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

RESPONDENT UAIC'S SUPPLEMENTAL APPENDIX
VOLUME 1
PAGES 1–250

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DISTRICT COURT
CLARK COUNTY, NEVADA

CHEYENNE NALDER,

Plaintiff,

vs.

GARY LEWIS; DOES I through V, inclusive,

Defendants.

UNITED AUTOMOBILE INSURANCE COMPANY,

Intervener.

GARY LEWIS,

Third Party Plaintiff,

vs.

UNITED AUTOMOBILE INSURANCE COMPANY; and DOES I through V,

Third Party Defendants.

Case No. 07A549111, *consolidated with* Case No. A-18-772220-C

Dep't No. 20

SUPPLEMENTAL BRIEF *and* CROSS-MOTION FOR SUMMARY JUDGMENT

Hearing Date: May 20, 2020
Hearing Time: 8;30 a.m.

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UAIC opposes plaintiff Cheyenne Nalder's renewed motion for summary judgment. Instead, this Court should grant summary judgment in favor of UIAC on all claims.

SUPPLEMENTAL OPPOSITION TO SUMMARY JUDGMENT

Nalder does not have a valid judgment against Lewis. Their arguments for tolling the statute of limitations on the 2008 default judgment are meritless: as a matter of law, the period for renewing the judgment began running from 2008 and was not interrupted when Lewis—who had counsel in common with Nalder—allegedly left Nevada. Regardless, Nalder would have needed to renew the judgment under NRS 17.214, which she has never done; there is no valid action on the judgment.

I.

THE STATUTE OF LIMITATIONS TO PURSUE RENEWAL OF THE DEFAULT JUDGMENT HAS NOT BEEN EXTENDED OR TOLLED

If a judgment can be renewed through an action on a judgment (which no longer seems to be the case, see argument in Part II below), such an action must be filed within six years. NRS 11.190(1)(b). Nalder did not do so.

In an attempt to circumvent Nalder's failure to properly renew the judgment, Nalder and Lewis raise several contentions for tolling the statute of limitations. This Court should reject these theories.

A. Cheyenne's Status as a Minor at the Time of the Incident is Irrelevant Because Her Guardian Obtained a Judgment

Plaintiff contends that Cheyenne Nalder was a minor when she was injured and that during her minority the statute of limitations was tolled. However, the fact that Cheyenne was a minor when the cause of action giving rise to the default judgment accrued does not toll the deadline to renew the default judgment.

NRS 11.250 provides that the statute of limitations is tolled if the person

entitled to bring the action has not turned 18. NRS 11.250 speaks in terms of "bring[ing]" a cause of action, the "accru[al]" of a cause of action, and "commencement" of a cause of action, all of which do not apply to the renewal of a default judgment resulting from a cause of action that has already been brought. Renewal of a default judgment in order to prevent its expiration does not constitute a cause of action. *See F/S Mfg.g v. Kensmore*, 798 N.W.2d 853, 858 (N.D. 2011) ("Because the statutory procedure for renewal by affidavit is not a separate action to renew the judgment, the specific time period [provided to renew] cannot be tolled under [the equivalent to NRS 11.300] based on a judgment debtor's absence from the state."); *Striegel v. Gross*, No. 2:13-CV-01338-GMN, 2013 WL 5658074, at *2 (D. Nev. Oct. 16, 2013) ("Plaintiff has failed to point to, and the court has not found, any legal authority describing renewal of judgment as a recognized cause of action in Nevada.").

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Moreover, the default judgment was not issued to Cheyenne, but rather to James Nalder. That is because James, on behalf of his daughter Cheyanne, initiated suit against Lewis. James Nalder was not a minor at the time the default judgment expired and so did not have a legal disability that would toll the six-year statute of limitations to renew the default judgment. *In re Nuyen's Estate*, 443 N.E.2d 1099, 1104 (Ill. App. Ct. 1982) (in the absence of some wrongdoing, a minor is bound by a guardian ad litem's actions). It was James Nalder as judgment creditor that had the responsibility to file the affidavit of renewal required by NRS 17.214, and the fact that Cheyenne was a minor at the time is legally irrelevant.

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Additionally, because Cheyenne was not the judgment creditor, anyone looking at the default judgment would know that it expired because there was no affidavit of renewal filed. If this Court were to adopt the argument that Cheyenne's status as a minor extended the deadline to renew the default judgment, the certainty NRS 17.214 was enacted to promote would be frustrated.

For example, if tolling of deadlines to renew judgments were allowed, title to real property owned by anyone who had ever been a judgment debtor would be clouded, as a title examiner would not know whether a judgment issued more than six years prior had expired pursuant to statute, or was still valid, or could be revived when a real party in interest who was a minor reached the age of majority. As this Court held in *Leven v. Frey*, 123 Nev. 399, 168 P.3d 712 (2007), one of the primary reasons for the need to strictly comply with NRS 17.214's recordation requirement is to "procure reliability of title searches for both creditors and debtors since any lien on real property created when a judgment is recorded continues upon that judgment's proper renewal." *Id*. at 719. Compliance with the notice requirement of NRS 17.214 is important to preserve the due process rights of the judgment debtor. *Id*. If a judgment debtor is not provided with notice of the renewal of a judgment, he may believe that the judgment has expired and he need take no further action to defend himself against execution

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B. Lewis's Purported Absence From the State of Nevada Does Not Toll the Statute Because He Was Available for Service

Nalder further contends that the statute of limitations was tolled because NRS 11.300 provides that a "cause of action" against a person is tolled if the person is out of the State, and Lewis allegedly resided out of state. This argument demands both an overly literal and a haphazard approach: the Supreme Court has rejected the literal reading of "out of state," yet plaintiffs also ignore that renewing a judgment is not a "cause of action" to which NRS 11.300 applies, at all. *Striegel v. Gross*, No. 2:13-CV-01338-GMN, 2013 WL 5658074, at *2 (D. Nev. Oct. 16, 2013) (finding no basis on which to conclude that renewal of judgment is a cause of action). As Lewis was actually represented by Nalder's attorney, Mr. Christensen, there was no impediment to service.

1. NRS 11.300 Does Not Apply Where the Defendant's Absence from Nevada Does Not Debilitate the Plaintiff

NRS 11.300 is a rule of disability, not residency. The Supreme Court has long abandoned the idea that a defendant's absence automatically tolls the statute of limitations. *Simmons v. Trivelpiece*, 98 Nev. 167, 168, 643 P.2d 1219, 1220 (1982) (overruling 19th-century cases); *Bank of Nev. v. Friedman*, 82 Nev. 417, 420 P.2d 1 (1966); *Cal-Farm Ins. Co. v. Oliver*, 78 Nev. 479, 482, 375 P.2d 857, 858 (1962). The Court instead recognizes that the defendant's presence in the state is not always necessary to prosecuting the action, and in those circumstances, NRS 11.300 does not apply. *Simmons v. Trivelpiece*, 98 Nev. 167, 168, 643 P.2d 1219, 1220 (1982).

Under the modern rule, NRS 11.300 applies only when the plaintiff is "unable to bring a particular defendant into court." *Seely v. Illinois-California Exp., Inc.*, 541 F. Supp. 1307, 1311 (D. Nev. 1982). If the plaintiff is able to secure relief against an out-of-state defendant, NRS 11.300 does not apply.

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2. NRS 11.300 Does Not Apply to Renewal

Now that the Legislature has provided a means for renewing a judgment via affidavit and recording—without having to serve an out-of-state defendant—NRS 11.300 does not apply to judgment renewals.

As the Supreme Court of North Dakota, a state with similar statutes to Nevada regarding judgments, held in *F/S Manufacturing v. Kensmore*, "[b]ecause the statutory procedure for renewal by affidavit is not a separate action to renew the judgment, the specific time period [provided to renew] cannot be tolled under [the equivalent to NRS 11.300] based on a judgment debtor's absence from the state." 798 N.W.2d at 858. *See also Mandlebaum*, 24 Nev. at 158-161 (holding, in relevant part, that the judgment debtor's absence from the State of Nevada did not toll the statutory right of execution on a prior judgment under Nevada law); *Blackburn v. Blackburn*, 113 Misc. 2d 619, 625, 449

N.Y.S.2d 827, 832 (Sup. Ct. 1982) (noting that tolling provision related "to causes of action where personal service or its legal substitute is required in the bringing of an action. It has no reference to, nor does it repeal, the plain provisions of the statute in respect to dormant judgments. . . . Therefore defendant's absence did not toll the statute." (internal quotation marks and citations omitted)).

3. Lewis Was Amenable to Service

Furthermore, Lewis' alleged absence from the State of Nevada did not impede Nalder from attempting to execute the default judgment or comply with the requirements for renewal under NRS 17.214. *See Angell v. Hallee*, 2012 ME 10, ¶ 9, 36 A.3d 922, 925 (Me. 2012) (citing Maine's similar statute providing that, if a person is absent from and resides out of the state after a cause of action has accrued against him, the time of his absence shall not be taken as part of the time limited for commencement of the action does not operate to toll the limitations period for any portion of the period during which the plaintiff could, through reasonable effort, find and serve the defendant by any means other than publication); *Youngblood-W. v. Aflac Inc.*, 796 F. App'x 985 (11th Cir. 2019) (noting that plaintiff was not entitled to statutory tolling based on Dr. Amos's relocation to Florida, because she knew how to serve him with process after having earlier settled claims against him); *Cortes v. Cotton*, 626 A.2d 1306, 1309 (Conn. Ct. App. 1993) (the purpose of tolling statute is to preserve a right of action during the absence of the defendant when it is impossible to serve him with process.)

Here, Nalder and her counsel Mr. Christensen were well aware of Lewis' location in California and assuredly would have had no difficulty serving Lewis with process in California. For example, as early as March of 2010, Lewis' executed verified answers to interrogatories through Mr. Christensen's office that

provided his address in California. Thus, as early as four years before the expiration of the default judgment, Nalder and his counsel were well aware of Mr. Lewis' location in California and fully capable of taking the necessary steps to prevent expiration of the default judgment under the requirements of NRS 11.190 and NRS 17.214. Because Lewis was "otherwise subject to service of process," Nalder was not disabled from renewing her judgment; NRS 11.300 offers no refuge. *Simmons v. Trivelpiece*, 98 Nev. 167, 168, 643 P.2d 1219, 1220 (1982)

Any reliance on this Court's holding in *Mandlebaum* that the judgment creditor's and assignee's action was timely brought because the statute of limitations was tolled due to the judgment debtor's absence from the State of Nevada, is again misplaced because, as discussed at length above, the underlying action herein is not an action on the judgment sufficient to satisfy the requirements of NRS 11.190.

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Nalder and his counsel Mr. Christensen were not prevented from pursuing an action on the judgment against Lewis due to his absence from the State of Nevada because they were aware of his location in California and would have had no difficulty serving Lewis with process in California, pursuant to NRCP 4(e)(2). *See, e.g., Simmons*, 98 Nev. at 168, 643 P.2d at 1219.

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4. Lewis and Nalder Have the Same Lawyer, Mr. Christensen

Lewis and Nalder cannot claim that Nalder could not serve Lewis in California when they were represented by the same lawyer, Tom Christensen. Mr. Christensen not only filed documents in a representational capacity for Lewis, in one paper he even proclaimed that Lewis could be contacted "c/o" Tom Christensen. (*See* Ex. F to Opp., filed 12/20/2018, at 1.) When a party indicates that service can be accomplished through their mutual lawyer, both parties are estopped from denying it.

5. Questions of Fact Remain about Lewis's Presence in California and his Susceptibility to Service through Mr. Christensen

These facts are sufficient to defeat tolling as a matter of law. But in no case could this Court grant Nalder summary judgment without discovery into the circumstances of Lewis's alleged absence from the state, including any coordination that Lewis or his counsel had with Nalder or her counsel. NRCP 56(d). Further discovery is needed into the nature of the relationship between the parties and their attorney.

C. The Judgment Based on Sister-State Judgment Obtained by Nalder Against Lewis in California is Invalid

Plaintiff contends that Nalder domesticated the judgment in California. However, the Nevada default judgment had expired as a matter of Nevada law at the time Nalder domesticated the judgment in California. Accordingly, the California judgment is just as invalid as the Nevada judgment on which it is based. *See* CAL. CODE CIV. PROC. § 1710.40 ("A judgment entered pursuant to this chapter may be vacated on any ground which would be a defense to an action in this state on the sister state judgment[.]").[1] Therefore, the statute of limitations on such judgments in California is irrelevant, inapplicable, and immaterial.

Nalder, moreover, has done nothing to enforce the California "judgment" in Nevada, even against Lewis. Still less have Nalder and Lewis shown that

[1] *See also Conseco Mktg., LLC v. IFA & Ins. Servs., Inc.*, 164 Cal. Rptr. 3d 788, 793–94 (Cal. Ct. App. 2013) (holding that a judgment that is void in the sister state is "vulnerable to direct or collateral attack at any time" (quoting *People v. American Contractors Indemnity Co.*, 93 P.3d 1020, 1024 (Cal. 2004))); *Leven v. Frey*, 123 Nev. 399, 409, 168 P.3d 712, 719 (2007) (holding that a judgment's expiration renders it void); *cf. generally Kroop & Kurland, P.A. v. Lambros*, 703 A.2d 1287, 1293 (Md. Ct. Spec. App. 1998) (holding that after the time for enforcing a judgment has passed without renewal, "a judgment no longer exists to be renewed").

that "judgment"—entered with Lewis's cooperation long after Lewis the Nevada judgment expired—is a consequential damage of UAIC's breach of the duty to defend so as to make it enforceable against UAIC.

D. UAIC's Payment of a Separate Judgment Were Not Payments Towards the Default Judgment

Nalder alleges that UAIC made three payments of the judgment and these payments extend the statute of limitations pursuant to NRS 11.200. This is false. UAIC's paid its policy limits after the federal district court, in the bad-faith action before it, determined that there was coverage. On October 30, 2013 the federal district court granted Nalder's motion for summary judgment in part, finding that the insurance renewal statement contained an ambiguity. (ECF No. 102, Ex. A.) The Court directed UAIC to pay Nalder the policy limits on Lewis's implied insurance policy. *Id*. Thereafter, UAIC paid Nalder the $15,000 policy limits.[2] (Ex. B.)

UAIC's satisfaction of the underlying judgment shows nothing more than that the federal district court found coverage for Lewis' accident under an implied insurance policy, and that the judgment obligated UAIC to pay the policy limits of Lewis' policy. *See Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 275 (1935).

Because the bad-faith lawsuit was not an action upon the default judgment against Lewis, UAIC did not acknowledge the validity of the default judgment by satisfying the judgment entered against it by the district court. As such, UAIC's satisfaction of the judgment based on breach of the duty to defend

[2] While the federal district court also ordered UAIC to pay fees and costs (ECF 132, Ex. C), there is no dispute that that payment is not an acknowledgment of the underlying default judgment. Indeed, Lewis argues in its Countermotion for Summary Judgment that "UAIC has not paid any amount of the judgment, with the exception of the $15,000 it was ordered to pay after Mr. Lewis brought an action against it." Opposition to UAIC's Motion to Dismiss and Countermotion for Summary Judgment filed November 27, 2018.

cannot extend the life of a default judgment previously entered in a *wholly separate* proceeding of which UAIC was not even a party. This in no way can be considered an acknowledgment of the default judgment's continuing validity. Nalder cannot prove any circumstances that tolled or extended the statute of limitations. Accordingly Nalder is not entitled to partial summary judgment in her favor.

E. Nalder Waived the Arguments She Is Trying to Raise Now

Nalder and Lewis also waived the tolling arguments in the federal suit against UAIC, and they cannot evade that waiver by asking this Court to reach a different result.

If a party thinks that questions certified to the Nevada Supreme Court will not be determinative, that party needs to object to certification before the Supreme Court accepts and answers the questions. That's because the Nevada Supreme Court's "review is limited to the facts provided by the certification order." *Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.*, 345 P.3d 1040, 1041 (Nev. 2015) (quoting *In re Fontainebleau Las Vegas Holdings*, 289 P.3d 1199, 1207 (Nev. 2012) (*Fountainebleau II*)). "[T]he place to voice [a factual] objection" is in the certifying court. *In re Fontainebleau Las Vegas Holdings*, 267 P.3d 786, 795 (Nev. 2011) (*Fontainebleau I*) (quoting *Puckett v. Rufenacht Bromagen & Hertz*, 587 So. 2d 273, 277 (Miss. 1991)). After the Nevada Supreme Court answers the certified question, it is too late to challenge the answers or the record on which certification was based. *Reinkemeyer v. SAFECO Ins. Co. of Am.*, 166 F.3d 982, 984 (9th Cir. 1999).[3]

[3] In a similar circumstance, the D.C. Circuit rejected an attempt, after the Indiana Supreme Court answered a certified question, to attack Indiana law as unconstitutional.

> [L]itigants must raise their claims on their initial appeal and not in subsequent hearings following a remand. . . . This is a specific application of the general waiver rule, which bends

When UAIC moved for a dismissal based on the expiration of the judgment, Nalder and Lewis opposed on narrow grounds. Nowhere in their opposition did Nalder and Lewis raise any other mechanism for tolling the statute of limitations. That is why the Ninth Circuit determined that "the statute of limitations has passed and that they have failed to renew the judgment," *Nalder v. UAIC*, 878 F.3d 754, 757 (9th Cir. 2017), and why the Nevada Supreme Court rebuffed Nalder's invitation to reopen that question and rejected her petition for rehearing on that basis. (Order Answering Certified Questions, at 6, Ex. D ("[W]e accept the facts as given and therefore will not second-guess the [Ninth Circuit's] assumption that the statute of limitations has otherwise run on the default judgment.").)

This Court lacks jurisdiction to go beyond the scope of the federal suit and cannot consider the waived tolling arguments.

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II.

NEVADA NO LONGER RECOGNIZES A COMMON LAW METHOD OF RENEWING A JUDGMENT

A common law action on the judgment no longer exists in Nevada after the adoption of the judgment renewal procedure under NRS 17.214. *Nalder vs. United Auto. Ins. Co*, No. 70504 WL 5260073, 449 P.3d 1268 (Nev. 2019) (concurrence) (noting that "[t]his court's opinion in *Leven v. Frey*, 123 Nev. 399, 402 n.6, 168 P.3d 712, 714 n.6 (2007), can be read to indicate that a common law action of the judgment does not exist"); *Worsnop v. Karam*, No. 77248, 2020 WL

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only in "exceptional circumstances, where injustice might otherwise result."

Eli Lilly & Co. v. Home Ins. Co., 794 F.2d 710, 717 (D.C. Cir. 1986) (quoting *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1085 (D.C. Cir. 1984)) (other internal citations omitted). Because the appellants had not raised the constitutional attack in the D.C. Circuit *before* certification (they first raised the issue in a petition for rehearing to the Indiana Supreme Court), the appellants waived the issue. *Id.*

970368, 458 P.3d 353 (Nev. Feb. 27, 2020) (unpublished) (reversing the district court's determination that judgment had been statutorily renewed).

A judgment in Nevada automatically expires by operation of law six years following its issuance pursuant to NRS 11.190. *Cf.* NRS 21.010 ("[T]he party in whose favor judgment is given may, at any time before the judgment expires, obtain the issuance of a writ of execution for its enforcement as prescribed in this chapter. The writ ceases to be effective when the judgment expires."); *Trubenbach v. Amstadter*, 109 Nev. 297, 849 P.2d 288, 300-01 (1993) ("Under Oklahoma law, a judgment becomes unenforceable when the judgment creditor does not execute on it within five years."). To keep a judgment from expiring, the judgment creditor has to renew it. Nevada recognizes just one method of renewal of the original judgment: the statutory renewal procedure in NRS 17.214.

Some states recognize a second method via an action on the original judgment, which allows a judgment creditor, "when the limitations period has almost run on the judgment, to obtain a new judgment that will start the limitations period anew." *Salinas v. Ramsey*, 234 So. 3d 569, 571 (Fla. 2018). But in a recent unpublished opinion, the Nevada Supreme Court held that the district court did not err when it determined that the *only* method to renew a judgment is under NRS 17.214. *Worsnop v. Karam*, No. 77248, 2020 WL 970368, 458 P.3d 353 (Nev. Feb. 27, 2020) (unpublished) (reversing the district court's determination that judgment had been statutorily renewed).

Here, Nalder does not dispute that she failed to renew the default judgment under NRS 17.214. Instead, Nalder contended that her suit was an "action on the judgment." Nevada does not recognize a common law action to renew judgments after NRS 17.214 was enacted. Even if it did, the Supreme Court unanimously held that Nalder's underlying bad faith and breach of contract action is not an action to renew the judgment. By the time Nalder got around to filing this new action purportedly "on the judgment" in 2018, there remained no

valid judgment to enforce.

A. Nevada Does Not Recognize a Common-Law Action on the Judgment

There is no common law method to renew a judgment.[4] *See Worsnop*, No. 77248, 2020 WL 970368 at *2, 458 P.3d 353 (holding that the district court did not err when it determined that the only method to renew his judgment was under NRS 17.214); *see also Striegel v. Gross*, No. 2:13-CV-01338-GMN, 2013 WL 5658074, at *2 (D. Nev. Oct. 16, 2013) ("Nevada courts appear to agree that section 17.214 lacks language to support a separate cause of action for renewal of judgment."). Judgment renewal proceedings are purely statutory in nature and courts cannot deviate from the legislatively mandated conditions for renewal. *Id.; see also Leven v. Frey*, 123 Nev. 399, 409, 168 P.3d 712, 719 (2007).

The Nevada Supreme Court, in answering the certified question from the Ninth Circuit, unanimously decided that Nalder had not filed any "action upon the judgment." And three concurring Justices went even farther, noting that the Court's opinion in *Leven v. Frey,* 123 Nev. 399, 402 n.6, 168 P.3d 712, 714 n.6 (2007), can be read to indicate a common law method to renew the judgment no longer exists. *Nalder*, No. 70504 WL 5260073 at *3, 449 P.3d 1268 (Nev. 2019). In *Leven*, the Nevada Supreme Court thoroughly reviewed NRS 17.214's legislative history for when it was first enacted in 1985 and amended in 1995.

[4] UAIC raised this issue in oral argument on multiple occasions. Further, UAIC never conceded the validity of an action on the judgment. The argument (which the Supreme Court accepted) that the bad faith lawsuit was not an action on the judgment was sufficient to defeat Nalder's and Lewis's claim of renewal. The abolishment of that action is an alternative ground for the same relief. Further, this Court permitted supplemental briefing and although UAIC contends the issues are pending before the Ninth Circuit, UAIC is permitted to raise any defenses, including that an action on the judgment doesn't exist. *See Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008), holding modified by *Weddell v. Sharp*, 131 Nev. 233, 350 P.3d 80 (2015) (noting that for preclusion to apply there must be a final judgment).

Id. at 404-405, 168 P.3d at 716. In doing so, the Court concluded: "The legislative history indicates that NRS 17.214's enactment was intended to establish a procedure for judgment renewal to allow judgment creditors additional time to collect payment after the original judgment expired." *Id.* at 404, 168 P.3d at 716 (citing Hearing on A.B. 500 Before the Senate Judiciary Comm., 63rd Leg. (Nev., May 14, 1985)).

Prior to the enactment of NRS 17.214 in 1985, the statute of limitations for an action upon a judgment was six years pursuant to NRS 11.190(1)(a) and therefore the statute of limitations for renewing a judgment was also six years. *Polk v. Tully*, 97 Nev. 27, 28 & n.1, 623 P.2d 972, 972 & n.1. (1981). In *Polk*, the judgment creditor was not able to collect on his judgment and six years had passed. *Id.*, 623 P.2d at 972 & n.1. Because there was no clear procedure for renewing a judgment, the judgment creditor filed a timely complaint before the expiration of the six year time period to renew the judgment. *Id.* at 28, 972 P.2d at 972. Recognizing that "[t]he proper procedure for reviving a judgment in Nevada is not clear[,]" this Court concluded that the procedure followed by the judgment creditor was proper. *Id.* at 29, 972 P.2d at 973. In doing so, the Court further noted that "[i]n many states the revival of judgments is provided for by statute." *Id.*, 972 P.2d at 972-973.

In a recent decision, the Nevada Supreme Court found the district court did not err when it determined that the only method to renew his judgment was under NRS 17.214. In *Worsnop*, respondent filed a motion and supporting affidavit to renew his 2011 judgment against appellants. *Worsnop*, 458 P.3d at 353. The district court granted the motion. *Id.* Appellants filed a motion to set aside the renewed judgment and to declare the expired judgment void, arguing that respondent failed to comply strictly with the express terms of NRS 17.214. *Id.* Respondent alleged that he properly used the alternative common law method for renewing his judgment. *Id.* The district court determined that respondent

was required to renew his judgment in accordance with NRS 17.214. *Id.*

The Nevada Supreme Court noted that a judgment creditor may renew an unpaid judgment by using the renewal process established by the Legislature. *Id.* The Court recognized that it previously acknowledged a judgment creditor may sue a judgment debtor on an unpaid judgment by filing a common law action upon the judgment, however the Court noted that such an action does not *renew* the judgment but instead results in a new judgment in the amount still owed. *Id.* (citing *Mandlebaum v. Gregovich*, 24 Nev. 154, 161, 50 P. 849, 851 (1897)). The Court found respondents argument that there is a common law method to *renew a judgment* unpersuasive. *Id.*; *see also Leven v. Frey,* 123 Nev. 399, 402 n.6, 168 P.3d 712, 714 n.6 (2007) (noting that NRS 17.214 superseded the Court's decision in *Polk v. Tully*, 97 Nev. 27, 623 P.2d 972 (1981), which held that in the absence of a statute, a proceeding to revive a money judgment may be via a complaint filed in the same case number as the original judgment). As in the Supreme Court's answers to the certified questions here, the Supreme Court did not need to decide whether a common-law action on the judgment exists—even to create a new judgment—because the judgment creditor had not properly filed such an action. *Id.*[5]

The subsequent enactment of NRS 17.214 unequivocally sets forth the *only* proper mechanism by which a judgment creditor can renew a judgment. *See Worsnop*, 458 P.3d at 353; *Leven*, 123 Nev. at 402 n.6, 168 P.3d at 714 n.6; *see also Davidson v. Davidison*, Nev.___, ___, 382 P.3d 880, 884 (2016) ("NRS

[5] Any action on the judgment, if it exists, would have needed to be filed within six years of Nalder's 2008 judgment, making Nalder's 2018 "action on the judgment" untimely. But it is not just untimely; it is also procedurally improper as discussed in *Worsnop*: "[A] judgment creditor may revive a judgment by filing a complaint *in the same case number* as the original judgment." *Id.* at *2 n.1 (emphasis added) (citing *Polk v. Tully*, 97 Nev. 27, 29, 623 P.2d 972, 973 (1981)). Nalder's 2018 action, however, was not filed in the same case number.

17.214 allows a judgment creditor to renew a judgment and avoid the harsh results that could accompany the expiration of the statute of limitations").

The concurring Justices in the certified questions are correct: as *Leven* indicates, there is no "action upon the judgment" in Nevada.

B. Nalder Did Not Strictly Comply with NRS 17.214

NRS 17.214 establishes a statutory procedure for judgment renewal that must be followed. It provides that a judgment creditor or a judgment creditor's successor in interest may renew a judgment which has not been paid by (1) filing an affidavit with the clerk of the court where the judgment is entered and docketed or (2) if the judgment is recorded, recording the affidavit of renewal in the office of the county recorder. NRS 17.214 "includes no built-in grace period or safety valve provision." *Leven*, 123 Nev. at 407, 168 P.3d at 718. The timing requirements of NRS 17.214 "must be complied with strictly." *Id.* at 408, 168 P.3d at 718.

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Here, it is undisputed that Nalder failed to renew the default judgment pursuant to the terms of NRS 17.214. Indeed, Nalder concedes that she failed to renew the default judgment pursuant to the terms of NRS 17.214. Rather, she contends she renewed the judgment through the bad-faith action against UAIC. The Nevada Supreme Court expressly rejected this argument. (Order Answering Certified Questions, at 4–6, Ex. D.)

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C. Even if Nevada Recognized a Common-Law Method to Renew the Judgment, Plaintiffs' Bad Faith Lawsuit is Not an Action on the Default Judgment

The Supreme Court previously held that 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. In states where it exists, an action upon a judgment is one that seeks to collect upon a debt owed. *See, e.g., Fid. Nat'l Fin. Inc. v. Friedman*, 225 Ariz. 307, 310, 238 P.3d 118, 121 (2010)

("Our post-statehood case law confirms that every judgment continues to give rise to an 'action to enforce it, called an action upon a judgment.' . . . As was true at common law, the defendant in an action on the judgment under our statutory scheme is generally the judgment debtor, and the amount sought is the outstanding liability on the original judgment.") (internal citations omitted and emphasis added); *Ewing v. Jennings,* 15 Nev. 379; 382 (1880) (addressing what facts are sufficient to state a cause of action upon a judgment); It is "not simply an action in some way related to the earlier judgment, but rather a specific form of suit-the common law action *on* a judgment." *Fid. Nat'l Fin. Inc. v. Friedman,* 238 P.3d 118, 121 (Ariz. 2010). This is because the goal of an action upon a judgment is to recover the amount left unsatisfied from the original judgment, not to litigate new claims against a new party. *See id.* ("[T]he defendant in an action on the judgment ... is generally the judgment debtor, and the amount sought is the outstanding liability on the original judgment."); 47 AM. JUR. 2D *Judgments* § 723 ("The main purpose of an action on a judgment is to obtain a new judgment which will facilitate the ultimate goal of securing the satisfaction of the original cause of action.").

In Nevada, there is no common law method to renew a judgment. Even if it did recognize a common law method, however, the Nevada Supreme Court has already found that the action against UAIC was not an action to collect on the default judgment. The default judgment was entered against Lewis after Nalder, on behalf of his daughter Cheyenne, initiated suit against Lewis in Nevada state court for injuries sustained by Cheyenne when she was run over by Lewis' truck in July of 2007. Thereafter, Nalder and Lewis filed suit against UAIC in Nevada state court, alleging claims for breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, fraud and breach of section 686A.310 of the Nevada Revised Statutes. Nalder and Lewis alleged that UAIC had not been reasonable in its insurance coverage determination.

UAIC was not a judgment debtor of the default judgment. In fact, prior to commencing the underlying action, Nalder did not hold any judgment against UAIC on which they could bring an action. Instead, Nalder and Lewis sought to have a judgment entered against UAIC for the first time in the bad faith action. Nalder otherwise failed to renew the judgment pursuant to the terms of NRS 17.214. Accordingly, the default judgment has expired as a matter of law and can no longer serve as evidence for Lewis's claims of damage allegedly caused by UAIC's breach of the duty to defend.

CROSS-MOTION FOR SUMMARY JUDGMENT

UAIC is entitled to summary judgment as a matter of law. Nevada does not recognize a common law action to renew judgments after the legislature enacted NRS 17.214. Nalder does not contest that she failed to renew the default judgment pursuant to the terms of NRS 17.214. Furthermore, Nalder has failed to demonstrate the statute of limitations to renew the judgment was tolled or extended. Accordingly, UAIC is entitled to summary judgment in its favor.

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A. The Deadline to Renew the Judgment Was Not Tolled By Any Statute or Rule

The renewal of a judgment is not a cause of action. *Striegel*, No. 2:13-CV-01338-GMN, 2013 WL 5658074, at *2 (D. Nev. Oct. 16, 2013) ("Plaintiff has failed to point to, and the court has not found, any legal authority describing renewal of judgment as a recognized cause of action in Nevada."). The statutes Nalder relies upon apply to causes of action. As such, her arguments fail as a matter of law.

Finally, any reliance on the Court's holding in *Mandlebaum* that the statute of limitations were tolled due to the judgment debtor's absence from the State of Nevada is misplaced. The action against UAIC is not an action of the judgment. Furthermore, NRS 11.300, the statute plaintiffs rely upon, "does not apply when the absent defendant is otherwise subject to service of process."

Simmons, 98 Nev. 167, 168, 643 P.2d 1219, 1220 (1982).

