IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 81710

CHEYENNE NALDER

Appellant,

vs.

GARY LEWIS and UNITED AUTOMOBILE INSURANCE COMPANY,

Respondents.

ON APPEAL FROM
THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

District Court Case No. 07A549111

APPELLANT'S OPENING BRIEF

David A. Stephens, Esq.
Nevada Bar No. 00902
Stephens Law Offices
3636 N. Rancho Drive
Las Vegas, NV 89130
Telephone: 702-656-2355
Facsimile: 702-656-2355
Email: dstephens@davidstephenslaw.com

DISCLOSURE STATEMENT
PURSUANT TO NRAP 26.1

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellant Cheyenne Nalder is an individual. Her true name is Cheyenne Nalder.

During the course of these proceedings, Cheyenne Nalder has been represented by the following law firms: Stephens Law Offices, through David A. Stephens, which is her current counsel, Stephens & Bywater, P.C., and Christensen Law Offices, through Thomas F. Christensen, Esq., and David F. Sampson, Esq., was her original counsel.

Her current attorney is David A. Stephens, Esq., of Stephens Law Offices.

Dated this 16th day of March, 2021.

S/ David A Stephens

David A. Stephens, Esq.
Nevada Bar No. 00902
Stephens Law Offices
3636 North Rancho Drive
Las Vegas, Nevada 89130
Attorneys for Cheyenne Nalder

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

None

JURISDICTIONAL STATEMENT

The Nevada Supreme Court has jurisdiction over this matter because it is an appeal from a final order in a case granting in part, and denying in part, Cheyenne Nalder's motion for attorney's fees and costs against United Automobile Insurance Company.

The Order regarding Cheyenne Nalder's motion for costs and attorney's fees was filed on July 24, 2020. Notice of Entry of that Order was filed on July 27, 2020, and the Notice of Entry was served that same day by electronic service through the Eighth Judicial District Court electronic filing system.

No tolling motions were filed following the Notice of Entry of Order in this matter.

At the time the order appealed from was entered, Defendant Gary Lewis had a pending motion for attorney's fees against United Automobile Insurance Company before the Eighth Judicial District Court. On July 30, 2020, the District Court issued a Minute order denying Mr. Lewis' motion for attorney's fees. That order resolved the remaining claims in the suit.

ROUTING STATEMENT

Pursuant to NRAP 17(b)(7), this matter could be presumptively assigned to the Nevada Court of Appeals in that it is an appeal from a post judgment order in a civil case.

Pursuant to NRAP 17(a), Appellant believes the Nevada Supreme Court should retain this appeal because it is related to a matter which is currently pending before the Nevada Supreme Court. That matter is case number 79487.

Additionally, the Nevada Supreme Court has been involved with several appeals involving this case, including two certified questions from the Ninth Circuit Court of Appeals to the Nevada Supreme Court which were resolved in Case number 70504. It has also been involved in writs arising in this case, including Supreme Court Case number 78085, Case number 78243, and Case number 80965.

While this appeal involves a motion for attorney's fees and costs following issuance of an amended judgment, the judgment itself is for an amount in excess of $3,500,000.00.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred by using the wrong legal standard to decide and deny Appellant's motion for attorney's fees under the facts and circumstances of this case.

2. Whether the District Court erred in finding that United Automobile Insurance Company did not intervene in this matter in bad faith and denying Appellant motion for attorney's fees under NRS 18.010(2)(b) for that reason.

3. Whether the District Court erred in holding that the word "costs" as used in NRS 12.130(1)(d) does not include attorney's fees when a party has improperly intervened into a matter after judgment has been entered.

STATEMENT OF THE CASE

This case arises out of an automobile accident, ("Accident"), which Gary Lewis, ("Lewis"), negligently ran over Cheyenne Nalder, ("Cheyenne"). This Accident occurred in 2007 when Cheyenne was a minor. (App. Vol. I, pp. App0001-0004).

United Auto Insurance Company, ("UAIC"), Lewis' insurance carrier, denied coverage for the Accident.

Cheyenne, through her guardian ad litem, filed suit against Lewis on October 9, 2007. (App. Vol. I, pp. App0001-0004).

On June 3, 2008, a default judgment was entered against Lewis and in the favor of Cheyenne for $3,500,000.00 plus interest and costs. (App. Vol. I, pp. App0005-0006). A Notice of Entry of Judgment was filed and served on Lewis on August 26, 2008. (App. Vol. I, pp. App0007-0010). This final judgment fixed the liability of Lewis to Cheyenne and the damages he owed to Cheyenne caused by his negligence.

