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 2
PAGES 251–397

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CHRONOLOGICAL TABLE OF CONTENTS TO APPENDIX

ALPHABETICAL TABLE OF CONTENTS TO APPENDIX

CERTIFICATE OF SERVICE

I certify that on July 19, 2021, I submitted the foregoing "Respondent UAIC's Supplemental Appendix" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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Attorneys for Gary Lewis

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

CERTIFICATE OF SERVICE

Pursuant to NRAP 21(a)(1) and NRAP 25(c)(1), I hereby certify that I am an employee of Stephens & Bywater, P>C., and that on the 26 day of August, 2019, I caused the foregoing **REPLY IN SUPPORT OF WRIT OF MANDAMUS** to be served as follows:

[ ] personal, including deliver of the copy to a clerk or other responsible person at the office of counsel; and/or

[X] by mail; and/or

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Eighth judicial District Court
Department XXIX
Regional Justice Center, Courtroom 3B
200 Lewis Ave
Las Vegas, Nevada 89155
Respondent Judge

The Honorable Eric Johnson
Eighth Judicial District Court
Department XX
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STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

AFFIDAVIT OF DAVID A. STEPHENS

David A. Stephens, ESQ. , first being duly sworn deposes and says:

1. I was, at all times relevant an attorney duly licensed to practice in the State of Nevada and that I have personal knowledge of the facts stated herein.

2. I was retained by Ms. Nalder upon her reaching the age of majority as a result of false allegations made by UAIC regarding the status of her judgment that she seeks to collect from UAIC.

3. I understood that that generally a judgment renewal would be done within 90 days of the expiration of the six year statute of limitations. However I believed, in her case, that tolling statutes apply to the time for renewal and there were at least three statutes that applied in her case. The earliest of these tolling statutes would suggest her renewal affidavit may be arguably too early not filed in a ninety day period in the year 2021.

4. Thus, rather than jumping to a renewal of her judgment that was arguably too early I believed an action on a judgment was a wiser choice. I believed that her judgment formed a valid basis for a common law action on the judgment under the Mandelbaum case that it could be filed from then and up until at least 2021 because the statute of limitations is tolled. Unlike statutory renewal the action on a judgment does not have to be brought within 90 days of expiration. I believed filing to enforce the judgment would provide her with a new judgment even though the old judgment was still valid as the statute of limitations had not run.

5. I thought that that filing to enforce the judgment would be a relatively simply straight forward process because there were no valid defenses and Mandelbaum was a case directly on point, where the judgment creditor brought an action on a judgment that was fifteen

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years old and received a new judgment because the defendant did not live in the state of Nevada. In her case the judgment was ten years old and the defendant did not live in the State of Nevada for the last eight years. I could find no contrary authority.

6. I then obtained an amended judgment in the name of my adult client citing the tolling statutes in the application. I then filed my action on the judgment and served the defendant and sent a copy to UAIC. I heard from Steve Rogers. He advised me that he had been retained by UAIC to defend Mr. Lewis in this case.

7. Later, I received notice that Mr. Rogers was not going to represent Lewis and that E. Breen Arntz, Esq., would be representing him as Cumis counsel because UAIC was in litigation with Gary Lewis. Mr. Rogers did not provide any contrary authority to Mandelbaum.

8. Mr. Arntz agreed with the analysis and the clear precedent and we entered into a stipulation for a judgment to settle the matter and save everyone time, additional attorney fees, and inconvenience. I filed the stipulation and submitted it to the judge.

9. Randall Tindall, Esq., filed a motion to set aside the 2018 judgment in the 2007 ccase, and another motion to dismiss my case filed in 2018. I asked Mr. Arntz what was going on in that these actions were causing additional damages to my client. Mr. Arntz informed me that Mr. Tindal was acting solely on behalf of UAIC and without any authorization from Mr. Lewis and that his client had reported Mr. Tindal to the State Bar of Nevada. Even though Mr. Lewis was represented by both defense counsel appointed by UAIC (Tindal) and Cumis/Hansen counsel selected by Mr. Lewis (Arntz) the Court allowed UAIC to intervene and refused (by inaction without reason) to sign a judgment.

10. At the very first actual hearing in the case on January 9, 2019 the Honorable Eric Johnson dismissed one of my client's claims and stated that he would look at other claims in that I still had a pending motion for summary judgment set for January 23, 2019. He did not

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orally stay any actions. I sent an offer of judgment to the Mr. Lewis's attorney because now attorney time was piling up and UAIC was abusing the judicial process to delay a decision on the merits which I was sure would be in my client's favor. UAIC had not cited any contrary authority and ignored Mandlebaum and the tolling statutes. The offer of judgment was accepted and filed with the clerk as required by the rules.

11. Judge Johnson then signed an order shortening time and then before I could even file a response and well before the hearing date Judge Johnson issued an order voiding the judgment because he alleges the action was stayed by him. I have never seen this kind of activity without giving an opportunity to be heard. I have never had a Judge refuse to sign a judgment based on a signed stipulation.

FURTHER AFFIANT SAYETH NAUGHT.

David A. Stephens, Esq.

SUBSCRIBED and SWORN to before
me this 20th day of August, 2019.

Notary Public in and for said County and State.

NOTARY PUBLIC
M. L. GOLDSTEIN
STATE OF NEVADA - COUNTY OF CLARK
MY APPOINTMENT EXP. APRIL 13, 2022
No: 01-70903-1

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EXHIBIT J

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EXHIBIT J

Case No. 78085

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.

Electronically Filed
Jul 10 2019 05:09 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

District Court Case Nos.
A549111 & A772220

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UNITED AUTOMOBILE INSURANCE COMPANY'S ANSWER

With Supporting Points and Authorities

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Docket 78085 Document 2019-29395

NRAP 26.1 DISCLOSURE

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

Real party in interest United Automobile Insurance Company (UAIC) is a privately held limited-liability company. No publicly traded company owns more than 10% of its stock.

UAIC is represented by Thomas E. Winner and Matthew J. Douglas at Atkin Winner & Sherrod, and by Daniel F. Polsenberg, Joel D. Henriod, and Abraham G. Smith at Lewis Roca Rothgerber Christie, LLP.

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Dated this 10th day of July, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*
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INTRODUCTION

To petitioners Cheyanne Nalder and Gary Lewis, a decade-old judgment against Lewis has untold power. Although the judgment expired without its renewal under NRS 17.214, that has not stopped them from seeking (1) to amend it; (2) to beget a new action and a new (or renewed) judgment; and (3) to brandish it to prevent Lewis's insurer, United Automobile Insurance Company (UAIC), from intervening in either action or consolidating the two. Now they have asked for this Court's extraordinary intervention to keep the district court from making the very determinations about the judgment's expiration that would confirm that intervention and consolidation are justified.

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The effect of an expired judgment on a district court's discretion in matters of intervention or consolidation might be an interesting issue, but it poorly and prematurely teed up in this petition. This Court should deny the petition.

ROUTING STATEMENT

Although UAIC disagrees with petitioner's characterizations about the record, UAIC agrees that it makes sense for the Supreme

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Court to retain the petition because of its familiarity with the issues in the certified question, Docket No. 70504.

ISSUES PRESENTED

1. In an action purporting to renew a judgment, does a district court have discretion to let the defendant's insurer intervene before the trial or judgment in the action?

2. An expired judgment is a void judgment, *Leven v. Frey*, 123 Nev. 399, 410, 168 P.3d 712, 719 (2007), and a void judgment may be vacated under NRCP 60(b)(4) at any time, including by the court on its own motion, *Rawson v. Ninth Judicial Dist. Court*, 133 Nev., Adv. Op. 44, 396 P.3d 842, 848 & n.4 (2017). When a plaintiff seeks to revive an expired judgment against an insured, does a district court have discretion to let the insurer intervene to contest the expired judgment's validity, especially when the insured refuses to do so?

3. If *Ryan v. Landis*, 58 Nev. 253, 75 P.2d 734 (1938) holds otherwise, should that case be reconsidered or overruled?

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STATEMENT OF FACTS

A. The Accident

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

B. The 2007 Lawsuit

On October 9, 2007, Nalder through her guardian ad litem filed suit against Lewis. (1 R. App. 1.) Lewis did not answer, and eight months later the district court entered a default judgment for $3.5 million. (1 R. App. 5, 6–7.)

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C. The Bad-Faith Action Against UAIC

Nalder then sued Lewis's former insurer, UAIC, in federal court, based on an assignment of Lewis's rights to a claim for bad faith. (1 R. App. 231–32; 11 R. App. 2531.)

1. Due to an Ambiguity, the Accident Is Deemed Covered

The federal court initially granted UAIC summary judgment because at the time of the accident, Lewis had let his policy lapse. (1 R.

[1] "R. App." refers to real party in interest UAIC's appendix.

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App, 87, 99, 231–32.) The Ninth Circuit found an ambiguity in the renewal statement, however (1 R. App. 104, 11 R. App. 2547), and on remand the district court construed the ambiguity against UAIC to imply a policy covering the 2007 accident. (1 R. App. 110, 232.)

UAIC paid Nalder the $15,000 policy limits and $90,000 for her attorney's fees.

2. The Judgment Against Lewis Expires

Nalder appealed, however, because she considered the entire $3.5 million default judgment a consequential damage of UAIC's failure to defend, even though UAIC had acted in good faith. (1 R. App. 110.)

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Pending that appeal, Nalder let that default judgment expire without renewing it under NRS 17.214. (1 R. App. 15.)

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3. This Court Accepts Certified Questions on the Availability of Consequential Damages

The Ninth Circuit certified to this Court two questions: first, whether an insurer who mistakenly but in good faith denies coverage can be liable for consequential damages beyond the payment of policy limits and the costs of defense; and second, whether the expiration of the judgment without renewal cuts off the right to seek, in an action

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against the insurer, consequential damages based on that judgment. (2 R. App. 257, 268.)

D. Nalder "Amends" the Expired Judgment in the 2007 Suit

Shortly after this Court accepted the second certified question, Nalder moved *ex parte* to "amend" the expired 2008 judgment to be in her own name rather than that of her guardian ad litem. (1 R. App. 62, 71, 74; 2 R. App. 273, 282; P. (Dkt. 78085) App. 6–7;[2] 5 R. App. 1108 (describing the amendment as "an amendment of the expired judgment").)[3]

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[2] "P. (Dkt. #) App." refers to the petitioners' appendix in the indicated docket.

[3] Coverage counsel initially moved on Lewis's behalf to vacate the amended judgment. (1 R. App. 26–28; 4 R. App. 841, 852) After the district court in a minute order granted UAIC permission to intervene (4 R. App. 839, 10 R. App. 2313) but before the entry of a written order (4 R. App. 874), Lewis, through another attorney, alleged that coverage counsel had not conferred with Lewis about the motion and moved to strike it. (1 R. App. 26–28.) Two days later, the district court entered its written order granting UAIC permission to intervene (1 R. App. 31), and UAIC was able to file its own motion to vacate the judgment (1 R. App. 35). Both Nalder and Lewis opposed the motion. (1 R. App. 78, 134.)

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E. Nalder Brings a New Action Testing the Validity of the Expired Judgment

A few days later, on April 3, 2018, Nalder filed a new complaint against Lewis as a purported "action on the judgment," seeking a new $3.5 million judgment (minus $15,000 plus interest) and a declaration that the six-year limitation for bringing such an action had not expired. (10 R. App. 2284–88.)

F. UAIC Intervenes in the Pending Actions and Moves to Consolidate Them

To contest Nalder's new effort to revive the expired 2008 default judgment against its insured, UAIC moved to intervene in both actions and moved for their consolidation. (P. (Dkt. 78085) App. 8; 10 App. 2083; 1 R. App. 227; P. (Dkt. 78085) App. 213; 11 R. App. 2610.) The motion to intervene was properly served both by mail and by electronic service (3 R. App. 732–74), and the motion to consolidate was properly e-served (11 R. App. 2624); Nalder and Lewis opposed both motions. (1 R. App. 8, 2 R. App. 310, 3 R. App. 741, 4 R. App. 754, 763, 10 R. App. 2308, 2329, 11 R. App. 2685, 2743.) Seeking to create a judgment in the 2018 action, Nalder and Lewis submitted a stipulated judgment against

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Lewis for the full amount requested in Nalder's complaint. (3 R. App. 595, 4 R. App. 771.)

The district court granted intervention in both cases (1 R. App 31, 10 R. App. 2450),[4] and the judge in the lower-numbered 2007 case ordered the related cases consolidated (P. (Dkt. 78243) App. 2). The district court did not enter judgment on Nalder's and Lewis's stipulation. (5 R. App. 1133–34.)