B. Nevada Does Not Recognize a Common Law Action on the Judgment

As discussed, a common law action on the judgment no longer exists in Nevada after the adoption of the judgment renewal procedure under NRS 17.214. *Nalder vs. United Auto. Ins. Co*, No. 70504 WL 5260073, 449 P.3d 1268 (Nev. 2019) (concurrence) (noting that This court's opinion in *Leven v. Frey*, 123 Nev. 399, 402 n.6, 168 P.3d 712, 714 n.6 (2007), can be read to indicate that a common law action of the judgment does not exist). The only method to renew the judgment was under NRS 17.214. *See Worsnop*, No. 77248, 2020 WL 970368 at *2, 458 P.3d at 353. The legislative history indicates that NRS 17.214's enactment was intended to establish a procedure for judgment renewal to allow judgment creditors additional time to collect payment after the original judgment expired. *Leven*, 123 Nev. at 404-405, 168 P.3d at 716 (citing Hearing on A.B. 500 Before the Senate Judiciary Comm., 63rd Leg. (Nev. May 14, 1985)). Accordingly, the subsequent enactment of NRS 17.214 sets forth the only proper mechanism by which a judgment creditor can renew a judgment. *See Worsnop*, No. 77248, 2020 WL 970368 at *2, 458 P.3d at 353; *Leven*, 123 Nev. at 402 n.6, 168 P.3d at 714 n.6.

Here, Nalder does not contest that she did not renew the judgment pursuant to NRS 17.214. However, the only method to renew a judgment is under NRS 17.214.

Even taking the evidence in the light most favorable to Nalder, the statute of limitations was not tolled or extended. The judgment expired and accordingly, UAIC is entitled to summary judgment in its favor.

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CONCLUSION

For these reasons, this Court should deny Nalder's motion for summary judgment and grant summary judgment in favor of UAIC.

Dated this 8th day of April, 2020.

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CERTIFICATE OF SERVICE

I certify that on April 8, 2020, I served the foregoing "SUPPLEMENTAL BRIEF AND CROSS-MOTION FOR SUMMARY JUDGMENT" through the Court's electronic filing system to the following counsel:

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EXHIBIT A

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EXHIBIT A

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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

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

BACKGROUND

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

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

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

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

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

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

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

[1] Record citations omitted.

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

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

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

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

(*Id.* at 7-9).

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

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

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

The pending motions now follow.

LEGAL STANDARD

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

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

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

DISCUSSION

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

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

A. Ambiguous Contract

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

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

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

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

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

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

B. Bad Faith

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

(*Id.*).

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

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

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

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

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

C. Pre and Post-Judgment Interest

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

The Clerk of the Court shall enter judgment accordingly.

Dated this 30th of October, 2013.

United States District Judge

EXHIBIT B

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EXHIBIT B

UNITED AUTOMOBILE INSURANCE COMPANY DETACH AND RETAIN THIS STATEMENT

DATE: 11/01/13 CHECK#: 0956661 CHECK AMOUNT: $ *****15,000.00
POLICY#: NVA -030021926 LOSS DATE: 7/08/07 ADJ: V03
PAYEE: Christensen Law Office
& James Nalder, Guardian Ad Litem for minor Cheyanne Nalder
FULL AND FINAL SETTLEMENT OF ALL CLAIMS

CLAIM #: 0006000455 Claimant: 002 - CHEYANNE NALDER
Unit # : 001 - 96 CHEV PICKUP1500 Coverage: BI - BODILY INJURY
REASON:

ATKIN WINNER AND SHERROD
1117 S RANCHO DR
LAS VEGAS NV 89102-2216

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EXHIBIT C

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EXHIBIT C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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

Plaintiffs,

vs.

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

Defendants.

2:09-cv-1348-RCJ-GWF

ORDER

On October 30, 2013, the Court entered summary judgment in this case, which arises out of an automobile accident. Defendant has moved for attorney fees (ECF No. 104), and Plaintiffs have filed a countermotion, seeking attorney fees, costs, and prejudgment interest, (ECF No. 106). Defendant has also moved to strike an affidavit filed in support of Plaintiffs' motion, (ECF No. 108), and to strike Plaintiffs' subsequently filed errata, (ECF No. 127). For the reasons stated herein, the Court grants in part and denies in part Plaintiffs' motion. Defendant's motion for attorney fees is denied in the entirety, and the motions to strike are denied as moot.

I. Facts and Procedural History

In July 2009, Defendant United Automobile Insurance Company ("Defendant" or "UAIC") filed a petition for removal based on diversity jurisdiction. (Pet. for Removal, ECF No. 1, at 1–2). Defendant attached Plaintiffs James Nalder, guardian ad litem for minor Cheyanne Nalder, real party in interest, and Gary Lewis's (collectively "Plaintiffs") complaint which had been filed in Nevada's Eighth Judicial District. (Compl., ECF No. 1, at 5–16).

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The complaint alleged the following: Lewis was the owner of a 1996 Chevy Silverado and had an automobile insurance policy with Defendant on July 8, 2007. (*Id.* at 6). On July 8, 2007, Lewis drove over the top of Cheyanne while Cheyanne was a pedestrian in a residential area, causing Cheyanne serious personal injuries. (*Id*. at 7). Cheyanne made a claim to Defendant for damages and offered to settle the claim within the policy limits. (*Id*.). Defendant refused to settle and denied the claim, contending that Lewis did not have coverage at the time of the accident. (*Id*.). Defendant was required to provide insurance coverage under the policy. (*Id*. at 9). Defendant never informed Lewis that Cheyanne was willing to settle the claim for the sum of $15,000, the policy limit. (*Id*.). Due to the dilatory tactics and failure of Defendant to protect its insured, Cheyanne filed a complaint on October 9, 2007 against Lewis for her personal injuries and damages. (*Id*.). Cheyanne procured a default judgment in the amount of $3,500,000 against Lewis. (*Id*.). Plaintiffs alleged breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, breach of NRS 686A.310, and fraud against Defendant. (*Id*. at 9–14).

In March 2010, Defendant moved for summary judgment on all claims. (*See* Mot. Summ. J., ECF No. 17). In December 2010, Judge Reed issued an order granting Defendant's motion in the entirety. (Order, ECF No. 42, at 13). The order provided the following factual history:

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

(*Id.* at 2–3).[1]

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

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

> Plaintiffs contend that Lewis was covered under an insurance policy on July 8, 2007, the date of the accident, because Lewis' payment on July 10, 2007 was timely. Plaintiffs rely on the sentence "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy" contained in the renewal statement. Defendant contends that "expiration of your policy" did not refer to the expiration date of the renewal policy listed on the renewal statement, but to the expiration of Lewis' current policy, which coincided with the listed due date on the renewal statement. Plaintiffs contend that Lewis reasonably believed that while there was a due date on which UAIC preferred to receive payment, there was also a grace period within which Lewis could pay and avoid any lapse in coverage.
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> The renewal statement cannot be considered without considering the entirety of the contract between Lewis and UAIC. Plaintiff[s] attached exhibits of renewal statements, policy declarations pages, and Nevada automobile insurance cards issued by UAIC for Lewis. The contract, taken as a whole, cannot reasonably be interpreted in favor of Plaintiffs' argument.
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> Lewis received a "Renewal Policy Declarations" stating that he had coverage from May 31, 2007 to June 30, 2007 at 12:01 A.M. (Pls' Opp., Exhibit A at 29 (#20-1); Pls' Supp., Exhibit A at 11-12 (#26-1); Pls' Supp., Exhibit A at 15 (#26-1).) The declarations page stated that "[t]his declaration page with 'policy provisions' and all other applicable endorsements complete your policy." (Pls' Opp., Exhibit A at 29 (#20-1).) Lewis also received a Nevada Automobile Insurance Card issued by UAIC stating that the effective date of his policy was May 31, 2007, and the expiration date was June 30, 2007. (*Id.* at 30; Pls' Supp.,

[1] Record citations omitted.

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> Exhibit A at 11-12 (#26-1).) The renewal statement Lewis received in June must be read in light of the rest of the insurance policy, contained in the declarations page and also summarized in the insurance card.
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> "In interpreting a contract, 'the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself.'" *Anvui, LLC v. G.L. Dragon, LLC*, 163 P.3d 405, 407 (Nev. 2007). Plaintiffs contend that there was a course of dealing between Lewis and UAIC supporting a reasonable understanding that there was a grace period involved in paying the insurance premium for each month-long policy. In fact, the so-called course of dealing tilts, if at all, in favor of Defendant. Lewis habitually made payments that were late. UAIC never retroactively covered Lewis on such occasions. Lewis' new policy, clearly denoted on the declarations page and insurance cards Lewis was issued, would always become effective on the date of the payment.
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> Plaintiffs point to the fact that in April 2007, Lewis was issued a revised renewal statement stating that the renewal amount was due on May 6, 2007, a date after the effective date of the policy Lewis would be renewing through the renewal amount. This isolated occasion occurred due to the fact that Lewis added a driver to his insurance policy, resulting in an increase in the renewal amount, after UAIC had previously sent a renewal notice indicating that a lower renewal amount was due on April 29, 2007. UAIC issued a revised renewal statement dated April 26, 2007, and gave Lewis an opportunity to pay by May 6, 2007, instead of April 29, 2007, when the original renewal amount had been due upon expiration of his April policy. In that case, Lewis made a timely payment on April 28, 2007, and therefore there is not a single incident Plaintiffs can point to in which Lewis was retroactively covered for a policy before payment was made, even in the single instance UAIC granted him such an opportunity due to a unique set of circumstances.

(*Id*. at 7–9).

Plaintiffs appealed. (Notice of Appeal., ECF No. 46). In a two-page memorandum disposition, the Ninth Circuit held, *inter alia*, the following:

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

(Ninth Cir. Mem. Dispo., ECF No. 82, at 2–3).

The parties then filed cross-motions for summary judgment. (Pls.' Mot. Summ. J., ECF No. 88; Def.'s Mot. Summ. J., ECF No. 89). In an order dated October 30, 2013, this Court granted in part and denied in part Plaintiffs' motion. (ECF No. 102). Specifically, the Court granted summary judgment as to the existence of coverage, finding that the insurance renewal statement contained an ambiguity that must construed in favor of coverage during the time of the accident. (*Id.* at 10.). The Court denied Plaintiffs' motion as to the remaining bad faith claims and granted Defendant's countermotion as to all of the extra-contractual claims. (*Id.*). The Court then directed Defendant to pay Nalder the policy limits and ordered the case closed. (*Id.*).

Shortly thereafter, the parties filed the pending cross-motions for attorney fees and costs. (ECF No. 104; ECF No. 106). Defendant has also moved to strike the affidavit submitted in support of Plaintiffs' motion. (ECF No. 108). The Court heard oral argument on February 13, 2014 and now considers the pending motions.

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II. Jurisdiction

Although Plaintiffs have filed a notice of appeal from this Court's October 30, 2013 order on the motions for summary judgment, (ECF No. 112), the Court retains jurisdiction to hear the pending motions for attorney fees. In *Masalosalo by Masalosalo v. Stonewall Ins. Co.*, the Court of Appeals for the Ninth Circuit held that an appeal from the merits does not foreclose an award of attorney fees by the district court. 718 F.2d 955, 956 (9th Cir. 1983). Allowing the district court retain jurisdiction to consider a motion for attorney fees "will prevent hasty consideration of postjudgment fee motions" and "will prevent postponement of fee consideration until after the circuit court mandate, when the relevant circumstances will no longer be fresh in the mind of the district judge." *Id.* The Ninth Circuit also noted that if the district court rules on the fees motion,

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the losing party may file an appeal from the district court's order on the motion for attorney fees and have that appeal consolidated with the appeal on the merits. *Id.* Accordingly, the Court has jurisdiction over the pending motions.

III. Plaintiffs' Motion for Attorney Fees and Costs (ECF No. 106)

Plaintiffs have moved for prejudgment interest, costs, and an award of attorney fees. (ECF No. 106). Upon initial review, the Court found the motion substantively and procedurally deficient in numerous respects. However, as explained at the hearing held on February 13, 2014, the Court was, and remains, inclined to grant a reasonable award of conservative fees and costs upon the filing of a properly supported motion. (Hr'g, Feb. 13, 2014, Las Vegas Courtroom 4B, at 10:09:20 a.m.). Specifically, the Court suggested that Plaintiffs could supplement their original filings with the required, additional proofs. (*Id.* at 10:04 a.m., 10:07 a.m.). In response, Plaintiffs have filed an "errata" to the original motion for fees and costs. (Errata, ECF No. 126). Plaintiffs have also filed an amended bill of costs. (ECF No. 125).

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Defendant complains that, during the hearing, the Court did not expressly grant leave to file these supplemental materials but instead took the matter under advisement and indicated that a written order would issue. (Mot. Strike Errata, ECF No. 127, at 4–5). To clarify whatever confusion this may have created, the Court now grants retroactive leave to file both the errata, (ECF No. 126), and the amended bill of costs (ECF No. 125). Defendant's motion to strike these filings, (ECF No. 127), is denied as moot. To the extent that Defendant argues that it should be given a "meaningful chance to brief the substance of the new materials and arguments," (Mot. Strike, ECF No. 127, at 5), the Court also grants retroactive leave to file the responsive briefs docketed on April 7, 2014, (*see* Objection to Am. Bill of Costs, ECF No. 128; Opp'n to Errata,

ECF No. 129), which the Court now considers in conjunction with Plaintiffs' supplemental filings.

A. Prejudgment Interest

Plaintiffs contend that they are entitled to prejudgment interest in the amount of $3,378.24. (Pls.' Mot. Att'y Fees, ECF No. 106, at 5). Defendant agrees. (Opp'n, ECF No. 109, at 3 n.1). The amount requested appears to be correctly calculated. Therefore, Plaintiffs' motion is granted as to the award of prejudgment interest in the amount of $3,378.24.

B. Costs

Plaintiffs have filed an amended bill of costs and now seek an award of taxable costs in the amount of $7,492.77. (ECF No. 125). They also seek an award of "other costs and nontaxable related expenses," as part of the award of attorney fees, in the amount of $14,056.25, (Errata, ECF No. 126, at 5, 16–42), for a total of $21,549.02 in claimed costs. While the Court is inclined to grant an award of permissible costs, the Court finds that only a fraction of the amount presently claimed is justified by both the instant record and existing law. Specifically, the Court finds that Plaintiffs are entitled to a total award of costs in the amount of $8,028.40.

Under Federal Rule 54(d)(1), costs should be awarded to the prevailing party. Such costs, however, must be reasonable and permissible under the applicable rules. Local Rule 54-1(b) requires that "documentation of requested costs in all categories *must* be attached to the bill of costs." (emphasis added).As Defendant notes in its objections, Plaintiffs have failed to provide the required documentation in support of several of their alleged costs. For example, in the amended bill of costs, Plaintiffs request $6,667.29 in costs for their deposition transcript fees. (ECF No. 125, at 1). However, the documentation submitted to substantiate such costs supports

only an award of $6259.89. Therefore, under Local Rule 54-1(b), the remaining $407.40 in deposition transcript fees must be denied.

The Court also denies Plaintiffs requests for "Costs of Appeal," in the amount of $5,405.30; "Expert Costs," in the amount of $6,322.18; "Deposition Expenses (other than transcripts)," in the amount of $1,078.24; and "Investigation Costs," in the amount of $307.50, (*See* Errata, ECF No. 126, at 17). Stated simply, Plaintiffs have failed to cite any authority permitting the award of such costs. (*See generally id.*).

Regarding Plaintiffs' prayer for "Costs of Appeal," Local Rule 54-15 states that the "District Court does not tax or retax appellate costs." Instead, such costs, if allowable, must be granted by the Ninth Circuit and included in the applicable mandate. In the instant case, Plaintiffs were not awarded such costs by the Ninth Circuit. (*See* Mandate, ECF No. 82, at 3). Therefore, Plaintiffs cannot now claim such costs in this Court.[2]

Likewise, with respect to the unexplained "Insurance Expert Fees," Plaintiffs appear to seek costs for consultation and preparation of an expert report. Indeed, Plaintiffs' insurance expert, Charles Miller, was never deposed, and therefore, Plaintiffs cannot claim any "witness fees" under Local Rule 54-4. However, consultation and report fees are not listed as taxable costs under 28 U.S.C. §1920, and Plaintiffs have failed to argue that the taxation of such costs is permitted by another authority. Therefore, without additional argument, the prayer for "Insurance Expert Fees" appears improper. *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445

[2] Plaintiffs requested appellate costs in their original motion, (ECF No. 106, at 15), and during the February 13, 2014 hearing, the Court explained this rule and that such costs are unavailable in this case. (Hr'g, Feb. 13, 2014, Las Vegas Courtroom 4B, at 10:05 a.m.). In response, Plaintiffs' counsel assured the Court that it would not request appellate costs in the supplemental filings. (*Id.* at 10:05:15). Nonetheless, Plaintiffs have once again moved for such costs, requesting them in the instant errata instead of the amended bill of costs. (*See* Errata, ECF No. 126, at 17).

(1987) ("Absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920.").

Plaintiffs' prayers for "Deposition Expenses (Other than transcripts)" and "Investigation Costs" are likewise unexplained, unsubstantiated, and not contemplated by any cited rule. Accordingly, an award of such costs would be inappropriate. Therefore, by subtracting the denied costs from the total claimed amount of $21,549.02, and finding the remaining costs permissible, the Court concludes that Plaintiffs are entitled to an award of costs in the amount of $8,028.40.

C. Attorney Fees

After obtaining a $15,000 judgment in this case, Plaintiffs now seek an award of attorney fees in the amount of $128,259.00. (Errata, ECF No. 126, at 5). While the Court is inclined to exercise its discretion under NRS 18.010(2)(a) to grant a reasonable award of conservative fees, the amount presently requested is plainly excessive. Accordingly, and for the reasons stated below, the Court grants Plaintiffs an award of attorney fees in the reduced amount of $72,546.18.

The parties agree that in a diversity action, such as this, state law governs the award of attorney fees. *See Shakey's Inc. v. Covalt*, 704 F.2d 426, 435 (9th Cir. 1983). NRS 18.010(2)(a) provides that the court may make an allowance of attorney fees to a prevailing party who has not recovered more than $20,000.The making of such an award is discretionary. *Schulz v. Lamb*, 591 F.2d 1268, 1272 (9th Cir. 1978).

Local Rule 54-16(b) provides that motions for attorney fees *must* include a reasonable itemization and description of the work performed, an itemization of all costs sought to be

charged as part of the fee award and not otherwise taxable, and a brief summary of twelve factors:

> (1) the results obtained and the amount involved;
> (2) the time and labor required;
> (3) the novelty and difficulty of the questions involved;
> (4) the skill requisite to perform the legal service properly;
> (5) the preclusion of other employment by the attorney due to acceptance of the case;
> (6) the customary fee;
> (7) whether the fee is fixed or contingent;
> (8) the time limitations imposed by the client or the circumstances;
> (9) the experience, reputation, and ability of the attorney(s);
> (10) the undesirability of the case, if any;
> (11) the nature and length of the professional relationship with the client; and
> (12) awards in similar cases.

(emphasis added). The motion must also be accompanied by an attorney affidavit authenticating the information and attesting that the fees and costs sought are reasonable. LR 54-16(c). The "failure to provide the information required by Local Rule 54-16(b) and (c) in a motion for attorneys' fees constitutes a consent to the denial of the motion." LR 54-16(d). In this case, the Court finds that Plaintiffs' supplemental filings satisfy each of Local Rule 54-16's procedural requirements.

Once a party establishes its entitlement to attorney fees, the court must determine the reasonableness of such an award. *In re USA Commercial Mortgage Co.*, No. 2:07-CV-892-RCJ-GWF, 2013 WL 3944184, at *18 (D. Nev. July 30, 2013). This requires the court to perform the "lodestar" calculation set forth in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). *See Fischer v. SJB-P.D., Inc.*, 214 F.3d 1115, 1119 (9th Cir. 2000). First, the court multiplies "the number of hours reasonably expended on the litigation" by "a reasonable hourly rate" to reach the so-called "lodestar figure." *Hensley*, 461 U.S. at 433. After making that computation, the court then assesses whether it is necessary to adjust the presumptively reasonable lodestar figure on the

basis of the *Kerr* factors[3] that are not already subsumed in the initial lodestar calculation.[4] *See Fischer*, 214 F.3d at 1119 (citation omitted). Only in "rare and exceptional cases" should a court adjust the lodestar figure. *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (internal quotation marks omitted); *Fischer*, 214 F.3d at 1119 n.4 ("A strong presumption exists that the lodestar figure represents a reasonable fee, and therefore, it should only be enhanced or reduced in rare and exceptional cases.") (internal quotation marks omitted).

1. Reasonable Hourly Rate

Courts consider the experience, skill, and reputation of the attorney requesting fees when determining the reasonableness of an hourly rate. *Webb v. Ada County*, 285 F.3d 829, 840 & n.6 (9th Cir. 2002). A reasonable hourly rate should reflect the prevailing market rates of attorneys practicing in the forum community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *See id.; see also Blum v. Stenson*, 465 U.S. 886, 895–96 n.11 (1984). To inform and assist the court in the exercise of its discretion, "[t]he party seeking an award of fees should submit evidence supporting the . . . rates claimed." *Hensley*, 461 U.S. at

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[3] The twelve *Kerr* factors are:

> (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Kerr v. Screen Guild Extras, Inc., 526 F.2d 67, 70 (9th Cir. 1975).

[4] Factors one through five are subsumed in the lodestar calculation. *See Morales v. City of San Rafael*, 96 F.3d 359, 364 n.9 (9th Cir. 1996). Further, the sixth factor, whether the fee is fixed or contingent, *may not* be considered in the lodestar calculation. *See Davis v. City & Cnty. of S.F.*, 976 F.2d 1536, 1549 (9th Cir. 1992), *vacated in part on other grounds*, 984 F.2d 345 (9th Cir. 1993).

433; *see also Jordan v. Multnomah Cnty.*, 815 F.2d 1258, 1263 (9th Cir. 1987). Rates evidenced through affidavits are normally deemed to be reasonable. *Blum*, 465 U.S. 895–96 n.11.

Here, Plaintiffs claim hourly rates of $600 for Attorney Thomas Christensen; $450 for Attorneys David Sampson, Dawn Hooker, and Matthew Minnuci; $300 for Attorney Cara Xidis; $150 for Attorneys Jennifer M. Gooss, Jason A. Gordon, and Derek Muaina. (Estimate of Billable Hours, ECF No. 126, at 14). Plaintiffs also claim hourly rates for support staff in amounts ranging from $50 to $150. (*Id.*). Based on these figures, Plaintiffs claim "an average hourly rate of $272.73." (Estimate of Billable Hours, ECF No. 126, at 14).

In other cases involving similar issues and similarly skilled attorneys, courts balancing the relevant factors have found similar rates to be reasonable. *See, e.g.*, *Tracey v. Am. Family Mut. Ins. Co.*, No. 2:09-CV-1257-GMN-PAL, 2010 WL 5477751 (D. Nev. Dec. 30, 2010) (finding an award of $250 per hour to be a reasonable rate in a case involving similar claims that was litigated to trial by then-attorney Jerry A. Wiese II, who is now a sitting Nevada State Court Judge). This Court agrees with those results. Therefore, the Court finds that the claimed average hourly rate of $272.73 is reasonable in this case.

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2. Hours Reasonably Expended

In addition to evidence supporting the rates claimed, "[t]he party seeking an award of fees should submit evidence supporting the hours worked." *Hensley*, 461 U.S. at 433; *see also Jordan*, 815 F.2d at 1263. "Where the documentation of hours is inadequate, the district court may reduce the award accordingly." *Hensley*, 461 U.S. at 433. "The district court also should exclude from this initial fee calculation hours that were *not reasonably expended*." *Hensley*, 461 U.S. at 433–34 (emphasis added) (internal quotation marks omitted). "In other words, the court has discretion to 'trim fat' from, or otherwise reduce, the number of hours claimed to have been

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spent on the case." *Plaza Bank v. Alan Green Family Trust*, No. 2:11-CV-00130-MMD, 2013 WL 1759580, at *2 (D. Nev. Apr. 24, 2013) (quoting *Edwards v. Nat'l Business Factors, Inc.*, 897 F. Supp. 458, 460 (D. Nev. 1995)); *see also Gates v. Deukmejian*, 987 F.2d 1392, 1399 (9th Cir. 1992) ("The district court has the authority to make across-the-board percentage cuts either in the number of hours claimed or in the final lodestar figure as a practical means of trimming the fat from a fee application.").

The Ninth Circuit accords "considerable deference to the district court's findings regarding whether hours claimed by prevailing counsel are excessive, redundant or otherwise unnecessary." *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1047 (9th Cir. 2000) (citing *McGrath v. County of Nevada*, 67 F.3d 248, 255 (9th Cir. 1995)). This is due to "the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437. The district court need only provide a "concise but clear explanation of its reasons" for reducing the number of hours included in the fee award, *id.*, and it need not engage in a line-by-line examination of the hourly charges:

> We emphasize, as we have before, that the determination of fees "should not result in a second major litigation." The fee applicant . . . must, of course, submit appropriate documentation to meet "the burden of establishing entitlement to an award." But trial courts need not, and indeed should not, become green-eyeshade accountants. *The essential goal in shifting fees . . . is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time*. And appellate courts must give substantial deference to these determinations, in light of "the district court's superior understanding of the litigation." *We can hardly think of a sphere of judicial decision making in which appellate micromanagement has less to recommend it.*

Fox v. Vice, 131 S.Ct. 2205, 2216 (2011) (Kagan, J.) (emphasis added) (internal citations omitted).

The time records submitted in support of Plaintiffs' errata indicate that counsel spent a total of 379.79 hours litigating this case. (*See* Estimate of Billable Hours, ECF No. 126, at 14). As Plaintiffs concede, these records are only *estimates* of the billable hours that *could* have been charged in the absence of the contingency-fee agreement. (*See id.* at 8–14). Nonetheless, they reveal that the time claimed for various tasks is a bit excessive. For example, in a single record entry, one attorney billed twenty-four consecutive hours to prepare for and attend two depositions in Scottsdale, AZ. (*See id.* at 10). The Court finds it unlikely that attending these depositions reasonably required twenty-four hours of billable time. Moreover, at the attorney's claimed hourly rate of $450.00, Plaintiffs now seek, by their own admission, an award of $10,800 in fees for these tasks alone. (*Id.*). This is excessive. In a similar entry, Plaintiffs estimate that it took the same attorney sixteen hours to prepare for and attend a deposition in Phoenix, AZ. (*Id.*). Assuming that this deposition was subject to the presumed seven-hour limit, *see* Fed. R. Civ. P. 30(d)(1), and that it lasted the full seven hours, this entry suggests that counsel estimates spending nine hours to prepare to attend it. Again, this seems excessive. The Court is likewise skeptical of the estimated forty hours that counsel spent "finish[ing] and fil[ing]" Plaintiffs' opening brief to the Ninth Circuit, (*id.* at 12), and Plaintiffs' estimates include other similar examples, (*see id.* at 8–14).

In sum, the Court must conclude that Plaintiffs' counsel could have reasonably prosecuted this case to the $15,000 judgment eventually obtained using 70% of the time presently alleged. Accordingly, the Court will reduce the number of hours presently claimed by 30%, for a rounded total of 266. Multiplying that number by the reasonable hourly rate of $272.73, the Court concludes that the lodestar amount in this case is $72,546.18. Neither party has argued for a *Kerr*-factor adjustment, and the Court finds no reason to make one. Therefore,

exercising its discretion to award fees under NRS 18.010(2)(a), and its broad discretion to do "rough justice" in cutting the hours claimed, *Fox*, 131 S.Ct. at 2216, the Court grants Plaintiffs an award of reasonable attorney fees in the amount of $72,546.18.

IV. Defendant's Motions to Strike (ECF Nos. 108 and 127)

Based on the forgoing, the motion to strike the affidavit of Jason A. Gordon in support of Plaintiffs' motion for fees and costs, (ECF No. 108), and the motion to strike Plaintiffs' errata, (ECF No. 127), are denied as moot.

V. Defendant's Motion for Attorney Fees (ECF No. 104)

Defendant's countermotion for fees seeks an award of fees in the amount of $6,996.00, and is based on a rejected $15,001 offer of judgment extended prior to the court's entry of the $15,000 judgment. (*See Generally* ECF No. 104). It appears that Defendant does not seek an award of costs. (*Id.*).

A. Legal Standards

Under Federal Rule of Civil Procedure 68, a party defending a claim may serve on an opposing party, at least 14 days before a date set for trial, an offer to allow judgment on specified terms, with the costs then accrued. Fed. R. Civ. P. 68(a). If the offeree rejects the offer and the "judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." Fed. R. Civ. P. 68(d). Nevada has a similar "offer of judgment" rule, but the Nevada version allows for an award of attorney fees. NRS §17.115(4)(d)(3).

In diversity cases, the court applies federal law if the law is procedural and state law if the law is substantive. *Walsh v. Kelly*, 203 F.R.D. 597, 598 (D. Nev. 2001) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). If the two rules conflict, the federal rule applies if it is

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"sufficiently broad to control an issue." *Id.* (citing *Hanna v. Plumer*, 380 U.S. 460, 471–72 (1965)). "Statutes allowing for recovery of attorney's fees are considered substantive for *Erie* purposes" and "will be applied in diversity cases unless they conflict with a valid federal statute or procedural rule." *Id.*

In *Walsh*, as here, a plaintiff received a judgment which was less than the offer of judgment made by the defendants. *Id.* at 599. This required the court to decide whether NRS 17.115, which provides for both costs and attorney fees, conflicted with Rule 68, which provides only for costs. *Id.* at 600. The court determined that Rule 68 was sufficiently broad to cover the point in dispute—offer of judgment rules—and found that an award of attorney fees under NRS 17.115 would conflict with Rule 68. *Id.* Consequently, the court concluded that Rule 68 applied and that defendants could not recover attorney fees based on their rejected offer of judgment. *Id.* at 601.

However, as a subtle nuance, while Rule 68 provides only for "costs" by its text, the Supreme Court has interpreted it to include all costs properly awardable under the relevant substantive rule, including attorney fees where included in the authoritative definition of "costs." *Marek v. Chesny*, 473 U.S. 1, 9 (1985)("[T]he most reasonable inference is that the term 'costs' in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority. In other words, all costs properly awardable in an action are to be considered within the scope of Rule 68 'costs.'").

B. Analysis

The parties agree that Rule 68 governs Defendant's motion. Defendant, however, asserts that it is entitled to fees under *Marek*. The Court disagrees, finding that Defendant has failed to demonstrate that its fees are recoverable as a cost of litigation under "an agreement, statute, or

rule," as required by Nevada law. The Court likewise rejects Defendant's alternative claim for fees under NRS 18.010(b), finding that Defendant has failed to establish that sanctions are appropriate in this case.

Defendant first cites to two Nevada Supreme Court cases examining damage-based fee awards, contending that such cases constitute "other authority" for purposes of the *Marek* analysis. Specifically, Defendant claims that Plaintiff Nalder maintained its claims without a valid assignment for the first nine months this case was pending, and that under Nevada case law this was improper such that an award of fees, in the form of damages, is appropriate. (*See* Def.'s Mot. Att'y Fees, ECF No. 104, at 6–7 (citing *Artistic Hairdressers, Inc. v. Levy*, 486 P.2d 482, 484 (Nev. 1971); *City of Las Vegas v. Cragin Indus., Inc*., 478 P.2d 585, 590 (Nev. 1970))). This argument is defective for several reasons.

First, an award of fees under *Marek* requires Defendant to set forth legal authority permitting an award of attorney fees as "costs" of litigation; an award of damages is an entirely separate issue. Indeed, were Defendant entitled to attorney fees as damages, the present analysis would be unnecessary. In *Shuette v. Beazer Homes Holdings Corp*., the Nevada Supreme Court explained the distinction:

> In *Sandy Valley Associates v. Sky Ranch Estates*, after pointing out that attorney fees as 'a cost of litigation' are recoverable only under an agreement, statute, or rule, we stated that 'if the fees are so authorized, the trial court examines the reasonableness of the fees requested and the amount of any award.' Ordinarily, we noted, the court's determination is based on the documentary evidence submitted to it in a post-judgment motion. Then, we distinguished litigation cost attorney fees from those fees requested as an element of damages, which constitute a rather narrow exception to the rule prohibiting attorney fees awards absent express authorization, and consequently must be specially pleaded and proved 'just as any other element of damages.'

