IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 81710

CHEYENNE NALDER

Appellant,

vs.

GARY LEWIS and UNITED AUTOMOBILE INSURANCE COMPANY,

Respondents.

ON APPEAL FROM
THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

District Court Case No. 07A549111

CHEYENNE NALDER'S REPLY BRIEF

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DISCLOSURE STATEMENT
PURSUANT TO NRAP 26.1

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

Appellant Cheyenne Nalder is an individual. Her true name is Cheyenne Nalder.

During the course of these proceedings, Cheyenne Nalder has been represented by the following law firms: Stephens Law Offices, which is her current counsel, Stephens Gourley & Bywater, (a predecessor to Stephens Law Offices), and Christensen Law Offices, through David F. Sampson, Esq., as her original counsel.

Her current attorney is David A. Stephens, Esq., of Stephens Law Offices.

Dated this _____ day of October, 2021.

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I. NALDER MAY FILE AN ACTION ON A JUDGMENT

During these proceedings United Automobile Insurance Company, ("UAIC"), has consistently attempted to conflate the renewal of a judgment and an action on a judgment.

While the final results of the two legal options are similar, the actions to get to the result are very distinct.

NRS 17.214 states that a judgment creditor "may" renew its judgment by following the process laid out in NRS 17.214. It does not say "shall" renew by following that process.

NRS 11.190(1)(a) allows a judgment creditor to bring an action on a judgment or a renewal of a judgment to enforce it. This option is distinct from a renewal, but it is an allowed form of enforcing a judgment under NRS 11.190(1)(a). *See. Davidson v. Davidson*, 132 Nev. Ad, Op. 71, 382 P.3d 880 (2016).

It is essential to distinguish between the two options for handling judgments in analyzing this case.

II. THE TRIAL COURT USED AN IMPROPER LEGAL STANDARD TO DENY CHEYENNE'S MOTION FOR ATTORNEY'S FEES

The district court denied Cheyenne's motion for fees, finding that UAIC did not intervene in bad faith. However, the standard for determining a motion for attorney's fees under NRS 18.010(2)(b) is whether the pleading was brought "without reasonable ground."

Statutory interpretations are reviewed on appeal de novo. *County of Clark v. Upchurch*, 114 Nev. 749, 753, 961 P.2d 754, 757 (1998). Thus, this Court must review the district court's interpretation of NRS 18.010(2)(b) de novo, *Miller v. Jones*, 114 Nev. 1291, 1300, 970 P.2d 571, 577 (1998), and then review its decision to deny attorney's fees for abuse of discretion. .

This was the procedure followed in *Marrone v. Kaczmarek*, 125 Nev. 1059, 281 P.3d 1198 (2009). In *Marrone* the appellant appealed the decision of the trial court denying her request for a new trial. The appeal was based on judicial misconduct. This Court stated:

> "While the denial of a new trial motion based on judicial misconduct is reviewed for an abuse of discretion, whether judicial misconduct occurred at all is subject to de novo review."

Id. 281 P.3d at 1198.

A similar procedure should be followed here in looking at the trial court's interpretation of the statute. Interpreting the statute to require bad faith in the pleading, rather than being brought without reasonable ground cannot withstand judicial review.

III. THE TRIAL COURT ERRED IN FINDING UAIC DID NOT ACT IN BAD FAITH AND DENYING THE INTERVENTION AND ATTORNEY'S FEES UNDER NRS 18.010(2)(b)

A. UAIC'S INTERVENTION WAS WITHOUT REASONABLE GROUND, AND IN BAD FAITH

UAIC's intervention in this case was without reasonable ground and was in bad faith as is shown below.

In its answering brief, UAIC makes several arguments to justify its motion to intervene in this case even though a judgment had been entered by the court prior to the time UAIC filed its motion to intervene.[1] However, those arguments are not necessarily reflected in UAIC's motion to intervene in this matter.

