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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES NALDER, Guardian Ad Litem on behalf of Cheyanne Nalder; GARY LEWIS, individually, Plaintiffs-Appellants, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant-Appellee.	No. 21-16283 D.C. No. 2:09-cv-01348-RCJ-GWF MEMORANDUM* (Filed Dec. 9, 2022)

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

Argued and Submitted November 18, 2022
San Francisco, California

Before: LINN,** RAWLINSON, and HURWITZ, Circuit Judges.

Plaintiffs James Nalder, guardian ad litem for Cheyanne Nalder, and Gary Lewis appeal the district court's denial of a motion for relief from a judgment

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

** The Honorable Richard Linn, United States Circuit Judge for the U.S. Court of Appeals for the Federal Circuit, sitting by designation.

pursuant to Federal Rule of Civil Procedure 60 in this action against United Automobile Insurance Company ("UAIC") arising out of the insurer's failure to defend Lewis in a personal injury suit brought by Nalder. The district court judgment from which relief was sought was in favor of Nalder and Lewis but limited consequential damages to the limits of Lewis's insurance policy, rejecting plaintiffs' contention that the appropriate measure of damages was the award in a state-court default judgment entered in 2008 against Lewis. *Nalder v. United Auto. Ins. Co.*, No. 2:09–cv–1348–RCJ–GWF, 2013 WL 5882472 (D. Nev. Oct. 30, 2013). On appeal, after receiving answers to two certified questions from the Nevada Supreme Court, *Nalder v. United Auto. Ins. Co.*, 449 P.3d 1268 (Nev. 2019) (table), we held that the expired default judgment could not provide a basis for consequential damages, *Nalder v. United Auto. Ins. Co.*, 817 F. App'x 347, 349 (9th Cir. 2020).

Plaintiffs' Rule 60 motion nonetheless claimed that an award of consequential damages in excess of the policy limits could be premised on the expired default judgment. Our prior decision squarely rejected that argument, and we see no warrant for revisiting it. *See United States v. Thrasher*, 483 F.3d 977, 981 (9th Cir. 2007) ("Under the [law of the case] doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case." (quoting *Herrington v. Cnty. of Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993))).

Plaintiffs' attempts to reassert various other arguments previously rejected by this Court fare no better. *See Nalder*, 817 F. App'x at 349 (holding that the tolling argument was "waived" and that the later state-court judgments were "irrelevant . . . because such other judgments were not the basis for [Plaintiffs'] complaint against UAIC in this case"). Because we have already decided all the issues raised in this appeal, we affirm the district court's denial of Rule 60 relief.

AFFIRMED.[1]

[1] Both Requests for Judicial Notice (Dkt. 30, 44) are granted. Appellants' Motion to Strike (Dkt. 45) is denied.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No. 2:09-cv-1348-RCJ-GWF

ORDER

(Filed Jul. 6, 2021)

Plaintiffs move to overturn a judgment that this Court issued in this case nearly eight years ago and which the Ninth Circuit affirmed after submitting certified questions to the Nevada Supreme Court. The Court denies this motion for the reasons stated herein.[1]

[1] Plaintiffs also move to have this case consolidated with another case wherein Defendant is suing Plaintiffs in a matter related to this case. The Court denies this motion as well because this case is closed and continues to be closed due to this Court's denial of the motion to vacate the judgment.

FACTUAL BACKGROUND

In 2007, Plaintiff Gary Lewis was involved in a car accident with Cheyenne Nalder. Plaintiff James Nalder as Cheyenne Nalder's guardian ad litem sued Mr. Lewis for injuries from a car accident. Defendant United Automobile Insurance Company ("UAIC") was Mr. Lewis's former insurer, but UAIC declined to defend Mr. Lewis, claiming that its coverage had lapsed at the time of the accident. Mr. Nalder's suit against Mr. Lewis resulted in a default judgment against Mr. Lewis because UAIC had failed to defend him. Subsequently, Mr. Nalder and Mr. Lewis sued UAIC for breaches of its insurance agreement with Mr. Lewis and claiming it did so in bad faith. After an appeal, this Court ultimately determined at summary judgment UAIC had incorrectly determined that its coverage had lapsed but did so in good faith. (ECF No. 102.) Finding that UAIC acted in good faith, the Court found UAIC's coverage was limited to the policy limits and issued a judgment accordingly on October 30, 2013. (ECF Nos. 102, 103.)

Plaintiffs appealed this judgment to the Ninth Circuit, arguing that they were entitled to extracontractual consequential damages from UAIC's breach of the duty to defend, even if it was in good faith. *Nalder v. United Auto. Ins. Co.*, 824 F.3d 854 (9th Cir. 2016). The Ninth Circuit certified this question of law to the Nevada Supreme Court:

> 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?

Id. at 855.

During the pendency of the appeal, UAIC moved to dismiss the case for lack of standing because "the six-year life of the default judgment had run and that the judgment had not been renewed, so the judgment is no longer enforceable." *Nalder v. UAIC*, 878 F.3d 754, 757 (9th Cir. 2017). The Ninth Circuit also certified this issue to the Nevada Supreme Court:

> 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?

Id. at 755–58. The circuit noted that Plaintiffs must succeed on both questions in order to prevail in its case against UAIC. *Id.* at 758. In 2019, The Nevada Supreme Court ruled in favor of Plaintiffs on the first question but against them on the second, and the Ninth Circuit consequently dismissed the appeal without remand on June 4, 2020. (ECF No. 142.)

Plaintiffs now move to nullify this Court's judgment and reopen this case under Fed. R. Civ. P. 60(b). Plaintiffs claim that the judgment is void under Rule 60(b)(4) because they were not afforded due process.

They posit that this Court "*sua sponte* misappl[ied] Nevada law at the hearing, without giving [them] the opportunity to brief the issue and the resulting denial of his right to a jury trial on his claims against UAIC." (ECF No. 146 at 8.) They also argue that there has been a change in the law since this Court has ruled on summary judgment in 2013. Namely, in 2018, the Nevada Supreme Court ruled 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." *Century Sur. Co. v. Andrew*, 432 P.3d 180, 186 (Nev. 2018). The Nevada Supreme Court relied upon *Century* in addressing the certified questions. (ECF No. 146 Ex. 1 at 2.)

ANALYSIS

First, Plaintiffs were afforded adequate due process, and their contention to the contrary is frivolous. Rule 60(b)(4) allows that a party may challenge a final judgment on the grounds that it is void. This rule "applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010). In spite of Plaintiffs' arguments to the contrary, the Court did not act *sua sponte*, depriving them of their opportunity to be heard. For example, in Defendant's motion for summary judgment, it argued:

> Plaintiffs' claims that they are entitled to $3.5 million dollar default judgment, far in excess of Mr. Lewis' $15,000 policy limits, apparently because of Defendant's 'bad faith' for their failure to defend under Lewis' policy. However, it seems clear from the discussion above, regarding Defendant's actions on the policy - which was not in force at the time by plaintiff's admission **no payment was made between June 12, 2007 and July 10, 2007** - that Plaintiffs' must admit a genuine dispute exists as to coverage for the loss.

(ECF No. 89 at 18). Plaintiffs responded to this motion (ECF No. 96), and the Court held oral arguments on the issue of summary judgment (ECF No. 101). Even more, Plaintiffs were permitted to appeal the Court's order in favor of Defendant to the Ninth Circuit, where Plaintiffs were provided ample opportunity to argue this question before the circuit and the Nevada Supreme Court via the certified questions. While the Nevada Supreme Court may have ultimately disagreed with this Court's finding that Plaintiffs' damages were limited to the policy limits based upon a new case, this error does not render the order void. *In re Ctr. Wholesale, Inc.*, 759 F.2d 1440, 1448 (9th Cir. 1985) ("A judgment is not void merely because it is erroneous."). In sum, Plaintiffs were provided with ample opportunity to litigate this issue, satisfying due process.

Second, Rule 60(b)(6) allows for a party to challenge a final judgment for "any other reason that justifies relief." Among these reasons, the Ninth Circuit has noted that an intervening change in law may

qualify for relief in some extraordinary circumstances. *Henson v. Fid. Nat'l Fin., Inc.*, 943 F.3d 434, 444 (9th Cir. 2019). The change in law must "change the outcome" of the case. *Riley v. Filson*, 933 F.3d 1068, 1072 (9th Cir. 2019). Here, however, the change in law—that Nevada recognizes extracontractual damages even in the absence of bad faith—does not affect the outcome of the underlying case, as the current disposition of the case is dictated by Plaintiff's lack of standing as determined by the Ninth Circuit. (ECF No. 142.)

CONCLUSION

IT IS HEREBY ORDERED that Motion to Vacate Judgment (ECF No. 146) is DENIED.

IT IS FURTHER ORDERED that Motion to Consolidate (ECF No. 152) is DENIED.

IT IS SO ORDERED.

Dated July 6, 2021.

/s/ Robert C. Jones
ROBERT C. JONES
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES NALDER, Guardian Ad Litem on behalf of Cheyanne Nalder; GARY LEWIS, individually, Plaintiffs-Appellants, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant-Appellee.	No. 13-17441 D.C. No. 2:09-cv-01348-RCJ-GWF ORDER* (Filed Jun. 4, 2020)

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

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

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

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

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

Supplement the Record (Dkt. 67); and Nalder and Lewis's Motion to Take Judicial Notice, or, in the Alternative to Supplement the Record (Dkt. 83). Because the facts are known to the parties, we repeat them only as necessary to explain our decision.

I

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

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

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

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

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

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

II

Shortly after the Nevada Supreme Court answered our certified question, Nalder and Lewis filed a Motion to Supplement the Record. They subsequently filed a Motion to Take Judicial Notice, or, in the Alternative to Supplement the Record.

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

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

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

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

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

III

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

APPEAL DISMISSED.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMES NALDER, Guardian Ad Litem for minor Cheyanne Nalder, real party in interest, and GARY LEWIS, Individually, Plaintiffs, v. UNITED AUTOMOBILE INSURANCE COMPANY, DOES I through V, and ROE CORPORATIONS I through V, inclusive, Defendants.	2:09-cv-1348-RCJ-GWF **ORDER** (Filed Oct. 30, 2013)

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

BACKGROUND

In July 2009, Defendant United Automobile Insurance Company ("UAIC") filed a petition for removal based on diversity jurisdiction. (Pet. for Removal (#1) at 1-2). Defendant attached Plaintiffs James Nalder, guardian ad litem for minor Cheyanne Nalder, real

party in interest, and Gary Lewis's (collectively "Plaintiffs") complaint which had been filed in the Eighth Judicial District in Clark County, Nevada. (Compl. (#1) at 5-16).

The complaint alleged the following. (*Id.* at 5). Lewis was the owner of a 1996 Chevy Silverado and had an automobile insurance policy with Defendant on July 8, 2007. (*Id.* at 6). On July 8, 2007, Lewis drove over top of Cheyanne while Cheyanne was a pedestrian in a residential area and caused Cheyanne serious personal injuries (*Id* at 7) Cheyanne made a claim to Defendant for damages and offered to settle the claim for personal injuries and damages against Lewis within the policy limits. (*Id.*). Defendant refused to settle and denied the claim all together indicating that Lewis did not have coverage at the time of the accident. (*Id.*). Defendant was required to provide insurance coverage under the policy. (*Id.* at 9). Defendant never informed Lewis that Cheyanne was willing to settle the claim for the sum of $15,000, the policy limit. (*Id.*). Due to the dilatory tactics and failure of Defendant to protect its insured, Cheyanne filed a complaint on October 9, 2007 against Lewis for her personal injuries and damages. (*Id.*). Cheyanne procured a default judgment in the amount of $3,500,000 against Lewis. (*Id.*). Plaintiffs alleged breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, breach of Nev. Rev. Stat. § 686A.310, and fraud against Defendant. (*Id.* at 9-14).

In March 2010, Defendant filed a motion for summary judgment on all claims. (*See* Mot. for Summ. J.

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

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

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

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[1] Record citations omitted.

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

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

> Plaintiffs contend that Lewis was covered under an insurance policy on July 8, 2007, the date of the accident, because Lewis' payment on July 10, 2007 was timely. Plaintiffs rely on the sentence "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy" contained in the renewal statement. Defendant contends that "expiration of your policy" did not refer to the expiration date of the renewal policy listed on the renewal statement, but to the expiration of Lewis' current policy, which coincided with the listed due date on the renewal statement. Plaintiffs contend that Lewis reasonably believed that while there was a due date on which UAIC preferred to receive payment, there was also a grace period within which

Lewis could pay and avoid any lapse in coverage.

The renewal statement cannot be considered without considering the entirety of the contract between Lewis and UAIC. Plaintiff attached exhibits of renewal statements, policy declarations pages, and Nevada automobile insurance cards issued by UAIC for Lewis. The contract, taken as a whole, cannot reasonably be interpreted in favor of Plaintiffs' argument.

Lewis received a "Renewal Policy Declarations" stating that he had coverage from May 31, 2007 to June 30, 2007 at 12:01 A.M. (Pls' Opp., Exhibit A at 29 (#20-1); Pls' Supp., Exhibit A at 11-12 (#26-1); Pls' Supp., Exhibit A at 15 (#26-1).) The declarations page stated that "[t]his declaration page with 'policy provisions' and all other applicable endorsements complete your policy." (Pls' Opp., Exhibit A at 29 (#20-1).) Lewis also received a Nevada Automobile Insurance Card issued by UAIC stating that the effective date of his policy was May 31, 2007, and the expiration date was June 30, 2007. (Id. at 30; Pls' Supp., Exhibit A at 11-12 (#26-1).) The renewal statement Lewis received in June must be read in light of the rest of the insurance policy, contained in the declarations page and also summarized in the insurance card.

"In interpreting a contract, 'the court shall effectuate the intent of the parties, which may be determined in light of the

surrounding circumstances if not clear from the contract itself.'" *Anvui, LLC v. G.L. Dragon, LLC*, 163 P.3d 405, 407 (Nev. 2007). Plaintiffs contend that there was a course of dealing between Lewis and UAIC supporting a reasonable understanding that there was a grace period involved in paying the insurance premium for each month-long policy. In fact, the so-called course of dealing tilts, if at all, in favor of Defendant. Lewis habitually made payments that were late. UAIC never retroactively covered Lewis on such occasions. Lewis' new policy, clearly denoted on the declarations page and insurance cards Lewis was issued, would always become effective on the date of the payment.

Plaintiffs point to the fact that in April 2007, Lewis was issued a revised renewal statement stating that the renewal amount was due on May 6, 2007, a date after the effective date of the policy Lewis would be renewing through the renewal amount. This isolated occasion occurred due to the fact that Lewis added a driver to his insurance policy, resulting in an increase in the renewal amount, after UAIC had previously sent a renewal notice indicating that a lower renewal amount was due on April 29, 2007. UAIC issued a revised renewal statement dated April 26, 2007, and gave Lewis an opportunity to pay by May 6, 2007, instead of April 29, 2007, when the original renewal amount had been due upon expiration of his April policy. In that case, Lewis made a timely payment on April 28, 2007, and therefore there is not a single

> incident Plaintiffs can point to in which Lewis was retroactively covered for a policy before payment was made, even in the single instance UAIC granted him such an opportunity due to a unique set of circumstances.