On March 22, 2018, Cheyenne filed a motion to amend the judgment to change the name of the plaintiff from her father, who had been her guardian ad litem, to herself in that she had then reached the age of majority. The motion was supported up by points and authorities showing how the statute of limitations on the original judgment had not expired. (App. Vol. I, pp. App0011-0019). The court entered an

Amended Judgment on March 28, 2018. (App. Vol. I, pp. App0020-0022). Notice of Entry of that amended judgment was filed and served on Lewis on May 18, 2018. (App. Vol. I, pp. App0023-0027).

Cheyenne filed a second lawsuit against Lewis on April 3, 2018, seeking to enforce the judgment and to obtain declaratory relief as to the status of the judgment.

On August 17, 2018, UAIC filed a motion to intervene in both lawsuits. (App. Vol. I, pp. App0028-0093). UAIC's motion to intervene was granted in both lawsuits. (App. Vol. I, pp. App0113-0114).

Cheyenne sought a writ from this Court to establish that UAIC had no right to intervene in either case. (App. Vol. III, pp. App0484-0517). This Court held that UAIC could not intervene in this case because the judgment was already entered. (App. Vol. III, pp. App00599-0615). It allowed the intervention in the other case to stand.

Following this Court's decision granting the Writ, Cheyenne, because the case was concluded, filed a motion for attorney's fees and costs against UAIC. (App. Vol. IV, pp. App0854-0872). The District Court granted her costs, but denied her motion for attorney's fees. (App. Vol. V, pp. App0175, 1078-1079). Cheyenne then appealed that decision to this Court.

STATEMENT OF FACTS

A. UNDERLYING FACTS

This case arises from an auto accident, ("Accident"), that occurred on July 8, 2007, when Lewis negligently ran over Cheyenne. Cheyenne was a nine-year-old girl at the time. (App. Vol. I, pp. App0001-0004).

Following the accident, Cheyenne's father extended an offer to UAIC to settle Cheyenne's injury claim against Lewis for the policy limits of $15,000.00. UAIC rejected this offer. Cheyenne believes that UAIC rejected the offer based on its position that Lewis was not covered by its policy on the date of the accident because Lewis had not renewed his policy by June 30, 2007.

After UAIC rejected the offer, James Nalder, on behalf of Cheyenne, filed this lawsuit against Lewis in the Eighth Judicial District Court. (App. Vol. I, pp. App0001-0004).

UAIC did not defend Lewis or file a declaratory relief action regarding Lewis's insurance coverage. Lewis did not answer Cheyenne's complaint. Cheyenne obtained a default judgment against Lewis for $3,500,000.00. (App. Vol. I, pp. App0005-0006). Notice of entry of judgment was filed and served on Lewis on August 26, 2008. (App. Vol. I, pp. App0007-0010).

B. Factual Background of the Claims Handling Case Against UAIC

On May 22, 2009, Lewis and James Nalder, on behalf of Cheyenne, 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 Cheyenne his right to "all funds necessary to satisfy the Judgment" and retained to himself any funds recovered above the judgment.[1]

UAIC removed the bad faith case to US District Court. UAIC filed a motion for summary judgment as to all the claims, alleging Lewis did not have insurance coverage on the date of the accident. The US District Court granted summary judgment to UAIC because it found that the insurance policy was not ambiguous as to when Lewis had to make a payment to avoid a coverage lapse.

Cheyenne and Lewis appealed that decision to the Ninth Circuit. The Ninth Circuit reversed the summary judgment in favor of UAIC finding that Lewis and Cheyenne had raised material questions of facts showing that the insurance renewal statement was ambiguous regarding the date when the premium payment was due to avoid a coverage lapse.

---

[1] The majority of the documents cited in this and the next section are not included in the Appendix for two reasons. First, the information in these sections is provided to give the Court some background on how the parties got here, but the documents themselves do not affect the issues in this appeal. Second, NRAP 30(b) requires that only essential document be included in the Appendix.

On remand, the U.S. District Court concluded the renewal statement was ambiguous, construed the ambiguity against UAIC, and found Lewis was covered on the date of the accident. The U.S. District Court also determined UAIC breached its duty to defend Lewis, but did not award damages, other than the policy limits because Lewis did not incur any fees or costs in defense of the state court action. Sometime after that UAIC paid the policy limits.

