IN THE SUPREME COURT OF THE STATE OF NEVADA

CASE NO. 81510 consolidated with Case No. 81710

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CHEYENNE NALDER,
Appellant,
vs.

GARY LEWIS and
UNITED AUTOMOBILE
INSURANCE COMPANY,
Respondents,

GARY LEWIS and
CHEYENNE NALDER
Appellants,
vs.

UNITED AUTOMOBILE
INSURANCE COMPANY
Respondent

GARY LEWIS' REPLY BRIEF TO UAIC'S ANSWERING BRIEF

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I. INTRODUCTION

Respondent UAIC recites a fanciful case history as part of UAIC's delay, deny, defend, distract and distort course of conduct to bias the court.[1] UAIC's supplemental appendix was unnecessary and only served to waste this Court's time, misrepresent the case history and distract and prejudice this Court regarding the very narrow issue raised by this appeal, which is what costs, including attorney fees, should be awarded on the valid judgment entered in 2018 in the trial court below.

This is a very simple appeal, the focus of which is the ***mandatory*** language of NRS 12.130, which the lower court herein disregarded. The plethora of other issues and voluminous historical misrepresentations[2] presented by UAIC are the

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[1] Though irrelevant to the issues before the court, rather than allow UAIC's misrepresentations (which violate NRAP 38) that Lewis was adverse to Nalder in either the Ninth Circuit appeal or the certified questions before the Nevada Supreme Court to go unchallenged, please see the corrected statement of facts below.

[2] For example UAIC states "Nalder then sued...UAIC" (See Answering Brief, Statement of "Facts" at page 3, paragraph C. This misquotes and mischaracterizes *Nalder v. United Auto. Ins. Co.*, 878 F.3d 754, 756 (9th Cir. 2017). The *actual* quote is: "**Nalder and Lewis** then filed the instant suit against UAIC in state court, which UAIC removed to federal court." This is not an innocent or irrelevant error, but rather a calculated misrepresentation. UAIC's recitation is designed to confuse the Court regarding Nalder and Lewis. Lewis and Nalder were not adverse to each other in the Ninth Circuit appeal and the Nevada Supreme Court's answers to certified questions. Therefore, no issues regarding statute of limitations or tolling as between them were part of the record on appeal, or could be decided or waived between in that forum.

proverbial bright shiny objects that UAIC flashes to misdirect the Court's attention from the very attenuated issue this Court is being asked to decide. UAIC, without support, attacks Lewis and his independent counsel and Nalder and her separate counsel. Both were required because of UAIC's improper intervention (that was made for the ulterior purpose of delay.) The intervention failed substantively and procedurally. The 2018 judgment against Lewis is final, not appealable, valid and preclusive.[3] Nalder has been awarded some costs, but not attorney fees, on this valid judgment entered in 2018.[4] Lewis was not awarded any costs including attorney fees. (See Lewis' Appendix, bates Lewis 112-118).

II. FACTS

In 2007, Respondent UAIC set the claims in motion by failing to respond or communicate offers of settlement to its insured (Lewis). UAIC then took the dangerous route of denying coverage and refusing to defend its insured. Directly as a result of UAIC's failure to defend Lewis, Nalder obtained a judgment against Lewis. Only then did Lewis and Nalder join forces to pursue Lewis' insurer, UAIC, for all consequential damages, including the judgment. Lewis, the insured, was the main plaintiff in the action to establish coverage, for indemnity, for

[3] See Nalder's Appendix at APP 0023-0027.

[4] UAIC attempts to bootstrap the Nevada Supreme Court's refusal to decide the issues of tolling in 2019 and the Ninth Circuit's subsequent dismissal of the appeal (in 2020) as some commentary on the new 2018 judgment, which UAIC argued to the Ninth Circuit was not before it. (See UAIC Supplemental Appendix 000385-000387.)

payment on the judgment and for UAIC's acts occurring prior to 2009 breaching the duty of affirmative good faith and fair dealing and violating NRS 686A.310. In lieu of formal execution and as partial payment of the 2008 judgment against him, Lewis assigned proceeds (up to the judgment amount) to Nalder (the judgment creditor). This was not and is not an unusual or improper method to pursue these types of insurance claims. It is the standard approach required. (See *Allstate Insurance v. Miller, 125 Nev. Adv. Op. No. 28, 49760 (2009)*, 212 P.3d 318, 337 n.1 (Nev. 2009), where the insured sued his insurance company after judgment against him exceeding the policy limits was obtained using some of the proceeds to pay the judgment; Also see *Century Surety Co. v. Andrew*, 432 P.3d 180 (Nev. 2018), where the claimant sued the insurance company under an assignment that was given after the claimant obtained an excess judgment against the insured in the underlying case.)

