Case Nos. 81510 & 81710

In the Supreme Court of Nevada

CHEYENNE NALDER,

Appellant,

vs.

GARY LEWIS; and UNITED AUTOMOBILE INSURANCE COMPANY,

Respondents.

GARY LEWIS, and CHEYENNE NALDER,

Appellants,

vs.

UNITED AUTOMOBILE INSURANCE COMPANY,

Respondent.

APPEAL

from the Eight Judicial District Court, Clark County, Nevada
The Honorable ERIC JOHNSON District Judge
District Court Case No. 07A54911

UNITED AUTOMOBILE INSURANCE COMPANY'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certify that the following are persons as described in NRAP 26.1(a) and must be disclosed:

1. United Automobile Insurance Company is a is a privately held limited-liability company. No publicly traded company owns more than 10% of its stock.

2. Thomas E. Winner and Matthew J. Douglas of Winner & Sherrod, Ltd. represents United Automobile Insurance Company in the district Court.

3. Daniel F. Polsenberg, Abraham G. Smith, and Adrienne Brantley-Lomeli of Lewis Roca LLP have appeared in this Court.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated this 19th day of July, 2021.

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ROUTING STATEMENT

The Supreme Court should retain this appeal pursuant to NRAP 17(a) because it is related to matters which the Supreme Court has reviewed pertaining to the same parties and the same dispute.

ISSUES PRESENTED

1. Whether the district court acted within its discretion in determining that attorney's fees are not taxable as costs.

2. Whether the district court acted within its discretion in determining that UAIC maintained its position with reasonable grounds and in good faith.

STATEMENT OF THE CASE

This is an appeal from the district court's denial of appellants' motions for attorney's fees, the Honorable Eric Johnson, District Judge of the Eighth Judicial District, presiding.

In 2008, plaintiff James Nalder obtained a default judgment against defendant Gary Lewis. Nalder and Lewis then sued Lewis's insurer, United Automobile Insurance Company (UAIC), in a bad-faith action that resulted in a federal-court judgment without a finding of bad faith. In 2014, pending an appeal to the Ninth Circuit, Nalder let the default judgment expire without renewal. Alerted to this fact, the Ninth Circuit posed to this Court a certified question regarding the impact of expiration on Nalder's and Lewis's claim for consequential damages.

Shortly after certification, in early 2018 Nalder ran back to the state district court to "amend" her expired judgment in this action and to file a separate action "upon" the expired judgment. UAIC intervened to prevent Nalder from evading the issues before this Court and the Ninth Circuit.

Lewis and Nalder petitioned this Court (in Docket Nos. 78085 and

78243) to contest UAIC's intervention in both cases. This Court determined that although UAIC improperly intervened in this action because it had already proceeded to a judgment in 2008, UAIC properly intervened in the 2018 case, which, despite Nalder's and Lewis's efforts, had not proceeded to judgment.

Shortly thereafter, the Ninth Circuit, applying this Court's answers to the certified questions, concluded that the default judgment in this case had expired in 2014 and is unenforceable.

In the meantime, Lewis and Nalder moved for attorney's fees and costs arising from their writ petitions in three separate courts, including in this Court as part of a motion "for reconsideration" and petition for *en banc* reconsideration. This Court, however, denied Lewis's and Nalder's requests and awarded no fees or costs. District Judge Eric Johnson likewise denied Lewis and Nalder's motion for attorney's fees and costs, holding that attorney's fees are not "costs" and that UAIC maintained its position with reasonable grounds. The district court awarded Nalder $458.52 in costs but denied costs to Lewis, who had provided no justifying documentation or evidence. Lewis and Nalder appealed.

STATEMENT OF THE FACTS

A. The Accident

Cheyenne Nalder alleges that on July 8, 2007, Gary Lewis negligently struck her with a car. (1 App. 2.)

B. The 2007 Lawsuit

On October 9, 2007, Nalder, through her guardian ad litem, filed suit against Lewis. (*Id.*) Lewis did not answer, and eight months later, the district court entered a default judgment for $3.5 million. (1 App. 5–6.)

C. The Bad-Faith Action Against UAIC

Nalder then sued Lewis's former insurer, UAIC, based on an assignment of Lewis's rights to a claim for bad faith. *Nalder v. United Auto. Ins. Co.*, 878 F.3d 754, 756 (9th Cir. 2017) (*Nalder II*). (1 App. 42, 4 App. 779; 1 R. App. 58–59.) UAIC removed the case to federal court. *Nalder II*, 878 F.3d at 756. (1 App. 42, 4 App. 779.)

1. Nalder and Lewis Appeal to the Ninth Circuit

After an initial appeal and remand on the question of coverage, Nalder appealed to the Ninth Circuit from an order making UAIC liable for just the policy limits. *Nalder II*, 878 F.3d at 757. (1 App. 42, 4 App.