Cheyenne and Lewis appealed the decision denying damages to the Ninth Circuit. The Ninth Circuit certified to this Court the question of 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 claimed that Cheyenne's judgment against Lewis had to be renewed pursuant to NRS 17.214. UAIC then filed a motion to dismiss Lewis and Cheyenne's appeal to the Ninth Circuit for lack of standing. UAIC raised this claim for the first time in the Ninth Circuit, rather than the trial court.

UAIC presented new evidence into the appeal process, arguing Cheyenne's underlying $3,500,000.00 judgment against Lewis was not enforceable because the time to renew the judgment pursuant to NRS 17.214 had expired. UAIC ignored all of the tolling statutes. The only proof that the judgment had to be renewed and was

the affidavit of UAIC's counsel that no renewal pursuant to NRS 17.214 had been filed. As a result, UAIC argued that Cheyenne could no longer recover damages above the $15,000.00 policy limit for breach of the contractual duty to defend. UAIC based that argument on a theory that the state court judgment had lapsed because it has not been renewed under NRS 17.214.

C. Factual Background of 2018 Case

Even though Cheyenne believes that the judgment had not expired and that the law is clear that UAIC is bound by the judgment, regardless of its continued validity against Lewis, Cheyenne, in an abundance of caution, filed actions in Nevada and California in 2018 to establish the continued validity of the judgment against Lewis.

Cheyenne, on April 3, 2018, filed another action against Lewis with three distinct claims for relief, pled in the alternative. The first claim is an action to enforce the original judgment against Lewis. This action will result in the original judgment and post judgment interest being reduced to judgment.

The second claim seeks a declaration that the statute of limitations on the original judgment against Lewis had not run due to various statutory tolling provisions.

The District Court dismissed the third claim for relief as a result of UAIC's

motion to dismiss.[2]

Cheyenne also retained California counsel, who domesticated the original Nevada judgment in California, which has a ten-year statute of limitations regarding actions on a judgment.

Cheyenne maintains that these subsequent actions are unnecessary, but out of an abundance of caution, she filed them to maintain her judgment against Lewis.

D. Facts Underlying UAIC's Intervention

On August 17, 2018, more than 10 years after the original final judgment in this case was filed, and almost five months after the amended judgment was filed, UAIC filed a Motion to Intervene in this case. (App. Vol. I, pp. App0028-0093).[3] Prior to its motion to intervene UAIC had never previously been involved in this lawsuit. It had not appeared. It had not defended Lewis. The Motion, based on the certificate of "service," was not served on any of the parties. (App. Vol. I, p. App0036).

Cheyenne's counsel discovered UAIC's motion to intervene on the district court website and obtained a copy of it through the court's portal. (App. Vol. I, pp.

---

[2] The dismissal of the third claim for relief has not been appealed by any party, as of now. That case is still pending.

[3] On the same day, or the day after, UAIC also filed a motion to intervene in Cheyenne's second case against Lewis.

App0094-0095). As was noted in the Cheyenne's Opposition to the motion to intervene, Mr. Stephens contacted Matthew Douglas, Esq., who was and is representing UAIC, and advised him that he had not received the motion and asked for additional time to file an opposition. His request was denied. (App. Vol. I, pp. App0094-0095). The certificate of service on the Motion to Intervene was not completed.[4] Cheyenne then quickly filed an Opposition to the UAIC's Motion to Intervene and provided a courtesy copy to the court. (App. Vol. I, pp. App0094-0099).

Cheyenne's Opposition detailed the procedural defects of UAIC's Motion to Intervene, and also set forth the clear and well settled Nevada case law and statutory law that prohibit intervention in a case after judgment is entered. (App. Vol. I, pp. App0094-0099). UAIC filed a reply before the in "chambers hearing." (App. Vol. I, pp. App0100-0111).

Even though this Court has clearly and consistently held that "in all cases" a party must seek to intervene before judgment is entered and that intervention is never permitted after judgment is entered or settlement reached, *(See, Lopez v. Merit Insurance Co*., 109 Nev. 553, 556, 853 P.2d 1266, 1268 (1993) and APP Vol. III

[4] See the incomplete Certificate of Service is found at App. Vol I, p. App0036. No type of service is marked, at all.

