

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

McDONALD CARANO WILSON  
LLP, a Nevada limited liability  
partnership,

Appellant,

vs.

THE BOURASSA LAW GROUP, LLC,  
a Nevada limited liability corporation;  
OASIS LEGAL FINANCE, LLC, an  
Illinois limited liability company;  
CALIFORNIA BACK SPECIALISTS  
MEDICAL GROUP, INC., a California  
corporation; CALIFORNIA  
MINIMALLY INVASIVE SURGERY  
CENTER, INC., a California  
corporation; THOUSAND OAKS  
SPINE MEDICAL GROUP, INC., a  
California corporation; CONEJO  
NEUROLOGICAL MEDICAL  
GROUP, INC., a California corporation;  
and MEDICAL IMAGING MEDICAL  
GROUP INC., a California corporation,

Respondents.

Supreme Court No. 64658

District Court Case No.  
A-07-553070-C

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**APPEAL FROM ORDER**

The Eighth Judicial District Court

In and for the County of Clark

THE HONORABLE RONALD J. ISRAEL  
DISTRICT COURT JUDGE

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**APPELLANT'S OPENING BRIEF**

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## DISCLOSURE STATEMENT

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

### Corporate Relationships

None

### Law Firm

McDonald Carano Wilson LLP

Dated: October 21, 2014.

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	IV
JURISDICTIONAL STATEMENT.....	1
STATEMENT OF ISSUE PRESENTED FOR REVIEW.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.....	2
I. RELEVANT BACKGROUND FACTS.....	2
II. INTERPLEADER ACTION.....	4
A. Complaint in Interpleader.....	4
B. Proceedings Related to Motions for Disbursement of Settlement Proceeds.....	5
1. Initial Hearing on Disbursement Requests.....	6
2. Second Hearing on Disbursement Requests. ....	6
3. Third Hearing on Disbursement Requests. ....	7
4. McDonald Carano’s Motion for Publication.....	8
5. Fourth Hearing on Disbursement Requests.....	8
6. Stipulation and Order Regarding Disbursement. ....	9
C. The Chiu Entities’ Failure to Retain Nevada Counsel. ....	9
D. Amended Default Judgment as to Steven Zlatt, M.D., Inc.. ....	10
ARGUMENT .....	10
I. SUMMARY OF ARGUMENT.....	10
II. STANDARD OF REVIEW .....	11
III. THE DISTRICT COURT ERRED BY RULING THAT <i>ARGENTENA</i> PROHIBITS THE ENFORCEMENT OF MCDONALD CARANO’S CHARGING LIEN. ....	11
A. History of Nevada Attorney Charging Lien Statute.....	11
1. Nevada Compiled Laws § 8923. ....	11
2. 1951 Amendment to Charging Lien Statute (NRS 18.010).....	12
3. 1977 Amendments to Charging Lien Statute (NRS 18.015). ....	12

4.	2013 Amendments to Charging Lien Statute.....	14
B.	The Court’s Interpretation of Nevada’s Charging Lien Statute. ....	14
1.	<i>Morse v. Dist. Court</i> , 65 Nev. 275, 195 P.2d 199 (1948). ....	14
2.	<i>Earl v. Las Vegas Auto Parts</i> , 73 Nev. 58, 307 P.2d 781 (1957). ....	15
3.	<i>Figliuzzi v. Dist. Court</i> , 11 Nev. 338, 890 P.2d 798 (1995). ....	16
4.	<i>Argentina</i> , 125 Nev. 527, 216 P.3d 779 (2009).....	17
C.	The Nevada State Bar Supports McDonald Carano’s Position. ....	18
D.	Numerous Other Jurisdictions Have Adopted the Position Advanced by McDonald Carano.....	19
E.	Any Other Interpretation of NRS 18.015 is Inequitable. ....	22
IV.	COOPER’S SEPARATE MALPRACTICE ACTION IS IRRELEVANT.....	23
	CONCLUSION .....	23
	CERTIFICATE OF COMPLIANCE .....	25
	CERTIFICATE OF MAILING.....	26