G. While the Case is Stayed, Nalder and Lewis Try to Create a Judgment in the 2018 Action

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On January 9, 2019, the district court orally dismissed part of Nalder's 2018 complaint and stayed the remaining proceedings. (5 R. App. 1129, 1141–42.) The district court gave no indication that the order staying proceedings was anything other than immediate; in fact, the district court made it clear that it was refusing to sign Nalder's and

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[4] At the time, both cases were pending before Judge David Jones in Department 29. On October 24, 2018, a week after UAIC's intervention, Judge Jones disclosed his prior work with Lewis's then-coverage counsel, Randy Tindall. (1 R. App. 76–77.) Upon objection by Nalder's counsel and a request to refer Tindall to the state bar, Judge Jones voluntarily recused himself. (1 R. App. 76–77.) (The claim against Tindall was later dismissed. (5 R. App. 1169.)) The 2007 case was eventually reassigned to Judge Eric Johnson in Department 20, who granted consolidation. (11 R. App. 2626.)

Lewis's proposed judgment. (5 R. App. 1132–33, 7 R. App. 1664–66.) And again in a minute order on January 22, 2019, the district court granted a stay pending this Court's resolution of the certified questions. (7 R. App. 1664–66, 9 R. App. 2159.)

Yet that same day, Nalder and Lewis worked to evade the stay before a written order memorializing the then-in-effect stay could be entered (6 R. App. 1311, 1316–18[5]): Nalder served and Lewis accepted an offer of judgment for over $5 million, and they submitted the judgment to the clerk for entry. (5 R. App. 1194, 1197, 1201.) As the notice of acceptance and the clerk's entry of judgment were filed at the same minute (5 R. App. 1194, 1201), neither UAIC nor the district judge had advance notice of this judgment. UAIC moved to vacate the judgment. (5 R. App. 1176, 8 R. App. 1853.) Based on the mistake or inadvertence in the clerk's entering judgment while the case was stayed, the district court vacated the judgment. (7 R. App. 1656, 1666–67.)

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[5] *See also* 9 R. App. 2002–04 (counsel's comments on the draft order, including the denial of Nalder's and Lewis's stipulation and the granting of the stay).

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Nalder and Lewis complained that in vacating the judgment the district court violated their due process, and they asked the court to reinstate the judgment on grounds that the oral ruling and minute order could not restrain the parties until the entry of a written order staying the case. (6 R. App. 1328, 1487; 10 R. App 2272.) The district court denied the motions, noting that it had stayed the matter at the previous hearing, that the judgment entered by the clerk was void, and that vacating merely "put us back to where I thought I clearly had indicated I wanted us to be" at the time the district court stayed the case. (10 R. App. 2283; 7 R. App. 1656, 1666–67; 10 App. 2286–87.)

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SUMMARY OF THE ARGUMENT

United Automobile Insurance Company timely intervened. In the 2018 action, intervention was timely because that case—seeking to revive an expired judgment from 2008—has not proceeded to trial or judgment.

And in the underlying 2007 action, intervention is likewise appropriate because (1) that case is consolidated with the 2018 action in which UAIC's intervention is proper, (2) UAIC intervened not to reopen what the parties did in 2008 but to prevent Nalder from reopening that

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expired judgment, (3) to the extent Nalder raises doubts about the 2008 judgment's expiration, the district court has not ruled on that mixed question of law and fact, so the objection to intervention is premature.

If a wooden reading of *Ryan v. Landis*, 58 Nev. 253, 75 P.2d 734 (1938) would prevent intervention in these circumstances, that case should be reconsidered or overruled.

ARGUMENT

Standard of review: Intervention may be as of right or permissive. Determining whether a party has met the requirements to intervene as of right "is within the district court's discretion." *Hairr v. First Judicial Dist. Court*, 132 Nev., Adv. Op. 16, 368 P.3d 1198, 1201 (2016) (quoting *Am. Home Assurance Co. v. Eighth Judicial Dist. Court*, 122 Nev. 1229, 1238, 147 P.3d 1120, 1126 (2006)). And "[a] district court's ruling on permissive intervention is subject to 'particularly deferential' review." *Id.*, 132 Nev., Adv. Op. 16, 368 P.3d at 1202 (quoting *United States v. City of New York*, 198 F.3d 360, 367 (2d Cir. 1999)). This is true even on the question of timeliness. *Lawler v. Ginochio*, 94 Nev. 623, 626, 584 P.2d 667, 668 (1978).

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I.

INTERVENTION IS SUBSTANTIVELY PROPER

Apart from the question of timeliness, there is little dispute that the district court acted within its discretion to allow intervention, whether as of right or for permissive intervention.

A. Intervention Gives Voice to Unrepresented Positions and Protects the Integrity of the Judicial Process

Intervention is an essential tool for protecting the integrity of the judicial process and ensuring that Courts resolve legal issues correctly. Rule 24 offers two paths to intervention: The district court *must* let a party intervene when a statute confers such a right or

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

NRCP 24(a); *Am. Home Assurance Co.*, 122 Nev. at 1238, 147 P.3d at 1126.[6]

[6] UAIC refers to the rules in effect as of the time of intervention in 2018.

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But even without such an interest, the district court may allow intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." NRCP 24(b)(2). In exercising discretion, the court should consider whether intervention will "unduly delay or prejudice the adjudication of the rights of the original parties." NRCP 24(b). Of course, a case may take longer to resolve whenever a proposed intervenor demands "anything adversely to both the plaintiff and the defendant," but that kind of "prejudice" is baked into the statutory right of intervention itself. NRS 12.130(1)(b); *see also St. Charles Tower, Inc. v. County of Franklin*, No. 4:09-CV-987-DJS, 2010 WL 743594, at *6–7 (E.D. Mo. Feb. 25, 2010) ("[P]rejudice that results from the mere fact that a proposed intervenor opposes one's position and may be unwilling to settle always exists when a party with an adverse interest seeks intervention." (quoting *United States v. Union Elec. Co.*, 64 F.3d 1152, 1159 (8th Cir. 1995))). The question is whether the delay in *moving* for intervention causes undue harm. *Lawler*, 94 Nev. at 626, 584 P.2d at 669; *St. Charles Tower*, 2010 WL 743594, at *6–7 (citing *Union Elec. Co.*, 64 F.3d at 1159).

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B. The District Court Had Discretion to Allow UAIC's Intervention

The district court had good cause to allow UAIC's intervention here. UAIC had a right to intervene based on its interest in preventing an expired judgment from being enforced or revived against its insured—for which Nalder expressly seeks to hold UAIC liable in the bad-faith lawsuit. NRCP 24(a). And given Lewis's refusal to cooperate in UAIC's defense—going so far as to collaborate with Nalder in trying to get a multimillion-dollar judgment entered against himself, and to prevent UAIC from protecting Lewis against such a judgment—there is no question that the original parties left UAIC's interest inadequately represented. NRCP 24(a). Had Lewis cooperated in the defense, UAIC arguably would not have needed to intervene; his refusal made intervention essential. *Cf. Hairr*, 132 Nev., Adv. Op. 16, 368 P.3d at 1201–02 (upholding denial of intervention where "petitioners and the State have the same ultimate objective" and petitioners could not "point to any arguments that the State was refusing to make"). Plus, the question of the judgment's expiration without renewal in the bad-faith lawsuit (now pending before this Court as a certified question) dovetails the main question in the 2007 litigation: whether the judgment can be amended

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or revived after its expiration. In fact, to have refused intervention in these circumstances would have been an abuse of discretion.

II.

UAIC'S INTERVENTION IN THE 2018 ACTION, IN WHICH THERE IS NO JUDGMENT, WAS TIMELY

The real issue, then, is timing.

Half of Nalder's and Lewis's petition fails on its own terms. They tether their petition to the statement in *Lopez v. Merit Insurance Co.*, 109 Nev. 553, 556, 853 P.2d 1266, 1268 (1993) that "NRS 12.130 does not permit intervention subsequent to the entry of a final judgment." But there is no judgment—final or otherwise—in the 2018 action. (5 R. App. 1132–33.)

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They point to the statement that "a voluntary agreement of the parties stands in the place of a verdict" (Pet'n 23–24 (citing *Dangberg Holdings v. Douglas County*, 115 Nev. 129, 978 P.2d 311 (1999)), neglecting that what counts is not the mere agreement, but "*judgment* . . . by agreement." *Ryan v. Landis*, 58 Nev. 253, 75 P.2d 734, 735–36 (1938) (emphasis added). *Estate of Lomastro ex rel. Lomastro v. Am. Family Ins. Grp.*, 124 Nev. 1060, 1071 n.29, 195 P.3d 339, 347 n.29

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(2008) (describing *Lopez* as holding that "intervention after *entry of judgment* on a settlement agreement was not timely" (emphasis added)). In *Eckerson v. C.E. Rudy, Inc.*, for example, it was important in denying intervention that the parties had not only settled, but that "[b]y the time the application for intervention was made a default judgment had been entered." 72 Nev. 97, 98–99, 295 P.2d 399, 399–400 (1956).

Here, in contrast, UAIC timely sought intervention before Nalder and Lewis submitted their proposed judgment. The district court did not enter judgment on that settlement. So even on the notion that a judgment cuts off all rights of intervention, the district court properly let UAIC intervene in the 2018 action.

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And as discussed immediately below, that categorical view about the timing of intervention misreads the rule, the statute, and the case law.

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III.

UAIC'S INTERVENTION IN THE 2007 ACTION, WHICH NALDER IS TRYING TO REVIVE, WAS TIMELY

The petition's objection to UAIC's intervention in the 2007 action is equally unfounded. First, because UAIC's intervention in the 2018 action was timely and that action has been consolidated with the 2007 action, kicking UAIC out of the consolidated action would have been untenable. Second, UAIC's intervention in the 2007 action was itself timely because UAIC is not seeking a new or different judgment; UAIC is just preventing Nalder from transforming the old, expired judgment into a valid one. No case forbids intervention in this circumstance, and other jurisdictions approve it. Third, even if the validity of the 2008 judgment were enough to prevent intervention, that mixed question of law and fact has not been resolved, making this petition premature. And fourth, if Nalder and Lewis are correct that this Court's cases forbid intervention even to point out a judgment's voidness due to expiration—an issue that could be raised by nonparty *amici* or the court on its own motion—those cases should be reconsidered or overruled.

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A. The 2007 Action Is Consolidated with the 2018 Action, in which UAIC Properly Intervened

Because UAIC properly intervened in the 2018 action, it is a proper party to this action, which has now been consolidated with the 2007 action. Nalder and Lewis assume that a party must justify intervening in each of a consolidated action's constituent cases before intervention in any one of those cases will be honored for the consolidated action. There is no basis for that assumption. As set forth in the answer to the petition in Docket No. 78243, consolidation was proper. So UAIC's demonstrated right to intervene in the 2018 action renders them a proper party to this now-consolidated action.

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B. Intervention Properly Attaches to Nalder's Pending Quest to Revive an Expired Judgment

1. What Cuts Off Intervention Is the Absence of a Pending Issue, Not a Judgment

This Court's "cases generally reflect that intervention is timely if the procedural posture of the action allows the intervenor to protect its interest." *Estate of Lomastro*, 124 Nev. at 1071 n.29, 195 P.3d at 347 n.29. So while an intervenor "must take the action as he finds it," *Ryan*, 58 Nev. 253, 75 P.2d at 736, if a "matter[] would otherwise be subject to reconsideration," the intervenor can raise that issue just as

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well as any party. *Estate of Lomastro*, 124 Nev. at 1068 n.10, 195 P.3d at 345 n.10 (quoting *Arizona v. California*, 460 U.S. 605, 615 (1983)).

The entry of a judgment does not, in itself, cut off the right to intervene. Although this Court has occasionally denounced as untimely attempts to intervene to reopen a final judgment—"where the controversy already is ended and settled to the satisfaction of the parties litigant"— "it would more accurately be said that there was no pending action to which the intervention might attach." *Eckerson*, 72 Nev. at 98–99, 295 P.2d at 399–400, *quoted in Lopez*, 109 Nev. at 556, 853 P.2d at 1268.

