEN, ESQ.,
Nevada Bar #2326
1000 S. Valley View Blvd.
Las Vegas, Nevada 89107
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of CHRISTENSEN LAW OFFICES, LLC., and that on this 5th day of ~~March~~ June, 2008, I served a copy of the foregoing **NOTICE OF ENTRY OF JUDGMENT** as follows:

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

☐ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile number(s) shown below and in the confirmation sheet filed herewith. Consent to service under NRCP 5(b)(2)(D) shall be assumed unless an objection to service by facsimile transmission is made in writing and sent to the sender via facsimile within 24 hours of receipt of this Certificate of Service; and/or

☐ Hand Delivery—By hand-delivery to the addresses listed below.

Gary Lewis
5049 Spencer St. #D
Las Vegas, NV 89119

An employee of CHRISTENSEN LAW OFFICES, LLC

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

CLERK OF THE COURT

JUN 3 1 52 PM '08

FILED

DISTRICT COURT
CLARK COUNTY, NEVADA

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

JUDGMENT

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

. . .

. . .

. . .

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

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

[redacted]
DISTRICT JUDGE

Submitted by:
CHRISTENSEN LAW OFFICES, LLC.

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

EXHIBIT "C"

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

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

DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

Date: N/A

Time: N/A

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

/ / / /

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

Dated this 19 day of March, 2018.

STEPHENS GOURLEY & BYWATER

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

EXHIBIT "1"

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

CLERK OF THE COURT

JUN 3 1 52 PM '08

FILED

DISTRICT COURT
CLARK COUNTY, NEVADA

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

JUDGMENT

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

. . .

. . .

. . .

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

DATED THIS 2 day of June, 2008.

DISTRICT JUDGE

Submitted by:
CHRISTENSEN LAW OFFICES, LLC.

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

EXHIBIT "2"

JMT

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

DISTRICT COURT

CLARK COUNTY, NEVADA

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

AMENDED JUDGMENT

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

...

...

...

...

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

DATED this _____ day of March, 2018.

_____
District Judge

Submitted by:
STEPHENS GOURLEY & BYWATER

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

EXHIBIT "D"

Electronically Filed
5/18/2018 3:37 PM
Steven D. Grierson
CLERK OF THE COURT

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

DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER,

Plaintiff,

vs.

GARY LEWIS

Defendant.

Case No. 07A549111

Dept. No. XXIX

NOTICE OF ENTRY OF AMENDED JUDGMENT

NOTICE IS HEREBY GIVEN that on the 26th day of March, 2018, the Honorable David M. Jones entered an **AMENDED JUDGMENT,** which was thereafter filed on March 28, 2018, in the above entitled matter, a copy of which is attached to this Notice.

Dated this 17 day of May, 2018.

STEPHENS & BYWATER

David A. Stephens, Esq.
Nevada Bar No. 00902
3636 North Rancho Drive
Las Vegas, Nevada 89130
Attorney for Brittany Wilson

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the law office of STEPHENS & BYWATER, and that on the 18th day of May, 2018, I served a true copy of the foregoing **NOTICE OF ENTRY OF AMENDED JUDGMENT,** by depositing the same in a sealed envelope upon which first class postage was fully prepaid, and addressed as follows:

Gary Lewis
733 S. Minnesota Ave.
Glendora, California 91740

An employee of Stephens & Bywater

Electronically Filed
3/28/2018 3:05 PM
Steven D. Grierson
CLERK OF THE COURT

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

DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER,

Plaintiff,

vs.

GARY LEWIS,

Defendant.

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

AMENDED JUDGMENT

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

...

...

...

...

Case Number: 07A549111

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

DISTRICT COURT

CLARK COUNTY, NEVADA

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

AMENDED JUDGMENT

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

...

...

...

...

IT IS ORDERED THAT PLAINTIFF HAVE JUDGMENT AGAINST DEFENDANT in the sum of $3,500,000.00, which consists of $65,555.37 in medical expenses, and ~~$3,434,4444.63~~ $3,434,444.63 in pain, suffering, and disfigurement, with interest thereon at the legal rate from October 9, 2007, until paid in full.

DATED this 26 day of March, 2018.

District Judge

Submitted by:
STEPHENS GOURLEY & BYWATER

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

EXHIBIT B

EXHIBIT B

Electronically Filed
10/29/2018 5:13 PM
Steven D. Grierson
CLERK OF THE COURT

OPPM
E. BREEN ARNTZ, ESQ.
Nevada Bar No. 3853
5545 Mountain Vista Ste. E
Las Vegas, Nevada 89120
T: (702) 384-8000
F: (702) 446-8164
breen@breen.com

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES NALDER, Plaintiff, vs. GARY LEWIS and DOES I through V, inclusive Defendants,	CASE NO:07A549111 DEPT. NO: XX Date of Hearing: 12/12/18 Time of Hearing: 8:30am
UNITED AUTOMOBILE INSURANCE COMPANY, Intervenor.	

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

Defendant, Gary Lewis, by and through his counsel, E. Breen Arntz, Esq., opposes Intervenor's motion for relief from judgment.

POINTS AND AUTHORITIES

UAIC's motion is unsupported by Nevada authority and is frivolous. UAIC misstates Nevada's statute of limitations and tolling statutes. UAIC misstates Nevada cases regarding actions on a judgment to obtain a new judgment and its relationship to the optional and additional process to renew a judgment by affidavit. UAIC's motion is not supported by authority, is not timely, is not brought in good faith and is contrary to law. In addition, UAIC's

Case Number: 07A549111

motion to intervene was not properly noticed, is contrary to the well settled law in Nevada should have been denied and UAIC's resulting motion in intervention should now be denied, stricken and the intervention denied. The intervention statute provides for intervention **prior to trial** not after judgment. NRS 12.130 Intervention:...1. ...(a) Before the trial, any person may intervene in an action or proceeding.... Nevada law does not allow for intervention after judgment. In addition UAIC waived their right to direct the defense and their right to intervene when they refused to defend Lewis and failed to indemnify him. UAIC claims to have a direct and immediate interest to warrant intervention. However the California court in *Hinton v. Beck*, 176 Cal. App. 4th 1378 (Cal. Ct. App. 2009) has held just the opposite: "Grange, 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 only facts and procedural history relevant to UAIC's motion in intervention for relief from the judgment in this action are that Nalder was born April 4, 1998. That UAIC refused to defend their insured Lewis following Cheyenne's injury. Nalder sued Lewis. UAIC was notified of the litigation. UAIC refused to defend or indemnify Lewis. The original Judgment was entered on August 26, 2008. It is a final judgment. Lewis and Nalder sued UAIC to collect on the judgment among other claims. Mr. Lewis moved from Nevada and was not subject to service of process in the State of Nevada from at the latest December of 2010 to the present. This case was removed to federal court by UAIC. The federal district court erroneously granted summary judgment in favor of UAIC on December 20, 2010. Exhibit 1. This erroneous ruling was appealed to the Ninth circuit who reversed the trial court and ordered further proceedings consistent with that order.

On remand the district court issued an order holding UAIC liable for insurance coverage of the incident and ordering payment of the policy limits but erroneously failing to award

consequential damages in the amount of the judgment on October 30, 2013. Exhibit 2. This failure to award the amount of the judgment as damages to Lewis and Nalder was again appealed to the Ninth Circuit. UAIC made three undisputed payments toward the judgment on June 23, 2014; June 25, 2014; and March 5, 2015.

Following the District court's finding of coverage UAIC did not take any immediate steps to intervene in the Nevada action. UAIC did not take any action in 2014 to defend their insured regarding the expiration of the judgment which they claim -- wrongly -- could be done as early as August 26, 2014. UAIC did not take any action in 2015 to defend their insured. UAIC did not take any action in 2016 to intervene and defend their insured. UAIC did not take any action in 2017 to intervene and defend their insured. Now UAIC has obtained a void order allowing intervention and filed a frivolous motion for relief from judgment. This is not timely. UAIC by failing to defend has waived their right to intervene. The motion to intervene should not have been granted and now the motion in intervention must be denied, stricken and the intervention disallowed.

The case of *Hinton v. Beck*, 176 Cal. App. 4th 1378 (Cal. Ct. App. 2009) is dispositive of the issue in this case. In Hinton the court affirmed the trial court's striking of the insurers complaint in intervention and concluded "*Hamilton* speaks directly to the case before us because Grange rejected the opportunity and waived the chance to contest the liability of its insured when it denied Beck a defense. Hinton settled with Beck by agreeing to forego execution of her default judgment against him in exchange for an assignment of his rights against Grange. Grange may not now inject itself into the litigation because it lost its right to control the litigation when it refused to defend or indemnify Beck." Likewise UAIC lost its right to control the litigation when it refused to defend or indemnify Lewis.

In regard to the validity of the judgment UAIC misstates Nevada law throughout its motion. NRS 11.190 is the statute of limitations for many types of actions including an action on a judgment. It's time calculation is tolled by many statutes in the same section. *Mandlebaum v. Gregovich*, 24 Nev. 154, 161, 50 P. 849, 851 (1897) The three applicable here are NRS 11.200 (the time in NRS 11.190 runs from the last transaction or payment), NRS 11.250 (the time in NRS 11.190 runs from the time the person reaches the age of majority) and NRS 11.300 (the time in NRS 11.190 is tolled for any time the defendant is out of the state of Nevada). Nowhere does NRS 11.190(1)(a) say "unless renewed under NRS 17.214." In fact it says within six years "an action upon a judgment...**OR** the renewal thereof." (emphasis added)

The judgment remains collectible even in the absence of an action upon the judgment or renewal of the judgment for three reasons. UAIC made three undisputed payments toward the judgment on June 23, 2014; June 25, 2014; and March 5, 2015. Pursuant to "**NRS 11.200 Computation of time.** The time in NRS 11.190 shall be deemed to date from the last transaction ... the limitation shall commence from the time the last payment was made." Further, when any payment is made, "the limitation shall commence from the time the last payment was made." Therefore, UAIC's last payment on the judgment extended the expiration of the six-year statute of limitations to March 5, 2021.

Additionally, NRS 11.250 outlines various circumstances that prevent the running of the statute of limitations and states, in relevant part:

> If a person entitled to bring an action other than for the recovery of real property be, at the time the cause of action accrued, either:
> 1. Within the age of 18 years;
> . . .
> the time of such disability ***shall not*** be a part of the time limited for the commencement of the action (emphasis added).

Cheyenne Nalder was a minor when she obtained the judgment. She turned 18 on April 4, 2016.

Therefore, the earliest that the six-year statute of limitations runs is April of 2022. This judgment was never recorded and the provisions of NRS 17.214 relating to real property have no application here.

Pursuant to NRS 11.300, the absence of Lewis from the State of Nevada tolls the statute of limitations to enforce a judgment and it remains tolled because of his absence. *See Bank of Nevada v. Friedman*, 82 Nev. 417, 421, 420 P.2d 1, 3 (1966) and *Mandlebaum v. Gregovich*, 24 Nev. 154, 161, 50 P. 849, 851 (1897)

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

UAIC admits that North Dakota is a state with similar renewal methods to Nevada. While they are partially correct there is a crucial difference in the renewal statutes between North Dakota and Nevada. The language of the renewal statute in North Dakota contains a ten year period in the body of the statute. The Nevada renewal statute refers one back to the statute of limitations for judgments. Further, the case cited by UAIC, *F/S Manufacturing v. Kensmoe*, 798 N.W.2d 853 (N.D. 2011) supports the validity of the judgment here. As that Court notes:

> Of course, it may be easier to renew a judgment by affidavit; but it by no means follows that the old judgment may not be made the basis of a new suit, and *many cases arise where it is an advantage to be able to bring suit, instead of renewing by affidavit — the case at bar being an example.* It is our conclusion that the two remedies are not inconsistent, and that a judgment creditor may either sue upon his judgment, or renew it by affidavit ... *Id at 857.*

These tolling statutes present a catch-22 for the use of NRS 17.214 and the "strict compliance" interpretation given by the Nevada Supreme Court. One of the terms of the statute

in Nevada is that the renewal needs to brought within 90 days of the expiration of the statute of limitations. If that 90-day period is strictly construed, any renewal attempt pursuant to NRS 17.214 by Nalder at the present time, or earlier as argued by UAIC, might be premature and therefore may be ineffective because it would not be filed within the 90 day window prior to expiration of the statute of limitations.

NRS 17.214 was enacted to give an optional, not "mandatory," statutory procedure in addition to the rights already present for an action on the judgment. UAIC claims the plain, permissive language of NRS 17.214: "A judgment creditor...**may** renew a judgment," (emphasis added) mandates use of NRS 17.214 as the only way to obtain a new judgment. UAIC cites no authority for this mandated use of NRS 17.214. The legislative history demonstrates that NRS 17.214 was adopted to give an easier way for creditors to renew judgments. This was to give an option for renewal of judgments that was easier and more certain, not make it a trap for the unwary and cut of rights of injured parties. This is contrary to the clear wording of the statute and the case law in Nevada. See *Mandlebaum v. Gregovich*, 24 Nev. 154, 161, 50 P. 849, 851 (1897)

> The law is well settled that a judgment creditor may enforce his judgment by the process of the court in which he obtained it, or he may elect to use the judgment as an original cause of action and bring suit thereon and prosecute such suit to final judgment.

Where as here, the timing of the expiration is in doubt, the best way to obtain a new judgment is the common law method, which is only supplemented by the statutory renewal method, not replaced. See *Mandlebaum* at 161-162

> In the absence of direct legislation restricting or limiting the common law rule of the right of action upon judgments, there are found within our statutes provisions from which the court is authorized in holding, as a matter of inference, that no change in that rule was intended, otherwise some legislative restriction or limitation of the right under the common law rule would have been included in the statute other than the

> one barring the action if not commenced within six years after the right accrued. In other words, the legislature gave to the judgment creditor the right of action at any time within six years after such right accrued without other limitations. Furthermore, the statutory law preserved that right as against the judgment debtor who might be out of the state, by allowing such action to be commenced within the time limited after his return to the state, which might be, as in this case, long after the right of execution had been barred.
>
> We must therefore hold, that under the common law rule, which prevails in this state, that the right of action upon an unsatisfied judgment is a matter of course…

This has been the law in Nevada for over a hundred years. It has not been modified by the legislature. UAIC's motion for relief from judgment should be denied, it is untimely and frivolous. UAIC's Motion in Intervention should be stricken and Intervention revoked.

Dated this 29th day of October, 2018.

E. BREEN ARNTZ, ESQ.
Nevada Bar No. 3853
5545 Mountain Vista Ste. E
Las Vegas, Nevada 89120
T: (702) 384-8000
F: (702) 446-8164
breen@breen.com

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of E. BREEN ARNTZ, ESQ. and that on this 29th day of Oct, 2018, I served a copy of the foregoing Defendant's **OPPOSITION TO MOTION IN INTERVENTION FOR RELIEF FROM JUDGMENT** as follows:

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

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

Randall Tindall, Esq.
Resnick & Louis
8925 W. Russell Road, Suite 225
Las Vegas, NV 89148
rtindall@rlattorneys.com

David A. Stephens, Esq.
Stephens, Gourley & Bywater
3636 North Rancho Drive
Las Vegas, NV 89130
dstephens@sgblawfirm.com

Matthew Douglas, Esq.
Atkin Winner & Sherrod
1117 South Rancho Drive
Las Vegas, NV 89102
mdouglas@awslawyers.com

An employee of E. BREEN ARNTZ, ESQ.