(*Id.* at 7-9).

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

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

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

The pending motions now follow.

LEGAL STANDARD

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

The moving party bears the initial burden of identifying the portions of the pleadings and evidence that the party believes to demonstrate the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). A party asserting that a fact cannot be or is genuinely disputed must support the assertion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A)-(B). Once

the moving party has properly supported the motion, the burden shifts to the nonmoving party to come forward with specific facts showing that a genuine issue for trial exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512. The nonmoving party cannot defeat a motion for summary judgment "by relying solely on conclusory allegations unsupported by factual data." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356.

DISCUSSION

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

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

A. Ambiguous Contract

Nalder argues that because the renewal statement was ambiguous it must be strictly construed against the insurance company pursuant to Nevada

law and, thus, Lewis had coverage at the time of the accident. (Mot. for Summ. J. (#88) at 10).

In response, Defendant argues that Lewis's renewal statement is not ambiguous and clearly demanded remittance of the policy premium for the subsequent term by the expiration of the present policy period. (Opp'n to Mot. for Summ. J. (#90) at 15). Defendant argues that a material issue of fact remains over whether the renewals were ambiguous. (*Id.*).

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

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

In this case, the Court finds that the renewal statement is ambiguous based on the Ninth Circuit's reverse and remand. The Court finds that the renewal statement is reasonably susceptible to more than one

interpretation as demonstrated by both Judge Reed and the Ninth Circuit's conflicting interpretations. As such, the Court finds that, pursuant to Nevada law, this ambiguity is construed against Defendant and in favor of the insured such that Lewis was covered by the insurance policy on the date of the accident. The Court grants summary judgment on this issue in favor of Plaintiffs.

B. Bad Faith

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

In response, Defendant argues that every case cited by Nalder involves a situation where there existed a policy in force at the time of the loss. (Opp'n to Mot. for Summ. J. (#90) at 21). Defendant asserts that, in this case, Nalder asks the Court to find an implied policy from an ambiguity in the renewal. (*Id.* at 22).

Defendant argues that Nevada law provides that a court may review an insurer's actions at the time they were made to determine whether the insurer's actions were reasonable as a matter of law and that bad faith cannot be premised upon an honest mistake, bad judgment, or negligence. (*Id.* at 25). Defendant asserts that Nevada law provides that an insurer cannot be found liable for bad faith, as a matter of law, if it had a reasonable basis to contest coverage. (*Id.*). Defendant contends that if an insurer's actions are reasonable the court can decide as a matter of law to dismiss the extra-contractual claims. (*Id.* at 26). Defendant asserts that because Lewis admits that he did not make any policy payments between June 12, 2007 and July 10, 2007 its actions were reasonable. (*Id.*). Defendant contends that even if it may be found to owe coverage on an implied contract, Plaintiffs must admit that a genuine dispute existed as to coverage at the time of the accident. (*Id.*).

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

Nevada law imposes the covenant of good faith and fair dealing on insurers. *Allstate Ins. Co. v. Miller*, 212 P.3d 318, 324 (Nev. 2009). A violation of the covenant gives rise to a bad-faith tort claim. *Id*. The Nevada Supreme Court has defined "bad faith as 'an actual or implied awareness of the absence of a reasonable basis for denying benefits of the [insurance] policy.'" *Id*. (quoting *Am. Excess Ins. Co. v. MGM*, 729 P.2d 1352, 1354-55 (Nev. 1986). "To establish a prima facie case of bad-faith refusal to pay an insurance claim, the

plaintiff must establish that the insurer had no reasonable basis for disputing coverage, and that the insurer knew or recklessly disregarded the fact that there was no reasonable basis for disputing coverage." *Powers v. United Servs. Auto. Ass'n*, 962 P.2d 596, 604 (Nev. 1998) *opinion modified on denial of reh'g*, 979 P.2d 1286 (Nev. 1999).

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

C. Pre and Post-Judgment Interest

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

against Lewis. (*Id.*). Nalder contends that Defendant has the duty to indemnify Lewis. (*Id.*).

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

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

The Nevada Supreme Court has held that primary liability insurance policies create a hierarchy of duties between the insurer and the insured. *Allstate Ins.*, 212 P.3d at 324. One of these contractual duties is the duty to defend. *Id*. A breach of the duty to defend is a breach of a contractual obligation. *See id.* at 324-25. An insurer bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy. *United Nat'l Ins. Co. v. Frontier Ins. Co., Inc.*, 99 P.3d 1153, 1158 (Nev. 2004). Once the duty to defend arises, it continues through the course of litigation. *Id*. "If there is any doubt about whether the duty to defend arises, this doubt must be resolved in favor of the insured." *Id*. "The purpose behind construing the duty to defend so broadly is to prevent an insurer from evading its obligation to provide a defense for an insured without at least investigating the facts behind a complaint." *Id*. However, the duty to defend is not absolute. *Id*. "A potential for coverage only exists

when there is arguable or possible coverage." *Id*. "Determining whether an insurer owes a duty to defend is achieved by comparing the allegations of the complaint with the terms of the policy." *Id*. If an insurer breaches the duty to defend, damages are limited to attorneys' fees and costs incurred by the insured to defend the action. *See Home Sav. Ass'n v. Aetna Cas. & Sur. Co.*, 854 P.2d 851, 855 (Nev. 1993) (holding that an insured was not barred from further pursuing recovery from insurance company for fees and costs incurred in defending an action); *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 255 P.3d 268, 278 (Nev. 2011) (discussing damages related to an indemnitor's duty to defend an indemnitee).

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

As such, the Court grants in part and denies in part Nalder's motion for summary judgment. The Court grants summary judgment for Nalder on the ambiguity issue and finds that there is an ambiguity in the renewal statement and, thus, the policy is construed in favor of coverage at the time of the accident. Defendant must pay the policy limits of the implied insurance policy. The Court denies summary judgment

for Nalder on the remaining bad-faith claims. The Court grants in part and denies in part summary judgment for Nalder on the duty to defend issue. The Court finds that Defendant did breach its contractual duty to defend but denies Nalder's request for damages for that breach.

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

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

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

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

CONCLUSION

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

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

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

The Clerk of the Court shall enter judgment accordingly.

Dated this 30th of October, 2013.

/s/ Robert C. Jones
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES NALDER, Guardian Ad Litem on behalf of Cheyanne Nalder and GARY LEWIS, individually, Plaintiffs - Appellants, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant - Appellee.	No. 11-15010 D.C. No. 2:09-cv-01348-ECR-GWF MEMORANDUM* (Filed Dec. 17, 2012)

JAMES NALDER, Guardian Ad Litem on behalf of Cheyanne Nalder and GARY LEWIS, individually, Plaintiffs - Appellees, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant - Appellant.	No. 11-15462 D.C. No. 2:09-cv-01348-ECR-GWF

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, Senior District Judge, Presiding

Argued and Submitted December 7, 2012
San Francisco, California

Before: SILVERMAN, GOULD, and CHRISTEN, Circuit Judges.

Plaintiffs James Nalder, guardian *ad litem* of his daughter Cheyanne Nalder, and Gary Lewis appeal from the district court's grant of Defendant United Automobile Insurance Company's motion for summary judgment on all of Plaintiffs' claims. United Automobile Insurance Company cross-appeals from the district court's denial of United Automobile Insurance Company's motion for attorney's fees. We have jurisdiction under 28 U.S.C. § 1291, and we reverse in part and affirm in part.

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

portion of the order granting summary judgment with respect to the statutory arguments is affirmed.

United Automobile Insurance Company's cross-appeal regarding attorney's fees is moot in light of our disposition. We therefore affirm the district court's denial of attorney's fees. *Electro Source, LLC v. Brandess-Kalt -Aetna Grp., Inc.*, 458 F.3d 931, 941 (9th Cir. 2006).

Each party shall bear its own costs.

REVERSED AND REMANDED IN PART, AFFIRMED IN PART.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JAMES NALDER, Guardian Ad Litem for minor Cheyanne Nalder, real party in interest, and GARY LEWIS, Individually; Plaintiffs, vs. UNITED AUTOMOBILE INSURANCE COMPANY, DOES I through V, and ROE CORPORATIONS I through V, inclusive Defendants.	2:09-cv-1348-ECR-GWF **Order** (Filed Dec. 20, 2010)

Plaintiffs in this automobile insurance case allege breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, breach of Nev. Rev. Stat. § 686A.310, and fraud. Now pending is Defendant's "motion for summary judgment on all claims; alternatively, motion for summary judgment on extra-contractual remedies; or, further in the alternative, motion stay [sic] discovery and bifurcate claims for extra-contractual remedies; finally, in the alternative, motion for leave to amend" ("MSJ") (#17).

The motion is ripe, and we now rule on it.

I. Background

Plaintiff Gary Lewis ("Lewis") is a resident of Clark County, Nevada. (Compl. ¶ 2 (#1).) Plaintiff James Nalder ("Nalder"), Guardian ad Litem for minor Cheyanne Nalder, is a resident of Clark County, Nevada. (Id. at ¶ 1.) Defendant United Automobile Insurance Co. ("UAIC") is an automobile insurance company duly authorized to act as an insurer to the State of Nevada and doing business in Clark County, Nevada. (Id. at ¶ 3.) Defendant is incorporated in the State of Florida with its principal place of business in the State of Florida. (Pet. for Removal ¶ VII (#1).)

Lewis was the owner of a 1996 Chevy Silverado insured, at various times, by Defendant. (Compl. at ¶ 5-6 (#1).) Lewis had an insurance policy issued by UAIC on his vehicle during the period of May 31, 2007 to June 30, 2007.(MSJ at 3 (#17).) Lewis received a renewal statement, dated June 11, 2007, instructing him to remit payment by the due date of June 30, 2007 in order to renew his insurance policy. (Id. at 3-4.) The renewal statement specified that "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy." (Pls.' Opp. at 3 (#20).) The renewal statement listed June 30, 2007 as effective date, and July 31, 2007 as an "expiration date." (Id.) The renewal statement also states that the "due date" of the payment is June 30, 2007, and repeats that the renewal amount is due no later than June 30, 2007. (MSJ at 7-8 (#17).) Lewis made a payment on July 10, 2007. (Id.)

Defendant then issued a renewal policy declaration and automobile insurance cards indicating that Lewis was covered under an insurance policy between July 10, 2007 to August 10, 2007. (Pls' Opp. Exhibit 1 at 35-36; MSJ at 4.)

On July 8, 2007, Lewis was involved in an automobile accident in Pioche[1], Nevada, that injured Cheyanne Nalder.(MSJ at 3 (#17).) Cheyanne Nalder made a claim to Defendant for damages under the terms of Lewis's insurance policy with UAIC. (Compl. at ¶ 9 (#1).) Defendant refused coverage for the accident that occurred on July 8, 2007, claiming that Lewis did not have coverage at the time of the accident. (Id. at ¶ 10.) On October 9, 2007, Plaintiff Nalder, as guardian of Cheyanne Nalder, filed suit in Clark County District Court under suit number A549111 against Lewis. (Mot. to Compel at 3 (#12).) On June 2, 2008, the court in that case entered a default judgment against Lewis for $3.5 million. (Id.)

Plaintiffs then filed their complaint in this action in Nevada state court on March 22, 2009 against Defendant UAIC. On July 24, 2009, Defendant removed the action to federal court, invoking our diversity jurisdiction. (Petition for Removal (#1).)

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[1] Plaintiffs' complaint originally alleged that the accident occurred in Clark County, Nevada. It is unclear from the documents which site is the correct one, but neither party disputes jurisdiction and the actual location of the accident is irrelevant to the disposition of this motion.

On March 18, 2010, Defendant filed the MSJ (#17). On April 9, 2010, Plaintiffs opposed (#20), and on April 26, 2010, Defendant replied (#21). We granted leave for Plaintiffs to file a supplement (#26), and Defendant filed a supplement (#33) to its reply (#21).

II. Summary Judgment Standard

Summary judgment allows courts to avoid unnecessary trials where no material factual dispute exists. N.W. Motorcycle Ass'n v. U.S. Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). The court must view the evidence and the inferences arising therefrom in the light most favorable to the nonmoving party, Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996), and should award summary judgment where no genuine issues of material fact remain in dispute and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party. FED. R. CIV. P. 50 (a) . Where reasonable minds could differ on the material facts at issue, however, summary judgment should not be granted. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 116 S.Ct. 1261 (1996) .

The moving party bears the burden of informing the court of the basis for its motion, together with evidence demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden,

the party opposing the motion may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing that there exists a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Although the parties may submit evidence in an inadmissible form – namely, depositions, admissions, interrogatory answers, and affidavits – only evidence which might be admissible at trial may be considered by a trial court in ruling on a motion for summary judgment. FED. R. CIV. P. 56(c); Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179, 1181 (9th Cir. 1988).

In deciding whether to grant summary judgment, a court must take three necessary steps: (1) it must determine whether a fact is material; (2) it must determine whether there exists a genuine issue for the trier of fact, as determined by the documents submitted to the court; and (3) it must consider that evidence in light of the appropriate standard of proof. Anderson, 477 U.S. at 248. Summary judgment is not proper if material factual issues exist for trial. B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir. 1999). "As to materiality, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248. Disputes over irrelevant or unnecessary facts should not be considered. Id. Where there is a complete failure of proof on an essential element of the nonmoving party's case, all other facts become immaterial, and the moving party is entitled to judgment as a matter of law. Celotex, 477 U.S.

at 323. Summary judgment is not a disfavored procedural shortcut, but rather an integral part of the federal rules as a whole. Id.

III. Analysis

Defendant seeks summary judgment on all claims on the basis that Lewis had no insurance coverage on the date of the accident. Plaintiff contends that Lewis was covered on the date of the accident because the renewal notice was ambiguous as to when payment must be received in order to avoid a lapse in coverage, and any ambiguities must be construed in favor of the insured. Defendants request, in the alternative, that we dismiss Plaintiffs' extra-contractual claims, or bifurcate the claim of breach of contract from the remaining claims. Finally, if we deny all other requests, Defendant requests that we grant leave to amend

A. Contract Interpretation Standard

In diversity actions, federal courts apply substantive state law. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); Nitco Holding Corp. v. Boujikian, 491 F.3d 1086, 1089 (9th Cir. 2007). Under Nevada law, "[a]n insurance policy is a contract that must be enforced according to its terms to accomplish the intent of the parties." Farmers Ins. Exch. v. Neal, 64 P.3d 472, 473 (Nev. 2003). When the facts are not in dispute, contract interpretation is a question of law. Grand Hotel Gift Shop v. Granite State Ins. Co., 839 P.2d 599, 602 (Nev. 1992). The language of the insurance policy must be

viewed "from the perspective of one not trained in law," and we must "give plain and ordinary meaning to the terms." Farmers Ins. Exch., 64 P.3d at 473 (internal quotation marks omitted). "Unambiguous provisions will not be rewritten; however, ambiguities are to be resolved in favor of the insured." Id. (footnote omitted); see also Fed. Ins. Co. v. Am. Hardware Mut. Ins. Co., 184 P.3d 390, 392 (Nev. 2008) ("In the insurance context, we broadly interpret clauses providing coverage, to afford the insured the greatest possible coverage; correspondingly, clauses excluding coverage are interpreted narrowly against the insurer.") (internal quotation marks omitted); Capitol Indemnity Corp. v. Wright, 341 F. Supp. 2d 1152, 1156 (D. Nev. 2004) (noting that "a Nevada court will not increase an obligation to the insured where such was intentionally and unambiguously limited by the parties"). "When a contract is unambiguous and neither party is entitled to relief from the contract, summary judgment based on the contractual language is proper." Allstate Ins. Co. v. Fackett, 206 P.3d 572, 575 (Nev. 2009) (citing Chwialkowski v. Sachs, 834 P.2d 405, 406 (Nev. 1992)).