## TABLE OF AUTHORITIES

### Cases

<u>Ambrose v. Detroit Edison Co.,</u>	
237 N.W.2d 520 (Mich. Ct. App. 1975) .....	18
<u>Argentina v. Jolley Urga, et al.,</u>	
125 Nev. 527, 216 P.3d 779 (2009).....	passim
<u>Earl v. Las Vegas Auto Parts,</u>	
73 Nev. 58, 307 P.2d 781 (1957).....	11, 14-16
<u>Figliuzzi v. Dist. Court,</u>	
11 Nev. 338, 890 P.2d 798 (1995).....	15-17
<u>Jenkins v. Dist. Court,</u>	
676 P.2d 1201 (Co. 1984) .....	18
<u>Karras v. Alpha Corp.,</u>	
528 N.W.2d 397 (S.D. 1995) .....	18-19
<u>Leventhal v. Black &amp; LoBello,</u>	
129 Nev. ___, 305 P.3d 907 (2013).....	6-7
<u>Morse v. Dist. Court,</u>	
65 Nev. 275, 195 P.2d 199 (1948).....	passim
<u>Phelps Steel, Inc. v. Von Deak,</u>	
511 N.E.2d 42 (Mass. Ct. App. 1987) .....	17-18, 21
<u>Rangel v. Save Mart, Inc.,</u>	
142 P.3d 983 (N. M. Ct. App. 2006) .....	20
<u>Robinson v. Campbell,</u>	
661 P.2d 479 (N.M. Ct. App. 1983) .....	20
<u>Rosen v. Rosen,</u>	
468 N.Y.S.2d 723 (N.Y. 1983) .....	18-19

<u>Sheriff, Clark County v. Burcham,</u>	
124 Nev. 1247, 198 P.3d 326 (2008).....	10
<u>Smyth v. Fidelity and Deposit Co. of Md.,</u>	
192 A. 640 (Pa. 1973).....	13

## **Statutes**

Nevada Compiled Laws § 8923 .....	10-11, 13, 16, 19
New York Judiciary Law § 475 .....	19
NRS 18.010 .....	11, 14
NRS 18.015 .....	passim

## **Secondary Sources**

<u>State Bar of Nev. Standing Comm. on Ethics and Prof'l Responsibility</u>	
<u>Formal Op. No. 31, Nev. Law., Sept. 2005.....</u>	13

## **JURISDICTIONAL STATEMENT**

The Court has jurisdiction over this appeal pursuant to NRAP 3A(b)(1). The written order to which this appeal relates was entered on December 6, 2013. Written notice of entry of that order was served on December 10, 2013. The notice of appeal was filed on December 12, 2013. This is an appeal from a final order in an interpleader action, wherein the district court granted a motion for disbursement of settlement proceeds and denied a countermotion for adjudication and enforcement of an attorney charging lien.

## **STATEMENT OF ISSUE PRESENTED FOR REVIEW**

Whether the district court erred by holding that an attorney who voluntarily withdraws from representing a client prior to settlement or judgment cannot enforce a statutory charging lien against settlement proceeds that were recovered after the attorney's withdrawal.



## **STATEMENT OF THE CASE**

McDonald Carano represented a client in a personal injury matter from December 2007 until October 2010, when the attorney-client relationship broke down. Immediately after the district court granted McDonald Carano's motion to withdraw from the representation, McDonald Carano caused an attorney charging lien to be filed, recorded, and served in accordance with NRS 18.015. Thereafter, the Bourassa Firm negotiated a settlement on behalf of McDonald Carano's former client in the underlying litigation, and initiated a separate interpleader action in which McDonald Carano requested that the district court adjudicate and enforce the charging lien against the settlement proceeds that were the subject of the interpleader. The district court ordered that under Argentina v. Jolley Urga, et al., 125 Nev. 527, 216 P.3d 779 (2009), McDonald Carano's charging lien could not be enforced in the interpleader action because McDonald Carano had voluntarily withdrawn from the personal injury matter prior to settlement. McDonald Carano is seeking reversal of that order.