In its motion to intervene, UAIC failed to even mention any of the case law in Nevada establishing that a party cannot intervene in a case if judgment has been entered. *See, Lopez v. Merit Insurance Co.*, 109 Nev. 553, 556, 853 P.2d 1266,

[1] The initial judgment was entered in 2008. The amended judgment was entered on March 28, 2019, (App. Vol. I APP0020-0022, which was months before UAIC filed its motion to intervene. (App. Vol. I APP0028-0093).

1268 (1993).

UAIC's motion mentioned NRS 12.130, in passing, stating:

> "Intervention is governed by NRCP 24 and NRS 12.130. Although strikingly similar, NRCP 24 requires 'timely application' to intervene whereas NRS 12.130 merely requires intervention at the district court level."

(App. Vol. I. App0033). The UAIC motion does not mention that NRS 12.130(1)(a) allows intervention only "before trial." If a judgment has been entered, the intervention cannot be "before trial."

UAIC argued that intervention was timely because the amended judgment had recently been entered by the court and that Cheyenne Nalder, ("Cheyenne"), had filed an ex parte motion to amend the judgment.

Cheyenne filed her motion to amend ex parte because no other party had ever made an appearance in this case, neither Gary Lewis, ("Lewis"), nor UAIC on behalf of Lewis. (APP. Vol. I, APP0005-0006). Thus there was no party on whom Cheyenne could have served the motion to amend and thus she filed the motion to amend ex parte. The motion provided points and authorities to justify why the amended judgment should be entered. (APP. Vol. I, APP0011-0019).

UAIC seems to have wanted the District Court to believe that Cheyenne, by

filing an ex parte motion to amend the judgment, was making a sneak attack on UAIC and Lewis. In fact, she had no duty to serve anyone in that no one had made an appearance in that case and the judgment had been entered and noticed years before her motion to amend the judgment was filed. *See*, EF which was in effect in 2018 at the time the motion to amend was filed.[2]

UAIC's motion to intervene misrepresented the content of the letter that Mr. Christensen sent to UAIC's counsel after UAIC's counsel had contacted Lewis directly, rather than Mr. Christensen, about UAIC defending Lewis. (APP. Vol. I, APP0032). At that time, Lewis was an adversary against UAIC in a claims handling case. (App. Vol. I, APP0079, 0081-0082). UAIC argued that Mr. Christensen was prohibiting them from taking any action to protect Lewis from Cheyenne. However, in the letter Mr. Christensen made two requests. First he requested that UAIC contact him as Lewis' attorney, rather than contacting Lewis. The letter reads:

> "I repeat, please do not take any actions, including requesting more time or filing anything on behalf of Mr. Lewis without first getting authority from Mr. Lewis through me. Please only communicate

[2] NRCP 5(a)(2) currently in effect contains similar language regarding the duty to serve other parties.

through this office with Mr. Lewis."

(APP. Vol. I, APP0081).

This request is 100% within the Rules of Professional Conduct which require that if an attorney is aware that the party they are contacting is represented by counsel the contact must be made to the attorney rather than the party. See Nevada Rules of Professional Conduct, Rule 4.2.

Mr. Christensen's request is not a blanket prohibition against UAIC representing Lewis. It simply requests that UAIC's contacts with Lewis go through Mr. Christensen's office, which is how UAIC should have handled it anyway.

Second, Mr. Christensen asked UAIC's counsel to provide information about how Lewis would benefit from UAIC's representation. The letter states:

> "Mr. Lewis does not wish you to file any motions until and unless he is convinced that they will benefit Mr. Lewis -- not harm him and benefit UAIC."

(App. Vol. I, App0082).

However, UAIC never provided any reasons to Mr. Christensen about how its representation would benefit Lewis. Rather, UAIC claimed that it had not choice but to intervene, and argued that Lewis was not letting UAIC represent him. (App. Vol. I App0028-0093). Neither the motion nor the reply explained how UAIC's

representation would benefit Lewis. (App. Vol. I, App0028-0093 and 0100-0111).