The only difference in this situation is that UAIC not only breached duties prior to litigation, but UAIC also abused the litigation process by taking advantage of the insured as litigation continued. First, UAIC enticed the trial court to disregard the well accepted principle that ambiguities are to be construed in favor of coverage. UAIC originally used that argument to obtain dismissal of Lewis' action against UAIC. Lewis had to appeal and the federal trial court was reversed.

(See UAIC's Supplemental appendix at page 000032[5]). The trial court then reluctantly found coverage and that UAIC had breached the duty to defend, but limited the damage from the judgment against the insured to the policy limit of $15,000.[6]

On remand, the federal trial court refused to allow the issues of damages from the breach of the duty to defend, breach of the duty of affirmative good faith and fair dealing, or violation of NRS 686A.310 to go to a jury. This decision was contrary to Nevada law, and the opposite treatment by the federal trial court to a similarly situated Plaintiff in *Century Surety Co. v. Andrew, Id*. The trial court's sole reason for dismissal of claims for breach of the duty of affirmative good faith and fair dealing and violation of NRS 686A.310 was because the court reasoned that it granted the original dismissal regarding coverage, so UAIC's actions must have been reasonable (even though the coverage decision was not affirmed on appeal). This equates to basically holding that since the trial court erred regarding

[5] But, also see Lewis' Motion to Strike filed concurrently herewith because these UAIC's arguments go beyond the scope of this appeal.

[6] Respondent Lewis has not created another Appendix with voluminous documents irrelevant to the issue on Appeal; however, his task is made difficult in responding to UAIC's Answering Brief because it goes well beyond what is necessary for the Court's understanding. Lewis refers the Court to the Judgment in favor of Plaintiffs Nalder and Lewis in U.S. District Court, District of Nevada, 2:09-cv-01348, entered October 30, 2013, and other pleadings therein to substantiate facts asserted. Should the Court require additional or more detailed information regarding the statements made herein, Respondent Lewis requests additional time to provide the Court with a supplemental appendix. Lewis has also filed a Motion to Enlarge concurrently herewith.

damages originally, the insurance company is excused of all claims handling improprieties. This decision was then appealed again to the Ninth Circuit. Lewis used the $15,000 policy limit received from UAIC to pay part of the judgment to Nalder, pursuant to the assignment of proceeds agreement between them, thus extending the statute of limitations under NRS 11.200. The issues were briefed, argued and the Ninth Circuit certified the issue of the appropriate damages from a breach of the duty to defend to the Nevada Supreme Court. The same question was also before the Nevada Supreme Court in the *Century Surety Co. v. Andrew, Id.* case.

Three years into Nalder and Lewis' appeal regarding the amount of damages they were entitled to, however, and with nothing in the record on appeal regarding the status of the judgment, UAIC raised the issue of standing. UAIC alleged that Nalder had failed to renew the judgment against her co-Plaintiff, Lewis, and that it therefore had expired. Nalder and Lewis countered with a number of arguments, one of which was that three years into an appeal was not the appropriate place to raise a factual-based damages argument that was not brought below, nor supported by the record. Another argument was that the action against UAIC was an action on the judgment, eliminating the need for a renewal. Subsequently, a second question was certified to the Nevada Supreme Court: whether the action against UAIC was an action on the judgment (which was clearly brought within the

non-tolled six year statute of limitations).[7]

Concerned about the continued viability of her judgment against Lewis, and because Christensen Law represented both Nalder and Lewis (as co-plaintiffs against UAIC in that appeal), Nalder consulted other counsel. David Stephens, Esq. informed her that a renewal in Nevada would possibly be premature,[8] because the statute of limitations was subject to tolling and the time for renewal had not yet arrived, but a common law "action on the judgment" could be brought immediately. David Stephens first obtained a new amended judgment in 2018 based on the tolling statutes.[9] He then filed a second action -- an "action on the judgment."[10] Attorney Joshua M. Dietz filed a third action against Lewis in California, where Lewis resides, obtaining a judgment against Lewis there in 2018.[11]

UAIC sought intervention because it was trying to undo the first and third judgments and delay the second action on a judgment from going to judgment.

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[7] The claimed waiver resulted from just such a sentence, arguing that even if the statute of limitations runs, the action against UAIC was filed prior. UAIC's attempt to twist this into a factual waiver is pure sophistry.