## **STATEMENT OF FACTS**

### **I. RELEVANT BACKGROUND FACTS**

In December 2007, Robert Cooper (Cooper) and the law firm of McDonald Carano Wilson LLP (McDonald Carano) executed a written agreement, pursuant to which Cooper engaged McDonald Carano to represent him in connection with a negligence lawsuit against ABC Union Cab Company (Union Cab) in Clark County, Nevada. Joint Appendix (JA) Vol. 1 at 1-2 (Tab 1). The suit arose out of injuries that Cooper allegedly suffered after being involved in an automobile accident while being transported in a taxicab owned by Union Cab. JA Vol. 1 at 3-6 (Tab 2).

McDonald Carano prosecuted the personal injury suit on Cooper's behalf for approximately three years, during which time it incurred in excess of \$100,000.00

in legal fees and \$13,456.62 in costs in connection with removing the case from the court-annexed arbitration program, discovery and depositions (including several in California), pre-trial motion practice, settlement negotiations, trial preparation, and other matters that were necessary to the representation. JA Vol. 1 at 7-34 (Tab 3).

In October 2010, the district court granted McDonald Carano's motion to withdraw from representing Cooper, on the grounds that the relationship between McDonald Carano and Cooper had broken down. JA Vol. 1 at 35-36 (Tab 4). The next day, McDonald Carano caused an attorney charging lien to be recorded in the Office of the Recorder of Clark County, Nevada, as Book/Instrument No. 0220004202, for "compensation in the amount of 40% of the gross amount recovered by settlement or judgment, plus costs in the approximate amount of \$13,500 plus interest (accrued and accruing) according to statute and/or contract on the foregoing amounts until paid in full" against any settlement or judgment recovered by Cooper in connection with the personal injury suit. JA Vol. 1 at 37-39 (Tab 5). McDonald Carano also caused copies of the recorded lien to be served on Cooper (via certified mail) and counsel for Union Cab (via hand-delivery) in accordance with NRS 18.015. Id.

Thereafter, Cooper retained the Bourassa Law Group, LLC (the Bourassa Firm) to represent him in the personal injury action, which Cooper and Union Cab agreed to settle and dismiss with prejudice shortly before trial. JA Vol. 1 at 40-41 (Tab 6). McDonald Carano mailed a copy of its charging lien to the Bourassa Firm upon learning of the settlement. JA Vol. 1 at 42-45 (Tab 7).

## **II. INTERPLEADER ACTION**

### **A. Complaint in Interpleader.**

On October 10, 2011, the Bourassa Firm initiated a separate lawsuit by filing a complaint in interpleader to adjudicate the rights of the potential claimants to the \$55,000.00 in settlement funds (the Settlement Proceeds) that resulted from the settlement of Cooper's personal injury suit. JA Vol. 1 at 46-51 (Tab 8).<sup>1</sup> McDonald Carano, certain medical providers who were identified during the course of the personal injury litigation, and Oasis Legal Finance, LLC (Oasis), which advanced funds to Cooper in exchange for an assignment of an interest in any judgment or settlement that he recovered in connection with the underlying litigation, were named as defendants. Id. Cooper was not named as a party to the interpleader action because the legal and medical claims to the Settlement Proceeds far exceeded the amount available to satisfy those claims. JA Vol. 2 at 371:16-25 (Tab 27).

McDonald Carano filed an answer to the complaint in interpleader and asserted a counterclaim against the Bourassa Firm and cross-claims against the other defendants on December 20, 2011, alleging that McDonald Carano had a valid and perfected first priority charging lien, and requesting that the district court adjudicate and enforce the lien. JA Vol. 1 at 115-124 (Tab 9). Oasis filed separate answers to the complaint in interpleader and McDonald Carano's cross-claims on May 8, 2012. JA Vol. 1 at 125-172 (answer to complaint); 173-177 (answer to cross-claims) (Tab 10). California Back Specialists Medical Group, Inc., California Minimally Invasive Surgery Center, Inc., Thousand Oaks Spine Medical Group, Inc., Conejo Neurological Medical Group, Inc., and Medical Imaging

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<sup>1</sup> The summonses and proofs of service are included with this exhibit. JA Vol. 1 at 52-114.