EXHIBIT 1

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JAMES NALDER, Guardian Ad Litem for minor Cheyanne Nalder, real party in interest, and GARY LEWIS, Individually; Plaintiffs, vs. UNITED AUTOMOBILE INSURANCE COMPANY, DOES I through V, and ROE CORPORATIONS I through V, inclusive Defendants.	2:09-cv-1348-ECR-GWF **Order**

Plaintiffs in this automobile insurance case allege breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, breach of Nev. Rev. Stat. § 686A.310, and fraud. Now pending is Defendant's "motion for summary judgment on all claims; alternatively, motion for summary judgment on extra-contractual remedies; or, further in the alternative, motion stay [sic] discovery and bifurcate claims for extra-contractual remedies; finally, in the alternative, motion for leave to amend" ("MSJ") (#17).

The motion is ripe, and we now rule on it.

I. Background

Plaintiff Gary Lewis ("Lewis") is a resident of Clark County, Nevada. (Compl. ¶ 2 (#1).) Plaintiff James Nalder ("Nalder"), Guardian ad Litem for minor Cheyanne Nalder, is a resident of Clark County, Nevada. (Id. at ¶ 1.) Defendant United Automobile Insurance Co. ("UAIC") is an automobile insurance company duly authorized to act as an insurer to the State of Nevada and doing business in Clark County, Nevada. (Id. at ¶ 3.) Defendant is incorporated in the State of Florida with its principal place of business in the State of Florida. (Pet. for Removal ¶ VII (#1).)

Lewis was the owner of a 1996 Chevy Silverado insured, at various times, by Defendant. (Compl. at ¶ 5-6 (#1).) Lewis had an insurance policy issued by UAIC on his vehicle during the period of May 31, 2007 to June 30, 2007. (MSJ at 3 (#17).) Lewis received a renewal statement, dated June 11, 2007, instructing him to remit payment by the due date of June 30, 2007 in order to renew his insurance policy. (Id. at 3-4.) The renewal statement specified that "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy." (Pls.' Opp. at 3 (#20).) The renewal statement listed June 30, 2007 as effective date, and July 31, 2007 as an "expiration date." (Id.) The renewal statement also states that the "due date" of the payment is June 30, 2007, and repeats that the renewal amount is due no later than June 30, 2007. (MSJ at 7-8 (#17).) Lewis made a payment on July 10, 2007. (Id.)

Defendant then issued a renewal policy declaration and automobile insurance cards indicating that Lewis was covered under

an insurance policy between July 10, 2007 to August 10, 2007. (Pls' Opp. Exhibit 1 at 35-36; MSJ at 4.)

On July 8, 2007, Lewis was involved in an automobile accident in Pioche[1], Nevada, that injured Cheyanne Nalder. (MSJ at 3 (#17).) Cheyanne Nalder made a claim to Defendant for damages under the terms of Lewis's insurance policy with UAIC. (Compl. at ¶ 9 (#1).) Defendant refused coverage for the accident that occurred on July 8, 2007, claiming that Lewis did not have coverage at the time of the accident. (Id. at ¶ 10.) On October 9, 2007, Plaintiff Nalder, as guardian of Cheyanne Nalder, filed suit in Clark County District Court under suit number A549111 against Lewis. (Mot. to Compel at 3 (#12).) On June 2, 2008, the court in that case entered a default judgment against Lewis for $3.5 million. (Id.)

Plaintiffs then filed their complaint in this action in Nevada state court on March 22, 2009 against Defendant UAIC. On July 24, 2009, Defendant removed the action to federal court, invoking our diversity jurisdiction. (Petition for Removal (#1).)

On March 18, 2010, Defendant filed the MSJ (#17). On April 9, 2010, Plaintiffs opposed (#20), and on April 26, 2010, Defendant replied (#21). We granted leave for Plaintiffs to file a supplement (#26), and Defendant filed a supplement (#33) to its reply (#21).

[1] Plaintiffs' complaint originally alleged that the accident occurred in Clark County, Nevada. It is unclear from the documents which site is the correct one, but neither party disputes jurisdiction and the actual location of the accident is irrelevant to the disposition of this motion.

II. Summary Judgment Standard

Summary judgment allows courts to avoid unnecessary trials where no material factual dispute exists. N.W. Motorcycle Ass'n v. U.S. Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). The court must view the evidence and the inferences arising therefrom in the light most favorable to the nonmoving party, Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996), and should award summary judgment where no genuine issues of material fact remain in dispute and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party. FED. R. CIV. P. 50(a). Where reasonable minds could differ on the material facts at issue, however, summary judgment should not be granted. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 116 S.Ct. 1261 (1996).

The moving party bears the burden of informing the court of the basis for its motion, together with evidence demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the party opposing the motion may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing that there exists a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Although the parties may submit evidence in an inadmissible form — namely, depositions, admissions, interrogatory answers, and affidavits — only evidence which might be admissible at trial may be considered

by a trial court in ruling on a motion for summary judgment. FED. R. CIV. P. 56(c); Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179, 1181 (9th Cir. 1988).

In deciding whether to grant summary judgment, a court must take three necessary steps: (1) it must determine whether a fact is material; (2) it must determine whether there exists a genuine issue for the trier of fact, as determined by the documents submitted to the court; and (3) it must consider that evidence in light of the appropriate standard of proof. Anderson, 477 U.S. at 248. Summary judgment is not proper if material factual issues exist for trial. B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir. 1999). "As to materiality, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248. Disputes over irrelevant or unnecessary facts should not be considered. Id. Where there is a complete failure of proof on an essential element of the nonmoving party's case, all other facts become immaterial, and the moving party is entitled to judgment as a matter of law. Celotex, 477 U.S. at 323. Summary judgment is not a disfavored procedural shortcut, but rather an integral part of the federal rules as a whole. Id.

III. Analysis

Defendant seeks summary judgment on all claims on the basis that Lewis had no insurance coverage on the date of the accident. Plaintiff contends that Lewis was covered on the date of the accident because the renewal notice was ambiguous as to when payment

must be received in order to avoid a lapse in coverage, and any ambiguities must be construed in favor of the insured. Defendants request, in the alternative, that we dismiss Plaintiffs' extra-contractual claims, or bifurcate the claim of breach of contract from the remaining claims. Finally, if we deny all other requests, Defendant requests that we grant leave to amend

A. Contract Interpretation Standard

In diversity actions, federal courts apply substantive state law. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); Nitco Holding Corp. v. Boujikian, 491 F.3d 1086, 1089 (9th Cir. 2007). Under Nevada law, "[a]n insurance policy is a contract that must be enforced according to its terms to accomplish the intent of the parties." Farmers Ins. Exch. v. Neal, 64 P.3d 472, 473 (Nev. 2003). When the facts are not in dispute, contract interpretation is a question of law. Grand Hotel Gift Shop v. Granite State Ins. Co., 839 P.2d 599, 602 (Nev. 1992). The language of the insurance policy must be viewed "from the perspective of one not trained in law," and we must "give plain and ordinary meaning to the terms." Farmers Ins. Exch., 64 P.3d at 473 (internal quotation marks omitted). "Unambiguous provisions will not be rewritten; however, ambiguities are to be resolved in favor of the insured." Id. (footnote omitted); see also Fed. Ins. Co. v. Am. Hardware Mut. Ins. Co., 184 P.3d 390, 392 (Nev. 2008) ("In the insurance context, we broadly interpret clauses providing coverage, to afford the insured the greatest possible coverage; correspondingly, clauses excluding coverage are interpreted narrowly against the insurer.") (internal quotation marks omitted); Capitol Indemnity Corp. v. Wright, 341 F.

Supp. 2d 1152, 1156 (D. Nev. 2004) (noting that "a Nevada court will not increase an obligation to the insured where such was intentionally and unambiguously limited by the parties"). "When a contract is unambiguous and neither party is entitled to relief from the contract, summary judgment based on the contractual language is proper." Allstate Ins. Co. v. Fackett, 206 P.3d 572, 575 (Nev. 2009) (citing Chwialkowski v. Sachs, 834 P.2d 405, 406 (Nev. 1992)).

B. Plaintiff Lewis' Insurance Coverage on July 8, 2007

Plaintiffs contend that Lewis was covered under an insurance policy on July 8, 2007, the date of the accident, because Lewis' payment on July 10, 2007 was timely. Plaintiffs rely on the sentence "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy" contained in the renewal statement. Defendant contends that "expiration of your policy" did not refer to the expiration date of the renewal policy listed on the renewal statement, but to the expiration of Lewis' current policy, which coincided with the listed due date on the renewal statement. Plaintiffs contend that Lewis reasonably believed that while there was a due date on which UAIC preferred to receive payment, there was also a grace period within which Lewis could pay and avoid any lapse in coverage.

The renewal statement cannot be considered without considering the entirety of the contract between Lewis and UAIC. Plaintiff attached exhibits of renewal statements, policy declarations pages, and Nevada automobile insurance cards issued by UAIC for Lewis. The contract, taken as a whole, cannot reasonably be interpreted in favor of Plaintiffs' argument.

Lewis received a "Renewal Policy Declarations" stating that he had coverage from May 31, 2007 to June 30, 2007 at 12:01 A.M. (Pls' Opp., Exhibit A at 29 (#20-1); Pls' Supp., Exhibit A at 11-12 (#26-1); Pls' Supp., Exhibit A at 15 (#26-1).) The declarations page stated that "[t]his declaration page with 'policy provisions' and all other applicable endorsements complete your policy." (Pls' Opp., Exhibit A at 29 (#20-1).) Lewis also received a Nevada Automobile Insurance Card issued by UAIC stating that the effective date of his policy was May 31, 2007, and the expiration date was June 30, 2007. (Id. at 30; Pls' Supp., Exhibit A at 11-12 (#26-1).) The renewal statement Lewis received in June must be read in light of the rest of the insurance policy, contained in the declarations page and also summarized in the insurance card.

"In interpreting a contract, 'the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself.'" Anvui, LLC v. G.L. Dragon, LLC, 163 P.3d 405, 407 (Nev. 2007). Plaintiffs contend that there was a course of dealing between Lewis and UAIC supporting a reasonable understanding that there was a grace period involved in paying the insurance premium for each month-long policy. In fact, the so-called course of dealing tilts, if at all, in favor of Defendant. Lewis habitually made payments that were late. UAIC never retroactively covered Lewis on such occasions. Lewis' new policy, clearly denoted on the declarations page and insurance cards Lewis was issued, would always become effective on the date of the payment.

Plaintiffs point to the fact that in April 2007, Lewis was issued a revised renewal statement stating that the renewal amount was due on May 6, 2007, a date after the effective date of the policy Lewis would be renewing through the renewal amount. This isolated occasion occurred due to the fact that Lewis added a driver to his insurance policy, resulting in an increase in the renewal amount, after UAIC had previously sent a renewal notice indicating that a lower renewal amount was due on April 29, 2007. UAIC issued a revised renewal statement dated April 26, 2007, and gave Lewis an opportunity to pay by May 6, 2007, instead of April 29, 2007, when the original renewal amount had been due upon expiration of his April policy. In that case, Lewis made a timely payment on April 28, 2007, and therefore there is not a single incident Plaintiffs can point to in which Lewis was retroactively covered for a policy before payment was made, even in the single instance UAIC granted him such an opportunity due to a unique set of circumstances.

C. Statutory Arguments

Plaintiffs' arguments that Lewis had coverage due to Nev. Rev. Stat. § 687B.320 and § 687B.340 are untenable. Section 687B.320 applies in the case of midterm cancellations, providing that:

> 1. Except as otherwise provided in subsection 3, no insurance policy that has been in effect for at least 70 days or that has been renewed may be cancelled by the insurer before the expiration of the agreed term or 1 year from the effective date of the policy or renewal, whichever occurs first, except on any one of the following grounds:

> (a) Failure to pay a premium when due;
>
> . . .
>
> 2. No cancellation under subsection 1 is effective until in the case of paragraph (a) of subsection 1 at least 10 days and in the case of any other paragraph of subsection 1 at least 30 days after the notice is delivered or mailed to the policyholder.

The policies at issue in this case were month-long policies with options to renew after the expiration of each policy. Lewis' June policy expired on June 30, 2007, according to its terms. There was no midterm cancellation and Nev. Rev. Stat. § 687B.320 simply does not apply. Plaintiffs' arguments that between terms is equivalent to "midterm" simply defies the statutory language and the common definition of midterm. In a Ninth Circuit case interpreting Montana law, the Ninth Circuit noted that the district court's observation that "the policy expired by its own terms; it was not cancelled" was proper, and the Montana statute at issue in the case, similar to the Nevada statute here, "appl[ies] only to cancellation of a policy, not to its termination." State Farm Mut. Auto. Ins. Co. v. White, 563 F.2d 971, 974 (9th Cir. 1977). The Ninth Circuit went on to note that situations in which "the policy terminated by its own terms for failure of the insured to renew" is controlled by a different statute, which "does not require any notice to the policy-holder when the reason for the non-renewal of the policy is the holder's failure to pay the renewal premiums." Id.

Nev. Rev. Stat. § 687B.340 provides:

> 1. Subject to subsection 2, a policyholder has a right to have his or her policy renewed, on the terms then being applied by the insurer to persons, similarly situated, for an additional period equivalent to the expiring term if the agreed term is 1 year or less, or for 1 year if the agreed term is longer than 1 year, unless:
>
> . . .
>
> (b) At least 30 days for all other policies,
>
> before the date of expiration provided in the policy the insurer mails or delivers to the policyholder a notice of intention not to renew the policy beyond the agreed expiration date. If an insurer fails to provide a timely notice of nonrenewal, the insurer shall provide the insured with a policy of insurance on the identical terms as in the expiring policy.

Plaintiffs argues that Nev. Rev. Stat. § 687B.340 indicates how favorable the law is to the insured, and that there is no mention in the statute that payment is a prerequisite to a policyholder's "right to have his or her policy renewed." It is true that the Nevada statute does not include a provision similar to the one in the Montana statute providing that the section does not apply when the insured has "failed to discharge when due any of his obligations in connection with the payment of premiums for the policy, or the renewal therefor . . . ." White, 563 F.2d at 974 n.3. The Montana statute also stated that the section does not apply "[i]f the insurer has manifested its willingness to renew." Id.

Plaintiffs, however, fail to give credit to the entirety of the Nevada statute. The statute does not say that the policyholder's policy must be renewed, it says that the insurer shall provide the insured with a policy on "the identical terms as in the expiring policy." One of the terms of the expiring policy was payment of the renewal amount. UAIC did provide Lewis, the policyholder, with a renewal statement indicating that UAIC would renew the insurance policy as long as all the terms of the previous policy were met, i.e., payment.

Defendant correctly points out that this statute does not fit the circumstances of this case. Lewis' policy was not renewed not because UAIC had an intention not to renew, but because Lewis failed to carry out his end of the contract, that is, to pay a renewal amount. Lewis' policy was renewed on the date payment was received, but this date was after the date of the accident. Plaintiffs' statutory arguments, therefore, do not pass muster.

IV. Conclusion

Defendant's motion for summary judgment on all claims shall be granted because Lewis had no insurance coverage on the date of the accident. The renewal statement was not ambiguous in light of the entire contract and history between Lewis and UAIC. The term "expiration of your policy" referred to the expiration of Lewis' current policy, and Lewis was never issued retroactive coverage when his payments were late. His renewal policy would always begin on the date payment was received. We cannot find that Lewis was covered between the expiration of his policy in June and payment for

his next policy without straining to find an ambiguity where none exists, and creating an obligation on the part of insurance companies that would be untenable, i.e., to provide coverage when the insured has not upheld his own obligations under the contract to submit a payment.

The statutes cited by Plaintiffs simply do not apply. The expiration of Lewis' policy was not a midterm cancellation, and UAIC was not obligated to provide an insurance policy despite Lewis' failure to adhere to the terms of that policy.

Defendant's other requests are moot in light of our decision granting summary judgment.

IT IS, THEREFORE, HEREBY ORDERED that Defendant's motion for summary judgment on all claims (#17) is **GRANTED** with respect to all of Plaintiffs' claims.

The Clerk shall enter judgment accordingly.

DATED: December 17, 2010.