779.) Nalder argued that she was entitled to the entire $3.5 million default judgment as a consequential damage of UAIC's failure to defend, even though UAIC had acted in good faith. *Nalder II*, 878 F.3d at 757. (1 App. 43, 4 App. 780.) The Ninth Circuit certified that question to this Court. *Nalder II*, 878 F.3d at 757. (1 App. 43, 4 App. 780.)

Pending that appeal, however, Nalder let that 2008 default judgment expire without renewing it under NRS 17.214. *Nalder II*, 878 F.3d at 757 (1 App. 44, 4 App. 781; 5 App. 885-86 ("Because Nalder's default judgment against Lewis expired, Lewis is no longer liable to Nalder for that judgment.").)

2. UAIC Moves to Dismiss the Ninth Circuit Appeal

UAIC moved to dismiss the appeal, arguing that the statutory six-year limitations period to enforce the 2008 default judgment had run, rendering it expired and unenforceable. *Nalder v. UAIC*, 878 F.3d 754, 757 (9th Cir. 2017). (1 App. 43, 4 App. 780.)

Nalder and Lewis did not contest that the six-year limitations period had passed or that they failed to renew the judgment. *Nalder II,* 878 F.3d at 758 (noting the concessions). (1 App. 44, 4 App. 781.) Instead, they argued that (1) a lapse in the judgment affects only the

amount of damages, not liability; and (2) their suit against UAIC, which was filed within the six-year life of the judgment, is itself "an action upon" the default judgment, and thus, timely. *Nalder II,* 878 F.3d at 758 (noting the concessions). (1 App. 44, 4 App. 781.)

3. The Ninth Circuit Certifies Questions on the Availability of Consequential Damages

The Ninth Circuit certified to this Court a second certified question: whether the expiration of the judgment without renewal cuts off the right to seek, in an action against the insurer, consequential damages based on that judgment. *Nalder II*, 878 F.3d 754, 758 (9th Cir. 2017) (noting certified question). (1 App. 45-46, 4 App. 782-83.) The Ninth Circuit warned that "Nalder and Lewis must prevail on both questions in order to recover consequential damages based on the default judgment for breach of the duty to defend." *Nalder II*, 878 F.3d at 758. (1 App. 47, 4 App. 784.)

In early 2018, this Court reworded and accepted this second certified question, as "the answer may determine the federal case." (2 App. 473.)

D. Nalder's and Lewis's Further Actions in State Court

1. In Response to the Issues Raised in the Ninth Circuit, Nalder Files a Separate Action

A month after this Court accepted the certified question, Cheyenne Nalder in the original 2007 state-court action moved the district court *ex parte* to amend the 2008 judgment to replace her guardian *ad litem*'s name with her own name, ostensibly because she had turned 18 two years earlier. *Nalder v. Eighth Judicial Dist. Court*, 136 Nev. 200, 201, 462 P.3d 677, 681 (2020) (*Nalder IV*). (1 App. 54; 5 App. 928, 938.)

Less than two weeks later, Nalder separately instituted what she called action "upon" the 2008 judgment (the 2018 case) and alternatively sought a declaration that the statute of limitations on the original judgment was tolled. *Nalder IV*, 136 Nev. at 201, 462 P.3d at 681. (1 App. 69; 5 App. 929.)

2. UAIC Intervenes in the State-Court Actions

UAIC moved to intervene in both the 2007 and the 2018 cases. *Nalder IV*, 136 Nev. at 202, 462 P.3d at 681. (1 App. 84–110; 5 App. 929.) While those motions were pending, Nalder and Lewis stipulated to a judgment in the 2018 case that would have given Nalder everything she was seeking. *Nalder IV*, 136 Nev. at 202, 462 P.3d at 681. (1 App.

132; 5 App. 929.)

The district court did not approve the Nalder-Lewis stipulation; instead, it granted UAIC's motions to intervene in both the 2007 and the 2018 cases and consolidated the two actions. *Nalder IV*, 136 Nev. at 202, 462 P.3d at 681. (1 App. 115–118; 5 App. 929.)

3. Nalder and Lewis Create a Judgment in Violation of the District Court's Stay

During a hearing on the consolidated cases, the district court orally stayed the proceedings in the 2018 case pending the resolution of certified questions before this Court, a ruling also reflected in the court's minute order. *Nalder IV*, 136 Nev. at 202, 462 P.3d at 681. (3 App. 602.) The same day, Lewis and Cheyenne orchestrated an offer and acceptance of judgment, which the district court clerk entered the next day. *Nalder IV*, 136 Nev. at 202, 462 P.3d at 681. (*Id.*) The district court later vacated the judgment as a violation of the stay. *Nalder IV*, 136 Nev. at 202, 462 P.3d at 681. (3 App. 603.)

