

Case Nos. 81510 & 81710

In the Supreme Court of Nevada

GARY LEWIS,

Appellant,

*vs.*

CHEYENNE NALDER; and UNITED  
AUTOMOBILE INSURANCE COMPANY,

Respondents.

No. 81510

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CHEYENNE NALDER,

Appellant,

*vs.*

GARY LEWIS; and UNITED  
AUTOMOBILE INSURANCE COMPANY,

Respondents.

No. 81710

**UNITED AUTOMOBILE INSURANCE COMPANY’S COMBINED  
RESPONSE TO APPELLANT GARY LEWIS’S MOTION TO STRIKE  
AND MOTION TO ENLARGE THE RECORD**

*and*

**ALTERNATIVE COUNTERMOTION FOR JUDICIAL NOTICE**

In these appeals from orders denying appellants’ motions for attorney’s fees, appellant Gary Lewis has asked this Court to strike the entirety of respondent United Automobile Insurance Company’s appendix. He has also filed a motion to “enlarge the record” with a series of documents, all but one of which were not in the district-court

record below.

This Court should deny the motion to strike. UAIC admits that due to clerical error, UAIC inadvertently included its opposition brief from the wrong case. UAIC is concurrently filing a corrected appendix to substitute the opposition from the case below. The remaining documents in UAIC's appendix are part of the district-court record below and should not be stricken.<sup>1</sup>

As UAIC is not asking this Court to “expand” the record, there is no need for Lewis to enlarge the record, either. Lewis did not file a motion to take judicial notice of these other documents. But even if he had, he has not demonstrated how these documents, filed before the relevant resolutions in their respective cases, would aid rather than confuse this Court. Depending on how Lewis characterizes these documents, UAIC would likely need to address their impact in a surreply.

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<sup>1</sup> Alternatively, as discussed below, this Court should take judicial notice of this Court's order answering certified questions.

## **OPPOSITION TO MOTION TO STRIKE**

### **A. The Appendix Will Be Corrected to Reflect the Briefing on the Relevant Order on Appeal**

On one point, Lewis is correct, and UAIC is filing the appropriate motion to correct the appendix.

#### ***1. Lewis Files Nearly Identical Motions in Two Cases***

In *Nalder v. Eighth Judicial Dist. Court*, 136 Nev. 200, 462 P.3d 677 (2020), Lewis and appellant Cheyenne Nalder challenged several district-court orders challenging UAIC's intervention in two cases and their consolidation, and the vacatur of a judgment entered in violation of the district court's stay. This Court granted the petitions in part and denied them in part, vacating UAIC's intervention in one case (and consequently de-consolidating the two cases), while upholding intervention in the other, and upholding the order vacating the judgment.

Lewis filed parallel, nearly identical motions for attorney's fees in both underlying cases, No. 07A549111 (the 2007 action) and No. A-18-772220-C (the 2018 action). And UAIC filed substantially similar oppositions in both cases, too. When Lewis appealed from the denial of

fees in the 2007 action, his appendix included his motion but not the opposition or reply briefs. (Lewis Appellant's App. 84, Dkt No. 81510, Doc. 2021-11341.)

## ***2. UAIC Mistakenly Includes the Wrong Opposition***

UAIC intended in its respondent's appendix to include the missing opposition and reply from the 2007 action. The reply at 2 R. App. 363 is correct. Inadvertently, however, UAIC included the opposition from the 2018 action, filed June 20, 2020 (at 1 R. App. 65), instead of the opposition from the 2007 action, filed June 26, 2020.

## ***3. UAIC Is Seeking to Correct the Appendix***

UAIC is concurrently filing a motion to correct the appendix, substituting the opposition in the 2007 action for the opposition in the 2018 action.

This Court should grant that motion, alleviating Lewis's concern.

## **B. It Was Appropriate to Include Lewis's Reply Brief**

There is no question that Lewis's reply brief—on the very motion that constitutes the basis for his appeal—is part of the record below and appropriate to include in the appendix. NRAP 30(a)(4). It is unclear why Lewis would oppose the Court's consideration of his own

arguments below.