Edward C. Reed.
UNITED STATES DISTRICT JUDGE

EXHIBIT 2

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMES NALDER, Guardian Ad Litem for minor Cheyanne Nalder, real party in interest, and GARY LEWIS, Individually,

Plaintiffs,

v.

UNITED AUTOMOBILE INSURANCE COMPANY, DOES I through V, and ROE CORPORATIONS I through V, inclusive,

Defendants.

2:09-cv-1348-RCJ-GWF

ORDER

Currently before the Court are a Motion for Summary Judgment (#88) and a Counter-Motion for Summary Judgment (#89). This case, originally ruled upon by the Honorable Edward C. Reed, is on partial remand from the U.S. Court of Appeals for the Ninth Circuit. The Court heard oral argument on October 22, 2013.

BACKGROUND

In July 2009, Defendant United Automobile Insurance Company ("UAIC") filed a petition for removal based on diversity jurisdiction. (Pet. for Removal (#1) at 1-2). Defendant attached Plaintiffs James Nalder, guardian ad litem for minor Cheyanne Nalder, real party in interest, and Gary Lewis's (collectively "Plaintiffs") complaint which had been filed in the Eighth Judicial District in Clark County, Nevada. (Compl. (#1) at 5-16).

The complaint alleged the following. (*Id.* at 5). Lewis was the owner of a 1996 Chevy Silverado and had an automobile insurance policy with Defendant on July 8, 2007. (*Id.* at 6). On July 8, 2007, Lewis drove over top of Cheyanne while Cheyanne was a pedestrian in a residential area and caused Cheyanne serious personal injuries. (*Id.* at 7). Cheyanne made

a claim to Defendant for damages and offered to settle the claim for personal injuries and damages against Lewis within the policy limits. (*Id.*). Defendant refused to settle and denied the claim all together indicating that Lewis did not have coverage at the time of the accident. (*Id.*). Defendant was required to provide insurance coverage under the policy. (*Id.* at 9). Defendant never informed Lewis that Cheyanne was willing to settle the claim for the sum of $15,000, the policy limit. (*Id.*). Due to the dilatory tactics and failure of Defendant to protect its insured, Cheyanne filed a complaint on October 9, 2007 against Lewis for her personal injuries and damages. (*Id.*). Cheyanne procured a default judgment in the amount of $3,500,000 against Lewis. (*Id.*). Plaintiffs alleged breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, breach of Nev. Rev. Stat. § 686A.310, and fraud against Defendant. (*Id.* at 9-14).

In March 2010, Defendant filed a motion for summary judgment on all claims. (*See* Mot. for Summ. J. (#17)). In December 2010, Judge Reed issued an order granting Defendant's motion for summary judgment on all claims and directed the Clerk of the Court to enter judgment accordingly. (Order (#42) at 13). The order provided the following factual history:

> Lewis was the owner of a 1996 Chevy Silverado insured, at various times, by Defendant. Lewis had an insurance policy issued by UAIC on his vehicle during the period of May 31, 2007 to June 30, 2007. Lewis received a renewal statement, dated June 11, 2007, instructing him to remit payment by the due date of June 30, 2007 in order to renew his insurance policy. The renewal statement specified that "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy." The renewal statement listed June 30, 2007 as effective date, and July 31, 2007 as an "expiration date." The renewal statement also states that the "due date" of the payment is June 30, 2007, and repeats that the renewal amount is due no later than June 30, 2007. Lewis made a payment on July 10, 2007.
>
> Defendant then issued a renewal policy declaration and automobile insurance cards indicating that Lewis was covered under an insurance policy between July 10, 2007 to August 10, 2007.

(*Id.* at 2-3).[1]

The order stated the following. (*Id.* at 5). Defendant sought summary judgment on all

[1] Record citations omitted.

claims on the basis that Lewis had no insurance coverage on the date of the accident. (*Id.*). Plaintiffs argued that Lewis was covered on the date of the accident because the renewal notice was ambiguous as to when payment had to be received in order to avoid a lapse in coverage and that any ambiguities had to be construed in favor of the insured. (*Id.* at 5-6). Defendants, in the alternative, requested that the Court dismiss Plaintiffs' extra-contractual claims or bifurcate the claim of breach of contract from the remaining claims. (*Id.* at 6).

The order stated the following regarding Lewis's insurance coverage on July 8, 2007:

> Plaintiffs contend that Lewis was covered under an insurance policy on July 8, 2007, the date of the accident, because Lewis' payment on July 10, 2007 was timely. Plaintiffs rely on the sentence "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy" contained in the renewal statement. Defendant contends that "expiration of your policy" did not refer to the expiration date of the renewal policy listed on the renewal statement, but to the expiration of Lewis' current policy, which coincided with the listed due date on the renewal statement. Plaintiffs contend that Lewis reasonably believed that while there was a due date on which UAIC preferred to receive payment, there was also a grace period within which Lewis could pay and avoid any lapse in coverage.
>
> The renewal statement cannot be considered without considering the entirety of the contract between Lewis and UAIC. Plaintiff attached exhibits of renewal statements, policy declarations pages, and Nevada automobile insurance cards issued by UAIC for Lewis. The contract, taken as a whole, cannot reasonably be interpreted in favor of Plaintiffs' argument.
>
> Lewis received a "Renewal Policy Declarations" stating that he had coverage from May 31, 2007 to June 30, 2007 at 12:01 A.M. (Pls' Opp., Exhibit A at 29 (#20-1); Pls' Supp., Exhibit A at 11-12 (#26-1); Pls' Supp., Exhibit A at 15 (#26-1).) The declarations page stated that "[t]his declaration page with 'policy provisions' and all other applicable endorsements complete your policy." (Pls' Opp., Exhibit A at 29 (#20-1).) Lewis also received a Nevada Automobile Insurance Card issued by UAIC stating that the effective date of his policy was May 31, 2007, and the expiration date was June 30, 2007. (Id. at 30; Pls' Supp., Exhibit A at 11-12 (#26-1).) The renewal statement Lewis received in June must be read in light of the rest of the insurance policy, contained in the declarations page and also summarized in the insurance card.
>
> "In interpreting a contract, 'the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself.'" *Anvui, LLC v. G.L. Dragon, LLC*, 163 P.3d 405, 407 (Nev. 2007). Plaintiffs contend that there was a course of dealing between Lewis and UAIC supporting a reasonable understanding that there was a grace period involved in paying the insurance premium for each month-long policy. In fact, the so-called course of dealing tilts, if at all, in favor of Defendant. Lewis habitually made payments that were late. UAIC never retroactively covered Lewis on such occasions. Lewis' new policy, clearly denoted on the declarations page and insurance cards Lewis was issued, would always become effective on the date of the payment.
>
> Plaintiffs point to the fact that in April 2007, Lewis was issued a revised renewal statement stating that the renewal amount was due on May 6, 2007, a date after the effective date of the policy Lewis would be renewing through the

> renewal amount. This isolated occasion occurred due to the fact that Lewis added a driver to his insurance policy, resulting in an increase in the renewal amount, after UAIC had previously sent a renewal notice indicating that a lower renewal amount was due on April 29, 2007. UAIC issued a revised renewal statement dated April 26, 2007, and gave Lewis an opportunity to pay by May 6, 2007, instead of April 29, 2007, when the original renewal amount had been due upon expiration of his April policy. In that case, Lewis made a timely payment on April 28, 2007, and therefore there is not a single incident Plaintiffs can point to in which Lewis was retroactively covered for a policy before payment was made, even in the single instance UAIC granted him such an opportunity due to a unique set of circumstances.

(*Id.* at 7-9).

Plaintiffs appealed. (Notice of Appeal (#46)). In a two-page memorandum disposition, the Ninth Circuit held, *inter alia*, the following:

> We reverse the district court's grant of United Automobile Insurance Company's motion for summary judgment with respect to whether there was coverage by virtue of the way the renewal statement was worded. Plaintiffs came forward with facts supporting their tenable legal position that a reasonable person could have interpreted the renewal statement to mean that Lewis's premium was due by June 30, 2007, but that the policy would not lapse if his premium were "received prior to expiration of [his] policy," with the "expiration date" specifically stated to be July 31, 2007. We remand to the district court for trial or other proceedings consistent with this memorandum. The portion of the order granting summary judgment with respect to the statutory arguments is affirmed.

(Ninth Cir. Mem. Dispo. (#82) at 2-3).

The pending motions now follow.

LEGAL STANDARD

In reviewing a motion for summary judgment, the court construes the evidence in the light most favorable to the nonmoving party. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). Pursuant to Fed.R.Civ.P. 56, a court will grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). Material facts are "facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.*

The moving party bears the initial burden of identifying the portions of the pleadings and evidence that the party believes to demonstrate the absence of any genuine issue of material

fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). A party asserting that a fact cannot be or is genuinely disputed must support the assertion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A)-(B). Once the moving party has properly supported the motion, the burden shifts to the nonmoving party to come forward with specific facts showing that a genuine issue for trial exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512. The nonmoving party cannot defeat a motion for summary judgment "by relying solely on conclusory allegations unsupported by factual data." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356.

DISCUSSION

I. Plaintiff James Nalder's Motion for Summary Judgment (#88)

Nalder moves for partial summary judgment as to liability against Defendant. (Mot. for Summ. J. (#88) at 1). Nalder makes three arguments which will be addressed in turn.

A. Ambiguous Contract

Nalder argues that because the renewal statement was ambiguous it must be strictly construed against the insurance company pursuant to Nevada law and, thus, Lewis had coverage at the time of the accident. (Mot. for Summ. J. (#88) at 10).

In response, Defendant argues that Lewis's renewal statement is not ambiguous and clearly demanded remittance of the policy premium for the subsequent term by the expiration

of the present policy period. (Opp'n to Mot. for Summ. J. (#90) at 15). Defendant argues that a material issue of fact remains over whether the renewals were ambiguous. (*Id.*).

Nalder filed a reply. (Reply to Mot. for Summ. J. (#95)).

"Summary judgment is appropriate in contract cases only if the contract provision or the contract in question is unambiguous." *Econ. Forms Corp. v. Law Co., Inc.*, 593 F.Supp. 539, 540 (D. Nev. 1984). A contract is ambiguous if it is reasonably susceptible to more than one interpretation. *Shelton v. Shelton*, 78 P.3d 507, 510 (Nev. 2003). Whether a contract is ambiguous is a question of law. *Margrave v. Dermody Properties, Inc.*, 878 P.2d 291, 293 (Nev. 1994). "The interpretation of an ambiguous contract is a mixed question of fact and law." *Econ. Forms Corp.*, 593 F.Supp. at 541. However, in Nevada, "any ambiguity or uncertainty in an insurance policy must be construed against the insurer and in favor of the insured." *United Nat'l Ins. Co. v. Frontier Ins. Co., Inc.*, 99 P.3d 1153, 1156 (Nev. 2004).

In this case, the Court finds that the renewal statement is ambiguous based on the Ninth Circuit's reverse and remand. The Court finds that the renewal statement is reasonably susceptible to more than one interpretation as demonstrated by both Judge Reed and the Ninth Circuit's conflicting interpretations. As such, the Court finds that, pursuant to Nevada law, this ambiguity is construed against Defendant and in favor of the insured such that Lewis was covered by the insurance policy on the date of the accident. The Court grants summary judgment on this issue in favor of Plaintiffs.

B. Bad Faith

Nalder argues that Defendant's actions constitute bad faith. (Mot. for Summ. J. (#88) at 19). Specifically, Nalder argues that Lewis properly renewed his policy pursuant to the policy's renewal statements, Defendant renewed Lewis's policy, and then Defendant claimed that there was a lapse in coverage. (*Id.*). Nalder asserts that Defendant never investigated to determine whether Lewis was covered, made a snap decision that there was no coverage, and left Lewis bereft of protection against Cheyanne's lawsuit. (*Id.*). Nalder contends that these facts constitute bad faith which requires Defendant to compensate Lewis, pay for the judgment currently entered against him, and pay for compensatory and punitive damages.

(*Id.*).

In response, Defendant argues that every case cited by Nalder involves a situation where there existed a policy in force at the time of the loss. (Opp'n to Mot. for Summ. J. (#90) at 21). Defendant asserts that, in this case, Nalder asks the Court to find an implied policy from an ambiguity in the renewal. (*Id.* at 22). Defendant argues that Nevada law provides that a court may review an insurer's actions at the time they were made to determine whether the insurer's actions were reasonable as a matter of law and that bad faith cannot be premised upon an honest mistake, bad judgment, or negligence. (*Id.* at 25). Defendant asserts that Nevada law provides that an insurer cannot be found liable for bad faith, as a matter of law, if it had a reasonable basis to contest coverage. (*Id.*). Defendant contends that if an insurer's actions are reasonable the court can decide as a matter of law to dismiss the extra-contractual claims. (*Id.* at 26). Defendant asserts that because Lewis admits that he did not make any policy payments between June 12, 2007 and July 10, 2007 its actions were reasonable. (*Id.*). Defendant contends that even if it may be found to owe coverage on an implied contract, Plaintiffs must admit that a genuine dispute existed as to coverage at the time of the accident. (*Id.*).

Nalder filed a reply. (Reply to Mot. for Summ. J. (#95)).

Nevada law imposes the covenant of good faith and fair dealing on insurers. *Allstate Ins. Co. v. Miller*, 212 P.3d 318, 324 (Nev. 2009). A violation of the covenant gives rise to a bad-faith tort claim. *Id.* The Nevada Supreme Court has defined "bad faith as 'an actual or implied awareness of the absence of a reasonable basis for denying benefits of the [insurance] policy.'" *Id.* (quoting *Am. Excess Ins. Co. v. MGM*, 729 P.2d 1352, 1354-55 (Nev. 1986). "To establish a prima facie case of bad-faith refusal to pay an insurance claim, the plaintiff must establish that the insurer had no reasonable basis for disputing coverage, and that the insurer knew or recklessly disregarded the fact that there was no reasonable basis for disputing coverage." *Powers v. United Servs. Auto. Ass'n*, 962 P.2d 596, 604 (Nev. 1998) *opinion modified on denial of reh'g*, 979 P.2d 1286 (Nev. 1999).

In this case, the Court denies Nalder's motion for summary judgment on the bad faith

claims. The procedural history of this case demonstrates that Defendant had a reasonable basis for disputing coverage during the time of the incident. As demonstrated by Judge Reed's original order, there was arguably sufficient evidence to find a basis for Defendant to deny Lewis benefits of the insurance policy. Even though the Ninth Circuit reversed and remanded Judge Reed's original order, this Court finds that the procedural history of this case demonstrates that Defendant had a reasonable basis to dispute coverage and, on one occasion, had succeeded in that argument. The Court denies Nalder's motion for summary judgment on this issue.

C. Pre and Post-Judgment Interest

Nalder argues that because there was arguable or possible coverage under the policy, Defendant had a duty to defend Lewis. (Mot. for Summ. J. (#88) at 20). Nalder asserts that Defendant's failure to provide coverage and its breach of the duty to defend was the proximate cause of the default judgment being entered against Lewis. (*Id.*). Nalder contends that Defendant has the duty to indemnify Lewis. (*Id.*).

In response, Defendant argues that there are court cases where an insurer who investigated coverage and based its decision not to defend on a reasonable construction of the policy was not liable for bad faith breach of the duty to defend even after the court resolved the ambiguity in the contract in favor of the insured. (Opp'n to Mot. for Summ. J. (#90) at 33).

Nalder filed a reply. (Reply to Mot. for Summ. J. (#95)).