E. Nalder and Lewis Challenge UAIC's Intervention in the 2007 and 2018 Cases

While this Court was still considering the certified questions, Nalder and Lewis petitioned this Court (Docket Nos. 78085 and 78243)

to overturn the state district court's decisions granting intervention and consolidation and vacating a judgment and to consolidate the new action with the action that resulted in the now-expired default judgment. (3 App. 484–517; 1 App. Lewis 8-41.) The petitions never suggested, even in the alternative, that this Court could sustain the intervention in the 2018 action while vacating the intervention in the 2007 action. (*Id.*)

In answer, UAIC argued that intervention was permissible in both actions. (3 App. 518.) UAIC pointed out that there was little dispute that UAIC had a genuine interest in intervening. (3 App. 541-44.) And although Nalder and Lewis objected to the timing of intervention, in the 2018 action there was no judgment to bar intervention. (3 App. 544-45.) As for the 2007 action, UAIC argued in good faith that the expired default judgment did not bar intervention: Based on this Court's decisions that an expired judgment is void, *Leven v. Frey*, 123 Nev. 399, 410, 168 P.3d 712, 719 (2007), UAIC believed that after the time for enforcing a judgment has passed without renewal, "a judgment no longer exists to be renewed." (3 App. 549 (citing *Kroop & Kurland, P.A. v. Lambros*, 703 A.2d 1287, 1293 (Md. Ct. Spec. App. 1998)).) UAIC reconciled this with this Court's 80-year-old decision in *Ryan v. Landis*, 58 Nev. 253, 75 P.2d

734 (1938), citing *Seattle & N. Ry. Co. v. Bowman*, 102 P. 27, 28–29 (Wash. 1909). (*Id.* at 551.) Alternatively, UAIC argued in good faith for its overruling. (*Id.* at 567.)

F. The 2008 Default Judgment Is Found to Have Expired, and Nalder and Lewis Have No Consequential Damages

1. Accepting the Record on Certification, this Court Holds that the Default Judgment Is Expired and Unenforceable

On September 20, 2019, this Court answered the certified questions. (1 R. App. 58–59.) Although Nalder and Lewis prevailed on the first question, they lost on the second: this Court held that "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" and that "because the [2008] judgment expired . . . it is no longer enforceable against him." *Nalder v. United Automobile Insurance Company*, Docket No. 70504, 2019 WL 5260073 (Sept. 20, 2019) (*Nalder III*). (1 R. App. 59, 61.)

This Court ultimately held that "the expired state court judgment cannot form the basis for consequential damages from UAIC's breach of its duty to defend Lewis." *Nalder III*, 2019 WL 5260073. (1 R. App. 59.)

2. The Ninth Circuit Definitively Finds the Judgment Expired

On June 4, 2020, the Ninth Circuit applied this Court's answers to the certified questions. (5 App. 884.) The court held that the judgment in this case has expired and is unenforceable against Lewis. (5 App. 886.) So "because Nalder and Lewis did not suffer an injury as a result of UAIC's failure to defend Lewis, they lack standing." (5 App. 886.) As a result, the Ninth Circuit dismissed the appeal. (5 App. 888.)

G. This Court Upholds UAIC's Intervention in the 2018 Action but Vacates the Intervention in the 2007 Action

In the meantime, Nalder's and Lewis's petitions challenging UAIC's intervention met mixed success.

This Court rejected their petitions as they concerned the 2018 action. Instead, this Court agreed that UAIC properly intervened in that action. First, this Court held that the stipulation between Nalder and Lewis did not constitute a judgment to bar intervention:

> The district court never entered judgment on the stipulation between Cheyenne and Gary. The stipulation therefore lacked the binding effect of a final judgment and did not bar intervention.

Nalder IV, 136 Nev. at 204, 462 P.3d at 683 (citing *Willerton v. Bassham*, 111 Nev. 10, 16, 889 P.2d 823, 826 (1995)). (3 App. 606.) This

Court considered that

> [a]llowing the agreement itself to bar intervention would permit the undesirable result of allowing parties to enter into bad-faith settlements and forbidding a third party potentially liable for the costs of the judgment from intervening because settlement was reached.

Nalder IV, 136 Nev. at 205, 462 P.3d at 683. (3 App. 607.) This Court also observed that UAIC had moved to intervene before Lewis and Nalder submitted their settlement agreement:

> We consider the filing of the motion as controlling because any other interpretation would permit collusive settlements between parties one day after an absent third party tries to intervene or permit judicial delay and bias in determining timeliness.

Nalder IV, 136 Nev. at 206, 462 P.3d at 684. (3 App. 608.)