B. Plaintiff Lewis' Insurance Coverage on July 8, 2007

Plaintiffs contend that Lewis was covered under an insurance policy on July 8, 2007, the date of the accident, because Lewis' payment on July 10, 2007 was timely. Plaintiffs rely on the sentence "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy" contained in the renewal statement.

Defendant contends that "expiration of your policy" did not refer to the expiration date of the renewal policy listed on the renewal statement, but to the expiration of Lewis' current policy, which coincided with the listed due date on the renewal statement. Plaintiffs contend that Lewis reasonably believed that while there was a due date on which UAIC preferred to receive payment, there was also a grace period within which Lewis could pay and avoid any lapse in coverage.

The renewal statement cannot be considered without considering the entirety of the contract between Lewis and UAIC. Plaintiff attached exhibits of renewal statements, policy declarations pages, and Nevada automobile insurance cards issued by UAIC for Lewis. The contract, taken as a whole, cannot reasonably be interpreted in favor of Plaintiffs' argument.

Lewis received a "Renewal Policy Declarations" stating that he had coverage from May 31, 2007 to June 30, 2007 at 12:01 A.M. (Pls' Opp., Exhibit A at 29 (#20-1); Pls' Supp., Exhibit A at 11-12 (#26-1); Pls' Supp., Exhibit A at 15 (#26-1).) The declarations page stated that "[t]his declaration page with 'policy provisions' and all other applicable endorsements complete your policy." (Pls' Opp., Exhibit A at 29 (#20-1).) Lewis also received a Nevada Automobile Insurance Card issued by UAIC stating that the effective date of his policy was May 31, 2007, and the expiration date was June 30, 2007. (Id. at 30; Pls' Supp., Exhibit A at 11-12 (#26-1).) The renewal statement Lewis received in June must be read in light of the rest of the insurance

policy, contained in the declarations page and also summarized in the insurance card.

"In interpreting a contract, 'the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself.'" Anvui, LLC v. G.L. Dragon, LLC, 163 P.3d 405, 407 (Nev. 2007). Plaintiffs contend that there was a course of dealing between Lewis and UAIC supporting a reasonable understanding that there was a grace period involved in paying the insurance premium for each month-long policy. In fact, the so-called course of dealing tilts, if at all, in favor of Defendant. Lewis habitually made payments that were late. UAIC never retroactively covered Lewis on such occasions. Lewis' new policy, clearly denoted on the declarations page and insurance cards Lewis was issued, would always become effective on the date of the payment.

Plaintiffs point to the fact that in April 2007, Lewis was issued a revised renewal statement stating that the renewal amount was due on May 6, 2007, a date after the effective date of the policy Lewis would be renewing through the renewal amount. This isolated occasion occurred due to the fact that Lewis added a driver to his insurance policy, resulting in an increase in the renewal amount, after UAIC had previously sent a renewal notice indicating that a lower renewal amount was due on April 29, 2007. UAIC issued a revised renewal statement dated April 26, 2007, and gave Lewis an opportunity to pay by May 6, 2007, instead of April 29, 2007, when the original renewal

amount had been due upon expiration of his April policy. In that case, Lewis made a timely payment on April 28, 2007, and therefore there is not a single incident Plaintiffs can point to in which Lewis was retroactively covered for a policy before payment was made, even in the single instance UAIC granted him such an opportunity due to a unique set of circumstances.

C. Statutory Arguments

Plaintiffs' arguments that Lewis had coverage due to Nev. Rev. Stat. § 687B.320 and § 687B.340 are untenable. Section 687B.320 applies in the case of mid-term cancellations, providing that:

> 1. Except as otherwise provided in subsection 3, no insurance policy that has been in effect for at least 70 days or that has been renewed may be cancelled by the insurer before the expiration of the agreed term or 1 year from the effective date of the policy or renewal, whichever occurs first, except on any one of the following grounds:
>
> (a) Failure to pay a premium when due;
>
> . . .
>
> 2. No cancellation under subsection 1 is effective until in the case of paragraph (a) of subsection 1 at least 10 days and in the case of any other paragraph of subsection 1 at least 30 days after the notice is delivered or mailed to the policyholder.

The policies at issue in this case were month-long policies with options to renew after the expiration of each policy. Lewis' June policy expired on June 30,

2007, according to its terms. There was no midterm cancellation and Nev. Rev. Stat. § 687B.320 simply does not apply. Plaintiffs' arguments that between terms is equivalent to "midterm" simply defies the statutory language and the common definition of midterm. In a Ninth Circuit case interpreting Montana law, the Ninth Circuit noted that the district court's observation that "the policy expired by its own terms; it was not cancelled" was proper, and the Montana statute at issue in the case, similar to the Nevada statute here, "appl[ies] only to cancellation of a policy, not to its termination." State Farm Mut. Auto. Ins. Co. v. White, 563 F.2d 971, 974 (9th Cir. 1977). The Ninth Circuit went on to note that situations in which "the policy terminated by its own terms for failure of the insured to renew" is controlled by a different statute, which "does not require any notice to the policy-holder when the reason for the non-renewal of the policy is the holder's failure to pay the renewal premiums." Id.

Nev. Rev. Stat. § 687B.340 provides:

> 1. Subject to subsection 2, a policyholder has a right to have his or her policy renewed, on the terms then being applied by the insurer to persons, similarly situated, for an additional period equivalent to the expiring term if the agreed term is 1 year or less, or for 1 year if the agreed term is longer than 1 year, unless:
>
> . . .
>
> (b) At least 30 days for all other policies, before the date of expiration provided in the policy the insurer mails or delivers to the policyholder a

> notice of intention not to renew the policy beyond the agreed expiration date. If an insurer fails to provide a timely notice of nonrenewal, the insurer shall provide the insured with a policy of insurance on the identical terms as in the expiring policy.

Plaintiffs argues that Nev. Rev. Stat. § 687B.340 indicates how favorable the law is to the insured, and that there is no mention in the statute that payment is a prerequisite to a policyholder's "right to have his or her policy renewed." It is true that the Nevada statute does not include a provision similar to the one in the Montana statute providing that the section does not apply when the insured has "failed to discharge when due any of his obligations in connection with the payment of premiums for the policy, or the renewal therefor. . . ." White, 563 F.2d at 974 n.3. The Montana statute also stated that the section does not apply "[i]f the insurer has manifested its willingness to renew." Id. Plaintiffs, however, fail to give credit to the entirety of the Nevada statute. The statute does not say that the policyholder's policy must be renewed, it says that the insurer shall provide the insured with a policy on "the identical terms as in the expiring policy." One of the terms of the expiring policy was payment of the renewal amount. URIC did provide Lewis, the policyholder, with a renewal statement indicating that URIC would renew the insurance policy as long as all the terms of the previous policy were met, i.e., payment.

Defendant correctly points out that this statute does not fit the circumstances of this case. Lewis' policy

was not renewed not because URIC had an intention not to renew, but because Lewis failed to carry out his end of the contract, that is, to pay a renewal amount. Lewis' policy was renewed on the date payment was received, but this date was after the date of the accident. Plaintiffs' statutory arguments, therefore, do not pass muster.

IV. Conclusion

Defendant's motion for summary judgment on all claims shall be granted because Lewis had no insurance coverage on the date of the accident. The renewal statement was not ambiguous in light of the entire contract and history between Lewis and URIC. The term "expiration of your policy" referred to the expiration of Lewis' current policy, and Lewis was never issued retroactive coverage when his payments were late. His renewal policy would always begin on the date payment was received. We cannot find that Lewis was covered between the expiration of his policy in June and payment for his next policy without straining to find an ambiguity where none exists, and creating an obligation on the part of insurance companies that would be untenable, i.e., to provide coverage when the insured has not upheld his own obligations under the contract to submit a payment.

The statutes cited by Plaintiffs simply do not apply. The expiration of Lewis' policy was not a midterm cancellation, and UAIC was not obligated to provide an

insurance policy despite Lewis' failure to adhere to the terms of that policy.

Defendant's other requests are moot in light of our decision granting summary judgment.

IT IS, THEREFORE, HEREBY ORDERED that Defendant's motion for summary judgment on all claims (#17) is **GRANTED** with respect to all of Plaintiffs' claims.

The Clerk shall enter judgment accordingly.

DATED: December 17, 2010.

/s/ Edward C. Reed
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES NALDER, Guardian Ad Litem on behalf of Cheyanne Nalder; GARY LEWIS, individually, Plaintiffs-Appellants, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant-Appellee.	No. 21-16283 D.C. No. 2:09-cv-01348-RCJ-GWF District of Nevada, Las Vegas ORDER (Filed Jan. 19, 2023)

Before: LINN,* RAWLINSON, and HURWITZ, Circuit Judges.

The panel voted to deny the Petition for Panel Rehearing.

Judge Rawlinson voted to deny, and Judges Linn and Hurwitz recommended denying, the Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote.

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* The Honorable Richard Linn, United States Circuit Judge for the U.S. Court of Appeals for the Federal Circuit, sitting by designation.

Appellants' Petition for Rehearing and Rehearing En Banc, filed December 23, 2022, is DENIED.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMES NALDER, Guardian Ad Litem For minor Cheyanne Nalder, real party in interest, and Gary Lewis, Individually; Plaintiffs, vs. UNITED AUTOMOBILE INSURANCE COMPANY, DOES I through V, and ROE CORPORATIONS I through V, inclusive, Defendants.	CASE NO: 2:09-cv-1348-RCJ-GWF **HEARING REQUESTED** **ORAL ARGUMENT REQUESTED** (Filed Sep. 2, 2020)

PLAINTIFFS' MOTION FOR RELIEF PURSUANT TO FRCP 60(b)

I. Factual and Procedural History

Lewis sues United Automobile Insurance Company to establish coverage

This litigation was initiated by an insured, Gary Lewis, against his insurance company, United Automobile Insurance Company (hereinafter "UAIC"), when it failed to communicate offers to settle, failed to pay a claim and failed to defend him. Mr. Lewis sued to establish coverage, to obtain the policy limits, to obtain collection of the judgment that Nalder had against him for $3.5 million dollars, for breach of contract, for

breach of the duty to defend, for breach of the covenant of good faith and fair dealing and for violations of NRS 686A.310. All of the breaches sued on occurred prior to the filing of the complaint (on May 22, 2009.)[1] Although UAIC has been found, as a matter of law, to have breached its duty, Plaintiffs have not received their consequential damages and UAIC continues to delay the case and avoid its obligations.

UAIC removes the action to Federal Court and convinces the Court to disregard Nevada law

UAIC is aware and has taken advantage of the tendency of judges, and in particular, federal court judges, to be biased against the insured in these types of actions.[2] Unfortunately for the insured, the

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[1] See this Court's instant Docket, Document #1, Petition for Removal, which contains a copy of the original Complaint.

[2] The most obvious indicator of this bias is the consistent removal of actions by the insurance industry to the safety of the federal jurisdiction. The reasons for the bias are numerous: 1. An innocent misunderstanding of the affirmative duty to deal in good faith because the insurance industry pushes the term "bad faith" to mislead the court (The no bad faith allegation); 2. The amount of damages that must be awarded under state law to relieve the insured of multimillion dollar judgments and to curb abuses of the affirmative duty to deal in good faith with the insureds (the windfall allegation); 3. The claimant and/or the insured must document the claims handling failures (the set-up allegations); 4. The claimant and insured, of necessity, must resolve issues between them before presenting the claim against the insurance company to the court (the allegations of collusion, lack of cooperation, and fraud); 5. The federal judges and their clerks are more frequently connected in the past (or the future) to large politically connected law firms which tend to be insurance defense oriented

claimant, and the general public, the affirmative duty of good faith and fair dealing is the ***only*** effective method the State of Nevada provides for regulating insurers. In far too many instances, rather than faithfully applying Nevada law and Nevada state court judgments and rulings, the federal judiciary undermines the state claims that have been removed to federal court. Instead of regulating the insurance industry, the Court effectively joins with the insurance industry in further victimizing the insured and his counsel when it refuses to apply state law.

Initially herein, UAIC attempted to avoid payment of any damages, including the judgment Lewis suffered, by claiming Lewis did not have insurance coverage for the loss that resulted in the multimillion dollar judgment being entered against him. UAIC convinced Judge Reed to disregard Nevada law[3] and grant summary judgment in its favor. Lewis had to appeal the clearly erroneous ruling and it was ultimately reversed. (See Ninth Circuit case 11-15462, DktEntry

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(unequal access to justice); 6. Finally, the insurance defense firms frequently have sponsorship advertisements running at Judicial Conferences (political influence).

[3] And probably the law of every state, in deciding an ambiguity on summary judgment against the insured/non-moving party. The law is that the insurance company owes an affirmative duty to the insured to investigate coverage and resolve any ambiguities in favor of the insured and in favor of coverage. Failure to do this is a breach of the duty of good faith. It is a duty to affirmatively treat the insured "good", not merely prohibiting "bad" treatment of the insured. "[The insured] has the right to expect trust and confidence in the integrity and fidelity of [the insurer]." *Powers v. United Servs. Auto. Ass'n*, 115 Nev. 38, 42 (Nev. 1999).

34-1, December 17, 2012.) The case was then remanded to this Court for trial.

The Parties Brief Both Sides of Motions for Summary Judgment

On remand, Lewis moved for partial summary judgment, requesting a finding that UAIC breached the duty to defend. Lewis argued the court rule that the judgment Nalder held against him was the ***minimum damages***. Lewis requested that the issue of breach of the covenant of good faith and other consequential damages be submitted to the jury.

UAIC opposed Lewis' motion and filed a counter motion for summary judgment. Even though it had been decided as a matter of law on appeal, UAIC continued to argue that there was no coverage. UAIC also argued that any bad faith claims were premature. UAIC further requested to amend its Answer to Lewis' Complaint to bring a claim of champerty against Lewis and his attorneys. No argument or case law was presented by UAIC that the judgment was not an item of consequential damages stemming from the breach of the duty to defend. The **only** argument regarding the judgment damages UAIC put forth was a request that the "Court find a material issue remains as to whether any such breach proximately caused Plaintiffs' claimed damages." (See this Court's instant Docket, Document 90, filed 3/26/2013, Defendant UAIC's Opposition to Plaintiff's Motion for Summary Judgement, at page 34.)