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a. USUALLY, AN INTERVENOR IS PRECLUDED ONLY FROM MOST CHALLENGES TO A FACIALLY VALID JUDGMENT

"No intervention after a final judgment" is a decent rule of thumb, for in most cases only a *party* to a judgment can appeal that judgment or challenge it in the district court. *See Anthony S. Noonan IRA, LLC v. Bank of New York Mellon*, No. 71365, 429 P.3d 294 (Nev. Oct. 12, 2018) (unpublished table disposition) (citing *Lopez*, 109 Nev. at 556–57, 853 P.2d at 1268–69). That includes most motions under Rule 60(b). *Id.* And in many cases, such as when an insured is pursuing tort claims

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that will require the insurer to pay out uninsured-motorist benefits, the need for intervention becomes clear well before the judgment. *See Lopez*, 109 Nev. at 556–57, 853 P.2d at 1268–69.

b. AN EXPIRED JUDGMENT IS NOT A JUDGMENT

Not so with a judgment that, without facing a threat of being reopened or relitigated, simply expires by its own terms. In contrast with a judgment that appears valid on its face, after the time for enforcing a judgment has passed without renewal, "a judgment no longer exists to be renewed." *Kroop & Kurland, P.A. v. Lambros*, 703 A.2d 1287, 1293 (Md. Ct. Spec. App. 1998) (citations omitted). The expired judgment is void. *Leven v. Frey*, 123 Nev. 399, 410, 168 P.3d 712, 719 (2007). And that can be raised not just on direct appeal from proceedings to enforce that judgment, but as a collateral attack in the underlying case. *Rawson v. Ninth Judicial Dist. Court*, 133 Nev., Adv. Op. 44, 396 P.3d 842, 848 & n.4 (2017); NRCP 60(b)(4). Not only can the *parties* mount such an attack, but the court on its own motion can, too. *A-Mark Coin Co., Inc. v. Redfield's Estate*, 94 Nev. 495, 498, 582 P.2d 359, 361 (1978). The burden for establishing renewal rests with the party asserting its continued validity. *Leven*, 123 Nev. at 405, 168 P.3d at 717. "Either a

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judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly." 11 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2862 (3d ed.). In a real sense, when the parties take action to revive and expired judgment, they are no longer operating "*after* a final judgment."

Other jurisdictions have held that an interested party such as an insurer can bring a Rule 60(b) motion to vacate certain judgments against its insureds—even without the insured's consent. *Crawford v. Gipson*, 642 P.2d 248, 249–50 (Okla. 1982) (citing *Kollmeyer v. Willis*, 408 S.W.2d 370 (Mo. Ct. App. 1966)). Particularly when the *plaintiff* undertakes to enforce a void judgment, "any interested person[] may show such nullity." *Gumina v. Dupas*, 159 So. 2d 377, 379 (La. Ct. App. 1964).

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Ryan v. Landis, 58 Nev. 253, 75 P.2d 734 (1938) is not to the contrary. There, this Court rejected intervention as "a proper remedy to vacate a judgment alleged to be void," *id.*, 58 Nev. 253, 75 P.2d at 735–36, relying on the Washington Supreme Court's decision in *Seattle & N. Ry. Co. v. Bowman*, 102 P. 27 (Wash. 1909). That case, however, makes

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clear that it is not talking about a motion under modern Rule 60(b)(4); far from it, the proposed intervenors in *Bowman* who claimed defective service did not directly attack the judgment in the trial court but came up with that theory only on appeal:

> As the judgment is regular upon its face and recites due and personal service, it would seem that the validity of such service and the question whether the person upon whom it had been made was an authorized officer of the defendant *could only be questioned in a proceeding directly attacking the judgment, properly instituted by motion or petition* . . . .

102 P. at 28–29 (emphasis added). The problem was not that such a motion was unavailable to the proposed intervenors, but that they elected not to use it.

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But even supposing that good reasons exist for denying a third party the right to challenge as void a judgment that is "regular upon its face," there is no reason to bar intervention that merely points out a judgment's facial invalidity due to expiration. As the court could so conclude on its own, or with the help of *amici*, so should an intervenor be able to make that same point. *Cf.*, *e.g.*, *United States v. Windsor*, 570 U.S. 744, 755 (2013) (*amicus* appointed to argue that the Court lacks jurisdiction, a position not taken by either party).

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2. Nalder's Attempt to Revive an Expired Judgment Creates a New, Pending Issue in the 2007 Case

Here, the district court appreciated the difference between intervening in a case after a valid, final judgment and intervening in new litigation to revive an expired judgment:

> But I do see, you know, a distinction between that case, those cases, and what we have here, which is you now have essentially the prospect of new litigation, which is that 2018 case, on—to enforce that 2007 judgment.
>
> And that new litigation creates new issues, which is whether that judgment has expired . . . or has been renewed. And I think definitely UAIC . . . has an interest in that and meets the elements necessary to intervene.

(5 R. App. 1132–33.) UAIC is not challenging or seeking to reopen the 2007 judgment, even in the sense discussed in *Ryan v. Landis*. Those issues were long ago decided, and but for Nalder's harried reaction to this Court's certified question, that case would have stayed closed. Rather, it is Nalder who is attempting to resuscitate a decade-old judgment without timely renewing it under NRS 17.214. (5 R. App. 1109–10 (describing this case as "litigation to declare that judgment a valid or continuing, renewed or whatever, judgment").) That new controversy has not gone to trial or otherwise to judgment, and while that dispute hinges in part on what to make of a document called "judgment" in the

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docket from 2008, UAIC's intervention in this present, pending dispute is timely.

C. The Undeveloped Record Underscores the Impropriety of Writ Relief

Nalder and Lewis are not just wrong in their legal position. They are also bringing this challenge in the wrong form: a premature petition for extraordinary relief rather than an appeal in the ordinary course. Because the status of the 2008 judgment is uncertain, and Nalder and Lewis swear that nothing this Court does will resolve it, this Court cannot prejudge the validity of the 2008 judgment to bar intervention.

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1. Orders Granting Intervention Are Appealable, and this Court Should Not Hear the Petition

When a district court has *denied* intervention, the party seeking intervention cannot appeal, so "a mandamus petition is an appropriate method to seek review of such an order." *Hairr*, 132 Nev., Adv. Op. 16, 368 P.3d at 1200 (citing *Am. Home Assurance Co.*, 122 Nev. at 1234, 147 P.3d at 1124).

In contrast, a party contesting an order *granting* intervention can do so on appeal. *See Lopez*, 109 Nev. at 554, 853 P.2d at 1266. This

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Court should abstain from hearing the petition now and allow the district court to more fully develop the issues.

2. This Court Should Not Grant Mandamus in the Face of Legal and Factual Uncertainty

"Mandamus is an important escape hatch from the final judgment rule, but such relief must be issued sparingly and thoughtfully due to its disruptive nature. Advisory mandamus, like any form of interlocutory review, carries the significant negative risks of delaying the ultimate resolution of the dispute and undermining the 'mutual respect that generally and necessarily marks the relationship between . . . trial and appellate courts.'" *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev., Adv. Op. 101, 407 P.3d 702, 709 (2017) (quoting *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 653 (9th Cir. 1977)).

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3. Further Findings Are Necessary to Resolve the Threshold Question of Renewal or Expiration

Here, even assuming for a moment Nalder's and Lewis's position that a final judgment precludes intervention, it is far too early to say whether there *is* such a judgment. Integral to their argument against intervention is the assumption that they will prevail in her new claim about renewal, proving a final judgment in the 2007 action. But the

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case is stayed pending this Court's resolution of the certified questions (6 R. App. 1311, 1316–18), and even then, Lewis and Nalder repeatedly assert that this Court is "NOT deciding if the judgment is expired." (*E.g.*, 6 R. App. 1330, 1489; 10 R. App. 2277.) The district court will eventually consider this Court's decision, any decision from the Ninth Circuit, and its own factfinding to decide whether the 2008 judgment is valid. The district court's decision may provide grounds for the district court to reconsider the intervention question or for an appeal.

For now, though, that remains uncertain. Simply assuming that they win on this crucial question is an abuse of the extraordinary writ procedure.

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D. Preventing Intervention Would Produce Waste and Absurd Results

Ignoring the circumstances that call for intervention in a case such as this—where a party is attempting to revive a facially invalid judgment—would produce tremendous waste and perverse results.

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1. Denying Intervention Would Waste this Court's Resources

That UAIC has intervened to participate in the consolidated case below, rather than to appeal to this Court, highlights an absurd consequence of Nalder's and Lewis's petition. By their logic, this Court's work would triple: this Court would grant their petition, then UAIC would file its own petition challenging a judgment affecting its interests without its joinder, then the district court would join UAIC as a party, and finally, after a final judgment, the losing party could appeal.

Something similar happened in the two-part saga of *Gladys Baker Olsen Family Trust ex rel. Olsen v. Olsen*. In part one, the district court entered a judgment invading the assets of a nonparty trust, removing the nonparty trustee, and taking other adverse actions. 109 Nev. 838, 839, 858 P.2d 385, 385 (1993) (*Olsen I*). The trust moved to intervene after the judgment, but "only for purposes of appealing" the order. *Id.* This Court vacated the intervention order, noting that the district court could not grant intervention solely to confer party status for standing to appeal. *Id.* at 841–42, 858 P.2d at 386–87. Without being a proper party, the trust lacked standing to appeal the order, so this Court dismissed the appeal without prejudice to file a writ petition instead. *Id.*

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In part two, this Court heard and granted the petition heard the trust's writ petition challenge to the order of June 2, 1993. *Gladys Baker Olsen Family Trust ex rel. Olsen v. Eighth Judicial Dist. Court*, 110 Nev. 548, 874 P.2d 778 (1994) (*Olsen II*). This Court held that "joinder rather than knowledge of a lawsuit and opportunity to intervene is the method by which potential parties are subjected to the jurisdiction of the court." *Id.* at 553, 874 P.2d at 781. The trust was an indispensable party to a judgment regarding trust property, and "failure to join an indispensable party may be raised by the appellate court sua sponte." *Id.* at 554, 874 at 782 (citing *Schwob v. Hemsath*, 98 Nev. 293, 646 P.2d 1212 (1982)). This Court vacated the order as void and remanded for the trust to be . . . joined as a party. *Id.*

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It cannot be that every time a court fails to join an indispensable party to a judgment—rendering the judgment void—the party and the district court are powerless to remedy that defect and instead must petition this Court for extraordinary relief. Rather, the problem in *Olsen* was that the district court tried to confer *only* appellate standing, without actually joining the trust to any proceedings in the district court. By contrast, the recognition that the judgment was void—something,

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again, the district court could decide *sua sponte*—freed the court to join the trust as a party to the district-court proceedings.

Here, too, it would be absurd to deny UAIC intervention now, only to have to vacate the judgment affecting UAIC's rights on the basis that UAIC was an indispensable party who ought to have been joined. Instead, the district court properly exercised its discretion to join UAIC, not merely to appeal a judgment between other parties, but to participate as an indispensable party in Nalder's pending efforts to revive a judgment that on its face appeared expired.

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2. Denying Intervention Would Spur Collusive Settlements

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A basic principle of intervention is that an intervening party cannot "be prejudiced by not doing an act that they had no right to do" before the intervention. *State ex rel. Moore v. Fourth Judicial Dist. Court*, 77 Nev. 357, 361, 364 P.2d 1073, 1075–76 (1961).

Yet to deny intervention in these circumstances would also create a disastrous template for collusive settlements in preparation for a claim against an insurer. The defendant could refuse to cooperate with the insurer, stipulate to an exorbitant judgment, then prevent the insurer from coming in to vacate the judgment on behalf of the insured.

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3. Denying Intervention Would Give UAIC Fewer Rights than an Amicus

As discussed, where the court has power to act on its own motion, anyone could appear *amicus* to assist the court's resolution. Indeed, this Court has approved of "allowing a proposed intervenor to file an amicus brief" where doing so "is an adequate alternative to permissive intervention." *See, e.g.*, *Hairr*, 132 Nev., Adv. Op. 16, 368 P.3d at 1203 (quoting *McHenry v. Comm'r*, 677 F.3d 214, 227 (4th Cir. 2012)). And *amici* can appear at any stage of litigation, including rehearing on appeal. *E.g.*, *Powers v. United Services Auto. Ass'n*, 115 Nev. 38, 40–41, 979 P.2d 1286, 1287–88 (1999); *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606, 608, 245 P.3d 1182, 1184 (2010). In such a circumstance, it makes no sense to bar a party whose interests are adversely affected from intervening to make the same arguments. *Id.* (recognizing that amicus briefing may be inadequate when the proposed intervenor's interests are not represented by the original parties).