Second, this Court agreed with UAIC that apart from the timeliness of UAIC's motion, UAIC had substantively demonstrated its right to intervene under NRCP 24:

> UAIC has shown that it has a sufficient interest in the 2018 case, as it could potentially be liable for all or part of the judgment. . . . UAIC's interests are not adequately represented by Gary, whose interests are adverse to UAIC's and who is represented by the same counsel as Cheyenne.

Nalder IV, 136 Nev. at 206, 462 P.3d at 684. (3 App. 609.)

This Court vacated UAIC's intervention in the 2007 action, however, along with the consolidation of those two cases. *Nalder IV*, 136 Nev. at 204, 462 P.3d at 682-83. (3 App. 606.) While this Court disagreed that a judgment's expiration merits intervention, this Court never suggested that UAIC's argument was frivolous. (3 App. 571-96.)

This Court also rejected various other issues in Nalder's and Lewis's petitions:

Although Lewis argued that the district court improperly vacated the acceptance of Nalder's offer of judgment, this Court disagreed, noting that the district court's "minute order granting a stay operates like an administrative or emergency order that is valid and enforceable." *Nalder IV*, 136 Nev. at 208, 462 P.3d at 685. (3 App. 613.) This Court also rejected Lewis's argument that vacating the judgment *ex parte* violated due process:

> We note that the district court could have *sua sponte* vacated the mistakenly entered judgment without notice to the parties. . . . The clerk's entry here of the judgment was a clerical mistake that did not involve any judicial discretion. Therefore, notice was not required, Gary's due process rights were not violated, and the district court properly vacated the judgment.

Nalder IV, 136 Nev. at 209, 462 P.3d at 686 (citing NRCP 60(a) and

Marble v. Wright, 77 Nev. 244, 248, 362 P.2d 265, 267 (1961)). (3 App. 613.)

In addition, this Court rejected Nalder's and Lewis's due process arguments that they were deprived of notice and an opportunity to be heard on the question of UAIC's intervention. *Nalder IV*, 136 Nev. at 206 n.7, 462 P.3d at 684 n.7. (3 App. 609 n.7.)

Finally, this Court rejected Lewis's request to "strike as void any orders issued in the 2018 case by Judge Johnson regarding the third-party complaint," a request unsupported by any allegation of a conflict related to Judge Johnson. *Nalder IV*, 136 Nev. at 209 n.10, 462 P.3d at 686 n.10. (3 App. 609 n.7.)

H. Following this Court's Determination that Intervention was Impermissible, Lewis and Nalder Move for Attorney's Fees and Costs

Having failed in significant aspects of their petitions, Lewis and Nalder petitioned this Court to reconsider. (5 App. 890.) Curiously, even though this Court had adopted many of UAIC's arguments—hence the motion for reconsideration[1]—Nalder and Lewis characterized all of

[1] The "Motion for Attorney Fees and Costs and for Reconsideration" somewhat resembled a petition for rehearing but did not comply with NRAP 40 and was not accompanied by the $150 filing fee. (5 App. 913-

UAIC's positions as frivolous and sought their costs and attorney's fees, including on the basis of a separate appeal that had not proceeded to briefing. (5 App. 901-06.)

They then sought the same relief in the district court. (1A App. Lewis 84-102; 4 App. 854-72.)

The district court reviewed the written submissions and determined that Lewis was not entitled to attorney's fees and costs because UAIC's intervention and claims were reasonable and not in bad faith. (1 App. Lewis 105-107). The district court further held that Nalder was entitled to $458.52 in costs but denied Nalder attorney's fees, finding that UAIC did not maintain its position without reasonable grounds or in bad faith. (5. App. 1083.)

This Court, too, denied Nalder's and Lewis's petitions for rehearing and *en banc* reconsideration, and awarded no fees or costs. (Dkt. 78085/78243, Doc. 20-24335 (filed July 1, 2020), Doc. 20-33463 (filed Sept. 11, 2020).)

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14. *See generally* 5 App. 890.)

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion in denying Lewis and Nalder attorney's fees and costs. The district court properly held that it had no statutory authority to treat the attorney's fees as costs in this matter. In general, attorney's fees are not costs. The award of attorney fees must be authorized by agreement, statute or rule. NRS 12.130 does not authorize attorney's fees to be recovered as a cost and as such, the district court was legally correct in denying the fees.

Furthermore, even if fees were authorized, the district court did not abuse its discretion in finding that, considering the unique posture of this case, UAIC's position was reasonable and in good faith.

I.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING ATTORNEY'S FEES AND COSTS

This Court will not set aside a trial court's decision to award or deny attorney's fees absent an abuse of the district court's discretion. *Miller v. Jones*, 114 Nev. 1291, 1300, 970 P.2d 571, 577 (1998). Here, the district court did not abuse its discretion in denying Lewis and Nalder attorney's fees.