124 P.3d 530, 547 (Nev. 2005) (internal citations and footnotes omitted) (quoting *Sandy Valley Associates v. Sky Ranch Estates Owners Ass'n*, 35 P.3d 964 (Nev. 2001). In the instant case

Defendant has neither plead nor proved its fees as an element of damages, and therefore an award of such damages is plainly inappropriate. Defendant has also failed to set forth any "agreement, statute, or rule" establishing that its fees are recoverable as "a cost of litigation." *See id.* Accordingly, an award of fees under Rule 68 is inappropriate.

Defendant's reliance on NRS 18.010(b) as an alternative basis for fees is likewise unpersuasive. NRS 18.010(b) provides for an award of attorney fees "[w]ithout 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*." (emphasis added). As Defendant correctly notes, the standard for determining whether a party maintained a claim or defense, without reasonable ground is the same as it would be for assessing sanctions pursuant to Federal Rule 11. *See Bergmann v. Boyce*, 856 P.2d 560 (Nev. 1993). In *Bergman,* the court compared NRS 18.010(2)(b) to sanctions under Rule 11, stating "[t]he trial court must examine the actual circumstances surrounding the case to determine whether the suspect claims were brought without reasonable grounds." *Id.* A claim or defense "is frivolous or groundless if there is no credible evidence to support it." *Rodriguez v. Primadonna Co., LLC*, 216 P.3d 793, 800 (Nev. 2009).

Defendant contends that because Nalder lacked a valid assignment at the outset of this action, Plaintiffs brought the case without reasonable grounds such that sanctions, in the form of attorney fees, are appropriate. The Court disagrees.

While Defendant may be correct in its assertion that Nalder lacked standing to prosecute this case at its commencement, Nalder was not the only Plaintiff at that time. Indeed, Lewis was a named Plaintiff at the inception of this case, and he clearly had standing to prosecute it.

Moreover, as Defendant admits, Lewis eventually assigned the claim to Nalder. (ECF No. 104, at 10). Accordingly, while Nalder's claims may not have survived a motion to dismiss at the outset of this case, the Court cannot conclude, from these facts alone, that Plaintiffs maintained this action, taken as a whole, in which they obtained a $15,000 judgment, in bad faith or without reasonable grounds. In fact, there is nothing in the record that would support such a conclusion. Moreover, Plaintiffs have raised serious questions, which the Court need not reach at this time, with respect to whether Defendant can be deemed a "prevailing party" for purposes of an award under NRS 18.010(b). Therefore, Defendant's motion for attorney fees is denied.

CONCLUSION

IT IS HEREBY ORDERED that Plaintiffs' motion for attorney fees and costs (ECF No. 106) is GRANTED IN PART and DENIED IN PART. Plaintiffs are hereby awarded prejudgment interest in the amount of $3,378.24, costs in the amount of $8,028.40, and attorney fees in the amount of $72,546.18.

IT IS FURTHER ORDERED that Defendant's motion for attorney fees (ECF No. 104) is DENIED in the entirety.

IT IS FURTHER ORDERED that Defendant's motions to strike (ECF Nos. 108 and 127) are DENIED as moot.

IT IS SO ORDERED.

Dated this 3rd day of June, 2014.

ROBERT C. JONES
United States District Judge

EXHIBIT D

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EXHIBIT D

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES NALDER, GUARDIAN AD LITEM ON BEHALF OF CHEYENNE NALDER; AND GARY LEWIS, INDIVIDUALLY,
Appellants,
vs.
UNITED AUTOMOBILE INSURANCE COMPANY,
Respondent.

No. 70504

ORDER ANSWERING CERTIFIED QUESTIONS[1]

Appellant James Nalder previously sued appellant Gary Lewis in Nevada district court and obtained a $3.5 million default judgment. Nalder and Lewis then sued Lewis's insurance company, respondent United Automobile Insurance Company, for claims related to UAIC's failure to defend Lewis in the first action. UAIC removed this second action to federal court. The United States Court of Appeals for the Ninth Circuit certified two separate questions to this court related to Nalder and Lewis's action against UAIC. The first question is:

> Whether, under Nevada law, the liability of an insurer that has breached its duty to defend, but has not acted in bad faith, is capped at the policy limit plus any costs incurred by the insured in mounting a defense, or is the insurer liable for all losses consequential to the insurer's breach?

The second question, as we rephrased it, is:

> In an action against an insurer for breach of the duty to defend its insured, can the plaintiff

[1]The Honorable Nancy M. Saitta, Senior Justice, was appointed to sit in place of the Honorable Ron Parraguirre, Justice, who recused.

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> continue to seek consequential damages in the amount of a default judgment obtained against the insured when the judgment against the insured was not renewed and the time for doing so expired while the action against the insurer was pending?

First certified question

Our recent decision in *Century Surety Co. v. Andrew*, 134 Nev., Adv. Op. 100, 432 P.3d 180 (2018), answers the first question. *Century Surety* held that "an insured may recover any damages consequential to the insurer's breach of its duty to defend" and that "an insurer's liability for the breach of the duty to defend is not capped at the policy limits, even in the absence of bad faith." *Id.* at 186. Despite the federal courts certifying identical questions in both cases, UAIC argues that *Century Surety* is "factually and legally distinguishable" from the present case and that we should not apply *Century Surety*'s holding to "cases where the complaint did not allege a loss within the policy period and an insurer's breach of a duty to defend is based on a reasonable, good faith determination that the insurance policy at issue was not in effect at the time of the loss." UAIC's argument—essentially that UAIC's refusal to defend in this case was more reasonable than the insurer's refusal to defend in *Century Surety*—is undermined by *Century Surety*'s holding "that good-faith determinations are irrelevant for determining damages upon a breach of [the duty to defend]." *Id.* at 182. We therefore decline to answer the question posed in *Century Surety* again, or differently, in this case.

Second certified question

To prevent the statute of limitations from barring enforcement of a default judgment after six years, a party normally must either bring "an action upon [the] judgment or decree" or obtain "the renewal thereof"

within that time period. NRS 11.190(1)(a)[2]; *Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007) ("An action on a judgment or its renewal must be commenced within six years under NRS 11.190(1)(a); thus a judgment expires by limitations in six years."). UAIC argues that because Nalder did not bring an action upon the default judgment he obtained against Lewis within six years, or otherwise renew the judgment, the judgment has expired and is therefore not a consequential damage of its breach of the duty to defend Lewis. This second certified question therefore asks if Nalder and Lewis's action against UAIC in federal court was "an action upon [the] judgment" under NRS 11.190(1)(a). And, if it was not, and the state court judgment has expired, we must then determine whether Lewis and Nalder

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[2]NRS 11.190(1)(a):

> Except as otherwise provided in NRS 40.4639, 125B.050 and 217.007, actions other than those for the recovery of real property, unless further limited by specific statute, may only be commenced as follows:
>
> 1. Within 6 years:
>
> (a) Except as otherwise provided in NRS 62B.420 and 176.275, an action upon a judgment or decree of any court of the United States, or of any state or territory within the United States, or the renewal thereof.

(as Lewis's assignee) can still seek consequential damages against UAIC in the amount of that judgment.

Nalder and Lewis's federal action for breach of the duty to defend is not "an action upon a judgment"

An "action upon a judgment" as referenced in NRS 11.190(1)(a) is a distinct cause of action under the common law. *See Mandlebaum v. Gregovich*, 24 Nev. 154, 161, 50 P. 849, 851 (1897) ("[A] judgment creditor may enforce his judgment by the process of the court in which he obtained it, or he may elect to use the judgment as an original cause of action and bring suit thereon and prosecute such suit to final judgment."); *Ewing v. Jennings*, 15 Nev. 379, 382 (1880) (addressing what facts are sufficient to state a cause of action upon a judgment); 47 Am. Jur. 2d Judgments § 722 (2017) ("Every judgment gives rise to a common-law cause of action to enforce it, called an action upon a judgment."). It is "not simply an action in some way related to the earlier judgment, but rather a specific form of suit—the common law action *on* a judgment." *Fid. Nat'l Fin. Inc. v. Friedman*, 238 P.3d 118, 121 (Ariz. 2010). This is because the goal of an action upon a judgment is to recover the amount left unsatisfied from the original judgment, not to litigate new claims against a new party. *See id.* ("[T]he defendant in an action on the judgment . . . is generally the judgment debtor, and the amount sought is the outstanding liability on the original judgment."); 47 Am. Jur. 2d Judgments § 723 ("The main purpose of an action on a judgment is to obtain a new judgment which will facilitate the ultimate goal of securing the satisfaction of the original cause of action.").

Nalder and Lewis's suit in federal court regarding UAIC's breach of its duty to defend is not an action upon Nalder's state court judgment against Lewis. The federal court complaint does "not simply

recite the amount owed and seek a judgment on that debt," but instead seeks remedies for UAIC's failure to defend Lewis in the original action between Nalder and Lewis. *See Friedman*, 238 P.3d at 123 (holding that a racketeering suit based on the judgment debtors' actions to frustrate collection of a judgment "clearly was not a common law action on the judgment"). That the action is not upon the default judgment is further illustrated by the fact that the suit was not filed solely by Nalder against Lewis—who is the judgment debtor in the state court action—but instead was filed by both Nalder and Lewis, and filed against UAIC, a third party to the state court action. *See, e.g., id.* at 121; *Apollo Real Estate Inv. Fund, IV, L.P. v. Gelber*, 935 N.E.2d 949, 961 (Ill. App. Ct. 2009) ("[G]enerally, an action on a judgment can only be brought against the defendant of record in the judgment or his successor in interest, not against an entity or person not named in judgment."). Nalder and Lewis's action alleging breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, fraud, and breach of NRS 686A.310 is not "an action upon [the state court default] judgment" that renewed the judgment under NRS 11.190(1)(a).

Nalder makes various alternative arguments for holding that the six-year statute of limitations has not expired. We decline to address the arguments because they exceed the scope of the certified question, require application of law to facts that are disputed, or involve alleged facts not included in the original or supplemental certified question orders. *See In re Fountainbleau Las Vegas Holdings, LLC*, 127 Nev. 941, 955-56, 267 P.3d 786, 794-95 (2011) (recognizing that "this court is bound by the facts as stated in the certification order" and will not apply the law to facts or resolve factual disputes, because it would "intrud[e] into the certifying

court's sphere"). When answering a certified question under NRAP 5, we accept the facts as given and therefore will not second-guess the certifying question's assumption that the statute of limitations has otherwise run on the default judgment. *See id.* (constraining review to the facts in the certification order when respondents contended that "the assumptions included in the certified questions [were] not true").

A plaintiff cannot continue to seek consequential damages for breach of the duty to defend based on an expired judgment

It is black letter contract law that an "injured party is limited to damages based on his actual loss caused by the breach." Restatement (Second) of Contracts § 347 cmt. e (1981); 24 Williston on Contracts § 64:12 (4th ed.) ("The proper measure of recovery for a breach of contract claim is the loss or damage actually sustained."). And "[t]he purpose of an award of damages is to put the nonbreaching party in as good a position as if the contract had been performed." *Covington Bros. v. Valley Plastering, Inc.*, 93 Nev. 355, 363, 566 P.2d 814, 819 (1977).

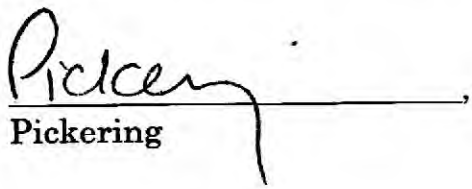
Based on what is before this court on the certified question presented, Lewis has not actually suffered a loss in the form of the $3.5 million state court judgment because the judgment expired and, thus, it is no longer enforceable against him. *See Riofrio Anda v. Ralston Purina Co.*, 959 F.2d 1149, 1153 (1st Cir. 1992) ("It is beyond cavil that a party must suffer actual loss before it is entitled to damages."). If Lewis is not liable to Nalder for the $3.5 million judgment, it follows that UAIC is not liable for that judgment as a result of breaching its duty to defend Lewis in the action that led to it; Lewis no longer needs UAIC to pay him $3.5 million to give him the benefit of his insurance contract. *See id.* at 1152 ("[T]he law does not allow awards for phantom injuries."). To hold otherwise would give Lewis (and his assignee, Nalder) a benefit greater than what he could have

expected had UAIC performed under the contract. *See id.* at 1153 ("To allow [plaintiffs] to recover for expenses that they did not incur would be tantamount to giving them a windfall, resulting in punitive damages against [the defendant]."). Without more, the expired state court judgment cannot form the basis for consequential damages from UAIC's breach of its duty to defend Lewis.

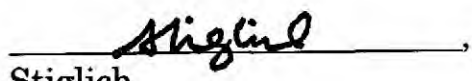
Accordingly, we answer the second certified question in the negative. In an action against an insurer for breach of the duty to defend its insured, a plaintiff cannot continue to seek consequential damages in the amount of a default judgment against the insured when the judgment against the insured was not renewed and the time for doing so expired while the action against the insurer was pending.

It is so ORDERED.

_____, C.J.
Gibbons



_____, J.
Pickering



_____, J.
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Clerk, United States Court of Appeals for the Ninth Circuit

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CADISH, J., with whom HARDESTY, J., and SAITTA, Sr. J., agrees, concurring:

While I join the court's answer to the certified questions herein, I write separately to note that the parties did not raise, and we do not today decide, whether a common law action on the judgment still exists in Nevada after the adoption of the judgment renewal procedure under NRS 17.214. This court's opinion in *Leven v. Frey*, 123 Nev. 399, 402 n.6, 168 P.3d 712, 714 n.6 (2007), can be read to indicate that it does not.[1]

_____, J.
Cadish

We concur:

_____, J.
Hardesty

_____, Sr. J.
Saitta

[1]The Honorable Nancy M. Saitta, Senior Justice, participated in the decision of this matter under a general order of assignment.

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DISTRICT COURT
CLARK COUNTY, NEVADA

CHEYENNE NALDER, Plaintiff, vs. GARY LEWIS; DOES I through V, inclusive, Defendants.	Case No. A-18-772220-C Dep't No. 19 **OPPOSITION TO GARY LEWIS'S MOTION FOR ATTORNEY'S FEES AND COSTS** Hearing Date: July 16, 2020 Hearing Time: In chambers
UNITED AUTOMOBILE INSURANCE COMPANY, Intervener.	
GARY LEWIS, Third-Party Plaintiff, vs. UNITED AUTOMOBILE INSURANCE COMPANY, Third-Party Defendant.	

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This is no time for defendant Gary Lewis to be seeking attorney's fees: On June 4, 2020, the Ninth Circuit closed the book on this decade-long saga, holding that the judgment in Case No. 07A549111 (the "2007 action") has expired and is unenforceable—eliminating the only issue in this so-called "action upon the judgment" from that case. (Ex. A, ECF 90, Order Dismissing Appeal, at 3.)[1] The court held that Lewis and plaintiff Cheyenne Nalder had waived their arguments for tolling the judgment's expiration. (*Id.* at 4–5.) That final disposition by the Ninth Circuit, applying the Nevada Supreme Court's answers to two certified questions,[2] is *res judicata* as to the parties. *See* NRAP 5(h); *Nalder v. UAIC*, 878 F.3d 754, 758 (9th Cir. 2017).

Lewis's motion in this action (the "2018 action") is bewildering because he has already filed identical requests both in the Supreme Court and before Judge Johnson in the 2007 action—the only case in which his writ petitions even arguably succeeded in part. On the questions relevant to this 2018 action—whether United Automobile Insurance Company's intervention in this "action on the judgment" should be stricken and whether the Court erred in vacating an attempted Rule 68 judgment in violation of the Court's stay—Lewis lost.[3]

The request for fees and costs is galling in other ways, too: Lewis's counsel presents no documentation to support either the fees or the costs. They

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[1] Appellants Cheyenne Nalder and Gary Lewis have petitioned for panel and *en banc* rehearing. (Ex. B, ECF 91.) The Ninth Circuit has not yet acted on the petition. Although UAIC's arguments would not be frivolous under NRAP 38 even if the Ninth Circuit were to grant the petition, if this Court believes it needs to await the outcome of that petition, Lewis's motion may be denied for now as premature.

[2] *See* Ex. N, Order Answering Certified Questions.

[3] Because his motion is largely copied from a motion filed before Judge Johnson in the 2007 action, Lewis falsely (though perhaps inadvertently) claims that the Nevada Supreme Court determined that UAIC "was not entitled to intervene into this matter." (Mot. 2:24.)

seeks costs that are properly taxable only in the Supreme Court. And after electing to take the case on a contingency which has not resulted in any judgment against UAIC, they seek an astronomical fee—an hourly rate of $1000 for Mr. Christensen—while even the cases they cite confirm that the request is grossly unreasonable.

This Court should deny the motion.

A. This Court Lacks Jurisdiction to Award Fees and Costs

Initially, this Court cannot consider the motion while an identical request is pending before the Supreme Court and in Case No. 07A549111.

1. Lewis Is Still Fighting the Supreme Court's Decision, So the Court Has Not Issued its Remittitur

At Nalder's and Lewis's insistence, this case is still in the Supreme Court. Unhappy with the Supreme Court's decision that had agreed with UAIC and this Court that UAIC could intervene in this 2018 action, Nalder and Lewis filed a motion for reconsideration. (Ex. C, Petitioners' "Motion for Attorney Fees and Costs and for Reconsideration.") Although that motion was not a proper petition for hearing under NRAP 40,[4] it has prevented the Supreme Court from issuing its remittitur or an equivalent notice. NRAP 41(b)(1) (petition for rehearing stays remittitur). The Supreme Court still has jurisdiction over these appellate proceedings for which Lewis seeks fees and costs.

2. Lewis Cannot Ask Three Courts to Award Fees

In addition, Lewis is already asking for fees in two other courts. First, he

[4] *See generally* Ex. D, "Opposition to Petitioners' 'Motion for Attorney Fees and Costs and for Reconsideration,'" at 1–2 (detailing violations of NRAP 40(a)(2) (no citations to the original petitions or record); 40(b)(1), (4) (no certificate of compliance); and 40(b)(5) (no filing fee)). Petitioners forwent a reply.

has asked the Supreme Court to award attorney's fees directly.[5] (Ex. C, Petitioners' "Motion for Attorney Fees and Costs and for Reconsideration.") Second, he has filed a nearly identical motion before Judge Johnson in Case No. 07A549111. (Ex. E, "Gary Lewis' Motion for Attorney's Fees and Costs.") The motion before this Court is thus Lewis's third ticket in the same raffle, with Lewis hoping to triple his chances that at least one court will grant relief. Because Lewis initially opted to have the Supreme Court decide his entitlement to fees, he should be bound by that Court's determination.

B. Lewis Includes No Evidence to Support the Fees

1. O'Connell *Does Not Excuse the Failure to Provide the Parties' Fee Agreements*

Lewis relies on *O'Connell vs. Wynn Las Vegas, LLC*, 134 Nev., Adv. Op. 67, 429 P.3d 664, 670 (Nev. Ct. App. 2018) (*see* Mot. 8:15–18), but he has not attached the contingency-fee agreement that was the substitute for attorney billing records in that case. *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." (emphasis added)); *id.* at 561, 429 P.3d at 672 ("she included the contingency fee agreement as part of her request for fees"). He has not followed *O'Connell*'s instruction that "a party seeking attorney fees based on a contingency fee agreement must provide or point to substantial evidence of counsel's

[5] While NRAP 39 divides costs between those taxable in the Supreme Court (NRAP 39(c)) and those taxable in the district court (NRAP 39(e)), there is no such division when it comes to attorney's fees. Nalder and Lewis are seeking the same fees in both courts.

efforts to satisfy the *Beattie* and *Brunzell* factors." *Id.* at 562, 429 P.3d at 673.[6]

2. If the Contingency Did Not Happen, Counsel Must Keep Records

O'Connell ultimately cautions trial courts to "keep in mind that their awards of attorney fees should be made on a case-by-case basis by applying the considerations described herein to the evidence provided, and that an adequate record will be critical to facilitate appellate review." 134 Nev. at 562, 429 P.3d at 673. One salient consideration is whether the contingency underpinning a fee agreement actually occurred.

Here, it did not. Although Lewis's failure to attach the relevant agreements prevents UAIC from assessing the nature of the contingency, it appears that Lewis is waiting for a judgment against UAIC to pay the now-expired judgment against Lewis. (*See* Mot. 5:23–26.) Nalder filed this belated action "upon" the 2008 default judgment in the 2007 action only after the Nevada Supreme Court accepted a second certified question that cast doubt on the judgment's validity[7]—making it unlikely that this action would be path to enforcing any judgment against UAIC. Regardless, the Ninth Circuit's order now eliminates that contingency. (Ex. A, ECF 90, Order Dismissing Appeal, at 3–5.) In these circumstances, the failure of Lewis's counsel to keep records inexcusable. All Lewis has given UAIC and this Court is his assurance that Mr. Christensen and Mr. Arntz represent Lewis on some kind of undisclosed contingency or *pro bono* basis (Mot. 5:23–26)—for a case with a judgment that is now worth $0. (*See* Ex.

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

[7] *Compare* Ex. M, Order Accepting Second Certified Question, filed Feb. 23, 2018, *with* Complaint, filed Apr. 3, 2018.

A, ECF 90, Order Dismissing Appeal, at 3.)[8]

C. Lewis Seeks Nontaxable and Undocumented Costs

The request for costs is no better. It includes costs that are taxable only in the Supreme Court and omits any documentation.

1. Copies Are Not Taxable Costs Here

Lewis's seeks $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 the Supreme Court, not the district court. NRAP 39(b)(1). And even there, the maximum is $500. NRAP 39(c)(5).

2. Lewis Provided No Documentation

Besides, "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. He has slapped together a three-line "memorandum of costs" (without even a breakdown of the per-page cost of transcripts or copies), but *Cadle Co.* expressly holds that that is insufficient. *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 would be an abuse of discretion. *Id.*

D. Lewis Is Not Entitled to Fees Based on Issues that He Lost

UAIC's positions were taken in good faith, vindicated in full by this Court, and vindicated in relevant part as pertains to this 2018 action by the Supreme Court. Nalder and Lewis are seeking rehearing; UAIC is not. Lewis is not entitled to fees in appellate proceedings, the outcome of which he still resists.

[8] Lewis has apparently waived any request for fees for Dawn Hooker, who submitted no declaration.

1. Attorney's Fees Are Not Taxable as Costs

Generally, attorney's fees are not costs. Despite Lewis's appeal to Webster's dictionary (Mot. 3:17–23),

> [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").

2. Attorney's Fees Are Reserved for Frivolous Appeals

Asking this Court to assess attorney's fees is an extraordinary sanction reserved for gross abuses of the appellate process. NRAP 38. Lewis cites NRS 18.010(2)(b) (Mot. 3:24–4:1), ignoring that the Supreme 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).

3. UAIC Prevailed on the Issues Relevant to this 2018 Action

Fees may be assessed only against a party whose positions the Supreme Court rejected as frivolous. Here, however, it is Nalder and Lewis who are complaining that the Supreme Court, far from dismissing UAIC's arguments as

frivolous, *accepted* many of them in a published opinion—including all of the issues related specifically to this 2018 action.

First, UAIC prevailed on the critical question of its intervention in this 2018 action. (Ex. F, Opinion 8–12.)[9] As their motion for reconsideration in the Supreme Court underscores (Ex. C), Nalder and Lewis wanted UAIC out of the litigation altogether, not merely out of the 2007 action. Indeed, in striking UAIC's intervention in the 2007 action and denying consolidation, the Supreme Court clarified that there is no pending issue in this action: an amendment to substitute Cheyenne for her former guardian "was a ministerial change that did not alter the legal rights and obligations set forth in the original judgment or create any new pending issues." (Ex. F, Opinion 13.)[10] The parties' dispute about the enforceability of the 2008 judgment is—or was, until the Ninth Circuit's resolution of that issue (Ex. A, ECF 90, Order Dismissing Appeal)—presented in the 2018 action, to which UAIC is a proper party.

Second, UAIC also prevailed against Lewis's attack on this Court's order vacating the Rule 68 judgment. (Ex. F, Opinion 13–16.) Rejecting the argument that a stay is ineffective until the entry of a written order, the Supreme Court "determine[d] that a minute order granting a stay operates like an administrative or emergency order that is valid and enforceable." (Ex. F, Opinion 15.)[11] The Supreme Court also "reject[ed] Gary's argument that the district

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[9] This Court also rejected Nalder's and Lewis's due process arguments based on the service of the motions to intervene. (Ex. F, Opinion 11 n.7.)

[10] Below, counsel for Lewis agreed: if the 2008 judgment had expired, "[i]t's an amendment of the expired judgment." (Ex. G, 5 R. App. 1108:13–17.)

[11] Oddly, the stay that Lewis unsuccessfully tried to evade is one of the bases of Lewis's request for "sanctions" under EDCR 7.60(b)(3), even though Lewis acknowledges that this Court did not find the request sanctionable. (Mot. 4:26–5:5.) Indeed, Lewis lashes out at this Court for having "basically pulled the rug out from under him" in accepting UAIC's arguments as having substantial merit. (*Id.*)

court vacating the parties 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." (Ex. F, Opinion 15 (citing NRCP 60(a)).)

4. Lewis Seeks Fees for His Unsuccessful Arguments

Lewis's attorneys do not even try to hide that their fee request includes hours spent on arguments—intervention in this 2018 action, the vacatur of the Rule 68 judgment, various due process objections—that this Court and the Supreme Court rejected. (*See* Mot. Ex. 2, ¶ 20 ("I have estimated my hours working on this case since the intervention/consolidation."); Mot. Ex. 3, ¶ 19 (same).)

And it's easy to see why: Nalder and Lewis never separated the propriety of intervention in this 2007 action from the propriety of intervention in the 2018 action. After electing in the petition to challenge only the timeliness of UAIC's intervention (Ex. H, Petition for Writ of Mandamus), in reply for the first time Nalder and Lewis asked the Supreme Court to consider UAIC's intervention "substantively improper." (Ex. I, Reply (Dkt. 85085), at 14–15.) But even then, Nalder and Lewis did not distinguish between the 2007 and 2018 actions, stating only that "[b]oth actions were ended and settled to the satisfaction of the parties litigant." (*Id.* at 15.)

Indeed, by filing this same request in the 2007 action,[12] Lewis's counsel confirm that they have commingled their successful hours with their unsuccessful ones.

There is no basis for this Court to award Lewis fees and costs for petitions that the Supreme Court rejected in part, especially when that Court has not

[12] Compare, for example, the claimed hours in the exhibits to this motion, *e.g.*, Mot. Ex. 2, ¶ 20 (Christensen's claim that he "incurred 92 hours"); Mot. Ex. 3, ¶ 19 (Mr. Arntz's claim that he "incurred 69 hours"), with the identical claims in the exhibits to the motion filed before Judge Johnson (Ex. E).

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provided for such an award. *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.").

5. UAIC's Arguments Were in Good Faith, and the District Court Accepted Them

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.[13]

And even on those issues, which were not before this Court, 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. As Judge Johnson found, "we have new litigation" on whether "that judgment continue[s] to exist." (Ex. G, 5 R. App. 1240:19–22.) Based on the Supreme Court's decisions that an expired judgment is void, *Leven v. Frey*, 123 Nev. 399, 410, 168 P.3d 712, 719 (2007), UAIC reasonably believed that after the time for enforcing a judgment has passed without renewal, "a judgment no longer exists to be renewed." (Ex. J, Answer (Dkt. 78085), at 19–20 (citing *Kroop & Kurland, P.A. v. Lambros*, 703 A.2d 1287, 1293 (Md. Ct. Spec. App. 1998)).) UAIC reconciled this with the Supreme Court's eighty-year-old decision in *Ryan v. Landis*, 58 Nev. 253, 75 P.2d 734 (1938) (Ex. J, Answer (Dkt. 78085), at 20–21 (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 30–37.) UAIC likewise argued in good faith that

[13] The impact of the Supreme Court's ruling on consolidation is properly presented only before Judge Johnson as the "judge assigned to the case first commenced." EDCR 2.50(a). As discussed in Part I.A.2, Lewis has already sought his fees before the Supreme Court and Judge Johnson.

identical issue of the 2008 judgment's expiration thought to be pending in both actions warranted consolidation. (Ex. L, Answer (Dkt. 78243), at 12–16.)

The Supreme Court disagreed that a judgment's expiration merits intervention. (Ex. F, Opinion 7–8.) But it never suggested that UAIC's argument was frivolous. Indeed, the Supreme Court in a sense mooted the necessity of intervention 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. (Ex. F, Opinion 12–13.) *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. (Ex. F, Opinion 13.)

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 indeed expired, and that the parties have waived their chance to argue otherwise. (Ex. A, ECF 90, Order Dismissing Appeal, at 3–5.)

E. The *Brunzell* Factors Do Not Support a Fee

For all these reasons, Lewis falls far short of demonstrating that any fee would be reasonable. The most complex aspects of the case are those of Nalder's and Lewis's own making—including their desperate efforts to revive the judgment in this action and create a judgment in a new action after the Nevada Supreme Court agreed to accept the second certified question that threatened to eliminate their Ninth Circuit appeal. Lewis's mixed bag of success and failure in the writ petition did not prevent his ultimate failure: the Ninth Circuit's determination, notwithstanding the post-certification flurry, that the

judgment in this case is expired.

1. Lewis Unreasonably Rejected Free Counsel

Lewis could have had attorneys at no cost. Lewis rejected UAIC's appointed counsel (Ex. K, 1 R. App. 30, 165), instead expressing eagerness to have a multimillion-dollar judgment entered against himself[14]—notwithstanding prior signals from the Ninth Circuit[15] (and later confirmation from the Nevada Supreme Court[16] and the Ninth Circuit[17]) that Lewis could escape all liability. Lewis's position—that opposing the judgment's enforcement would be so frivolous that he should not even put up a defense—has been exposed as a façade.

Lewis should not be rewarded for taking that unreasonable position (and without which UAIC would not have intervened) with an award of attorney's fees.

2. The Proposed Hourly Rates Are Unreasonable

Both Mr. Christensen's request for $1,000 an hour and Mr. Arntz's request for $600 an hour are unreasonable.

"A reasonable hourly rate should reflect the prevailing market rates of attorneys practicing in the relevant community." *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1202 (9th Cir. 2013). Attorney affidavits alone are insufficient proof of the rate's reasonableness in the community: Rather, "[t]he burden is on the fee applicant to produce satisfactory evidence—*in addition to the attorney's*

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[14] *See*, *e.g.*, "Defendant's Motion to Strike Defendant's Motion for Relief from Judgment," filed Oct. 17, 2018; "Notice of Acceptance of Offer of Judgment in Case 18-A-772220," filed Jan. 22, 2019.

[15] *Nalder v. UAIC*, 878 F.3d 754, 757 (9th Cir. 2017) ("the statute of limitations [on the 2008 judgment] has passed" and "they have failed to renew the judgment").

[16] Ex. N, Order Answering Certified Questions, at 2–3 ("because the [2008] judgment expired . . . it is no longer enforceable against" Lewis).

[17] Ex. A, ECF 90, Order Dismissing Appeal, at 3.

own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 980 (9th Cir. 2008) (emphasis added).

Here, Mr. Christensen and Mr. Arntz offer only their own insufficient declarations, without evidence of the reasonableness of those rates in the community.

Mr. Christensen seeks to charge more than *twice* the highest rate in the cases that he cites. (Ex. 2, ¶ 6.) Respectfully, Mr. Christensen points to no evidence that having handled personal-injury lawsuits and "taught CLE classes on automobile accident litigation and bad faith" (Ex. 2, ¶¶4–5) so distinguishes him that he deserves such an astronomical rate.[18] And Mr. Christensen provides no evidence that his proposed $1000 hourly fee has ever been approved.