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E. If *Ryan v. Landis* Is Read to Prevent Intervention, It Should Be Overruled

The rule UAIC proposes—that an intervenor may appear after judgment when (1) the judgment appears void on its face, (2) the original parties raise new issues regarding the validity of the facially void judgment, (3) the dispute does not reopen or relitigate any issue in the original judgment, and (4) the court or *amici* could raise the same arguments, without the original parties' acquiescence—does no violence to the principles that thread through the case law from *Ryan* to *Eckerman* to *Lopez* to *Lomastro*. It remains true that "[a]n intervener must take the action as he finds it": the intervenor cannot make arguments regarding previously decided issues that, under NRCP 60(b) or NRAP 3A only a party could make. *Ryan*, 58 Nev. 253, 75 P.2d at 736. And these limitations preserve the "simplicity, clarity and certainty" of a jurisdiction rule that nonetheless does not force absurd, and duplicative, writ petitions or appeals. *See Olsen I*, 109 Nev. 838, 841, 858 P.2d 385, 387 (1993). It would simply bring Nevada into the mainstream of jurisdictions interpreting Rule 24. *See McDonald v. E. J. Lavino Co.*, 430 F.2d 1065, 1071 (5th Cir. 1970) (describing limits on intervention after judg-

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ment, including that the intervention not reopen or relitigate the original lawsuit); *see generally* 7C WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1916 & n.23 (3d ed.) (listing cases in nearly every circuit allowing intervention in limited circumstances after a final judgment);.[7]

[7] *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 458–461 (1940); *Flynt v. Lombardi*, 782 F.3d 963 (8th Cir. 2015); *Blum v. Merrill Lynch Pierce Fenner & Smith Inc.*, 712 F.3d 1349 (9th Cir. 2013); *United States v. City of Detroit*, 712 F.3d 925 (6th Cir. 2013); *In re Lease Oil Antitrust Litig.*, 570 F.3d 244 (5th Cir. 2009*); Tweedle v. State Farm Fire & Cas. Co.*, 527 F.3d 664 (8th Cir. 2008); *Alstom Caribe, Inc. v. Geo. P. Reintjes Co.*, 484 F.3d 106 (1st Cir. 2007); *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091 (10th Cir. 2005); *Acree v. Republic of Iraq*, 370 F.3d 41, 50 (D.C. 2004); *Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994); *United States ex rel. McGough v. Covington Techs. Co.*, 967 F.2d 1391 (9th Cir. 1992); *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470 (9th Cir. 1992); *Ceres Gulf v. Cooper*, 957 F.2d 1199 (5th Cir. 1992); *Officers for Justice v. Civil Serv. Comm'n*, 934 F.2d 1092 (9th Cir. 1991); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424 (10th Cir. 1990); *United States v. Yonkers Bd. of Educ.*, 902 F.2d 213 (2d Cir. 1990); *Grubbs v. Norris*, 870 F.2d 343 (6th Cir. 1989); *Bank of Am. Nat'l Trust & Savs. Ass'n v. Hotel Rittenhouse Assocs.*, 844 F.2d 1050 (3d Cir. 1988); *Fiandaca v. Cunningham*, 827 F.2d 825 (1st Cir. 1987); *Hill v. W. Elec. Co.*, 672 F.2d 381, 387 (4th Cir. 1982); *Brown v. Eckerd Drugs, Inc.*, 663 F.2d 1268, 1278 (4th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982); *Howse v. S/V "Canada Goose I",* 641 F.2d 317 (5th Cir. 1981); *Fleming v. Citizens For Albemarle, Inc.*, 577 F.2d 236 (4th Cir. 1978); *McDonald*, 430 F.2d 1065 (reversing denial of insurer's motion to intervene); *Shy v. Navistar Int'l Corp.*, 291 F.R.D. 128 (S.D. Ohio 2013); *Nextel Commc'ns of Mid-Atlantic, Inc. v. Town of*

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Hanson, 311 F. Supp. 2d 142 (D. Mass 2004); *S. Pac. Co. v. City of Portland*, 221 F.R.D. 637 (D. Or. 2004); *Van Etten v. Bridgestone/Firestone, Inc.*, 117 F. Supp. 2d 1375 (S.D. Ga. 2000), *vacated on other grounds sub nom. Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304 (11th Cir. 2001); *Smith v. Bd. of Election Comm'rs*, 586 F. Supp. 309 (N.D. Ill. 1984); *Wilson v. Sw. Airlines Co.*, 98 F.R.D. 725 (N.D. Tex. 1983); *In re Franklin Nat'l Bank Secs. Litig.*, 92 F.R.D. 468 (E.D.N.Y. 1981); *Armstrong v. Bd. of Sch. Dirs.*, 471 F. Supp. 827, 846 (E.D. Wis. 1979); *New York State ex rel. New York County v. United States*, 65 F.R.D. 10 (D.D.C. 1974); *EEOC v. Am. Tel. & Tel. Co.*, 365 F. Supp. 1105 (E.D. Pa. 1973), *aff'd*, 506 F.2d 735 (3d Cir. 1974); *Winders v. People*, 45 N.E.3d 289, 293 (Ill. App. Ct. 2015); *R.D.B. v. A.C.*, 27 So. 3d 1283, 1286 (Ala. Civ. App. 2009); *Olver v. Fowler*, 168 P.3d 348, 352–53 (Wash. 2007); *Ex parte Caremark RX, Inc.*, 956 So. 2d 1117, 1129 (Ala. 2006); *City of Chicago v. Ramirez*, 852 N.E.2d 312, 322 (Ill. Ct. App. 2006); *Johnson Turf & Golf Mgmt., Inc. v. City of Beverly*, 802 N.E.2d 597, 600 (Mass. App. Ct. 2004); *Jenkins v. City of Coll. Park*, 840 A.2d 139, 146 (Md. 2003); *Taylor v. Abernethy*, 560 S.E.2d 233, 236 (N.C. Ct. App. 2002); *Wichman v. Benner*, 948 P.2d 484, 488 (Alaska 1997); *Humana Health Plans, Inc. v. Durant*, 650 So. 2d 203, 204 (Fla. Dist. Ct. App. 1995); *Cruz Mgmt. Co., Inc. v. Thomas*, 633 N.E.2d 390, 393 (Mass. 1994); *Blue Cross/Blue Shield of R.I. v. Flam ex rel. Strauss*, 509 N.W.2d 393, 396 (Minn. Ct. App. 1993) (reversing denial of insurer's motion to intervene to vacate judgment against insured); *Weimer v. Ypparila*, 504 N.W.2d 333, 336 (S.D. 1993); *Rosenbalm v. Commercial Bank of Middlesboro*, 838 S.W.2d 423, 427 (Ky. Ct. App. 1992); *Bouhl v. Gross*, 478 N.E.2d 620, 624 (Ill. App. Ct. 1985) *Petition of City of Shawnee*, 687 P.2d 603, 612 (Kan. 1984) ("The trial court not only had jurisdiction to grant the motion to intervene, but also authority to grant relief from the final judgment . . . ."); *Salvatierra v. Nat'l Indem. Co.*, 648 P.2d 131, 135 (Ariz. Ct. App. 1982); *Vicendese v. J-Fad, Inc.*, 389 A.2d 1021, 1024 (N.J. Super. Ct. 1978); *Elwell v. Vt. Commc'ns Mktg. Grp., Inc.*, 349 A.2d 218, 220 (Vt. 1975) (""While there is some authority for the proposition that intervention after final judgment is untimely, we feel that the better view is that intervention may be permitted even after final judgment where those already parties are not prejudiced, and

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But if *Ryan* and its progeny are read to bar *every* intervention in a case whose docket includes a document labeled "judgment," this Court should reconsider those cases today.

1. The Washington Authority on which Ryan *Relied Has Been Discarded*

Stare decisis is at its weakest when the cases relied upon to create a rigid rule have themselves been discarded. *In re Estate of Sarge*, 134 Nev., Adv. Op. 105, 432 P.3d 718, 722 (2018) (overruling *Mallin v. Farmers Ins. Exch.*, 106 Nev. 606, 797 P.2d 978 (1990), which had relied on now-overruled federal cases).

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Here, as discussed, *Ryan* rejected "the proposition that intervention is a proper remedy to vacate a judgment alleged to be void" based on a Washington Supreme Court case, though that case did not actually

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that where there is real potential for harm to the intervenor intervention should be denied as untimely only in extreme circumstances."); *E. Constr. Co. v. Cole*, 217 N.W.2d 108, 110 (Mich. Ct. App. 1974); *Wags Transp. Sys., Inc. v. City of Miami Beach*, 88 So. 2d 751, 752 (Fla. 1956); *Zeitinger v. Hargadine-McKittrick Dry Goods Co.*, 250 S.W. 913, 916 (Mo. 1923); *Sizemore v. Dill*, 220 P. 352, 355 (Okla. 1923); *Casey v. Ohio State Nurses Ass'n*, 114 N.E.2d 866, 867–68 (Ohio Ct. App. 1951); *Brown v. Brown*, 98 N.W. 718, 721 (Neb. 1904).

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categorically bar such a remedy. *See Ryan*, 58 Nev. 253, 75 P.2d at 735–36 (citing *Seattle & N. Ry. Co. v. Bowman*, 102 P. 27 (Wash. 1909)).

But even if it did, Washington has abandoned such a categorical approach, holding now intervention is permitted after judgment upon a "strong showing" of the factors. *Olver v. Fowler*, 168 P.3d 348, 352–53 (Wash. 2007); *compare also Safely v. Caldwell*, 42 P. 766 (Mont. 1895) (cited in *Ryan* and prohibiting intervention after default judgment), *with In re Marriage of Glass*, 697 P.2d 96, 99 (Mont. 1985) ("motions to intervene made after judgment are not per se untimely").

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2. Under Ryan*'s Strict Reading, NRS 12.130 Would Be Unconstitutional*

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Cases such as *Ryan v. Landis* often invoke NRS 12.130's reference to intervention "[b]efore the trial" as a limitation on the time for intervention. It is not. The Legislature was simply respecting the separation of powers, enacting a substantive standard for intervention ("an interest in the matter in litigation") and allocating costs, NRS 12.130(1), but not treading on the judiciary's exclusive power to "manage the litigation process" and "provide finality." *See Berkson v. LePome*, 126 Nev. 492, 501, 245 P.3d 560, 566 (2010) (invalidating NRS 11.340, a statute

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allowing plaintiffs to refile claims after their reversal on appeal, for violating separation of powers).

The Legislature can "sanction the exercise of inherent powers by the courts," but it cannot "limit or destroy" them. *Lindauer v. Allen*, 85 Nev. 430, 434, 456 P.2d 851, 854 (1969). Thus, a statute that attempted to limit the preclusive effect of a judgment was unconstitutional for interfering with a "judicial function." *State Farm Mut. Auto. Ins. Co. v. Christensen*, 88 Nev. 160, 162–63, 494 P.2d 552, 553 (1972). If possible, however, this Court reads statutes so as not to impinge on the judiciary's rulemaking, adjudicative, and other incidental powers. *Borger v. Eighth Judicial Dist. Court*, 120 Nev. 1021, 1029–30, 102 P.3d 600, 606 (2004). In *Borger*, for example, because the expert-affidavit requirement for medical-malpractice claims "contains no explicit prohibition against amendments [of defective affidavits], and because legislative changes in the substantive law may not unduly impinge upon the ability of the judiciary to manage litigation," this Court held that district courts retained their discretion to allow amendments. *Id.* "Retention of this discretion . . . is consistent with well-recognized notions of separation of legislative and judicial powers." *Id.*

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Thus, the Nebraska Supreme Court held that a statute allowing intervention "before the trial commences" could not restrict the judiciary from allowing intervention after judgment:

> [H]owever that section may affect the right of a party to intervene, we are satisfied that it was not intended, and should not be permitted, to require a court to pursue an erroneous theory to a worthless decree, nor to curtail, in any degree, its power to do complete justice, so long as it retains jurisdiction of the cause and the parties.

Brown v. Brown, 98 N.W. 718, 721 (Neb. 1904).

Here, too, this Court should read NRS 12.130 to avoid an unconstitutional infringement on judicial power. The Legislature cannot *force* the judiciary to accept intervention after a final judgment; that is why the statute only addresses intervention "[b]efore the trial." At the same time, though, the Legislature cannot *restrict* the judiciary's rulemaking authority or *ad hoc* decisionmaking to permit intervention in limited circumstances after a final judgment; the statute simply does not address it. The court remains free to apply its own rules of civil procedure, as the federal courts and many state courts have, to govern post-judgment intervention. The district courts retain jurisdiction after judgment over some matters, including to declare a judgment void. So

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to read NRS 12.130 as categorically barring intervention after the trial would render the statute unconstitutional for infringing on the judiciary's exclusive power.

IV.