A. The District Court Properly Determined that Attorney's Fees are not Litigation Costs

Lewis and Nalder contend that the district court improperly applied the definition of costs. (Lewis AOB at 12; Nalder AOB at 29). Generally, attorney's fees are not costs. Despite Lewis and Nalder's appeal to Webster's and Black's Law Dictionary (Lewis AOB at 12–13; Nalder AOB at 30),

> [i]t has been a consistent rule throughout the United States that a litigant has no inherent right to have his attorneys' fees paid by his opponent or opponents. Such an item is not recoverable in the ordinary case as damages, nor as costs, and hence is held not allowable in the absence of some provision for its allowance either in a statute or rule of court, or some contractual provision or stipulation.

Smith v. Crown Fin. Servs. of Am., 111 Nev. 277, 281, 890 P.2d 769, 771–72 (1995) (emphasis added) (quoting 1 STUART M. SPEISER, ATTORNEYS' FEES § 12:3 at 463–64 (1973) and describing this as a "sweeping general rule" "applied in legions of cases"); *see also St. Pierre v. State ex rel. S. Dakota Real Est. Comm'n*, 813 N.W.2d 151, 159 (S.D. 2012) (finding that ordinarily, the term costs and expenses as used in a statute are not understood to include attorney's fees).

Indeed, courts have found that where the legislature uses the word "costs," it means the fees and charges of the court such as filing fees, fees for service of process, and the like. *Alliance Indem. Co. v. Kerns*, 398 P.3d 198, 204 (Kan. Ct. App. 2017); *Peter v. Nantkwest, Inc.*, 140 S. Ct. 365, 373 (2019) ("The appearance, in tandem, of the words 'expenses' and 'attorney's fees' across various federal statutes shifting litigation costs indicates that Congress understands the two terms to be distinct and not inclusive of each other …").

Accordingly, attorney fees cannot be recovered as a cost of litigation unless authorized by agreement, statute or rule. *See e.g. Young v. Nev. Title Co.*, 103 Nev. 436, 441, 744 P.2d 902, 904 (1987); *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 863, 124 P.3d 530, 548 (2005) (finding the plain language of statute that allowed attorney fees in constructional defect actions expressly required the court to determine the reasonableness of the requested fees); *cf., e.g.*, 42 U.S.C. § 1988 (expressly allowing "a reasonable attorney's fee" as part of the costs).

Here, NRS 12.130[2] does not authorize attorney's fees to be recovered as a cost. Lewis and Nalder's argument that the district court should have awarded attorney's fees as a cost under NRS 12.130 contradicts the well-established general rule and should be rejected. The district correctly found here that no statute authorizes attorney's fees as costs.

B. Lewis and Nalder Failed to Include Any Evidence to Support the Fees

In addition, Lewis and Nalder provided the district court no evidence to support the fee award.

Lewis failed to provide any attorney billing records or the contingency fee agreement. *See O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 553, 429 P.3d 664, 667 (Ct. App. 2018) ("To support this request, O'Connell attached her contingency fee agreement, which stated, in part, that the fee would be 40 percent of any recovery and 50 percent of any recovery if there was an appeal."); *id.* at 561, 429 P.3d at 672 ("she

[2] NRS 12.130 provides that "[t]he court shall determine upon the intervention at the same time 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." (Emphasis added.)

included the contingency fee agreement as part of her request for fees").[3] In addition, Nalder withheld the crux of any request for attorney's fees: the dollar amount of those fees. So all Nalder gave the district court is a bare contingency fee for a case with a judgment that—because the Ninth Circuit determined she cannot enforce it against Lewis—is now worth $0. (5 App. 886.)

C. Lewis and Nalder Were Not Entitled to Fees on Issues they Lost

Here, Lewis and Nalder contend that the trial court was required to award all of their requested fees and costs because of this Court's finding that UAIC improperly intervened in the 2007 action. (Lewis AOB at 9–10.) But Lewis and Nalder ignore that the fees they seek to shift to UAIC were not expended solely on that one question, but also on issues where UAIC prevailed.

UAIC prevailed on the critical question of its intervention in the 2018 action. (5 App. 933–37.) As their motion for reconsideration in this Court underscores, Nalder and Lewis wanted UAIC out of the litigation

[3] Further, none of the factors in *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983) supported an award because Lewis has never obtained a judgment against UAIC more favorable than his offer of judgment.

altogether, not merely out of the 2007 action. The parties' dispute about the enforceability of the 2008 judgment was equally presented in the 2018 action, to which UAIC is a proper party.

Likewise, Lewis and Nalder failed in their efforts to reinstate their judgment on Nalder's offer of judgment in violation of the stay, their request to vacate all orders entered by Judge Johnson, and their arguments regarding due process.