Medical Group, Inc. (collectively, the Chiu Entities)<sup>2</sup> purported to file separate answers to the complaint in interpleader and McDonald Carano's cross claims on May 29, 2012. JA Vol. 1 at 178-183 (answer to complaint); 184-189 (answer to cross-claims) (Tab 11).<sup>3</sup>

In addition, all but one of the other parties that were named as defendants in the interpleader action were voluntarily dismissed because they did not provide medical treatment related to the accident that was the subject of Cooper's personal injury suit (see JA Vol. 1 at 190-210 (Tab 12)), or had default judgment entered against them because they failed to answer or otherwise respond to the complaint in interpleader or McDonald Carano's cross-claims (see JA Vol. 1 at 211-223 (Tab 13)).<sup>4</sup>

**B. Proceedings Related to Motions for Disbursement of Settlement Proceeds.**

After the default judgments and voluntary dismissals were finalized, the Bourassa Firm filed a motion to disburse the Settlement Proceeds, wherein it requested 40% of the Settlement Proceeds plus litigation costs, with the remainder of the Settlement Proceeds to be disbursed on a pro rata basis. JA Vol. 1 at 224-230 (Tab 14). Oasis filed a joinder to the Bourassa Firm's motion. JA Vol. 1 at

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<sup>2</sup> The Chiu Entities are owned and/or controlled by John C. Chiu, M.D., a California surgeon who provided services to Cooper after the accident that was the subject of the personal injury suit.

<sup>3</sup> As discussed in Section II(C), the Chiu Entities were never represented by counsel in the interpleader action, and they are not currently represented in this appeal.

<sup>4</sup> The Bourassa Firm's original default judgment as to Steven Zlatt, M.D., Inc. was the subject of the Order to Show Cause that the Court entered in this matter on August 18, 2014. The jurisdictional defect that the Court identified was resolved after the Bourassa Firm obtained an amended default judgment. See discussion in Section II(D).

231 (Tab 15). McDonald Carano filed an opposition and countermotion to adjudicate and enforce its charging lien, wherein, among other things, it set forth the relevant legal standards pertaining to the creation and perfection of a charging lien under NRS 18.015, demonstrated that its lien was valid and perfected, and argued that its lien was enforceable and subject to adjudication. JA Vol. 2 at 232-305 (Tab 16). McDonald Carano requested 40% of the Settlement Proceeds plus litigation costs, with the remainder of the Settlement Proceeds to be disbursed as follows: 40% to the Bourassa Firm, and the remainder to the Chiu Entities on a pro rata basis. *Id.* (243:9-244:10). The Chiu Entities did not file anything.

### **1. Initial Hearing on Disbursement Requests.**

The district court held its initial hearing on the parties' respective disbursement requests on April 16, 2013, during which it ordered the parties to submit supplemental briefs to address whether Argentina deprives the district court of the ability to adjudicate a charging lien if the attorney has withdrawn from the representation prior to the entry of judgment or payment of settlement proceeds. JA Vol. 2 at 306-309 (Tab 17).<sup>5</sup> The district court also stated that Argentina is "the controlling case" on the issue of enforcement and adjudication of McDonald Carano's lien. *Id.* (308:18-19).

### **2. Second Hearing on Disbursement Requests.**

In its supplemental brief, the Bourassa Firm argued that the definition of "charging lien" set forth in Argentina<sup>6</sup> prevents a withdrawing attorney from

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<sup>5</sup> McDonald Carano did not address Argentina in its countermotion because, as discussed herein, it should have had no bearing on the resolution of the interpleader action.

<sup>6</sup> According to Argentina (which did not involve a charging lien), a charging lien is defined as "a lien on the settlement or judgment that the attorney has obtained for the client." 125 Nev. 527, 534, 216 P.3d 779, 783-84 (emphasis added). The underlined language is at the heart of this appeal.

seeking to enforce a charging lien against a judgment or settlement proceeds that are recovered after the attorney's withdrawal. JA Vol. 2 at 310-315 (Tab 18). Oasis and the Chiu Entities did not file anything.