NALDER AND LEWIS WERE ACCORDED DUE PROCESS THROUGH PROPER, TIMELY SERVICE

Nalder and Lewis do not articulate any due process violation. They claim to have been improperly served (Pet'n 28), but substantial evidence shows that they were properly served (3 R. App. 732–74, 11 R. App. 2609) and indeed opposed the motions. (1 R. App. 8, 2 R. App. 310, 3 R. App. 741, 4 R. App. 754, 763, 10 R. App. 2293, 2314, 11 R. App. 2670, 2728.) Any error, moreover, would have been harmless because Nalder and Lewis had repeated opportunities to be heard on reconsideration. (2 R. App. 310 (countermotion to set aside intervention order); 6 R. App. 1328 (motion for reconsideration); 6 R. App. 1487 (motion for reconsideration); 10 R. App. 2272 (joinder in motion for reconsideration).) Regardless, this Court is ill-equipped to decide that fact question in the first instance. *See Beazer Homes Holding Corp. v. Eighth Judicial Dist. Court*, 128 Nev. 723, 736, 291 P.3d 128, 137 (2012) ("The district court

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is in the best position to analyze the facts and circumstances of this case . . . .").

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Dated this 10th day of July, 2019.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2016 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 7869 words.

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

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Dated this 10th day of July, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/Abraham G. Smith*

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CERTIFICATE OF SERVICE

I certify that on July 10, 2019, I submitted the foregoing ANSWER for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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/s/Adam Crawford
An Employee of Lewis Roca Rothgerber Christie LLP

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EXHIBIT K

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EXHIBIT K

October 16, 2018

Randall Tindall, Esq.
Resnick and Louis, P.C.
8925 W. Russell Rd., Ste 220
Las Vegas NV 89148
FAX: 702-997-8478
rtindall@rlattorneys.com

Re: Stop telling the Court you represent me.

Dear Mr. Tindall :

You have never communicated with me and I have never retained you to represent me. I am writing to make it very clear to you that I do not want you to make any representations or communications on my behalf without first getting my authority to do so in connection with the lawsuits that are currently pending in Nevada. I left Nevada at the end of 2008. I believe the actions you have taken on my behalf are fraudulent, improper and inaccurate. You already know all of this because Steve Rogers, who was previously hired by UAIC to represent me, also was told this and then did not file anything on my behalf. I have had the issues explored by my own counsel and I do not agree that your actions are in my best interest. My attorney defending me in these two cases is Breen Amtz. My attorney representing me against UAIC is Thomas Christensen. Please communicate with him regarding my desires. Please withdraw your three motions filed on my behalf and discontinue making any representations to the court that you are acting on my behalf. You are not.

Thank you.

Gary Lewis

cc: breen@breen.com
thomasc@injuryhelpnow.com

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Randall Tindall

From: Gary Lewis <gsl6971@yahoo.com>
Sent: Friday, October 19, 2018 5:56 PM
To: Randall Tindall
Cc: breen@breen.com; Thomas Christensen
Subject: cease communication

Mr Tindall I ask that all communication with me directly cease! All communication should be done through Tom Christensen.

Thank you,

Gary Lewis

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EXHIBIT L

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EXHIBIT L

Case No. 78243

In the Supreme Court of Nevada

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 CHEYANNE NALDER,

Real Parties in Interest.

Electronically Filed
Jul 10 2019 06:04 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

District Court Case Nos.
A549111 & A772220

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UNITED AUTOMOBILE INSURANCE COMPANY'S ANSWER

With Supporting Points and Authorities

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NRAP 26.1 DISCLOSURE

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

Real party in interest United Automobile Insurance Company (UAIC) is a privately held limited-liability company. No publicly traded company owns more than 10% of its stock.

UAIC is represented by Thomas E. Winner and Matthew J. Douglas at Atkin Winner & Sherrod, and by Daniel F. Polsenberg, Joel D. Henriod, and Abraham G. Smith at Lewis Roca Rothgerber Christie, LLP.

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Dated this 10th day of July, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*
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INTRODUCTION

In an impressive variety of ways, petitioner Gary Lewis asks this Court to eschew the logical and embrace the surreal.

One might think that two actions in which plaintiff Cheyanne Nalder is seeking the same relief—even by filing the same briefs—are ideal candidates for consolidation. No, Lewis says: that one of the actions has a decade-old judgment (its expiration or revival is the critical issue in both cases) makes consolidation impossible; the actions must proceed in parallel, but separate spheres.

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One might also think that notice of a motion to consolidate and the opportunity to oppose it (which Lewis did) satisfy due process. No, Lewis says: the submission of the motion for an order shortening time gave the Court too much time and Lewis and Nalder too little time with it, transforming a common practice into an improper *ex parte* rendezvous.

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One might also think that a district court could expect its oral ruling granting a stay to be obeyed, and that when the clerk mistakenly entered a judgment in violation of that stay, that the district court could promptly vacate the judgment as a clerical error. But again no, Lewis

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says: the parties are free to disregard a court's oral stay until the written order, and the court is powerless to do anything about it. What's more, Lewis says, even though a court can vacate a judgment *sua sponte*, it can do so only after notice and a hearing; in the meantime, the erroneous judgment must stay in place.

That the district court in each instance chose the reasonable and not the inexplicable path is not an emergency calling for this Court's extraordinary intervention. It is a relief.

ROUTING STATEMENT

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Although UAIC disagrees with petitioners' characterizations about the record, UAIC agrees that it makes sense for the Supreme Court to retain the petition because of its familiarity with the issues in the certified question, Docket No. 70504.

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ISSUES PRESENTED

1. When a plaintiff attempts to revive an expired judgment in two actions—the action with the original, expired judgment, and a new action purportedly "on the judgment"—does the district court have discretion to consolidate the matters?

2. Is EDCR 2.26 constitutional?

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3. Does a district court have discretion to (1) vacate *sua sponte* a judgment that was mistakenly entered by the clerk in violation of a stay and then (2) hear the parties' arguments as to why that judgment should be reinstated?

STATEMENT OF FACTS

A. The Accident

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

B. The 2007 Lawsuit

On October 9, 2007, Nalder through her guardian ad litem filed suit against Lewis. (1 R. App. 1.) Lewis did not answer, and eight months later the district court entered a default judgment for $3.5 million. (1 R. App. 5, 6–7.)

C. The Bad-Faith Action Against UAIC

Nalder then sued Lewis's former insurer, UAIC, in federal court, based on an assignment of Lewis's rights to a claim for bad faith. (1 R. App. 231–32; 11 R. App. 2531.)

[1] "R. App." refers to real party in interest UAIC's appendix.

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1. Due to an Ambiguity, the Accident Is Deemed Covered

The federal court initially granted UAIC summary judgment because at the time of the accident, Lewis had let his policy lapse. (1 R. App, 87, 99, 231–32.) The Ninth Circuit found an ambiguity in the renewal statement, however (1 R. App. 104, 11 R. App. 2547), and on remand the district court construed the ambiguity against UAIC to imply a policy covering the 2007 accident. (1 R. App. 110, 232.)

UAIC paid Nalder the $15,000 policy limits and $90,000 for her attorney's fees.

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2. The Judgment Against Lewis Expires

Nalder appealed, however, because she considered the entire $3.5 million default judgment a consequential damage of UAIC's failure to defend, even though UAIC had acted in good faith. (1 R. App. 110.)

Pending that appeal, Nalder let that default judgment expire without renewing it under NRS 17.214. (1 R. App. 15.)

3. This Court Accepts Certified Questions on the Availability of Consequential Damages

The Ninth Circuit certified to this Court two questions: first, whether an insurer who mistakenly but in good faith denies coverage

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can be liable for consequential damages beyond the payment of policy limits and the costs of defense; and second, whether the expiration of the judgment without renewal cuts off the right to seek, in an action against the insurer, consequential damages based on that judgment. (2 R. App. 257, 268.)

D. Nalder "Amends" the Expired Judgment in the 2007 Suit

Shortly after this Court accepted the second certified question, Nalder moved *ex parte* to "amend" the expired 2008 judgment to be in her own name rather than that of her guardian ad litem. (1 R. App. 62, 71, 74; 2 R. App. 273, 282; P. (Dkt. 78085) App. 6–7;[2] 5 R. App. 1108 (describing the amendment as "an amendment of the expired judgment").)[3]

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[2] "P. (Dkt. #) App." refers to the petitioners' appendix in the indicated docket.

[3] Coverage counsel initially moved on Lewis's behalf to vacate the amended judgment. (1 R. App. 26–28; 4 R. App. 841, 852) After the Court in a minute order granted UAIC permission to intervene (4 R. App. 839, 10 R. App. 2313) but before the entry of a written order (4 R. App. 874), Lewis, through another attorney, alleged that coverage counsel had not conferred with Lewis about the motion and moved to strike it. (1 R. App. 26–28.) Two days later, the Court entered its written order granting UAIC permission to intervene (1 R. App. 31), and UAIC was able to file its own motion to vacate the judgment (1 R. App. 35).

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E. Nalder Brings a New Action Testing the Validity of the Expired Judgment

A few days later, on April 3, 2018, Nalder filed a new complaint against Lewis as a purported "action on the judgment," seeking a new $3.5 million judgment (minus $15,000 plus interest) and a declaration that the six-year limitation for bringing such an action had not expired. (10 R. App. 2299–303.)

F. UAIC Intervenes in the Pending Actions and Moves to Consolidate Them

To contest Nalder's new effort to revive the expired 2008 default judgment against its insured, UAIC moved to intervene in both actions and moved for their consolidation. (P. (Dkt. 78085) App. 8; 10 R. App. 2083; 1 R. App. 227; P. (Dkt. 78085) App. 213; 11 R. App. 2610.) The motion to intervene was properly served both by mail and by electronic service (3 R. App. 732–74), and the motion to consolidate was properly e-served (11 R. App. 2624); Nalder opposed intervention, and Lewis opposed both motions. (1 R. App. 8, 2 R. App. 310, 3 R. App. 741, 4 R. App. 754, 763, 10 R. App. 2293, 2314, 11 R. App. 2685.) Seeking to cre-

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Both Nalder and Lewis opposed the motion. (1 R. App. 78, 134.)

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ate a judgment in the 2018 action, Nalder and Lewis submitted a stipulated judgment against Lewis for the full amount requested in Nalder's complaint. (3 R. App. 595, 4 R. App. 771.)

The district court granted intervention in both cases (1 R. App 31, 10 R. App. 2450),[4] and the judge in the lower-numbered 2007 case ordered the related cases consolidated (P. (Dkt. 78243) App. 2). The district court did not enter judgment on Nalder's and Lewis's stipulation. (5 R. App. 1133–34.)

G. While the Case is Stayed, Nalder and Lewis Try to Create a Judgment in the 2018 Action

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On January 9, 2019, the district court orally dismissed part of Nalder's 2018 complaint and stayed the remaining proceedings. (5 R. App. 1129, 1141–42.) The district court gave no indication that the order staying proceedings was anything other than immediate; in fact, the

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[4] At the time, both cases were pending before Judge David Jones in Department 29. On October 24, 2018, a week after UAIC's intervention, Judge Jones disclosed his prior work with Lewis's then-coverage counsel, Randy Tindall. (1 R. App. 76–77.) Upon objection by Nalder's counsel and a request to refer Tindall to the state bar, Judge Jones voluntarily recused himself. (1 R. App. 76–77.) (The claim against Tindall was later dismissed. (5 R. App. 1169.)) The 2007 case was eventually reassigned to Judge Eric Johnson in Department 20, who granted consolidation. (11 R. App. 2626.)

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district court made it clear that it was refusing to sign Nalder's and Lewis's proposed judgment. (5 R. App. 1132–33, 7 R. App. 1664–66.) And again in a minute order on January 22, 2019, the district court granted a stay pending this Court's resolution of the certified questions. (7 R. App. 1664–66, 9 R. App. 2159.)

Yet that same day, Nalder and Lewis worked to evade the stay before a written order memorializing the then-in-effect stay could be entered (6 R. App. 1311, 1316–18[5]): Nalder served and Lewis accepted an offer of judgment for over $5 million, and they submitted the judgment to the clerk for entry. (5 R. App. 1194, 1197, 1201.) As the notice of acceptance and the clerk's entry of judgment were filed at the same minute (5 R. App. 1194, 1201), neither UAIC nor the district judge had advance notice of this judgment. UAIC moved to vacate the judgment. (5 R. App. 1176, 8 R. App. 1853.) Based on the mistake or inadvertence in the clerk's entering judgment while the case was stayed, the district court vacated the judgment. (7 R. App. 1656, 1666–67.)

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[5] *See also* 9 R. App. 2002–04 (counsel's comments on the draft order, including the denial of Nalder's and Lewis's stipulation and the granting of the stay).