Yet Nalder and Lewis sought a blanket reimbursement of all of their fees incurred in the writ petitions—including the aspects where they failed—leaving the district court no basis to award Lewis and Nalder fees and costs for petitions that this Court rejected in part. *See* NRAP 39(a)(4) ("[I]f a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the [Supreme Court] orders."). It is impossible to draw a line between time spent contesting UAIC's intervention in this 2007 action and the time spent contesting UAIC's intervention in the 2018 action precisely because the petitions never distinguished the two.

D. The District Court Did Not Err in Denying Lewis Costs Because He Sought Nontaxable and Undocumented Costs

Lewis further contends that the district court erred in denying his costs. (Lewis AOB at 12.) Lewis ignores that his request for costs omitted any documentation and included costs that are taxable only in the Supreme Court.

First, Lewis sought $1600 for some undifferentiated amalgam of "photocopies/fax/postage/courier/delivery." But the "cost of producing necessary copies of briefs or appendices" is taxable in this Court, not the district court. NRAP 39(b)(1). And even then, the maximum is $500. NRAP 39(c)(5).

Further, "a district court must have before it evidence that the costs were reasonable, necessary, and actually incurred." *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 121, 345 P.3d 1049, 1054 (2015). Lewis has provided none of that here. Lewis's three-line "memorandum of costs" that did not include a breakdown of the per-page cost of transcripts or copies, was insufficient under *Cadle Co. Id.* ("It is clear, then, that 'justifying documentation' must mean something more than a

memorandum of costs."). Without receipts, invoices, or other documentation, awarding costs awarding costs would have been an abuse of discretion. *Id.*

The district court's determination that the memorandum of costs provided no additional evidence justifying the costs was not an abuse of discretion.

E. The District Court Applied the Correct Legal Standard in Ruling on the Fee and Costs Motions

In a veiled attempt to avoid the deficiencies in their fee and cost requests, Lewis and Nalder argue that the district court misapplied various statutes and case law. (Lewis AOB at 15-16; Nalder AOB 16.) First, Lewis alleges that the district court misapplied the law of *Cadle Co.,* by holding that in "all cases a memorandum of costs 'that provides no additional justifying documentation or evidence' cannot form the basis for an award of costs."

Lewis misconstrues the district court's findings. Rather, the district court determined that without evidence to determine whether a cost was reasonable, it could not award costs:

> NRS 12.130 provides that "[i]f the claim of the party intervening is not sustained, the party intervening shall pay all costs incurred by the intervention." The

> Nevada Supreme Court has held, however, that "[w]ithout evidence to determine whether a cost was reasonable and necessary, a district court may not award costs." *Cadle Co. v. Woods & Erickson, LLP,* 131 Nev. 114, 121, 345 P.3d 1049, 1054 (2015). Here, the attached memorandum of costs provides no additional justifying documentation or evidence.

(1 App. Lewis 103, Lewis 105). The district court did not err in its application of *Cadle Co*.

Second, Lewis contends that the district court erred in failing to consider an argument Lewis never raised: whether the intervention was brought to "harass" the opposing party. (Lewis AOB at 16.) In the district court, Lewis contended that "the intervention by UAIC into this case was brought without good cause." (1 App. Lewis 86.) Lewis never argued or presented any evidence that UAIC brought its motion to harass Lewis. The district court did not err in its analysis of NRS 18.010(2). *See Millard v. Northland Grp., Inc.*, 2014 WL 6455986, at *2 (D. Nev. Nov. 17, 2014) (finding that conclusory assertions that a party's purpose was to harass does not entitle it to attorney's fees); *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 940–41 (9th Cir. 2007).

Lewis and Nalder further distort the district court's findings and

argue the district court applied the incorrect standard by failing to consider whether the intervention was groundless. (Lewis AOB at 19; Nalder AOB at 17.) Lewis and Nalder appear to contend that the district court only considered whether UAIC acted in bad faith. This argument is simply false. The district court found that "UAIC did not maintain its position without *reasonable ground* or in bad faith." (1 App. Lewis 104, 106; 5 App. 1084 (emphasis added).) The district court further stated that it did not consider UAIC's conduct unreasonable.

> And to some degree, I mean, well, I was obviously reversed by the Court on your writ. The Court finding, you know reasonable ground, tends to suggest that at least the UAIC wasn't acting unreasonable in that – in their conduct.

(5 App. 1089.) Not only did the district court find UAIC's conduct reasonable, it had *agreed* with UAIC's position in initially granting UAIC permission to intervene.