On the other hand, McDonald Carano argued that Argentena had nothing to do with a charging lien, Argentena's definition of charging lien is not supported by the plain language of NRS 18.015 or its legislative or judicial history, and the Nevada State Bar and courts in numerous other jurisdictions have expressly or impliedly determined that an attorney who withdraws from representing a client can enforce a charging lien against a judgment or settlement proceeds that subsequently come into the client's hands. JA Vol. 2 at 316-328 (Tab 19).

The district court rejected McDonald Carano's arguments based solely on Argentena's charging lien definition (JA Vol. 2 at 329-335 (331:22-332:6) (Tab 20)) (i.e., McDonald Carano's lien was not enforceable because McDonald Carano had withdrawn prior to settlement, so McDonald Carano was required to pursue its claims for compensation in a separate case against Cooper), and entered an order granting the Bourassa Firm's motion and denying McDonald Carano's countermotion on September 12, 2013. JA Vol. 2 at 336-345 (Tab 21). The Bourassa Firm caused notice of that order to be served on September 16. Id.

### **3. Third Hearing on Disbursement Requests.**

On September 24, 2013, well before the deadline for McDonald Carano to appeal the order denying its countermotion for adjudication of its charging lien and disbursement of the Settlement Proceeds, the district court entered an order *sua sponte*, directing the parties to appear "for Hearing on Disbursement of Interpleader Funds" on October 15. JA Vol. 2 at 346-347 (Tab 22). At that hearing, the district court directed the parties to submit supplemental briefs on the effect, if any, that Leventhal v. Black & LoBello, 129 Nev. \_\_\_, \_\_\_, 305 P.3d 907, 909 (2013) and/or the 2013 legislative amendments to NRS 18.015 had on the

lien issue presented by McDonald Carano in the interpleader action. JA Vol. 2 at 348-353 (Tab 23).

The Bourassa Firm (JA Vol. 2 at 354-359 (Tab 24)) and McDonald Carano (JA Vol. 2 at 360-366 (Tab 25)) submitted supplemental briefs, wherein they each concluded that neither Leventhal (holding that an attorney cannot enforce a charging lien without a *res* to which the lien can attach) nor the amendments to NRS 18.015 (codifying the common law retaining lien) had any bearing on the issues presented in the interpleader action.<sup>7</sup> Oasis filed a joinder to the Bourassa Firm's supplemental brief. JA Vol. 2 at 367 (Tab 26).

#### **4. McDonald Carano's Motion for Publication.**

On October 29, 2013, McDonald Carano filed a motion requesting that this Court reissue, as a published decision, an unpublished Order of Reversal that the Court had recently entered in Case No. 57759. See Motion, on file with the Court. The Court ultimately denied McDonald Carano's motion. See Order Denying McDonald Carano's Motion for Publication, on file with the Court.

#### **5. Fourth Hearing on Disbursement Requests.**

On November 12, 2013, the district court conducted a hearing on the issues that the parties addressed in their supplemental briefs. JA Vol. 2 at 368-376 (Tab 27). Because McDonald Carano's motion for publication had not been decided at that point, however, the district court entered an oral order staying the interpleader action pending resolution of that motion. Id. at 369:10-373:13. The district court also noted that even though it had entered its original order regarding the parties' respective disbursement requests two months earlier (JA Vol. 2 at 336-345 (Tab

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<sup>7</sup> The Bourassa Firm also argued that Leventhal (like Argentina) supports the conclusion that a withdrawing attorney cannot enforce a charging lien against settlement proceeds that are recovered after the attorney withdraws. JA Vol. 2 at 356:12-357:23 (Tab 24). For the reasons discussed herein, neither Leventhal nor Argentina can be read in the manner advanced by the Bourassa Firm.

21)), it had retained jurisdiction to adjudicate all of the issues in the interpleader action. JA Vol. 2 at 374:13-375:16 (Tab 27). The Bourassa Firm stipulated to the Court's continuing jurisdiction. Id.