Regardless, "[a]mple case law" establishes "that the upper range of the prevailing rates in [Nevada] is $450 for partners and $250 for experienced associates. *Cohen v. Gold*, 2:17-CV-00804-JAD-NJK, 2018 WL 1308945, at *6–7 (D. Nev. Mar. 12, 2018) (citing the collection of cases in *Sinanyan v. Luxury Suites Int'l, LLC*, 2:15-CV-00225-GMN-VCF, 2016 WL 4394484, at *4–5 (D. Nev. Aug. 17, 2016); *accord Capital One v. SFR Invs. Pool 1, LLC*, 2:17-CV-00604-RFB-

[18] *Cf.* LEWIS ROCA ROTHGERBER CHRISTIE LLP, *Dan Polsenberg*, https://www.lrrc.com/Daniel-Polsenberg#distinctions (last visited June 26, 2020); LEWIS ROCA ROTHGERBER CHRISTIE LLP, LRRC.com, *Lewis and Roca Attorney Dan Polsenberg Ranked #1 for 2013 Edition of Mountain States Super Lawyers*, https://www.lrrc.com/Lewis-and-Roca-Attorney-Dan-Polsenberg-Ranked-1-for-2013-Edition-of-Mountain-States-Super-Lawyers-06-25-2013 (last visited June 26, 2020); LEWIS ROCA ROTHGERBER CHRISTIE LLP, *Dan Polsenberg Argues 250th Appeal* https://www.lrrc.com/Dan-Polsenberg-Argues-250th-Appeal (last visited June 26, 2020) (noting Mr. Polsenberg's ranking as the #1 lawyer in Nevada in 2014, according to Super Lawyers). This Court need not decide whether a $1000 hourly rate is categorically inappropriate; Lewis has simply not met his burden to support such a rate here.

DJA, 2019 WL 9100174, at *7 (D. Nev. Sept. 24, 2019). The requesting attorney's "cursory averments" that "[t]he billing rates applied are reasonable and customary" for the kind of work "fall short of demonstrating that Counsel's rates are consistent with the prevailing market rate." *Sinanyan v. Luxury Suites Int'l, LLC*, 2:15-CV-00225-GMN-VCF, 2016 WL 4394484, at *4–5 (D. Nev. Aug. 17, 2016) (citing *Camacho*, 523 F.3d at 980). No surprise, the *Cohen* court rejected a $1000 hourly rate, and the *Sinanyan* court rejected a rate of $550 even for the well-respected Don Springmeyer. *Cohen*, 2018 WL 1308945, at *7; *Sinanyan*, 2016 WL 4394484, at *5.

Mr. Arntz's rate, smaller only in comparison to Mr. Christensen's, is still far beyond the $450 "upper range" for exceptionally complex cases. (*See also* Mot. Ex. 2, ¶ 6 (citing case law confirming the upper range of $450).) But even that rate would be inappropriate here. Again, to the extent Lewis has made this case complex—such as by Lewis's refusing appointed counsel that would have defended him against the enforcement of a multimillion-dollar judgment—that complexity should not be encouraged with an award of fees. In addition, Mr. Arntz does not provide the documentation supporting his $600 fee approval before Judge Sturman. Because he has not attached it, it is impossible to say whether Judge Sturman awarded such a high rate in circumstances similar to this—where Mr. Arntz was unsuccessful in obtaining a judgment for his client.

3. The Character of the Work and the Result Do Not Support Such a Large Fee

The limited "success" in the writ petition that Lewis trumpets comes, as discussed, with a heavy dose of failure. The questions of intervention and consolidation were secondary to the ultimate question of whether the 2008 judgment would be enforceable. And even on this point, the Nevada Supreme Court made it clear that UAIC could advance its interest in this 2018 action, "as it could potentially be liable for all or part of the judgment." (Ex. F, Opinion 11.)

With the Ninth Circuit's determination that the 2008 judgment expired, the position UAIC sought to advance in intervention has been vindicated. A temporary, and very much mixed, result from the Nevada Supreme does not warrant $133,400 in fees.

CONCLUSION

UAIC does not doubt that Lewis's counsel "have taken risk in litigating this matter." (Mot. 9:9.) The risk was that the Ninth Circuit would do exactly what it has done, and rule that the 2008 judgment is unenforceable. This Court should deny the motion.

Dated this 29th day of June, 2020.

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CERTIFICATE OF SERVICE

I certify that on June 29, 2020, I served the foregoing "Opposition to Gary Lewis's Motion for Attorney's Fees and Costs" through the Court's electronic filing system to the following counsel:

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EXHIBIT A

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EXHIBIT A

NOT FOR PUBLICATION

FILED

JUN 4 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES NALDER, Guardian Ad Litem on behalf of Cheyanne Nalder; GARY LEWIS, individually, Plaintiffs-Appellants, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant-Appellee.	No. 13-17441 D.C. No. 2:09-cv-01348-RCJ-GWF ORDER*

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Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, District Judge, Presiding

Argued and Submitted January 6, 2016
Submission Withdrawn June 1, 2016
Resubmitted June 2, 2020
San Francisco, California

Before: O'SCANNLAIN, W. FLETCHER, and PAEZ, Circuit Judges.

We must resolve three motions that are before this court: United Automobile Insurance Company's (UAIC's) Motion to Dismiss for Lack of Standing (Dkt. 44); James Nalder and Gary Lewis's Motion to Supplement the Record (Dkt. 67); and

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Nalder and Lewis's Motion to Take Judicial Notice, or, in the Alternative to Supplement the Record (Dkt. 83). Because the facts are known to the parties, we repeat them only as necessary to explain our decision.

I

In its Motion to Dismiss for Lack of Standing, UAIC argues that Nalder's default judgment against Lewis expired and is therefore unenforceable. As a result, UAIC contends that Nalder and Lewis no longer have standing to bring their claims against UAIC.

Under Nevada Revised Statute § 11.190(1)(a), a judgment normally expires after six years unless a party either renews the judgment or brings "an action upon [the] judgment." *See Leven v. Frey*, 168 P.3d 712, 715 (Nev. 2007) ("An action on a judgment or its renewal must be commenced within six years under NRS 11.190(1)(a); thus a judgment expires by limitation in six years."). Renewing a judgment requires strict compliance with the procedures set out in Nev. Rev. Stat. § 17.214. *Id.* at 719.

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In the case of Nalder's default judgment against Lewis, the Notice of Entry of Judgment was filed on August 26, 2008. Thus, the judgment would have expired on August 26, 2014, unless Nalder or Lewis either renewed the judgment or brought an action upon the judgment. There is no dispute that Nalder and Lewis did not follow the procedures of Nev. Rev. Stat. § 17.214 to renew the judgment.

Therefore, the remaining questions are whether Nalder and Lewis brought an action upon the judgment and, if they did not, whether they can continue to seek consequential damages based on the expired judgment.

The Nevada Supreme Court, answering a certified question from our court, held that Nalder and Lewis's federal action against UAIC for "breach of its duty to defend is not an action upon Nalder's state court judgment against Lewis." *Nalder v. United Auto. Ins. Co.*, No. 70504, 2019 WL 5260073, at *2 (Nev. Sept. 20, 2019). As the court explained, "[a]n 'action upon a judgment' as referenced in [Nev. Rev. Stat. §] 11.190(1)(a) is a distinct cause of action under the common law." *Id.* Because Nalder and Lewis's suit against UAIC is not such an action, it does not renew Nalder's default judgment against Lewis under § 11.190(1)(a).

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Furthermore, the Nevada Supreme Court concluded that Nalder and Lewis cannot continue to seek consequential damages for breach of the duty to defend. *Id.* Because Nalder's default judgment against Lewis expired, Lewis is no longer liable to Nalder for that judgment. Consequently, "UAIC is not liable for that judgment as a result of breaching its duty to defend Lewis in the action that led to it." *Id.* at *3. And, because Nalder and Lewis did not suffer an injury as a result of UAIC's failure to defend Lewis, they lack standing.

II

Shortly after the Nevada Supreme Court answered our certified question,

Nalder and Lewis filed a Motion to Supplement the Record. They subsequently filed a Motion to Take Judicial Notice, or, in the Alternative to Supplement the Record.

We have the "inherent authority to supplement the record in extraordinary cases." *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003). However, we normally "will not supplement the record on appeal with material not considered by the trial court." *Daly-Murphy v. Winston*, 837 F.2d 348, 351 (9th Cir. 1987). Moreover, as an appellate court, "[i]t is rarely appropriate for [us] to take judicial notice of facts that were not before the district court." *Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 392 n.7 (9th Cir. 2000).

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Nalder and Lewis claim that the proposed record supplements will show that there are still valid and enforceable judgments against Lewis. They also cite Nevada tolling statutes to argue that Nalder's judgment against Lewis did not expire. Thus, the underlying reason why Nalder and Lewis ask us to grant their motion is so that they may present arguments that they still have standing in their suit against UAIC.

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If Nalder and Lewis had wanted us to consider their arguments about Nevada tolling statutes, they should have offered them in their response to UAIC's Motion to Dismiss for Lack of Standing over three years ago, before we certified our second question to the Nevada Supreme Court. Because they did not, such

arguments are waived. *See United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015). Furthermore, it is irrelevant whether Nalder has obtained additional judgments against Lewis in Nevada state court because such other judgments were not the basis for their complaint against UAIC in this case.

Accordingly, we conclude that Nalder and Lewis have not presented adequate justification for why we should take the extraordinary steps of supplementing the record or taking judicial notice of facts that were not before the district court.

III

Appellee's Motion to Dismiss for Lack of Standing, filed with this court on March 14, 2017, is GRANTED. Appellants' Motion to Supplement the Record, filed with this court on November 14, 2019, is DENIED. Appellants' Motion to Take Judicial Notice, or, in the Alternative to Supplement the Record, filed with this court on May 1, 2020, is DENIED.

APPEAL DISMISSED.

EXHIBIT B

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EXHIBIT B

DOCKET No.13-17441

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

PLAINTIFFS/ APPELLANTS,
v.
UNITED AUTOMOBILE INSURANCE COMPANY,

DEFENDANTS/ APPELLEES.

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

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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Statutes, Rules and Constitutional Provisions

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I. Each of the overlooked or misapprehended points of law or facts below labeled A through H requires a finding of standing, independent of any other reason.

Appellants Gary Lewis and James Nalder hereby petition for rehearing and hearing en banc of the Order (Doc #142) issued June 4, 2020. A panel rehearing is appropriate when a material point of law or fact was overlooked or misapprehended in the decision. Fed. R. App. P. 40(a)(2). Appellants have identified eight alphabetically enumerated reasons below, each independently supporting rehearing. Rehearing en banc is warranted under FRAP 35(b)(2) because the issues presented by this decision—whether the appellate court can disregard Nevada Supreme Court decisions and Nevada and California trial court judgments and thereby frustrate Nevada's regulation of the insurance industry by cutting of the right to a jury trial by factual findings made by an appellate court—are of "exceptional importance." (See U.S. Constitution, Amendment VII).

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II. Points of law or fact that the petitioner believes the court has overlooked or misapprehended and argument in support of the petition.

A. The Panel's decision misapprehended the Nevada Supreme Court holding.

The panel states "Furthermore, the Nevada Supreme Court concluded that Nalder and Lewis cannot continue to seek consequential damages for breach of the duty to defend. *Id.*" (At page 3 of the June 4, 2020 Order.) This, however, is

not what the Nevada Supreme Court stated or held. What the Nevada Supreme Court actually said was:

> "A plaintiff cannot continue to seek consequential damages **in the amount of a default judgment** against the insured when the judgment against the insured was not renewed and the time for doing so expired while the action against the insurer was pending." (Order page 7). (Emphasis added.)

The distinction is important. The Nevada Supreme Court cut off the consequential damage of **ONLY** the judgment in specific circumstances. The Court did not, in any way, however cut off ***all*** damages that would eliminate standing when there is a breach of the duty to defend. The Nevada Supreme Court rephrased and narrowed the certified question posed by this Court. It noted that both a "common law action on a judgment" and a statutory renewal are valid under Nevada law. (Order page 4, citing *Mandlebaum v. Gregovich*, 24 Nev. 154, 161, 50 P. 849, 851 (1897). The Nevada Supreme Court further found that the action filed against UAIC, on appeal herein, is not an action on the judgment. (Order page 4.) The Nevada Supreme Court **did not address** whether the judgment expired, but held that ***if*** the judgment expired, the judgment amount would not be damages that Appellants could recover.

The Nevada Supreme Court held that "An insured may recover ***any*** *damages consequential* to the insurer's breach of its duty to defend." *Century*

Surety Co. v. Andrew, 134 Nev. Adv. Op. 100, 432 P.3d 180 (2018)(emphasis added.) And, "the determination of the insurer's liability depends on the unique facts of each case and is one that is left to the jury's determination." *Id.*, citing *Khan v. Landmark Am. Ins. Co.*,757, S.E.2d 151, 155 (Ga. Ct. App. 2014). Here, Appellants have standing based upon actual and concrete injury and the right to a jury trial must be restored by remand.[1]

B. The Panel's decision misapprehended the facts that the March 28, 2018 amended judgment in case number 07A549111 and the California enforcement action judgment entered July 24, 2018 provided to the Ninth Circuit on January 29, 2019 are extensions of the judgment in case number 07A549111, which was originally pled as one of the elements of damage, giving standing to Lewis.

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The Panel stated "Furthermore, it is irrelevant whether Nalder has obtained additional judgments against Lewis in Nevada State Court because such other judgments were not the basis for their complaint against UAIC in this case." Therein, this Court dubbed "irrelevant" the judgment in the Nevada State Court case number 07A549111 on March 28, 2018, which is the very same case number that formed the basis of the original complaint against UAIC. Further, this Court

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[1] State courts enjoy the benefit of having the final say on matters of state law. Certification is perhaps uniquely suited to further the principles of judicial federalism underlying the Supreme Court's decision in *Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)*. See Bradford R. Clark, Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie, 145 U. PA. L. REV. 1459, 1495-1515, 1535-39 (1997).

ignores the valid and enforceable California judgment, which was an enforcement action of that same judgment that formed the basis of the original complaint against UAIC. The existence of these judgments confirm Appellants' standing.

C. The Panel's decision overlooks Appellants' standing resulting from other contractual damages, in addition to, or instead of, the judgment.

Appellants set forth at length in their opposition to UAIC's Motion to Dismiss, filed three years ago, that Lewis was damaged when Lewis assigned a portion of this lawsuit to Nalder. It was alleged that the assignment damaged Lewis in excess of $3.5 million dollars. Whether or not the judgment became enforceable afterward is irrelevant. Lewis was immediately damaged. Any actual or alleged expiration does not change the consequence and negative effect on Lewis of the assignment.

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Appellants herein alleged, in their complaint against UAIC, additional damages that give standing and require remand for a jury trial in this case. As evidenced in the complaint:

> 32. As a proximate result of the aforementioned breach of contract, Plaintiffs have suffered and will continue to suffer in the future, damages in the amount of $3,500,000.00 **plus continuing interest.**
> **33. As a further proximate result of the aforementioned breach of contract, Plaintiffs have suffered anxiety, worry, mental and emotional distress, and other incidental damages and out of pocket expenses, all to their damage in excess of $10,000.**" (See Complaint filed May 22, 2009, Dkt Entry 20-4, at page 188 of 203, 783 of 999, Appellee's Excerpts of Record. Emphasis added.)

These damages, giving rise to standing, have been overlooked by the Panel.

In addition, the Nevada Supreme Court has held (in other litigation involving these parties) that in order to remove the "expired judgment" UAIC must collaterally attack the judgment, which UAIC has not done.[2] Lewis has standing based upon having a multimillion dollar judgment pending against him and the **ongoing injury until it is affirmatively removed.**

On remand from the U.S. Supreme Court, the Ninth Circuit found that a plaintiff's allegations of inaccurate reporting of information about his marital status, age, education, and employment history constituted harm sufficiently concrete to satisfy the injury-in-fact requirement for standing. *Robins v. Spokeo, Inc.*, 867 F. 3d 1108, 9th Circuit (2017). Surely, the injury to Lewis of having an actual, active valid judgment against him for at least six years[3] is a greater injury in fact and concrete injury than having a false credit report. Likewise, financial consequences remain once a large judgment is a part of a person's credit history--whether expired or not. The years of financial ruin and involvement in litigation with UAIC, at the very least, are additional consequential damages

[2] *Nalder v. Eighth Judicial Dist. Court and UAIC*, 136 Nev. Adv. Op. 24, (April 30, 2020).

[3] This is assuming the shortest, non-tolled or waived time frame, which Appellants only argue hypothetically, not wanting to be accused of inadvertently waiving.

giving Appellants continued standing.[4]

D. The Panel overlooks Appellants' standing for damages for breach of the duty of good faith and fair dealing and violating NRS 686A.310.

The Nevada Supreme Court narrowed its ruling by stating that "**If** Lewis is not liable to Nalder for the $3.5 million judgment..."(Order page 6, emphasis added); and "Based on what is before this court on the certified question presented" (Order page 6). The decision limiting the damages under the contract has no application to the liability in tort for the default judgment, even if expired.[5]

As stated in Appellants' opening brief, and throughout this appeal, the original "state court judgment is the minimum measure of damages" and just one item of damage in this appeal and that "all consequential damages should be awarded." (DktEntry 10, page ii, Appellant's opening Brief). See *Allstate v. Miller*, 125 Nev. 300, 212 P.3d 318 (2009), *Campbell v. State Farm*, 840 P.2d 130

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[4] One example is the *Cumis/Hansen* counsel fees incurred in defending the Nalder actions. *State Farm Mut. Auto. Ins. Co. v. Hansen*, 357 P. 3d 338 (NV Supreme Court 2015). Other damages include the publicity and resultant reputational loss in addition to the financial harm of a judgment against an insured that results from a failure of a duty to defend. *Starr Indemnity & Liability Company v. Limmie Young III*, 379 F. Supp. 3d 1103 (2019).

[5] UAIC admitted that there is potential for tort liability for the excess judgment "If an insurer violates its duty of good faith and fair dealing by failing to adequately inform the insured of a reasonable settlement opportunity, the insurer's actions can be a proximate cause of the insured's damages arising from a foreseeable settlement or excess judgment. *Allstate Ins. Co. v. Miller,* 125 Nev. at 313-14, 212 P.3d at 327." DktEntry 44, Appellee's Motion, page 10.

(Utah App.1992), *Powers v. USAA*, 114 Nev. 690, 962 P.2d 596(1998). This concept of more expansive tort damages than contract damages was presented in the trial court, argued in every Appellant Brief before this court, admitted in every brief filed by Respondent, argued by Appellants at oral argument and ignored by the Panel in its decision.

E. The Panel overlooked UAIC's waiver of the statute of limitations defense.

UAIC did not bring the alleged "expiration" of the judgment to the Court's attention in UAIC's Opening Brief on appeal.[6] UAIC did not raise the issue in the trial court, nor was it raised in its Reply Brief filed May 21, 2014, nor was it raised when it made payment in exchange for a partial satisfaction of judgment on March 5, 2015, nor was it raised in UAIC's 28(j) letter filed December 30, 2015, nor was it raised at oral argument on January 6, 2016, nor was it raised when the 9th Circuit certified the first question to the Nevada Supreme Court on June 1, 2016, nor was it raised when the Nevada Supreme Court accepted the certified question on July

[6] As stated in Appellant's first brief opposing dismissal: "As a general rule, an appellate court will not hear an issue raised for the first time on appeal." *Whittaker Corp. v. Execuair Corp*., 953 F.2d 510, 515 (9th Cir. 1992) (Dkt Entry 45, page 5.) UAIC agrees: "Raise it or waive it is the rule on appeal. *United States v. Dreyer,* 804 F.3d 1266, 1277 (9th Cir. 2015)(generally, an appellee waives any argument it fails to raise in its answering brief."); *In re Cellular 101, Inc.,* 539 F.3d 1150, 1155 (9th Cir. 2008); *cf. Parmalat Capital Finance Ltd. v. Bank of Am. Corp.,* 671 F.3d 261, 270-71 (2d Cir. 2012) (parties waived argument by failing to raise it in the first round of appeal." (DktEntry 75, page 3).

22, 2016, nor was it raised when UAIC moved to associate counsel on Dec 14, 2016, nor was it raised when UAIC filed its 31-page brief on January 6, 2017, nor was it raised in the amicus brief filed on January 24, 2017. It was not until March 14, 2017, nearly three years after UAIC alleges the "expiration" occurred--after all briefing was complete on the first certified question.[7]

The second certified question was the result of the belated introduction (by affidavit of UAIC's counsel) of alleged facts and issues that were not part of the record below. Appellants' objected in their initial Opposition to the Motion to Dismiss (filed three years ago on March 28, 2017) that arguments raised by UAIC four years after the judgment and three years after it alleges the issue became ripe were improper and waived. (DktEntry 45, page 5.) The Panel overlooked and excused UAIC's waiver without comment or justification.

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F. The Panel overlooked Appellants' timely arguments against expiration.

Appellants, in their Opposition to UAIC's Motion to Dismiss, argued that the question of the effect of non-renewal was "a substantive legal issue that should be placed before the District Court once this Court reaches a final ruling on the appeal." (DktEntry 45, at page 4.) The Nevada Supreme Court's unpublished

[7] UAIC also violated NRS 686A.310(p) when the issue was belatedly raised before this Court.

order confirms this. This Court should be reviewing the District Court's legal rulings based on the factual record before it at the time of the rulings that are on Appeal herein. Appellants argued, correctly as confirmed by the Nevada Supreme Court, that on appeal is not the proper place to find facts or evaluate statute of limitations and tolling issues. FRCP 52(a) serves two important functions: it informs appellate courts about the basis for the trial court's decision, and it ensures reasoned decision making by trial courts. See *TEC Engineering Corp v Budget Molders Supply, Inc.*, 82 F3d 542, 545(1st Cir 1996)(discussing the importance of creating a record adequate for review); and *United States v Merz*, 376 US 192, 199(1964)(discussing the importance of reasoned decision making). The Nevada Supreme Court has recognized that the question of whether the six year limitations period expires "require[s] application of law to facts that are disputed..." (See DktEntry 55, NV Supreme Court Order Answering Certified Questions, at page 5). The trial court is the appropriate forum for such factual findings, which could clarify the consequential damages issue, but which does not defeat standing.

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The Panel seeks to apply waiver to Appellants while allowing UAIC to bring up untimely issues, as set forth above. Comparing the two waivers, the Panel has failed to articulate a reasonable basis for its refusal to find a waiver on the part

of UAIC, which filed or argued more than ten times, in various aspects of this appeal, dealing directly with this judgment, and did not even touch on the issue of the expiration of the statute of limitations.[8]

And yet the panel enforces a draconian waiver on Appellants even though Appellants, in the first brief opposing dismissal for lack of standing, stated "If the Nevada Supreme Court concludes that a default judgment is a recoverable consequential damage for an insurer's breach of the duty to defend, then it should be left to the district court on remand to collect and weigh evidence to make a factual determination as to what amount of consequential damages are recoverable in this case." (See DktEntry 45, pages 7-8). Of course, that factual determination would include a determination of any statute of limitations and tolling statute issues. Appellants brought up the payments[9] that form the basis of tolling under NRS 11.200 in their Opposition to the Motion to Dismiss for lack of standing, but inartfully claimed they "acted as a Mechanism for Renewal." Appellants go on to argue that UAIC acknowledged "the underlying judgment through payment." Though this is not a perfect statement of the tolling statute, it can hardly be viewed as an affirmative waiver.[10]

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[8] As set forth in Section E, above.

[9] The payments are part of the record below.

[10] "A waiver is the intentional relinquishment of a known right." *Mahban v. MGM*

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If there was any ambiguity about any claimed waiver Appellants removed all doubt when filing their very first pleading following the belated issue brought up by UAIC "C. The Six-Year Statute of Limitations to Pursue an Action Upon the Default Judgment or a Renewal of that Judgment was Extended and Tolled" and argued "Pursuant to NRS 11.200, the statute of limitations "dates from the last transaction or the last item charged or the last credit given." Further, when any payment is made, "the limitation shall commence from the time the last payment was made. See Nev. Rev. Stat. 11.200. Therefore, UAIC's last payment on the judgment extended the expiration of the six-year statute of limitations to February 5, 2021."[11]

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Nevada courts have consistently applied applicable tolling principles to the action on a judgment and even to Nevada statutory judgment renewal under NRS 17.214. *Mandlebaum v. Gregovich*, 24 Nev. 154, 50 P. 849 (Nev. 1897), *O'Lane v. Spinney*, 110 Nev. 496, 874 P.2d 754 (1994),*Worsnop v. Karam*, No. 77248, at *7 (Nev. Feb. 27, 2020), *Wisniewski v. Wisniewski*, No. 66248 (Nev. App. Oct. 22, 2015), *Los Angeles Airways v. Est. of Hughes*, 99 Nev. 166 (Nev. 1983).

The Panel decision overlooks and misapprehends the comparative equities

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Grand Hotels, Inc., 100 Nev. 593, 596 (Nev. 1984).

[11] This is at the earliest. Appellants are not waiving other applicable tolling statutes by not setting them forth in this page limited brief.

of the applied "waivers." The Panel's decision finds that UAIC did not waive an issue, even though it was not brought up in more than ten affirmative filings over a four year period, but Appellants are guilty of waiver for not crisply stating the issue until the first brief filed on the issue. This is not a reasonable use of discretion. This is an abuse of discretion that should shock the judicial conscience and amounts to arbitrary and capricious denial of due process to these litigants and a miscarriage of justice further delaying and extending resolution. (See U.S. Constitution, Amendment XIV.)

Long before the Nevada Supreme Court answered the certified questions in this case, on January 29, 2019, Appellants filed a Fed.R.App.P.28(j) supplemental authority (DktEntry 52), providing this Court with the Nevada Supreme Court opinion issued in *Century Surety Co. v. Andrew,* 134 Nev. Adv. Op. 100 (Dec. 13, 2018) (en banc), 432 P.3d 180 (2018). (Supporting Appellants' statement that the consequential damage from the judgment is a factual issue to be determined by the jury, not on appeal with no record). Appellants' January 29, 2019 Fed.R.App.P.28(j) letter also provided the Court with three final judgments in favor of Nalder and against Lewis that were entered in 2018 -- two in Nevada and one in California. One of these Nevada judgments is the judgment Nalder originally obtained against Lewis, confirmed by the trial court to be valid as a

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result of tolling statutes. This judgment is binding on Lewis and damaging him currently.

G. The Panel overlooked the lack of a case and controversy between Nalder and Lewis.

The Panel states that "unless Nalder or Lewis either renewed the judgment or brought an action upon the judgment." This statement demonstrates that the Panel disregarded an important aspect of waiver: that it be an issue in the litigation knowingly waived. "A waiver is the intentional relinquishment of a known right." *Mahban v. MGM Grand Hotels, Inc.*, 100 Nev. 593, 596 (Nev. 1984). The statute of limitations and the tolling statutes that apply are not issues that can be ruled on directly in this litigation, even at the trial court level. **Nalder is not suing Lewis in this case.** There is no controversy between the two here. The statute of limitations and tolling issues are factual and legal issues that exist between Nalder and Lewis. These can only be litigated in controversies between Nalder and Lewis styled Nalder v. Lewis in the State Courts of Nevada and California. This was brought up by Appellants in the Opposition to the Motion to Dismiss, as set forth above and was not waived, but was overlooked by the Panel.

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H. Appellants ask for oral argument regarding these important issues of judicial estoppel and restraint.

Appellants request oral argument to aid in maintaining the federal-state

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balance. The State of Nevada must have its insurance regulatory scheme operate properly. The decisions of the Nevada Supreme Court must be followed. This Panel's decision ignores and undermines state court determinations regarding the underlying liability and damage to Lewis, and more importantly, undermines the consistent jurisprudence of Nevada of submitting the question of an insurer's liability for breach of the duty to defend, breach of the duty of good faith and fair dealing and violation of NRS 686A.310 to a jury. If this Court does not allow rehearing to correct the clear errors, the judgments and litigation in the state courts caused by UAIC's breaches of good faith and fair dealing will go forward, causing further delay and damage to the insured, the insured public in general and the Nevada State Courts.

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It would be judicially economical for this Court to send the case back to the Federal District Court with instructions to hold a jury trial to determine whether the breach of the duty to defend was also a breach of the covenant of good faith and fair dealing or a violation of NRS 686A.310 and what the consequential damages are from each and from breach of the duty to defend. The answers to the two certified questions are not undermined, as the District court will be instructed that this case is not an action on the judgment. Therefore, any consequential damages in the form of a judgment will have to be proven currently valid and enforceable.

III. Each one of the considerations labeled A through H above warrant reconsideration or a hearing en banc.

In conclusion, rehearing or a hearing en banc is warranted because the Panel overlooked or misapprehended important issues of law and fact in interpreting the Supreme Court's answers to the two Certified Questions. This Court should hold that 1) UAIC is liable for all consequential damages that stem from its breach of its duty to defend regardless of policy limits or defense costs; 2) this Court should overturn the District Court's clearly erroneous Summary Judgment on the tort claims; and, 3) the case must be remanded to the District Court for a determination of the full extent of the consequential damages suffered by Lewis, including but not limited to any judgments that are still collectable by Nalder against Lewis, attorney fees incurred by Lewis, damage arising from the assignment agreement, lost rights or claims of Lewis, interest, loss of income or employment, financial hardship or ruin, and any other consequential damages that flow from UAIC's conduct.

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Dated this 18 day of June, 2020.

CHRISTENSEN LAW OFFICES, LLC
/s/ Thomas Christensen
Nevada Bar #2326
CHRISTENSEN LAW OFFICES
1000 S. Valley View Blvd.
Las Vegas, NV 89107
Attorney for Appellants

Certificate of Compliance for Petitions for Rehearing

I am the attorney for Appellants herein.
I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is:

X In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Dated this 18th day of June, 2020.

/s/ Thomas Christensen
Counsel for Appellants

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/DktEntry system on June 18, 2020.

I certify that all participants in the case are registered CM/DktEntry users and that service will be accomplished by the appellate CM/DktEntry system.

/s/ Thomas Christensen
Counsel for Appellants

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Addendum A- Panel Decision dated June 4, 2020

NOT FOR PUBLICATION

FILED

JUN 4 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES NALDER, Guardian Ad Litem on behalf of Cheyanne Nalder; GARY LEWIS, individually, Plaintiffs-Appellants, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant-Appellee.	No. 13-17441 D.C. No. 2:09-cv-01348-RCJ-GWF ORDER*

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Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, District Judge, Presiding

Argued and Submitted January 6, 2016
Submission Withdrawn June 1, 2016
Resubmitted June 2, 2020
San Francisco, California

Before: O'SCANNLAIN, W. FLETCHER, and PAEZ, Circuit Judges.

We must resolve three motions that are before this court: United Automobile Insurance Company's (UAIC's) Motion to Dismiss for Lack of Standing (Dkt. 44); James Nalder and Gary Lewis's Motion to Supplement the Record (Dkt. 67); and

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Nalder and Lewis's Motion to Take Judicial Notice, or, in the Alternative to Supplement the Record (Dkt. 83). Because the facts are known to the parties, we repeat them only as necessary to explain our decision.

I

In its Motion to Dismiss for Lack of Standing, UAIC argues that Nalder's default judgment against Lewis expired and is therefore unenforceable. As a result, UAIC contends that Nalder and Lewis no longer have standing to bring their claims against UAIC.

Under Nevada Revised Statute § 11.190(1)(a), a judgment normally expires after six years unless a party either renews the judgment or brings "an action upon [the] judgment." *See Leven v. Frey*, 168 P.3d 712, 715 (Nev. 2007) ("An action on a judgment or its renewal must be commenced within six years under NRS 11.190(1)(a); thus a judgment expires by limitation in six years."). Renewing a judgment requires strict compliance with the procedures set out in Nev. Rev. Stat. § 17.214. *Id.* at 719.

In the case of Nalder's default judgment against Lewis, the Notice of Entry of Judgment was filed on August 26, 2008. Thus, the judgment would have expired on August 26, 2014, unless Nalder or Lewis either renewed the judgment or brought an action upon the judgment. There is no dispute that Nalder and Lewis did not follow the procedures of Nev. Rev. Stat. § 17.214 to renew the judgment.

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Therefore, the remaining questions are whether Nalder and Lewis brought an action upon the judgment and, if they did not, whether they can continue to seek consequential damages based on the expired judgment.