Lewis had a great deal at risk. UAIC was arguing to the 9th Circuit that Cheyenne's judgment was not valid so there was no claims handling case. If the judgment was valid, but the 9th circuit dismissed Lewis' claims handling case, he would be left holding the bag as to Cheyenne's judgment, and with no claim against his insurance carrier. That risk justifies Lewis being reticent about cooperating with UAIC, without some information from UAIC as to how its representation would benefit him.

Additionally the motion to intervene stated

> "Despite the apparent contradiction of counsel representing both the judgment-creditor and judgment-debtor in the same action, it is also clear that Mr. Christensen's letter has caused the need for UAIC to intervene in the present action and, this Motion follows."

(APP. Vol. I App0028 at App0032).

Here there are two misstatements of fact. First, Mr. Christensen only represented Cheyenne and Lewis in their claims handling case against UAIC. He did not represent Cheyenne in her new action against Lewis or the motion to amend the original judgment.

In its reply UAIC argues that Cheyenne is attempting a fraud on the court.

Apparently the fraud on the court was UAIC's claim that Mr. Christensen represents Cheyenne and Lewis in this case. While Mr. Christensen does represent Cheyenne and Lewis in their claims handling case against UAIC, he did not ever represent Lewis in this case. He also did not represent Cheyenne in this case at that time. His firm, through an associate, David Sampson, Esq., represented Cheyenne until the original judgment was obtained. It is Cheyenne's understanding that when Mr. Sampson left Mr. Christensen's law firm, he took the original case with him. David A. Stephens, Esq., who filed the motion to amend the judgment and has represented Cheyenne since then in this matter, has never been affiliated with Mr. Christensen's law firm.

UAIC, from the beginning, has attempted to portray itself as the righteous party and that Lewis and Nalder somehow are dirty and cannot be trusted. However, that is not the case. It is true Lewis and Nalder, by way of assignment of rights, filed a lawsuit against UAIC because UAIC failed to defend Lewis in the original lawsuit. Such an arrangement is common in that Nevada does not allow for third party bad faith claims, and thus Cheyenne had no direct rights against UAIC for its failure to defend Lewis. See, *Gunny v. Allstate Insurance Co.*, 108 Nev. 344, 830 P.2d 1355 (1992).

An example of such "righteous indignation" appears in UAIC's Answering

Brief when UAIC alleges that Cheyenne and Lewis conspired to obtain a judgment against Lewis when a stay was in place in the 2018 action filed by Cheyenne against Lewis. There are several problems with this argument, especially in this case.

One problem is that UAIC did not present any evidence in that case that Cheyenne and Lewis had conspired. UAIC just argues a claim of conspiracy.

The second problem is that the offer to settle was not made in this case.

A third problem is that the oral stay had nothing to do with UAIC's intervention in this case. It is just a random reference to another matter which UAIC used to attempt to portray Cheyenne and Lewis in a bad light.

A fourth problem is that the argument completely misrepresents what occurred. No written stay from the January 8, 2019 hearing had been entered by the court at the time Cheyenne made an offer to settle the case to Lewis, which offer Lewis subsequently accepted.[3] There was an oral stay from the Honorable Eric Johnson. However the oral stay did not clearly indicate that all matters, including settlement, were stayed, and in fact Judge Johnson held a hearing on

[3] With this reference Cheyenne is left with the difficult problem of proving a negative, i.e., that there was no written stay order at that time. A written stay order arising from the January 8, 2019 hearing was entered by the court on February 14, 2019. (Reply App. APPRPLY0001-0006). A second stay order arising out of the January 23, 2019 hearing was also entered on February 14, 2019. (Reply App. APPRPLY0007-0011)

Cheyenne's motion for summary judgment in that case on January 23, 2019, after the Judge orally entered a stay, on January 8, 2019. At the January 23, 2019, hearing on Cheyenne's motion for summary judgment, Judge Johnson again entered a stay staying further litigation of the underlying case pending the decision on the appeal then pending before this Court Circuit arising from a certified question to this Court form the Ninth Circuit. However the Judge did not indicate that the case was stayed for purposes of settlement or any other purposes, such as discovery. When the written stay orders were entered, neither of them stayed anything, including settlement, other than the hearings on certain pending motions. (Reply App. APPRPLY0001-0006, and APPRPLY0007-0011).