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Nalder and Lewis complained that in vacating the judgment the district court violated their due process, and they asked the court to reinstate the judgment on grounds that the oral ruling and minute order could not restrain the parties until the entry of a written order staying the case. (6 R. App. 1328, 1487; 10 R. App 2272.) The district court denied the motions, noting that it had stayed the matter at the previous hearing, that the judgment entered by the clerk was void, and that vacating merely "put us back to where I thought I clearly had indicated I wanted us to be" at the time the district court stayed the case. (10 R. App. 2283; 7 R. App. 1656, 1666–67; 10 R. App. 2286–87.)

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SUMMARY OF THE ARGUMENT

Consolidation exists for cases such as this. Nalder is trying, in two actions, to achieve a single result—the resuscitation of an expired judgment. Because that issue is pending in both actions, and the district court has jurisdiction to declare the original judgment expired, consolidation was proper.

Lewis's allegations of due process violations are fact-bound and farcical. UAIC and the district court followed the established, lawful procedure for noticing expedited motions. When Lewis and Nalder

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themselves violated due process by getting the clerk to mistakenly enter a judgment in violation of a stay, the district court properly and promptly corrected the clerk's error and vacated the judgment—no notice necessary. But Lewis and Nalder in fact got their due process opportunity to argue that the judgment should be reinstated; the district court simply disagreed.

These issues do not merit this Court's extraordinary intervention.

ARGUMENT

Standard of review: "[T]he trial court is vested with a discretion to consolidate or to refuse to do so, subject to reversal in case of abuse." *Ward v. Scheeline Banking & Tr. Co.*, 54 Nev. 442, 22 P.2d 358, 360–61 (1933); *accord Zupancic v. Sierra Vista Recreation, Inc.*, 97 Nev. 187, 192–93, 625 P.2d 1177, 1180 (1981) ("Hearing and trial procedures, such as consolidation . . . are matters vested in the sound discretion of the trial court.").

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While due process requires an "opportunity to be heard," *Browning v. Dixon*, 114 Nev. 213, 217, 954 P.2d 741, 743 (1998), in most instances the form of that opportunity is left to the district court's discretion, *see J.D. Constr. v. IBEX Int'l Group*, 126 Nev. 366, 376, 378, 240

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P.3d 1033, 1040, 1041 (2010) (citing NRCP 78, which excuses "determination of motions without oral hearing"); *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606, 611, 245 P.3d 1182, 1185 (2010) (district court has discretion to not hold an evidentiary hearing for non-case-concluding sanctions).

I.

INTERVENTION WAS PROPER

Although Lewis does not actually argue the intervention question in this petition, for all the reasons stated in UAIC's answer to the petition in Docket No. 85085, intervention was timely and substantively proper. NRCP 24(a), (b)(2). UAIC timely intervened in the 2018 action at its beginning to address the expiration of the judgment that Nalder was trying to enforce; that case has not proceeded to a trial or judgment. And UAIC timely intervened to defend the same position in the 2007 action, where the only "judgment" had long expired, and plaintiff's bid to revive that judgment is a pending question.

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II.

CONSOLIDATION OF PLAINTIFF'S PARALLEL ACTIONS TO REVIVE AN EXPIRED JUDGMENT WAS PERMISSIBLE

The district court properly exercised its discretion to consolidate two pending actions: Nalder's efforts to litigate the renewal of her 2008 judgment in that original action and in the 2018 action "on the judgment." No rule or case supports Lewis's contention that an expired judgment in one of the actions thwarts consolidation. And contrary to Lewis's suggestion, on the pending question of the expired judgment's validity, the two actions are at precisely the same procedural posture.

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A. Questions Remain Pending in Both Actions

1. NRCP 42(a) Allows Consolidation of Any "Pending" Action

Like its federal counterpart, NRCP 42(a) allows a court to consolidate any "actions involving a common question of law or fact . . . pending before the court."[6]

The rule does not draw a line between cases in which there is a judgment and those in which there is not. The common question must

[6] UAIC refers to the rules in effect as of the time of consolidation in 2018.

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merely be "pending"—that is, the district court must in some sense retain jurisdiction over the issue. *See Foster v. Dingwall*, 126 Nev. 49, 52, 228 P.3d 453, 455 (2010) (describing the district court's jurisdiction during appeal as extending to pending "matters that are collateral to and independent from the appealed order" (quoting *Mack–Manley v. Manley*, 122 Nev. 849, 855, 138 P.3d 525, 529–30 (2006))).

In *Payne v. Tri-State Careflight, LLC*, for example, the district court entered a final judgment but then granted motions to intervene, "restocking this case's docket with sixty-nine fresh named Plaintiffs." 327 F.R.D. 433, 451–53 (D.N.M. 2018). Despite the final judgment, there was "enough life in the case" in the form of prospective Rule 59 or Rule 60 motions to justify consolidation. *Id.* *See generally Earl v. Lefferts*, 1800 WL 2341, 1 Johns. Cas. 395, 395 (N.Y. Sup. Ct. 1800) (an example of post-judgment consolidation dating from the Eighteenth Century).

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2. The District Court Retains Jurisdiction to Decide Whether a Judgment Is Void Because It Has Expired

The district court always retains jurisdiction to address a collateral attack on a void judgment. *Rawson v. Ninth Judicial Dist. Court*,

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133 Nev., Adv. Op. 44, 396 P.3d 842, 848 & n.4 (2017); NRCP 60(b)(4). That includes a judgment that has expired without renewal under NRS 17.143. *Leven v. Frey*, 123 Nev. 399, 410, 168 P.3d 712, 719 (2007).

3. Nalder's Attempt to Litigate the Validity of the Expired 2008 Judgment Is a "Pending" Question

Here, the district court has jurisdiction to adjudicate Nalder's attempt to revive the expired 2008 judgment—and UAIC's motion to vacate it as void—both in that action and in the 2018 lawsuit seeking the same relief. As that identical question of the expired judgment's validity is pending in both actions, the district court properly consolidated them.

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B. On the Pending Question, the Two Cases Are in the Same Procedural Posture

Not only is consolidation procedurally proper, but it makes substantive sense. Nalder seeks "the identical relief" from each action. *Ward*, 54 Nev. 442, 22 P.2d at 360. Many of the same briefs had already been filed in both actions; leaving the cases separate (especially when, after Judge Jones's recusal, the two cases split to different departments) would have merely duplicated the work for two district judges and risked coming to inconsistent answers on the same pivotal

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legal questions. Denying consolidation would have been an abuse of discretion.

Lewis instead cites inapposite cases dealing with actions "at different stages of pretrial preparation." (Pet'n 30 (citing *Prudential Ins. Co. of Am. v. Marine Nat'l Exch. Bank*, 55 F.R.D. 436 (E.D. Wis. 1972).) A judge does not abuse its discretion in consolidating cases merely because of that disparity.[7] The general principles stated in cases such as *Huene v. United States*, 743 F.2d 703, 704 (9th Cir. 1984) (cited at Pet'n 31) *support* consolidation here, "weigh[ing] the saving of time and effort

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[7] *Wolfe v. Hobson*, 2018 WL 6181404 (S.D. Ind. 2018); *Fabric Selection, Inc. v. Topson Downs of Cal., Inc.*, 2018 WL 3917758 (C.D. Cal. 2018) (even though one action would be delayed, the "similarity in facts and evidence" produced overall judicial economy justifying consolidation); *Bedwell v. Braztech Int'l, L.C.*, 2018 WL 830073 (S.D. Fla. 2018); *Brook v. Sterling Testing Systems, Inc.*, 2013 WL 2155478 (M.D. Tenn. 2013); *Ashcroft v. N.Y. Dep't of Corr. Servs.*, 2009 WL 1161480 (W.D.N.Y. 2009); *Dennis v. EG&G Defense Materials, Inc.*, 2009 WL 250396 (D. Utah 2009); *Single Chip Sys. Corp. v. Intermec IP Corp.*, 495 F. Supp. 2d 1052 (D.C. Cal. 2007); *Blasko v. Wash. Metro. Area Trans. Auth.*, 243 F.R.D. 13 (D.D.C. 2007); *Internet Law Library, Inc. v. Southridge Capital Mgmt.*, 208 F.R.D. 59 (S.D.N.Y. 2002); *B.D. ex rel. Jean Doe v. DeBuono*, 193 F.R.D. 117 (S.D.N.Y. 2000), *Monzo v. Am. Airlines, Inc.*, 94 F.R.D. 672 (S.D.N.Y. 1982); *Rohm & Haas Co. v. Mobil Oil Corp.*, 525 F. Supp. 1298 (D. Del. 1981).

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consolidation would produce against any inconvenience, delay, or expense."[8] The relevant procedural posture here is how far developed is the question of the judgment's expiration that is central to both actions: *that* question is identically postured in both actions.

C. Lewis Is Not Forcibly Realigned with UAIC

Nor does consolidation forcibly realign the parties against their interests. Although UAIC remains suspect of Lewis's efforts to have a judgment entered against him, nothing about the consolidation order forbids him from maintaining that posture. Lewis cites *Dupont v. Southern Pacific Co.*, but the problem there was the court's appointing one counsel to represent *all* plaintiffs, effectively forcing plaintiffs to forgo some of the claims that they would have had against each other. 366 F.2d 193, 196–97 (5th Cir. 1966). Nothing like that is happening here. Lewis has separate counsel from UAIC, and he is electing to take positions contrary to UAIC.

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[8] *Huene* came to a different result on rehearing, 753 F.2d 1081 (9th Cir. 1984) and has been overruled by *Hall v. Hall*, 138 S. Ct. 1118 (2018). *See generally In re Estate of Sarge*, 134 Nev., Adv. Op. 105, 432 P.3d 718, 720 (2018) (adopting *Hall*'s rule that the constituent cases of a consolidated action are independently appealable).

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III.

THE COURT'S ORDERS WERE ENTERED IN ACCORDANCE WITH DUE PROCESS

Lewis's due process objection bewilders. Either Lewis misunderstands conventions of motion practice in the Eighth Judicial District, or he sincerely believes them to be unconstitutional without making that showing.

A. EDCR 2.26 Is Constitutional

1. Ministerial Scheduling Motions Can Be Granted Ex Parte

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A judge can grant ministerial or scheduling requests (motions "of course") on an ex parte basis, while "substantive matters or issues on the merits" ("special" motions) involve judicial discretion and must be noticed to opposing parties. *Crawford v. State*, 117 Nev. 718, 721, 30 P.3d 1123, 1125 (2001) (citing NCJC Canon 3(B)(7)(a)), *abrogated on other grounds by Stevenson v. State*, 131 Nev. Adv. Op. 61, 354 P.3d 1277 (2015); *Maheu v. Eighth Judicial Dist. Court*, 88 Nev. 26, 34, 493 P.2d 709, 714 (1972).

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2. EDCR 2.26 Lawfully Allows Ex Parte Orders Shortening Time

EDCR 2.26 properly allows *ex parte* motions for the ministerial issue of shortening the time for calendaring a substantive motion. The process is familiar to anyone who practices in the Eighth Judicial District. A party may submit a declaration asking the court for good cause to expedite the resolution of the party's motion. EDCR 2.26. The underlying motion is usually attached to the declaration, but the district judge signs only the order shortening time. The party then serves and files the motion and the order shortening time, which notifies the opposing party of the expedited timeline for decision.

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B. The Parties Had Proper Notice of the Motion to Consolidate

UAIC properly followed the procedure under EDCR 2.26 for filing its consolidation motion on an order shortening time.

1. UAIC Served All Parties

Although UAIC had prepared the motion in early November, the Court did not sign the order shortening time until November 21, 2018, and UAIC filed and served the motion on all parties on November 26. (11 R. App. 2595, 2596, 2609.) Interpreting this five-day period in the

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worst possible light, Lewis forgets that Thursday, November 22 was Thanksgiving Day. Monday, November 26 was, for most people, the next business day after November 21.

2. Lewis Opposed the Motion

Lewis opposed the motion. (2 R. App. 310, 11 R. App. 2670.) Because he was actually heard on the motion before the district court ruled, there was no violation of Lewis's due process rights.

3. Lewis Lacks Standing to Assert Nalder's Due Process Rights

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When it comes to the due process right of notice and an opportunity to be heard, a party does not have standing to assert a violation of someone else's due process. *Hewitt v. Glaser Land & Livestock Co.*, 97 Nev. 207, 209, 626 P.2d 268, 269 (1981).

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Here, Lewis actually had that opportunity and cannot complain about an alleged violation of Nalder's due process rights.

4. Nalder Had Notice and an Opportunity to Oppose

Besides, Nalder was not deprived of due process. She had more than a full judicial day to oppose the motion, as EDCR 2.26 requires.