The Nevada Supreme Court has held that primary liability insurance policies create a hierarchy of duties between the insurer and the insured. *Allstate Ins.*, 212 P.3d at 324. One of these contractual duties is the duty to defend. *Id.* A breach of the duty to defend is a breach of a contractual obligation. *See id.* at 324-25. An insurer bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy. *United Nat'l Ins. Co. v. Frontier Ins. Co., Inc.*, 99 P.3d 1153, 1158 (Nev. 2004). Once the duty to defend arises, it continues through the course of litigation. *Id.* "If there is any doubt about whether the duty to defend arises, this doubt must be resolved in favor of the insured." *Id.* "The purpose behind construing the duty to defend so broadly is to prevent an insurer from

evading its obligation to provide a defense for an insured without at least investigating the facts behind a complaint." *Id.* However, the duty to defend is not absolute. *Id.* "A potential for coverage only exists when there is arguable or possible coverage." *Id.* "Determining whether an insurer owes a duty to defend is achieved by comparing the allegations of the complaint with the terms of the policy." *Id.* If an insurer breaches the duty to defend, damages are limited to attorneys' fees and costs incurred by the insured to defend the action. *See Home Sav. Ass'n v. Aetna Cas. & Sur. Co.*, 854 P.2d 851, 855 (Nev. 1993) (holding that an insured was not barred from further pursuing recovery from insurance company for fees and costs incurred in defending an action); *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 255 P.3d 268, 278 (Nev. 2011) (discussing damages related to an indemnitor's duty to defend an indemnitee).

In this case, as discussed at oral argument, the Court finds that Defendant breached its contractual duty to defend Gary Lewis in the underlying action. As such, Gary Lewis's damages are limited to the attorneys' fees and costs he incurred in defending that action. However, the Court awards no damages to Gary Lewis because he did not incur any fees or costs in defending the underlying action because he chose not to defend and, instead, took a default judgment.

As such, the Court grants in part and denies in part Nalder's motion for summary judgment. The Court grants summary judgment for Nalder on the ambiguity issue and finds that there is an ambiguity in the renewal statement and, thus, the policy is construed in favor of coverage at the time of the accident. Defendant must pay the policy limits of the implied insurance policy. The Court denies summary judgment for Nalder on the remaining bad-faith claims. The Court grants in part and denies in part summary judgment for Nalder on the duty to defend issue. The Court finds that Defendant did breach its contractual duty to defend but denies Nalder's request for damages for that breach.

II. Defendant's Counter-Motion for Summary Judgment on All Extra-Contractual Claims or Remedies (#89)

Defendant seeks summary judgment on all of Plaintiff's claims for extra-contractual

remedies and/or bad faith claims because there was a genuine dispute as to whether coverage existed at the time and its actions were reasonable. (Counter Mot. for Summ. J. (#89) at 15). Defendant argues that because it had a reasonable basis to deny coverage there can be no bad faith. (*Id.* at 16).

Nalder filed a response and Defendant filed a reply. (Opp'n to Counter Mot. for Summ. J. (#96); Reply to Counter Mot. for Summ. J. (#97)).

The Court grants Defendant's counter-motion for summary judgment on Plaintiffs' extra-contractual claims and/or bad faith claims. As discussed above, the procedural history of this case demonstrates that Defendant had a reasonable basis for disputing coverage during the time of the accident and, thus, there is no bad faith on the part of Defendant.

CONCLUSION

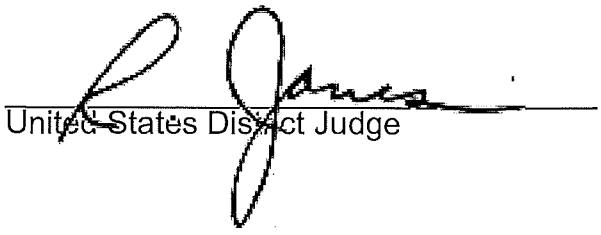
For the foregoing reasons, IT IS ORDERED that Plaintiff James Nalder's Motion for Summary Judgment (#88) is GRANTED in part and DENIED in part. The Court grants summary judgment in favor of Nalder and finds that the insurance renewal statement contained an ambiguity and, thus, the statement is construed in favor of coverage during the time of the accident. The Court denies summary judgment on Nalder's remaining bad-faith claims.

IT IS FURTHER ORDERED that Defendant's Counter-Motion for Summary Judgment on All Extra-Contractual Claims or Remedies (#89) is GRANTED. The Court grants summary judgment on all extra-contractual claims and/or bad faith claims in favor of Defendant.

The Court directs Defendant to pay Cheyanne Nalder the policy limits on Gary Lewis's implied insurance policy at the time of the accident.

The Clerk of the Court shall enter judgment accordingly.

Dated this 30th of October, 2013.



United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JAMES NALDER, Guardian Ad Litem for minor Cheyanne Nalder, real party in interest, and GARY LEWIS, Individually; Plaintiffs, vs. UNITED AUTOMOBILE INSURANCE COMPANY, DOES I through V, and ROE CORPORATIONS I through V, inclusive Defendants.	2:09-cv-1348-ECR-GWF **Order**

Plaintiffs in this automobile insurance case allege breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, breach of Nev. Rev. Stat. § 686A.310, and fraud. Now pending is Defendant's "motion for summary judgment on all claims; alternatively, motion for summary judgment on extra-contractual remedies; or, further in the alternative, motion stay [sic] discovery and bifurcate claims for extra-contractual remedies; finally, in the alternative, motion for leave to amend" ("MSJ") (#17).

The motion is ripe, and we now rule on it.

I. Background

Plaintiff Gary Lewis ("Lewis") is a resident of Clark County, Nevada. (Compl. ¶ 2 (#1).) Plaintiff James Nalder ("Nalder"), Guardian ad Litem for minor Cheyanne Nalder, is a resident of Clark County, Nevada. (Id. at ¶ 1.) Defendant United Automobile Insurance Co. ("UAIC") is an automobile insurance company duly authorized to act as an insurer to the State of Nevada and doing business in Clark County, Nevada. (Id. at ¶ 3.) Defendant is incorporated in the State of Florida with its principal place of business in the State of Florida. (Pet. for Removal ¶ VII (#1).)

Lewis was the owner of a 1996 Chevy Silverado insured, at various times, by Defendant. (Compl. at ¶ 5-6 (#1).) Lewis had an insurance policy issued by UAIC on his vehicle during the period of May 31, 2007 to June 30, 2007. (MSJ at 3 (#17).) Lewis received a renewal statement, dated June 11, 2007, instructing him to remit payment by the due date of June 30, 2007 in order to renew his insurance policy. (Id. at 3-4.) The renewal statement specified that "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy." (Pls.' Opp. at 3 (#20).) The renewal statement listed June 30, 2007 as effective date, and July 31, 2007 as an "expiration date." (Id.) The renewal statement also states that the "due date" of the payment is June 30, 2007, and repeats that the renewal amount is due no later than June 30, 2007. (MSJ at 7-8 (#17).) Lewis made a payment on July 10, 2007. (Id.)

Defendant then issued a renewal policy declaration and automobile insurance cards indicating that Lewis was covered under

an insurance policy between July 10, 2007 to August 10, 2007. (Pls' Opp. Exhibit 1 at 35-36; MSJ at 4.)

On July 8, 2007, Lewis was involved in an automobile accident in Pioche[1], Nevada, that injured Cheyanne Nalder. (MSJ at 3 (#17).) Cheyanne Nalder made a claim to Defendant for damages under the terms of Lewis's insurance policy with UAIC. (Compl. at ¶ 9 (#1).) Defendant refused coverage for the accident that occurred on July 8, 2007, claiming that Lewis did not have coverage at the time of the accident. (Id. at ¶ 10.) On October 9, 2007, Plaintiff Nalder, as guardian of Cheyanne Nalder, filed suit in Clark County District Court under suit number A549111 against Lewis. (Mot. to Compel at 3 (#12).) On June 2, 2008, the court in that case entered a default judgment against Lewis for $3.5 million. (Id.)

Plaintiffs then filed their complaint in this action in Nevada state court on March 22, 2009 against Defendant UAIC. On July 24, 2009, Defendant removed the action to federal court, invoking our diversity jurisdiction. (Petition for Removal (#1).)

On March 18, 2010, Defendant filed the MSJ (#17). On April 9, 2010, Plaintiffs opposed (#20), and on April 26, 2010, Defendant replied (#21). We granted leave for Plaintiffs to file a supplement (#26), and Defendant filed a supplement (#33) to its reply (#21).

[1] Plaintiffs' complaint originally alleged that the accident occurred in Clark County, Nevada. It is unclear from the documents which site is the correct one, but neither party disputes jurisdiction and the actual location of the accident is irrelevant to the disposition of this motion.

II. Summary Judgment Standard

Summary judgment allows courts to avoid unnecessary trials where no material factual dispute exists. N.W. Motorcycle Ass'n v. U.S. Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). The court must view the evidence and the inferences arising therefrom in the light most favorable to the nonmoving party, Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996), and should award summary judgment where no genuine issues of material fact remain in dispute and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party. FED. R. CIV. P. 50(a). Where reasonable minds could differ on the material facts at issue, however, summary judgment should not be granted. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 116 S.Ct. 1261 (1996).

The moving party bears the burden of informing the court of the basis for its motion, together with evidence demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the party opposing the motion may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing that there exists a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Although the parties may submit evidence in an inadmissible form — namely, depositions, admissions, interrogatory answers, and affidavits — only evidence which might be admissible at trial may be considered

by a trial court in ruling on a motion for summary judgment. FED. R. CIV. P. 56(c); Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179, 1181 (9th Cir. 1988).

In deciding whether to grant summary judgment, a court must take three necessary steps: (1) it must determine whether a fact is material; (2) it must determine whether there exists a genuine issue for the trier of fact, as determined by the documents submitted to the court; and (3) it must consider that evidence in light of the appropriate standard of proof. Anderson, 477 U.S. at 248. Summary judgment is not proper if material factual issues exist for trial. B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir. 1999). "As to materiality, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248. Disputes over irrelevant or unnecessary facts should not be considered. Id. Where there is a complete failure of proof on an essential element of the nonmoving party's case, all other facts become immaterial, and the moving party is entitled to judgment as a matter of law. Celotex, 477 U.S. at 323. Summary judgment is not a disfavored procedural shortcut, but rather an integral part of the federal rules as a whole. Id.

III. Analysis

Defendant seeks summary judgment on all claims on the basis that Lewis had no insurance coverage on the date of the accident. Plaintiff contends that Lewis was covered on the date of the accident because the renewal notice was ambiguous as to when payment

must be received in order to avoid a lapse in coverage, and any ambiguities must be construed in favor of the insured. Defendants request, in the alternative, that we dismiss Plaintiffs' extra-contractual claims, or bifurcate the claim of breach of contract from the remaining claims. Finally, if we deny all other requests, Defendant requests that we grant leave to amend

A. Contract Interpretation Standard

In diversity actions, federal courts apply substantive state law. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); Nitco Holding Corp. v. Boujikian, 491 F.3d 1086, 1089 (9th Cir. 2007). Under Nevada law, "[a]n insurance policy is a contract that must be enforced according to its terms to accomplish the intent of the parties." Farmers Ins. Exch. v. Neal, 64 P.3d 472, 473 (Nev. 2003). When the facts are not in dispute, contract interpretation is a question of law. Grand Hotel Gift Shop v. Granite State Ins. Co., 839 P.2d 599, 602 (Nev. 1992). The language of the insurance policy must be viewed "from the perspective of one not trained in law," and we must "give plain and ordinary meaning to the terms." Farmers Ins. Exch., 64 P.3d at 473 (internal quotation marks omitted). "Unambiguous provisions will not be rewritten; however, ambiguities are to be resolved in favor of the insured." Id. (footnote omitted); see also Fed. Ins. Co. v. Am. Hardware Mut. Ins. Co., 184 P.3d 390, 392 (Nev. 2008) ("In the insurance context, we broadly interpret clauses providing coverage, to afford the insured the greatest possible coverage; correspondingly, clauses excluding coverage are interpreted narrowly against the insurer.") (internal quotation marks omitted); Capitol Indemnity Corp. v. Wright, 341 F.

Supp. 2d 1152, 1156 (D. Nev. 2004) (noting that "a Nevada court will not increase an obligation to the insured where such was intentionally and unambiguously limited by the parties"). "When a contract is unambiguous and neither party is entitled to relief from the contract, summary judgment based on the contractual language is proper." Allstate Ins. Co. v. Fackett, 206 P.3d 572, 575 (Nev. 2009) (citing Chwialkowski v. Sachs, 834 P.2d 405, 406 (Nev. 1992)).

B. Plaintiff Lewis' Insurance Coverage on July 8, 2007

Plaintiffs contend that Lewis was covered under an insurance policy on July 8, 2007, the date of the accident, because Lewis' payment on July 10, 2007 was timely. Plaintiffs rely on the sentence "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy" contained in the renewal statement. Defendant contends that "expiration of your policy" did not refer to the expiration date of the renewal policy listed on the renewal statement, but to the expiration of Lewis' current policy, which coincided with the listed due date on the renewal statement. Plaintiffs contend that Lewis reasonably believed that while there was a due date on which UAIC preferred to receive payment, there was also a grace period within which Lewis could pay and avoid any lapse in coverage.

The renewal statement cannot be considered without considering the entirety of the contract between Lewis and UAIC. Plaintiff attached exhibits of renewal statements, policy declarations pages, and Nevada automobile insurance cards issued by UAIC for Lewis. The contract, taken as a whole, cannot reasonably be interpreted in favor of Plaintiffs' argument.

Lewis received a "Renewal Policy Declarations" stating that he had coverage from May 31, 2007 to June 30, 2007 at 12:01 A.M. (Pls' Opp., Exhibit A at 29 (#20-1); Pls' Supp., Exhibit A at 11-12 (#26-1); Pls' Supp., Exhibit A at 15 (#26-1).) The declarations page stated that "[t]his declaration page with 'policy provisions' and all other applicable endorsements complete your policy." (Pls' Opp., Exhibit A at 29 (#20-1).) Lewis also received a Nevada Automobile Insurance Card issued by UAIC stating that the effective date of his policy was May 31, 2007, and the expiration date was June 30, 2007. (Id. at 30; Pls' Supp., Exhibit A at 11-12 (#26-1).) The renewal statement Lewis received in June must be read in light of the rest of the insurance policy, contained in the declarations page and also summarized in the insurance card.

"In interpreting a contract, 'the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself.'" Anvui, LLC v. G.L. Dragon, LLC, 163 P.3d 405, 407 (Nev. 2007). Plaintiffs contend that there was a course of dealing between Lewis and UAIC supporting a reasonable understanding that there was a grace period involved in paying the insurance premium for each month-long policy. In fact, the so-called course of dealing tilts, if at all, in favor of Defendant. Lewis habitually made payments that were late. UAIC never retroactively covered Lewis on such occasions. Lewis' new policy, clearly denoted on the declarations page and insurance cards Lewis was issued, would always become effective on the date of the payment.

Plaintiffs point to the fact that in April 2007, Lewis was issued a revised renewal statement stating that the renewal amount was due on May 6, 2007, a date after the effective date of the policy Lewis would be renewing through the renewal amount. This isolated occasion occurred due to the fact that Lewis added a driver to his insurance policy, resulting in an increase in the renewal amount, after UAIC had previously sent a renewal notice indicating that a lower renewal amount was due on April 29, 2007. UAIC issued a revised renewal statement dated April 26, 2007, and gave Lewis an opportunity to pay by May 6, 2007, instead of April 29, 2007, when the original renewal amount had been due upon expiration of his April policy. In that case, Lewis made a timely payment on April 28, 2007, and therefore there is not a single incident Plaintiffs can point to in which Lewis was retroactively covered for a policy before payment was made, even in the single instance UAIC granted him such an opportunity due to a unique set of circumstances.