#### **6. Stipulation and Order Regarding Disbursement.**

After the Court denied McDonald Carano's motion for publication, the Bourassa Firm, Oasis, and McDonald Carano entered into a stipulation to fully and finally resolve all of the issues presented in the interpleader action. JA Vol. 2 at 377-384 (Tab 28). The district court's original ruling on the parties' disbursement requests was incorporated into the stipulation and included in an amended order on the competing disbursement motions that was entered on December 6, 2013. Id. McDonald Carano appeals from that order. JA Vol. 2 at 385-388 (Tab 29).

#### **C. The Chiu Entities' Failure to Retain Nevada Counsel.**

Counsel for the Bourassa Firm, Oasis, and McDonald Carano participated in a telephone conference with the appellate settlement judge on January 16, 2014. No one appeared on behalf of the Chiu Entities. On January 28, 2014, attorney Jacqueline Mary McQuigg (who was identified as counsel for the Chiu Entities in their answers to the Bourassa Firm's complaint in interpleader and McDonald Carano's cross-claim) wrote a letter to the Court, wherein she stated that she had never represented the Chiu Entities in the interpleader action, and that California attorney James Studer (who is not licensed in Nevada) and/or Dr. Chiu had used Ms. McQuigg's name and address without her permission to file documents on behalf of the Chiu Entities in the interpleader action. See Letter (Jan. 28, 2014), on file with the Court. As a result, the Court entered an order directing the Chiu Entities to retain counsel to represent them in connection with this appeal by August 11, 2014 (45 days after the date of the order). See Order Regarding Counsel, Removing Appeal from Settlement Program and Reinstating Briefing



(June 27, 2014), on file with the Court. As of the date of filing this brief, no counsel has made an appearance on behalf of the Chiu Entities.

**D. Amended Default Judgment as to Steven Zlatt, M.D., Inc.**

On August 18, 2014, the Court entered an order directing McDonald Carano to show cause why its appeal should not be dismissed based on a jurisdictional defect. See Order to Show Cause (Aug. 18, 2014), on file with the Court. Specifically, the Court noted that the Bourassa Firm's purported default judgment as to Steven Zlatt, M.D., Inc. (Zlatt) was defective because the body of the order purported to grant default judgment as to a different defendant, the Los Angeles Orthopaedic Institute, Inc. Id. McDonald Carano filed its response to the Order to Show Cause approximately three weeks later, informing the Court that the Bourassa Firm had obtained an amended default judgment as against Zlatt. See McDonald Carano's Response to Order to Show Cause (Sept. 4, 2014), on file with the Court; see also Exhibit 1 thereto. Accordingly, the Court reinstated the briefing schedule. See Order Reinstating Briefing (Oct. 20, 2014), on file with the Court.

**ARGUMENT**

**I. SUMMARY OF ARGUMENT**

The district court granted the Bourassa Firm's disbursement motion and denied McDonald Carano's countermotion based on the erroneous conclusion that under Argentena, an attorney cannot have an enforceable charging lien pursuant to NRS 18.015 if the attorney has voluntarily withdrawn prior to time of settlement or judgment. Argentena had nothing to do with a charging lien, and its definition of charging lien is not supported by the plain language, legislative history, or judicial interpretation of NRS 18.015. Moreover, as numerous other jurisdictions have recognized, the district court's interpretation is entirely inequitable. Accordingly, the final disbursement order (JA Vol. 2 at 378-384 (Tab 28)) should be reversed.

## **II. STANDARD OF REVIEW.**

This appeal presents a purely legal question – whether an attorney who voluntarily withdraws from representing a client can enforce a charging lien under NRS 18.015 against a judgment or settlement proceeds that the client receives after the attorney’s withdrawal. Therefore, a de novo standard of review applies. Sheriff, Clark County v. Burcham, 124 Nev. 1247, 1253, 198 P.3d 326, 329 (2008).

## **III. THE DISTRICT COURT ERRED BY RULING THAT ARGENTENA PROHIBITS THE ENFORCEMENT OF McDONALD CARANO’S CHARGING LIEN.**

McDonald Carano has consistently argued that its withdrawal from representing Cooper prior to settlement has no bearing on the district court’s ability to enforce McDonald Carano’s charging lien in the interpleader action. McDonald Carano’s position is supported by an analysis of the history of Nevada’s charging lien statute, the interpretations of that statute by the Court and the State Bar of Nevada, analogous case law from other jurisdictions, and public policy.

