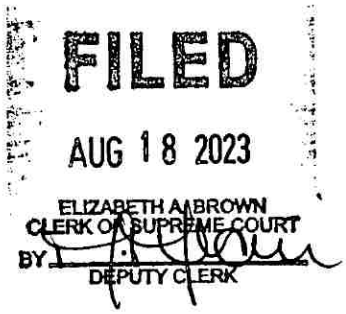
IN THE SUPREME COURT OF THE STATE OF NEVADA

CHEYENNE NALDER,
Appellant,
vs.
GARY LEWIS,
Respondent/Cross-Appellant,
vs.
UNITED AUTOMOBILE INSURANCE COMPANY,
Respondent/Cross-Respondent.

No. 83392



ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from a district court summary judgment in an action for damages and declaratory relief. Eighth Judicial District Court, Clark County; Veronica Barisich, Judge. Reviewing de novo, *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005), we affirm.

Facts and procedural history

This appeal arises from many years of litigation in three interrelated cases (the 2007 case, the 2009 case, and the 2018 case).

The 2007 case

In July 2007, respondent/cross-appellant Gary Lewis struck appellant Cheyenne Nalder with his vehicle. Cheyenne was a 9-year-old playing on private property at the time of the incident. Cheyenne's father, James Nalder, as her guardian ad litem, offered to settle with Lewis' insurer, respondent/cross-respondent United Automobile Insurance Company (UAIC). UAIC rejected this offer based on its belief that Lewis' policy had expired. James then instituted the 2007 case in state district court seeking damages from Lewis. UAIC declined to defend Lewis in the

action and Lewis failed to appear or answer the complaint. As a result, the district court entered a default judgment against Lewis in the principal amount of $3.5 million, plus interest and costs in June 2008 (the 2008 judgment).[1]

The 2009 case

In March 2009, James, as guardian ad litem for Cheyenne, and Lewis sued UAIC as co-plaintiffs alleging breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, breach of NRS 686A.310, and fraud.[2] The 2009 case involved several dispositions and appeals, which eventually resulted in the federal district court granting partial summary judgment to each party in 2013 (the 2013 judgment).[3] The federal court found in its 2013 judgment, in relevant part, that UAIC breached its duty to defend Lewis and awarded the policy limit of $15,000 in damages. *Nalder v. United Auto. Ins. Co.*, No. 2:09-cv-1348-RCJ-GWF, 2013 WL 5882472, at *5, 7 (D. Nev. Oct. 30, 2013).

James, as guardian ad litem for Cheyenne, and Lewis appealed the 2013 judgment to the Ninth Circuit, seeking $3.5 million in consequential damages for UAIC's failure to defend Lewis based on the 2008 judgment. During the pendency of that appeal, the 2008 judgment expired

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[1]In July 2018, Cheyenne domesticated the 2008 Nevada judgment in California, but by that time the 2008 judgment had already expired.

[2]Lewis assigned some of his rights in the 2009 case to Cheyenne to avoid collection on the 2008 judgment.

[3]*See generally Nalder v. United Auto. Ins. Co.*, No. 2:09-cv-1348-ECR-GWF, 2010 WL 5559974 at *6 (D. Nev. Dec. 20, 2010) (granting summary judgment to UAIC based on a finding that there was no coverage), *rev'd,* 500 F. App'x 701, 702 (9th Cir. 2012) (concluding that an issue of fact as to the date of coverage precluded summary judgment).

in 2014, and Cheyenne reached the age of majority in 2016. Subsequently, in 2017, UAIC filed a motion to dismiss the Ninth Circuit appeal for lack of standing, arguing that the 2008 judgment had expired. After this court answered two certified questions from the Ninth Circuit,[4] the Ninth Circuit dismissed that appeal for lack of standing, determining that (1) Cheyenne and Lewis waived any arguments regarding tolling of the time to renew or enforce the 2008 judgment, and therefore, (2) Cheyenne and Lewis did not suffer injury as a result of UAIC's failure to defend because the 2008 judgment expired and Lewis was no longer liable to Cheyenne for that judgment. *Nalder v. United Auto. Ins. Co.*, 817 F. App'x 347, 349 (9th Cir. 2020), *cert. denied,* 141 S. Ct. 1381 (Feb. 22, 2021).