The Nevada Supreme Court, answering a certified question from our court, held that Nalder and Lewis's federal action against UAIC for "breach of its duty to defend is not an action upon Nalder's state court judgment against Lewis." *Nalder v. United Auto. Ins. Co.*, No. 70504, 2019 WL 5260073, at *2 (Nev. Sept. 20, 2019). As the court explained, "[a]n 'action upon a judgment' as referenced in [Nev. Rev. Stat. §] 11.190(1)(a) is a distinct cause of action under the common law." *Id.* Because Nalder and Lewis's suit against UAIC is not such an action, it does not renew Nalder's default judgment against Lewis under § 11.190(1)(a).

Furthermore, the Nevada Supreme Court concluded that Nalder and Lewis cannot continue to seek consequential damages for breach of the duty to defend. *Id.* Because Nalder's default judgment against Lewis expired, Lewis is no longer liable to Nalder for that judgment. Consequently, "UAIC is not liable for that judgment as a result of breaching its duty to defend Lewis in the action that led to it." *Id.* at *3. And, because Nalder and Lewis did not suffer an injury as a result of UAIC's failure to defend Lewis, they lack standing.

II

Shortly after the Nevada Supreme Court answered our certified question,

Nalder and Lewis filed a Motion to Supplement the Record. They subsequently filed a Motion to Take Judicial Notice, or, in the Alternative to Supplement the Record.

We have the "inherent authority to supplement the record in extraordinary cases." *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003). However, we normally "will not supplement the record on appeal with material not considered by the trial court." *Daly-Murphy v. Winston*, 837 F.2d 348, 351 (9th Cir. 1987). Moreover, as an appellate court, "[i]t is rarely appropriate for [us] to take judicial notice of facts that were not before the district court." *Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 392 n.7 (9th Cir. 2000).

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Nalder and Lewis claim that the proposed record supplements will show that there are still valid and enforceable judgments against Lewis. They also cite Nevada tolling statutes to argue that Nalder's judgment against Lewis did not expire. Thus, the underlying reason why Nalder and Lewis ask us to grant their motion is so that they may present arguments that they still have standing in their suit against UAIC.

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If Nalder and Lewis had wanted us to consider their arguments about Nevada tolling statutes, they should have offered them in their response to UAIC's Motion to Dismiss for Lack of Standing over three years ago, before we certified our second question to the Nevada Supreme Court. Because they did not, such

arguments are waived. *See United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015). Furthermore, it is irrelevant whether Nalder has obtained additional judgments against Lewis in Nevada state court because such other judgments were not the basis for their complaint against UAIC in this case.

Accordingly, we conclude that Nalder and Lewis have not presented adequate justification for why we should take the extraordinary steps of supplementing the record or taking judicial notice of facts that were not before the district court.

III

Appellee's Motion to Dismiss for Lack of Standing, filed with this court on March 14, 2017, is GRANTED. Appellants' Motion to Supplement the Record, filed with this court on November 14, 2019, is DENIED. Appellants' Motion to Take Judicial Notice, or, in the Alternative to Supplement the Record, filed with this court on May 1, 2020, is DENIED.

APPEAL DISMISSED.

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EXHIBIT C

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EXHIBIT C

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHEYENNE NALDER, an individual, and GARY LEWIS Petitioners and Real Parties in Interest, Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; THE HONORABLE DAVID M. JONES, DISTRICT JUDGE; AND THE HONORABLE ERIC JOHNSON, DISTRICT COURT JUDGE, Respondents, And UNITED AUTOMOBILE INSURANCE COMPANY, Real Party in Interest.	Supreme Court No. 78085
GARY LEWIS Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; THE HONORABLE ERIC JOHNSON, DISTRICT COURT JUDGE, Respondents, and UNITED AUTOMOBILE INSURANCE COMPANY; and CHEYENNE NALDER, Real Parties in Interest.	Supreme Court No. 78243

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(Consolidated original petitions for writs of mandamus challenging district court orders granting intervention, consolidation and relief from judgment in tort actions.)

MOTION FOR ATTORNEY FEES AND COSTS AND FOR RECONSIDERATION

I. INTRODUCTION

Nalder and Lewis request an award of attorney fees and costs and that the Court reconsider and revise the Opinion issued on April 30, 2020, which strives to correct decisions made by Judge David Jones and Judge Eric Johnson. The lower court actions were improperly intervened and wrongly consolidated at UAIC's urging and have caused more than a year of ongoing litigation expenses for the real parties Lewis and Nalder. The Court's Opinion moved the parties closer to the positions they were in prior to the actions taken by UAIC. However, on the portion that was denied--allowing intervention by UAIC in the 2018 Action on the Judgment case (Case No. A-18-772220-C)--the Court overlooked or misapprehended material facts that should be corrected through reconsideration.

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Specifically, the Court misstated what actually took place and is taking place in the Court below. There are three misstated facts in the Court's Opinion: 1) Lewis' Third-Party Complaint against UAIC is still pending and is subject to a motion for partial summary judgment. 2) In the Nalder v. Lewis cases below, Plaintiff Cheyanne Nalder is represented by David A. Stephens; and Defendant Gary Lewis is represented by E. Breen Arntz pursuant to *Cumis/Hansen* and, at the

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time of intervention, he was also represented by Randall Tindall, who was appointed by UAIC. In the Third Party Complaint of Lewis v. UAIC, Third Party Plaintiff is represented by Thomas Christensen. 3) The settlement and judgment of the Nalder and Lewis dispute resulted from arm's length negotiation between David Stephens and E. Breen Arntz, counsel for the parties. The controversy was resolved. There was no collusion or fraud in the settlement reached between these represented parties.

Reconsideration is also warranted because the court overlooked, misapplied or failed to consider a statute, procedural rule and decision directly controlling a dispositive issue as follows: 1) The Court did not appropriately interpret NRS 12.130. 2) The court did not follow *Dangberg Holdings. v. Douglas Co.*, 115 Nev. 129, 139 (Nev. 1999). 3) The court mistakenly applied *Allstate Ins. Co. v. Pietrosh*, 85 Nev. 310, 454 P.2d 106 (1969), an uninsured motorist intervention to this liability carrier action. The Court should have applied the reasoning in *Hinton v. Beck*, 176 Cal. App. 4th 1378 (Cal. Ct. App. 2009) which held: "Grange [the liability insurer like UAIC here], having denied coverage and having refused to defend the action on behalf of its insured, did not have a direct and immediate interest to warrant intervention in the litigation."

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The Court's April 30, 2020 Opinion, as written, will cause confusion for future litigants who are in the unfortunate position of having to stand up to their own insurance companies; and therefore the Opinion must be reheard and corrected.

II. FACTUAL HISTORY

UAIC'S LACK OF GOOD FAITH AND FAIR DEALING IN THIS LITIGATION

A. UAIC Acts in Bad Faith, Multiplying and Delaying the Litigation.

UAIC, in bad faith, intervened, consolidated and appealed the lower Court's ruling in a desperate effort to delay and discharge itself from the consequences of its own bad acts arising from its failure to defend Gary Lewis. UAIC began multiplying the litigation while the Ninth Circuit Court's First Certified Question was fully briefed before this court (see Docket 70504). Instead of doing a good faith investigation and acting to protect UAIC's insured Lewis, UAIC brought a baseless and untimely motion to dismiss the Ninth Circuit appeal for lack of standing. This was promoted by an affidavit of counsel for UAIC suggesting that Nalder needed to renew her judgment in case number 07A549111.

Nalder sought instead through attorney David Stephens (see cases 07A549111 & 18-772220), to obtain an amended judgment because the statute of limitations had been tolled and new judgment under the clear precedent in *Mandlebaum v. Gregovich,* 24 Nev. 154, 50 P. 849 (1897) which holds that a

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judgment is still a valid basis for an action on the judgment after ten years because of Lewis' absence from the state of Nevada for eight years (where the *Mandlebaum* judgment was still valid for that purpose after a fifteen year absence from the state.) In addition to the tolling statute applied by the court in *Mandlebaum,* NRS 11.300, other tolling statutes applied: NRS 11.200 (time period in NRS 11.190 runs from last payment); and NRS 11.250 (time period in NRS 11.190 is tolled during minority). Because of this clear on point black letter law in Nevada, a written settlement agreement was entered by the parties and filed with the court. [1]

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UAIC was not candid with the courts and did not act in good faith by informing the 9th circuit and this Court that the second question was now moot and counsel's affidavit was false. UAIC improperly intervened and distorted the record and the law, obtaining clearly erroneous rulings allowing intervention to stand and consolidating both cases.[2]

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

UAIC refused to pay *Cumis*[3] counsel, E. Breen Arntz. UAIC went behind

[1] See Petitioners' Appendix, Docket 78085, bates 0142-0143, Stipulation to Enter Judgment, dated September 13, 2018.

[2] These clearly improper rulings delayed the case caused greater expense and were eventually struck down by Writ in this Docket 78085 & 780243.

[3] *State Farm Mutual Automobile Insurance Company v. Hansen*, 357 P. 3d 338 (2015); *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc*., 162 Cal App3d. 358, 208

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its insured's back disregarded reasonable requests from counsel for Gary Lewis and directed other attorneys to file unauthorized pleadings on behalf of its insured. UAIC without any supporting law requested and obtained a stay. Judge Johnson refused to set aside the judgment entered by the former judge on the case, Judge Jones.[4] UAIC, in bad faith and without a reasonable basis, appealed. UAIC had no good faith basis to appeal the lower Court's ruling.[5] This is also evident by UAIC's repetitive requests for extensions of time to file an Opening Brief itsbaseless appeal at Docket 79487.

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

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The mediation of the Docket 79487 appeal became an attempted global mediation of the entire dispute between the parties. The case was not resolved and originally the Opening Brief in that Appeal was due February 11, 2020. At the request of UAIC, it was extended to March 12, 2020 by Stipulation of the parties and Order of the Court pursuant to NRAP 31(b)(2).

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The Court's Order dated February 12, 2020, stated "No further extensions of time shall be permitted, except upon motion clearly demonstrating good cause.

Cal Rptr. 494(1984).

[4] The one ruling consistent with the law.

[5] At the hearing in front of Judge Johnson on March 4, 2020 the court asked: What have you appealed? Mr Polsenberg responded at 8:55.30 "You want me to be candid? I don't know what I am going to be arguing ... I am not even entirely positive of how I am going to go ahead with that appeal."

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NRAP 31(b)(2); NRAP 31(b)(3)(B)." Despite this, on March 12, 2020, UAIC did not file its Opening Brief, but instead filed a last minute Motion to Extend Time. In Opposition, Real Party in Interest, Gary Lewis, alerted this Court to the *modus operandi* of UAIC in seeking last minute extensions without good cause for purposes of delay. UAIC's primary motive was to seek further, unnecessary delay because UAIC had no good faith arguments for that appeal.

D. UAIC Obtained an Extension in that Appeal to File a baseless Petition for a Writ, Seeking Further Delay.

On April 3, 2020, the Court granted UAIC's Motion for Extension under NRAP 31(b)(3)(B), without specifically finding what good cause claimed by UAIC justified the extension. The Chief Justice ordered UAIC's Opening Brief and Appendix to be filed by April 13, 2020. Instead of working on its brief regarding the very narrow issue in that appeal, on April 10, 2020, counsel for UAIC, Lewis Roca, served an Emergency Writ Petition, a 15 Volume Appendix, and two Motions, creating another Docket in this Court. (See Docket 80965). That Writ requested a stay. It was filed on April 13, 2020, which was the very due date of the Opening Brief and Appendix in the appeal. The real parties in interest then had to oppose the two motions in expedited fashion because they were filed

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on an emergent basis. Ultimately, UAIC's Writ and motions were denied by this Court.

E. UAIC Now Seeks Yet Another Delay.

On April 13, 2020, at 5:08pm, UAIC filed yet another last minute Motion to Extend Time to File Opening Brief and Appendix in the appeal. This was its third request for an extension. Again, no extraordinary circumstances for delay were cited, yet, the extension was granted through May 13, 2020.

This Court issued a Writ of Mandamus on April 30, 2020 confirming that UAIC should not have been allowed to intervene in and delay the lower court case for nearly two years. Incredibly, on May 13, 2020, instead of doing the ethical thing, UAIC then filed a "Suggestion of Mootness" requesting the Court delay briefing indefinitely by a request to "suspend the briefing."[6] UAIC should have filed a voluntary dismissal of that Appeal, or its opening brief, or both. The fact that it did not voluntarily dismiss that appeal and that UAIC has also made other filings designed to delay these proceedings and multiply the casework of the counsel for the Real Parties in Interest, not in good faith and with a reasonable basis, are grounds for an award of fees and costs.

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[6] See footnote three on page 6 of Appellant's Suggestion of Mootness in Docket 79487 .

III. SUPPORTING LAW AND ARGUMENT

A. Even though this court did not properly apply *Dangberg* and NRS 12.130, UAIC's intervention presented claims and defenses that overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

The obviously improper intervention in case 07A549111 by UAIC spawned months of litigation expenses on a case that was already to judgment. In order to correct the Court's error brought on by UAIC's disingenuous litigation tactics, the parties had to file two writ petitions. As set forth below, this in itself requires granting of fees and costs to the parties below, Gary Lewis and CheyAnne Nalder.

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The court should grant rehearing to properly apply Nevada Law.

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Nevada Rule of Appellate Procedure 40 governs Petitions for rehearing and limits the scope as follows:

> **(c) Scope of Application; When Rehearing Considered.**
> (1) Matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing.
> (2) The court may consider rehearings in the following circumstances:
> (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
> (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

B. Proper application of NRS 12.130 and the case law interpreting it makes the need for fees and costs even more apparent

NRS 12.130 requires intervention to happen "before the trial," when there is still a controversy. All of the cases interpreting this statute do not allow intervention if there is no trial to be had. The statute reads:

NRS 12.130 Intervention: Right to intervention; procedure, determination and costs; exception.

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.
   (b) An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant.
   (c) Intervention is made as provided by the Nevada Rules of Civil Procedure.
   (d) The 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.
   (e) 2. The provisions of this section do not apply to intervention in an action or proceeding by the Legislature pursuant to NRS 218F.720.

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Dangberg Holdings. v. Douglas Co., 115 Nev. 129, 139 (Nev. 1999) holds that:

> **"[A] voluntary agreement of the parties stands in the place of a verdict, and, as between the parties to the record as fully and finally determines the controversy as a verdict could do."**

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The intervention was allowed in *Dangberg* not because a judgment would be required, but rather because there was no settlement agreement in the record.[7] That is not the case here. Not only was an agreement reached in the instant case, it was written, signed and filed with the court.[8] This was a reasoned settlement based on the available defenses, not collusive or in bad faith. This Court disregards Lewis' argument that parties can settle during a stay because he failed to cite authority. If a settlement is reached, at any time, however, it would not create case law. A case that is settled by the real parties in interest is not appealed. UAIC's intervention was after the resolution of the case to the satisfaction of the parties. Even in intervention, UAIC will be bound by that agreement.

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The court mistakenly applies *Allstate Ins. Co. v. Pietrosh*, 85 Nev. 310, 454 P.2d 106 (1969) to this action. Allstate was an **uninsured motorist carrier** intervening in the underlying tort lawsuit. What we have below in this case is a **liability carrier** intervening in the tort lawsuit. When UAIC got around to requesting intervention in this case, Randall Tindall, who was an attorney paid by UAIC, and an attorney the insured picked that the carrier is refusing to pay under *Cumis/Hansen*, E. Breen Arntz, were already adequately representing the insured's

[7] And apparently no settlement agreement had been reached.
[8] See Petitioners' Appendix, Docket 78085, bates 0142-0143, Stipulation to Enter Judgment, dated September 13, 2018.

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interests. Thus the decision in *Am. Home Ass. v. Eighth Dist. Ct.*, 122 Nev. 1229, 1233 (Nev. 2006) applies.

> "Because the insurer here failed to show that its interest was inadequately represented by the injured worker, we deny the insurer's request for extraordinary relief."

Also, UAIC refused to defend or intervene when the lawsuit was filed. The Court should have applied the reasoning in *Hinton v. Beck*, 176 Cal. App. 4th 1378 (Cal. Ct. App. 2009) which held: "Grange [the liability insurer like UAIC here], having denied coverage and having refused to defend the action on behalf of its insured, did not have a direct and immediate interest to warrant intervention in the litigation."

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C. UAIC compounded its bad faith intervention and made a frivolous appeal in Docket 79487.

UAIC suggests its still pending appeal should be dismissed because it is moot. The truth is that it was a frivolous appeal from the start, designed only to delay matters and UAIC should be reprimanded and sanctioned for abuse of process.

At the urging of UAIC, upon reaching her majority, CheyAnne consulted David A. Stephens, Esq. regarding the judgment CheyAnne held against Lewis. Stephens moved the trial court to amend the judgment, substituting in CheyAnne

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because she had reached her majority and because the statute of limitations had been tolled on the judgment. Judge Jones granted the motion and signed an amended judgment in favor of CheyAnne Nalder and against Gary Lewis on March 26, 2018. Months later, UAIC moved to intervene, without serving its Motion on anyone. At the time UAIC was aware that CheyAnne was represented by David Stephens and Gary Lewis was represented by E. Breen Arntz. UAIC moved to set aside the judgment. The motion was correctly denied. The appeal in Docket 79487. The ruling was made January 9, 2019, the Notice of Appeal was filed on August 21, 2019, and the Court still has had no briefs filed.

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D. UAIC has multiplied and complicated these proceedings needlessly.

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By repeatedly delaying the filing of the Opening Brief on the appeal following intervention, UAIC has been allowed to use the process to avoid responsibility and inflict extraordinary pain on the real parties in this case. UAIC has never, and cannot, state any good faith basis for the appeal. Recently, in this Docket 78085 & 78243 this Court determined that UAIC's intervention in the lower court action was improper, as Nalder and Lewis had stated all along.

NRS 12.130 only permits intervention prior to trial. After judgment trial is clearly not pending and intervention is improper. Additionally, NRS 12.130(d) provides that "If the claim of the party intervening is not sustained, the party

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intervening shall pay all costs incurred by the intervention." Additionally, NRS 34.270 allows Writ applicants Recovery of damages and states if judgment be given for the applicant, the applicant shall recover the damages which the applicant shall have sustained as found by the jury, or as may be determined by the court or master, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue, and a peremptory mandate shall also be awarded without delay.

This Court should award fees and costs in these writ petitions and in the other docket numbers[9] before this Court wherein UAIC has presented claims and defenses that overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

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UAIC has been stringing along opposing counsel and this Court. "This court expects all appeals to be pursued with high standards of diligence, professionalism, and competence." *Barry v. Lindner*, 119 Nev. 661, 671, 81 P.3d 537, 543 (2003). " *Carroll v. Carroll*, No. 73534-COA, 17 (Nev. App. May. 7, 2019). NRAP 38(a) states that "If the Supreme Court or Court of Appeals

[9] Dockets 70504, 78085, 78243, 79487 and 80965. This Court, on its own, consolidated the two Writ Petitions of 78085 and 78243, then issued a Writ of Mandamus directing the lower Court to enter an Order and strike pleadings.

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determines that an appeal is frivolous, it may impose monetary sanctions." Likewise, NRAP 38(b) states that "When an appeal has frivolously been taken or been processed in a frivolous manner; when circumstances indicated that an appeal has been taken or processed solely for purposes of delay, when an appeal has been occasioned through **respondent's imposition on the court below**; or whenever the appellate processes of the court have otherwise been misused, the court may, on its own motion, require the offending party to pay, as costs on appeal, such attorney fees as it deems appropriate to discourage like conduct in the future."

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NRS 18.010 states: In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party. Section (b) states: Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. **The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations.** It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to

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punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public. (Emphasis added.)

Under NRAP 38, this Court may award attorneys' fees, damages, costs, and such other relief as it may fashion. *Imperial Palace v. Dawson*, 715 P. 2d 1318 (1986), citing *In re Herrmann,* 100 Nev. 149, 152, 679 P.2d 246 (1984); *Varnum v. Grady,* 90 Nev. 374, 377, 528 P.2d 1027 (1974). In *City of Las Vegas v. Cragin Industries*, 86 Nev. 933, 478 P.2d 585, (1970), the Nevada Supreme Court stated "actions for declaratory or injunctive relief may involve claims for attorney fees as damages when actions were necessitated by the opposing party's bad faith conduct."

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UAIC's improper filings, including its unwarranted Motions for intervention and consolidation, were in bad faith and necessitated a response by Nalder and Lewis. In all of these intertwined actions, UAIC has taken inconsistent positions in the various Courts. The only consistent argument UAIC has made has been the promotion and self-preservation, over that of its insured. UAIC has made desperate attempts to free itself from consequences arising from its breach of the duty to defend in 2007. The issue of what consequences it should

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face remains before the Ninth Circuit, on appeal.[10] This amounts to bad faith conduct on the part of UAIC that has multiplied and delayed the litigation and necessitated the Respondents herein to incur additional costs and fees.

III. CONCLUSION

UAIC should pay attorneys fees and costs related hereto to Real Parties in Interest, Lewis and Nalder and the court should rehear and correct the decision.

Dated this 18th day of May, 2020.

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Attorney for Defendant Gary Lewis

[10] UAIC's counsel has not corrected his Affidavit on file with that Court to reflect the action in the lower Court case since 2017, which is critical to the Ninth Circuit's understanding and analysis. Instead, UAIC has continually tried to prevent the Ninth Circuit from considering the truth.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing via the Court's eFlex system on May 18, 2020 and thereby served this document upon all registered users in this case.

/s/ Thomas Christensen

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DECLARATION OF COUNSEL

I, THOMAS CHRISTENSEN, first being duly sworn hereby declares as follows:

1. I was admitted to the bar of Nevada in December of 1981; my bar number is 2326.
2. I am an attorney duly licensed to practice law in all Courts in the State of Nevada, Federal District Court for the District of Nevada, the United States Court of Appeals for the Ninth Circuit and The Supreme Court of the United States of America. I am the managing member of Christensen Law Offices, LLC and I am counsel of record for Plaintiffs/Appellants James Nalder and Gary Lewis in an action against UAIC pending in the Ninth Circuit. I also represent Gary Lewis as a Third Party Plaintiff in an action instituted in the Eighth Judicial District in 2018. I make this declaration based on my personal knowledge.
3. Regarding the representation of Nalder and Lewis, throughout, I have referred both Nalder and Lewis for independent representation when there is a conflict between them and I have not represented both sides in these actions.
4. UAIC has claimed, in the Nevada state court case, that its failure to act in good faith and treat its insured fairly in 2018 and 2019 are before the Ninth Circuit. This argument was made in an effort to escape liability in the Nevada state court.
5. Cheyanne Nalder is represented by David A. Stephens, Esq., in her amendment of the 2008 judgment and her action on a judgment filed against Gary Lewis in 2018. Gary Lewis, as a defendant in those lawsuits, is represented by E. Breen Arntz, Esq. pursuant to *Cumis/Hansen* because of the obvious conflict between UAIC and Lewis. (Although

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

6. I have watched the video of the hearing that took place on March 4, 2020 before Judge Eric Johnson and the quote provided herein at footnote 4, page 3, accurately reflects the discussion between Judge Johnson and Dan Polsenberg, Esq., on behalf of UAIC at that hearing.

7. Any communications to the defense attorneys hired by UAIC to "defend" Gary Lewis against the Nalder judgment were consistent and were made under attorney client privilege. A privilege the defense attorneys did not always respect, because they reported the communication to UAIC, which is the adverse party to Gary Lewis. These communications were: 1) I represent Gary Lewis (not as a defendant in the Nalder v. Lewis litigation) and Nalder (not as a plaintiff in the Nalder v. Lewis litigation) in their claims against UAIC; 2) Gary Lewis welcomes your belated defense if it is likely of success, ethical and non-frivolous; 3) Before taking any action on behalf of Gary Lewis, please let me know the basis for your defense and your evaluation of the likelihood of success; 4) Gary Lewis does not want to use a frivolous or weak defense that may only increase his liability; 5) Nor does he wish to delay the inevitable and create more damage or exposure to him in the end; 6) Gary Lewis does not trust that UAIC is actually looking out for his best interests, so please communicate through me; after all, he has been in litigation with UAIC for ten years. He has been exposed to a multimillion dollar judgment for more than 10 years and is still exposed to it; 7) If UAIC will confirm that if its proposed defense fails, it will pay the judgment, then Gary Lewis does

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not need to review your defense; 8) However, if UAIC's position is: if we lose, you are on your own (which has been its approach from the beginning), then Gary Lewis wants to at least be able to evaluate the strength of the defense before embarking on that path.

The undersigned, Thomas F. Christensen, Esq., declares and acknowledges, under penalty of perjury, that the information provided herein is correct to the best of his information and belief and can be supported by documentation if called upon to substantiate the information provided herein.

Dated this 18 day of May, 2020.

Thomas Christensen, Esq.

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EXHIBIT D

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EXHIBIT D

In the Supreme Court of Nevada

CHEYANNE NALDER, and GARY LEWIS, Petitioners, *vs.* THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark; THE HONORABLE DAVID M. JONES, District Judge; and THE HONORABLE ERIC JOHNSON, District Judge, Respondents, and UNITED AUTOMOBILE INSURANCE COMPANY, Real Party in Interest.	Case No. 78085
GARY LEWIS, Petitioner, *vs.* THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark; THE HONORABLE DAVID M. JONES, District Judge; and THE HONORABLE ERIC JOHNSON, District Judge, Respondents, and UNITED AUTOMOBILE INSURANCE COMPANY, Real Party in Interest.	Case No. 78243 District Court Case Nos. A549111 & A772220

Electronically Filed
May 26 2020 09:28 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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OPPOSITION TO PETITIONERS' "MOTION FOR ATTORNEY FEES AND COSTS AND FOR RECONSIDERATION"

OPPOSITION TO PETITIONERS' "MOTION FOR ATTORNEY FEES AND COSTS AND FOR RECONSIDERATION"

Petitioners' bizarre motion is procedurally and substantively improper. Cheyenne Nalder and Gary Lewis had a chance to petition for rehearing but did not do that. They are in no position to seek attorney's fees while seeking to change the outcome of these writ proceedings. This Court should deny the motion.

A. The Motion Is Procedurally Improper

Nalder's and Lewis's problems begin with form.

1. It Is Not a Proper Petition for Rehearing

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This motion fails all of the tests for a petition for rehearing. Its contention that this Court overlooked a material question of law (Mot. 2) is not supported by reference to any page of the original petitions. *See* NRAP 40(a)(2). Its complaints about factual errors are also largely unsupported by record citations.[1] *See id.*; *cf. also In re Discipline of Serota*, 129 Nev. 631, 637 n.5, 309 P.3d 1037, 1041 n.5 (2013) (disregarding counsel's "numerous factual assertions not supported by references to the record and references to facts that are outside the record altogether"). The motion does not comply with NRAP 32 or contain a

[1] All but footnotes 1 and 8 (at pages 4 and 10), which both cite the same settlement agreement.

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certificate of compliance. *See* NRAP 40(b)(1), (4). Nalder and Lewis did not pay the $150 filing fee. *See* NRAP 40(b)(5); *cf. also Weddell v. Stewart*, 127 Nev. 645, 648, 261 P.3d 1080, 1082 (2011) (emphasizing the "importance of following the rules pertaining to appellate procedure" and that "failure to pay required fees . . . is not without consequence"). Although Nalder and Lewis threaten UAIC with sanctions (Mot. 11, 14), it is their noncompliant motion that risks such an outcome. NRAP 40(g).

2. It Is Not a Proper Motion for Fees and Costs

Nor is the motion a proper request for fees and costs. It is six pages too long. NRAP 27(d)(2). And it seeks fees in costs in other docket numbers (Mot. 13 & n.9) without actually being filed in those other cases. In two of those cases (Docket Nos. 70504, 80965), this Court has already relinquished jurisdiction by issuing remittitur or an equivalent notice and closing the cases. As this Court has warned, without a request to reopen the appeal or recall remittitur, parties cannot seek relief in a closed case. *Weddell*, 127 Nev. at 652–53, 261 P.3d at 1085 (rejecting, unfiled, a motion for reconsideration in a closed appeal).

3. Petitioners' Disregard for the Rules Prejudices UAIC

Nalder's and Lewis's decision to flout NRAP 40 and NRAP 27 puts

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UAIC in a bind. Were this a proper petition, UAIC would not be required (or even permitted) to respond unless the Court so ordered, and UAIC would ordinarily have 14 days and 4,667 words to do so. NRAP 40(b)(3), (d). But by mislabeling their petition a "motion for reconsideration"—and by seeking attorney's fees and costs—Nalder and Lewis seek to shorten both the time and the length for UAIC's response. *Cf.* NRAP 27(a)(3), (d)(2).

B. If Ordered, UAIC Would Oppose the Request for Rehearing

If this Court construes Nalder's and Lewis's motion as a Rule 40 petition and orders an answer, UAIC will oppose rehearing. NRAP 40(d). Their legal arguments are wrong.

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1. This Court Correctly Held that UAIC Timely Intervened in the 2018 Action Before Judgment

This Court clarified that "a settlement agreement on its own" cannot "stand[] in the place of a judgment" to bar intervention. (Opinion 9.) "[I]t is the judgment that bars intervention, not the agreement itself reached by the parties." (Opinion 10.) Nalder and Lewis balk, arguing that it was enough that the settlement was "filed with the court" (Mot. 10), though not approved or entered as a judgment. Mere agreement without judgment has never been enough to bar intervention. *See Ryan*

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v. Landis, 58 Nev. 253, 75 P.2d 734, 735–36 (1938) ("*judgment* . . . by agreement" (emphasis added)).

2. This Court Correctly Found that UAIC Has an Interest in the 2018 Case

Nalder and Lewis have waived any substantive objection to UAIC's intervention in the 2018 action. After electing in the petition to challenge only the timeliness of UAIC's intervention, in reply for the first time Nalder and Lewis asked this Court to consider UAIC's intervention "substantively improper." (Reply (Dkt. 85085), at 14–15.) Even then, Nalder and Lewis did not distinguish between the 2007 and 2018 action, stating only that "[b]oth actions were ended and settled to the satisfaction of the parties litigant." (*Id.* at 15.)

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In any case, the argument to bar UAIC's intervention under California law fails. Criticizing this Court's application of *Allstate Ins. Co. v. Pietrosh*, 85 Nev. 310, 454 P.2d 106 (1969), Nalder and Lewis ask this Court to adopt *Hinton v. Beck*, 98 Cal. Rptr. 3d 612 (Ct. App. 2009), which bars an insurer from intervening in the same action where it has refused to defend its insured. (Mot. 11.) This Court need not decide whether to adopt such a categorical rule, however, because UAIC tendered a defense to Lewis in the 2018 where it intervened. (Mot. 5; 5 R.

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App. 1064–65.) Lewis rejected UAIC's appointed counsel (1 R. App. 30, 165), instead expressing eagerness to have a multimillion-dollar judgment entered against himself[2]—notwithstanding signals from the Ninth Circuit[3] (and later confirmation from this Court)[4] that Lewis could escape all liability. UAIC had no one in the 2018 action to represent its interest in showing that the underlying judgment had expired.

C. While Challenging the Aspects of this Court's Opinion in UAIC's Favor, Are Not in a Position to Seek Fees

UAIC's positions were taken in good faith, vindicated in full by the district court, and vindicated in important part by this Court. Nalder and Lewis are seeking rehearing; UAIC is not. They are not entitled to fees in appellate proceedings, the outcome of which they still resist.

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1. Attorney's Fees Are Reserved for Frivolous Appeals

Asking this Court to assess attorney's fees is an extraordinary sanction reserved for gross abuses of the appellate process. NRAP 38. Nalder and Lewis cite NRS 18.010 (Mot. 15), ignoring that this Court

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[2] *See*, *e.g.*, 1 R. App. 26 (motion to strike his appointed counsel's request to vacate the judgment against him); 1/22/19 acceptance of offer of judgment, Ex. A.

[3] *Nalder v. UAIC*, 878 F.3d 754, 757 (9th Cir. 2017) ("the statute of limitations [on the 2008 judgment] has passed" and "they have failed to renew the judgment").