The Court Goes Beyond the Briefing of the Parties and Rules, Contrary to Nevada law

In ruling on the Motions for Summary Judgment, the Court found, as a matter of law, that UAIC breached its duty to defend Lewis. However, the Court's Order filed October 30, 2013, did not find damages in the amount of the judgment or allow the question of additional damages suffered by Lewis (as a consequence of the breach) to go to a jury. Instead, the Court ***sua sponte*** capped the award of damages at the policy limits of $15,000, contrary to Nevada law. (See *Allstate Insurance v. Miller, 125 Nev. Adv. Op. No. 28, 49760 (2009)*, 212 P.3d 318, 2 (Nev. 2009) and *Century Sur. Co. v. Andrew*, 432 P.3d 180, (Nev. 2018)). This result was not argued by UAIC and was therefore not subject to briefing and an opportunity to be heard on behalf of Lewis. This violated the due process rights of Lewis and resulted in a void judgment that is currently in place in this case. This injustice will be most efficiently resolved by the Court through the instant Motion.

Additionally, the Court's prior ruling precluded the questions of the reasonableness of UAIC's failure to inform its insured of offers of settlement, refusal to provide a defense and failure to file a declaratory relief action to go to trial or the jury. This denial in this type of case is also contrary to Nevada law. (Again, see *Miller & Century Sur. Co., Id.*) The Court found that UAIC had a reasonable basis to dispute *coverage*, but it simply **did not rule and did not allow the jury to consider** whether UAIC's actions (in how it disputed

coverage and failed to communicate with its insured) were reasonable, in good faith, and fair to the insured. Lewis therefore again appealed to the Ninth Circuit. UAIC *did not* appeal any of this court's rulings, including the denial of UAIC's attempt to litigate a champerty claim against Lewis and his attorneys.

Post judgment, while this case was no longer pending, UAIC again breaches the affirmative duty of good faith and fair dealing, causing Lewis new damages that are not part of this action

Breaches of the affirmative duty of good faith and fair dealing on the part of UAIC occurring after the filing of the complaint on May 22, 2009 were never brought by Lewis in this action. UAIC argued in its Motion for Summary Judgment that all the claims for bad faith brought by Lewis for acts prior to the filing of the complaint were premature and must await the finding of coverage before they would become actionable. (See this Court's instant Docket, Document 89, filed 3/26/2013, Defendant UAIC's Counter-Motion for Summary Judgment at page 8, and 24-26, and Document 97, filed 5/3/2013, UAIC's Reply, at pages 40-41.) This case then went to final judgment on October 30, 2013. It was no longer pending as of that date and coverage was thereby established.

After coverage was established, UAIC continued to breach the affirmative duty of good faith and fair dealing by failing to defend Lewis and by refusing to pay

the consequential damages flowing from its breach of the duty to defend. Post judgment, UAIC delayed payment and failed to use the policy limits to protect Lewis. UAIC engaged in a calculated assault of its insured, Gary Lewis, in an effort to avoid paying ***any*** consequential damages suffered by Lewis because of its denial of coverage and breach of the duty to defend.

Post judgment, UAIC violated NRS 686A.310 by misleading its insured and the claimant regarding the applicable statute of limitations. Then, UAIC brought a Motion to Dismiss the insured's/claimant's Ninth Circuit Appeal based on lack of standing, which UAIC alleged occurred post-judgment, and after the underlying suit was no longer pending. UAIC argued in the appeal that Nalder's judgment against Lewis had expired. Lewis and Nalder opposed the Motion. Lewis and Nalder argued that the record the Ninth Circuit was reviewing contained a valid and enforceable judgment during the pendency of the action and at the time this Court's judgment was entered. At the time this Court should have evaluated consequential damages, there was no question the judgment was valid and enforceable against Lewis and had been so since 2009, causing damage to him.

Lewis Incurs Additional Damages

In 2018, as a direct result of UAIC's assault on and failure to protect Lewis, Nalder took action in Nevada State Court, through new counsel David A. Stephens, Esq., to amend her judgment. The state court judge

entered an amended judgment, finding that the statute of limitations had not expired due to application of tolling statutes under state law.[4] Nalder also filed a new action on the judgment in state court against Lewis pursuant to *Mandlebaum v. Gregovich*, 24 Nev. 154, 159 (Nev. 1897). These actions constitute additional and ongoing damage to Lewis arising from UAIC's original failure to defend him. They were not and are not part of this action

After Judgment in this case, the Nevada Supreme Court rules that all consequential damages of a breach of the duty to defend must be awarded

On December 13, 2018, the Nevada Supreme Court held:

> In answering the certified question, we conclude that an insured may recover any damages consequential to the insurer's beach of its duty to defend. As a result, 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. *Century Sur. Co. v. Andrew*, 432 P.3d 180, (Nev. 2018).

In answering the first certified question in this case, the Nevada Supreme Court removed any question about the applicability of the above decision in

[4] See Exhibit 2 hereto, Ex Parte Application and Exhibit 3 hereto, Notice of Entry of Judgment, both from Eighth Judicial District Court, Case No. 07A549111. UAIC attacked this judgment and was denied relief. The time for appeal has passed.

Century Sur. Co. v. Andrew, Id., to UAIC by applying it directly to UAIC in this case. (See Nevada Supreme Court Docket 70504, Order Answering Certified questions, filed September 20, 2019, attached hereto as Exhibit 1).

In answering the second certified question in this case, the Nevada Supreme Court held that if the judgment expires while the case is pending, then the judgment itself is not an item of damage. The Court stated:

> In an action against an insurer for the breach of a 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.

This determination by the Nevada Supreme Court means that other damages suffered by Lewis in this case, in addition to the judgment, like those resulting from execution on the judgment or assignments in lieu of execution ***are still*** damages. UAIC refuses to pay these damages. This holding does not even remove the judgment itself from damages in the instant case, because even UAIC admits that the earliest the non-tolled statute could run on the judgment was August 26, 2014. This date was after this case was to judgment and no longer pending. Prior to the judgment being entered, at the time the judgment was entered and for some time after this case was no longer pending, UAIC admits the judgment against Lewis remained valid

and enforceable. UAIC alleges only that the judgment expired after this case went to judgment and was no longer pending.

UAIC alleges the time for renewal expired on August 26, 2014, nearly a year after the current lawsuit was no longer pending. Even accepting UAIC's allegations,[5] the judgment was clearly enforceable at the time the damages were evaluated by the trial court herein. Even if the statute of limitations on enforcement of the judgment expired on August 26, 2014, as alleged by UAIC, this was long after ***this action*** was no longer pending. Nevertheless, the Ninth Circuit dismissed the appeal, accepting UAIC's argument that the post judgment breaches by UAIC and the resulting 2018 judgments were not part of this action. Jurisdiction was then conveyed by Mandate back to this Court.

II. Argument

Lewis herein makes a timely motion for relief from the void judgment under FRCP 60(b)(4)

FRCP 60(b)(4) allows federal courts to vacate judgments which are "void." A final judgment is "void" for purposes of FRCP 60(b)(4) "where a judgment is premised either on a certain type of jurisdictional error

[5] Lewis contests and does not accept or admit and doesn't waive any defenses by not mentioning them when discussing UAIC's allegations. In fact, Lewis affirmatively alleges that Nalder may claim and has claimed that the statute of limitations is tolled and therefore the judgment is still damaging to Lewis, even now.

or on a violation of due process that deprives a party of notice or the opportunity to be heard." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010). Gary Lewis has been deprived of his due process rights by the court's *sua sponte* misapplication of Nevada law at the hearing, without giving Lewis the opportunity to brief the issue and the resulting denial of his right to a jury trial on his claims against UAIC for breach of contract, breach of the covenant of good faith and fair dealing and for violations of NRS 686A.310.

"A judgment is void under 60(b)(4) . . . if the court has acted in a manner inconsistent with due process of law. *V. T. A., Inc. v. Arico, Inc.* (10th Cir. 1979), 597 F.2d 220, 224-25." *Compton v. Alton Steamship Co.*, 608 F.2d 96, 106 n.19 (4th Cir. 1979). The pleadings and record in this case leading up to the grant of summary judgment did not contain an argument suggesting the damages should be limited to defense costs. This is no different than going beyond the allegations of a complaint to provide relief the opposing party had no way of knowing would be considered and therefore had no opportunity to oppose.

> Were this not so, there would well be serious due process questions. *See Mullane v. Central Hanover Tr. Co.* (1950), 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest"). The "mistake" of the district court in granting default judgment for statutory penalty wages which on

> the face of the complaint and on plaintiff's proof at the damages hearing went beyond the ordinary "mistake;" it resulted in a judgment which under Rule 54(c) was "void." This represents a separate and distinct ground for vacation of a judgment under 60(b). The ground is established in this case. When such a ground exists, vacation of judgment is required. *Id.* at 106.

Lewis makes a timely motion under FRCP 60(b)(6) as a result of a change in the law

An additional ground under Rule 60(b) is a change in the law. Where the basis for a Rule 60(b) motion was a change in the law the "motion was properly filed under Rule 60(b)(6)" *Bynoe v. Baca*, No. 17-17012, at *10 (9th Cir. July 24, 2020). Rule 60(b)(6) is a rule designed for just such a situation as is presented to this Court. At the time this Court made its decision, this Court believed the law with regard to consequential damages for breach of duty to defend was unclear. Another judge in the district certified a question to the Nevada Supreme Court in *Century Sur Co. v. Andrew*, 432 P.3d 180, (Nev. 2018). Any doubts about the law were therein answered in *Century Surety.* The answer from the Nevada Supreme Court is that all consequential damages are appropropriate and should be awarded.

Even if the Court ruled improperly and the law had not changed, its error could be corrected through NRCP 60(b) as "The law in this circuit is that errors of law are cognizable under Rule 60(b)" *(Liberty Mut. Ins.*

Co. v. EEOC, 691 F2d 438, 441 (9th Cir 1982) (citation omitted)). "The flexibility embedded in Rule 60(b)(6)'s timing requirement preserves its purpose as a "grand reservoir of equitable power," available as a vehicle for "vacat[ing] judgments whenever such action is appropriate to accomplish justice." *Hall v. Haws*, 861 F.3d 977, 987 (9th Cir. 2017) (internal quotation marks omitted)." *Bynoe v. Baca*, No. 17-17012, at 11 (9th Cir. July 24, 2020).

The timeliness of a Rule 60(b) motion is generally measured by reference to the date of the final judgment, order, or proceeding. *See*, *e.g.*, *Lemoge v. United States*, 587 F.3d 1188, 1197 (9th Cir. 2009). But where a change in law is the basis for the motion, the date of the challenged order provides little guidance in measuring its timeliness; valid grounds for reconsideration may arise long after a final judgment has been entered. When a Rule 60(b)(6) motion is premised on a change in law, courts measure timeliness "as of the point in time when the moving party has grounds to make [a Rule 60(b)] motion, regardless of the time that has elapsed since the entry of judgment." *Clark v. Davis*, 850 F.3d 770, 780 (5th Cir. 2017) (internal quotation marks omitted); *see also Miller v. Mays*, 879 F.3d 691, 699 (6th Cir. 2018). *Bynoe v. Baca*, No. 17-17012, at *11-12 (9th Cir. July 24, 2020).

> But, beyond any claim for relief by the defendant for mistake (ground 1) and invalidity (ground 4), there is another ground for relief set forth in 60(b), which, assuming that none of the other grounds are applicable, would

> afford relief to the defendant under the unusual and extraordinary circumstances of this case and in view of the unconscionably unjust judgment entered. Subdivision (b)(6) authorizes relief for "any other reason justifying relief from the operation of the judgment." This has been described as the "catch-all" clause, *Menier v. United States* (5th Cir. 1968), 405 F.2d 245, 248 because it provides the court with "a grand reservoir of equitable power to do justice in a particular case," 7 Moore, § 60.27[2] at 375, *Radack v. Norwegian America Line Agency, Inc.* (2d Cir. 1963), 318 F.2d 538, 542, and "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice," *Klapprott v. United States, 335 US. at 615, 69 S. Ct. at 390, where relief might not be available under any other clause in 60(b)*, Transit Casualty Company v. Security Trust Company *(5th Cir 1971), 441 F.2d 788, 792*, cert. denied, *404 US. 883, 92 S.Ct. 211, 30 L.Ed.2d 164. This is just such an extraordinary case where this "catch-all" ground was intended to afford relief Compton v. Alton Steamship Co.*, 608 F.2d 96, 106-07 (4th Cir. 1979).

This motion pursuant to FRCP 60(b) must be brought within a reasonable time. The judgment was issued on October 30, 2013. A notice of appeal removing this Court's jurisdiction and tolling the time for bringing any motion for FRCP 60(b) relief was timely filed on November 27, 2013. The *Century Surety* decision was rendered on December 13, 2018. Remand was

recently filed restoring jurisdiction in this Court on August 11, 2020 and this motion was promptly filed. This motion is therefore timely. The timing, the totality of circumstances, and the history of this case are sufficiently "extraordinary" that granting relief from judgment pursuant to FRCP 60(b)(6) here "is appropriate to accomplish justice." *Phelps v. Alameida*, 569 F.3d 1120, at 1133 (9th Cir. 2009).

Lewis makes a timely motion for relief from the judgment under FRCP 60(b)

Also under FRCP 60(b), the Court may relieve a party from a final judgment or order for: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; or (3) misrepresentation. "Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). A motion for relief from judgment "may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). *Bellon v. Deal*, Dist. Court, D. Nevada 2020.

> One or more of the six grounds itemized in the Rule on which a vacation of judgment may be authorized. These grounds include, among others, (1) mistake, inadvertence, surprise, or excusable neglect, (2) the voidness of the

> judgment, and (3) a final catchall ground, "any other reason justifying relief from the operation of the judgment." These grounds for relief often overlap and it is difficult, if not inappropriate, in many cases to specify or restrict the claim for relief to a particular itemized ground. As one court has well put it, "[t]he rule [60(b)] is broadly phrased and many of the itemized grounds are overlapping, freeing Courts to do justice in hard cases where the circumstances generally measure up to one or more of the itemized grounds." In fact, Professor Moore has suggested that exact "categorization" of ground for relief under the Rule "should be avoided except where the category is obvious or where exact choice is necessary to decision." 7 Moore's Federal Practice ¶ 60.27[1] at pp. 346-47. *Compton v. Alton Steamship Co.*, 608 F.2d 96, 102 (4th Cir. 1979).

In short, any considerations of the need "to expedite cases, to fully utilize the court's time, to reduce overcrowded calendars and to establish finality of judgments . . . should never be used to thwart the objectives of the blind goddess" of justice itself. *Boughner v. Secretary of Health, Ed. Welf, U.S.,*572 F.2d at 978-79. *Compton v. Alton Steamship Co.*, 608 F.2d 96, 103 (4th Cir. 1979.)

This motion is also timely under subparagraphs 1, 2 and 3. The judgment was issued on October 30, 2013. A notice of appeal removing this Court's jurisdiction and tolling the time for bringing any motion for FRCP 60(b) relief was timely filed on November 27, 2013. The

issue giving rise to the motion was only ripe upon the remand recently filed restoring jurisdiction in this Court on August 11, 2020 and this motion was promptly filed.

