

IN THE SUPREME COURT OF THE STATE OF NEVADA  
Case No. 81510 consolidated with Case No. 81710

CHEYENNE NALDER, )  
Appellant, )  
vs. )

Electronically Filed  
May 10 2021 08:08 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

GARY LEWIS and )  
UNITED AUTOMOBILE )  
INSURANCE COMPANY )  
Respondents, )

\_\_\_\_\_)  
GARY LEWIS, and )  
CHEYENNE NALDER )  
Appellants, )  
vs. )

UNITED AUTOMOBILE )  
INSURANCE COMPANY )  
\_\_\_\_\_)

Appeal from the Eighth Judicial District Court, Clark County, Nevada  
The Honorable Eric Johnson, District Judge  
District Court Case No. 07A549111

\_\_\_\_\_  
**RESPONDENT GARY LEWIS' ANSWERING BRIEF**  
\_\_\_\_\_

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**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.

Respondent Gary Lewis is an individual. His true name is Gary Lewis.

During the course of these consolidated proceedings, beginning in 2018, Gary Lewis has been represented by the following law firms: E. Breen Arntz and Christensen Law Offices (Thomas F. Christensen). E. Breen Arntz represents Gary Lewis as a defendant adverse to Nalder; Thomas Christensen represents Gary Lewis as a third-party plaintiff against United Automobile Insurance Company (“UAIC”). These attorneys are his current counsel.

To clarify, Christensen Law previously represented James Nalder, mainly through attorney David Sampson, against Gary Lewis in 2007. At that time, Gary Lewis was unrepresented. Once a judgment was obtained against Lewis in that case and the case was over, Nalder and Lewis reached an agreement wherein Lewis could satisfy the judgment via distribution of proceeds that might be obtained from UAIC as a result of Lewis’ claims against UAIC. Christensen Law



then represented their mutual interest against UAIC in a Federal Court case.

Three years into the second appeal to the Ninth Circuit on that case, UAIC raised the issue of the continued validity of the judgment Nalder held against Lewis, which created a new conflict between the two. Christensen Law then informed both clients that Christensen Law could represent neither in that litigation. They each retained other counsel to represent their adverse interests. Nalder retained David Stephens. Lewis retained E. Breen Arntz. Both desired that Christensen Law continue to represent their common interests against UAIC. Therefore, since 2018, Christensen Law has only represented Lewis and Nalder against UAIC. Christensen Law has not and does not represent Nalder or Lewis in the Nalder v. Lewis litigation. Christensen Law only represents Lewis v. UAIC in the 2018 action. Nalder has not presented a claim against UAIC in the 2018 actions.

Dated this 10th day of May, 2021.

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## **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 Nalder's motion for attorney's fees and costs against United Automobile Insurance Company after wrongful intervention and consolidation.

The Order regarding Nalder's motion for costs, including attorney's fees, was filed on July 24, 2020. Notice of Entry of that Order was filed on July 27, 2020 and Notice of Entry was served the same day. This case has now been consolidated with Appellant Gary Lewis' appeal from a final order denying attorney's fees and costs that was filed on September 23, 2020. Notice of Entry of that Order was filed on September 23, 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 these consolidated matters. At the time the orders appealed from were entered, there were no other 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 matters which the Nevada Supreme Court has reviewed pertaining to the same parties and the same disputes. There have been several appeals related to this straightforward tolling statute 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. The Nevada Supreme Court also recently dismissed case number 79487 which involved the same parties and dispute.

While this appeal involves a motion for attorney's fees and costs, the damages suffered by Gary Lewis as a result of UAIC's wrongful actions include requiring him to be involved in unnecessary ongoing litigation and improper maneuvering by UAIC to attempt to evade responsibility for a now in excess of \$6,000,000 liability against the insured, Lewis.



## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether the District Court erred in holding that the words “all 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 was entered, with delay and increasing the cost of litigation as its purpose.

2. Whether the District Court erred in finding that UAIC did not intervene in the Nalder matter in bad faith and denying Appellants’ Motions for fees under NRS 18.010(2)(b) for that reason.



## **STATEMENT OF THE CASE**

Comes now Respondent Gary Lewis, by and through his counsel of record, E. Breen Arntz, Esq. and Christensen Law, and hereby submits this Response brief and joinder to Appellant Cheyenne Nalder's Opening Brief Pursuant to NRAP 28(j).

This Response Brief and joinder is made and based upon the papers and pleadings on file herein in the Memorandum of Points and Authorities attached to the Opening Brief and Gary Lewis's own Opening Brief submitted in the consolidated appeal, and such other documentary evidence as may be presented and any oral arguments at the time of the hearing if any. Respondent Gary Lewis is adverse to Nalder in this underlying action. Mr. Lewis did not and does not see a defensible position for him within the original lawsuit. He agrees with and joins the statement of facts presented by Nalder.