0599-0615)), the District Court, without hearing oral argument, allowed UAIC to Intervene. Even though Cheyenne filed an opposition, the District Court's minute order stated "There being no opposition" and granted the motion. (App. Vol. I, pp. App0112). The written order of the District Court contained the same language, although it was crossed out. (APP. Vol. I, pp.0113-0114). That Order was entered on October 19, 2018. (App. Vol. I, pp. App0113-0114).

After UAIC was allowed to intervene in this matter, it filed several motions which complicated and extended this previously resolved matter, including a Motion to Consolidate this action with Cheyenne's second action, which was granted, and a Motion to Set Aside the Judgment, which was denied. (App. Vol III, pp. App0688-0728).

After the District Court signed the order allowing UAIC to intervene, Cheyenne filed a petition for a writ with this Court. (App. Vol. III, pp. App0484-0517). UAIC opposed this writ. (App. Vol. III, pp. App0518-0570). This Court issued a decision holding that the intervention by UAIC into this case was improper because the judgment had already been entered. (App. Vol. I, pp. App0599-0615).

Subsequent to the issuance of the order on the writ, Cheyenne filed a motion to recover the attorney's fees and costs she incurred by reason of the improper intervention by UAIC into this matter. (App. Vol. IV, pp. App0854-0872). The

motion was filed against UAIC only. It was based on UAIC's improper intervention into this case. The District Court granted Cheyenne an award of costs[5], but denied the motion for attorney's fees. (App. Vol. V, pp. App1075-1078). The minute order noted that there was no bad faith and that attorney's fees are not costs. (App. Vol V. p. 1075). Although the Judge's findings in the transcript, (App. Vol V. pp App1097-1099), and minute order to not mention "without reasonable ground" that was added to the final order. (App. Vol. V. pp. App1076-1078).

SUMMARY OF THE ARGUMENT

The trial court erred in denying Cheyenne's motion for attorney's fees because it used the wrong standard for determining whether she was entitled to attorney's fees. The trial court held that UAIC had not intervened in this case in "bad faith". However, bad faith is not the standard. The issue, under NRS 18.010(b)(2) is whether the motion to intervene was filed "without ground" or to "harass" the opposing party. UAIC's intervention, given existing Nevada case and statutory law prohibiting intervention after judgment is entered, was clearly without grounds and should have been denied. Cheyenne was prejudiced by the denial of her motion for attorney's fees when the trial court followed an improper standard in denying the motion. Additionally, NRS 18.010(2)(b), by its own language, is to be interpreted broadly by

[5] No party has appealed the award of costs.

the court.

Assuming that "bad faith" is the correct standard for determining whether a party is entitled to attorney's fees under NRS 18.010(2)(b), UAIC's intervention into this lawsuit, given that judgment had been entered prior to the time the motion to intervene was filed, was in bad faith. Thus, the trial court erroneously determined that the participation of UAIC in this case was not in bad faith. That decision was an abuse of discretion by the trial court and for that reason this Court should reverse that decision.

NRS 12.130 provides that if a party does not succeed on its intervention then the other party is entitled to recover its "costs". Under the circumstances the terms "costs" should include an award of attorney's fees, rather than just the out of pocket costs as defined in NRS 18.005. The definition of costs in NRS 18.005 does not include NRS 12.130. Because the trial court failed to recognize this distinction the decision denying Cheyenne her attorney's fees under NRS 12.010 must be reversed.

ARGUMENT

I. THE TRIAL COURT USED AN IMPROPER LEGAL STANDARD IN DENYING CHEYENNE'S MOTION FOR ATTORNEY'S FEES

After finally succeeding in this case, Cheyenne brought her motion for attorney's fees and costs pursuant to two statutes, NRS 18.010(2)(b) and NRS

12.130(2)(b). She filed her motion for attorney's fees against UAIC only. (App. Vol. V, pp. App0854-0872). She did not believe that she had, under existing Nevada law, a valid claim for attorney's fees against Lewis.

Both statutes[6] provide a basis to recover attorney's fees from UAIC in this matter.

NRS 18.010(2)(b) provides that attorney's fees may be recovered,

> "[W]ithout regard to recovery sought, when the court finds the claim, counterclaim, cross claim or third party complaint or defense of the opposing party was brought without reasonable ground or to harass the prevailing party."

While the District Court has discretion in deciding a motion for attorney's fees, it must follow the correct legal principles in exercising its discretion.