C. Statutory Arguments

Plaintiffs' arguments that Lewis had coverage due to Nev. Rev. Stat. § 687B.320 and § 687B.340 are untenable. Section 687B.320 applies in the case of midterm cancellations, providing that:

> 1. Except as otherwise provided in subsection 3, no insurance policy that has been in effect for at least 70 days or that has been renewed may be cancelled by the insurer before the expiration of the agreed term or 1 year from the effective date of the policy or renewal, whichever occurs first, except on any one of the following grounds:

> (a) Failure to pay a premium when due;
>
> . . .
>
> 2. No cancellation under subsection 1 is effective until in the case of paragraph (a) of subsection 1 at least 10 days and in the case of any other paragraph of subsection 1 at least 30 days after the notice is delivered or mailed to the policyholder.

The policies at issue in this case were month-long policies with options to renew after the expiration of each policy. Lewis' June policy expired on June 30, 2007, according to its terms. There was no midterm cancellation and Nev. Rev. Stat. § 687B.320 simply does not apply. Plaintiffs' arguments that between terms is equivalent to "midterm" simply defies the statutory language and the common definition of midterm. In a Ninth Circuit case interpreting Montana law, the Ninth Circuit noted that the district court's observation that "the policy expired by its own terms; it was not cancelled" was proper, and the Montana statute at issue in the case, similar to the Nevada statute here, "appl[ies] only to cancellation of a policy, not to its termination." State Farm Mut. Auto. Ins. Co. v. White, 563 F.2d 971, 974 (9th Cir. 1977). The Ninth Circuit went on to note that situations in which "the policy terminated by its own terms for failure of the insured to renew" is controlled by a different statute, which "does not require any notice to the policy-holder when the reason for the non-renewal of the policy is the holder's failure to pay the renewal premiums." Id.

Nev. Rev. Stat. § 687B.340 provides:

> 1. Subject to subsection 2, a policyholder has a right to have his or her policy renewed, on the terms then being applied by the insurer to persons, similarly situated, for an additional period equivalent to the expiring term if the agreed term is 1 year or less, or for 1 year if the agreed term is longer than 1 year, unless:
>
> . . .
>
> (b) At least 30 days for all other policies,
>
> before the date of expiration provided in the policy the insurer mails or delivers to the policyholder a notice of intention not to renew the policy beyond the agreed expiration date. If an insurer fails to provide a timely notice of nonrenewal, the insurer shall provide the insured with a policy of insurance on the identical terms as in the expiring policy.

Plaintiffs argues that Nev. Rev. Stat. § 687B.340 indicates how favorable the law is to the insured, and that there is no mention in the statute that payment is a prerequisite to a policyholder's "right to have his or her policy renewed." It is true that the Nevada statute does not include a provision similar to the one in the Montana statute providing that the section does not apply when the insured has "failed to discharge when due any of his obligations in connection with the payment of premiums for the policy, or the renewal therefor . . . ." White, 563 F.2d at 974 n.3. The Montana statute also stated that the section does not apply "[i]f the insurer has manifested its willingness to renew." Id.

Plaintiffs, however, fail to give credit to the entirety of the Nevada statute. The statute does not say that the policyholder's policy must be renewed, it says that the insurer shall provide the insured with a policy on "the identical terms as in the expiring policy." One of the terms of the expiring policy was payment of the renewal amount. UAIC did provide Lewis, the policyholder, with a renewal statement indicating that UAIC would renew the insurance policy as long as all the terms of the previous policy were met, i.e., payment.

Defendant correctly points out that this statute does not fit the circumstances of this case. Lewis' policy was not renewed not because UAIC had an intention not to renew, but because Lewis failed to carry out his end of the contract, that is, to pay a renewal amount. Lewis' policy was renewed on the date payment was received, but this date was after the date of the accident. Plaintiffs' statutory arguments, therefore, do not pass muster.

IV. Conclusion

Defendant's motion for summary judgment on all claims shall be granted because Lewis had no insurance coverage on the date of the accident. The renewal statement was not ambiguous in light of the entire contract and history between Lewis and UAIC. The term "expiration of your policy" referred to the expiration of Lewis' current policy, and Lewis was never issued retroactive coverage when his payments were late. His renewal policy would always begin on the date payment was received. We cannot find that Lewis was covered between the expiration of his policy in June and payment for

his next policy without straining to find an ambiguity where none exists, and creating an obligation on the part of insurance companies that would be untenable, i.e., to provide coverage when the insured has not upheld his own obligations under the contract to submit a payment.

The statutes cited by Plaintiffs simply do not apply. The expiration of Lewis' policy was not a midterm cancellation, and UAIC was not obligated to provide an insurance policy despite Lewis' failure to adhere to the terms of that policy.

Defendant's other requests are moot in light of our decision granting summary judgment.

IT IS, THEREFORE, HEREBY ORDERED that Defendant's motion for summary judgment on all claims (#17) is **GRANTED** with respect to all of Plaintiffs' claims.

The Clerk shall enter judgment accordingly.

DATED: December 17, 2010.

Edward C. Reed.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMES NALDER, Guardian Ad Litem for minor Cheyanne Nalder, real party in interest, and GARY LEWIS, Individually,

Plaintiffs,

v.

UNITED AUTOMOBILE INSURANCE COMPANY, DOES I through V, and ROE CORPORATIONS I through V, inclusive,

Defendants.

2:09-cv-1348-RCJ-GWF

ORDER

Currently before the Court are a Motion for Summary Judgment (#88) and a Counter-Motion for Summary Judgment (#89). This case, originally ruled upon by the Honorable Edward C. Reed, is on partial remand from the U.S. Court of Appeals for the Ninth Circuit. The Court heard oral argument on October 22, 2013.

BACKGROUND

In July 2009, Defendant United Automobile Insurance Company ("UAIC") filed a petition for removal based on diversity jurisdiction. (Pet. for Removal (#1) at 1-2). Defendant attached Plaintiffs James Nalder, guardian ad litem for minor Cheyanne Nalder, real party in interest, and Gary Lewis's (collectively "Plaintiffs") complaint which had been filed in the Eighth Judicial District in Clark County, Nevada. (Compl. (#1) at 5-16).

The complaint alleged the following. (*Id.* at 5). Lewis was the owner of a 1996 Chevy Silverado and had an automobile insurance policy with Defendant on July 8, 2007. (*Id.* at 6). On July 8, 2007, Lewis drove over top of Cheyanne while Cheyanne was a pedestrian in a residential area and caused Cheyanne serious personal injuries. (*Id.* at 7). Cheyanne made

a claim to Defendant for damages and offered to settle the claim for personal injuries and damages against Lewis within the policy limits. (*Id.*). Defendant refused to settle and denied the claim all together indicating that Lewis did not have coverage at the time of the accident. (*Id.*). Defendant was required to provide insurance coverage under the policy. (*Id.* at 9). Defendant never informed Lewis that Cheyanne was willing to settle the claim for the sum of $15,000, the policy limit. (*Id.*). Due to the dilatory tactics and failure of Defendant to protect its insured, Cheyanne filed a complaint on October 9, 2007 against Lewis for her personal injuries and damages. (*Id.*). Cheyanne procured a default judgment in the amount of $3,500,000 against Lewis. (*Id.*). Plaintiffs alleged breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, breach of Nev. Rev. Stat. § 686A.310, and fraud against Defendant. (*Id.* at 9-14).

In March 2010, Defendant filed a motion for summary judgment on all claims. (*See* Mot. for Summ. J. (#17)). In December 2010, Judge Reed issued an order granting Defendant's motion for summary judgment on all claims and directed the Clerk of the Court to enter judgment accordingly. (Order (#42) at 13). The order provided the following factual history:

> Lewis was the owner of a 1996 Chevy Silverado insured, at various times, by Defendant. Lewis had an insurance policy issued by UAIC on his vehicle during the period of May 31, 2007 to June 30, 2007. Lewis received a renewal statement, dated June 11, 2007, instructing him to remit payment by the due date of June 30, 2007 in order to renew his insurance policy. The renewal statement specified that "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy." The renewal statement listed June 30, 2007 as effective date, and July 31, 2007 as an "expiration date." The renewal statement also states that the "due date" of the payment is June 30, 2007, and repeats that the renewal amount is due no later than June 30, 2007. Lewis made a payment on July 10, 2007.
>
> Defendant then issued a renewal policy declaration and automobile insurance cards indicating that Lewis was covered under an insurance policy between July 10, 2007 to August 10, 2007.

(*Id.* at 2-3).[1]

The order stated the following. (*Id.* at 5). Defendant sought summary judgment on all

[1] Record citations omitted.

claims on the basis that Lewis had no insurance coverage on the date of the accident. (*Id.*). Plaintiffs argued that Lewis was covered on the date of the accident because the renewal notice was ambiguous as to when payment had to be received in order to avoid a lapse in coverage and that any ambiguities had to be construed in favor of the insured. (*Id.* at 5-6). Defendants, in the alternative, requested that the Court dismiss Plaintiffs' extra-contractual claims or bifurcate the claim of breach of contract from the remaining claims. (*Id.* at 6).

The order stated the following regarding Lewis's insurance coverage on July 8, 2007:

> Plaintiffs contend that Lewis was covered under an insurance policy on July 8, 2007, the date of the accident, because Lewis' payment on July 10, 2007 was timely. Plaintiffs rely on the sentence "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy" contained in the renewal statement. Defendant contends that "expiration of your policy" did not refer to the expiration date of the renewal policy listed on the renewal statement, but to the expiration of Lewis' current policy, which coincided with the listed due date on the renewal statement. Plaintiffs contend that Lewis reasonably believed that while there was a due date on which UAIC preferred to receive payment, there was also a grace period within which Lewis could pay and avoid any lapse in coverage.
>
> The renewal statement cannot be considered without considering the entirety of the contract between Lewis and UAIC. Plaintiff attached exhibits of renewal statements, policy declarations pages, and Nevada automobile insurance cards issued by UAIC for Lewis. The contract, taken as a whole, cannot reasonably be interpreted in favor of Plaintiffs' argument.
>
> Lewis received a "Renewal Policy Declarations" stating that he had coverage from May 31, 2007 to June 30, 2007 at 12:01 A.M. (Pls' Opp., Exhibit A at 29 (#20-1); Pls' Supp., Exhibit A at 11-12 (#26-1); Pls' Supp., Exhibit A at 15 (#26-1).) The declarations page stated that "[t]his declaration page with 'policy provisions' and all other applicable endorsements complete your policy." (Pls' Opp., Exhibit A at 29 (#20-1).) Lewis also received a Nevada Automobile Insurance Card issued by UAIC stating that the effective date of his policy was May 31, 2007, and the expiration date was June 30, 2007. (Id. at 30; Pls' Supp., Exhibit A at 11-12 (#26-1).) The renewal statement Lewis received in June must be read in light of the rest of the insurance policy, contained in the declarations page and also summarized in the insurance card.
>
> "In interpreting a contract, 'the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself.'" *Anvui, LLC v. G.L. Dragon, LLC*, 163 P.3d 405, 407 (Nev. 2007). Plaintiffs contend that there was a course of dealing between Lewis and UAIC supporting a reasonable understanding that there was a grace period involved in paying the insurance premium for each month-long policy. In fact, the so-called course of dealing tilts, if at all, in favor of Defendant. Lewis habitually made payments that were late. UAIC never retroactively covered Lewis on such occasions. Lewis' new policy, clearly denoted on the declarations page and insurance cards Lewis was issued, would always become effective on the date of the payment.
>
> Plaintiffs point to the fact that in April 2007, Lewis was issued a revised renewal statement stating that the renewal amount was due on May 6, 2007, a date after the effective date of the policy Lewis would be renewing through the

> renewal amount. This isolated occasion occurred due to the fact that Lewis added a driver to his insurance policy, resulting in an increase in the renewal amount, after UAIC had previously sent a renewal notice indicating that a lower renewal amount was due on April 29, 2007. UAIC issued a revised renewal statement dated April 26, 2007, and gave Lewis an opportunity to pay by May 6, 2007, instead of April 29, 2007, when the original renewal amount had been due upon expiration of his April policy. In that case, Lewis made a timely payment on April 28, 2007, and therefore there is not a single incident Plaintiffs can point to in which Lewis was retroactively covered for a policy before payment was made, even in the single instance UAIC granted him such an opportunity due to a unique set of circumstances.

(*Id.* at 7-9).

Plaintiffs appealed. (Notice of Appeal (#46)). In a two-page memorandum disposition, the Ninth Circuit held, *inter alia*, the following:

> We reverse the district court's grant of United Automobile Insurance Company's motion for summary judgment with respect to whether there was coverage by virtue of the way the renewal statement was worded. Plaintiffs came forward with facts supporting their tenable legal position that a reasonable person could have interpreted the renewal statement to mean that Lewis's premium was due by June 30, 2007, but that the policy would not lapse if his premium were "received prior to expiration of [his] policy," with the "expiration date" specifically stated to be July 31, 2007. We remand to the district court for trial or other proceedings consistent with this memorandum. The portion of the order granting summary judgment with respect to the statutory arguments is affirmed.

(Ninth Cir. Mem. Dispo. (#82) at 2-3).

The pending motions now follow.

LEGAL STANDARD

In reviewing a motion for summary judgment, the court construes the evidence in the light most favorable to the nonmoving party. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). Pursuant to Fed.R.Civ.P. 56, a court will grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). Material facts are "facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.*

The moving party bears the initial burden of identifying the portions of the pleadings and evidence that the party believes to demonstrate the absence of any genuine issue of material

fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). A party asserting that a fact cannot be or is genuinely disputed must support the assertion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A)-(B). Once the moving party has properly supported the motion, the burden shifts to the nonmoving party to come forward with specific facts showing that a genuine issue for trial exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512. The nonmoving party cannot defeat a motion for summary judgment "by relying solely on conclusory allegations unsupported by factual data." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356.

DISCUSSION

I. Plaintiff James Nalder's Motion for Summary Judgment (#88)

Nalder moves for partial summary judgment as to liability against Defendant. (Mot. for Summ. J. (#88) at 1). Nalder makes three arguments which will be addressed in turn.

A. Ambiguous Contract

Nalder argues that because the renewal statement was ambiguous it must be strictly construed against the insurance company pursuant to Nevada law and, thus, Lewis had coverage at the time of the accident. (Mot. for Summ. J. (#88) at 10).

In response, Defendant argues that Lewis's renewal statement is not ambiguous and clearly demanded remittance of the policy premium for the subsequent term by the expiration

of the present policy period. (Opp'n to Mot. for Summ. J. (#90) at 15). Defendant argues that a material issue of fact remains over whether the renewals were ambiguous. (*Id.*).

Nalder filed a reply. (Reply to Mot. for Summ. J. (#95)).

"Summary judgment is appropriate in contract cases only if the contract provision or the contract in question is unambiguous." *Econ. Forms Corp. v. Law Co., Inc.*, 593 F.Supp. 539, 540 (D. Nev. 1984). A contract is ambiguous if it is reasonably susceptible to more than one interpretation. *Shelton v. Shelton*, 78 P.3d 507, 510 (Nev. 2003). Whether a contract is ambiguous is a question of law. *Margrave v. Dermody Properties, Inc.*, 878 P.2d 291, 293 (Nev. 1994). "The interpretation of an ambiguous contract is a mixed question of fact and law." *Econ. Forms Corp.*, 593 F.Supp. at 541. However, in Nevada, "any ambiguity or uncertainty in an insurance policy must be construed against the insurer and in favor of the insured." *United Nat'l Ins. Co. v. Frontier Ins. Co., Inc.*, 99 P.3d 1153, 1156 (Nev. 2004).

In this case, the Court finds that the renewal statement is ambiguous based on the Ninth Circuit's reverse and remand. The Court finds that the renewal statement is reasonably susceptible to more than one interpretation as demonstrated by both Judge Reed and the Ninth Circuit's conflicting interpretations. As such, the Court finds that, pursuant to Nevada law, this ambiguity is construed against Defendant and in favor of the insured such that Lewis was covered by the insurance policy on the date of the accident. The Court grants summary judgment on this issue in favor of Plaintiffs.