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And while she did not take that opportunity, she benefitted from the arguments that Lewis made in opposition.

C. A Court Can *Sua Sponte* Vacate a Mistakenly Entered Judgment that Violates the Court's Stay

"Clerical mistakes and errors of oversight or omission may be corrected at any time. The court either may make the correction on its own initiative, or it may act on the motion of a party after such notice, *if any*, as the court orders." 11 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2855 (3d ed.); *accord Holzmeyer v. Walgreen Income Prot. Plan for Pharmacists & Registered Nurses*, 46 F. Supp. 3d 865, 870 (S.D. Ind. 2014) ("We possess the power to amend our judgments without notice, *sua sponte* or on the motion of a party, in order to correct an omission [under Rule 60(a)].").

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Here, the clerk's error in entering a judgment while the case was stayed was an "oversight or omission" that the district court could correct without notice to the parties. That UAIC also made a motion pointing out the clerk's inadvertent violation of the stay[9] did not entitle

[9] Lewis also insinuates that the district court "signed a written order granting a stay" "at UAIC's ex-parte request, without any legal support, and again, without a hearing." But there *had* been a hearing at which the district court stated that it was staying proceedings (5 R.

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Lewis and Nalder to notice before the district court could vacate the erroneous judgment.

D. Although Nalder and Lewis Denied UAIC Due Process in Entering their Judgment, They Were Accorded Due Process after its Vacatur

A party dissatisfied with a written order has a remedy: a motion to alter or amend the findings, or (in the case of a final judgment) an appeal. *See* NRCP 52(b), 59(e); NRAP 3A.

Here, Lewis and Nalder did not give UAIC notice of their plan to enter a stipulated judgment in violation of the court's stay, but after its vacatur the district court gave Lewis and Nalder repeated chances to explain why their stipulated judgment should be reinstated. They insisted that the district court lacked the power to enforce its own oral ruling or minute order granting a stay—leaving Lewis and Nalder free

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App. 1129, 1141–42), the district court again made that clear in the January 22 minute order (9 R. App. 2159), and Lewis's counsel on January 15 even made comments on the draft stay order that he complains was entered "ex parte." (9 R. App. 2202–05.) (Note also that while parties have a right to notice of a motion, a losing party is not entitled as a matter of due process to weigh in on every aspect of a proposed order before it is entered. After all, the Court retains discretion to draft any order by itself without taking comments from anyone.)

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to violate it—until memorialized in a written order. That those arguments proved unpersuasive is the sign of a functioning judicial system; it is not a violation of due process.

IV.

WRIT RELIEF IS IMPROPER

This is not a case crying out for extraordinary writ relief. As with the order granting intervention, the order granting consolidation is reviewable on appeal, making mandamus generally inappropriate. *Ward*, 54 Nev. 442, 22 P.2d at 360–61; *Zupancic*, 97 Nev. at 192–93, 625 P.2d at 1180. Advisory mandamus is particularly improper here, where the district court's order is based on a number of factual circumstances weighing the relative costs and efficiencies of consolidation. (P. (Dkt. 78243) App. 2.) In this interlocutory posture, the most this Court could do is evaluate whether the district court had jurisdiction to grant consolidation. As discussed above, it did. This Court should let the district court continue to develop the factual record on these issues, which will also facilitate this Court's review on appeal.

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CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Dated this 10th day of July, 2019.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2016 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 4374 words.

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

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Dated this 10th day of July, 2019.

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CERTIFICATE OF SERVICE

I certify that on July 10, 2019, I submitted the foregoing ANSWER for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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/s/Adam Crawford
An Employee of Lewis Roca Rothgerber Christie LLP

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EXHIBIT M

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EXHIBIT M

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 70504

ORDER ACCEPTING SECOND CERTIFIED QUESTION AND DIRECTING SUPPLEMENTAL BRIEFING

The United States Ninth Circuit Court of Appeals previously certified a legal question to this court under NRAP 5, asking us to answer the following question:

> 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?

Because no clearly controlling Nevada precedent answers that legal question and the answer could determine part of the federal case, we accepted that certified question and directed the parties to file briefs addressing that question. After briefing had been completed, respondent United Automobile Insurance Company informed this court that it had filed a motion to dismiss in the federal case. We then stayed our consideration of the certified question because a decision by the Ninth Circuit granting the motion to dismiss would render the question before this court advisory.

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The Ninth Circuit has now certified another legal question to this court under NRAP 5. The new question, which is related to the motion to dismiss pending in the Ninth Circuit, asks us to answer the following:

> Under Nevada law, if a plaintiff has filed suit against an insurer seeking damages based on a separate judgment against its insured, does the insurer's liability expire when the statute of limitations on the judgment runs, notwithstanding that the suit was filed within the six-year life of the judgment?

That question is focused on the insurer's liability, but elsewhere in the Ninth Circuit's certification order, it makes clear that the court is concerned with whether the plaintiff in this scenario can continue to seek the amount of the separate judgment against the insured as consequential damages caused by the insurer's breach of the duty to defend its insured when the separate judgment was not renewed as contemplated by NRS 11.190(1)(a) and NRS 17.214 during the pendency of the action against the insurer. We therefore choose to accept the Ninth Circuit's invitation to "rephrase the question as [we] deem necessary." Consistent with language that appears elsewhere in the certification order, we rephrase the question as follows:

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

As no clearly controlling Nevada precedent answers this legal question and the answer may determine the federal case, we accept this certified question as rephrased. *See* NRAP 5(a); *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 749-51, 137 P.3d 1161, 1163-64 (2006).

Appellants shall have 30 days from the date of this order to file and serve a supplemental opening brief. Respondent shall have 30 days from the date the supplemental opening brief is served to file and serve a supplemental answering brief. Appellants shall then have 20 days from the date the supplemental answering brief is served to file and serve any supplemental reply brief. The supplemental briefs shall be limited to addressing the second certified question and shall comply with NRAP 28, 28.2, 31(c), and 32. *See* NRAP 5(g)(2). To the extent that there are portions of the record that have not already been provided to this court and are necessary for this court to resolve the second certified question, the parties may submit a joint appendix containing those additional documents. *See* NRAP 5(d). Given the relationship between the two certified questions, we lift the stay as to the first certified question.

It is so ORDERED.[1]

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Douglas, C.J.

Cherry, J.

Gibbons, J.

Pickering, J.

Hardesty, J.

Stiglich, J.

[1]As the parties have already paid a filing fee when this court accepted the first certified question, no additional filing fee will be assessed at this time.

The Honorable Ron D. Parraguirre, Justice, voluntarily recused himself from participation in the decision of this matter.

cc: Eglet Prince
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Mark Andrew Boyle
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Clerk, United States Court of Appeals for the Ninth Circuit

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EXHIBIT N

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EXHIBIT N

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"

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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

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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

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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

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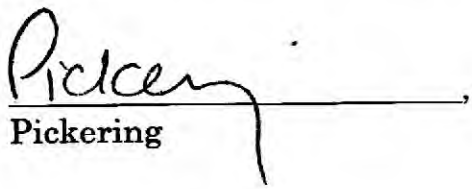
expected had UAIC performed under the contract. *See id.* at 1153 ("To allow [plaintiffs] to recover for expenses that they did not incur would be tantamount to giving them a windfall, resulting in punitive damages against [the defendant]."). Without more, the expired state court judgment cannot form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

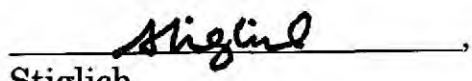
Accordingly, we answer the second certified question in the negative. In an action against an insurer for breach of the duty to defend its insured, a plaintiff cannot continue to seek consequential damages in the amount of a default judgment against the insured when the judgment against the insured was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

It is so ORDERED.

_____, C.J.
Gibbons



_____, J.
Pickering



_____, J.
Stiglich

_____, J.
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Boyle Leonard, P.A.
Matthew L. Sharp, Ltd.
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

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:** **8/5/2020, 9am**

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Gary Lewis' Reply in Support of Motion for Attorney's Fees and Costs

I. UAIC Admits It Has Unreasonably and Vexatiously Multiplied the Proceedings in this Case.

UAIC's intervention and consolidation were "brought [and] maintained without reasonable ground [and] to harass the prevailing party." (See NRS 18.010(2)(b)). Both the consolidation and the intervention were reversed by extraordinary writ relief from the Nevada Supreme Court. The intervention and consolidation were groundless and obviously brought for improper purposes to delay, to increase the costs of litigation and to obtain a change of judicial officers. In its Opposition to this motion, UAIC does not address this specific basis for an award of attorney fees. UAIC attempts to distract the Court and argue facts and issues irrelevant to the instant

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Motion. Lewis' Motion contained specific facts, which remain uncontroverted and unopposed, and which now require an award of attorney fees from this Court because of the wrongful consolidation of Lewis' other case with this case, which was already to judgment. "Certainly, if the record reveals that counsel or any party has brought, maintained, or defended an action in bad faith, the rationale for awarding attorney fees is even stronger. . . . [Bad faith] may include conduct aimed at unwarranted delay or disrespectful of truth and accuracy." *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 996 (Nev. 1993).

UAIC does not contest these principle reasons for an award of attorney fees, but instead continues its bad faith disrespect of truth and accuracy by knowingly distorting and misrepresenting **the other Courts' decisions.** Instead of dealing with its bad faith multiplication of the litigation[1], UAIC makes a number of irrelevant claims using disrespectful terms such as "saga" "galling" "unhappy" "astronomical" "raffle" 'flurry" and "trumpets" to continue twisting the truth into falsehood. The entirety of UAIC's Opposition herein is both an admission that attorney fees are warranted and additional proof of UAIC's improper motives to delay and harass, instead of protect its insured.

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II. This Court has Jurisdiction to Award Attorney Fees and Costs

UAIC states, without authority, that this Court cannot consider a motion while an identical request is pending before the Supreme Court. Subsection A. 1. of the opposition discussed a need for a remittitur. This is a false statement by UAIC. UAIC knows that the intervention issue was brought to the Supreme Court by writ petition, which does nothing to the pending case jurisdictionally and does not require or even provide for a remittitur. Jurisdiction was never removed from the trial court; it cannot be returned. The Court knows this as the Court recently

[1] But for UAIC's interference, both state court cases would have been long ago resolved.

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entertained a motion brought by Nalder. Subsection A. 2. Suggests, without any citations at all, that a request for attorney fees may not be made in each court where incurred. No law supports this argument and it must be disregarded.

III. UAIC's Entire Opposition Is Further Proof of Bad Faith; It is Nonresponsive to the Motion before the Court and Should Be Stricken

UAIC has a pattern of bad faith litigation. In early 2017, UAIC launched an attack in the Ninth Circuit, claiming a judgment held by Nalder against Lewis must be renewed in order for Nalder and Lewis (together) to have standing to pursue UAIC (on appeal) for the judgment, which originally arose because of UAIC's breach of the duty to defend. UAIC knew its attack created a conflict between Nalder and Lewis.[2] UAIC knew it had done nothing to legally declare the judgment expired on behalf of Lewis. UAIC knew it had done nothing to timely present this issue in the trial court, nor the appellate court. Yet UAIC took action to defeat jurisdiction and end the appeal. UAIC's sole motive remains to escape all consequences for its bad acts, regardless of the greater consequence to its insured.

As a result of UAIC's bad faith litigation tactics, Nalder undertook representation through her counsel, David A. Stephens, Esq. to continue to pursue her judgment against Lewis. She was successful obtaining a new amended judgment in this case. This was entered as a result of the tolling statutes applicable to the statute of limitations on judgments.[3] The new judgment became final, binding and *res judicata* upon Nalder and Lewis, when entered on March 28, 2018. UAIC argued to the Ninth Circuit that none of the new judgments were before that Court or formed the

[2] See Exhibit 1 hereto: Excerpt from UAIC's Reply in Ninth Circuit Appeal Case 13-17441, 4/6/17, DktEntry 46, page 9: "Indeed, the expiration of the default judgment creates a conflict between Mr. Nalder and Mr. Lewis, as it is in Mr. Lewis' interest that this Court determine that the default judgment against him has expired."

[3] See Exhibit 2 hereto, application for amended judgment and amended judgment (March, 2018.)

"basis for plaintiffs' complaint in the district court; only the 2008 judgment is." (See Exhibit 3, excerpt from UAIC's Opposition to Motion to Supplement in Ninth Circuit Appeal Case 13-17441, 12/23/19, DktEntry 75 at page 14.)