The 2018 case

Presumably in reaction to UAIC's attacks on the validity of the 2008 judgment, Cheyenne did two things. First, she filed an ex parte motion in the 2007 case to amend the 2008 judgment to be in her name, which the district court granted. Second, she instituted another action against Lewis in April 2018, asserting, in relevant part, two alternative claims: (1) "action . . . to obtain a judgment against Gary Lewis including the full damages assessed in the original judgment plus interest and minus the one payment made," or (2) "declaratory relief regarding when the statutes of

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[4]*See, e.g., Nalder v. United Auto. Ins. Co.*, 824 F.3d 854, 855 (9th Cir. 2016) (order certifying first question), *and Nalder v. United Auto. Ins. Co.*, 878 F.3d 754, 755-56 (9th Cir. 2017) (order certifying second question); *see also Nalder v. United Auto. Ins. Co.*, No. 70504, 2019 WL 5260073, at *2-3 (Nev. Sept. 20, 2019) (Order Answering Certified Questions) (concluding that (1) the 2009 case was not an action upon the 2008 judgment and it had otherwise expired, and (2) Cheyenne and Lewis could not seek consequential damages for breach of the duty to defend based on an expired judgment).

limitations on the judgments expire." Lewis then filed a third-party complaint against UAIC. The district court granted summary judgment to UAIC on all of Cheyenne's and Lewis' claims, concluding that they are barred by the doctrines of issue and claim preclusion. Cheyenne now appeals and Lewis cross-appeals.

Discussion

The district court correctly granted summary judgment based on the preclusive rulings of this court and the Ninth Circuit

UAIC contends that this court's answers to the Ninth Circuit's certified questions are preclusive as to the 2008 judgment's validity, including waiver of the tolling arguments. We agree.

First, we conclude that issue preclusion bars Cheyenne's tolling arguments. The elements for issue preclusion are:

> (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; . . . (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated.

Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008) (citation omitted) (internal quotation marks omitted).

On appeal from the 2013 judgment, the Ninth Circuit concluded that Cheyenne's and Lewis' tolling arguments were waived, reasoning as follows:

> 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.

Nalder v. United Auto. Ins. Co., 817 F. App'x 347, 349 (9th Cir. 2020). Here, the first element of issue preclusion is met given that Cheyenne raised the issue of tolling in the 2009 case, and subsequently raised the same arguments in the 2018 case. The second element is also met because the Ninth Circuit's dismissal for lack of standing on appeal from the 2013 judgment was premised on waiver of the tolling arguments and, as the quotation above indicates, was on the merits and final. *See* Restatement (Second) of Judgments § 12 cmt. c (Am. Law Inst. 1982) (observing that a court's resolution of a jurisdictional question is "conclusive under the usual rules of issue preclusion"). The third element is satisfied because Cheyenne is in privity with Lewis due to her assignment of rights in the 2009 bad faith case, as well as her father, acting as her guardian ad litem. Finally, the fourth element is met as the validity of the 2008 judgment was actually and necessarily litigated, and the Ninth Circuit found it expired due to waiver of the tolling arguments. *Nalder*, 817 F. App'x at 349.

Thus, the district court did not err in granting summary judgment on Cheyenne's claims based on its finding that the decisions by this court and the Ninth Circuit precluded Cheyenne from relitigating the validity of the 2008 judgment.

Second, Lewis' third-party claims are barred by claim preclusion. This court has explained that claim preclusion applies when:

> [(1)] the final judgment [in a previous action] is valid, . . . [(2)] the subsequent action is based on the same claims or any part of them that were or could have been brought in the first [action], and (3) the parties or their privies are the same in the instant lawsuit as they were in the previous lawsuit, *or* the defendant can demonstrate that he

> or she should have been included as a defendant in the earlier suit and the plaintiff fails to provide a good reason for not having done so.