B. Bad Faith

Nalder argues that Defendant's actions constitute bad faith. (Mot. for Summ. J. (#88) at 19). Specifically, Nalder argues that Lewis properly renewed his policy pursuant to the policy's renewal statements, Defendant renewed Lewis's policy, and then Defendant claimed that there was a lapse in coverage. (*Id.*). Nalder asserts that Defendant never investigated to determine whether Lewis was covered, made a snap decision that there was no coverage, and left Lewis bereft of protection against Cheyanne's lawsuit. (*Id.*). Nalder contends that these facts constitute bad faith which requires Defendant to compensate Lewis, pay for the judgment currently entered against him, and pay for compensatory and punitive damages.

(*Id.*).

In response, Defendant argues that every case cited by Nalder involves a situation where there existed a policy in force at the time of the loss. (Opp'n to Mot. for Summ. J. (#90) at 21). Defendant asserts that, in this case, Nalder asks the Court to find an implied policy from an ambiguity in the renewal. (*Id.* at 22). Defendant argues that Nevada law provides that a court may review an insurer's actions at the time they were made to determine whether the insurer's actions were reasonable as a matter of law and that bad faith cannot be premised upon an honest mistake, bad judgment, or negligence. (*Id.* at 25). Defendant asserts that Nevada law provides that an insurer cannot be found liable for bad faith, as a matter of law, if it had a reasonable basis to contest coverage. (*Id.*). Defendant contends that if an insurer's actions are reasonable the court can decide as a matter of law to dismiss the extra-contractual claims. (*Id.* at 26). Defendant asserts that because Lewis admits that he did not make any policy payments between June 12, 2007 and July 10, 2007 its actions were reasonable. (*Id.*). Defendant contends that even if it may be found to owe coverage on an implied contract, Plaintiffs must admit that a genuine dispute existed as to coverage at the time of the accident. (*Id.*).

Nalder filed a reply. (Reply to Mot. for Summ. J. (#95)).

Nevada law imposes the covenant of good faith and fair dealing on insurers. *Allstate Ins. Co. v. Miller*, 212 P.3d 318, 324 (Nev. 2009). A violation of the covenant gives rise to a bad-faith tort claim. *Id.* The Nevada Supreme Court has defined "bad faith as 'an actual or implied awareness of the absence of a reasonable basis for denying benefits of the [insurance] policy.'" *Id.* (quoting *Am. Excess Ins. Co. v. MGM*, 729 P.2d 1352, 1354-55 (Nev. 1986). "To establish a prima facie case of bad-faith refusal to pay an insurance claim, the plaintiff must establish that the insurer had no reasonable basis for disputing coverage, and that the insurer knew or recklessly disregarded the fact that there was no reasonable basis for disputing coverage." *Powers v. United Servs. Auto. Ass'n*, 962 P.2d 596, 604 (Nev. 1998) *opinion modified on denial of reh'g*, 979 P.2d 1286 (Nev. 1999).

In this case, the Court denies Nalder's motion for summary judgment on the bad faith

claims. The procedural history of this case demonstrates that Defendant had a reasonable basis for disputing coverage during the time of the incident. As demonstrated by Judge Reed's original order, there was arguably sufficient evidence to find a basis for Defendant to deny Lewis benefits of the insurance policy. Even though the Ninth Circuit reversed and remanded Judge Reed's original order, this Court finds that the procedural history of this case demonstrates that Defendant had a reasonable basis to dispute coverage and, on one occasion, had succeeded in that argument. The Court denies Nalder's motion for summary judgment on this issue.

C. Pre and Post-Judgment Interest

Nalder argues that because there was arguable or possible coverage under the policy, Defendant had a duty to defend Lewis. (Mot. for Summ. J. (#88) at 20). Nalder asserts that Defendant's failure to provide coverage and its breach of the duty to defend was the proximate cause of the default judgment being entered against Lewis. (*Id.*). Nalder contends that Defendant has the duty to indemnify Lewis. (*Id.*).

In response, Defendant argues that there are court cases where an insurer who investigated coverage and based its decision not to defend on a reasonable construction of the policy was not liable for bad faith breach of the duty to defend even after the court resolved the ambiguity in the contract in favor of the insured. (Opp'n to Mot. for Summ. J. (#90) at 33).

Nalder filed a reply. (Reply to Mot. for Summ. J. (#95)).

The Nevada Supreme Court has held that primary liability insurance policies create a hierarchy of duties between the insurer and the insured. *Allstate Ins.*, 212 P.3d at 324. One of these contractual duties is the duty to defend. *Id.* A breach of the duty to defend is a breach of a contractual obligation. *See id.* at 324-25. An insurer bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy. *United Nat'l Ins. Co. v. Frontier Ins. Co., Inc.*, 99 P.3d 1153, 1158 (Nev. 2004). Once the duty to defend arises, it continues through the course of litigation. *Id.* "If there is any doubt about whether the duty to defend arises, this doubt must be resolved in favor of the insured." *Id.* "The purpose behind construing the duty to defend so broadly is to prevent an insurer from

evading its obligation to provide a defense for an insured without at least investigating the facts behind a complaint." *Id.* However, the duty to defend is not absolute. *Id.* "A potential for coverage only exists when there is arguable or possible coverage." *Id.* "Determining whether an insurer owes a duty to defend is achieved by comparing the allegations of the complaint with the terms of the policy." *Id.* If an insurer breaches the duty to defend, damages are limited to attorneys' fees and costs incurred by the insured to defend the action. *See Home Sav. Ass'n v. Aetna Cas. & Sur. Co.*, 854 P.2d 851, 855 (Nev. 1993) (holding that an insured was not barred from further pursuing recovery from insurance company for fees and costs incurred in defending an action); *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 255 P.3d 268, 278 (Nev. 2011) (discussing damages related to an indemnitor's duty to defend an indemnitee).

In this case, as discussed at oral argument, the Court finds that Defendant breached its contractual duty to defend Gary Lewis in the underlying action. As such, Gary Lewis's damages are limited to the attorneys' fees and costs he incurred in defending that action. However, the Court awards no damages to Gary Lewis because he did not incur any fees or costs in defending the underlying action because he chose not to defend and, instead, took a default judgment.

As such, the Court grants in part and denies in part Nalder's motion for summary judgment. The Court grants summary judgment for Nalder on the ambiguity issue and finds that there is an ambiguity in the renewal statement and, thus, the policy is construed in favor of coverage at the time of the accident. Defendant must pay the policy limits of the implied insurance policy. The Court denies summary judgment for Nalder on the remaining bad-faith claims. The Court grants in part and denies in part summary judgment for Nalder on the duty to defend issue. The Court finds that Defendant did breach its contractual duty to defend but denies Nalder's request for damages for that breach.

II. Defendant's Counter-Motion for Summary Judgment on All Extra-Contractual Claims or Remedies (#89)

Defendant seeks summary judgment on all of Plaintiff's claims for extra-contractual

remedies and/or bad faith claims because there was a genuine dispute as to whether coverage existed at the time and its actions were reasonable. (Counter Mot. for Summ. J. (#89) at 15). Defendant argues that because it had a reasonable basis to deny coverage there can be no bad faith. (*Id.* at 16).

Nalder filed a response and Defendant filed a reply. (Opp'n to Counter Mot. for Summ. J. (#96); Reply to Counter Mot. for Summ. J. (#97)).

The Court grants Defendant's counter-motion for summary judgment on Plaintiffs' extra-contractual claims and/or bad faith claims. As discussed above, the procedural history of this case demonstrates that Defendant had a reasonable basis for disputing coverage during the time of the accident and, thus, there is no bad faith on the part of Defendant.

CONCLUSION

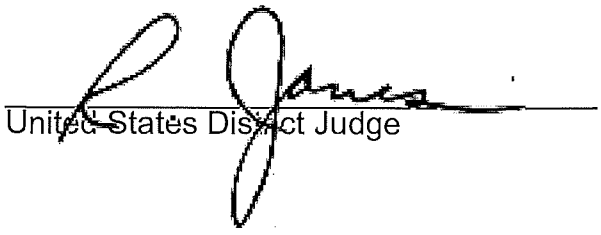
For the foregoing reasons, IT IS ORDERED that Plaintiff James Nalder's Motion for Summary Judgment (#88) is GRANTED in part and DENIED in part. The Court grants summary judgment in favor of Nalder and finds that the insurance renewal statement contained an ambiguity and, thus, the statement is construed in favor of coverage during the time of the accident. The Court denies summary judgment on Nalder's remaining bad-faith claims.

IT IS FURTHER ORDERED that Defendant's Counter-Motion for Summary Judgment on All Extra-Contractual Claims or Remedies (#89) is GRANTED. The Court grants summary judgment on all extra-contractual claims and/or bad faith claims in favor of Defendant.

The Court directs Defendant to pay Cheyanne Nalder the policy limits on Gary Lewis's implied insurance policy at the time of the accident.

The Clerk of the Court shall enter judgment accordingly.

Dated this 30th of October, 2013.



United States District Judge

EXHIBIT C

EXHIBIT C

Electronically Filed
10/29/2018 5:30 PM
Steven D. Grierson
CLERK OF THE COURT

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

DISTRICT COURT

CLARK COUNTY, NEVADA

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

PLAINTIFF'S OPPOSITION TO UAIC'S MOTION FOR RELIEF FROM JUDGMENT

Date: 12/12/2018
Time: 9:00 a.m.

Cheyenne Nalder, through her attorney, David A. Stephens, Esq., opposes UAIC"s Motion for Relief from Judgment, as follows:

POINTS AND AUTHORITIES

I. INTRODUCTION

United Automobile Insurance Company's, ("UAIC"), motion should be denied because the tolling statutes, NRS 11.200, NRS 11.250 and NRS 11.300, apply to the statute of limitations for judgments contained in the same chapter at NRS 11.190(a)(1) and extend the time for filing an action on the judgment or for renewal under NRS 17.214.

UAIC argues that the tolling statutes, NRS 11.200, NRS 11.250, and NRS 11.300, do not apply to the statute of limitations for judgments contained in the same chapter at NRS 11.190(a)(1). UAIC provides no legal authority for this unreasonable position. Unfortunately for UAIC, this position is not supported in Nevada's statutory scheme, case law or common sense. NRS 11.200 specifically refers to NRS 11.190. The other two statutes are part of chapter 11 and deal specifically with when the statute of limitations is tolled. UAIC's position is frivolous and must be met with a firm rejection.

II. FACTS

A. FACTS ON UNDERLYING CASE

The underlying matter arises from an auto accident that occurred on July 8, 2007, where Gary Lewis, ("Lewis"), accidentally ran over Nalder. Nalder was born April 4, 1998 and was a nine-year-old girl at the time. At the time of the accident Lewis maintained an auto insurance policy with United Auto Insurance Company ("UAIC"), which was renewable on a monthly basis.

Following the accident, Nalder's father, James Nalder, extended an offer to UAIC to settle Nalder's injury claim for Lewis's policy limit of $15,000.00. UAIC never informed Lewis that Nalder offered to settle Cheyenne's claim. UAIC never filed a declaratory relief action. UAIC rejected Nalder's offer. UAIC rejected the offer because it believed that Lewis was not covered under his insurance policy given that he did not renew his policy by June 30, 2007.

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

UAIC was notified of the lawsuit but declined to defend Lewis or file a declaratory relief action regarding coverage. Lewis failed to appear and answer the complaint. As a result, Nalder obtained a default judgment against Lewis for $3,500,000.00. Notice of entry of judgment was filed on August 26, 2008.

Nalder recently obtained an amended judgment in this matter. She amended the judgment to get it into her name because she is not longer a minor.

Nalder wants to maintain her judgment against Lewis. This intention is irrespective of its enforceability against UAIC. Lewis and Nalder are still involved in ongoing claims handling litigation against Lewis's insurance company, UAIC, because of its failure to defend Lewis in the original case.

Because the statute of limitations on Nalder's personal injury action may have been approaching, Nalder recently took action in both Nevada and California to maintain her judgment against Lewis, who resides in California, or, in the alternative, to prosecute her personal injury action against Lewis to judgment.

Cheyenne Nalder reached the age of majority on April 4, 2016. Nalder hired David A. Stephens, Esq., to maintain her judgment. First, counsel obtained an amended judgment in this case in Cheyenne's name as a result of her reaching the age of majority. This amended judgment was obtained appropriately, by demonstrating to the Court that

the judgment, as a result of the tolling provisions, was still within the applicable statute of limitations.

Nalder then filed a separate action with three distinct claims for relief, pled in the alternative. (See Case No. A-18-8772220-C). The first claim is an action on the amended judgment which will result in a new judgment which will have the total principal and post judgment interest reduced to judgment, so that interest would now run on the new, larger principal amount.

The second alternative claim is for declaratory relief seeking a determination of when a renewal under NRS 17.214 must be filed and when the statute of limitations, which is subject to tolling provisions, will run on the judgment.

And finally, the third claim, should the Court determine that the judgment is invalid, is an action on the injury claim within the applicable statute of limitations for injury claims, that is, two years after her reaching the age of majority.

Nalder also retained California counsel, who filed a judgment in California, which has a ten-year statute of limitations regarding actions on a judgment. Nalder maintains that all of these actions are unnecessary to the questions on appeal, and most are unnecessarily early; however, out of an abundance of caution, she brings them to maintain a judgment against Lewis and to demonstrate the actual way this issue should have been litigated in the Eighth Judicial District Court of Nevada, not midway into an appeal by a self-serving affidavit of counsel for UAIC.

UAIC has inserted itself into theses actions trying to assert the simple, but flawed, concept that unless a judgment renewal pursuant to NRS 17.214 is brought within six years, a judgment is no longer valid. UAIC's motivation for bringing this argument is not in good faith and is to avoid payment of damages arising from its claims handling failures that occurred in the first Nalder v. Lewis injury case.

UAIC made representations that it would be responsible for any judgment entered in this case in order to gain intervention into this case and the case filed by Nalder in 2018.

B. CLAIMS HANDLING CASE AGAINST UAIC

On May 22, 2009, James Nalder, on behalf of Cheyenne Nalder, and Lewis filed suit against UAIC alleging breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, fraud, and violation of NRS 686A.310. Lewis assigned to Nalder his right to "all funds necessary to satisfy the Judgment" and retaining to himself any funds recovered above the judgment. Lewis left the state of Nevada and relocated to California prior to 2010. Neither Lewis, nor anyone on his behalf, has been subject to service of process in Nevada since 2010.

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

contract was not ambiguous as to when Lewis had to make payment to avoid a coverage lapse. Nalder and Lewis appealed this decision to the Ninth Circuit. The Ninth Circuit reversed and remanded the matter because Lewis and Nalder had facts to show the renewal statement was ambiguous regarding the date when payment was required to avoid a coverage lapse.

On remand, the U.S. District Court concluded the renewal statement was ambiguous and therefore, Lewis was covered on the date of the incident because the court construed this ambiguity against UAIC. The U.S. District Court also determined UAIC breached its duty to defend Lewis, but did not award damages because Lewis did not incur any fees or costs in defense of the Nevada state court action. Based on these conclusions, the district court ordered UAIC to pay the policy limit of $15,000.00. UAIC then made three payments on the judgment: June 23, 2014; June 25, 2014; and March 5, 2015.

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

After the first certified question was fully briefed and pending before the Nevada Supreme Court, UAIC had the idea that the underlying judgment could only be renewed pursuant to NRS 17.214. Even though UAIC knew at this point that they owed a duty

to defend Gary Lewis, they did not undertake to investigate the factual basis or the legal grounds, or discuss this idea with Lewis, or seek declaratory relief on Lewis' behalf regarding the statute of limitations on the judgment. All of these actions would have been a good faith effort to protect Lewis. Instead, UAIC filed a motion to dismiss Lewis and Nalder's appeal with the Ninth Circuit for lack of standing. This allegation had not been raised in the trial court. It was something UAIC concocted solely for its own benefit. This allegation was brought for the first time in the appellate court. If UAIC's self-serving affidavit is wrong, this action will leave Lewis with a valid judgment against him and no cause of action against UAIC.