> "This court generally reviews a district court's decision awarding or denying costs or attorney fees for an abuse of discretion. *See Miller v. Jones*, 114 Nev. 1291 1300, 970 P.2d 571, 577 (1998). '[W]here a trial court exercises its discretion in clear disregard of the guiding legal principles,' it 'may constitute an abuse of discretion.' *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993)."

---

[6] See III *infra* for the argument regarding NRS 12.130.

Gunderson v. D.R. Horton, 130 Nev. Adv. Op. 9, 319 P.3d 606, 615 (Nev. 2014).

Here, in its ruling the District Court stated:

"[I]n looking at the issue of 18.010, and the issue of bad faith, Judge Jones did initially allow the intervention in this case. And on reconsideration, I denied the motion for reconsideration and I did it on the basis that I thought that the unique circumstances in this case and the unique posture of the parties and what is occurring in this case, permit it made -- intervention made sense and was appropriate as originally ordered by the Court.

"You know, obviously, the Supreme Court disagreed with that, I appreciate that, I don't have any problem with that. But you know, just because this Court was wrong, doesn't make the initial action by the parties that of bad faith. I don't believe that bad faith has been demonstrated in this case. And, you know, with reference to the one argument that UAIC may be gaming the system between the State Court and the Ninth Circuit Court in terms of what it -- position it takes here and -- versus what position it takes there.

"In terms of the underlying issue in this case, again, I don't think that that in and of itself demonstrates bad faith as opposed to vigorous

prosecution on behalf of their client. So I will deny it as to attorney's fees and grant it as to the costs of $458.52."

The trial court denied Cheyenne's motion for attorney's fees under NRS 18.010(2)(b) based on its finding that UAIC did not act in "bad faith." However, "bad faith" is not the correct standard for determining whether a party is entitled to attorney's fees under NRS 18.010(2)(b). The correct standard is whether the party brought its claim or defense "without reasonable ground" or to "harass" the prevailing party. NRS 18.010(2)(b)

Put another way, "NRS 18.010(2)(b) and NRCP 11 authorize the district court to grant an award of attorney fees as sanctions against a party who pursues a claim without reasonable ground." *Edwards v. Emperor's Garden Restaurant*, 122 Nev. 317, 330, 130 P.3d 1280, 1288 (2006).

Because the trial court applied the wrong legal standard in deciding Cheyenne's motion for attorney's fees, its decision must be reversed.

Blacks Law Dictionary defines bad faith as follows:

"The opposite of 'good faith,' generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, . . . , it implies the conscious doing of a wrong because of dishonest purpose."

Black's Law Dictionary, p. 127 (5th ed. 1979).

A claim that is "groundless" is not necessarily the same thing as a claim that is brought in "bad faith." It is true that a position taken in bad faith could be a position without reasonable ground. However, a party could take a position that is without reasonable ground, but that does not rise to the level of bad faith. Here the Judge denied the motion for attorney's fees because he found that UAIC did not intervene in bad faith.[7]

In *Bergmann v. Boyce*, 109 Nev. 670, 856 P.2d 560 (Nev. 1993), the trial court denied attorney's fees to the defendant. It found that because the plaintiff's claims had survived a motion to dismiss they could not be groundless. However, that standard for determining a motion for fees under NRS 18.010(2)(b) was incorrect. *Id.* at 674-675, 856 P.2d at 563. So, the Supreme Court reversed the order denying attorney's fees.

In *Bergmann*, the Supreme Court noted how to determine if a claim is groundless.

> "In assessing a motion for attorney's fees under NRS 18.010(2)(b), the trial court must determine whether the plaintiff had reasonable grounds for its claims. Such an analysis depends upon the actual circumstances

[7] See, Cheyenne does not concede that UAIC's motion to intervene was not brought in bad faith. See, *infra* for Cheyenne's argument that UAIC's motion to intervene in this case was brought in bad faith.

> of the case rather than a hypothetical set of facts favoring plaintiff's averments. See Western United Realty, Inc. v. Isaacs, 679 P.2d 1063, 1069 (Colo. 1984); Fountain v. Mojo, 687 P.2d 496, 501 (Colo. Ct. App.1984) (A claim is groundless if 'the complaint contains allegations sufficient to survive a motion to dismiss for failure to state a claim, but which are not supported by any credible evidence at trial.')."