Here Lewis could not have brought these issues to the court's attention because they did not arise in the court below. UAIC did not bring the issues up until well after this case was no longer pending and the issues could not be brought to the attention of this Court because the case was on appeal. UAIC also delayed bringing this issue to anyone's attention until 2017, three years after the alleged expiration. Rule 60(b) incorporates all possible grounds for relief from judgment, such relief must be sought by "motion as prescribed in these rules or by an independent action." The phrase "independent action" has been interpreted to mean . . . "that courts no longer are to be hemmed in by the uncertain boundaries of these and other common law remedial tools." *Klapprott v. United States*, 335 U.S. 601, 614 (1949). The court now has power "to vacate judgments whenever such action is appropriate to accomplish justice." *Id* 614-15. Thus, Rule 60(b) contains the substance of the older remedies while simplifying the procedure for obtaining such relief.

III. Conclusion

The Court should grant relief and enter an amended judgment *nunc pro tunc* in the amount of the valid judgment together with prejudgment interest through October 30, 2013.

The Court should grant relief under FRCP 60(b) and enter an amended judgment *nunc pro tunc* to Plaintiffs in the amount of the total judgment, plus prejudgment interest through October 30, 2013, plus judgment interest from October 30, 2013 until paid. The $15,000 paid as partial satisfaction of judgment should be credited against the resulting final judgment. A court's ultimate charge in evaluating a Rule 60(b)(6) motion remains to "intensively balance" all the relevant factors, "including the competing policies of the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts." *See Phelps v. Alameida*, 569 F.3d 1120, at 1133 (9th Cir. 2009) and *Henson v. Fid. Nat'l Fin., Inc.*, 943 F.3d 434, 446 (9th Cir. 2019). In the instant case, justice requires that judgment be entered consistent with Nevada law and this Court's prior determination that UAIC breached its duty to defend. This case presents an appropriate occasion for this Court to grant relief under rule 60(b).

Dated this 2nd day of September, 2020.

Christensen Law Offices, LLC

/s/ [Illegible]

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of September, 2020, and pursuant to FRCP 5(b), a true and correct copy of the foregoing pleading was filed electronically with the Clerk of the Court by using ECF service which provides copies to all counsel of record registered to receive ECF notification in this case.

/s/ [Illegible]

An Employee of Christensen Law Offices

EXHIBIT 1

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]

(Filed Sep. 20, 2019)

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,

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

> 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 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, UAW argues that *Century Surety* is "factually and legally distinguishable" from the present case and that we should not apply *Century Surety*'s holding to "cases where the complaint did not allege a loss within the policy period and an insurer's breach of a duty to defend is based on a reasonable, good faith determination that the

insurance policy at issue was not in effect at the time of the loss." UAIC's argument—essentially that UAIC's refusal to defend in this case was more reasonable than the insurer's refusal to defend in *Century Surety*—is undermined by *Century Surety*'s holding "that good-faith determinations are irrelevant for determining damages upon a breach of [the duty to defend]." *Id.* at 182. We therefore decline to answer the question posed in *Century Surety* again, or differently, in this case.

Second certified question

To prevent the statute of limitations from barring enforcement of a default judgment after six years, a party normally must either bring "an action upon [the] judgment or decree" or obtain "the renewal thereof" within that time period. NRS 11.190(1)(a)[2]; *Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007) ("An action on a judgment or its renewal must be commenced within six years under NRS 11.190(1)(a); thus a judgment expires by limitations in six years."). UAIC argues that because Nalder did not bring an action

[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.

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 (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 UAW'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 URIC, a third party to the state court action. *See*, *e.g.*, *id.* at 121; *Apollo Real Estate Inv. Fund, IV, L.P. v. Gelber*, 935 N.E.2d 949, 961 (Ill. App. Ct. 2009) ("[G]enerally, an

action on a judgment can only be brought against the defendant of record in the judgment or his successor in interest, not against an entity or person not named in judgment."). Nalder and Lewis's action alleging breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, fraud, and breach of NRS 686A.310 is not "an action upon [the state court default] judgment" that renewed the judgment under NRS 11.190(1)(a).

Nalder makes various alternative arguments for holding that the six-year statute of limitations has not expired. We decline to address the arguments because they exceed the scope of the certified question, require application of law to facts that are disputed, or involve alleged facts not included in the original or supplemental certified question orders. *See In re Fountainbleau Las Vegas Holdings, LLC*, 127 Nev. 941, 955-56, 267 P.3d 786, 794-95 (2011) (recognizing that "this court is bound by the facts as stated in the certification order" and will not apply the law to facts or resolve factual disputes, because it would intrud[e] into the certifying court's sphere"). When answering a certified question under NRAP 5, we accept the facts as given and therefore will not second-guess the certifying question's assumption that the statute of limitations has otherwise run on the default judgment. *See id.* (constraining review to the facts in the certification order when respondents contended that "the assumptions included in the certified questions [were] not true").

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

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

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

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

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

It is so ORDERED.

/s/ Gibbons, C.J.
Gibbons

/s/ Pickering, J.
Pickering

/s/ Stiglich, J.
Stiglich

/s/ Silver, J.
Silver

cc: Eglet Adams
Prince Law Group
Christensen Law Offices, LLC
Atkin Winner & Sherrod
Cole, Scott & Kissane, P.A.
Lewis Roca Rothgerber Christie LLP/Las Vegas

Pursiano Barry Bruce Demetriades Simon, LLP
Laura Anne Foggan
Boyle Leonard, P.A.
Matthew L. Sharp, Ltd.
Clerk, United States Court of Appeals for the Ninth Circuit

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]

/s/ Cadish, J.
Cadish

We concur:

/s/ Hardesty, J.
Hardesty

/s/ Saitta, Sr. J.
Saitta

---

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

EXHIBIT 2

MTN
David A. Stephens, Esq.
Nevada Bar No. 00902
STEPHENS, GOURLEY & BYWATER
3636 North Rancho Drive
Las Vegas, Nevada 89130
Telephone: (702) 656-2355
Facsimile: (702) 656-2776
Email: dstephens@sgblawfirm.com
Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

(Filed Mar. 22, 2018)

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 he 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 Lew. has been absent from the State of Nevada since at least February 2010.

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

/s/ David A. Stephens
David A. Stephens, Esq.
Nevada Bar No. 00902
3636 North Rancho Drive
Las Vegas, Nevada 89130
Attorneys for Plaintiff

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
(702) 870-1000
Attorney for Plaintiff,

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

(Filed Jun. 3, 2008)

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:

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.

/s/ [Illegible]
DISTRICT JUDGE

Submitted by:
CHRISTENSEN LAW OFFICES, LLC.

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

EXHIBIT "2"

JMT
DAVID A. STEPHENS, ESQ.
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E: dstephens@sbglawfirm.com
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:

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

/s/ David A. Stephens
DAVID A. STEPHENS, ESQ.
Nevada Bar No. 00902
STEPHENS GOURLEY & BYWATER
3636 North Rancho Dr
Las Vegas, Nevada 89130
Attorneys for Plaintiff

EXHIBIT "3"

NOE
David A. Stephens, Esq.
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Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER, Plaintiff, vs. GARY LEWIS Defendant.	)	Case No. 07A549111 Dept. No. XXIX

NOTICE OF ENTRY OF AMENDED JUDGMENT

(Filed May 18, 2018)

NOTICE IS HEREBY GIVEN that on the 26th day of March, 2018, the Honorable David M. Jones entered an **AMENDED JUDGMENT**, which was thereafter filed on March 28, 2018, in the above entitled matter, a copy of which is attached to this Notice.

Dated this 17 day of May, 2018.

STEPHENS & BYWATER

/s/ David A. Stephens
David A. Stephens, Esq.
Nevada Bar No. 00902
3636 North Rancho Drive
Las Vegas, Nevada 89130
Attorney for Brittany Wilson

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the law office of STEPHENS & BYWATER, and that on the 18th day of May, 2018, 1 served a true copy of the foregoing **NOTICE OF ENTRY OF AMENDED JUDGMENT,** by depositing the same in a sealed envelope upon which first class postage was fully prepaid, and addressed as follows:

Gary Lewis
733 S. Minnesota Ave.
Glendora, California 91740

/s/ ML Goldstein
An employee of
Stephens & Bywater

JMT
DAVID A. STEPHENS, ESQ.
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Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

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

AMENDED JUDGMENT

(Filed Mar. 28, 2018)

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:

JMT
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Las Vegas, Nevada 89130
Attorneys for Plaintiff
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E: dstephens@sbglawfirm.com
Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER, Plaintiff, vs. GARY LEWIS, Defendant.	07A549111 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:

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.

[Illegible]
District Judge

Submitted by:
STEPHENS GOURLEY & BYWATER

/s/ David A. Stephens
DAVID A. STEPHENS, ESQ.
Nevada Bar No. 00902
STEPHENS GOURLEY & BYWATER
3636 North Rancho Dr
Las Vegas, Nevada 89130
Attorneys for Plaintiff

[LOGO]
CHRISTENSEN LAW

Molly C. Dwyer, January 29, 2019
Clerk of the Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103
Electronically Filed and Served

***Re: James Nalder et al v. United Automobile Insurance Co., Case No. 13-17441* Appellants' Citation of Supplemental Authority Pursuant to Rule 28(j)**

Pursuant to Fed.R.App.P.28(j), Appellants provide an additional citation of supplemental authority relevant to the issues presented for consideration by the court. This matter is currently submitted to the Nevada Supreme Court on two certified questions. The first and main certified question is directly and completely resolved. The second question is rendered moot because the default judgment is identified as just one of the possible consequential damages an insurer will be liable for as a result of the breach of the duty to defend. In addition, recently entered judgments against Lewis are attached which demonstrate the inapplicability of the second certified question.

Century Surety Company v. Andrew, 134 Nev. Advance Opinion 100, filed on December 13, 2008 and the judgments entered in Nevada and California support Appellants' arguments set forth in Appellants' Opening Brief pp. 9-13 and in Appellants' Reply Brief pp. 2-4.

Appellants' Response To Appellee's Motion To Dismiss For Lack Of Standing pp. 6-8.

In *Andrew*, the Nevada Supreme Court settled the law in Nevada on this issue by stating " . . . an insurer's liability where it breaches its contractual duty to defend is . . . for any consequential damages caused by its breach." All three judgments are recent judgments against Gary Lewis for the injuries to Ms. Nalder.

Attached are Exhibits: 1. *Century Surety Company v. Andrew*, 134 Nev. Advance Opinion 100, filed on December 13, 2018. 2. The Nevada Amended Judgment filed March 28, 2018. 3. The Nevada judgment in case No. 18-A-772220 filed January 22, 2019 in 07A549111(consolidated with 18-A-772220. 4. The California sister state judgment filed July 24, 2018.

Respectfully Submitted,

/s/ Thomas Christensen
Thomas Christensen
Attorney for Appellants

EXHIBIT 1

134 Nev. Adv. Op. 100

IN THE SUPREME COURT OF THE
STATE OF NEVADA

CENTURY SURETY COMPANY, Appellant, vs. DANA ANDREW, AS LEGAL GUARDIAN ON BEHALF OF RYAN T. PRETNER; AND RYAN T. PRETNER, Respondents.	No. 73756 (Filed Dec. 13, 2018)

Certified question pursuant to NRAP 5 concerning insurer's liability for breach of its duty to defend. United States District Court for the District of Nevada; Andrew P. Gordon, Judge.

Question answered.

Gass Weber Mullins, LLC, and James Ric Gass and Michael S. Yellin, Milwaukee, Wisconsin; Christian, Kravitz, Dichter, Johnson & Sluga and Martin J. Kravitz, Las Vegas; Cozen O'Connor and Maria L. Cousineau, Los Angeles, California, for Appellant.

Eglet Prince and Dennis M. Prince, Las Vegas, for Respondents.

Lewis Roca Rothgerber Christie LLP and J. Christopher Jorgensen and Daniel F. Polsenberg, Las Vegas, for Amicus Curiae Federation of Defense & Corporate Counsel.

Lewis Roca Rothgerber Christie LLP and Joel D. Henriod and Daniel F. Polsenberg, Las Vegas; Crowell & Moring LLP and Laura Anne Foggan, Washington, D.C., for Amici Curiae Complex Insurance Claims Litigation Association, American Insurance Association, and Property Casualty Insurers Association of America.

Matthew L. Sharp, Ltd., and Matthew L. Sharp, Reno, for Amicus Curiae Nevada Justice Association.

BEFORE THE COURT EN BANC.[1]

OPINION

By the Court, DOUGLAS, C.J.:

An insurance policy generally contains an insurer's contractual duty to defend its insured in any lawsuits that involve claims covered under the umbrella of the insurance policy. In response to a certified question submitted by the United States District Court for the District of Nevada, we consider "[w]hether, 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 [whether] the insurer [is] liable for all losses consequential to the insurer's breach." We conclude that an insurer's liability where it breaches its contractual duty to defend is not capped at the policy limits plus

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[1] The Honorable Ron D. Parraguirre, Justice, is disqualified from participation in the decision of this matter.

the insured's defense costs, and instead, an insurer may be liable for any consequential damages caused by its breach. We further conclude that good-faith determinations are irrelevant for determining damages upon a breach of this duty.

FACTS AND PROCEDURAL HISTORY

Respondents Ryan T. Pretner and Dana Andrew (as legal guardian of Pretner) initiated a personal injury action in state court after a truck owned and driven by Michael Vasquez struck Pretner, causing significant brain injuries. Vasquez used the truck for personal use, as well as for his mobile auto detailing business, Blue Streak Auto Detailing, LLC (Blue Streak). At the time of the accident, Vasquez was covered under a personal auto liability insurance policy issued by Progressive Casualty Insurance Company (Progressive), and Blue Streak was insured under a commercial liability policy issued by appellant Century Surety Company. The Progressive policy had a $100,000 policy limit, whereas appellant's policy had a policy limit of $1 million.

Upon receiving the accident report, appellant conducted an investigation and concluded that Vasquez was not driving in the course and scope of his employment with Blue Streak at the time of the accident, and that the accident was not covered under its insurance policy. Appellant rejected respondents' demand to settle the claim within the policy limit. Subsequently, respondents sued Vasquez and Blue Streak in state

district court, alleging that Vasquez was driving in the course and scope of his employment with Blue Streak at the time of the accident. Respondents notified appellant of the suit, but appellant refused to defend Blue Streak. Vasquez and Blue Streak defaulted in the state court action and the notice of the default was forwarded to appellant. Appellant maintained that the claim was not covered under its insurance policy.

Respondents, Vasquez, and Blue Streak entered into a settlement agreement whereby respondents agreed not to execute on any judgment against Vasquez and Blue Streak, and Blue Streak assigned its rights against appellant to respondents. In addition, Progressive agreed to tender Vasquez's $100,000 policy limit. Respondents then filed an unchallenged application for entry of default judgment in state district court. Following a hearing, the district court entered a default judgment against Vasquez and Blue Streak for $18,050,183. The default judgment's factual findings, deemed admitted by default, stated that "Vasquez negligently injured Pretner, that Vasquez was working in the course and scope of his employment with Blue Streak at the time, and that consequently Blue Streak was also liable." As an assignee of Blue Streak, respondents filed suit in state district court against appellant for breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair claims practices, and appellant removed the case to the federal district court.