[8] Nevada may rule as Arizona did: "ADOSH's sixteen-month-premature filing of its renewal affidavit was contrary to the plain language and purpose of the statute and therefore ineffective." *State ex rel Indus. Com'n. V. Galloway*, 224 Ariz. 325, 330 (Ariz. Ct. App. 2010).

[9] See Nalder Appendix, APP0011-0019 and APP0023-0027.

[10] See Eighth Judicial District Court case 18-77220, filed April 3, 2018, Complaint at page 3.

[11] See Superior Court of California, County of Los Angeles, case KS021378, Judgment entered July 24, 2018.

The first action, in which UAIC was unsuccessful and intervention was ultimately not allowed, is the action that gives rise to this appeal. The third action was the one in California and was defended on behalf of Lewis by counsel Arthur Willner of Leader, Berkon, Colao & Silverstein, who was chosen and paid for by UAIC. UAIC also attacked that judgment through its own California counsel, Samantha Barron of O'Hagan Meyer. UAIC's attack thereon was also unsuccessful, resulting in a valid 2018 California judgment against the insured, Lewis. The second "action on a judgment" case is now also on appeal.

Both of the valid and enforceable judgments were provided to the Ninth Circuit prior to ruling by way of a rule 28(j) letter[12] and a motion to supplement the appellate record.[13] UAIC argued to the Ninth Circuit that the judgments Nalder obtained in 2018 were not before it and the Ninth Circuit confirmed that the two 2018 judgments were not part of the appeal; and, so the later judgments could not possibly have been affected by the Ninth Circuit's dismissal of the appeal, as argued by UAIC.

III. DISCUSSION

UAIC admits in its responding brief that the purpose of UAIC's intervention in this case (that was already to judgment in 2018), was to prevent Nalder from

[12] See U.S. Court of Appeals for the Ninth Circuit, Docket 13-17441, ECF 52, dated January 29, 2019.
[13] See U.S. Court of Appeals for the Ninth Circuit, Docket 13-17441, ECF 67, dated November 14, 2019.

bringing the factual issues of the judgment's validity and the effect of the applicable tolling provisions between the appropriate parties and in the appropriate forum.[14] This original litigation, between Nalder and Lewis, with judicial officer David A. Jones, went to final judgment in 2018 and is final.[15] In addition to the mandatory provisions of NRS 12.130, this admission by UAIC makes the failure to award fees and costs herein under NRS 18.010 an abuse of discretion.

In 2018, UAIC, without Lewis' knowledge or consent, hired Randall Tindall, Esq., who filed pleadings on behalf of Lewis. Mr. Tindall did this at the direction of UAIC, without ever communicating with Lewis or his counsel. Tindall states, in an affidavit filed supporting his voluntary withdrawal from

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[14] "UAIC intervened to prevent Nalder from" having the factual issues determined in a Nalder v. Lewis trial court setting, as opposed to on appeal where Nalder and Lewis were not adverse to each other. See UAIC Answering Brief, page 1. This "running" and "evading" is Nalder hiring new counsel who does not have a conflict and bringing the appropriate action against Lewis in the appropriate jurisdictions the trial courts of Nevada and Utah. Neither Nalder nor Lewis could predict the lack of candor and good faith of UAIC with the Ninth Circuit, the Nevada Supreme Court, the California trial court nor the Nevada trial court.

[15] In an incredible lack of candor, UAIC failed to correct the now false affidavit it filed with the Ninth circuit, or correct the record on the certified question before the Nevada Supreme Court with regard to the status of the judgment. Rather, UAIC continues to argue that the Nevada Supreme Court's refusal to evaluate the factual issues and the Ninth Circuit's dismissal of the appeal, both of which post-dated the new Nevada and California judgments entered in 2018 as a result of the effect of the tolling statutes, somehow undermines the obvious validity of those judgments. The Nevada Supreme Court, in deciding the writ petitions however, disagrees: "We do not intend today to disturb that well-settled principle that intervention may not follow a final judgment, nor do we intend to undermine the finality and the preclusive effect of final judgments." *Nalder v. Eighth Judicial Dist. Court*, 462 P.3d 677, 682 (Nev. 2020).

representing Lewis, that "To be clear, when I commenced my representation of Mr. Lewis, I was aware of only one way to preserve a judgment--i.e., through the NRS 17.214 renewal process...I've now come to realize there are two ways to preserve a judgment--i.e., the statutory renewal process and an action on the judgment. I have no experience with the action on the judgment method of preserving a judgment." Tindall admits in his affidavit that attorney E. Breen Arntz was "exercising independent judgment on Mr. Lewis's behalf," which was contrary to the instructions Tindall "received from UAIC," putting him "in an irreconcilable conflict of interest."[16]