[4] Ex. B, Order Answering Certified Questions, at 2–3 ("because the [2008] judgment expired . . . it is no longer enforceable against" Lewis).

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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).[5]

2. UAIC Prevailed in Significant Part

Fees may be assessed only against a party whose positions this Court rejected 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.

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First, UAIC prevailed on the critical question of its intervention in the 2018 action. (Opinion 8–12.)[6] As this motion for reconsideration underscores, Nalder and Lewis wanted UAIC out of the litigation altogether, not merely out of the 2007 action. Indeed, in striking UAIC's intervention in the 2007 action and denying consolidation, this Court clarified that there is no pending issue in the 2007 case: an amendment to

[5] They also cite *City of Las Vegas v. Cragin Indus.*, 86 Nev. 933, 478 P.2d 585 (1970) (*see* Mot. 15), but attorney fees as damages must be pleaded and proved in the underlying action—not in a motion for reconsideration on appeal.

[6] This Court also rejected Nalder's and Lewis's due process arguments based on the service of the motions to intervene. (Opinion 11 n.7.)

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substitute Cheyenne for her former guardian "was a ministerial change that did not alter the legal rights and obligations set forth in the original judgment or create any new pending issues." (Opinion 13.)[7] The parties' running dispute about enforceability of the 2008 judgment is presented in the 2018 action, to which UAIC is a proper party.

Second, UAIC prevailed in Nalder's and Lewis's attack on the district court's order vacating their Rule 68 judgment. (Opinion 13–16.) Rejecting their argument that a stay is ineffective until the entry of a written order, this Court "determine[d] that a minute order granting a stay operates like an administrative or emergency order that is valid and enforceable." (Opinion 15.) This Court also "reject[ed] Gary's argument that the district court vacating the parties 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." (Opinion 15 (citing NRCP 60(a)).)

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3. UAIC's Arguments Were in Good Faith

Even on the aspect of the opinion where Nalder and Lewis prevailed, UAIC maintained its position in good faith. UAIC had argued,

[7] Below, counsel for Lewis agreed: if the 2008 judgment had expired, "[i]t's an amendment of the expired judgment." (5 R. App. 1108:13–17.)

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and the district court 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. As the district court found, "we have new litigation" on whether "that judgment continue[s] to exist." (5 R. App. 1126:19–22.) 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 reasonably believed that after the time for enforcing a judgment has passed without renewal, "a judgment no longer exists to be renewed." (Answer (Dkt. 78085), at 19–20 (citing *Kroop & Kurland, P.A. v. Lambros*, 703 A.2d 1287, 1293 (Md. Ct. Spec. App. 1998)).) UAIC reconciled this with the Court's eighty-year-old decision in *Ryan v. Landis*, 58 Nev. 253, 75 P.2d 734 (1938) (Answer (Dkt. 78085), at 20–21 (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 30–37.)

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This Court disagreed that a judgment's expiration merits intervention. (Opinion 7–8.) But it never suggested that UAIC's argument was frivolous. Indeed, the Court in a sense mooted the necessity of intervention by clarifying that the amendment of the judgment in the

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2007 action did not create any new issues, as the district court believed. (Opinion 12–13.) *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. (Opinion 13.)

D. UAIC's Filings in Other Cases Are Immaterial

Procedurally, Nalder and Lewis cannot seek fees in other cases. Regardless, UAIC did not abuse the appellate process in any other case.

1. UAIC Acted Properly in the Rule 60(b) Appeal

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In Docket No. 79487, UAIC did "the ethical thing" (Mot. 7) in confessing that this Court's decision in these consolidated writ petitions rendered its appeal moot. As UAIC could not have known when or how this Court would resolve these writ petitions, UAIC's requests for extensions in that appeal are not evidence that UAIC "never intended to file a brief." (*Contra* Mot. 5.) As discussed in UAIC's reply to the suggestion of mootness in that case, UAIC would have had meritorious arguments for Rule 60(b) relief. (Ex. C, Reply Brief on Mootness.)

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2. The Writ Petition Was Not Frivolous

Likewise, UAIC's writ petition in Docket No. 80965 was taken in

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good faith. After the Ninth Circuit determined that the statute of limitations on the 2008 judgment had expired, and this Court adopted that assumption in its answers to the certified questions, UAIC believed that the state district court should abstain from hearing Nalder's and Lewis's argument to undermine that determination. *See* NRAP 5(h); *Nalder*, 878 F.3d at 758 (confirming that this Court's answers would be "res judicata as to the parties"). Although this Court denied the petition in a standard order, citing the purely discretionary nature of this Court's intervention (Order Denying Petition, Ex. D), that did not resolve any substantive issue in the petition.

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3. UAIC Prevailed on a Certified Question

Strangest of all is Nalder's and Lewis's request for fees in prosecuting the certified questions in Docket 70504. The Ninth Circuit had warned that "Nalder and Lewis must prevail on both questions," *Nalder*, 878 F.3d at 758, but they prevailed on just one, losing the second. (Ex. B, at 7.) Then, as now, they petitioned this Court for rehearing, and this Court refused. (Order Denying Rehearing, Ex E.)

This Court should do the same here and deny petitioners' motion.

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Dated this 26th day of May, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*
DANIEL F. POLSENBERG (SBN 2376)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Real Party in Interest

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CERTIFICATE OF SERVICE

I certify that on May 26, 2020, I submitted the foregoing "Opposition to 'Motion for Attorney's Fees and Costs and for Reconsideration'" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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

Attorneys for Petitioner Cheyenne Nalder

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

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

Attorneys for Petitioner Gary Lewis

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A courtesy copy is also being provided to the respondent district court:

Honorable Eric Johnson
Department 20
EIGHTH JUDICIAL DISTRICT COURT
200 Lewis Avenue
Las Vegas, Nevada 89155

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

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EXHIBIT E

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EXHIBIT E

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6/12/2020 7:44 PM
Steven D. Grierson
CLERK OF THE COURT

MFEE
Thomas Christensen, Esq.
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F: (702) 870-6152
courtnotices@injuryhelpnow.com
Attorney for Third Party Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES NALDER, Plaintiff, vs. GARY LEWIS and DOES I through V, inclusive Defendants,	CASE NO: 07A549111 DEPT. NO: XX
UNITED AUTOMOBILE INSURANCE COMPANY, Intervenor.	**HEARING REQUESTED**

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Gary Lewis' Motion for Attorney's Fees and Costs

COMES NOW, GARY LEWIS, by and through his counsel of record, Thomas Christensen, Esq and E. Breen Arntz, Esq., and hereby submits this Application for Attorneys' Fees and Costs. This Motion is brought to recover the funds incurred by reason of the improper intervention and consolation by United Automobile Insurance Company.

This Motion is made and based upon all pleadings and papers on file herein, all exhibits to this Motion, the Declaration of counsel, the Memorandum of costs and any oral argument at the

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hearing of this matter.

DATED this 12th day of June, 2020.

THOMAS F. CHRISTENSEN, ESQ.
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Telephone: (702) 870-1000
courtnotices@injuryhelpnow.com
Attorney for 3rd Party Plaintiff Lewis

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Telephone: (702) 384-8000
breen@breen.com
Attorney for Defendant Gary Lewi

Memorandum of Points and Authorities

I. Intervention and Consolidation resulted in the expenditure of costs and fees that should be awarded to Gary Lewis.

> NRS 12.130 provides: (d) The 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.

The Nevada Supreme Court has determined that United Automobile Insurance Company, ("UAIC"), was not entitled to intervene into this matter. Thus, UAIC's intervention was improper. Therefore, Lewis is entitled to his costs incurred due to the intervention from UAIC.

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 edition, p. 312, 1979).

Gary Lewis has incurred the following costs by reason of the intervention by UAIC, including the litigation revolving around the intervention, the writ proceedings, appeals by UAIC,

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including the litigation revolving around the intervention, the writ proceedings, appeals by UAIC, and the Writ issued by the Nevada Supreme Court finding that UAIC's intervention was improper. Using the definition of costs in NRS 18.005, and limiting them to those costs related to intervention, Gary Lewis costs are $2,258.10. (See Memorandums of Costs attached to this motion as Exhibit 1.)

In addition to seeking costs, Gary Lewis hereby seeks recovery of attorney's fees incurred by him 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.

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 Collegiate Dictionary, p. 18 1949.

Thus, as defined by Webster's the term costs can include attorney's fees. The term "costs" in NRS 12.130 is not limited by NRS 18.005 and can include attorney's fees.

Additionally in this case, attorney's fees can also be recovered under NRS 18.010(2)(b) which states: "[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." In this case, the intervention by UAIC into this case was brought without good cause. Here, the intervention of UAIC into this case was brought even without reasonable grounds. Intervention is specifically prohibited in NRS 12.130 which requires intervention "before trial." UAIC purposely misled the court by failing to inform the court of the plain language of NRS 12.130. It is also prohibited by case law. (See, Opinion of

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the Nevada Supreme Court in Case No. 78085, which is the writ issued in this matter.) This Court disregarded the statute and the law, which resulted in fees and costs being incurred by Gary Lewis that should not have been. This Motion must be granted to correct the harm.

NRS 18.010 states: In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party. Section (b) states: Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. **The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations.** It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public. (Emphasis added.)

This Court has authority to impose sanctions upon UAIC for forcing Gary Lewis to be involved in this matter and resist its proposed frivolous filings. EDCR 7.60(b)(3) allows the Court to impose upon a party sanctions, including the imposition of fines, costs or attorney's fees, when the party has unreasonably and vexatiously multiplied the proceedings in the case. Gary Lewis is entitled to sanctions because this Court basically pulled the rug out from under him in granting intervention, consolidation and then a stay.

UAIC's intervention has caused Gary Lewis to incur significant time and expense in legal fees protecting himself in this case, which should have ended upon the entry of the judgment by

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the court upon Cheyenne's unopposed motion to amend. Since that time, Gary Lewis had to be involved in active litigation in this case, all caused by UAIC. Once the intervention was granted, Gary Lewis had to have his independent counsel respond to a Motion to Dismiss, and then a Motion to set aside the Judgment. He also had to file a writ to the Nevada Supreme Court with respect to the intervention and consolidation. He has also been involved in the second writ to the Supreme Court filed by Nalder for wrongful intervention. (The cases were ultimately consolidated by the Supreme Court.)

Gary Lewis has also had to have counsel on his behalf be involved in an appeal of this court's order denying UAIC's motion to set aside. UAIC also recently filed a notice of mootness to Nevada Supreme Court which will likely result in the dismissal of the appeal in Case No. 78085. He has also had to respond to two emergency motions and a writ request for stay filed with the Supreme Court filed by UAIC. (Case No. 80965). Additionally, Mr. Lewis has had to defend himself from the case UAIC has brought in Federal Court (Case No. 2:18-cv02269).

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Thomas Christensen is representing Gary Lewis on a contingency fee and Breen Arntz is representing him on a pro-bono basis until UAIC pays the requested fees pursuant to *State Farm Mutual Automobile Insurance Company v. Hansen*, 357 P. 3d 338 (2015); *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc*., 162 Cal App3d. 358, 208 Cal Rptr. 494(1984). (See Declarations of Thomas Christensen, Esq., and E. Breen Arntz, Esq. attached as Exhibit 2 and 3 to this Motion.) Lewis's attorneys have estimated their hours incurred in litigating this case. As of June 5, 2020, Christensen Law Offices has incurred 92 total hours in litigating this case, directly as a result of the unreasonable actions of UAIC. Mr. Arntz's representation of Mr. Lewis was required because of the conflict between Gary Lewis and UAIC. Mr. Arntz has

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incurred 75 total hours litigating this case. Of those total hours, Mr. Arntz estimated the sum of 69 hours which are directly the result of the intervention and consolidation by UAIC. He is not seeking recovery for the original hours, related to evaluation of the accepted offer by Nalder, in that they were not directly related to the wrongful intervention and consolidation. (See Declaration of E. Breen Arntz, Esq, Exhibit 3 hereto).

II. The attorneys fees and costs incurred were reasonable.

Because this case is time consuming and a high risk litigation, counsel should be compensated, at a minimum, on a reasonable hourly basis. In analyzing a motion for attorney's fees, the Court must look to the *Brunzell* factors, which are as follows: "(1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived." *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

1. The qualities of the advocates: Mr. Christensen was licensed to practice law in Nevada in 1981. He has been practicing law in Nevada since 1981. His litigation experience is extensive in personal injury and claims handling. He has taught CLE classes related to personal injury law and bad faith. He believes he is regarded as having an excellent standing as an attorney in the community. His hourly rate is $1,000.00 per hour. (See Declaration of Thomas Christensen, Esq., attached as Exhibit 2 to this Motion.)

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Likewise, Mr. Arntz was licensed to practice law in Nevada in 1989. He has been practicing law in Nevada since1989. He has worked on a large variety of case types including both civil and criminal litigation. He believes that he is regarded as having an excellent standing as an attorney in the legal community of Las Vegas. His compensation rate, which was recently approved by Judge Sturman, is $600.00 per hour. (See Declaration of E. Breen Arntz, Esq., attached as Exhibit 3 to this Motion.)

2. The character of the work to be done. This case, to say the least, has been difficult. It involves a large sum of damages arising from an auto collision that occurred in 2007. It now involves issues regarding liability for paying the damages. It also involves experienced and respected attorneys on all sides. Novel issues of law have been raised. There have been various writs and various appeals made to the Nevada Supreme Court. Mr. Christensen and Mr. Arntz's roles are important and both necessary to assist Gary Lewis defend himself and preserve his rights against UAIC, his insurer who failed to defend him and continually now is seeking to avoid any consequence for its failure. This work has taken a significant amount of time and significant skills to move forward. (See Declarations of counsel, attached as Exhibits 2 and 3 to this Motion.)

3. The work performed by the lawyers: Mr. Christensen has performed almost all of the work for Gary Lewis, as a Third Party Plaintiff. He has been assisted by an associate attorney at his office, Dawn Allysa Hooker, Esq. (Ms. Hooker has been employed as an attorney at Christensen Law since 2001). Mr. Arntz has performed all of the work for Gary Lewis, as a Defendant, and has not been paid by UAIC. This work has taken counsels' time away from other legal matters. Nevertheless, counsel have both tried to give their best time and attention to the work in this matter in order to properly represent and protect Gary Lewis in this hotly contested

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case. (See Declarations of counsel, attached as Exhibits 2 and 3 to this Motion.)

4. The result: Mr. Arntz was able to negotiate with Mr. Stephens to reach a settlement that limited the amount of the amended judgment Cheyenne Nalder holds against him. Mr. Christensen has been able to successfully petition for a writ to now allow Mr. Lewis's Third Party case against UAIC to go forward. Thus, the results have been successful from the perspective of Gary Lewis and were only complicated by UAIC.

The case of *O'Connell vs. Wynn Las Vegas, LLC*, 134 Nev. Ad. Op. 67, 429 P.3d 664, 670 (Nev. App. 2018), indicates that an attorney does not have to keep track of his or her hours in order to file a motion for attorney's fees and recover attorney's fees. In this case, Mr. Christensen and Mr. Arntz have evaluated the time worked on this case. Based on the work necessary because of the wrongful intervention and consolidation promulgated by UAIC, the hours spent total 92 for Christensen Law Offices and 69 for E. Breen Arntz, Esq. (See Exhibits 2 and 3 to this Motion.) The *O'Connell* decision also noted that "whatever method the court ultimately uses, the result will prove reasonable as long as the court provides sufficient reasoning and findings in its support of its ultimate determination." *O'Connell* at 670. Additionally, "the district court must properly weigh the *Brunzell* factors in deciding what amount to award." *O'Connell* at 670. The *O'Connell* case is also noted that "[C]ourts should also account for the greater risk of nonpayment for attorneys who represent clients pro bono or on a contingency, in comparison to attorneys who bill and are paid on an hourly basis, as they normally obtain assurances that they will receive payment." *O'Connell,* at 671. Finally, pro bono and "contingency fees allow those who cannot afford an attorney who bills at an hourly rate to secure legal representation." *O'Connell* at 671.

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II. Conclusion

Mr. Christensen and Mr. Arntz have taken risk in litigating this matter. That work has been complicated and the investment of time has increased by UAIC's improper intervention and consolidation. These attorneys should be compensated for the work necessitated by the improper intervention and consolidation, which given existing statutes and case law, was frivolous in this case. These attorneys may be compensated on an hourly basis. For these reasons, it is respectfully requested that Gary Lewis be awarded court costs caused by the wrongful intervention and consolidation and attorney's fees.

DATED this 12th day of June, 2020.

/s/Thomas F. Christensen
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courtnotices@injuryhelpnow.com
Attorney for 3rd Party Plaintiff Lewis

/s/ E. Breen Arntz
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Telephone: (702) 384-8000
breen@breen.com
Attorney for Defendant Gary Lewis

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of CHRISTENSEN LAW OFFICES, LLC and that on this 12th day of June, 2020, I served a copy of the foregoing **MOTION** as follows:

XX E-Served through the Court's e-service system to all registered users on the case.

An employee of CHRISTENSEN LAW OFFICES, LLC.

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EXHIBIT 1

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MEMO
Thomas Christensen, Esq.
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courtnotices@injuryhelpnow.com
Attorney for Third Party Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES NALDER, Plaintiff, vs. GARY LEWIS and DOES I through V, inclusive Defendants,	CASE NO: 07A549111 DEPT. NO: XX
UNITED AUTOMOBILE INSURANCE COMPANY, Intervenor.	

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Gary Lewis' Memorandum of Costs

COMES NOW, GARY LEWIS, by and through his counsel of record, Thomas Christensen, Esq and E. Breen Arntz, Esq., and pursuant to NRS 18.110, submits his Memorandum of Costs and Disbursements as follows:

Court Filing Fees:	$ 370.00
Transcript Fees:	$ 288.10
Reasonable cost for photocopies/fax/postage/courier/delivery	$1,600.00

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Total Costs: **$2,258.10**

DATED this 12th day of June, 2020.

THOMAS F. CHRISTENSEN, ESQ.
Nevada Bar No. 2326
1000 S. Valley View Blvd.
Las Vegas, Nevada 89107
Telephone: (702) 870-1000
courtnotices@injuryhelpnow.com
Attorney for 3rd Party Plaintiff Lewis

DECLARATION OF THOMAS CHRISTENSEN, ESQ. IN SUPPORT OF MEMORANDUM OF COSTS

Thomas F. Christensen, Esq., under pains and penalty of perjury, declares as follows:

1. I am the attorney of record for Gary Lewis as Third-Party Plaintiff in the above entitled matter.

2. I am licensed to practice law before all courts in the State of Nevada.

3. That the items listed in the accompanying Memorandum are true and correct to the best of my knowledge and belief; and

4. That these costs have been necessarily incurred in this action.

FURTHER DECLARANT SAYETH NAUGHT.

Thomas F. Christensen, Esq.

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EXHIBIT 2

DECLARATION OF THOMAS CHRISTENSEN, ESQ. IN SUPPORT OF MOTION FOR FEES AND COSTS

Thomas F. Christensen, Esq., under pains and penalty of perjury, declares as follows:

1. I am the attorney of record for Gary Lewis as Third-Party Plaintiff herein.

2. I am licensed to practice law before all courts in the State of Nevada, the Ninth Circuit Court of Appeal and the Supreme Court of the United States.

3. I was licensed to practice law in the State of Nevada in 1981 and I have been practicing law in the State of Nevada since that time.

4. In the years I have been practicing law, I have dealt primarily with personal injury matters and claims handling matters.

5. I have taught CLE classes on automobile accident litigation and bad faith.

6. I believe that I am regarded as having an excellent standing as an attorney in the legal community of Las Vegas. My compensation rate is $1,000.00 per hour. I am familiar with attorneys' fees customarily charged and the hours and rates in this matter were consistent with those charged in other matters. See *SVI v. Supreme Corp.* 2:16-cv-01098-JAD-NJK, 2018 U.S. Dist. Lexis 69727 at *7 (D. Nev. April 9, 2018)(awarding $450 per hour for an attorney with 30 years of experience and $375 for an attorney with 12 years of experience); *Doud v. Yellow Cab*, 3:13-cv-00664-WGC (senior attorney received hourly rate of $400); *Van Asdale v. IGT*, 3:04-cv-00703-RAM (senior attorney received hourly rate of $450). As for my experience, I have 39 years of experience and take risk by pursuing cases such as this on a contingency basis.

7. This case has been a difficult case to handle. It involves a large sum of damages and significant issues regarding who may be liability for paying the damages.

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8. The case also involves experienced and respected attorneys on the opposing sides.

9. Novel issues have been raised in this case. Various writs have been filed with the Nevada Supreme Court and various appeals have been filed with the Nevada Supreme Court, in addition to appellate litigation out of the US District Court claims handling case. That appellate litigation has also affected this state court case.

10. I have been working to protect and advocate the rights of Gary Lewis as and against his insurance company, UAIC.

11. The work on this case has taken a significant amount of time and significant legal skills to move forward.

12. As to my law firm I have performed almost all of the work for Gary Lewis. My associate, Dawn Hooker, Esq. has also performed some work. This work has taken a significant portion of our time at work away from other legal matters.

13. I have tried to give my best time and attention to the work in this matter in order to properly represent and protect Gary Lewis in what is a very hotly contested case.

14. I successfully petitioned the Supreme Court for a writ challenging the wrongful consolidation of the 2007 case, which was to judgment, with the 2018 case, which is just beginning.

15. Gary Lewis and Cheyenne Nalder was also, by way of a writ, able to get the intervention of UAIC into this case overturned.

16. My client's third party complaint against UAIC may now proceed.

17. I am litigating this matter on a contingency fee for Gary Lewis. It is my understanding that he could not afford an attorney to litigate this matter for him but for a contingency fee

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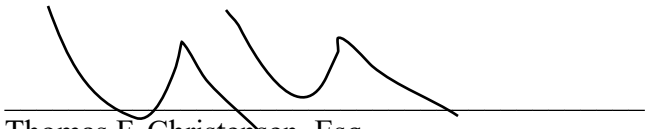
arrangement. He could not even afford to advance the costs of this matter.

18. I have incurred the costs set forth in the Memorandum of Costs filed in this matter.

20. Even though I am representing Gary Lewis on a contingency fee basis, I have estimated my hours working on this case since the intervention/consolidation. As of June 5, 2020, I have incurred 92 hours.

FURTHER DECLARANT SAYETH NAUGHT.

Dated this 12th day of June, 2020.



Thomas F. Christensen, Esq.

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EXHIBIT 3

DECLARATION OF E. BREEN ARNTZ, ESQ. IN SUPPORT OF MOTION FOR FEES AND COSTS

E. Breen Arntz, Esq., under pains and penalty of perjury, declares as follows:

1. I am the attorney of record for Gary Lewis as a Defendant in the above entitled matter.

2. I am licensed to practice law before all courts in the State of Nevada.

3. I was licensed to practice law in the State of Nevada in 1989 and I have been practicing law in the State of Nevada since that time.

4. In the years I have been practicing law, I have worked on a large variety of case types including both civil and criminal litigation.

6. I believe that I am regarded as having an excellent standing as an attorney in the legal community of Las Vegas.

7. My compensation rate approved by the Court most recently, by Judge Sturman, is $600.00 per hour.

8. This case has been a difficult case to handle. It involves a large sum of damages and significant issues regarding who may be liability for paying the damages.

9. The case also involves experienced and respected attorneys on the opposing sides.

10. Novel issues have been raised in this case. Various writs have been filed with the Nevada Supreme Court and various appeals have been filed with the Nevada Supreme Court, in addition to appellate litigation out of the US District Court claims handling case. That appellate litigation has also affected this state court case.

11. I have been working to protect and advocate the rights of Gary Lewis, who has a conflict with his insurance company, UAIC.

12. The work on this case has taken a significant amount of time and significant legal

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skills to move forward.

13. I have performed the work for Gary Lewis as a Defendant. This work has taken a significant portion of my time at work away from other legal matters.

14. I have tried to give my best time and attention to the work in this matter in order to properly represent and protect Gary Lewis in what is a very hotly contested case.

15. Gary Lewis successfully petitioned the Supreme Court for a writ challenging the consolidation of the 2007 case, which was to judgment, with the 2018 case, which is just beginning.

16. Gary Lewis was also, by way of a writ, able to get the intervention of UAIC into this case overturned.

17. I am litigating this matter for Gary Lewis on a pro-bono basis until UAIC pays the requested fees pursuant to *State Farm Mutual Automobile Insurance Company v. Hansen*, 357 P. 3d 338 (2015); *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc*., 162 Cal App3d. 358, 208 Cal Rptr. 494(1984). It is my understanding that Gary Lewis could not afford an attorney to litigate this matter for him but for such an arrangement. He could not even afford to advance the costs of this matter.

18. I have incurred the costs set forth in the Memorandum of Costs filed in this matter.

19. Even though I am representing Gary Lewis without demanding payment from him immediately, I have estimated my hours working on this case since the intervention and consolidation. As of June 5, 2020, I have incurred 69 hours.

FURTHER DECLARANT SAYETH NAUGHT.

E. Breen Arntz, Esq.

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EXHIBIT F

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EXHIBIT F

136 Nev., Advance Opinion 24

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHEYENNE NALDER, AN INDIVIDUAL; AND GARY LEWIS, PETITIONERS AND REAL PARTIES IN INTEREST,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; THE HONORABLE DAVID M. JONES, DISTRICT JUDGE; AND THE HONORABLE ERIC JOHNSON, DISTRICT JUDGE,
Respondents,
and
UNITED AUTOMOBILE INSURANCE COMPANY,
Real Party in Interest.

No. 78085

FILED
APR 30 2020
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

GARY LEWIS,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ERIC JOHNSON, DISTRICT JUDGE,
Respondents,
and
UNITED AUTOMOBILE INSURANCE COMPANY; AND CHEYENNE NALDER,
Real Parties in Interest.

No. 78243

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20-16341

Consolidated original petitions for writs of mandamus challenging district court orders granting intervention, consolidation, and relief from judgment in tort actions.

Petitions granted in part and denied in part.

Christensen Law Offices, LLC, and Thomas Christensen, Las Vegas; E. Breen Arntz, Chtd., and E. Breen Arntz, Las Vegas,
for Petitioner Gary Lewis.

Stephens & Bywater, P.C., and David A. Stephens, Las Vegas,
for Petitioner/Real Party in Interest Cheyenne Nalder.

Lewis Roca Rothgerber Christie LLP and Daniel F. Polsenberg, Joel D. Henriod, J. Christopher Jorgensen, and Abraham G. Smith, Las Vegas; Winner & Sherrod and Matthew J. Douglas, Las Vegas,
for Real Party in Interest United Automobile Insurance Company.

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BEFORE GIBBONS, STIGLICH and SILVER, JJ.

OPINION

By the Court, STIGLICH, J.:

These writ petitions arise from litigation involving a 2007 automobile accident where Gary Lewis struck then-minor Cheyenne Nalder. A default judgment was entered against Gary after he and his insurer, United Automobile Insurance Company (UAIC), failed to defend Cheyenne's tort action. After Cheyenne's attempt a decade later to collect on the judgment through a new action, UAIC moved to intervene in and consolidate the decade-old tort lawsuit and this new action, and the district court granted UAIC's motions. In these proceedings, we consider whether intervention and consolidation after final judgment is permissible. Because

we hold that intervention after final judgment is impermissible under NRS 12.130, we conclude that the district court erred in granting intervention in the initial action where a default judgment had been entered but properly granted intervention in the new action where a final judgment had not yet been entered. We also conclude that because an action that reached final judgment has no pending issues, the district court improperly consolidated the two cases. Finally, we conclude that the district court properly vacated a judgment erroneously entered by the district court clerk when a stay was in effect. Accordingly, we grant these petitions for extraordinary relief in part and deny in part.

FACTS

In July 2007, petitioner Gary Lewis struck then-minor petitioner/real party in interest Cheyenne Nalder with a vehicle. James Nalder, as guardian ad litem for Cheyenne, instituted an action in 2007 (Case No. 07A549111, hereinafter the 2007 case) seeking damages. In 2008, the district court entered a default judgment against Gary for approximately $3.5 million. Real party in interest UAIC did not defend the action because it believed that Gary's insurance policy at the time of the accident had expired. Subsequently, in a separate proceeding that was removed to federal court, the federal district court held that the insurance policy between UAIC and Gary had not lapsed because the insurance contract was ambiguous and, therefore, UAIC had a duty to defend Gary. The court, however, only ordered that UAIC pay James the policy limits.[1] Since 2008, James (on behalf of Cheyenne) has collected only $15,000—paid by UAIC—on the $3.5 million judgment.

[1]James and Gary appealed that decision, which is now pending before the Ninth Circuit.

In 2018, the district court substituted Cheyenne for James in the 2007 case, given that she had reached the age of majority. Cheyenne subsequently instituted a separate action on the judgment (Case No. A-18-772220-C, hereinafter the 2018 case) or alternatively sought a declaration that the statute of limitations on the original judgment was tolled by Gary's absence from the state since at least 2010, Cheyenne's status as a minor until 2016, and UAIC's last payment in 2015. The complaint[2] sought approximately $5.6 million, including the original judgment plus interest.

UAIC moved to intervene in both the 2007 and the 2018 cases. While those motions were pending, Cheyenne and Gary stipulated to a judgment in favor of Cheyenne in the 2018 case. The district court did not approve their stipulation and granted UAIC's motions to intervene in both the 2007 and the 2018 cases. It also granted UAIC's motion to consolidate the 2007 and the 2018 cases, concluding that the two cases shared significant issues of law and fact, that consolidating the cases would promote judicial economy, and that no parties would be prejudiced. After consolidation, the 2018 case was reassigned from Judge Kephart to Judge Johnson, the judge overseeing the 2007 case.

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 in *Nalder v. United Automobile Insurance Co.*, Docket No. 70504. The district court subsequently granted the stay in a minute order. On the same day, Gary filed an acceptance of an offer of judgment from Cheyenne despite the stay, and the district court clerk entered the judgment the following day. The district court

[2]Gary brought a third-party complaint against UAIC and its counsel in the 2018 case, which was later dismissed.

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subsequently filed a written order granting the stay and, because of the stay, granted UAIC relief from and vacated the judgment.

Cheyenne and Gary filed this petition for a writ of mandamus in Docket No. 78085, asking this court to direct the district court to vacate the two orders granting UAIC's intervention in the 2007 and 2018 cases and to strike any subsequent pleadings from UAIC and related orders. Gary in Docket No. 78243 seeks a writ of mandamus directing the district court to vacate its order consolidating the cases, to reassign the 2018 case back to Judge Kephart, and to vacate its order granting UAIC's motion for relief from judgment. We have consolidated both petitions.

DISCUSSION

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control an arbitrary or capricious exercise of discretion. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Whether to entertain a writ of mandamus is within this court's discretion, and the writ will not be issued if the petitioner has a plain, speedy, and adequate legal remedy. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Generally, orders granting intervention and orders granting consolidation can be challenged on appeal. *See generally, e.g., Lopez v. Merit Ins. Co.*, 109 Nev. 553, 853 P.2d 1266 (1993) (challenging intervention on appeal from final judgment); *Zupancic v. Sierra Vista Recreation, Inc.*, 97 Nev. 187, 625 P.2d 1117 (1981) (challenging consolidation on appeal from permanent injunction). Nonetheless, this court may still exercise its discretion to provide writ relief "under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition." *Cote H. v. Eighth*

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Judicial Dist. Court, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008) (internal quotation marks omitted).

Here, although we recognize that petitioners have a remedy by way of appeal, we exercise our discretion to consider these petitions because they raise important issues of law that need clarification. Namely, we clarify whether intervention is permissible in a case after final judgment has been reached. We also clarify whether consolidation of cases is proper where one case has no pending issues. Sound judicial economy and administration also militate in favor of granting this petition, as our extraordinary intervention at this time will prevent district courts from expending judicial resources on relitigating matters resolved by a final judgment and, additionally, will save petitioners the unnecessary costs of relitigation.

Intervention

Cheyenne and Gary argue that UAIC's intervention was improper in the 2007 and 2018 cases because a final judgment was reached in one and a written settlement agreement in the other. Determinations on intervention lie within the district court's discretion. *See Lawler v. Ginochio*, 94 Nev. 623, 626, 584 P.2d 667, 668 (1978). While we ordinarily defer to the district court's exercise of its discretion, "deference is not owed to legal error." *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010). 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.