The federal court found that appellant did not act in bad faith, but it did breach its duty to defend Blue

Streak. Initially, the federal court concluded that appellant's liability for a breach of the duty to defend was capped at the policy limit plus any cost incurred by Blue Streak in mounting a defense because appellant did not act in bad faith. The federal court stated that it was undisputed that Blue Streak did not incur any defense cost because it defaulted in the underlying negligence suit. However, after respondents filed a motion for reconsideration, the federal court concluded that Blue Streak was entitled to recover consequential damages that exceeded the policy limit for appellant's breach of the duty to defend, and that the default judgment was a reasonably foreseeable result of the breach of the duty to defend. Additionally, the federal court concluded that bad faith was not required to impose liability on the insurer in excess of the policy limit. Nevertheless, the federal court entered an order staying the proceedings until resolution of the aforementioned certified question by this court.

DISCUSSION

Appellant argues that the liability of an insurer that breaches its contractual duty to defend, but has not acted in bad faith, is generally capped at the policy limits and any cost incurred in mounting a defense.[2] Conversely, respondents argue that an insurer that breaches its duty to defend should be liable for all

[2] The Federation of Defense & Corporate Counsel, Complex Insurance Claims Litigation Association, American Insurance Association, and Property Casualty Insurers Association of America were allowed to file amicus briefs in support of appellant.

consequential damages, which may include a judgment against the insured that is in excess of the policy limits.[3]

In Nevada, insurance policies treated like other contracts, and thus, legal principles applicable to contracts generally are applicable to insurance policies. *See Century Sur. Co. v. Casino W., Inc.*, 130 Nev. 395, 398, 329 P.3d 614, 616 (2014); *United Nat'l Ins. Co. v. Frontier Ins. Co., Inc.*, 120 Nev. 678, 684, 99 P.3d 1153, 1156-57 (2004); *Farmers Ins. Exch. v. Neal*, 119 Nev. 62, 64, 64 P.3d 472, 473 (2003). The general rule in a breach of contract case is that the injured party may be awarded expectancy damages, which are determined by the method set forth in the Restatement (Second) of Contracts § 347 (Am. Law Inst. 1981). *Rd. & Highway Builders, LLC v. N. Nev. Rebar, Inc.*, 128 Nev. 384, 392, 284 P.3d 377, 382 (2012). The Restatement (Second) of Contracts § 347 provides, in pertinent part, as follows:

> [T]he injured party has a right to damages based on his expectation interest as measured by
>
> (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus

[3] The Nevada Justice Association was allowed to file an amicus brief in support of respondents.

> (b) *any other loss, including incidental or consequential loss, caused by the breach*, less
>
> (c) any cost or other loss that he has avoided by not having to perform.

(Emphasis added.)

An insurance policy creates two contractual duties between the insurer and the insured: the duty to indemnify and the duty to defend. *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 309, 212 P.3d 318, 324 (2009). "The duty to indemnify arises when an insured becomes legally obligated to pay damages in the underlying action that gives rise to a claim under the policy." *United Nat'l*, 120 Nev. at 686, 99 P.3d at 1157 (internal quotation marks omitted). On the other hand, "[a]n insurer . . . bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy." *Id.* at 687, 99 P.3d at 1158 (alteration in original) (internal quotation marks omitted).

Courts have uniformly held the duty to defend to be "separate from," 1 Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* § 5.02[a], at 327 (17th ed. 2015) (internal quotation marks omitted), and "broader than the duty to indemnify," *Pension Tr. Fund for Operating Eng'rs v. Fed. Ins. Co.*, 307 F.3d 944, 949 (9th Cir. 2002). The duty to indemnify provides those insured financial protection against judgments, while the duty to defend protects those insured from the action itself. "The duty to

defend is a valuable service paid for by the insured and one of the principal benefits of the liability insurance policy." *Woo v. Fireman's Fund Ins. Co.*, 164 P.3d 454, 459-60 (Wash. 2007). The insured pays a premium for the expectation that the insurer will abide by its duty to defend when such a duty arises. In Nevada, that duty arises "if facts [in a lawsuit] are alleged which if proved would give rise to the duty to indemnify," which then "the insurer *must* defend." *Rockwood Ins. Co. v. Federated Capital Corp.*, 694 F. Supp. 772, 776 (D. Nev. 1988) (emphasis added); *see also United Nat'l*, 120 Nev. at 687, 99 P.3d at 1158 ("Determining whether an insurer owes a duty to defend is achieved by comparing the allegations of the complaint with the terms of the policy.").[4]

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[4] Appellant correctly notes that we have previously held that this duty is not absolute. In the case appellant cites, *United National*, we held that "[t]here is no duty to defend [w]here there is no *potential* for coverage." 120 Nev. at 686, 99 P.3d at 1158 (second alteration in original) (internal quotation marks omitted). We take this opportunity to clarify that where there is potential for coverage based on "comparing the allegations of the complaint with the terms of the policy," an insurer does have a duty to defend. *Id.* at 687, 99 P.3d at 1158. In this instance, as a general rule, facts outside of the complaint cannot justify an insurer's refusal to defend its insured. Restatement of Liability Insurance § 13 cmt. c (Am. Law Inst., Proposed Final Draft No. 2, 2018) ("The general rule is that insurers may not use facts outside the complaint as the basis for refusing to defend. . . ."). Nonetheless, the insurer can always agree to defend the insured with the limiting condition that it does not waive any right to later deny coverage based on the terms of the insurance policy under a reservation of rights. *See Woo*, 164 P.3d at 460 ("Although the insurer must bear the expense of defending the insured, by doing so under a reservation of rights . . . the insurer avoids breaching its

In a case where the duty to defend does in fact arise, and the insurer breaches that duty, the insurer is at least liable for the insured's reasonable costs in mounting a defense in the underlying action. *See Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 127 Nev. 331, 345, 255 P.3d 268, 278 (2011) (providing that a breach of the duty to defend "may give rise to damages in the form of reimbursement of the defense costs the indemnitee was thereby forced to incur in defending against claims encompassed by the indemnity provision" (internal quotation marks omitted)). Several other states have considered an insurer's liability for a breach of its duty to defend, and while no court would disagree that the insurer is liable for the insured's defense cost, courts have taken two different views when considering whether the insurer may be liable for an entire judgment that exceeds the policy limits in the underlying action.

The majority view is that "[w]here there is no opportunity to compromise the claim and the only wrongful act of the insurer is the refusal to defend, the liability of the insurer is ordinarily limited to the

---

duty to defend and incurring the potentially greater expense of defending itself from a claim of breach."). Accordingly, facts outside the complaint may be used in an action brought by the insurer seeking to terminate its duty to defend its insured in an action whereby the insurer is defending under a reservation of rights. Restatement of Liability Insurance § 13 cmt. c (Am. Law Inst., Proposed Final Draft No. 2, 2018) ("Only in a declaratory-judgment action filed while the insurer is defending, or in a coverage action that takes place after the insurer fulfilled the duty to defend, may the insurer use facts outside the complaint as the basis for avoiding coverage.").

amount of the policy plus attorneys' fees and costs." *Comunale v. Traders & Gen. Ins. Co.*, 328 P.2d 198, 201 (Cal. 1958); *see also Emp'rs Nat'l Ins. Corp. v. Zurich Am. Ins. Co. of Ill.*, 792 F.2d 517, 520 (5th Cir. 1986) (providing that imposing excess liability upon the insurer arose as a result of the insurer's refusal to entertain a settlement offer within the policy limit and not solely because the insurer refused to defend); *George R. Winchell, Inc. v. Norris*, 633 P.2d 1174, 1177 (Kan. Ct. App. 1981) ("Absent a settlement offer, the plain refusal to defend has no causal connection with the amount of the judgment in excess of the policy limits."). In *Winchell*, the court explained the theory behind the majority view, reasoning that when an insurer refuses a settlement offer, unlike a refusal to defend, "the insurer is causing a discernible injury to the insured" and "the injury to the insured is traceable to the insurer's breach." 633 P.2d at 1177. "A refusal to defend, in itself, can be compensated for by paying the costs incurred in the insured's defense." *Id.* In sum, "[a]n [insurer] is liable to the limits of its policy plus attorney fees, expenses and other damages where it refuses to defend an insured who is in fact covered," and "[t]his is true even though the [insurer] acts in good faith and has reasonable ground[s] to believe there is no coverage under the policy." *Allen v. Bryers*, 512 S.W.3d 17, 38-39 (Mo. 2016) (first and fifth alteration in original) (internal quotation marks omitted), *cert. denied by Atain Specialty Ins. Co. v. Allen*, ___ U.S. ___, 138 S. Ct. 212 (2017).

The minority view is that damages for a breach of the duty to defend are not automatically limited to the amount of the policy; instead, the damages awarded depend on the facts of each case. *See Burgraff v. Menard, Inc.*, 875 N.W.2d 596, 608 (Wis. 2016). The objective is to have the insurer "pay damages necessary to put the insured in the same position he would have been in had the insurance company fulfilled the insurance contract." *Id.* (internal quotation marks omitted). Thus, "[a] party aggrieved by an insurer's breach of its duty to defend is entitled to recover all damages naturally flowing from the breach." *Id.* (internal quotation marks omitted). Damages that may naturally flow from an insurer's breach include;

> (1) the amount of the judgment or settlement against the insured plus interest [even in excess of the policy limits]; (2) costs and attorney fees incurred by the insured in defending the suit; and (3) any additional costs that the insured can show naturally resulted from the breach.

Newhouse v. Citizens Sec. Mut. Ins. Co., 501 N.W.2d 1, 6 (Wis. 1993).

For instance, in *Delatorre v. Safeway Insurance Co.*, the insurer breached its duty to defend by failing to ensure that retained counsel continued defending the insured after answering the complaint, which ultimately led to a default judgment against the insured exceeding the policy limits. 989 N.E.2d 268, 274 (Ill. App. Ct. 2013). The court found that the entry of default judgment directly flowed from the insurer's

breach, and thus, the insurer was liable for the portion that exceeded the policy limit. *Id.*, at 276. The court reasoned that a default judgment "could have been averted altogether had [the insurer] seen to it that its insured was actually defended as contractually required." *Id.*

On the other hand, in *Hamlin Inc. v. Hartford Accident & Indemnity Co.*, the court considered whether the insured had as good of a defense as it would have had had the insurer provided counsel. 86 F.3d 93, 95 (7th Cir. 1996). The court observed that although the "insurer did not pay the entire bill for [the insured's] defense," the insured is not "some hapless individual who could not afford a good defense unless his insurer or insurers picked up the full tab." *Id.* Moreover, the court noted that the insured could not have expected to do better with the firm it hired, which "was in fact its own choice, and not a coerced choice, that is, not a choice to which it turned only because the obstinacy of the [insurers] made it unable to 'afford' an even better firm (if there is one)." *Id.* Therefore, because the entire judgment was not consequential to the insurer's breach of its duty to defend, the insured was not entitled to the entire amount of the judgment awarded against it in the underlying lawsuit. *Id.*

We conclude that the minority view is the better approach. Unlike the minority view, the majority view places an artificial limit to the insurer's liability within the policy limits for a breach of its duty to defend. That limit is based on the insurer's duty to indemnify but "[a] duty to defend limited to and coextensive with the

duty to indemnify would be essentially meaningless; insureds pay a premium for what is partly litigation insurance designed to protect . . . the insured from the expense of defending suits brought against him." *Capitol Envtl. Servs., Inc. v. N. River Ins. Co.*, 536 F. Supp. 2d 633, 640 (E.D. Va. 2008) (internal quotation marks omitted). Even the *Comunale* court recognized that "[t]here is an important difference between the liability of an insurer who performs its obligations and that of an insurer who breaches its contract." 328 P.2d at 201. Indeed, the insurance policy limits "only the amount the insurer may have to pay in the performance of the contract as compensation to a third person for personal injuries caused by the insured; they do not restrict the damages recoverable by the insured for a breach of contract by the insurer." *Id.*

The obligation of the insurer to defend its insured is purely contractual and a refusal to defend is considered a breach of contract. Consistent with general contract principles, the minority view provides that the insured may be entitled to consequential damages resulting from the insurer's breach of its contractual duty to defend. *See* Restatement of Liability Insurance § 48 (Am. Law Inst., Proposed Final Draft No. 2, 2018). Consequential damages "should be such as may fairly and reasonably be considered as arising naturally, or were reasonably contemplated by both parties at the time they made the contract." *Hornwood v. Smith's Food King No. 1*, 105 Nev. 188, 190, 772 P.2d 1284, 1286 (1989) (internal quotation marks omitted). The determination of the insurer's liability depends on the

unique facts of each case and is one that is left to the jury's determination. *See Khan v. Landmark Am. Ins. Co.*, 757 S.E.2d 151, 155 (Ga. Ct. App. 2014) ("[W]hether the full amount of the judgment was recoverable was a jury question that depended upon what damages were found to flow from the breach of the contractual duty to defend.").[5]

The right to recover consequential damages sustained as a result of an insurer's breach of the duty to defend does not require proof of bad faith. As the Supreme Court of Michigan explained:

> The duty to defend . . . arises solely from the language of the insurance contract. A breach of that duty can be determined objectively, without reference to the good or bad faith of the insurer. If the insurer had an obligation to defend and failed to fulfill that obligation, then, like any other party who fails to perform its contractual obligations, it becomes liable for all foreseeable damages flowing from the breach.

Stockdale v. Jamison, 330 N.W.2d 389, 392 (Mich. 1982). In other words, an insurer's breach of its duty to defend can be determined objectively by comparing the facts alleged in the complaint with the insurance policy. Thus, even in the absence of bad faith, the insurer may be liable for a judgment that exceeds the policy

---

[5] Consequently, we reject appellant's argument that, as a matter of law, damages in excess of the policy limits can never be recovered as a consequence to an insurer's breach of its duty to defend.

limits if the judgment is consequential to the insurer's breach. An insurer that refuses to tender a defense for "its insured takes the risk not only that it may eventually be forced to pay the insured's legal expenses but also that it may end up having to pay for a loss that it did not insure against." *Hamlin*, 86 F.3d at 94. Accordingly, the insurer refuses to defend at its own peril. However, we are not saying that an entire judgment is automatically a consequence of an insurer's breach of its duty to defend; rather, the insured is tasked with showing that the breach caused the excess judgment and "is obligated to take all reasonable means to protect himself and mitigate his damages." *Thomas v. W. World Ins. Co.*, 343 So. 2d 1298, 1303 (Fla. Dist. Ct. App. 1977); *see also Conner v. S. Nev. Paving, Inc.*, 103 Nev. 353, 355, 741 P.2d 800, 801 (1987) ("As a general rule, a party cannot recover damages for loss that he could have avoided by reasonable efforts.").

CONCLUSION

In answering the certified question, we conclude that an insured may recover any damages consequential to the insurer's breach of its duty to defend. As a result, 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.

/s/ Douglas, C.J.
Douglas

We concur:

/s/ Cherry, J.
Cherry

/s/ Gibbons, J.
Gibbons

/s/ Pickering, J.
Pickering

/s/ Hardesty, J.
Hardesty

/s/ Stiglich, J.
Stiglich

EXHIBIT 2

JMT
DAVID A. STEPHENS, ESQ.
Nevada Bar No. 00902
STEPHENS GOURLEY & BYWATER
3636 North Rancho Dr
Las Vegas, Nevada 89130
Attorneys for Plaintiff
T: (702) 656-2355
F: (702) 656-2776
E: dstephens@sbglawfirm.com
Attorney for Cheyenne Nalder

DISTRICT COURT

CLARK COUNTY, NEVADA

CHEYENNE NALDER, Plaintiff, vs. GARY LEWIS, Defendant.	07A549111 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:

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.