A. NRS 12.130 requires an award of "all costs incurred by the intervention."

NRS 12.130 provides that "If the claim of the party intervening is not

[16] This Motion to Withdraw, although part of the record in the underlying case, and filed on January 1, 2019, does not, in and of itself pertain to the attorneys fees sought under the statute herein. Accordingly, Lewis did not include it in his original Appendix. He does not feel it will aid the Court in determining the immediate issues in this appeal, however, it is relevant to dispute UAIC's overly broad defenses it has asserted in its Answering Brief. In a concurrently filed Motion to Strike and a Motion to Enlarge, Lewis requests the ability to supplement the record on appeal if the Court is inclined to delve deeper into these issues.

sustained, the party intervening **shall pay all costs**[17] incurred by the intervention." In this case, UAIC improperly intervened. (See Nalder Appendix Vol. III, APP0599-0615). The claim -- that the amended judgment obtained by Nalder through her new attorney David A. Stephens based on the tolling statutes should be set aside -- put forth by UAIC and its surrogate, Randall Tindall, Esq., was not sustained, but was rather rejected by the trial court. (See Respondent Lewis's Appendix Vol 2, RespLewis 0469-470.) The new 2018 amended judgment, which is the first of the three cases in which Nalder is actually adverse to Lewis, stands and is valid and damaging to Lewis.

Later, pursuant to a writ petition brought by Nalder, through her Counsel David A. Stephens, and Lewis, through his independent counsel E. Breen Arntz, the improper intervention for purposes of delay allowed by the trial court was also stricken as contrary to the long line of Nevada cases and the intervention statute

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[17] Costs as used in the insurance industry include attorney fees as part of "defense costs and legal expenses" *American Excess Insurance v. MGM Grand Hotels, Inc.*, 102 Nev. 601, 603 (Nev. 1987). This is distinguished from the meaning of costs elsewhere in the Nevada Revised Statutes. For example, costs as defined in NRS 18.005 for the purposes of NRS 18.010 to 18.150, or where "[t]he Legislature clearly differentiated between costs and attorney fees on two other occasions **within the same chapter**" *Gilman v. State Bd. of Vet. Med. Exam'rs*, 120 Nev. 263, 271 (Nev. 2004). (Emphasis added.) No such distinction is present in NRS 12.130. Since NRS 18.005 costs are always available to a prevailing party, a more narrow reading would render the statutory grant in NRS 12.130 meaningless. This is a result that is improper in statutory interpretation. "[S]tatutory interpretation should not render any part of a statute meaningless, and a statute's language "`should not be read to produce absurd or unreasonable results." *Leven v. Frey*, 123 Nev. 399, 405 (Nev. 2007).

that only allows intervention prior to trial.

NRS 12.130 applies to "all costs incurred," including attorney fees of both real parties in interest, Lewis and Nalder. In this instance, but for the wrongful intervention by UAIC, this action would have been over and both Nalder and Lewis would have incurred only minimal costs, including attorney fees. UAIC's insertion of attorney Randall Tindall into the litigation and then UAIC's own intervention on top of that, which had to be undone by the Supreme Court, dramatically increased the expense of litigation to the real parties in interest both in this case and in related cases.

UAIC offers the case of *Miller v. Jones*, 114 Nev. 1291, 1300, 970 P.2d 571, 577 (1998) in support of its argument that abuse of discretion is the standard of review. This is misguided. *Miller* did not involve statutory interpretation. This case raises the issue of interpretation of a statutory provision, which is a pure question of law and the reviewing court must evaluate de novo and strive to interpret harmoniously with the legislative intent.

> Statutory interpretation is a question of law that this court reviews de novo. We interpret statutes in accordance with their plain meaning and generally do not look beyond the plain language of the statute absent ambiguity. Furthermore, "it is the duty of this court, when possible, to interpret provisions within a common statutory scheme `harmoniously with one another in accordance with the general purpose of those statutes' and to avoid unreasonable or absurd

> results, thereby giving effect to the Legislature's intent."" *Torrealba v. Kesmetis*, 124 Nev. 95, 101 (Nev. 2008).

B. UAIC admits the numerous acts set forth by Lewis where UAIC acted in "bad faith," without reasonable grounds and to harass the insured which requires attorney fees under 18.010(2)(b).