In the original case and the 2018 case Cheyenne did not sue UAIC. She had no rights against UAIC, and she still has no rights against UAIC. She has rights against Lewis by virtue of her judgment against him. The fact she was attempting to resolve her portion of the litigation and settle with Lewis cannot somehow be found to be a "dirty action." She had, and has, every right to proceed as she thinks best on her case against Lewis, including settling. In fact, her offer to settle was for the face amount of the judgment and accrued interest. The offer did not include all of the costs and attorney's fees that she had incurred since she amended her judgment. That offer was provided benefits to Lewis.

If in fact UAIC believed that the offer to accept judgment and the acceptance of that offer of judgment was in fact an unethical or dirty action on part of Cheyenne or Lewis, UAIC certainly has remedies against its insured to be certain that it does not have to pay that settlement.

In its motion to intervene UAIC then argues that the default judgment was expired and did not bar intervention. However, if UAIC really believed that the district court's decision amending the judgment was void because the original judgment had expired, there was no need for UAIC to intervene in the original law suit at all. It has certainly argued in the new case filed by Cheyenne against Lewis to enforce the judgment against Lewis that the original judgment is expired and therefore Cheyenne cannot enforce it. UAIC had no reason at all to intervene in the original case, particularly given its belief that the default judgment had expired and therefore was void and unenforceable.

In UAIC's reply in support of its motion to intervene it argues that NRS 11.190(1)(a) states that the time to file an action on a judgment, unless it is renewed is six years. This misstates NRS 11.190(1)(a) which allows actions on a judgment or a renewed judgment.

UAIC also argues the judgment was not renewed by August 26, 2014 and therefore it had expired. This is another misstatement of law. NRS 17.214 does

not require renewal. Renewal is an option. Additionally, there are tolling statutes, such as Cheyenne's minority, and a payment on the judgment which extend the time to renew or enforce the judgment. (See, NRS 11.250, and NRS 11.200).

It was UAIC which filed a motion to intervene in both of the underlying actions and failed to serve Cheyenne's attorney with either motion.[4] In fact, in UAIC's reply in support of its motion to intervene it argued that Cheyenne's opposition to the motion to intervene should be stricken because it was filed late, even though UAIC had no proof of service of its motion. When Cheyenne's attorney learned of the motions to intervene, he requested an extension of time to file a response, which counsel for UAIC refused. Thus he had to file a quick response without having full opportunity to research and explain the law on intervention from Cheyenne's perspective.

A review of UAIC's motion to intervene and reply shows that UAIC intervened without ground and in bad faith. Those documents show an effort to avoid the applicable law in Nevada and cast aspersions on Cheyenne and Lewis in an effort to obtain an intervention that the law does not support.

[4] See, (App. Vol I, p. App0093), for a copy of the Certificate of Service. No type of service is marked. In fairness, UAIC maintains that the motion was served, but the certificate of service does not reflect service and Counsel for Nalder maintains that he did not receive the motion. (App. Vol I APP0094).

B. THE BRUNZELL FACTORS FOR ATTORNEY'S FEES

UAIC, in its answering brief, argues that Cheyenne did not meet the *Brunzell* factors to allow the district court to analyze her request for attorney's fees. See, *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). *Brunzell* sets forth the factors a court should consider in determining the amount of attorney's fees to be awarded. However, the Honorable Eric Johnson never analyzed the *Brunzell* factors. He simply held that Cheyenne was not entitled to an award of attorney's fees.[5]

Cheyenne provided evidence in her motion for fees to meet the *Brunzell* factors. (See, App. Vol. IV APP0854 at APP0858 to 0861).