[Illegible]
District Judge

Submitted by:
STEPHENS GOURLEY & BYWATER

/s/ David A. Stephens
DAVID A. STEPHENS, ESQ.
Nevada Bar No. 00902
STEPHENS GOURLEY &
BYWATER
3636 North Rancho Dr
Las Vegas, Nevada 89130
Attorneys for Plaintiff

CERTIFIED COPY
DOCUMENT ATTACHED IS A
TRUE AND CORRECT COPY
OF THE ORIGINAL ON FILE

Steven D. Grierson
CLERK OF THE COURT

JAN 23 2019

EXHIBIT 3

JUDG
E. BREEN ARNTZ, ESQ.
Nevada Bar No. 3853
5545 Mountain Vista Ste. E
Las Vegas, Nevada 89120
T: (702) 384-8000
F: (702) 446-8164
breen@breen.com

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES NALDER, Plaintiff, vs. GARY LEWIS and DOES 1 through V, inclusive Defendants,	CASE NO: 07A549111 DEPT. NO: XX Consolidated with CASE NO: 18-A-772220
UNITED AUTOMOBILE INSURANCE COMPANY, Intervenor.	
GARY LEWIS, Third Party Plaintiff, vs. UNITED AUTOMOBILE INSURANCE COMPANY, RANDALL TINDALL, ESQ., and RESNICK & LOUIS, P.C. And DOES I through V, Third Party Defendants.	

JUDGMENT PURSUANT TO NRCP 68
IN CASE NO 18-A-772220

It appearing from the Notice of Acceptance of Offer of Judgment in the above-entitled matter that Cheyenne Nalder has accepted the Offer of Judgment served by

Gary Lewis pursuant to NRCP 68, therefore, Judgment shall be entered as follows:

Judgment is hereby entered in favor of Plaintiff, Cheyenne Nalder, and against Defendant, Gary Lewis, in the sum of five million six hundred ninety-six thousand eight hundred ten dollars and forty-one cents, ($5,696,810.41), plus interest at the legal rate from September 4, 2018. All court costs and attorney's fees are included in this Judgment.

Dated this _____ day of January, 2019.

STEVEN D. GRIERSON
CLERK OF THE COURT

Michelle McCarthy
Deputy Clerk
07A549111 1/23/2019

Michelle McCarthy

Submitted by:

/s/ E. Breen Arntz
E. BREEN ARNTZ, ESQ.
Nevada Bar No. 3853
5545 Mountain Vista Ste. E
Las Vegas, Nevada 89120
T: (702) 384-8000
breen@breen.com

CERTIFIED COPY
DOCUMENT ATTACHED IS A
TRUE AND CORRECT COPY
OF THE ORIGINAL ON FILE

Steven D. Grierson
CLERK OF THE COURT
JAN 23 2019

EXHIBIT 4

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES	Reserved for Clerk's File Stamp (Filed Jul. 24, 2018)
COURTHOUSE ADDRESS: Pomona Courthouse, 400 Civic Center Plaza, Pomona CA 91766	
PLAINTIFF/PETITIONER: James Nalder, individually and as Guardian ad Litem for Cheyenne Nalder	
DEFENDANT/RESPONDENT: Gary Lewis	
JUDGMENT BASED ON SISTER-STATE JUDGMENT (Code Civ. Proc., § 1710.25)	CASE NUMBER KS021378

BY FAX

An application has been filed for entry of judgment based upon judgment entered in the State of:
Nevada

Pursuant to Code of Civil Procedure section 1710.25, judgment is hereby entered in favor of plaintiff/judgment creditor

James Nalder, individually and as Guardian ad Litem for Cheyenne Nalder

and against defendant/judgment debtor Lewis

Gary Lewis

For the amount shown in the application remaining unpaid under said Judgment in the sum of $ 3,485,000, together with interest on said judgment in the sum of $ 2,174,998.52, Los Angeles Superior Court filing fees in the sum of $ 435, costs in the sum of $ 0, and it on said Judgment accruing from the time of entry of judgment at the rate provided by law.

SHERRI R. CATER,
Executive Officer/Clerk

Dated: JUL 24 2018 By: /s/ G. Moreno
G. MORENO
Deputy Clerk

CERTIFICATE OF MAILING

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the **Judgment Based on Sister-State Judgment (Code Civ. Proc., § 1710.25)** upon each party or counsel named below by depositing In the United States malt at the courthouse in _____, California, one copy of the original filed herein in a separate sealed envelope for each address as below with the postage thereon fully prepaid.

SHERRI R. CATER,
Executive Officer/Clerk

Dated: _____ By: _____
Deputy Clerk

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and address)*: Mark J. Linderman (State Bar No. 144685) mlinderman Joshua M. Deitz (State Bar No. 267454) jdeitz@rjo.co 311 California Street San Francisco, California 94104 ATTORNEY FOR *(Name)* Cheyenne Nalder, James Nalder TELEPHONE NO.: 415-956-282[Illegible] 415-956-2828	FOR COURT USE ONLY (Filed Jul. 24, 2018)
NAME OF COURT: Superior Court of California, County of Los Angeles STREET ADDRESS: 400 Civic Center Plaza MAILING ADDRESS: CITY AND ZIP CODE: Pomona 91766 BRANCH NAME: Pomona Courthouse	
PLAINTIFF: James Nalder, individually and as Guardian ad Litem for Cheyenne Nalder DEFENDANT: Gary Lewis	
NOTICE OF ENTRY OF JUDGMENT ON SISTER-STATE JUDGMENT	CASE NUMBER KS021378

BY FAX

1. TO JUDGMENT DEBTOR *(name)*: Gary Lewis 733 S. Minnesota Ave, Glendora, CA 91740

2. YOU ARE NOTIFIED

   a. Upon application of the judgment creditor, a judgment against you has been entered in this court as follows:

      (1) Judgment creditor *(name)*: James Nalder, individually and as Guardian ad Litem for Cheyenne Nalder

      (2) Amount of judgment entered in this court: $ 5,660,433.52

   b. This judgment was entered based upon a sister-state judgment previously entered against you as follows:

      (1) Sister state *(name)*: Nevada

      (2) Sister-state court *(name and location)*: Eighth Judicial District Court, Clark County, Nevada

      200 Lewis Ave, Las Vegas, NV. 89155

      (3) Judgment entered in sister state on *(date)*: June 2, 2008

      (4) Title of case and case number *(specify)*: Nalder v. Lewis, Case No. A549111

3. A sister-state judgment has been entered against you in a California court. Unless you file a motion to vacate the judgment in this court within 30 DAYS after service of this notice, this judgment will be final.

This court may order that a writ of execution or other enforcement may issue, Your wages, money, and property could be taken without further warning from the court.

If enforcement procedures have already been issued, the property levied on will not be distributed until 30 days you are served with this notice.

Dated: JUL 24 2018 **SHERRI R. CATER** Clerk, by /s/ G. Moreno G. MORENO, Deputy

4. ☑ NOTICE TO THE PERSON SERVED:
You are served
a. ☑ as an individual judgment debtor.
b. ☐ under the fictitious name of *(specify)*:
c. ☐ on behalf of *(specify)*:

Under:

[SEAL]
☐ CCP 416.10 (corporation)
☐ CCP 416.20 (defunct corporation)
☐ CCP 416.40 (association or partnership)
☐ CCP 416.60 (minor)
☐ CCP 416.70 (conservatee)
☑ CCP 416.90 (individual)
☐ Other:

(Proof of service on reverse)

PROOF OF SERVICE
(Use separate proof of service for each person served)

1. I served the Notice of Entry of Judgment on Sister-State Judgment as follows:

a. on judgment debtor *(name)*: GARY LEWIS

b. by serving ☑ judgment debtor ☐ other *(name and title or relationship to person served)*:

c. ☑ by delivery ☑ at home ☐ at business
(1) date: 07/26/18
(2) time: 7:00 p.m.
(3) address: 733 S. Minnesota Ave
Glendora, CA 91740

d. ☐ by mailing
(1) date:
(2) place:

2. Manner of service *(check proper box)*:

a. ☑ **Personal service.** By personally delivering copies. (CCP 415.10)

b. ☐ **Substituted service on corporation, unincorporated association (including partnership), or public entity.** By leaving, during usual office hours, copies in the office of the person served with the person who apparently was in charge and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left. (CCP 415.20(a))

c. ☐ **Substituted service on natural person, minor, conservatee, or candidate.** By leaving copies at the dwelling house, usual place of abode, or usual place of business of the person served in the presence of a competent member of the household or a person apparently in charge of the office or place of business, at least 18 years of age, who was

informed of the general nature of the papers, and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left. (CCP 415.20(b)) ***(Attach separate declaration or affidavit stating acts relied on to establish reasonable diligence in first attempting personal service.)***

d. ☐ **Mail and acknowledgment service.** By mailing (by first-class mail or airmail, postage prepaid) copies to the person served, together with two copies of the form of notice and acknowledgment and a return envelope, postage prepaid, addressed to the sender. (CCP 415.30) ***(Attach completed acknowledgment of receipt.)***

e. ☐ **Certified or registered mail service.** By mailing to an address outside California (by first-class mail, postage prepaid, requiring a return receipt) copies to the person served. (CCP 415.40) ***(Attach signed return receipt or other evidence of actual delivery to the person served.)***

f. ☐ Other *(specify code section)*:
☐ Additional page is attached.

3. The "Notice to the Person Served" was completed as follows:

a. ☑ an individual judgment debtor.
b. ☐ the person sued under the fictitious name of *(specify)*:
c. ☐ behalf of *(specify)*:
under:

☐ CCP 416.10 (corporation)
☐ CCP 416.20 (defunct corporation)
☐ CCP 416.40 (association or partnership)
☐ CCP 416.60 (minor)
☐ CCP 416.70 (conservatee)
☐ CCP 416.90 (individual)
☐ Other:

4. At the time of service I was at least 18 years of age and not a party to this action.
5. Fee for service: $
6. Person serving:
   a. ☐ California sheriff, marshal, or constable.
   b. ☑ Registered California process server.
   c. ☐ Employee or independent contractor of a registered California process server.
   d. ☐ Not a registered California process server.
   e. ☐ Exempt from registration under Bus. & Prof. Code 22350(b).
   f. Name, address and telephone number and, if applicable, county of registration and number:

      Jorge Rivera (Reg# 4690 Los Angeles County)
      52 Second Street, 3rd Floor
      San Francisco, California 94105
      (415) 546-6000

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 07/27/18

► [Illegible]
(SIGNATURE)

(For California sheriff, marshal, or constable use only)

I certify that the foregoing is true and correct.

Date:

►
(SIGNATURE)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and address)*: Mark J. Linderman (State Bar No. 144685) mlinderman Joshua M. Deitz (State Bar No. 267454) jdeitz@rjo.com 311 California Street San Francisco, California 94104 ATTORNEY FOR *(Name)* Cheyenne Nalder, James Nalder TELEPHONE NO.: 415-956-282[Illegible] 415-956-2828	FOR COURT USE ONLY (Filed Jul. 17, 2018)
NAME OF COURT: Superior Court of California, County of Los Angeles STREET ADDRESS: 400 Civic Center Plaza MAILING ADDRESS: CITY AND ZIP CODE: Pomona 91766 BRANCH NAME: Pomona Courthouse	
PLAINTIFF: James Nalder, individually and as Guardian ad Litem for Cheyenne Nalder DEFENDANT: Gary Lewis	
APPLICATION FOR ENTRY OF JUDGMENT ON SISTER-STATE JUDGMENT ☐ AND ISSUANCE OF WRIT OF EXECUTION OR OTHER ENFORCEMENT ☐ AND ORDER FOR ISSUANCE OF WRIT OR OTHER ENFORCEMENT	CASE NUMBER KS021378

BY FAX

Judgment creditor applies for entry of a judgment based upon a sister-state judgment as follows:

1. Judgment creditor *(name and address)*.
James Nalder, individually and as
Guardian ad Litem for Cheyenne Nalder
5037 Sparkling Sky Avenue
Las Vegas, Nevada, 89130

2. a. Judgment debtor *(name)*: *Gary* Lewis

b. ☑ An individual *(last known residence address)*:
733 8. Minnesota Ave, Glendora, CA 91740

c. ☐ A corporation of *(specify place of incorporation)*:

(1) ☐ Foreign corporation
☐ qualified to do business in California
☐ not qualified to do business in California

d. ☐ A partnership *(specify principal place of business)*:

(1) ☐ Foreign corporation which
☐ has filed a statement under Corp C 15700
☐ has not filed a statement under Corp C 15700

3. a. state *(name)*: Nevada

b. Sister-state court *(name and location)*:
Eighth Judicial District Court, Clark County, Nevada)
200 Lewis Ave, Las Vegas, NV. 89155

c. Judgment entered in sister state on *(date)*:
June 2, 2008

4. An authenticated copy of the sister-state judgment is attached to this application. Include accrued interest on the sister-state judgment in the California judgment (item 5c).

   a. Annual interest rate allowed by sister state *(specify)*: 6.5%

   b. Law of sister state establishing interest rate *(specify)*: NRS 17.130

5. a. Amount remaining unpaid on sister-state judgment: .....$ 3,485,000
   b. Amount of filing fee for the application: .....$ 435
   c. Accrued interest on sister-state judgment: $ 2,174,998.52
   d. Amount of judgment to be entered *(total of 5a, 6, and c)*.....$ 5,660,433.52

6. ☐ Judgment creditor also applies for issuance of a writ of execution or enforcement by other means before service of notice of entry of judgment as follows:

a. ☐ Under CCP 1710.45(b).

b. ☐ A court order is requested under CCP 1710.45(c). Facts showing that great or irreparable injury will result to judgment creditor if issuance of the writ or enforcement by other means is delayed are set forth as follows:

☐ continued in attachment 6b.

7. An action in this state on the sister-state judgment is not barred by the statute of limitations.

8. I am informed and believe that no stay of enforcement of the sister-state judgment is now in effect in the sister state.

9. No action is pending and no judgment has previously been entered in any proceeding in California based upon the sister-state it.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct except as to those matters which are stated to be upon information and belief, and as to those matters I believe them to be true.

Date: 7/17/18

Joshua M. Deitz	▶ [Illegible]
(TYPE OR PRINT NAME)	*(SIGNATURE OF JUDGMENT CREDITOR OR ATTORNEY)*

EXHIBIT A

JUDG
DAVID F. SAMPSON, ESQ.,
Nevada Bar #6811
THOMAS CHRISTENSEN, ESQ.,
Nevada Bar #2326
1000 S. Valley View Blvd.
Las Vegas, Nevada 89107
(702) 870-1000
Attorney for Plaintiff,
JAMES NALDER As Guardian Ad
Litem for minor, CHEYENNE NALDER

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES NALDER, individually and as Guardian ad Litem for CHEYANNE NALDER, a minor.	)	
Plaintiffs,	)	CASE NO: A549111
vs.	)	DEPT. NO: VI
GARY LEWIS, and DOES I through V, inclusive ROES I through V	)	
Defendants.	)	

NOTICE OF ENTRY OF JUDGMENT

PLEASE TAKE NOTICE that a Judgment against Defendant, GARY LEWIS, was entered in the above-entitled matter on June 2, 2008. A copy of said Judgment is attached hereto.