NRS 12.130 provides that "[*b*]*efore 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." (Emphases added.) In *Ryan v. Landis*, in interpreting a nearly identical

predecessor to NRS 12.130, we adopted the principle that there could be no intervention after judgment, including default judgments and judgments rendered by agreement of the parties. 58 Nev. 253, 259, 75 P.2d 734, 735 (1938). We reaffirmed that principle in *Lopez v. Merit Insurance Co.*, 109 Nev. at 556-57, 853 P.2d at 1268. In reversing a lower court's decision allowing an insurance company to intervene after judgment, we reasoned, "[t]he plain language of NRS 12.130 does not permit intervention subsequent to entry of a final judgment." *Id.* at 556, 853 P.2d at 1268. We do not intend today to disturb that well-settled principle that intervention may not follow a final judgment, nor do we intend to undermine the finality and the preclusive effect of final judgments.

The record clearly shows that a final judgment by default was entered against Gary in 2008 in the 2007 case. Intervention ten years later was therefore impermissible. We reject UAIC's argument that intervention was permissible because the 2008 final judgment expired and is thus void.[3] Nothing permits UAIC to intervene after final judgment to challenge the validity of the judgment itself.[4] *See Ryan*, 58 Nev. at 260, 75 P.2d at 736

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[3]We additionally reject UAIC's argument that consolidation of the two cases provided a basis for intervention in the 2007 case or that there was a pending issue in the 2007 case. As discussed later, consolidation was improper, as there was no pending issue in the 2007 case. We also decline to consider UAIC's arguments that public policy warrants granting intervention or that NRS 12.130 is unconstitutional, because those arguments are waived. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal.").

[4]If UAIC wanted to challenge the validity of a judgment, it could have timely intervened before judgment to become a proper party to the litigation to challenge it under NRCP 60. *See* NRCP 60(b)-(c) (2005) (allowing parties

(rejecting the interveners' argument that intervention was timely because the judgment was void); *see also Eckerson v. C.E. Rudy, Inc.*, 72 Nev. 97, 98-99, 295 P.2d 399, 399 (1956) (holding that third parties attempting to intervene to challenge a default judgment could not do so after judgment had been entered and satisfied). We therefore hold that the district court acted in excess of its authority in granting UAIC's motion to intervene in the 2007 case.

Turning to the 2018 case, we determine that the district court properly granted UAIC's motion to intervene. 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.[5] *Cf. Willerton v. Bassham*, 111 Nev. 10, 16, 889 P.2d 823, 826 (1995) ("Generally, a judgment entered by the court on consent of the parties after settlement or by stipulation of the parties is as valid and binding a judgment between the parties as if the matter had been fully tried, and bars a later action on the same claim or cause of action as the initial suit.").

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to move for relief from judgment). Alternatively, UAIC could have brought an equitable independent action to void the judgment. *See* NRCP 60(b) (permitting independent actions to relieve a party from judgment); *Pickett v. Comanche Const., Inc.*, 108 Nev. 422, 427, 836 P.2d 42, 45 (1992) (allowing nonparties to bring an independent action in equity if they could show that they were "directly injured or jeopardized by the judgment").

[5]We note that even if the court had approved the party's stipulation, there is no final judgment "[u]ntil a stipulation to dismiss this action is signed and filed in the trial court, or until this entire case is resolved by some other final, dispositive ruling . . . ." *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994).

We reject Cheyenne and Gary's argument that their agreement is sufficient to bar intervention. Our precedent holds that it is judgment, not merely agreement, that bars intervention. *Cf. Lopez*, 109 Nev. at 556, 853 P.2d at 1268 ("[T]his court has not distinguished between judgments entered following trial and *judgments entered* . . . by agreement of the parties." (emphasis added)); *see also Ryan*, 58 Nev. at 259-60, 75 P.2d at 735 ("The principle is the same if the *judgment* is by agreement of the parties." (emphasis added)). Allowing 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. *Cf. United States v. Alisal Water Corp.*, 370 F.3d 915, 922 (2004) ("Intervention, however, has been granted after settlement agreements were reached in cases where the applicants had no means of knowing that the proposed settlements was contrary to their interests.").

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We also clarify that to the extent that our prior opinion in *Ryan* relies on *Henry, Lee & Co. v. Cass County Mill & Elevator Co.*, 42 Iowa 33 (1875), that reliance was intended to explain why our statute does not distinguish between a judgment rendered through verdict or through agreement of the parties. *See Ryan*, 58 Nev. at 260, 75 P.2d at 735. We did not, nor do we intend today, to state that a settlement agreement on its own stands in the place of a judgment. Neither does our opinion in *Dangberg Holdings Nevada, LLC v. Douglas County*, 115 Nev. 129, 139-40, 978 P.2d 311, 317 (1999), suggest so. In *Dangberg Holdings*, we only noted that there was nothing in the record to support petitioner's assertion that there was a finalized settlement agreement barring intervention. *See id.* We hold that

it is the judgment that bars intervention, not the agreement itself reached by the parties.

Additionally, we note that UAIC timely moved to intervene when it filed its motion one month before the agreement between Cheyenne and Gary was made. The situation here is distinguishable from the situation in *Ryan*, 58 Nev. at 259, 75 P.2d at 735, where we affirmed the district court's denial of a motion for intervention filed almost a year after judgment, and in *Lopez*, 109 Nev. at 555, 853 P.2d at 1267, where we reversed the grant of a motion to intervene filed after judgment was entered. While NRS 12.130 does not explicitly state whether the filing of the motion for intervention or the granting of the motion is the relevant date in determining timeliness, NRCP 24 permits intervention based on the timeliness of the *motion*. *See* NRCP 24(a) (2005)[6] ("Upon timely application anyone shall be permitted to intervene in an action . . . ."); NRS 12.130(1)(a) ("Before the trial, any person may intervene in an action or proceeding . . . ."); *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 993, 860 P.2d 720, 723 (1993) ("Whenever possible, this court will interpret a rule or statute in harmony with other rules and statutes."). 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

[6]The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Comm. to Update and Revise the Nev. Rules of Civil Procedure*, ADKT 522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018). Any references in this opinion to the Nevada Rules of Civil Procedure apply to the rules that were in effect during the district court proceedings in this case. *See In re Study Comm. to Review the Nev. Rules of Civil Procedure*, ADKT 276 (Order Amending the Nevada Rules of Civil Procedure, July 26, 2004).

tries to intervene or permit judicial delay and bias in determining timeliness.

UAIC also met NRCP 24's requirements for intervention. NRCP 24(a)(2) permits a party to intervene as a right where the party shows that (1) it has a sufficient interest in the subject matter of the litigation, (2) its ability to protect its interest would be impaired if it does not intervene, (3) its interest is not adequately represented, and (4) its application is timely. *Am. Home Assurance Co. v. Eighth Judicial Dist. Court*, 122 Nev. 1229, 1238, 147 P.3d 1120, 1126 (2006). 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. Its ability to protect its interests would also be impaired without intervention because as an insurer, it would be bound to the judgment if it failed to defend. *See Allstate Ins. Co. v. Pietrosh*, 85 Nev. 310, 316, 454 P.2d 106, 111 (1969) ("[W]here the [insurance] company is given notice of the action, has the opportunity to intervene, and judgment is thereafter obtained . . . we hold that the company should be bound . . ."). 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. Lastly, UAIC timely moved to intervene in the 2018 case. UAIC's intervention in the 2018 case was therefore proper.[7]

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[7]We reject Cheyenne and Gary's arguments that UAIC provided them with improper notice of its motions to intervene and thereby deprived them of due process. UAIC complied with NRCP 24 and NRCP 5 to provide Cheyenne with sufficient notice of UAIC's motions. *See* NRCP 5(b)(2) (permitting service by mailing a copy to the attorney or party's last known address or by electronic means); NRCP 5(b)(4) ("[F]ailure to make proof of service shall not affect the validity of the service."); NRCP 24(c) ("A person desiring to intervene shall serve a motion to intervene upon the parties as

Accordingly, we hold that the district court was required by law to deny UAIC leave to intervene in the 2007 case but did not arbitrarily and capriciously act when granting UAIC leave to intervene in the 2018 case.

Consolidation

NRCP 42(a) allows consolidation of pending actions that involve "a common question of law or fact." Like under its identical federal counterpart, a district court enjoys "broad, but not unfettered, discretion in ordering consolidation." *Marcuse v. Del Webb Cmtys., Inc.*, 123 Nev. 278, 286, 163 P.3d 462, 468 (2007). However, this rule "may be invoked only to consolidate actions already pending." *Pan Am. World Airways, Inc. v. U.S. Dist. Court*, 523 F.2d 1073, 1080 (9th Cir. 1975). We determine that the district court improperly consolidated the 2007 and 2018 cases because a recently filed action cannot be consolidated with an action that reached a final judgment.

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In *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000), we clarified that "a final judgment is one that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs." Thus, when a final judgment is reached, there necessarily is no "pending" issue left. *See Simmons Self-Storage Partners, LLC v. Rib Roof, Inc.*, 127 Nev. 86, 91 n.2, 247 P.3d 1107, 1110 n.2 (2011) (noting that where issues remain pending in district court, there is no final judgment); *see also*

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provided in Rule 5."). While we recognize that Gary was not given prior notice of the motions to intervene, Gary had post-hearing opportunities to be heard on the issue. *See Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981) (recognizing that due process rights may be adequately protected by postdeprivation remedies), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 330-31 (1986).

Pending, *Black's Law Dictionary* (10th ed. 2014) (defining "pending" as "[r]emaining undecided; awaiting decision").

No pending issue remained in the 2007 case. A default judgment was entered against Gary in 2008 in the 2007 case, which resolved all issues in the case and held Gary liable for about $3.5 million in damages. Amending the 2008 judgment in 2018 to replace James' name with Cheyenne's was a ministerial change that did not alter the legal rights and obligations set forth in the original judgment or create any new pending issues. *See Campos-Garcia v. Johnson*, 130 Nev. 610, 612, 331 P.3d 890, 891 (2014) (noting that an "amended judgment" that does not alter legal rights and obligations leaves the original judgment as the final, appealable judgment). While the 2007 and 2018 actions share common legal issues and facts, no issue or fact is pending in the 2007 action that permits it to be consolidated with another case.

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We reiterate our goal of promoting judicial efficiency in permitting consolidation. *See Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 852, 124 P.3d 530, 541 (2005). Allowing a case that has reached final judgment to be consolidated with a newer case undermines that goal by permitting relitigation of resolved issues and requiring parties to spend unnecessary additional court costs. We hold that the district court improperly granted UAIC's motion to consolidate the 2007 and 2018 cases.[8]

Relief from judgment

Finally, we address whether the district court erred in vacating the judgment entered by the clerk pursuant to NRCP 68 after Gary filed an

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[8]Because we hold that the district court abused its discretion in granting consolidation, we do not reach Gary's due process arguments against the motion.

acceptance of Cheyenne's offer of judgment. NRCP 60(b)(1) allows the district court to relieve a party from judgment for "mistake, inadvertence, surprise, or excusable neglect." Here, the district court granted UAIC's motion for relief from the judgment because the clerk mistakenly entered judgment when the case was stayed. Reviewing the district court's decision on whether to vacate a judgment for an arbitrary and capricious exercise of discretion, *Cook v. Cook*, 112 Nev. 179, 181-82, 912 P.2d 264, 265 (1996), we determine that the district court did not err.

Gary argues that the district court improperly voided the judgment resulting from Cheyenne and Gary's settlement because judgment was entered before the written stay was filed. While we recognize that judgment was entered before the written stay was filed, we note that it was entered *after* the district court entered a minute order granting the stay.

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Generally, a "court's oral pronouncement from the bench, the clerk's minute order, and even an unfiled written order are ineffective." *Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 1251, 148 P.3d 694, 698 (2006) (quoting *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987)). These include "[d]ispositional court orders that are not administrative in nature, but deal with the procedural posture or merits of the underlying controversy." *State, Div. of Child & Family Servs. v. Eighth Judicial Dist. Court*, 120 Nev. 445, 455, 92 P.3d 1239, 1246 (2004). However, "[o]ral orders dealing with summary contempt, case management issues, scheduling, administrative matters or emergencies that do not allow a party to gain a procedural or tactical advantage are valid and enforceable." *Id.*

We determine that a minute order granting a stay operates like an administrative or emergency order that is valid and enforceable. A stay suspends the authority to act by operating upon the judicial proceeding itself rather than directing an actor's conduct. *Nken v. Holder*, 556 U.S. 418, 428-29 (2009). It is analogous to a judge orally disqualifying himself in *Ham v. Eighth Judicial Dist. Court*, 93 Nev. 409, 410-11, 566 P.2d 420, 421-22 (1977), which we deemed administrative because it did not direct the parties to take action, dispose of substantive matters, or give any party a procedural or tactical advantage. *State, Div. of Child & Family Servs.*, 120 Nev. at 453, 92 P.3d at 1244. A stay preserves the "*status quo ante*," and thus the parties may not modify the rights and obligations litigated in the underlying matter.[9] *Westside Charter Serv., Inc. v. Gray Line Tours of S. Nev.*, 99 Nev. 456, 460, 665 P.2d 351, 353 (1983). We hold that the district court's minute order was an effective stay and the clerk mistakenly entered Cheyenne and Gary's settlement judgment. We likewise reject Gary's argument that the district court vacating the parties' 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. *See* NRCP 60(a) ("[C]lerical mistakes in judgments . . . arising from oversight or omission may be corrected by the court at any time of its own initiative . . . and after such notice, if any, as the court orders."). In *Marble*

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[9]Gary argues that parties can settle during a stay. We need not consider that argument because he fails to cite to any supporting authority for this proposition. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that appellate courts need not consider claims that are not cogently argued or supported by relevant authority). Even assuming arguendo that parties can settle on their own during a stay, nothing permits *entry* of that settlement agreement by the court during a stay.

v. Wright, 77 Nev. 244, 248, 362 P.2d 265, 267 (1961), we distinguished a clerical error as "a mistake or omission by a clerk, counsel, judge, or printer [that] is not the result of the exercise of the judicial function" and "cannot reasonably be attributed to the exercise of judicial consideration or discretion." 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.

CONCLUSION

We conclude that intervention after final judgment is impermissible, and the district court erred in granting intervention in the 2007 case. We also conclude that an action that reached final judgment has no pending issues, and therefore, the district court improperly consolidated the 2007 and 2018 cases. Finally, we conclude that a minute order granting a stay is effective, and the district court properly vacated the erroneously entered settlement judgment between the parties. Accordingly, we grant in part and deny in part Cheyenne and Gary's petition in Docket No. 78085 and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order granting UAIC leave to intervene in Case No. 07A549111 and to strike any related subsequent pleadings and orders. We also grant in part and deny in part Gary's petition in Docket No. 78243 and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order granting UAIC's motion to

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consolidate Case Nos. 07A549111 and A-18-772220-C, and to reassign Case No. A-18-772220-C to Judge Kephart.[10]

_____, J.
Stiglich

We concur:

_____, J.
Gibbons

_____, J.
Silver

[10]Gary also seeks our intervention to direct the district court to strike as void any orders issued in the 2018 case by Judge Johnson regarding the third-party complaint. We decline that request because Gary has failed to demonstrate why he is seeking this relief and any allegations of conflicts of interest in the petition do not relate to Judge Johnson. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

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EXHIBIT G

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EXHIBIT G

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

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

BEFORE THE HONORABLE ERIC JOHNSON, DISTRICT COURT JUDGE

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

WEDNESDAY, JANUARY 9, 2019

APPEARANCES:

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

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

THE COURT: Okay. Now I'm -- but, I mean, that's -- that's obviously -- I mean, you refer to it as a minor demonstration that the judgment is still valid, but if the judgment isn't still valid in view of the underlying three and a half million dollars, I mean, that UAIC may be liable for, it obviously is -- I don't -- you know, whether or not that judgment is still valid is not what I would consider a minor -- minor question.

MR. CHRISTENSEN: Well, it actually -- and I apologize for calling it a minor question. It's -- with regard to the one aspect, that's not even the question in the first case. In the -- in the amendment of the judgment to Cheyenne Nalder, that is just an amendment of the judgment. That does nothing.

THE COURT: Well, I mean, if it's -- I would agree. I mean, if it had expired, I mean, it doesn't --

MR. CHRISTENSEN: It's an amendment of the expired judgment.

THE COURT: -- it doesn't --

MR. CHRISTENSEN: If it's --

THE COURT: It's an amendment of an expired judgment.

MR. CHRISTENSEN: If it's still valid, it's an amendment of a valid judgment.

THE COURT: Okay. Yeah.

MR. CHRISTENSEN: And we, of course, say it's an amendment of a valid judgment. But so to set aside that order

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

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

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

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

CERTIFICATION

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

AFFIRMATION

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

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

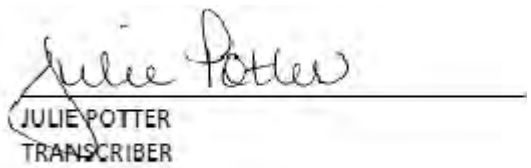

EXHIBIT H

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EXHIBIT H

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHEYENNE NALDER, an individual, and GARY LEWIS
Petitioners and Real Parties in Interest

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK THE HONORABLE DAVID JONES AND ERIC JOHNSON, DISTRICT COURT JUDGES,

Respondents,

And
UNITED AUTOMOBILE INSURANCE COMPANY,

Respondent.

Supreme Court No. _____

Electronically Filed
Feb 07 2019 03:47 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

District Court Case No. 07A549111
Consolidated with 18-A-772220
DEPT. NO: XX

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PETITION FOR WRIT OF MANDAMUS

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Docket 78085 Document 2019-05986

INTRODUCTION

Petitioners, CHEYENNE NALDER and GARY LEWIS ("Petitioners") by and through their attorneys of record, DAVID A. STEPHENS, ESQ., E. BREEN ARNTZ, ESQ., respectively, hereby petition for a Writ of Mandamus, pursuant to NRS §34.160 – 34.310 and NRAP 21, directing the Eighth Judicial District Court of the State of Nevada ("District Court") or Respondent court to:

Vacate its October 19, 2018 orders; wherein, the District Court granted leave to intervene after Judgment had already been entered in these actions. This Petition is supported by the attached Memorandum of Points and Authorities, the accompanying Appendix, all papers filed with the District Court in this matter, and argument by counsel that the Court may entertain.

DATED this 7th day of February, 2019.

S/David A Stephens
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Attorney for defendant Gary Lewis

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AFFIDAVIT OF DAVID A. STEPHENS, ESQ. IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

DAVID A. STEPHENS, ESQ., being first duly sworn, deposes and says:

1. That I am an attorney at law duly licensed to practice in the State of Nevada, with my office being located at 3636 North Rancho Drive, Las Vegas, Nevada 89130 and I represent the Petitioner, Cheyenne Nalder.
2. That the following narrative of facts and procedural history are based on my own personal knowledge, or are based on my belief and understanding as counsel. Petitioners personally are not personally giving this Affidavit because the salient issues involved in this Petition are issues of law and procedure.
3. Pursuant to NRS § 34.160, Petitioners request relief in the form of a Writ of Mandamus directing the Respondent Court to: Vacate its October 19, 2018 Order, wherein the District Court Granted leave to UAIC to intervene after Judgment had already been entered. (See Ex. 6). Further, all pleadings filed by UAIC in the Nalder v. Lewis litigation should be stricken and Orders entered at UAIC's request be voided.

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4. Pursuant to NRS § 34.160, Petitioners further request relief in the form of a Writ of Mandamus directing the Respondent Court to: Vacate its October 19, 2018 Order wherein the District Court Granted leave to UAIC to intervene after settlement had already been filed. (See Ex. 7). Further, all pleadings filed by UAIC should be stricken and Orders entered at UAIC's request be voided.
5. That a Writ review is necessary because as Petitioner contends and believes there are no disputed factual issues existing regarding the fact that intervention was not granted until after judgment was entered, and there are no legal issues as intervention is **never** permitted after judgment is entered in any action. Petitioners do not have a plain, speedy and adequate remedy in the ordinary course of law.
6. That Judgment was entered on August 26, 2008 in favor of James Nalder as guardian ad litem of Cheyanne Nalder and against Gary Lewis. (See Ex. 1.)
7. That an Amended Judgment was entered on March 28, 2018 in favor of Cheyenne Nalder and against Gary Lewis. (See Ex. 2.)
8. That a complaint was filed in Case No 18-A-772220 and the main claim was an action on the August 26, 2008 judgment pursuant to *Mandelbaum v. Gregovich*, 24 Nev. 154, 50 P. 849 (1897).

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9. That the parties resolved the dispute and signed and filed a stipulation settling the case of 18-A-772220 on September 13, 2018. (See Ex. 4).

10. That United Automobile Insurance Company, who was not a party at the time, or at any time prior to judgment being entered, filed defectively noticed motions to intervene in both actions. (See Ex. 3.)

11. That service of both motions was defective on the face of the certificates of service. (See Ex. 3).

12. That I was not served with either of UAIC's Motions to Intervene, as detailed in my Opposition and subsequent Motion to Set Aside. (See Ex. 5.)

13. That on October 19, 2019, subsequent to the entry of the final judgment and settlement in these respective matters, the lower court granted UAIC's motions. (See Ex. 6 & 7.)

14. This Petition is made and based upon the Memorandum of Points and Authorities attached below and the exhibits contained in the concurrently filed appendix.

15. Attached as **Exhibit 1** to Petitioner's Appendix is a true and correct copy of the Notice of Entry of Judgment in favor of James Nalder (August 26, 2008).

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16. Attached as **Exhibit 2** to Petitioner's Appendix is a true and correct copy of the Amended Judgment in favor of Cheyenne Nalder (March 28, 2018).

17. Attached as **Exhibit 3** to Petitioner's Appendix is a true and correct copy of UAIC's Motions to Intervene (August 16, 2018 & August 17, 2018).

18. Attached as **Exhibit 4** to Petitioner's Appendix is a true and correct copy of the signed and filed Stipulation settling the case of 18-A-772220 (September 13, 2018).

19. Attached as **Exhibit 5** to Petitioner's Appendix is a true and correct copy of my Opposition (October 8, 2019) and subsequent Motion to Set Aside (December 13, 2018).

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20. Attached as **Exhibit 6** to Petitioner's Appendix is a true and correct copy of the Order filed granting Intervention in Case 07A549111 (October 19, 2019).

21. Attached as **Exhibit 7** to Petitioner's Appendix is a true and correct copy of the Order filed granting Intervention in Case A-18-772220-C (October 19, 2019).

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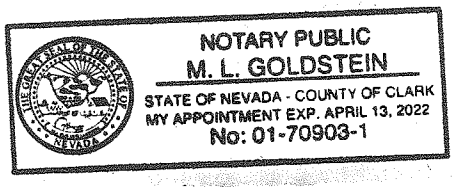
22. Attached as **Exhibit 8** to Petitioner's Appendix is a true and correct copy of UAIC's motion to consolidate on Order Shortening Time (sans exhibits) (November 26, 2018)

FURTHER AFFIANT SAYETH NAUGHT.

DAVID A. STEPHENS, ESQ.

Subscribed and sworn to before me
this 7th day of January, 2019.

NOTARY PUBLIC, in and for said County and State



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AFFIDAVIT OF E. BREEN ARNTZ, ESQ. IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

E. BREEN ARNTZ, ESQ., being first duly sworn, deposes and says:

1. That I am an attorney at law duly licensed to practice in the State of Nevada, with my office being located at and I represent the Petitioner, Gary Lewis, who resides in California.

2. That the following narrative of facts and procedural history are based on my own personal knowledge, or are based on my belief and understanding as counsel. Petitioners personally are not personally giving this Affidavit because the salient issues involved in this Petition are issues of law and procedure.

3. Pursuant to NRS § 34.160, Petitioners request relief in the form of a Writ of Mandamus directing the Respondent Court to:Vacate its October 19, 2018 Order, wherein the District Court Granted leave to UAIC to intervene after Judgment had already been entered in this action. (See Ex. 6). Further, all pleadings filed by UAIC in the Nalder v. Lewis

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4. Pursuant to NRS § 34.160, Petitioners further request relief in the form of a Writ of Mandamus directing the Respondent Court to: Vacate its October 19, 2018 Order wherein the District Court Granted leave to UAIC to intervene after settlement had already been filed in this action. (See Ex. 7). Further, all pleadings filed by UAIC should be stricken and Orders entered at UAIC's request be voided.
5. That a Writ review is necessary because as Petitioner contends and believes there are no disputed factual issues existing regarding the fact that intervention was not granted until after judgment was entered, and there are no legal issues as intervention is **never** permitted after judgment is entered in any action. Petitioners do not have a plain, speedy and adequate remedy in the ordinary course of law.
6. That Judgment was entered on August 26, 2008 in favor of James Nalder as guardian ad litem of Cheyanne Nalder and against Gary Lewis. See Ex. 1.
7. That, an Amended Judgment was entered on March 28, 2018 in favor of Cheyenne Nalder and against Gary Lewis. See Ex. 2.

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8. That a complaint was filed in Case No 18-A-772220 and the main claim was an action on the August 26, 2008 judgment pursuant to *Mandelbaum v. Gregovich*, 24 Nev. 154, 50 P. 849 (1897) .

9. That the parties resolved the dispute and signed and filed a stipulation settling the case of 18-A-772220 on September 13, 2018. See Ex. 4.

10. That United Automobile Insurance Company, who was not a party at the time, or at any time prior to judgment being entered, filed defectively noticed motions to intervene in both actions. *See* Ex 3.

11. That neither I nor my client nor any other attorney on his behalf was served with either of UAIC's Motions to Intervene.

12. That on October 19, 2019, even though subsequent to the entry of the final judgment and filing of the settlement in these respective matters, the lower court granted UAIC's motions. See Ex. 6 & Ex. 7.

13. This Petition is made and based upon the Memorandum of Points and Authorities attached below and the exhibits contained in the concurrently filed appendix.

14. Attached as **Exhibit 1** to Petitioner's Appendix is a true and correct copy of the Notice of Entry of Judgment in favor of James Nalder (August 26, 2008).

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17. Attached as **Exhibit 4** to Petitioner's Appendix is a true and correct copy of the signed and filed Stipulation settling the case of 18-A-772220 (September 13, 2018).

18. Attached as **Exhibit 5** to Petitioner's Appendix is a true and correct copy of my Opposition (October 8, 2019) and subsequent Motion to Set Aside (December 13, 2018).

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19. Attached as **Exhibit 6** to Petitioner's Appendix is a true and correct copy of the Order filed granting Intervention in Case 07A549111 (October 19, 2019).

20. Attached as **Exhibit 7** to Petitioner's Appendix is a true and correct copy of the Order filed granting Intervention in Case A-18-772220-C (October 19, 2019).

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21. Attached as **Exhibit 8** to Petitioner's Appendix is a true and correct copy of UAIC's motion to consolidate on Order Shortening Time (sans exhibits) (November 26, 2018)

FURTHER AFFIANT SAYETH NAUGHT.

E. Breen Arntz, Esq.

STEPHANIE MARTINEZ
Notary Public-State of Nevada
APPT. NO. 18-1983-1
My Appt. Expires 01-10-2022

Subscribed and sworn to before me
this 6 day of February, 2019.

NOTARY PUBLIC, in and for said
County and State

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II. STATEMENT OF RELIEF SOUGHT

Petitioners request that this Honorable Court: Issue a Writ of Mandamus requiring the District Court to vacate its prior order allowing UAIC to intervene subsequent to judgment being entered in this action, and enter an order denying the said motion as NRS 12.130 does not permit intervention subsequent to trial or settlement or the entry of a judgment in any action.

Petitioners further request that this Honorable Court: Issue a Writ of Mandamus directing the District Court to strike any and all Pleadings filed in the Nalder v. Lewis actions by UAIC after the granting of its Intervention.

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III. STATEMENT OF RELEVANT FACTS

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A. Relevant Procedural Facts

On June 3, 2008, the lower court signed the final judgment in this action in favor of Petitioner, CHEYENNE NALDER, (a minor) through her guardian ad litem James Nalder and against the sole Defendant in that action, GARY LEWIS. (Ex. 1.) Notice of Entry of that Judgment was filed on August 26, 2008. (Ex 1.) This final judgment resolved this dispute as to the parties involved. On March 22, 2018, Petitioner Cheyenne Nalder filed her Ex Parte

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Motion to Amend the Judgment to reflect her own name because she was no longer a minor. The Amended Judgment was thereafter filed on March 28, 2018. See, Ex. 2.

More than 10 years after the original, final judgment in this case was filed, United Automobile Insurance Company, filed a Motion to Intervene. See, Ex. 3. The Motions, based on the certificates of "service," were not served on any of the parties, but was ultimately opposed by Cheyenne Nalder's counsel. The Opposition and Motion to Aside later filed detailed not only the procedural defects of UAIC's Motion, but also included the very clear and well settled case law that does not allow for intervention after a final judgment or settlement. See Ex. 5. Even though the Nevada Supreme Court has clearly and consistently held that "in all cases" intervention must be before judgment is entered and that intervention is **never** permitted after judgment is entered or settlement reached, the lower Court, without hearing oral argument, allowed UAIC to Intervene. The Order was filed and entered on October 19, 2018. See, Ex. 6 & 7. Since its intervention, UAIC has made several strategic filings which complicate this previously resolved matter, including a Motion to Consolidate this action with another action. See Ex. 8. This action was, many

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years ago, resolved, yet now is consolidated with a new action that involves different facts and issues of law. This Writ is therefore necessary.

IV. STATEMENT OF THE LAW

A. Writ of Mandamus Authority

NRAP 21 sets forth the procedural rules required to qualify for a Writ of Mandamus. Rule 21(b) sets forth the general requirements of a Writ Petition. Writ Petitions require a statement of: (a) the relief sought; (b) the issues presented; (c) the facts necessary to understand the issues presented by the petition; and (d) the reasons why the writ should issue, including points and legal authorities.

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Mandamus is an extraordinary remedy, and the decisions as to whether a petition will be entertained lies within the discretion of the Supreme Court. *Poulos v. Eighth Judicial Dist. Court of State of Nev. In and For Clark County*, 98 Nev. 272, 652 P.2d 1177 (1974). Mandamus should not be used unless the usual and ordinary remedies fail to provide a plain, speedy, and adequate remedy, and without it there would be a failure of justice. *See*, *Stromberg v. Second Jud. Dist. Ct. ex rel. County of Washoe*, 125 Nev. 1, 200 P.3d 509, 511 (2009). This Court "will exercise [its] discretion to consider writ petitions despite the existence of an otherwise adequate legal remedy when an important issue of law needs

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clarification, and this court's review would serve considerations of public policy, sound judicial economy, and administration." *City of N. Las Vegas v. Eighth Judicial Dist. Court ex. Rel. County of Clark*, 122 Nev. 1197, 1204, 147 P.3d 1109, 1114 (2006).

V. ARGUMENT

a. Intervention was Improper.

Intervention was unknown at common law and is creature of statute. *Geis v. Geis*, 125 Neb. 394, 250 N.W. 252 (1933). In Nevada, NRS 12.130 permits a party to intervene under certain circumstances. The statute, in its entirety, reads as follows:

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> **NRS 12.130 Intervention: Right to intervention; procedure, determination and costs; exception.**
>
> 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.
>
> (b) An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant.

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> (c) Intervention is made as provided by the Nevada Rules of Civil Procedure.
>
> (d) The 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.
>
> 2. The provisions of this section do not apply to intervention in an action or proceeding by the Legislature pursuant to NRS 218F.720. (Emphasis added.)

As the Court can see, NRS 12.130 specifically states "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." The Nevada Supreme Court has previously held "***The plain language of NRS 12.130 does not permit intervention subsequent to the entry of a final judgment***." *Lopez v. Merit Insurance Co.*, 853 P.2d 1266, 1268 (1993) (emphasis added).