By and through his counsel in the underlying action, Gary Lewis did not believe he had a legitimate defense to set aside or contest the amended judgment against him. He only involved himself in this action to remove the unauthorized pleadings that were nefariously filed by Randall Tindall, Esq., allegedly on behalf of Gary Lewis. Those filings were actually directed by UAIC and designed solely to delay resolution and increase the cost of litigation. This Respondent expressly adopts and incorporates by reference herein all of the statements of fact and the



Points and Authorities set forth in the Opening Briefs of these consolidated appeals.

## LEGAL ARGUMENT

### **I. NRS 12.130 requires an award of “all costs incurred by the intervention.”**

NRS 12.130 provides that “If the claim of the party intervening is not sustained, the party intervening shall pay **all costs**<sup>1</sup> incurred by the intervention.” In this case, UAIC improperly intervened. (See Nalder Appendix Vol. III, APP0599-0615). The claim put forth by UAIC and its surrogate, Randall Tindall, Esq., was not sustained, but was rather rejected by the trial court. (See Respondent Lewis’s Appendix Vol 2, RespLewis 0469-470.) NRS 12.130 applies to “all costs incurred,” including attorney fees of both real parties in interest, Lewis and Nalder. In this instance, but for the wrongful intervention by UAIC, this action would have been over and both Nalder and Lewis would have incurred only minimal costs, including attorney fees. UAIC’s intervention, which had to be undone by the Supreme Court, dramatically increased the expense of litigation to the real parties

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<sup>1</sup> Costs as used in the insurance industry include attorney fees as part of “defense costs and legal expenses” *American Excess Insurance v. MGM Grand Hotels, Inc.*, 102 Nev. 601, 603 (Nev. 1987). This is distinguished from the meaning of costs elsewhere in the Nevada Revised Statutes, for example, “The Legislature clearly differentiated between costs and attorney fees on two other occasions **within the same chapter**” *Gilman v. State Bd. of Vet. Med. Exam’rs*, 120 Nev. 263, 271 (Nev. 2004). (Emphasis added.) No such distinction is present in NRS 12.130, the only statute dealing with intervention.



in interest.

In these actions, Thomas Christensen only represents Mr. Lewis against UAIC. Mr. Lewis, as a Defendant to claims by Nalder, is represented by E. Breen Arntz, Esq. David A. Stephens, Esq. represents Nalder. All real parties in interest objected to UAIC's intervention-- pointing out that the intervention statute provided that a failed intervenor *must* pay all the litigation costs caused by the intervention. Lewis, as a third party plaintiff adverse to UAIC (through attorney Thomas Christensen) also objected to UAIC's intervention in the underlying litigation. (See Respondent Lewis's Appendix Vol 2, RespLewis 0400-462, at page 423.)

District Court Judge Eric Johnson refused to set aside the intervention by UAIC, but also refused to set aside the judgment Nalder has against Lewis. (See Nalder Appendix Vol. II, APP0478-0483 and Nalder Appendix Vol. IV, APP0843-0846). Even though the amended judgment was now confirmed valid by both Judges Jones and Judge Johnson, Judge Johnson still refused to sever the old amended judgment case from the more recently filed 2018 action on a judgment case. UAIC appealed the refusal to set aside the judgment. (See Respondent Lewis's Appendix Vol 2, RespLewis471-473.) UAIC had no legal support for the appeal and it was made solely for the improper purpose of calling into question the resolution of the factual issues regarding the tolling issues that had been decided by



Judge Jones in entering the amended judgment and also confirmed by Judge Johnson's refusal to set the judgment aside. The appeal was dismissed by this Court prior to briefing, which was repeatedly delayed at UAIC's request. (See Respondent Lewis's Appendix Vol 2, RespLewis474-475.) UAIC pursued this for the express purpose of enabling it to misrepresent the status of the judgment in other venues. UAIC used the "pendency" of it to influence the decisions that were pending in the Ninth Circuit Court of Appeals and the Nevada Supreme Court.

The Court, by denying fees in this situation, is undermining the purpose of the intervention statute. The Courts should not be burdened by interventions which cannot be sustained. The statute clearly states "all costs incurred" and the burden to the parties and the judicial system in wrongful intervention is great. In a circumstance such as this, resources are wasted when the insurance company is allowed to intervene in clear contradiction of established case law, the rules and the statute. "Because its decision rested on legal error, we do not defer here to the district court's decision to permit UAIC's intervention in the 2007 case ten years after final judgment was entered." (See Nalder Appendix Vol. III, APP0599-0615 at bates no. 604.)

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**II. UAIC's Intervention was for an improper purpose, to delay and harass both real parties to the litigation; and it was maintained contrary to the black letter law and mandate of the Supreme Court writ.<sup>2</sup>**

Gary Lewis, from the beginning, welcomed an ethical defense by UAIC.<sup>3</sup> Lewis did not want a frivolous defense that would delay resolution in the trial court, but ultimately leave Lewis exposed to the judgment in Nevada State Court and in California State Court. UAIC intervened to present just such a frivolous defense. This resulted in a delayed resolution, but ultimately resulted in holding Lewis liable, just as he feared.