Weddell v. Sharp, 131 Nev. 233, 241, 350 P.3d 80, 85 (2015) (first & third alterations in original) (citation omitted) (internal quotation marks omitted).

Lewis' third-party claims are precluded by the 2009 bad faith case. The first element of claim preclusion is easily met. The 2009 case proceeded to a final judgment because the United States District Court for the District of Nevada, on remand from the Ninth Circuit, granted summary judgment in part to James and Lewis and awarded the $15,000 policy limit, attorney fees, and costs. *Nalder v. United Auto. Ins. Co.*, No. 2:09-cv-1348-RCJ-GWF, 2013 WL 5882472 (D. Nev. Oct. 30, 2013). The second element is also met because the district court determined that Lewis' third-party complaint in the 2018 case brought the same claims as the 2009 case,[5] or claims which could have been brought in 2009—indemnity, breach of covenant of good faith and fair dealing, breach of duty to defend, and violation of NRS 686A.310.[6] Finally, the parties and/or their privies are the

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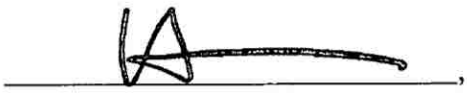
[5]The federal district court noted in its 2013 judgment that, in the 2009 case, "[p]laintiffs alleged breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, breach of [NRS] 686A.310, and fraud against Defendant." *Nalder*, 2013 WL 5882472, at *1.

[6]Lewis cites to the July 2018 California domesticated judgment, obtained by Cheyenne, in support of his bad faith claim for acts by UAIC post-2013. Because the California judgment is subject to the same attacks on its validity as the expired 2008 judgment, Lewis has failed to cite any evidence in the record that he was damaged by improper claims handling following the 2013 judgment. *See Conesco Mktg., LLC v. IFA & Ins. Servs., Inc.*, 164 Cal. Rptr. 3d 788, 793-94 (Ct. App. 2013) (holding that a judgment that is void in the sister state is "vulnerable to direct or collateral attack at any time") (internal quotation marks omitted).

same because Lewis assigned his rights in the 2009 bad faith case to Cheyenne in 2010. Given this assignment, Lewis was in privity with Cheyenne and James, acting as guardian ad litem, in the 2009 bad faith case against UAIC.

Therefore, the district court did not err in granting summary judgment on Lewis' claims.[7] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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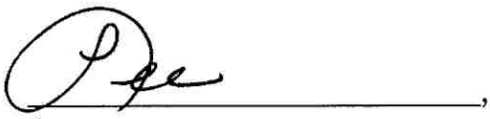
Herndon



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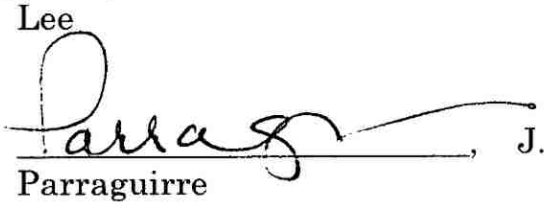

_____, J.
Parraguirre

cc: Hon. Veronica Barisich, District Judge
Persi J. Mishel, Settlement Judge
Stephens Law Offices
Lewis Roca Rothgerber Christie LLP/Las Vegas
Winner Booze & Zarcone
E. Breen Arntz, Chtd.
Christensen Law Offices, LLC
Eighth District Court Clerk

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[7]We have considered Cheyenne's and Lewis' other assertions on appeal and cross-appeal, but we decline to address them in light of the foregoing dispositive conclusions. *See Miller v. Burk*, 124 Nev. 579, 588-89 & n.26, 188 P.3d 1112, 1118-19 & n.26 (2008) (explaining that this court need not address issues that are unnecessary to resolve the case at bar).