**C. The Court Can Consider its Order Answering Certified Questions, Whether as Part of the Record or via Judicial Notice**

**1. *The Appendix Includes a Brief that Attaches this Court's Order Answering Certified Questions***

The final component of UAIC's respondent's appendix is UAIC's "Supplemental Brief and Cross-Motion for Summary Judgment." (1 R. App. 1.) UAIC's answering brief cites to just one exhibit, this Court's order answering the Ninth Circuit's certified questions in the related appeal involving these same parties. (1 R. App. 56-64, cited at RAB 3, 9.) That order, of course, is also publicly available at *Nalder ex rel. Nalder v. United Auto. Ins. Co.*, No. 70504, 449 P.3d 1268, 2019 WL 5260073 (Nev. Sept. 20, 2019), and through this Court's public portal, at Docket No. 70504.

**2. *The Brief and its Exhibits Are Part of the Record***

For what it's worth, the brief that attaches this Court's order was not stricken from the district court record. It was, as Lewis notes, filed in the 2007 action while it was still consolidated with the 2018 action. In vacating the order "granting UAIC leave to intervene in Case No.

07A549111,” this Court directed the district court “to strike any *related* subsequent pleadings and orders.” *Nalder v. Eighth Judicial Dist. Court*, 136 Nev. 200, 462 P.3d 677 (2020) (emphasis added). The district court entered a similar order: “the Clerk’s Office is directed to vacate the order granting UAIC leave to intervene in Case No. 074549111 and to strike any *related* subsequent pleadings and orders.” (Ex. A, 5/12/20 Order, at 1 (emphasis added).) But perhaps because this brief is unrelated to the question of intervention, the clerk did not strike this brief or its exhibits. It remains in the record in the 2007 action, and “bear[s] the file-stamp of the district court clerk” as required under NRAP 30(c)(1).

Regardless of the reason, Lewis has not challenged in this appeal the clerk’s or the court’s failure to strike all “related subsequent pleadings.” Lewis should have raised that issue in the district court and, if he disagreed with the district court’s resolution, appealed that question to this Court. Without proper preservation and an appeal, the question of whether UAIC’s brief *should* have been stricken is not before this Court.

**3.    *If this Court Strikes the Brief, It Should Still  
Take Judicial Notice of the Facts in the Order  
Answering the Certified Questions***

Alternatively, this Court may take judicial notice of records in another case that bear a “close relationship” to this case. *Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981). The *fact* of these related proceedings is accurate and undisputed. *See* NRS 47.130(2). Taking judicial notice is appropriate in these circumstances. *See Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009); *Lindsey v. Lindsey*, 200 So. 2d 643, 643–44 (Fla. Dist. Ct. App. 1967); *Commonwealth ex rel. Branch v. Branch*, 104 A.2d 183, 184–85 (Pa. Super. Ct. 1954); *State ex rel. LeCompte v. Keckler*, 628 N.W.2d 749, 754 & n.7 (S.D. 2001).

Here, there is no reason for this Court to close its eyes to its prior involvement in this convoluted litigation. Even if this Court were *sua sponte* to direct the district court to strike UAIC’s brief and its exhibits, that would not prohibit this Court from taking judicial notice of the anodyne facts for which they were included: that this Court answered certified questions from the Ninth Circuit relevant to UAIC’s liability to Lewis. Indeed, the relevant answers are already present in Nalder’s

own appendix, which includes the Ninth Circuit’s ultimate order dismissing Nalder’s and Lewis’s appeal, and which in turn refers to and quotes from this Court’s order. (5 App. 884-86.)

In fact, UAIC’s brief already includes the Westlaw citation to this Court’s order, in addition to the exhibit in the appendix. (RAB 9.)

### **OPPOSITION TO MOTION TO ENLARGE THE RECORD**

Lewis’s motion to enlarge the record appears to be an alternative request, “[i]f . . . the Court expands the record and allows UAIC to cloud the record with the documents submitted.” (Mot. to Enlarge, at 3.)