The hours claimed for Cheyenne were specifically noted to be just those fees incurred relative to legal work on the original case. (App. Vol. IV APP0870 to 0872). Cheyenne's attorney also removed from his calculation all time where he could not determine whether the time pertained to the original case or the second case, or both cases. (App. Vol. IV APP0870 to 0872). Cheyenne was not claiming attorney's fees for all of the time her attorney has spent on both cases. In fact, she was avoiding making such a claim.

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[5] Cheyenne is not arguing that Judge Johnson should have examined the *Brunzell* factors. Once he decided that Cheyenne was not entitled to an award of attorney's fees, it would have been a waste of time for him to analyze the *Brunzell* factors as to the amount that he would award if he were going to award her attorney's fees.

UAIC argues the Cheyenne failed to provide support for her request for fees. She was being represented under a contingency fee agreement. However, in her motion, the number of hours working for Cheyenne was set forth, although the hours were not itemized. (App. Vol. IV APP0871).

Additionally, the case of *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. Ad. Op. 67, 429 P.3d 664, 670 (Nev. App. 2018), holds that an attorney does not have to keep track of his or her hours in order to file a motion for attorney's fees and recover attorney's fees.

Here, Judge Johnson simply held that Cheyenne was not entitled to attorney's fees so he did not need to analyze the *Brunzell* factors for determining at the amount of attorney's fees that should be awarded. Thus, for purposes of this Reply Cheyenne is not going to analyze the *Brunzell* factors because Judge Johnson never got to the point of looking at the amount of fees that Cheyenne should be awarded.

IV. THE TRIAL COURT ERRED IN DENYING CHEYENNE'S MOTION FOR ATTORNEY'S FEES UNDER NRS 12.130

UAIC correctly cites the general rule as to awards of attorney's fee's in the United States. That rule states:

> "It has been a consistent rule throughout the United States that a litigant has no inherent right to have his attorneys' fees paid by his

opponent or opponents. Such an item is not recoverable in the ordinary case as damages, nor as costs, and hence is held not allowable in the absence of some provision for its allowance either in a statute or rule of court, or some contractual provision or stipulation."

Smith v. Crown Financial Services, 111 Nev. 277, 281, 890 P.2d 769, 771 (1995).

Cheyenne is not asking the Court to ignore this general rule. Rather, she is arguing that NRS 12.130 is a statute that provides for recovery of attorney's fees.

While NRS 12.130 talks in terms of "costs" rather than specifically mentioning fees, the statute does not make sense if "costs" is not construed more broadly than just legal costs as set forth in NRS 18.005 and 18.020. If a party prevails on a case against an intervenor, that party is already entitled to recover costs under NRS 18.020. Based on the language of NRS 12.130, the Legislature wanted an intervenor to pay something for its intervention, if it loses. Thus, "costs" must be more than NRS 18.005 costs, or the Legislature was giving the prevailing party the same thing to which that party was already allowed to recover irrespective of intervention. That would not make any sense.

CONCLUSION

There is a maxim in the law that he who enjoys the benefit must also accept

the burden.[6] That must apply to UAIC in this case. UAIC sought the benefits of intervention. It must now bear the burdens of intervention.

Dated this 15th day of October, 2021.

S/ David A Stephens

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[6] The maxim comes from the latin "quisensit commodum debet et sentire onus."

CERTIFICATE OF COMPLIANCE

1. 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:

[X] This brief has been prepared in a proportionally spaced typeface using Wordperfect 12 in Times New Roman font size 14; or

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 3,46 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text; or

[ ] Does not exceed ___ pages.

3. 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, in particular NRAP 28(e)(1), which requires every assertion in the brief 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 on is to 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 Nevada Rules of Appellate Procedure.

Dated this 15th day of October, 2021.

S/ David A Stephens

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CERTIFICATE OF SERVICE

Pursuant to NRAP 21(a)(1) and NRAP 25(c)(1), I hereby certify that I am over the age of eighteen (18), I am an employee of Stephens Law Offices and on the 19th day of October, 2021, I served a true copy of the foregoing **CHEYENNE NALDER'S REPLY BRIEF** via the Nevada Supreme Court E-Filing System, to the following parties.

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