UAIC ignored all of the tolling statutes and presented new evidence into the appeal process, arguing Nalder's underlying $3,500,000.00 judgment against Lewis is not enforceable because the six-year statute of limitation to institute an action upon the judgment or to renew the judgment pursuant to NRS 11.190(1)(a) expired. The only proof that it expired was UAIC counsel's affidavit that no renewal pursuant to NRS 17.124 had been filed. As a result, UAIC contends Nalder can no longer recover damages above the $15,000.00 policy limit for breach of the contractual duty to defend because the judgment lapsed after the judgment (in the case against UAIC) was entered in the U.S. District Court. This would be similar to arguing on appeal that a plaintiff is no longer entitled to medical expenses awarded because the time to file a lawsuit to recover them expired while the case was on appeal.

Even though Nalder believes the law is clear that UAIC is bound by the judgment, regardless of its continued validity against Lewis, Nalder, in an abundance of caution, took action in Nevada and California to demonstrate the continued validity of the judgment against Lewis. These Nevada and California state court actions will demonstrate that UAIC has again tried to escape responsibility by making misrepresentations to the Federal and State Courts.

IV. ARGUMENT

UAIC seeks to set aside the amended judgment based on NRCP 60(b) arguing it the judgment was void prior to the court amending it.

NRCP 60(b)(3), which allows the court to relieve a party from a final judgment if it is void, "is normally invoked . . . in a case where the court entering the challenged judgment was itself disqualified from acting, [citation omitted], or did not have jurisdiction over the parties, [citation omitted], or of the subject matter of the litigation." *Misty Management Corp. v. First Judicial District Court*, 83 Nev. 180, 426 P.2d 728, 729 (1967).

None of those grounds apply unless, UAIC is arguing that if the judgment was not timely renewed it was disqualified from acting. UAIC provides no support for that position.

However, assuming, *arguendo*, that position is correct, UAIC still fails establish that the judgment had to be renewed or even that the time for renewal had expired.

A. The Judgment is not expired because the statute of limitation is tolled

The Nevada six-year statute of limitations for bringing an action on a judgment is provided for in NRS 11.190(1)(a). That time period has either not expired, or it has been tolled.

i. The six-year time period was tolled by the three payments UAIC made on the judgment.

NRS 11.200, states:

> "The time in NRS 11.190 shall be deemed to date from the last transaction or the last item charged or last credit given; and whenever any payment on principal or interest has been or shall be made upon an existing contract, whether it be a bill of exchange, promissory note or other evidence of indebtedness if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made."

NRS 11.200 is specifically made applicable to the statues of limitation set forth in NRS 11.190

UAIC made its last payment on the judgment on March 5, 2015. Thus, as a result of this statute, the six-year statute to file suit to enforce the judgment began running on March 6, 2016 and would not expire until March 6, 2021, which is six years from the last payment.

ii. The Nevada statute of limitations to bring an action on a judgment was also tolled during the period of time that Nalder was a minor.

NRS 11.250 states:

"If a person entitled to bring an action other than for the recovery of real property be, at the time the cause of action accrued, either:

1. Within the age of 18 years;

* * *

"the time of such disability shall not be a part of the time limited for the commencement of the action."

Nalder reached the age of majority on April 4, 2016. The statute of limitation to enforce a judgment was tolled until she reached the age of 18. As a result, the statute of limitations to file an action to enforce the judgment does not run until April 4, 2022.

iii. Lewis' residency in California since 2010 tolls the statute of limitations.

Pursuant to NRS 11.300, the absence of Lewis from the State of Nevada tolls the statute of limitations to enforce a judgment and it remains tolled because of his absence. *See Bank of Nevada v. Friedman*, 82 Nev. 417, 421, 420 P.2d 1, 3 (1966).

Pursuant to NRS 11.300, Lewis' California residency also tolls the six-year statute of limitations to enforce a judgment because Lewis has not been subject to service of process in the State of Nevada from 2010 to the present.

iv. The time to renew the judgment has not run

NRS 17.214 provides that the renewal must be brought within 90 days of the expiration of the statute of limitations. If that 90-day period is strictly construed, any renewal attempt pursuant to NRS 17.214 by Nalder at the present time, or earlier as argued by UAIC, would be premature and therefore ineffective because it would not be filed within the 90-day window prior to expiration of the statute of limitations.

v. The renewal statute is optional, rather than mandatory

NRS 17.214 was enacted to give an optional, not "mandatory," statutory procedure in addition to the rights created at common law for an action on the judgment. UAIC claims the plain, permissive language of NRS 17.214: "A judgment creditor . . . **may** renew a judgment," (emphasis added), mandates use of NRS 17.214 as the only way to renew a judgment. This is contrary to the clear wording of the statute and the case law in Nevada. See *Mandlebaum v. Gregovich*, 24 Nev. 154, 161, 50 P. 849, 851 (1897) and general statutory interpretation.

UAIC cites no authority for this mandated use of NRS 17.214. The legislative history demonstrates that NRS 17.214 was adopted to give an easier way for creditors to renew judgments. This was to give an option for renewal of judgments that was easier and more certain, not make it a trap for the unwary and cut of rights of injured parties.

UAIC cites *Leven v. Frey*, 123 Nev. 399, 168 P.3d 712 (2007), for the proposition that judgment renewal is mandatory. However, that is not what the case held. It held that strict compliance with the statue was necessary to renew a judgment. That is not the

same as holding that a judgment must be renewed by this statutory process. *Id.*, 168 P.3d at 719. The issue of enforcing a judgment by a suit was never considered by the Nevada Supreme Court in the *Leven* case.

Mandlebaum v. Gregovich, 24 Nev. 154, 161, 50 P. 849, 851 (1897), specifically allowed a judgment creditor to file a suit to enforce a judgment fifteen years after it was entered. The Nevada Supreme Court stated:

> "The averments of the complaint and the undisputed facts are that at the time of the rendition and entry of the judgment in 1882, the appellant was out of the state, and continuously remained absent therefrom until March, 1897, thereby preserving the judgment and all right of action of the judgment creditor under the same. Notwithstanding nearly fifteen years had elapsed since the entry of the judgment, yet, for the purpose of action, the judgment was not barred - for that purpose the judgment was valid."

Id.

Where as here, the timing of the expiration is in doubt, the best way to renew the judgment is the common law method, which is only supplemented by the statutory method, not replaced.

Though the statute of limitations on Nalder's judgment is not even close to running, this action was taken because Nalder's tort statute of limitations was about to run. If the judgment is deemed not valid, then Nalder still wants to protect her tort

claim. Also, this action is the appropriate way to litigate and clarify the Nevada statutory scheme for actions on a judgment and judgment renewal.

B. The Statute of Limitations in California on a Judgment of a Sister State is Ten Years

Lewis now resides in California. In California, an action upon a judgment must be commenced within 10 years of entry of the judgment. *See* Cal. Code Civ. P. § 337.5. Alternatively, a judgment must be renewed within 10 years of entry of the judgment. *Kertesz v. Ostrovsky*, 115 Cal. App. 4th 369, 372, 8 Cal. Rptr. 3d 907, 911 (Cal. Ct. App. 2004); *see also,* Cal. Code Civ. P. §§ 683.020, 683.120, 683.130. Out of an abundance of caution, Nalder has incurred the expense to renew her judgment by filing actions in both Nevada and California. In spite of this action, Nalder contends that she timely instituted an action on the judgment or, alternatively, that the six-year limitations period has not yet expired.

C. The Underlying Judgment Did Not Expire As To Lewis Because Nalder Was Not Required to Institute an Action on the Judgment and Renew the Judgment

An action on a judgment is distinguishable from the treatment of an application to renew the prior judgment. *Pratali v. Gates*, 4 Cal. App. 4th 632, 637, 5 Cal. Rptr. 2d 733, 736 (Cal. Ct. App. 1992). This distinction is inherently recognized in the Nevada Revised Statutes' treatment of both courses of action. "A judgment creditor may enforce his judgment by the process of the court in which he obtained it, ***or he may elect to use***

the judgment as an original cause of action and bring suit thereon and prosecute such suit to final judgment." *Mandlebaum v. Gregovich*, 24 Nev. 154, 161, 50 P. 849, 851 (1897) (emphasis added). NRS 11.190(a)(1) provides the option that either an action upon the judgement or a renewal of the judgment be commenced. The limitation period for judgments runs from the time the judgment becomes final. Statutes of limitations are intended to ensure pursuit of the action with reasonable diligence, to preserve evidence and avoid surprise, and to avoid the injustice of long-dormant claims. *Petersen v. Bruen*, 106 Nev. 271, 273-74, 792 P.2d 18, 19-20 (1990).

NRS 17.214 provides the procedural steps necessary to renew a judgment before the expiration of the statute of limitations set forth in NRS 11.190(1)(a). NRS 17.214 provides that a judgment creditor may renew a judgment that has not been paid by filing an affidavit with the clerk of the court where the judgment is entered, "…within 90 days before the date the judgment expires by limitation." NRS 11.190(a)(1), NRS 11.200, NRS 11.250, NRS 11.300 must be read together with NRS 17.214 because they relate to the same subject matter and are not in conflict with one another. *Piroozi v. Eighth Judicial Dist. Court*, 131 Nev. Adv. Op. 100, 363 P.3d 1168, 1172 (2015). When these five statutes are read together, they establish that a party must either file an action on the judgment or renew the judgment under NRS 17.214 before the statute of limitations runs.

The Nevada Supreme Court expressly adopted this result in *Levin v. Frey*, 123 Nev. 399, 403, 168 P.2d. 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 limitation in six years."

The Nevada Supreme Court held that the time to file a renewal under NRS 17.214 is subject to statutory and equitable tolling provisions. See *O'Lane v. Spinney,* 110 Nev. 496, 874 P.2d 754 (1994). The statute of limitation tolling provisions in NRS 11.200, NRS 11.250, NRS 11.300 apply to the computation of the time for filing for renewal under NRS 17.214.

The Nevada Supreme Court also recognizes the well-established rule that it will not look beyond the plain language of the statute when the words "have a definite and ordinary meaning." *Harris Associates. v. Clark County School. District*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003). "Normal principles of statutory construction also preclude interpreting a statute to render part of it meaningless." *United States v. Bert*, 292 F.3d 649, 652 n.11 (9th Cir. 2002).

UAIC's apparent position is that even though Nalder filed an action upon the judgment, she was also required to file a renewal of the judgment. This interpretation ignores the clarity of the disjunctive "or". UAIC's proposed interpretation of the statute effectively renders the "or" used NRS 11.190(1)(a) meaningless. If the Nevada Legislature intended to require a judgment creditor to file an action on the judgment and renew the judgment, then the Nevada Legislature would have used the word "and". However, the Nevada Legislature uniquely understood that a party was only required to

proceed with one course of action to ensure the validity of a judgment. This understanding is reflected in the permissive language of NRS 17.214(1), which states that a judgment creditor "***may*** renew a judgment which has not been paid. . . ."

Based on the unambiguous language of NRS 11.190(1)(a), NRS 11.200, NRS 11.250, NRS 11.300 and NRS 17.214, the underlying judgment did not expire in this matter. Indeed, any renewal pursuant to NRS 17.214 filed by Nalder would be premature and possibly held to be ineffective. Nalder timely commenced her action on the judgment before the statute of limitations expired. As a result, the judgment does not have to be renewed and any renewal under NRS 17.214 is not possible at this time. This is the reason for the declaratory relief allegation in Nalder's 2018 complaint.

VII. CONCLUSION

Nevada has two methods for dealing with the expiration of statutes of limitation. Both methods are dependent on the expiration of the statutes of limitation and the associated tolling statutes. The statute of limitations in this matter is tolled until well past the time Cheyenne Nalder, ("Nalder"), amended the judgment and filed an action on the judgment. The initial judgment never expired. The judgment does not have to be revived. This Court did not make a mistake. The amended judgment is not void. UAIC's motion must be denied.

For the reasons set forth above, Nalder respectfully requests that this Court deny the Motion to Set Aside the Judgment brought by Gary Lewis, (without his consent).

Dated this 29th day of October, 2018.

STEPHENS & BYWATER, P.C.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of October, 2018, I served the following document: **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO SET ASIDE JUDGMENT**

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

Matthew J. Douglas, Esq.

Randall Tindall, Esq.

E. Breen Arntz, Esq.

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

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

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

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

S/David A Stephens
An Employee of Stephens & Bywater

EXHIBIT D

EXHIBIT D

Electronically Filed
2/14/2019 3:20 PM
Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

JAMES NALDER, et al, Plaintiffs, vs. GARY LEWIS, et al, Defendants. AND ALL RELATED PARTIES	)	CASE NO. 07A549111 A-18-772220-C DEPT NO. XX **Transcript of Proceedings**

BEFORE THE HONORABLE ERIC JOHNSON, DISTRICT COURT JUDGE

DEFENSE'S MOTION TO WITHDRAW ON ORDER SHORTENING TIME DEFENDANT'S MOTIONS TO DISMISS AND MOTIONS FOR RELIEF DEFENDANT'S MOTIONS TO STRIKE MOTIONS TO DISMISS AND FOR RELIEF UAIC'S MOTION FOR RELIEF, MOTION TO DISMISS PLAINTIFFS' COMPLAINT, MOTION FOR COURT TO DENY STIPULATION TO ENTER JUDGMENT BETWEEN PLAINTIFF AND LEWIS, AND OPPOSITION TO THIRD PARTY PLAINTIFF LEWIS'S MOTION FOR RELIEF FROM ORDER AND JOINDER IN MOTIONS FOR RELIEF FROM ORDERS ON ORDER SHORTENING TIME

WEDNESDAY, JANUARY 9, 2019

APPEARANCES:

FOR THE PLAINTIFFS:	DAVID ALLEN STEPHENS, ESQ.
FOR THE THIRD PARTY PLAINTIFF GARY LEWIS:	THOMAS F. CHRISTENSEN, ESQ.
FOR THE DEFENDANT GARY LEWIS:	BREEN E. ARNTZ, ESQ.
FOR THIRD PARTY DEFENDANTS:	DAN R. WAITE, ESQ. MATTHEW J. DOUGLAS, ESQ. THOMAS E. WINNER, ESQ.

RECORDED BY: ANGIE CALVILLO, COURT RECORDER
TRANSCRIBED BY: JULIE POTTER, TRANSCRIBER

whether or not the judgment continued. I definitely would agree you would have had to -- you know, that there had to be more done in that regard. So if I -- if that's the way I look at it, I mean, how is that handicapping you in some way?

MR. DOUGLAS: Well, Your Honor, I understand your point and clearly, you know, something to consider. The problem is, you know, I don't know eventually what an appellate court might say, and to us this looked like an attempt to an end around the jurisdiction of the Supreme Court and -- and somehow sanctify what was an expired judgment without going through the renewal process that [indiscernible] requires --

THE COURT: Let me -- let me tell you how I'm leaning on terms of your -- well, let me deal with -- with the issue relating to intervention. I don't see any issue with the intervention in the 2018 case. I have serious concerns in reference to the 2007 case, but I do think that there are distinctions factually between those cases that say once you've got a final judgment you can't come hopping into it.

And what's happening here, which is, you know, does that judgment continue to exist. And, essentially, we have new litigation on that, which I think -- so I am going to be denying the motion to strike the intervention. I'm leaning -- I mean, my inclination at this point is to deny your motion to -- for relief from judgment pursuant to NRCP 60. But I want to make it clear in any -- in my order that, you know, I just see that as

moving the case from the name of the father to the name of the now adult plaintiff.

And, you know, I would ask, you know, whoever ends up drafting the -- the order in that regard to -- to make that point clear. I don't see -- you know, I see that as just being a ministerial thing that was requested by plaintiffs' counsel to -- to get it into her name at this point since dad really doesn't have any authority over her anymore.