Continuing its pattern of bad faith litigation tactics, UAIC attempted to attack this judgment by improperly intervening and moving to set aside the judgment. UAIC's attack on the new amended judgment was denied by this Court. UAIC filed a frivolous appeal.[4] After delaying briefing on numerous occasions UAIC finally asked to have its appeal dismissed as moot. (See Nevada Supreme Court pending docket 79487.)

UAIC compounds its bad faith by undermining the effect of this 2018 judgment by its lack of candor to the court. The Ninth Circuit **did not** have the 2018 judgment before it. The Ninth circuit specifically found that the other judgments, including the 2018 amended judgment, were **not** the judgments that Nalder and Lewis had brought an action against UAIC on.[5]

UAIC attempts to mislead this Court that the Nevada Supreme Court order[6] --in litigation where Nalder and Lewis are adverse to only UAIC-- is *res judicata* as to factual issues between Nalder and Lewis in these two state court cases, both captioned Nalder v. Lewis. UAIC tries to suggest that factual issues were decided by appellate courts, as opposed to questions of law. Only the "law governing the certified question" is "res judicata upon the parties."[7] In this case, the

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[4] At a hearing in front of this Court on March 4, 2020 the court asked: What have you appealed? Mr. Polsenberg responded (at the Court's video timestamp 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."

[5] See Order Dismissing Appeal, attached to UAIC's instant Opposition as Exhibit A, at page 5.

[6] The Nevada Supreme Court issued an "Order", not a formal opinion answering the certified questions. (See Exhibit 4.)

[7] See **NRAP 5(h) Opinion.** The written opinion of the Supreme Court stating **the law governing the questions** certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties and **shall be res judicata as to the parties.**

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only law pronounced by the Nevada Supreme Court on the certified question is "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." (Contained at Exhibit 4, hereto, page 2) The Nevada Supreme Court further held "that good-faith determinations are irrelevant for determining damages upon a breach of [the duty to defend]." *Id.* Answering the second certified question the court held that "Nalder and Lewis's action [against UAIC] … is not "an action upon [the state court] judgment" that renewed the judgment under NRS 11.190(1)(a)." *Id.* at page 5. The Court therefore concluded "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." *Id.* at page 7.

The Nevada Supreme Court refused to consider the factual issues that would be involved in determining the applicability of the statute of limitations and its tolling provisions as it applies to Nalder's current state court action on a judgment. *Id.* at page 5. The Ninth Circuit did not address the factual issues either, instead determining the tolling arguments regarding renewal were waived. (See Exhibit A to UAIC's Opposition, at pages 4-5.) The only record in the trial court was a valid and enforceable judgment. The statute of limitations and tolling issues were not decided in the federal trial court ***and could not*** be decided on appeal. Indeed, Nalder and Lewis were not adversaries in the federal court litigation, nor in the Ninth Circuit appeal.

UAIC claims Nalder and Lewis are multiplying the proceedings. **All of this litigation** was a result of UAIC's improper intervention and lack of candor with the different courts. UAIC baited this Court to make a mistake, which was corrected by Writ of Mandamus. UAIC argued to the

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Ninth Circuit that unless the judgment was renewed, Nalder and Lewis could no longer seek damages in the amount of that judgment regardless of other new judgments obtained by Nalder. While Nalder and Lewis believe the Ninth Circuit and Nevada Supreme Court decisions do not promote judicial economy, they specifically by their language, and as argued by UAIC, have no effect here. The Nalder v. Lewis amended judgment, the Nalder v. Lewis California judgment and Nalder v. Lewis action on a judgment were not before the Nevada Supreme Court, nor the Ninth Circuit. The dispute between Nalder v. Lewis was concluded in the state courts of Nevada and California, before any rulings from the Nevada Supreme Court or the Ninth Circuit. The litigation regarding UAIC's post appeal acts of bad faith and further consequential damages of the breach of the duty to defend were not before the Ninth Circuit, nor the Nevada Supreme Court.

UAIC argued that the new judgments, including the amended judgment are not damages from the original action and can be disregarded by the Ninth Circuit. UAIC argued only the original judgment or its renewal and not any of the new judgments arising from the original judgment were part of the federal case and appeal. UAIC argued that no new acts of bad faith, either in failing to pay *Cumis/Hansen* fees, or failing to first remove any possibility of further litigation by Nalder against Lewis, or fraudulent activities by UAIC in presenting frivolous arguments in order to delay and cause further damage were part of the federal case and appeal. UAIC argues in a filing in the Ninth Circuit that "Allegations of post-appeal acts of bad faith--and the damages those acts allegedly caused--are not before this Court and do not change the Nevada Supreme Court's answers or merit supplementation." (See Exhibit 3, excerpt from UAIC's Opposition to Motion to Supplement in Ninth Circuit Appeal Case 13-17441, DktEntry 75 at page 15.) The Ninth circuit spelled out that "it is irrelevant whether Nalder has obtained additional judgments against Lewis in Nevada state court because such other judgments were not

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the basis for their complaint against UAIC in this case." (See Exhibit A to UAIC's instant Opposition as Exhibit A, at page 5.)

IV. The Instant Motion is Narrow and should be granted: Fees and Costs incurred by Lewis as a result of improper consolidation and intervention by UAIC, which delayed and increased costs of this litigation, are warranted.

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 and attorney's fees caused by the wrongful intervention and consolidation.

DATED this 29th day of July, 2020.

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

/s/ E. Breen Arntz
E. BREEN ARNTZ, ESQ.
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Attorney for Defendant Gary Lewis

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of CHRISTENSEN LAW OFFICES, LLC and that on this 29th day of July, 2020, I served a copy of the foregoing **Reply** as follows: 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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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,

PLAINTIFF/APPELLANT/CROSS-APPELLEE,

V.

UNITED AUTOMOBILE INSURANCE COMPANY, DOES I THROUGH V, AND ROE CORPORATIONS I THROUGH V, INCLUSIVE,

DEFENDANTS/APPELLEES/CROSS-APPELLANTS.

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

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

Thomas E. Winner, Esq.
Matthew J. Douglas, Esq.
ATKIN WINNER & SHERROD
1117 South Rancho Drive
Las Vegas, Nevada 89102

Thomas E. Scott, Esq.
Scott A. Cole, Esq.
COLE, SCOTT & KISSANE, P.A.
9150 South Dadeland Boulevard
Suite 1400
Miami, Florida 33156

against Mr. Lewis, as it provides, in pertinent part, "that [the] portion of said right or cause of action being hereby assigned pertains to the judgment entered against the undersigned [Mr. Lewis] in favor of NALDER in the amount of $3,500,000.00[.]" (App. 0495). As such, Mr. Nalder's ability to collect against UAIC *is* controlled by his right to collect against Mr. Lewis, as the right or cause of action assigned expressly pertains to the default judgment.

The assignment is also invalidated by the default judgment's expiration, as it now lacks consideration. Specifically, although not expressly stated in the assignment, presumably Mr. Nalder agreed not to execute on the default judgment against Mr. Lewis in exchange for the assignment of Mr. Lewis' rights and causes of action. If the default judgment has expired and can no longer be executed against Mr. Lewis, however, then the assignment no longer reflects a bargained for exchange, as it lacks consideration on the part of Mr. Nalder. This Court reached a similar conclusion in *Hicks v. Dairyland Insurance Company*, in which it held that an assignment of an insured's first-party claims to a tort judgment creditor was not effective because it was not a "bargained for exchange," as there was no valid consideration given for the assignment. *Hicks*, 441 Fed. App'x at 465. Indeed, the expiration of the default judgment now creates a conflict between Mr. Nalder and Mr. Lewis, as it is in Mr. Lewis' interest that this Court determine that the default judgment against him has expired.

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EXHIBIT 2

MTN
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Email: dstephens@sgblawfirm.com
Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

Date: N/A

Time: N/A

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

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

Dated this 19 day of March, 2018.

STEPHENS GOURLEY & BYWATER

David A. Stephens, Esq.
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3636 North Rancho Drive
Las Vegas, Nevada 89130
Attorneys for Plaintiff

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EXHIBIT "1"

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

CLERK OF THE COURT

JUN 3 1 52 PM '08

FILED

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES NALDER, as Guardian ad Litem for CHEYENNE NALDER, a minor.

Plaintiffs,

vs.

GARY LEWIS, and DOES I through V, inclusive

Defendants.

CASE NO: A549111
DEPT. NO: VI

JUDGMENT

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

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

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

DISTRICT JUDGE

Submitted by:
CHRISTENSEN LAW OFFICES, LLC.

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

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EXHIBIT "2"

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Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

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

AMENDED JUDGMENT

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

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

DATED this _____ day of March, 2018.

_____
District Judge

Submitted by:
STEPHENS GOURLEY & BYWATER

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STEPHENS GOURLEY & BYWATER
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Las Vegas, Nevada 89130
Attorneys for Plaintiff

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JMT
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Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

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

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AMENDED JUDGMENT

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

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

DATED this 26 day of March, 2018.

District Judge

Submitted by:
STEPHENS GOURLEY & BYWATER

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Las Vegas, Nevada 89130
Attorneys for Plaintiff

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EXHIBIT 3

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No. 13-17441

IN THE 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.

APPEAL
from the United States District Court
for the District of Nevada
Robert C. Jones, District Judge, Presiding
D.C. No. 2:09-cv-1348-RCJ-GWF

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RESPONSE TO APPELLANTS' MOTION TO SUPPLEMENT THE RECORD

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Attorneys for Appellee

In no sense is either judgment "consistent with NRS 11.190, 11.200, 11.250, 11.300 and *Mandlebaum v. Gregovich*, 24 Nev. 154, [50 P. 849] (Nev. 1897)" (ECF 67, at 4), which the Nevada Supreme Court expressly held did *not* save the 2008 judgment from expiration. (Majority opinion, at 4–6.) The new judgments have the same rotted foundation; they do not warrant reopening the appellate record for this Court to ignore the answer to the certified question.[5]

2. The New Judgments Were Not Pleaded as Damages

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Nalder and Lewis also miss the broader point: neither of these new "judgments" is the basis for plaintiffs' complaint in the district court; only the 2008 judgment is. (3 SER 700, ¶ 29.) And without a path to seek the relief in the complaint, no new grievance can make the complaint justiciable. *Arizonans for Official English v. Arizona*, 520

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[5] *See 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*, 168 P.3d 712, 719 (Nev. 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").

U.S. 43, 45 (1997).[6]

Nalder and Lewis can keep manufacturing new *Nalder v. Lewis* judgments based on the expired 2008 judgment until Judgment Day, but that should not keep this graying case in federal court until then. *See Bain v. Cal. Teachers Ass'n*, 891 F.3d 1206, 1216 (9th Cir. 2018) (decrying efforts to "hatch[] a new controversy on appeal, and without the benefit of development in the district court").[7] The consequential damages that Nalder and Lewis pleaded—arising from the 2008 default judgment—are extinguished as a matter of Nevada law.

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C. The Argument on Bad Faith Requires No Supplementation

The parties already briefed their positions on whether UAIC made a reasonable mistake or committed a bad-faith breach of the duty to defend. Allegations of post-appeal acts of bad faith—and the damages those acts allegedly caused—are not before this Court and do not change the Nevada Supreme Court's answers or merit supplementation.

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[6] Nalder and Lewis have not sought leave to amend the complaint. *Cf. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 446 (2009).

[7] The concern is not merely hypothetical. Nalder and Lewis concede that their *third* attempt to manufacture a judgment has not yet been successful. (ECF 67, Mot. at 6.)

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EXHIBIT 4

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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.

> 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"

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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

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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

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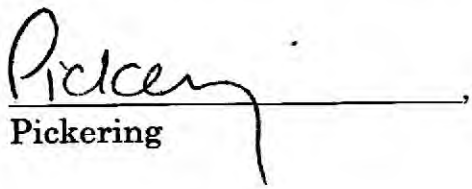
expected had UAIC performed under the contract. *See id.* at 1153 ("To allow [plaintiffs] to recover for expenses that they did not incur would be tantamount to giving them a windfall, resulting in punitive damages against [the defendant]."). Without more, the expired state court judgment cannot form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

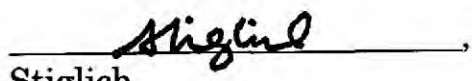
Accordingly, we answer the second certified question in the negative. In an action against an insurer for breach of the duty to defend its insured, a plaintiff cannot continue to seek consequential damages in the amount of a default judgment against the insured when the judgment against the insured was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

It is so ORDERED.

_____, C.J.
Gibbons



_____, J.
Pickering



_____, J.
Stiglich

_____, J.
Silver

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Boyle Leonard, P.A.
Matthew L. Sharp, Ltd.
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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