Bergmann v. Boyce, 109 Nev. 670, 675, 856 P.2d 560, 563 (Nev. 1993)

The actual circumstances in this case, when UAIC moved to intervene, were that the original judgment had been entered more than ten years before the motion to intervene was filed. (App. Vol. I, App0005-0006 and App0028-0093). The amended judgment had been entered almost five months before UAIC moved to intervene. (App. Vol. I, App0007-0010, and App0028-0093). This case had ended.

Existing case law and statutory law in Nevada clearly establish that a party cannot intervene in a case after judgment has been entered. See NRS 12.130 and *Lopez v. Merit Insurance Co.*, 109 Nev. 553, 556, 853 P.2d 1266, 1268 (1993). Because clear and existing case law prohibits intervening in a case after judgment is entered, UAIC's motion to intervene was groundless, even if it was not brought in bad faith.

The trial court also failed to follow the balance of NRS 18.010(2)(b) which

states:

> "The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public."

The trial court, by finding that UAIC had not intervened in "bad faith," was not "liberally construing" NRS 18.101(2)(b). The trial court's decision limited the application of NRS 18.010(2)(b) to bad faith, rather than broadly construing it.

The fact that the initial trial court erroneously allowed UAIC to intervene, and the subsequent trial court failed to set aside that order does not make the intervention of UAIC proper.[8] There were no grounds for UAIC to intervene in

---

[8] UAIC's motion to intervene was heard by the Honorable David Jones, who subsequently recused himself. Cheyenne's motion to set aside UAIC's intervention was heard by the Honorable Eric Johnson.

this case. UAIC's intervention was completely groundless, even if it was not done in bad faith.

This is not a case where the court looked at the *Brunzell* factors, (*Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969)), and decided to not award any amount of attorney's fees. The *Brunzell* factors are used to determine the amount of attorney's fees. The trial court decided to not even consider awarding fees. It decided that Cheyenne was not entitled to attorney's fees under the law. (App. Vol. V App1075, 1078-1079). Thus, it did not look at the *Brunzell* factors.

Because the District Court never even got to the *Brunzell* factors, Cheyenne will not argue them here.

The court's application of the incorrect legal standard in denying Cheyenne's motion for attorney's fees prejudiced Cheyenne's right to recover attorney's fees from UAIC due to its improper and groundless effort to intervene in a case where judgment had already been entered. She incurred substantial attorney's fees in defending against UAIC's improper intervention, and its subsequent actions. Thus, she was prejudiced by the denial of her attorney's fees motion.

For these reasons, this Court should reverse the trial court's decision and

remand this matter to the trial court for a determination of Cheyenne's motion for fees under the correct legal standard.

II. THE TRIAL COURT ERRED IN FINDING UAIC DID NOT INTERVENE IN BAD FAITH AND THUS DENYING CHEYENNE'S MOTION FOR ATTORNEY'S FEES UNDER NRS 18.010(2)(b)

Assuming, *arguendo*, that "bad faith" is the proper standard for determining whether a party is entitled to attorney's fees under NRS 18.010(2)(b), the trial court erred by finding UAIC did not act in bad faith in moving to intervene in this matter after judgment had been entered.

Black's Law Dictionary defines bad faith as follows:

> "The opposite of 'good faith,' generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, . . . , it implies the conscious doing of a wrong because of dishonest purpose."

Black's Law Dictionary, p. 127 (5th ed. 1979).

Here the intervention of UAIC into this case was made in bad faith.

One indicium of bad faith is found in the motion to intervene. The motion mentions, in passing, NRS 12.130. However, it does not cite, or even paraphrase, the provision in NRS 12.130(1)(b) that prohibits intervention after a judgment is

entered. It then blithely cites the entirety of NRCP 24. Thus, the motion itself never presented to the trial court the specific prohibition against intervening into a case after a judgment has been entered as stated in NRS 12.130. It also fails to note any existing Nevada case law prohibiting intervention after a judgment is entered. (App. Vol. I APP0028-0093).

At a minimum this failure to note the clear, existing standard is a violation of Rule 3.3 of the Nevada Rules of Professional Conduct, which states:

(a) A lawyer shall not knowingly:

. . .

"(2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;"

Similarly NRCP 11(b) provides;

"By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

"(1) it is not being presented for any improper purpose, such

as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

"(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law."

Here UAIC failed to disclose to the trial court what the existing law even was. Clearly its position was not justified by existing law. But, UAIC, rather than fully disclosing the existing law, and then making a nonfrivolous argument as to why it should not apply, just ignored existing law.