Lewis and Nalder's reliance on *Bergmann v. Boyce*, is also misplaced. 109 Nev. 670, 675, 856 P.2d 560, 563 (1993). In *Bergmann*, this Court held that the denial of attorney fees could not be based on same standard as denial of motion to dismiss. *Id.* This Court emphasized that

in assessing a motion to dismiss, the trial court assumes that the underlying facts support the allegations of the complaint. *Id*. The Court determined that motion for fee analysis depends upon the actual circumstances of the case rather than a hypothetical set of facts favoring plaintiff's averments. *Id*. This Court therefore held that whether a complaint survived a 12(b)(5) motion was not relevant to whether the party was entitled to attorney's fees. *Id*

Here, the district court considered the actual circumstances of the case noting the "unique circumstances of this case and the unique posture of the parties." (5 App. 1098.) It determined that just because the district court erred in permitting intervention in one of the two actions did not make UAIC's initial motion in bad faith. It further found that UAIC's actions demonstrated "vigorous prosecution on behalf of their client." (5 App. 1099.) The district court ultimately found that "UAIC did not maintain its position without *reasonable ground* or in bad faith." (1 App. Lewis 104, Lewis 106; 5 App. 1084 (emphasis added).) Accordingly, the district court did not err in its analysis of NRS 18.010(2).

II.

THE DISTRICT COURT DID NOT ERR IN FINDING UAIC HAD REASONABLE GROUNDS TO INTERVENE

UAIC had reasonable grounds to intervene in the 2007 and 2018 matter. Its positions were taken in good faith and vindicated in relevant part as pertains to the 2018 action by this Court. Indeed, Nalder and Lewis sought rehearing; UAIC did not. The district court did not err in denying Lewis and Nalder fees in appellate proceedings wherein they still resisted the outcome.

A. Awarding Attorney's Fees in this Case Would Have Been an Extraordinary Sanction

Lewis and Nalder demanded that the district court assess attorney's fees in an extraordinary sanction reserved for gross abuses of the appellate process. NRAP 38. Lewis and Nalder relied on NRS 18.010(2)(b) (Lewis AOB at 20; Nalder AOB at 15), ignoring that this Court has expressly rejected that standard for attorney's fees on appeal: "NRS 18.010 does not explicitly authorize attorney's fees on appeal," while "NRAP 38(b) limits attorney's fees on appeal to those instances where an appeal has been taken in a frivolous manner." *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348,

1356–57, 971 P.2d 383, 388 (1998); *see also Breeden v. Eighth Judicial Dist. Court*, 131 Nev. 96, 98, 343 P.3d 1242, 1243–44 (2015) (applying the NRAP 38 "frivolous" standard to writ petitions).

B. The District Court Did Not Err in Finding that UAIC Did Not Maintain Its Position Without Reasonable Grounds or in Bad Faith

Nalder and Lewis argue that the district court erred in finding UAIC did not intervene in bad faith. (Lewis AOB at 20; Nalder AOB at 22.) The limited aspects of the opinion where Nalder and Lewis prevailed relate to issues before Judge Johnson in the 2007 action: whether UAIC could intervene in that action and have this 2018 action consolidated with that 2007 action. And on those issues, UAIC maintained its position in good faith.

UAIC had argued, and Judge Johnson agreed, that the unusual posture of this case—with Nalder and Lewis straining to revive a decade-old judgment—was different from the ordinary case where a party seeks to vacate a facially valid, unexpired judgment. Based on this Court's decisions that an expired judgment is void, *Leven v. Frey*, 123 Nev. 399, 410, 168 P.3d 712, 719 (2007), UAIC believed that in contrast

with a judgment that appears valid on its face, after the time for enforcing a judgment has passed without renewal, "a judgment no longer exists to be renewed." (3 App. 549 (citing *Kroop & Kurland, P.A. v. Lambros*, 703 A.2d 1287, 1293 (Md. Ct. Spec. App. 1998)).) UAIC reconciled this with this Court's 80-year-old decision in *Ryan v. Landis*, 58 Nev. 253, 75 P.2d 734 (1938) (citing *Seattle & N. Ry. Co. v. Bowman*, 102 P. 27, 28–29 (Wash. 1909)), and alternatively argued in good faith for its overruling. (*Id.* at 551, 567.)[4]

[4] UAIC also pointed to other jurisdictions that have allowed an interested party such as an insurer can bring a Rule 60(b) motion to vacate certain judgments against its insureds—even without the insured's consent. *Crawford v. Gipson*, 642 P.2d 248, 249–50 (Okla. 1982) (citing *Kollmeyer v. Willis*, 408 S.W.2d 370 (Mo. Ct. App. 1966)). And UAIC identified a wealth of authority from other jurisdictions interpreting Rule 24 to allow intervention after a final judgment. (5 App. 1057-60.) *See generally* 7C WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1916 & n.23 (3d ed.) (listing cases in nearly every circuit allowing intervention in limited circumstances after a final judgment). *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 458–461 (1940); *Flynt v. Lombardi*, 782 F.3d 963 (8th Cir. 2015); *Blum v. Merrill Lynch Pierce Fenner & Smith Inc.*, 712 F.3d 1349 (9th Cir. 2013); *United States v. City of Detroit*, 712 F.3d 925 (6th Cir. 2013); *In re Lease Oil Antitrust Litig.*, 570 F.3d 244 (5th Cir. 2009*); Tweedle v. State Farm Fire & Cas. Co.*, 527 F.3d 664 (8th Cir. 2008); *Alstom Caribe, Inc. v. Geo. P. Reintjes Co.*, 484 F.3d 106 (1st Cir. 2007); *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091 (10th Cir. 2005); *Acree v. Republic of Iraq*, 370 F.3d 41, 50 (D.C. 2004); *Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994); *United States ex rel. McGough v. Covington Techs. Co.*, 967 F.2d 1391