Because, as discussed, UAIC does not seek to “expand” the district court record at all, there is no need for Lewis to do so, either. With the correction to UAIC’s appendix, all of the documents for this Court’s consideration will be documents filed in the underlying district court action, or at least judicially noticeable.

Lewis, in contrast, seeks to append a slew of new documents not in the record below.<sup>2</sup> It is unclear for what purpose Lewis intends to

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<sup>2</sup> The one exception is a motion to withdraw as counsel. (See Mot. to Enlarge, at 4.) But Lewis did not need to file a “motion to enlarge” to include this in the appendix. If that motion were truly “necessary to reply to respondent’s position on appeal,” Lewis could have simply filed a reply appendix in conformity with NRAP 30(b)(5).



include these new documents—especially as several of the documents are pleadings or briefs that do not provide the context of their resolution in final judgments in the state and federal courts. Depending on how Lewis characterizes these filings, UAIC may need to file a surreply that includes the actual judgments.

But as Lewis seems to concede, all of that strays from “the narrow issue on appeal”—Lewis’s entitlement to attorney’s fees following this Court’s opinion granting and denying in part his writ petitions. Rather than lose that focus, this Court should deny the motion.

Dated this 24th day of December, 2021.

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## CERTIFICATE OF SERVICE

I certify that on December 24, 2021, I submitted the foregoing “United Automobile Insurance Company’s Combined Response to Appellant Gary Lewis’s Motion to Strike and Motion to Enlarge the Record” for filing *via* the Court’s eFlex electronic filing system. Electronic notification will be sent to the following and all registered users:

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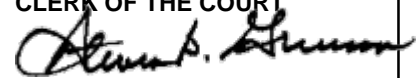
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**EXHIBIT A**

**EXHIBIT A**



1 ORDR

2 EIGHTH JUDICIAL DISTRICT COURT

3 CLARK COUNTY, NEVADA

4 JAMES NALDER,

Case No. 07A549111

5 Plaintiff,

Case No. A-18-772220-C

6 vs.

Dept. No. XX

7 GARY LEWIS,

8 Defendants.

9 **ORDER**

10 On October 19, 2018, an order was entered granting Intervenor United Automobile  
11 Insurance Company's Motion to Intervene in Case No. 07A549111 by Judge David Jones. On  
12 December 27, 2018, an order was entered granting Intervenor's Motion to Consolidate Case No. A-  
13 18-772220-C and Case No. 07A549111 by Judge Eric Johnson. Cheyenne Nalder and Gary Lewis  
14 filed a petition for a writ of mandamus regarding the orders granting UAIC's intervention in Case  
15 No. A-18-772220-C and Case No. 07A549111. Additionally, Gary Lewis filed a petition for a writ  
16 of mandamus regarding the order granting consolidation of Case No. A-18-772220-C and Case No.  
17 07A549111. On April 30, 2020, the Nevada Supreme Court entered an order finding that the  
18 district court erred in granting intervention in Case No. 07A549111 and Case No. A-18-772220-C  
and Case No. 07A549111 were improperly consolidated.

19 The Nevada Supreme Court ordered the district court to vacate its order granting UAIC  
20 leave to intervene in Case No. 07A549111 and to strike any related subsequent pleadings and  
21 orders. The Nevada Supreme Court also ordered the district court to vacate its order granting  
22 UAIC's motion to consolidate Case No. A-18-772220-C and Case No. 07A549111 and to reassign  
23 Case No. A-18-772220-C to Judge Kephart.

24 Accordingly, the Clerk's Office is directed to vacate the order granting UAIC leave to  
intervene in Case No. 07A549111 and to strike any related subsequent pleadings and orders.

1 Additionally, the Clerk's office is directed vacate the order granting UAIC's motion to consolidate  
2 Case No. A-18-772220-C and Case No. 07A549111, and to reassign Case No. A-18-772220-C to  
3 Judge Kephart.

4 DATED this 12 day of April, 2020.



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ERIC JOHNSON  
DISTRICT COURT JUDGE