In *Lopez*, Plaintiffs, Eric and Erwin Lopez, sued Defendant Leone for injuries stemming from a motor vehicle crash. Eric and Erwin agreed to accept Leone's policy limits in exchange for a covenant not to execute. Eric and Erwin then brought suit against Leone for purposes of having a judgment entered to collect applicable UM/UIM coverage from Merit Insurance. Eric and Erwin notified Merit about the action. The district court allowed Eric and Erwin to "prove up"

their damages in a hearing, and subsequently entered default judgments in favor of Eric and Erwin in excess of $100,000.00 each. "No appeal was taken from these judgments, and they became final." *Id.* at 1267. Subsequent to the entry of judgment in *Lopez*, Merit Insurance sought to have the judgments set aside. As the Court noted:

> Facing potential liability arising out of these judgments on its uninsured/underinsured motorist policy with Eric and Erwin's mother, Merit, on October 28, 1991, filed a "Motion To Set Aside Default Judgments And To Intervene." The district court granted both motions, finding that Eric and Erwin "did not give proper notice of the action and its trial to MERIT INSURANCE COMPANY. *Id*.

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The Supreme Court reversed the lower court, holding that intervention cannot be had **under any circumstances** after judgment has been entered in an action. The Court explained its position as follows:

> NRS 12.130(1) provides that "***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." NRS 12.130(2) further provides that an intervenor may join the plaintiff "in claiming what is sought," or may join the defendant "in resisting the claims of the plaintiff." ***The plain language of NRS 12.130 clearly indicates that intervention is appropriate only during ongoing litigation***, where the intervenor has an opportunity to protect or pursue an interest which will otherwise be infringed. ***The plain language of NRS***

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> ***12.130 does not permit intervention subsequent to the entry of a final judgment.***
>
> *Id.* at 1267-1268 (emphasis added).

The decision in *Lopez* reiterated the long standing prohibition against intervention post judgment. Dating all the way back to 1938, the Nevada Supreme Court has held that ***intervention cannot be had after a final judgment is entered***. *See*, *Ryan v. Landis*, 58 Nev. 253, 75 P.2d 734. (1938). In *Ryan* the Court adopted the holding from a California decision a decade before which held that "***in all cases [intervention] must be made before trial***." *Id.* (citing *Kelly v. Smith* 204 Cal. 496, 268 P. 1057 (1928). The Nevada Supreme Court has subsequently confirmed "In refusing to allow intervention subsequent to the entry of a final judgment, ***this court has not distinguished between judgments entered following trial and judgments entered by default or by agreement of the parties."*** *Lopez v. Merit Insurance Co.*, 853 P.2d 1266, 1268 (1993) (emphasis added).

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In *Dangberg Holdings. v. Douglas Co.*, 115 Nev. 129, 139 (Nev. 1999) the Supreme Court further clarified that intervention after judgment, **which includes settlement**, is not possible.

> **The plain language of NRS 12.130 does not permit intervention subsequent to the entry of a final judgment.** Lopez v. Merit Ins. Co., 109 Nev. 553, 556, 853 P.2d 1266, 1267-68 (1993). Additionally, in Ryan v. Landis, 58 Nev. 253, 260, 75 P.2d 734, 735 (1938)

> (quoting *Henry Lee Co. v. Elevator Co.*, 42 Iowa 33 (1918)), we reiterated that: "intervention must be made before the trial commences. After the verdict all would admit it would be too late to intervene. But **a voluntary agreement of the parties stands in the place of a verdict, and, as between the parties to the record as fully and finally determines the controversy as a verdict could do."** *Dangberg Holdings. v. Douglas Co.*, 115 Nev. 129, 139 (Nev. 1999). Emphasis added.

The Court has subsequently reiterated that NRS 12.130 does not permit intervention subsequent to the entry of a final judgment and that "***[i]n all cases***" intervention can only be granted before judgment is entered. *Id*.

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Indeed, the Nevada Supreme Court has detailed its reasoning as to why NRS 12.130 does not permit intervention subsequent to the entry of final judgment and why intervention must "in all cases" be made before judgment is entered. The Court has explained, "It is not the intention of the statute that one not a party to the record shall be allowed to interpose and open up and renew a controversy which has been settled between the parties to the record, either by verdict or voluntary agreement. *Ryan v. Landis*, 58 Nev. 253, 260, 75 P.2d 734, 735. (1938) (quoting *Henry Lee & Co. v. Cass County Mill & Elevator Co.*, 42 Iowa 33 (1875).

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In 1956, in the case of *Eckerson v. Rudy*, the Court not only recognized the long standing line of authority from the Nevada Supreme Court mandating that intervention cannot be had after judgment has been entered, but also noted that such a holding is supported by public policy. In that action, the appellant claimed that a default judgment was improperly entered, and that the appellant should have been allowed to intervene to set the default judgment aside. The Court held, "This they may not do by intervention where the controversy is ended and settled to the satisfaction of the parties litigant." *Eckerson v. Rudy*, 72 Nev. 97, 295 P.2d 399, 400 (1956).

In 1968, in the case of *McLaney v. Fortune Operating Co.*, the Nevada Supreme Court reversed the lower court's decision to allow intervention after judgment had been entered. The opinion states "The lower court allowed [appellants] to intervene . . . after judgment. ***The motion to intervene came too late and should have been denied***." *McLaney v. Fortune Operating Co.*, 84 Nev. 491, 499, 444 P.2d 505, 510 (1968).

In 1993, in *Lopez v. Merit Insurance Co.*, 853 P.2d 1266 (1993), the Nevada Supreme Court again confirmed its long held position that "in all cases" intervention cannot be granted after the entry of judgment. The Court detailed the long and consistent line of authority upholding NRS 12.130, which does not allow

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intervention after judgment has been entered. The Court discussed case after case where appellants, over the course of several decades, had asked district courts to allow them to intervene for myriad reasons. Without exception, every time a district court judge found that intervention could not be had after judgment had been entered the district court judge's decision was upheld. Without exception, every time a district court judge allowed intervention after judgment was entered the district court judge's decision was reversed. ***In the instant Writ, Petitioners seek nothing other than to be treated the same way every other litigant who has presented this issue to the Court has been treated since 1938.***

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In the instant action, a final judgment was entered on August 26, 2008. That judgment had remained on the docket that way for the better part of ten years. In 2018, the judgment creditor, (who had recently reached the age of majority), petitioned the Court to Amend the judgment to reflect her own name. ***Subsequent*** to final judgment being entered, and ***subsequent*** to the Amended final judgment being entered, UAIC was allowed to intervene in this matter. There is no dispute that the motion to intervene was granted subsequent to final judgment being entered. There is no dispute that Nevada authority holds that NRS 12.130 ***does not permit*** intervention subsequent to the entry of a final judgment, or that "in all

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cases" intervention is not allowed after judgment. Intervention can never be (and has never been) permitted after a final judgment has been entered, and should not have been permitted by the lower court in this action.

It is not disputed that in case number 18-A-772220 the parties to the litigation entered into a written settlement agreement filed in the action (Ex. 4) and the Court below still allowed intervention contrary to the long line of cases.

The lower court's orders allowing UAIC to intervene subsequent to final judgment or settlement being entered flies in the face of almost a century of clear and consistent holdings from the Nevada Supreme Court which have, in the most broad terms possible ("in all cases") unequivocally held that intervention cannot be allowed for any reason after judgment has been entered. UAIC's concerns, just like the concerns raised by Merit Insurance about not being properly notified in *Lopez*, do not change the fact that intervention can never be (and never has been) allowed after judgment has been entered. UAIC cannot identify, and the lower court did not identify, a single case in all of Nevada's jurisprudence where intervention has ever been allowed subsequent to judgment being entered. The lower court's order should be vacated as it violated the core principles of *stare*

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decisis which required that UAIC's motions for intervention subsequent to the entry of final judgment or settlement be denied.

b. Procedural Due Process was Denied to Petitioners.

The United States Constitution as well as the Constitution of the State of Nevada guarantee that a person must receive due process before the government may deprive him of his property. See, U.S Const. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); Nev. Const. art. 1, § 8(5) ("No person shall be deprived of life, liberty, or property, without due process of law."). This Court has recognized that procedural due process "requires notice and an opportunity to be heard." *Maiola v. State*, 120 Nev. 671, 675, 99 P.3d 227, 229 (2004); see also *Browning v. Dixon*, 114 Nev. 213, 217, 954 P.2d 741, 743 (1998).

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The requirements of procedural due process apply to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. *Board of Regents v. Roth*, 408 U.S. 564, 569–71 (1972). UAIC's failure on the face of both pleadings to properly serve them renders them void as a violation of due process requiring the voiding of the orders allowing intervention.

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VI. CONCLUSION AND RELIEF SOUGHT

As a result of the foregoing, Petitioners pray for this Honorable Court to grant relief via a Writ of Mandamus directing the District Court to vacate its order allowing UAIC to intervene subsequent to final judgment, and enter an order denying said motion in case no 07A549111. Further, Petitioners seek direction to the lower Court that any filings proffered by UAIC in case 07A549111 be stricken from the record and any Orders issued at UAIC's request be stricken as void in Case 07A549111.

Further, Petitioners seek a Writ of Mandamus directing the District Court to vacate its order allowing UAIC to intervene subsequent to settlement, and enter an order denying said motion in case no 18-A-772220. Petitioners likewise seek direction to the lower Court that any filings proffered by UAIC in case 18-A-772220, not related to the third-party complaint, be stricken from the record and any Orders issued at UAIC's request, not related to the third-party complaint be stricken as void in case 18-A-772220.

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Dated: 2/6/19

_S/ David A Stephens_____
DAVID A. STEPHENS, ESQ.
Nevada Bar No. 00902
3636 North Rancho Drive
Las Vegas, Nevada 89130
Attorney for Cheyenne Nalder

_S/ E Breen Arntz_____
E. BREEN ARNTZ, ESQ.
Nevada Bar No. 3853
5545 Mountain Vista Ste. E.
Las Vegas, NV 89120
Attorney for defendant Gary Lewis

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are the persons and entities as described in NRAP 26.1(a) (1), and must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal:

E. Breen Arntz, Esq., Attorney for Defendant Gary Lewsi

David A. Stephens, Esq., Stephens & Bywater, P.C., Attorneys for Cheynne Nalder

Thomas F. Christensen, Esq., Christensen Law Offices, Attorneys for Third Party Plaintiff Gary Lewis

DATED this 6th day of February, 2019.

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_S/ David A Stephens_____
David A. Stephens, Esq.
Nevada Bar No. 00902
STEPHENS & BYWATER, P.C.
3636 North Rancho Drive
Las Vegas, Nevada 89130
Attorney for Cheyenne Nalder

_S/ E Breen Arntz_____
E. BREEN ARNTZ, ESQ.
Nevada Bar No. 3853
5545 Mountain Vista Ste. E.
Las Vegas, NV 89120
Attorney for Defendant Gary Lewis

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ROUTING STATEMENT

This matter is not retained by the Supreme Court under NRAP 17(a) nor is it presumptively assigned to the Court of Appeals pursuant to NRAP 17(b). Petitioners believe the Supreme Court should retain this writ because it relates to a matter that is currently pending before the Supreme Court pursuant to NRAP 17(a)(6). The Supreme Court has accepted two certified questions from the Ninth Circuit Court of Appeals in Supreme Court Case No. 70504. Intervenor misrepresented the issues the Supreme Court is deciding in Case No. 70504 in order to influence the trial court regarding the simple issues of a common law action on a judgment pursuant to *Mandelbaum v. Gregovich*, 24 Nev. 154, 50 P. 849 (1897). In addition, the judgment amount is over $3,000,000.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read the above and foregoing brief and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purposes. I further certify that this brief complies with all applicable Nevada Rules of appellate procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the records. 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.

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DATED this 6th day of February, 2019.

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_S/ David A Stephens_____
DAVID A. STEPHENS, ESQ.
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3636 North Rancho Drive
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Telephone: (702) 656-2355
dstephens@sgblawfirm.com
Attorney for Cheyenne Nalder

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CERTIFICATE OF SERVICE

Pursuant to NRAP 21(a)(1) and NRAP 25(c)(1), I hereby certify that I am an employee of Stephens and Bywater and that on the 7th day of February, 2019, I caused the foregoing **PETITION FOR WRIT OF MANDAMUS** to be served as follows:

[X] personal, including deliver of the copy to a clerk or other responsible person at the office of counsel; and/or

[ ] by mail; and/or

The Honorable David Jones
Eighth judicial District Court
Department XXIX
Regional Justice Center, Courtroom 3B
200 Lewis Ave
Las Vegas, Nevada 89155
Respondent Judge

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The Honorable Eric Johnson
Eighth Judicial District Court
Department XX
Regional Justice Center, Courtroom 12A
200 Lewis Ave
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Respondent Judge

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Employee of Stephens and Bywater, P.C.

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EXHIBIT I

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EXHIBIT I

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHEYENNE NALDER, an individual, and GARY LEWIS

Petitioners,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK THE HONORABLE DAVID JONES AND ERIC JOHNSON, DISTRICT COURT JUDGES,

Respondents,

And
UNITED AUTOMOBILE INSURANCE COMPANY,

Real Party in Interest.

Supreme Court No. 78085

District Court Case No. 07A549111
Consolidated with 18-A-772220
DEPT. NO: XX

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REPLY TO ANSWER TO PETITION FOR WRIT OF MANDAMUS

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

In order to justify intervention, UAIC attacks the validity of the 2018 judgment in the 2007 case and the settlement reached in the 2018 case prior to its intervention. UAIC argues for an exception or to overrule the clear Nevada case law and statutory scheme against intervention after settlement or judgment.[1] UAIC attempts to close this circular reasoned loop by conflating the two methods for extending the effect of a judgment available to judgment creditors in Nevada. UAIC hopes this Court will disregard the effect of the statutory tolling scheme applicable to both methods.

The two methods are the common law action on a judgment discussed at length in *Mandlebaum v. Gregovich*, 24 Nev. 154, (Nev. 1897) (which is and always has been the basis of the actions below) and statutory judgment renewal pursuant to NRS 17.214 (which is not a part of the actions below). This is the same order the two methods are listed in the Statute of Limitations in NRS 11.190. UAIC's failure to distinguish or even discuss the *Mandlebaum* case acts as an admission that this writ for relief is well grounded and **must** be granted.

To compound matters for UAIC, it also admits in its briefing before this Court

[1] UAIC wants an exception to the black letter law in Nevada on intervention to protect its interests that were forfeited by it when it breached its duty to defend years ago.

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in Case No. 70504, on the second certified question, that the very action brought by Nalder below is appropriate and timely:

> "And in order to continue to serve as evidence for their consequential damages claim, the [2008] judgment had to remain valid and enforceable, which required that the judgment be renewed pursuant to the requirements of NRS 17.214 or, **alternatively, required Mr. Nalder to bring an action on the judgment against Mr. Lewis**..."

(See UAIC response brief on second certified question, page 13.)

Though *Leven v. Frey*, 123 Nev. 399, 168 P.3d 712 (2007), did not deal with any of the tolling statutes associated with NRS 11.190, it is consistent in approving the two methods -- the common law action on a judgment or, alternatively, renewing a judgment through NRS 17.214. "An action on a judgment or its renewal must be commenced within six years[2] under NRS 11.190(1)(a)" *Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007).

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In their brief before this Court UAIC goes on to state ". . . [T]his Court's decision in *Mandlebaum v. Gregovich*, 24 Nev. 154, 50 P. 849 (1897) . . . arose from an action filed by a judgment creditor and his assignee against a judgment debtor to recover on an unsatisfied prior judgment obtained by the creditor against the debtor."

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[2] *Leven* did not involve any tolling statutes, as did *Mandlebaum*. The expiration of the statute of limitations on the 2008 judgment was tolled by NRS 11.200 and NRS 11.250 and was tolled and continues to be tolled by NRS 11.300. This tolling extends the time for both an action on the judgment and statutory renewal under NRS 17.214.

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Id. at 157. This Court ultimately affirmed the new judgment entered in favor of the judgment creditor and his assignee, holding, in pertinent part, that while the statutory right of execution on the prior judgment had been barred by the passage of more than nine[3] years' time, the statute of limitations on the judgment creditor's right to file an action on the prior judgment was tolled due to the judgment debtor's absence from the state. *Id.* at 158-161." Thus, UAIC has adopted the holding in *Mandlebaum* that is directly on point regarding the continued validity of the judgment and settlement in the two cases below.

II. Facts

a. In Nevada, statute of limitations expire not judgments.

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UAIC plays fast and loose with the facts. UAIC constantly refers to an "expired" judgment when referring to the judgment in the 2007 litigation entered

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[3] UAIC misstates the age of the *Mandlebaum* judgment. *The Mandlebaum* judgment was 15 years old -- 5 years older than the judgment in this case. "The averments of the complaint and the undisputed facts are that, at the time of the rendition and entry of the judgment in 1882, the appellant was out of the state, and continuously remained absent therefrom until March, 1897, thereby preserving the judgment and all rights of action of the judgment creditor under the same. **Notwithstanding nearly fifteen years had elapsed** since the entry of the judgment, yet, for the purposes of action, the judgment was not barred — **for that purpose the judgment was valid.**" *Mandlebaum v. Gregovich*, 24 Nev. 154, 159 (Nev. 1897). (Emphasis added.) In the present action, it is undisputed that the judgment debtor has been absent from the state since at least 2010 and continues outside the state tolling the statute of limitations pursuant to *Mandlebaum* and NRS 11.300. Having adopted this holding, UAIC is estopped from now arguing it does not apply.

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in 2018. Rather than restate the entire history of the litigation between Nalder, Lewis and UAIC, in order to correct UAIC's numerous misstatements, Nalder and Lewis refer the Court to the accurate rendition of the procedural and factual history of this litigation contained in Lewis' Writ, (Supreme Court Case No. 78243). Petitioners will only highlight the facts most relevant to this petition for writ.

b. **The 2008, 2018 and 2019 judgments are valid.**

The 2008 judgment is valid pursuant to *Mandelbaum.* At the time of intervention, and now, the 2007 case had/has a judgment dated 2018, and was/is therefore "facially" valid. The judgment never expired.[4] Even if a judgment in Nevada could or would "expire" with the expiration of the statute of limitations, the statute of limitations on this judgment was tolled by NRS 11.200 (payments on

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[4] UAIC has cited **no** Nevada caselaw regarding judgments expiring. The Maryland case cited by UAIC actually holds: "Expiration of the judgment due to the passage of twelve years had to be pleaded as an affirmative limitations defense by the judgment debtor. Thus, it was possible for the judgment to be renewed, even if more than twelve years had passed since its entry, if the judgment debtor did not object to renewal, by raising limitations. See Paul V. Niemeyer Linda M. Schuett, *Maryland Rules Commentary*, 485-86 (2d ed. 1992). With the advent of Rule 2-625, that changed: Under [the new rule] a money judgment automatically expires after twelve years from its date of entry." *Kroop Kurland v. Lambros*, 118 Md. App. 651, 665 (Md. Ct. Spec. App. 1998). Thus, the *Kroop* case cited by UAIC in its brief but not contained in its table of cases is the result of a statutory scheme which does not exist in Nevada.

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the judgment), NRS 11.250 (minority), and NRS 11.300 (defendant absent from the State of Nevada).

c. **Nalder retained David A. Stephens.**

After reaching the age of majority, Nalder retained David Stephens, Esq., because of the false allegations made by counsel for UAIC regarding the expiration of the judgment.

d. **Lewis retained E. Breen Arntz.**

Lewis retained E. Breen Arntz, Esq., to defend against Nalder's claims in Nevada when it became apparent that no Nevada attorney selected by UAIC would provide an ethical non-frivolous defense.

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e. **David Stephens, Esq., and E. Breen Arntz, Esq., entered into and filed a stipulation resolving the 2018 litigation.**

Because the Mandelbaum case is directly on point and controlling David Stephens, Esq., and E. Breen Arntz, Esq., signed and filed a stipulation settling the 2018 litigation. The stipulation was submitted to the Honorable David Jones for his signature.

f. **UAIC directs Randall Tindall, Esq., to file pleadings on behalf of Lewis without his knowledge or consent.**

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This request was in direct violation of Lewis' requests to UAIC to clear all actions with him before filing them. Randall Tindall, Esq., filed pleadings claiming to be representing Lewis in both cases without any authority from Lewis.

g. **UAIC was allowed to intervene in both actions.**

Service of both motions to intervene were defective on their face. (See P. App 5 at 166-172). The only person listed for service on either motion was David A. Stephens, Esq. No method of service was checked on the 2007 case with a 2018 judgment on file. On the 2018 case with the settlement agreement on file the electronic service was erroneously checked because David Stephens, Esq., had not yet registered for electronic service. (See P. App 5 at 166-172). Both motions were granted without a hearing, via minute order stating "no opposition having been filed" even though oppositions were filed. Both motions were granted by the same judge who later recused himself because of a relationship with UAIC's chosen defense counsel at the time of intervention was granted, Randall Tindall, Esq.

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h. **The Court did not stay the entire case, either orally or in minutes at the January 9, 2019 hearing.**

Instead, the Court stated on the record it would review some of the issues

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again and some would be decided at the subsequent hearing date of January 23, 2019. (5 R. App. 1141 Lines 15-22)[5] Nalder sent an offer of judgment to Lewis in anticipation of a favorable ruling at the January 23, 2019 hearing on Nalder's motion for summary judgment. Lewis was fearful that if he did not accept the offer of judgment, he would ultimately end up with a larger judgment against him. Lewis, through *Cumis/Hansen*[6] defense counsel E. Breen Arntz, Esq., forwarded the offer of judgment to UAIC for comment. However, under the Nevada Rules of Civil Procedure then in effect, neither UAIC nor the judge was required to be noticed. In fact, it is improper to notify the judge of an offer of judgment until after the case is concluded. Lewis then accepted the offer of judgment.

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i. **The judgment was validly entered by the Clerk.**

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The Court exceeded its jurisdiction and breached the parties' due process and constitutional rights in voiding the judgment at the ex-parte urging of UAIC, not giving any time for a response or a hearing.

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[5] Mr. Douglas: ... we could stay that or grant that. The Court: it's on calendar for next week. Mr. Douglas: Oh, it's on calendar next week. Okay. Is that the 23rd? The Clerk: Yes. Mr. Douglas: Okay. Sorry. We'll deal with it then. The Court: Well, I'll look at it and -- Mr. Douglas: we'll deal with it then. The Court: But all right.

[6] *San Diego Navy Federal Credit Union v. Cumis Insurance Society,* 162 Cal. App. 3d 358 (Cal. Ct. App. 1984); *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Ad. Op. 74, 357 P.3d 338 (2015)

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III. A Writ of Mandamus is the only appropriate remedy in this case.

"A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. *See* NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008)." *Gralnick v. Eighth Judicial Dist. Court of Nev.*, No. 72048, at *1 (Nev. App. Mar. 21, 2017).

In the face of all Nevada cases and the clear language of NRS 12.130, stating that intervention is available ***only*** before settlement or judgment, UAIC filed a Response in which UAIC claimed a Writ of Mandamus is not an appropriate remedy in this case. It asks this Court to find NRS 12.130 unconstitutional and overrule every case dealing with insurance company intervention post-judgment. UAIC hopes the Court will ignore all the tolling statutes contained in NRS chapter 11. UAIC hopes this Court will not follow the clear precedent of *Mandlebaum* and disregard the common law right to an action on a judgment.

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In the 2007 action, an amended judgment was entered in May of 2018 by the District Court; and, in the 2018 case, a settlement agreement was filed and ***thereafter*** UAIC was allowed to intervene in both cases. UAIC does not dispute these facts. UAIC's response admits that UAIC never intervened in the underlying actions until

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after the lower court had already entered judgment and *after* the settlement was signed and filed. (*See* Response at P. 15 and 16.)

UAIC's Response completely ignores the clear Nevada law holding that "***The plain language of NRS 12.130 does not permit intervention subsequent to the entry of a final judgment.***" *Lopez v. Merit Insurance Co.*, 109 Nev. 553, 853 P.2d 1266, 1268 (1993). (Emphasis added). Indeed UAIC's response fails to distinguish, address, or even as much as acknowledge the Nevada Supreme Court's holding in *Lopez*. UAIC's response likewise completely ignores the clear mandate found in NRS 12.130 that intervention must be sought before trial in any action.

UAIC then attempts to convolute the clear holding in *Dangberg* that intervention is not allowed after settlement.

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> "Additionally, in *Ryan v. Landis*, 58 Nev. 253, 260, 75 P.2d 734, 735 (1938) (quoting *Henry Lee Co. v. Elevator Co.*, 42 Iowa 33 (1918)), we reiterated that: ... intervention must be made before the trial commences. After the verdict all would admit it would be too late to intervene. But **a voluntary agreement of the parties stands in the place of a verdict**, and, as between the parties to the record as fully and finally determines the controversy as a verdict could do.""

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Dangberg Holdings. v. Douglas Co., 115 Nev. 129, 139, 978 P.2d 311 (1999)

In *Dangberg,* there was no settlement agreement in the record and so intervention was allowed. In this case, the settlement agreement was signed and filed in the case prior to intervention. Allowing intervention was an abuse of discretion. In the 2007 action, the lower court entered Judgment in favor of Cheyenne Nalder and against the underlying Defendant Gary Lewis in May of 2018. Thereafter, UAIC moved to intervene. The lower court granted the motion to intervene **after** Judgment had been entered. The lower court's actions directly violated the Nevada Supreme Court's holding in *Lopez* that intervention cannot be permitted after judgment has been entered. *Id.* The lower court's error will not be remedied by forcing Cheyenne Nalder to continue to litigate and incur expenses and delays and possible improper rulings by the Ninth Circuit or this Court (See, Supreme Court Case No. 70504).

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It would be wholly improper to force Nalder and Lewis to relitigate an action that has already been resolved to the satisfaction of the parties involved in the action. Indeed, this has been the Supreme Court's very point for the last 80 years in holding, "It is not the intention of the statute that one not a party to the record shall be allowed to interpose and open up and renew a controversy which has been settled between the parties to the record, either by verdict or voluntary agreement." *Ryan v. Landis*, 58

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Nev. 253, 260, 75 P.2d 734, 735. (1938) (quoting *Henry Lee & Co. v. Cass County Mill & Elevator Co.*, 42 Iowa 33 (1875).

The Nevada Supreme Court reiterated this long held position in *Eckerson v. Rudy*, when yet another recalcitrant insurance carrier sought to intervene and set aside a judgment after it had already been entered. The Court held, "This they may not do by intervention where the controversy is ended and settled to the satisfaction of the parties litigant." *Eckerson v. Rudy*, 72 Nev. 97, 295 P.2d 399, 400 (1956). UAIC's response does not address any of this clear case law and certainly does not provide any authority indicating the Nevada Supreme Court has altered its position that "***in all cases***" intervention must be made before judgment is entered. *See*, *Ryan v. Landis*, 58 Nev. 253, 75 P.2d 734. (1938) ("***in all cases [intervention] must be made before trial.***") (citing *Kelly v. Smith* 204 Cal. 496, 268 P. 1057 (1928); *see also*, *Lopez v. Merit Insurance Co.*, 109 Nev. 553, 853 P.2d 1266, 1268 (1993) ("In refusing to allow intervention subsequent to the entry of a final judgment, ***this court has not distinguished between judgments entered following trial and judgments entered by default or by agreement of the parties.***") (Emphasis added).

Not only is UAIC's intervention not timely, it is substantively improper for two reasons. First, its interests are represented by counsel for Lewis. Because there are disagreements about what course of action is ethical and non-frivolous, does not

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mean the interests are not represented. An insured's duty of cooperation[7] does not extend to unethical frivolous defenses. UAIC would have to show that Lewis refusal to participate in a frivolous defense was unreasonable and prejudiced UAIC. *Belz v. Clarendon America Insurance*, 158 Cal. App. 4th 615, 625 (Cal. Ct. App. 2007). Second, the United States District Court has found that UAIC breached its duty to defend.[8] Even if intervention had been timely, which it clearly is not, UAIC waived its right to direct the defense, to have cooperation from Lewis and its right to intervene when it refused to defend Lewis and failed to indemnify him. The California court in *Hinton v. Beck*, 176 Cal. App. 4th 1378 (Cal. Ct. App. 2009) has held: "Grange, having denied coverage and having refused to defend the action on behalf of its insured, did not have a direct and immediate interest to warrant intervention in the litigation."

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Both actions were ended and settled to the satisfaction of the parties litigant. Yet, the lower court improperly granted both of UAIC's motions to intervene. The only proper remedy is for this Honorable Court to issue a Writ of Mandamus

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[7] Lewis owes no duty of cooperation because UAIC breached the duty to defend long ago. Lewis continues to welcome and cooperate with any ethical non-frivolous defense provided by UAIC.

[8] UAIC has not appealed that determination. The Ninth Circuit has yet to decide whether the federal district court erred in not allowing the breach of the duty to defend to go to the jury as one basis for a bad faith claim.

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directing the lower court to vacate its October 19, 2018 Orders and allow both of these matters to yet again be ended and settled to the satisfaction of the parties litigant.

IV. The District Court's Order was a manifest abuse of and arbitrary and capricious exercise of discretion.

This petition included the long held position of the Nevada Supreme Court that "in all cases" intervention must be made before judgment or settlement. *Kelly v. Smith* 204 Cal. 496, 268 P. 1057 (1928); *Ryan v. Landis*, 58 Nev. 253, 75 P.2d 734. (1938); *Eckerson v. Rudy*, 72 Nev. 97, 295 P.2d 399, 400 (1956); *McLaney v. Fortune Operating Co.*, 84 Nev. 491, 499, 444 P.2d 505, 510 (1968) (holding that a post judgment motion to intervene should be denied); *Lopez v. Merit Insurance Co.*, 109 Nev. 553, 853 P.2d 1266, 1268 (1993) ("The plain language of NRS 12.130 does not permit intervention subsequent to the entry of a final judgment.")

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UAIC failed to address any of the above noted authority, and did not even attempt to explain how the lower court's actions could be deemed proper in any way, given the plain language of NRS 12.130 that does not allow intervention post judgment. Indeed, the only excuse UAIC argues for is that the passage of time now allows intervention. UAIC argues that tolling statutes don't apply to judgments. UAIC argues that Nevada does not follow the common law. The lower court was

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advised of the Nevada Supreme Court's holding that "in all cases" intervention must be made before judgment is entered. Yet, the lower court determined that the Supreme Court's holding applied in all cases, ***except this one.*** The lower court does not have discretion to allow a party to do what the Supreme Court has held "they may not do." See, *Eckerson v. Rudy*, 72 Nev. 97, 295 P.2d 399, 400 (1956) (in discussing post judgment intervention, holding "This they may not do by intervention where the controversy is ended and settled to the satisfaction of the parties litigant.") The lower court's action was an absolute and obvious abuse of discretion.

V. The District Court's actions were in excess of its jurisdiction.

As noted in section "II" above, the Nevada Supreme Court's clear and consistent holdings that "in all cases" intervention must be made before trial, and that intervention is not permitted after settlement or judgment, left the lower court with no authority to set aside the Judgment entered or refuse the settlement reached by the parties given UAIC did not intervene until after both actions had been concluded. UAIC's response does not identify any authority provided by the lower court to openly defy the clear precedent set forth by our Supreme Court as identified above.

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VI. UAIC ARGUES FOR THE FIRST TIME ON APPEAL THAT NRS 12.130 IS UNCONSTITUTIONAL.

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UAIC continues, in bad faith, to argue issues and change positions. UAIC is not attempting in good faith to change the law but rather in bad faith and purposefully misstating the record, hiding the applicable law, misstating the law, misleading the Court, increasing the costs of litigation and abusing the system. Below UAIC ignored NRS 12.130, preferring not to inform the District Court that it prevented intervention herein and now UAIC brings it forward asking the Supreme Court to find it unconstitutional. This demonstrates that UAIC's arguments below were not in good faith because it could not have been trying to change the law for it did not even acknowledge the law below.

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CONCLUSION AND RELIEF SOUGHT

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As a result of the foregoing, Nalder and Lewis pray for this Honorable Court to grant relief via a Writ of Mandamus directing the District Court to vacate its order

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allowing UAIC to intervene subsequent to settlement or final judgment, and enter an order denying the motions to intervene.

DATED this 26 day of August, 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read the above and foregoing reply brief and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purposes. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the records. 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.

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DATED this 26 day of August, 2019.

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