This Court disagreed that a judgment's expiration merits intervention, but it never found or even suggested that UAIC's argument was frivolous. Specifically, this Court found that intervention in the 2007 case was impermissible but that UAIC properly intervened in the 2018 case. (3 App. 571-96.)

Indeed, this Court in a sense mooted the necessity of intervention

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(9th Cir. 1992); *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470 (9th Cir. 1992); *Ceres Gulf v. Cooper*, 957 F.2d 1199 (5th Cir. 1992); *Officers for Justice v. Civil Serv. Comm'n*, 934 F.2d 1092 (9th Cir. 1991); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424 (10th Cir. 1990); *United States v. Yonkers Bd. of Educ.*, 902 F.2d 213 (2d Cir. 1990); *Grubbs v. Norris*, 870 F.2d 343 (6th Cir. 1989); *Bank of Am. Nat'l Trust & Savs. Ass'n v. Hotel Rittenhouse Assocs.*, 844 F.2d 1050 (3d Cir. 1988); *Fiandaca v. Cunningham*, 827 F.2d 825 (1st Cir. 1987); *Hill v. W. Elec. Co.*, 672 F.2d 381, 387 (4th Cir. 1982); *Brown v. Eckerd Drugs, Inc.*, 663 F.2d 1268, 1278 (4th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982); *Howse v. S/V "Canada Goose I",* 641 F.2d 317 (5th Cir. 1981); *Fleming v. Citizens For Albemarle, Inc.*, 577 F.2d 236 (4th Cir. 1978); *McDonald v. E. J. Lavino Co.*, 430 F.2d 1065 (1970) (reversing denial of insurer's motion to intervene); *Shy v. Navistar Int'l Corp.*, 291 F.R.D. 128 (S.D. Ohio 2013); *Nextel Commc'ns of Mid-Atlantic, Inc. v. Town of Hanson,* 311 F. Supp. 2d 142 (D. Mass 2004); *S. Pac. Co. v. City of Portland*, 221 F.R.D. 637 (D. Or. 2004); *Van Etten v. Bridgestone/Firestone, Inc.*, 117 F. Supp. 2d 1375 (S.D. Ga. 2000), *vacated on other grounds sub nom. Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304 (11th Cir. 2001); *Smith v. Bd. of Election Comm'rs*, 586 F. Supp. 309 (N.D. Ill. 1984); *Wilson v. Sw. Airlines Co.*, 98 F.R.D. 725 (N.D. Tex. 1983); *In re Franklin Nat'l Bank Secs. Litig.*, 92 F.R.D. 468 (E.D.N.Y. 1981); *Armstrong v. Bd. of Sch. Dirs.*, 471 F. Supp. 827, 846 (E.D. Wis. 1979); *New York State ex rel. New York County v. United States*, 65 F.R.D. 10 (D.D.C. 1974).

by clarifying that the amendment of the 2008 default judgment in the 2007 action did not create any new issues, as Judge Johnson had believed. (*Id.*) *See also Eckerson v. C.E. Rudy, Inc.*, 72 Nev. 97, 98–99, 295 P.2d 399, 399–400 (1956) (noting that "it would more accurately be said that there was no pending action to which the intervention might attach"). It was just a ministerial change, leaving the substantive questions for resolution in the 2018 action. (*Id.*)

And even applying the wrong standard in NRS 18.010(2)(b), it is hard to say that UAIC's reason for wanting to intervene—to advance the position (resisted by both Nalder and Lewis) that the 2008 judgment had expired—was unreasonable or for purposes of harassment. In a decision that binds all of the parties here, the Ninth Circuit determined that the judgment had indeed expired and that the parties have waived their chance to argue otherwise. (5 App. 886–88.)

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

rectly rejected Nalder's and Lewis's petitions for rehearing and their requests for their fees. This is not a case for fees, and the district court did not abuse its discretion in denying them.

CONCLUSION

For the foregoing reasons, this court should affirm the district court's orders regarding attorney's fees and costs.

Dated this 19th day of July, 2021.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 29(e) because it contains 6,298 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 19th day of July, 2021.

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