At this point I am going to grant and withdraw, you know, Defendant Lewis's motion for relief from judgment pursuant to NRCP 60, defendant's motion to dismiss, and Defendant Lewis's motion to strike defendant's motion for relief from judgment -- well, no, not that one. I mean, that's the one, essentially, I'm granting. I'm going to -- the ones that Mr. Tindall filed, I'm going to pull those. I'm going to grant Mr. Arntz, whoever filed it, I can't -- everybody is representing everybody here, the motion to -- to pull those.

I don't see -- you know, the issue here is whether you've got anything under the contract or under case law that gives you a right to -- to assert anything. And so if Mr. Lewis wants to use Mr. Arntz as his attorney in this one, and Mr. Christensen on the other one, I mean, that, I think, is his choice. And to the degree that there's any legal implications from that, that's the case.

As far as your motion for an evidentiary hearing for a

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

Julie Potter
Kingman, AZ 86402
(702) 635-0301

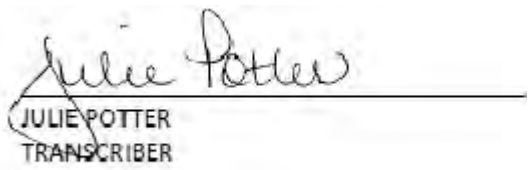


EXHIBIT E

EXHIBIT E

DOCKET NO. 13-17441
IN THE
UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES NALDER, GUARDIAN AD LITEM FOR MINOR CHEYANNE NALDER, REAL PARTY IN INTEREST, AND GARY LEWIS, INDIVIDUALLY,

PLAINTIFFS/APPELLANTS

V.

UNITED AUTOMOBILE INSURANCE COMPANY,

DEFENDANT/APPELLEE

APPEAL FROM A DECISION OF UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
CASE NO. 2:09-CV-01348-RCJ-GWF

APPELLANTS' RESPONSE TO APPELLEE'S MOTION TO DISMISS FOR LACK OF STANDING

DENNIS M. PRINCE, ESQ.
Nevada Bar No. 5092
EGLET PRINCE
400 South 7th Street, 4th Floor
Las Vegas, NV 89101

RICHARD CHRISTENSEN, ESQ.
Nevada Bar No. 13846
CHRISTENSEN LAW OFFICES
1000 S. Valley View Blvd.
Las Vegas, NV 89107

CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1(a)(1) United Automobile Insurance Company is the only corporation involved in the subject action.

I.

FACTUAL BACKGROUND

On July 8, 2007 Appellant Gary Lewis ("Lewis") negligently ran over a nine year old girl, Cheyanne Nalder, while driving his truck. Cheyanne sustained permanent injuries as a result of the incident. Appellee United Automobile Insurance Company ("UAIC") insured Lewis at the time of this incident. Appellant James Nalder ("Nalder"), on behalf of his daughter Cheyanne, brought a claim for the proceeds of Lewis' UAIC policy. UAIC claimed there was no policy in effect and, as a result, did not share Nalder's offer of $15,000 to resolve Cheyanne's claim to Lewis. Subsequently, Nalder, on behalf of Cheyanne, filed a lawsuit against Lewis in the State Court of Nevada and notice was provided to UAIC. UAIC took no steps to defend the lawsuit, did nothing to investigate, and failed to inform its insured, Lewis, of offers to settle made by Nalder. Due to UAIC's inaction, Lewis failed to appear and answer the complaint. On June 3, 2008, Nalder obtained a default judgment against Lewis for $3,500,000.00. The State Court of Nevada entered the default judgment on August 26, 2008.

On May 26, 2009, Nalder and Lewis filed the underlying action against UAIC for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of the Nevada Unfair Claims Practices Act, and

for bad faith. Nalder and Lewis specifically alleged that UAIC's conduct caused them to suffer damages in the amount of $3,500,000.00 and this action sought "payment for the excess verdict rendered against Lewis which remains unpaid in an amount in excess of $3,500,000.00." On February 28, 2010, Lewis assigned all of his bad faith rights against UAIC to Nalder to recover whatever amount eventually became due to satisfy the underlying default judgment.

This action has been pending for nearly eight years and two appeals have been filed. The parties have also fully briefed the question of law this Court certified to the Nevada Supreme Court and are currently awaiting a decision.

II.

ARGUMENT

UAIC's argument for dismissal of Appellants' appeal relies solely on their claim that the underlying default judgment is no longer in effect because Appellants did not renew the judgment pursuant to NRS 17.214. Aside from the fact that this argument fails as a matter of Nevada law, UAIC has also deliberately mischaracterized this issue as a standing issue that this Court has the jurisdiction to rule upon when, in actuality, it is a substantive

legal issue that should be placed before the district court once this Court reaches a final ruling on the appeal.

A. UAIC Improperly Requests this Court to Make a Factual Determination as to the Amount of Damages Appellants can Recover Based on a Distinct Legal Issue that is Not Properly Before this Court

"As a general rule, an appellate court will not hear an issue raised for the first time on appeal." *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992). While there is no bright-line rule for determining whether a matter was properly raised below, "…a workable standard is that the argument must be raised sufficiently for the trial court to rule upon." *Id.* (citing *In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989)).

"Standing is a threshold matter central to the [Ninth Circuit]'s subject matter jurisdiction." *Bates v. UPS*, 511 f.3D 974, 985 (9th Cir. 2007).

> The constitutional requirement of standing has three elements: (1) the plaintiff must have suffered an injury-in-fact, that is, a concrete and particularized invasion of a legally protectable interest that is actual or imminent, not conjectural or hypothetical; (2) the injury must be causally connected – that is fairly traceable – to the challenged action of the defendant and not the result of an independent action of a third party not before the court; and (3) it must be likely and not merely speculative that the injury will be redressed by a favorable decision by the court.

Catholic League for Religious & Civ. Rights v. City & County of San Francisco, 624 F.3d 1043, 1049 (9th Cir. 2009).

The standing inquiry's primary focus relates to whether the party invoking jurisdiction has the requisite stake in the outcome when he filed the lawsuit. *Valle Del Sol v. Whiting*, 732 F.3d 1006, 1018 n.11 (9th Cir. 2013).

UAIC's motion mischaracterizes the relief it requests. UAIC's motion is not about Appellants Lewis and Nalder's standing because they have still suffered an injury-in-fact regardless of the enforceability of the default judgment based on their claims of bad faith and breach of the implied covenant of good faith and fair dealing. In actuality, UAIC improperly requests this Court to make a determination regarding the extent of recoverable damages Appellants may receive as a result of UAIC's bad faith and breach of the contractual duty to defend based on the enforceability of the underlying default judgment. This is a substantive legal issue that is not properly before this Court on appeal because the issue was not ripe when Appellants filed their appeal. Therefore, the district court should be tasked with the authority to rule on this issue once the Nevada Supreme Court addresses the certified question and this Court decides the remaining issues on appeal.

Irrespective of the validity of the underlying default judgment, Appellants have still suffered damages resulting from UAIC's breach of the contractual duty to defend and bad faith. At a minimum, Appellants'

damages for UAIC's breach of the duty to defend are the $15,000 policy limits of Mr. Lewis's UAIC policy. Aside from these damages, Appellants may also have distinct, non-contractual damages related to UAIC's bad faith. In fact, this Court has not even addressed Appellants' issues on appeal regarding UAIC's bad faith, specifically:

> 1. Whether the reasonableness of the insurer's conduct is a question of fact that precludes summary judgment on bad faith issues where the insured wins on the coverage issue by summary judgment; and
>
> 2. Whether [Appellants] are entitled to the opportunity to present evidence to a jury on the non-contractual claims.

See DKTEntry: 10, at p. 3.

Thus, UAIC's request for this Court to summarily dismiss Appellants' appeal should be denied because it is premature. As UAIC itself admits, the judgment is one element of damages in a bad faith case.[1] Appellants also maintain active claims of breach of they duty of good faith and fair dealing and bad faith against UAIC, for which separate and distinct damages, apart from the default judgment, may be recoverable. *Allstate v. Miller*, 125 Nev. 300, 309-10, 212 P.3d 318, 324 (2009). If the Nevada Supreme Court concludes that a default judgment is a recoverable consequential damage for an insurer's breach of the duty to defend, then it should be left to the district

[1] *See* Appellee's Motion, at p. 10.

court on remand to collect and weigh evidence to make a factual determination as to what amount of consequential damages are recoverable in this case.

B. Appellants Timely Filed an Action to Enforce the Underlying Default Judgment Against UAIC and were Not Required to Renew the Underlying Default Judgment

UAIC's motion also fails because, as a practical matter, Appellants' action for bad faith and breach of contract is an enforcement action to collect on the underlying default judgment against UAIC. Appellants' action to enforce the judgment against UAIC was timely filed within the six-year statute of limitations to pursue an action upon a judgment pursuant to Nevada Revised Statute ("NRS") 11.190(1)(a). Specifically, Appellants allege in their Complaint against UAIC that they seek "payment for the excess verdict rendered against Lewis which remains unpaid in an amount in excess of $3,500,000.00." *See* Appellee's Appendix, at 704. Thus, Appellants were not required to also seek a renewal of the underlying default judgment pursuant to NRS 17.214 because the underlying action was filed to enforce the judgment.

"A judgment creditor may enforce his judgment by the process of the court in which he obtained it, ***or he may elect to use the judgment as an original cause of action and bring suit thereon and prosecute such suit to***

final judgment." *Mandlebaum v. Gregovich*, 24 Nev. 154, 161, 50 P. 849, 851 (1897) (emphasis added). NRS 11.190(a)(1) states that "an action upon a judgment or decree of any court of the United States…or the renewal thereof" must be instituted within 6 years. *See* Nev. Rev. Stat. 11.190(a)(1). The purposes of statutes of limitations are to encourage pursuit of the action with reasonable diligence, to preserve evidence and avoid surprise, and to avoid the injustice of long-dormant claims. *Petersen v. Bruen*, 106 Nev. 271, 273-74, 792 P.2d 18, 19-20 (1990).

NRS 17.214 provides an alternative option to renew a judgment to before the expiration of the statute of limitations set forth in NRS 11.190(1)(a). Specifically, NRS 17.214 provides that a judgment creditor may renew a judgment that has not been paid by filing an affidavit with the clerk of the court where the judgment is entered, "…within 90 days before the date the judgment expires by limitation." NRS 11.190(a)(1) must be read together with NRS 17.214 because they relate to the same subject matter and are not in conflict with one another. *Piroozi v. Eighth Judicial Dist. Court*, 131 Nev. ___, 363 P.3d 1168, 1172 (2015). When NRS 11.190(1)(a) and NRS 17.214 are read together, they establish that a party either has to file an action to enforce the judgment or renew the judgment before the 6-year statute of limitations runs. The Nevada Supreme Court

confirmed this result in *Levin v. Frey*, 123 Nev. 399, 403, 168 P.2d. 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 limitation in six years."

Contrary to UAIC's argument, strict compliance with NRS 17.214 is not required if an action on a judgment is instituted within the 6-year statute of limitations rather than a renewal of the judgment. If the Nevada Legislature intended to make renewal of the judgment the only method to maintain its validity before the expiration of the 6 year statute of limitations, the statute would not state that a judgment creditor "…may renew a judgment which has not been paid…" because such language is permissive. *See* Nev. Rev. Stat. 17.214(1). Instead, the legislature specifically recognized that a judgment creditor can still file an action on the judgment within 6 years and that such action maintains the validity of the judgment through an enforcement proceeding. The *Levin* Court implicitly acknowledged this result, which is why its analysis was solely devoted to whether a judgment creditor is required to strictly comply with the requirements to renew a judgment.

Levin stands for the proposition that a party must either institute an action on the judgment or seek renewal of the judgment, but a party is not

required to do both. On May 26, 2009, Appellants filed the underlying action for bad faith and breach of contract against UAIC, in part, to enforce the default judgment entered against Lewis as a result of UAIC's improper conduct. The 6-year statute of limitations expired on August 26, 2014. Therefore, Appellants timely instituted an action to enforce the underlying default judgment against UAIC. Neither the underlying default judgment, nor Lewis's assignment of his bad faith claims against UAIC to Nalder to recover damages, including the amount of the default judgment, are invalid. Appellants and the party against whom they instituted this action for collection of the judgment, among other actions, UAIC, have actively participated in this lengthy litigation since 2009 to enforce the underlying default judgment. Appellants have diligently pursued this judgment and it is disingenuous for UAIC to claim unfair surprise or that it has been prejudiced because the judgment is stale. The underlying default judgment against Lewis is not stale and remains enforceable because of Appellants' action instituted against UAIC to recover the amount of the default judgment, among other damages. Therefore, Appellants respectfully request that this Court deny UAIC's motion.

C. UAIC's Partial Payment of the Underlying Judgment Also Acted as a Mechanism for Renewal

Nalder's ability to collect against UAIC is not controlled by his right to collect against Lewis, the original judgment debtor. *Pinto v. Allstate Ins. Co.*, 221 F.3d 394, 403-04 (2d Cir. 2000) ("[E]xchange of a general release for an assignment of a bad faith claim operates to preserve the bad faith claim….") *see also*, *Consolidated American Ins. Co. v. Mike Soper Marine Services*, 951 F.2d 186, 190-91(9th Cir. 1991). It is not uncommon for judgment debtors to give up valuable rights and consideration to avoid execution of an adverse judgment. When a judgment debtor, like Lewis, assigns his bad faith rights in exchange for satisfaction of a judgment or stay of execution, such assignment does not relieve UAIC of its liability for the damages it caused to Lewis.

On February 28, 2010, Lewis took steps to protect himself from execution on the judgment because he gave up rights to sue UAIC for bad faith to Nalder. The value of these rights is at least $3,500,000.00 and likely now more because of interest. The terms of the assignment specifically state that Lewis assigns to Nalder the rights to "all funds necessary to satisfy the Judgment." Pursuant to these terms, any and all damages recovered in this action only go towards paying off the $3,500,000.00 judgment. Lewis has already effectively made a partial satisfaction of the judgment because

UAIC's payment of more than $90,000.00 in this case flowed directly to Nalder in accordance with the terms of the assignment. Therefore, UAIC's acknowledgement of the underlying judgment through payment further shows that the underlying action against UAIC is an enforcement action on the judgment.

III.

CONCLUSION

For the reasons set forth above, Appellants respectfully requests that this Court deny UAIC's Motion to Dismiss for Lack of Standing because Appellants properly instituted an action against the judgment before the 6 year statute of limitations expired in accordance with NRS 11.190(1)(a).

DATED this 27th day of March, 2017.

EGLET PRINCE

/s/ Dennis M. Prince
DENNIS M. PRINCE, ESQ.
Nevada Bar No. 5092
400 South 7th Street, 4th Floor
Las Vegas, NV 89101
Attorneys for Appellants

CHRISTENSEN LAW OFFICES

/s/ Richard Christensen
RICHARD CHRISTENSEN, ESQ.
Nevada Bar No. 13846
1000 S. Valley View Blvd.
Las Vegas, NV 89107
Attorneys for Appellants

CERTIFICATE OF SERVICE

Pursuant to FRAP 25(b), I hereby certify that I am an employee of EGLET PRINCE, and that on this 27th day of March, 2017, I served a copy of **APPELLANTS' RESPONSE TO APPELLEE'S MOTION TO DISMISS FOR LACK OF STANDING** on the party below via Case Management/Electronic Case Filing (CM/ECF):

Matthew Douglass, Esq.
Thomas E. Winner, Esq.
Susan M. Sherrod, Esq.
ATKIN WINNER & SHERROD
1117 S. Rancho Drive
Las Vegas NV 89102

/s/ Kimberly Culley
An employee of EGLET PRINCE

EXHIBIT F

EXHIBIT F

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

FILED
SEP 20 2019
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

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

---

[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.