While some of this case law and the prohibition of NRS 12.130 were disclosed by Cheyenne in her opposition to the motion, Cheyenne had not disclosed any of this case law and statutory law when the motion was filed.

UAIC attempted to skip past the NRS 12.130 prohibition by stating:

"NRS 12.130(1)(c), however, specifically provides that intervention may be made as provided by the Nevada Rules of Civil Procedure. As such, given this mandate, the procedural rule will be specifically addressed in the instant Motion."

APP. Vol. I App0033).

UAIC is represented by experienced attorneys. It is safe to assume they knew the law on intervention and that Nevada law provides that a party cannot intervene in a case after judgment is entered. Intervention after a judgment is entered is specifically prohibited in NRS 12.130. Such an intervention is also prohibited by case law. See, *Lopez v. Merit Insurance Co*., 109 Nev. 553, 556, 853 P.2d 1266, 1268 (1993)

Another indicium of bad faith is its argument that the motion completely misrepresents the content of the letter from Thomas Christensen, Esq., to Steven Rogers, Esq. Mr. Rogers, who was retained by UAIC to represent Lewis in the second suit, had directly contacted Lewis about defending him in Cheyenne's second lawsuit. At that time Lewis was represented by Mr. Christensen in the US District Court case against UAIC. This contact should have been made through Mr. Christensen to begin with.

UAIC claims that Mr. Christensen stated that "Counsel could not communicate with Mr. Lewis, nor appear and defend him in this action and take action to get relief from the amended judgment." (APP. Vol. I App0033).

Mr. Christensen did request that all further contacts to Lewis be made through his office, which is actually required by the Rules of Professional Conduct, in any event. UAIC and Lewis were adversaries at this time. Mr.

Christensen requested that UAIC's chosen attorney state whether UAIC was going to step in and represent Lewis and be responsible for the damages claimed against Lewis, and the law upon which UAIC was relying to defend Lewis. He wanted to know how UAIC would assist Lewis rather than harm him. There was no blanket prohibition against UAIC representing Lewis in the second suit. (See APP Vol. I App0081-0082).

UAIC then attached Mr. Christensen's letter as an exhibit to the Motion to Intervene. (APP Vol. I App0081-0082). This letter, rather than being disclosed, should have been treated as a confidential communication dealing with the scope of representation of Lewis.

Another indicium of bad faith is UAIC's misstatement of the law regarding renewal of judgments.

The motion to intervene states, "Specifically, as this Court is aware, under NRS 11.190(1)(a) the limitation of action to execute on such a judgment would be six (6) years, unless renewed under NRS 17.214." (APP Vol. I App0030). In fact that is not what the law states at all. That statement misstates NRS 17.214 which states that a judgment creditor "may" renew a judgment by following the provisions of NRS 17.214. Such a renewal is not mandatory. It also misstates NRS 11.190(1)(a) which talks of an action to enforce a judgment and does not

even mention the "renewal" of a judgment.

UAIC's failure to fully disclose the law on intervening after a judgment is entered is in bad faith. UAIC misstatements of facts in its motion to intervene are in bad faith. UAIC misstating the law on renewal of judgments and limitation of actions on judgments is in bad faith.

The trial court should have found that UAIC's intervention was in bad faith and then analyzed the *Brunzell* factors to determine the attorney's fees that should be awarded to Cheyenne.

UAIC's intervention has caused Cheyenne to incur significant time and expense in legal fees defending her judgment in this case. These expenses should have ended upon the entry of the judgment by the court relative to her motion to amend. Since that time she has had to battle UAIC's motion to intervene in this case. After the intervention was incorrectly granted she had to oppose UAIC's motion to consolidate, and then UAIC's motion to set aside the judgment. (APP Vol. II App0621-0641, app0688-0728).

She has filed a writ to the Nevada Supreme Court with respect to the intervention. (APP Vol. III App0484-0517). She has also been involved in a second writ to the Supreme Court relative to the consolidation of her two cases, which resulted from UAIC's wrongful intervention.

She has also been involved in an appeal of this Court's order to denying UAIC's motion to set aside.[9]

III. THE TRIAL COURT ERRED IN DENYING CHEYENNE'S MOTION FOR ATTORNEY'S FEES UNDER NRS 12.130.

NRS 12.130 provides:

> "1. Except as otherwise provided in subsection 2:
>
> (a) Before the trial, any person may intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both."