DATED this 5th day of June, 2008.

CHRISTENSEN LAW OFFICES, LLC

By: /s/ [Illegible]
DAVID F. SAMPSON, ESQ.
Nevada Bar #6811
THOMAS CHRISTENSEN, ESQ.,
Nevada Bar #2326
1000 S. Valley View Blvd.
Las Vegas, Nevada 89107
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of CHRISTENSEN LAW OFFICES, LLC., and that on this 5th day of ~~March~~ June 2008, I served a copy of the foregoing **NOTICE OF ENTRY OF JUDGMENT** as follows:

☒ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below; and/or

☐ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile number(s) shown below and in the confirmation sheet filed herewith. Consent to service under NRCP 5(b)(2)(D) shall be assumed unless an objection to service by facsimile transmission is made in writing and sent to the sender via facsimile within 24 hours of receipt of this Certificate of Service; and/or

☐ Hand Delivery—By hand-delivery to the addresses listed below.

Gary Lewis
5049 Spencer St. #D
Las Vegas, NV 89119

/s/ [Illegible]
An employee of THOMAS CHRISTENSEN LAW OFFICES, LLC

JMT
THOMAS CHRISTENSEN, ESQ.,
Nevada Bar #2326
DAVID F. SAMPSON, ESQ.,
Nevada Bar #6811
1000 S. Valley View Blvd.
Las Vegas, Nevada 89107
(702) 870-1000
Attorney for Plaintiff,

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES NALDER, as Guardian ad Litem for CHEYANNE 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:

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.

/s/ [Illegible]
DISTRICT JUDGE

Submitted by:
CHRISTENSEN LAW OFFICES, LLC

BY: /s/ [Illegible]
DAVID SAMPSON
Nevada Bar #6811
1000 S. Valley View
Las Vegas, Nevada 89107
Attorneys for Plaintiff

COM
THOMAS CHRISTENSEN, ESQ.
Nevada Bar No. 2326
DAVID F. SAMPSON, ESQ.
Nevada Bar No. 6811
CHRISTENSEN LAW OFFICES, LLC
1000 S. Valley View Blvd.
Las Vegas, Nevada 89107
Attorneys for Plaintiffs

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES NALDER, Guardian Ad Litem for minor Cheyanne Nalder, real party in interest, and GARY LEWIS, Individually; Plaintiffs, vs. UNITED AUTOMOBILE INSURANCE CO, DOES I through V, and ROE CORPORATIONS I through V, inclusive Defendants.	[A-09-590967-C] Case No.: Dept No.: [II]

COMPLAINT

(Filed May 22, 2009)

COME NOW the Plaintiffs, James Nalder, Guardian Ad Litem for minor, Cheyanne Nalder, real party in interest in this matter, and Gary Lewis, by and

through their attorneys of record, DAVID SAMPSON, ESQ., of the law firm of CHRISTENSEN LAW OFFICES, LLC, and for Plaintiffs' Complaint against the Defendants, and each of them, allege as follows:

1. That Plaintiff, James Nalder, Guardian Ad Litem for minor, Cheyanne Nalder real party in interest, was at all times relevant to this action a resident of the County of Clark, State of Nevada.

2. That Plaintiff, Gary Lewis, was at all times relevant to this action a resident of the County of Clark, State of Nevada.

3. That Defendant, United Automobile Insurance Co. (hereinafter "UAI"), was at all times relevant to this action an automobile insurance company duly authorized to act as an insurer in the State of Nevada and doing business in Clark County, Nevada.

4. That the true names and capacities, whether individual, corporate, partnership, associate or otherwise, of Defendants, DOES I through V and ROE CORPORATIONS I through V, are unknown to Plaintiffs, who therefore sue said Defendants by such fictitious names. Plaintiffs are informed and believe and thereon allege that each of the Defendants designated herein as DOE or ROE CORPORATION is responsible in some manner for the events and happenings referred to and caused damages proximately to Plaintiffs as herein alleged, and that Plaintiffs will ask leave of this Court to amend this Complaint to insert the true names and capacities of DOES I through V and ROE CORPORATIONS I through V, when the same have

been ascertained, and to join such Defendants in this action.

5. That, at all times relevant hereto, Gary Lewis was the owner of a certain 1996 Chevy Silverado with vehicle identification number 1GCEC19M6TE214944 (hereinafter "Plaintiff's Vehicle").

6. That Gary Lewis had in effect on July 8, 2007, a policy of automobile insurance on the Plaintiff's Vehicle with Defendant, UAI (the "Policy"); that the Policy provides certain benefits to Cheyanne Nalder as specified in the Policy; and the Policy included liability coverage in the amount of $15,000.00/$30,000.00 per occurrence (hereinafter the "Policy Limits").

7. That Gary Lewis paid his monthly premium to UAI for the policy period of June 30, 2007 through July 31, 2007.

8. That on July 8, 2007 on Bartolo Rd in Clark County Nevada, Cheyenne Nalder was a Ipedestrian in a residential area, Plaintiffs vehicle being operated by Gary Lewis when Gary Lewis drove over top of Cheyanne Nalder causing serious personal injuries and damages to Cheyanne Nalder.

9. That Cheyanne Nalder made a claim to UAI for damages under the terms of the Policy due to her personal injuries.

10. That Cheyanne Nalder offered to settle his claim for personal injuries and damages against Gary Lewis within the Policy Limits, and that Defendants, and each of them, refused to settle the claim of Cheyanne

Nalder against Gary Lewis within the Policy Limits and in fact denied the claim all together indicating Gary Lewis did not have coverage at the time of the accident.

11. That Plaintiff, Gary Lewis has duly performed all the conditions, provisions and terms of the Policy relating to the loss sustained by Plaintiff, Cheyanne Nalder, and has furnished and delivered to the Defendants, and each of them, full and complete particulars of said loss and have fully complied with all of the provisions of the Policy relating to the giving of notice of said loss, and have duly given all other notices required to be given by the Plaintiffs under the terms of the Policy, including paying the monthly premium.

12. That Plaintiff, Cheyanne Nalder, is a third party beneficiary under the Policy as well as a Judgment Creditor of Gary Lewis and is entitled to pursue action against the Defendants directly under Hall v. Enterprise Leasing Co., West, 122 Nev. 685, 137 P.3d 1104, 1109 (2006), as well as Denham v. Farmers Insurance Company, 213 Cal.App.3d 1061, 262 Cal.Rptr. 146 (1989).

13. That Cheyanne Nalder conveyed to UAI her willingness to settle her claim against Gary Lewis at or within the policy limits of $15,000.00 provided they were paid in a commercially reasonable manner.

14. That Cheyanne Nalder and Gary Lewis cooperated with UAI in its investigation including but not limited to providing a medical authorization to UAI on or about August 2, 2007.

15. That on or about August 6, 2007 UAI mailed to Plaintiff, Cheyanne Nalders' attorney, Christensen Law Offices, a copy of "Renewal Policy Declaration Monthly Nevada Personal Auto Policy" for Gary Lewis with a note that indicated "There was a gap in coverage".

16. That on or about October 10, 2007 UAI mailed to Plaintiff, Cheyanne Nalders' attorney, Christensen Law Offices, a letter denying coverage.

17. That on or about October 23, 2007, Plaintiff, Cheyanne Nalder provided a copy of the complaint filed against UAI's insured Gary Lewis.

18. That on or about November 1, 2007, UAI mailed to Plaintiff, Cheyanne Nalders' attorney, Christensen Law Offices, another letter denying coverage.

19. That UAI denied coverage stating Gary Lewis had a "lapse in coverage" due to nonpayment of premium.

20. That UAI denied coverage for non-renewal.

21. That UAI mailed Gary Lewis a "renewal statement" on or about June 11, 2007 that indicated UAI's intention to renew Gary Lewis' policy.

22. That upon receiving the "renewal statement", which indicated UAI's intention to renew Gary Lewis' policy, Gary Lewis made his premium payment and procured insurance coverage with UAI.

23. That UAI was required under the law to provide insurance coverage under the policy Gary Lewis had

with UAI for the loss suffered by Cheyenne Nalder, and was under an obligation to defend Gary Lewis and to indemnify Gary Lewis up to and including the policy limit of $15,000.00, and to settle Cheyyene's claim at or within the $15,000.00 policy limit when given an opportunity to do so.

24. That UAI never advised Lewis that Nalder was willing to settle Nalder's claim against Lewis for the sum of $15,000.00.

25. UAI did not timely evaluate the claim nor did it tender the policy limits.

26. Due to the dilatory tactics and failure of UAI to protect their insured by paying the policy limits when given ample opportunity to do so, Plaintiff, Nalder, was forced to seek the services of an attorney to pursue his rights under her claim against Lewis.

27. Due to the dilatory tactics and failure of UAI to protect their insured by paying the policy limits when given ample opportunity to do so, Plaintiff, Cheyanne Nalder, was forced to file a complaint on October 9, 2007 against Gary Lewis for her personal injuries and damages suffered in the July 8, 2007 automobile accident.

28. The filing of the complaint caused additional expense and aggravation to both Cheyanne Nalder and Gary Lewis.

29. Cheyanne Nalder procured a Judgment against Gary Lewis in the amount of $3,500,000.00.

30. UAI refused to protect Gary Lewis and provide Gary Lewis with a legal defense to the lawsuit filed against Gary Lewis by Cheyanne Nalder.

31. That Defendants, and each of them, are in breach of contract by their actions which include, but are not limited to:

a. Unreasonable conduct in investigating the loss;

b. Unreasonable failure to provide coverage for the loss;

c. Unreasonable delay in making payment on the loss;

d. Failure to make a prompt, fair and equitable settlement for the loss;

e. Unreasonably compelling Plaintiffs to retain an attorney before making payment on the loss.

32. As a proximate result of the aforementioned breach of contract, Plaintiffs have suffered and will continue to suffer in the future, damages in the amount of $3,500,000.00 plus continuing interest.

33. As a further proximate result of the aformentioned breach of contract, Plaintiffs have suffered anxiety, worry, mental and emotional distress, and other incidental damages and out of pocket expenses, all to their general damage in excess of $10,000.00.

34. As a further proximate result of the breach of contract, Plaintiffs were compelled to retain legal counsel

to prosecute this claim, and Defendants, and each of them, are liable for their attorney's fees reasonably and necessarily incurred in connection therewith.

35. That Defendants, and each of them, owed a duty of good faith and fair dealing implied in every contract.

36. That Defendants, and each of them, were unreasonable by refusing to cover the true value of the claim of Cheyanne Nalder, wrongfully failing to settle within the Policy Limits when they had an opportunity to do so, and wrongfully denying coverage.

37. That as a proximate result of the aforementioned breach of the implied covenant of good faith and fair dealing, Plaintiffs have suffered and will continue to suffer in the future, damages in the amount of $3,500,000.00 plus continuing interest.

38. That as a further proximate result of the aformentioned breach of the implied covenant of good faith and fair dealing, Plaintiffs have suffered anxiety, worry, mental and emotional distress, and other incidental damages and out of pocket expenses, all to their general damage in excess of $10,000.00.

39. That as a further proximate result of the aforementioned breach of the implied covenant of good faith and fair dealing, Plaintiffs were compelled to retain legal counsel to prosecute this claim, and Defendants, and each of them, are liable for their attorney's fees reasonably and necessarily incurred in connection therewith.

40. That Defendants, and each of them, acted unreasonably and with knowledge that there was no reasonable basis for its conduct, in its actions which include but are not limited to: wrongfully refusing to cover the value of the claim of Cheyanne Nalder, wrongfully failing to settle within the Policy Limits when they had an opportunity to do so and wrongfully denying the coverage.

41. That as a proximate result of the aforementioned bad faith, Plaintiffs have suffered and will continue to suffer in the future, damages in the amount of $3,500,000.00 plus continuing interest.

42. That as a further proximate result of the aformentioned bad faith, Plaintiffs have suffered anxiety, worry, mental and emotional distress, and other incidental damages and out of pocket expenses, all to their general damage in excess of $10,000.00.

43. That as a further proximate result of the aforementioned bad faith, Plaintiffs were compelled to retain legal counsel to prosecute this claim, and Defendants, and each of them, are liable for their attorney's fees reasonably and necessarily incurred in connection therewith.

44. That Defendants, and each of them, violated NRS 686A.310 by their actions, including but not limited to: wrongfully refusing to cover the value of the claim of Cheyanne Nalder, wrongfully failing to settle within the Policy Limits when they had an opportunity to do so and wrongfully denying coverage.

45. That NRS 686A.310 requires that insurance carriers conducting business in Nevada adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies, and requires that carriers effectuate the prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear.

46. That UAI did not adopt and implement reasonable standards for the prompt investigation and processing of claims arising under its insurance policies, and did not effectuate the a prompt, fair and/or equitable settlement of Nalder's claim against Lewis in which liability of the insurer was very clear, and which clarity was conveyed to UAI.

47. That NAC 686A.670 requires that an insurer complete an investigation of each claim within 30 days of receiving notice of the claim, unless the investigation cannot be reasonably completed within that time.

48. That UAI received notice of Nalder's claim against Lewis, at the very latest, on or before August 6, 2007. That it was more than reasonable for UAI to complete its investigation of Nalder's claim against Lewis well within 30 days of receiving notice of the claim.

49. That UAI did not offer the applicable policy limits.

50. That UAI did failed to investigate the claim at all and denied coverage.

51. That as a proximate result of the aforementioned violation of NRS 686A.310, Plaintiffs have suffered and will continue to suffer in the future, damages in the amount of $3,500.000.00 plus continuing interest.

52. That as a further proximate result of the aforementioned violation of NRS 686A.310, Plaintiffs have suffered anxiety, worry, mental and emotional distress, and other incidental damages and out of pocket expenses, all to their general damage in excess of $10,000.00.

53. That as a further proximate result of the aforementioned violation of NRS 686A.310, Plaintiffs were compelled to retain legal counsel to prosecute this claim, and Defendants, and each of them, are liable for their attorney's fees reasonably and necessarily incurred in connection therewith.

54. That the Defendants, and each of them, have been fraudulent in that they have stated that they would protect Gary Lewis in the event he was found liable in a claim. All of this was done in conscious disregard of Plaintiffs' rights and therefore Plaintiffs are entitled to punitive damages in an amount in excess of $10,000.00.

WHEREFORE, Plaintiffs, pray for judgment against Defendants, and each of them, as follows:

1. Payment for the excess verdict rendered against Lewis which remains unpaid in an amount in excess of $3,500,000.00;

2. General damages for mental and emotional distress and other incidental damages in an amount in excess of $10,000.00;

3. Attorney's fees and costs of suit incurred herein; and

4. Punitive damages in an amount in excess of $10,000.00;

5. For such other and further relief as this Court deems just and proper

DATED this 17th day of April, 2009.

CHRISTENSEN LAW OFFICES, LCC.

/s/ Thomas Christensen

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