UAIC, in its response to Lewis' responding brief and Nalder's opening brief, misstates the law and history and ignores much of the substance of the true issue on appeal herein. UAIC paints broad strokes and attempts to excuse any wrongful acts on its own part in litigation through the years by the 2013 finding that it had not acted in bad faith in originally denying coverage and failing to defend. This appeal, however, only concerns the denial of costs, including attorney fees, after UAIC's wrongful intervention was stricken in this underlying case, which was to judgment prior to the intervention.

UAIC's complacent failure to respond to the legal arguments asserted in the Opening brief of Nalder and Responding brief of Lewis is an admission that the arguments are valid. *Ozawa v. Vision Airlines, Inc.*, 216 P.3d 788 (Nev. 2009), citing *Bates v. Chronister,* 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (treating the failure to respond to an argument as a confession of error), and *Nationstar Mortgage, LLC. v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. Adv. Op. 91, 450 P.3d 641 (2017) (treating a party's failure to respond to an argument as a concession that the argument is meritorious.)

UAIC instead claims that "awarding attorney's fees in this case would have been an extraordinary sanction." (UAIC Response Brief at 26.) UAIC claims, without authority, that NRAP 38 governs the fees requested below, instead of NRS 18.010 or NRS 12.130. This leads UAIC to claim that fees could only be awarded if the intervention was "frivolous." While Lewis does not believe the appropriate standard is bad faith or frivolous, the sheer number of unopposed indicia of bad faith, lack of reasonable grounds and harassment all support a finding that UAIC's actions in this litigation have been in "bad faith" and "frivolous." UAIC's failure to rebut them acts as an admission.

UAIC then leaves the appellate standard and reiterates its prior citations to other states[18] that do not have a statutory scheme that requires intervention "prior to trial," thus demonstrating that UAIC has failed to learn anything from this Court's rejection of its improper litigation tactics.

C. UAIC misstates the rulings and effect of later rulings in the Nevada Supreme Court and the Ninth Circuit.

UAIC's delay tactics were not successful in stopping the first and third judgments from being entered against Lewis in 2018. This Court has ruled, in the Writ petition reversing UAIC's intervention, that "We do not intend today to disturb that well-settled principle that intervention may not follow a final judgment, nor do we intend to undermine the finality and the preclusive effect of

[18] See UAIC's Answering Brief at page 28, footnote 4.

final judgments." *Nalder v. Eighth Judicial Dist. Court*, 462 P.3d 677, 682 (Nev. 2020). The two final judgments entered in 2018 have preclusive effect as between Nalder and Lewis. Those judgments cannot be undermined by the later Ninth Circuit dismissal of the 2013 appeal because the two new judgments were not before that court. UAIC's constant referring back to the dismissed appeal and attempt to intertwine issues and cases is a deliberate attempt to have this Court misunderstand and misapply consequences for UAIC's actions.

This court is well aware that it did not rule on any statute of limitations, tolling statutes or timing of renewal, but rather only answered the question posed by certification, which assumed the time for renewal had passed (because the affidavit of UAIC's counsel said it had). The subsequent rulings of this court's answer to certified questions and the Ninth Circuit's dismissal of the 2013 appeal as between differently aligned parties cannot undermine the preclusive effect of the two 2018 judgments. Additionally, all of these ancillary arguments brought up by UAIC in response to the limited issue raised on appeal herein are designed only to muddy the waters and bias the Court and should be rejected and treated as further lack of reasonable basis, bad faith, frivolous and harassment of the insured.

IV. CONCLUSION

This Court should remand the case and instruct the District Court to hold an evidentiary hearing on the appropriate award of costs, including attorney fees, to

Nalder and Lewis under 18.010 and NRS 12.130. Because of the improper intervention of UAIC, the other parties were compelled to participate in the ongoing litigation of this case unnecessarily.

Dated this 15th day of October, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared proportionally spaced using 14 point double spaced Times New Roman font.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because excluding the parts exempted, it does not exceed 15 pages.

Finally, I hereby certify that I have read this appellate brief and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including NRAP 28(e)(1) which requires each assertion regarding matters in the record to be supported by a reference to the page and volume number, if any of the transcript or appendix where the matter relied upon may be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the NRAP.

Dated this 15th day of October, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that service of Gary Lewis' Reply Brief was made this 15th day of October, 2021, by electronic service through the Nevada Supreme Court's electronic filing system to all registered users.

_____/s/Thomas Christensen_____
Employee of Christensen Law Offices