Subsection 2 does not apply to this matter.

In *Lopez v. Merit Insurance Co*., 109 Nev. 553, 556, 853 P.2d 1266, 1268 (1993), this Court found that intervention is improper after judgment is entered.

This Court has determined that UAIC should not have been allowed to intervene into this matter. (PP Vol. III App0599-0615). This decision was based upon NRS 12.130 and existing Nevada case law prohibiting intervention after judgment has been entered. Thus, UAIC's intervention was improper.

NRS 12.130(1)(d) states:

"(d) The court shall determine upon the intervention at the same time

---

[9] See, Case No. 79487.

that the action is decided. If the claim of the party intervening is not sustained, the party intervening shall pay all costs incurred by the intervention."

Therefore, under NRS 12.130(1)(d) Cheyenne is entitled to her costs incurred due to the intervention from UAIC because its intervention was not sustained.

The District Court awarded Cheyenne her court costs as defined in NRS 18.005. It denied her an award of attorney's fees as costs.

However, Cheyenne's costs caused by the wrongful intervention of UAIC are not just the out of pocket legal costs she has incurred.

In addition to seeking her costs, Cheyenne is seeking to recover the attorney's fees she incurred due to the intervention of UAIC into this matter. The definition of costs in NRS 18.005 is limited to NRS 18.010 to 18.150. (See NRS 18.005 opening sentence). Cheyenne should not be limited to that definition of costs in that NRS 18.005 does not include NRS 12.130 which also speaks of recovery of costs.

This Court has defined attorney's fees as "costs."

"In *Young,* we held that attorney fees cannot be recovered as a cost of litigation unless authorized by agreement, statute or rule.

When authorized, a district court's award of attorney fees as costs will not be overturned on appeal absent a manifest abuse of discretion.

"Procedurally, when parties seek attorney fees as a cost of litigation, documentary evidence of the fees is presented to the trial court, generally in a post-trial motion. Opposing parties have an opportunity to contest the request for attorney fees, and the trial court must determine if any agreement, statute or rule authorizes fees. If the fees are authorized, the trial court examines the reasonableness of the fees requested and the amount of any award."

Sandy Valley Associates v. Sky Ranch Estates, 117 Nev. 948, 35 P.3d 964, 969 (Nev. 2001).

Black's Law Dictionary defines "cost" as "a pecuniary allowance made to the successful party (and recoverable from the losing party), for its expenses in prosecuting or defending an action or a distinct proceeding within an action." (*Black's Law Dictionary*, 5th ed. p. 312, 1979).

Webster's Dictionary defines costs as follows:

"In a general sense expenses incurred in litigation as; a) those payable to the attorney or counsel by his client, especially when fixed by law; commonly called fees, b) those given by the law or the court to

prevailing party against the losing party."

New Webster New Colligate Dictionary, p. 18 1949.

To categorically hold that attorney's fees are not costs under NRS 12.130 is an error of law. The term "costs" in NRS 12.130 is not limited by NRS 18.005 and can include attorney's fees.

For these reasons under NRS 12.130(1)(d), Cheyenne should have been awarded her attorney's fees caused by the intervention of UAIC. This intervention was erroneous.

CONCLUSION

For these reasons, Cheyenne respectfully requests that this Court reverse the order of the district court denying Cheyenne's motion for attorney's fees.

Dated this 16th day of March, 2021.

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

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Wordperfect 12 in Times New Roman font size 14; or

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 6,736 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text; or

[ ] Does not exceed ___ pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for

any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 16th day of March, 2021.

S/ David A Stephens

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

CERTIFICATE OF SERVICE

Pursuant to NRAP 21(a)(1) and NRAP 25(c)(1), I hereby certify that I am over the age of eighteen (18), I am an employee of the law offices of Stephens Law Offices and on the 16th day of March, 2021, I served a true copy of the foregoing **APPELLANT'S OPENING BRIEF** via the Nevada Supreme Court E-Filing System, to the following parties.

Daniel M. Polsenberg, Esq.
Attorney for UAIC, Respondent

Matthew Douglas, Esq.
Attorney for UAIC, Respondent

E. Breen Arntz, Esq.
Attorney for Gary Lewis

Thomas F. Christensen, Esq.
Attorney for Gary Lewis (in case # A-18-772220)

_S/ David A. Stephens _____
An employee of
STEPHENS LAW OFFICES