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

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<sup>2</sup> "We conclude that intervention after final judgment is impermissible, and the district court erred in granting intervention in the 2007 case." (See Nalder Appendix Vol. III, APP0599-0615 at bates no. 614.)

<sup>3</sup> "If you have case law from Nevada contrary to the clear language of these statutes please share it with me so that I may review it and discuss it with my client." (See Respondent Lewis's Appendix Vol 2, RespLewis253-254.) Rather than respond with case law supporting the UAIC proposed defense, Mr. Rogers withdrew from the representation on August 23, 2018. (See Respondent Lewis's Appendix Vol 2, RespLewis256-257.)



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.

UAIC used the tool of intervention improperly to delay the trial court in Nevada from reaching a final ruling on the tolling issues regarding this judgment. UAIC then used the uncertainty it created to obtain rulings from the Nevada Supreme Court and the Ninth Circuit. UAIC's strategy has been based on a groundless accusation of conflict or collusion that UAIC knowingly attempted to create, but which has been scrupulously avoided at great expense to the parties. In prosecuting and defending the actions taken in 2018 in Nevada by UAIC, Lewis hired E. Breen Arntz and Nalder hired David Stephens. The expense of these counsel would have been avoided had it not been for UAIC's unsustained intervention.

This propriety of Nalder retaining new counsel and Lewis retaining new counsel has already been ruled on by the trial court which found "4. This case is unusual but the Court does not find any unethical behavior by either Mr.



Christensen or Mr. Arntz.”<sup>4</sup> Although Respondent Gary Lewis is adverse to Nalder in this underlying action, Mr. Lewis, as advised by E. Breen Arntz, did not and does not see an ethical defense for him to the original lawsuit. Lewis asked counsel (hired by UAIC to represent him) for the basis of the representation and the likelihood of success. UAIC’s attorneys, rather than respond with case law, withdrew. (Again, see Respondent Lewis’s Appendix Vol 2, RespLewis253-254 and RespLewis256-257.) Lewis agrees with the statement of facts presented by Nalder herein. By and through his defense counsel in the 2018 action (later consolidated), E. Breen Arntz, Lewis did not feel he had an ethical defense to set aside or contest the amended judgment against him. This is because he felt the statute of limitations was tolled under NRS 200, NRS 250, NRS 300 and equitable tolling doctrines. Judge Jones and Judge Johnson agreed.

In undertaking to belatedly defend Gary Lewis, UAIC further did not notify Gary Lewis of any timely reservation of rights. UAIC attacked the finding by Judge Jones that the judgment remained valid and enforceable because of the various tolling statutes and principles that apply to actions on judgments and judgment renewals. UAIC did this by hiring defense counsel Randall Tindall to file fraudulent pleadings on behalf of UAIC in Lewis’ name. Lewis complained to the State Bar of Nevada ethics department, which took no action. Even though

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<sup>4</sup> See Respondent Lewis’s Appendix Vol 2, RespLewis463-468.)



UAIC's interests were represented through defense counsel hired by UAIC (Randall Tindall), UAIC was allowed to intervene in this underlying tort claim<sup>5</sup> for the express purpose of delaying adjudication of the tolling issues in the trial courts of the state of Nevada. Lewis had to ask his counsel, E. Breen Arntz to have the unauthorized and fraudulent filings by Tindall removed.

UAIC continued to delay resolution of the appeal by seeking three continuances of the opening brief. Ultimately, through Writ, the intervention was reversed. The appeal was dismissed. (Respondent Lewis's Appendix Vol 2, RespLewis474-475.) The judgment against Gary Lewis is valid and enforceable. Unfortunately, UAIC has already received some benefit of the delays through the Ninth Circuit and the Nevada Supreme Court.

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<sup>5</sup> "Looking to the merits, I note that, under our established practice, a personal injury action to reach policy proceeds must name the tortfeasor or the tortfeasor's personal representative as the party defendant — rather than proceeding as a direct action against the insurance carrier" *Reid v. Scheffler*, 95 Nev. 265, 267 (Nev. 1979). UAIC was allowed to intervene in addition to defense counsel and present a direct defense which was rejected after causing significant delay.



## **CONCLUSION**

This Court should remand the case and instruct the District Court to award costs, including attorney fees, to Nalder and Lewis because each was compelled to participate in the ongoing litigation of this case after UAIC wrongly intervened in the action.

Dated this 10th day of May, 2021.

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## **CERTIFICATE OF COMPLIANCE**

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 this brief has been prepared proportionally spaced using 14 point double spaced Times New Roman font.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because excluding the parts exempted, it does not exceed 30 pages.

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, including NRAP 28(e)(1) which requires each assertion 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 upon may be found. I understand that I may be subject to sanctions in the

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event that the accompanying brief is not in conformity with the requirements of the NRAP.

Dated this 10th day of May, 2021.

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### **CERTIFICATE OF SERVICE**

I hereby certify that service of Gary Lewis' Answering Brief was made this 10th day of May, 2021, by electronic service through the Nevada Supreme Court's electronic filing system to all registered users.



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Employee of Christensen Law Offices