### **A. History of Nevada Attorney Charging Lien Statute.**

#### **1. Nevada Compiled Laws § 8923.**

The original version of Nevada’s attorney charging lien statute (“Section 8923”) read as follows:

From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client’s cause of action or counterclaim which attaches to a verdict, report, decision, or judgment in his client’s favor and the proceeds thereof in whosoever hands they may come, and cannot be affected by any settlement between the parties before or after judgment.

See Morse v. Dist. Court, 65 Nev. 275, 283, 195 P.2d 199, 203 (1948).

The Nevada Legislature’s use of the term “his client” in Section 8923 could arguably be interpreted to mean that, at the time the statute was in effect, an attorney could not have a valid charging lien unless he: (1) “appear[ed] for” a client who asserted a cause of action or counterclaim; and (2) was representing the client at the time that “a verdict, report, decision, or judgment” was entered “in his client’s favor.” As discussed in Section III(B) below, however, the Court never interpreted Section 8923 in that manner. In fact, in the only published case that appears to have interpreted Section 8923, the Court implied that an attorney who played a significant role in obtaining the judgment or settlement has an enforceable lien, even if the attorney was not representing a client at the time of judgment or settlement.

## **2. 1951 Amendment to Charging Lien Statute (NRS 18.010).**

In 1951, the Nevada Legislature slightly amended the attorney charging lien statute by adding one sentence before the language contained in Section 8923: “The compensation of an attorney and counselor for his services is governed by an agreement, express or implied, which is not restrained by law.” The amendment was codified in NRS 18.010. See Earl v. Las Vegas Auto Parts, 73 Nev. 58, 62, 302 P.2d 781, 783 (1957).<sup>8</sup>

## **3. 1977 Amendments to Charging Lien Statute (NRS 18.015).**

In 1977, the Nevada Legislature made some significant changes to the charging lien statute, which were codified in NRS 18.015. For purposes of this appeal, the following provisions are relevant:

- (1) An attorney at law shall have a lien upon any claim, demand or cause of action, including any claim for unliquidated damages, which has been placed in the attorney’s hands by a client for suit or

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<sup>8</sup> The charging lien statute was amended several more times between 1951 and 1977, but those amendments are not relevant to this appeal.

collection, or upon which a suit or other action has been instituted. The lien is for the amount of any fee which has been agreed upon by the attorney and client. In the absence of an agreement, the lien is for a reasonable fee for the services which the attorney has rendered for the client on account of the suit, claim, demand or action.

. . .

(3) The lien attaches to any verdict, judgment or decree entered and to any money or property which is recovered on account of the suit or other action, from the time of service of the notices required by this section.

. . .

4) On motion filed by an attorney having a lien under this section, the attorney's client or any party who has been served with notice of the lien, the court shall, after 5 days' notice to all interested parties, adjudicate the rights of the attorney, client or other parties and enforce the lien.

In revising the statute, the Nevada Legislature made three fundamental changes that are central to this appeal. First, it omitted the words "in his client's favor" after the list of items to which a charging lien attaches. Second, it changed the term "a verdict, report, decision, or judgment" to "any verdict, judgment, or decree entered and to any money or property which is recovered on account of the suit . . . ." *Id.* (emphasis added). And third, it provided an express grant of jurisdiction to the district courts to adjudicate and enforce a charging lien. Those changes, coupled with the following analysis of the relevant case law, clearly support the position being advanced by McDonald Carano: an attorney who performs a substantial amount of work on behalf of a client has a charging lien that can be adjudicated and enforced upon motion by the lienholder, regardless of whether the attorney is representing the client at the time that the judgment is entered and/or money is recovered on account of the suit.

#### **4. 2013 Amendments to Charging Lien Statute.**

The Nevada Legislature amended NRS 18.015 again in 2013, when it codified the common law retaining lien. Although the subsections of the statute were renumbered to accommodate the additional provisions, there were no significant substantive revisions to the statutory language pertaining to the creation, perfection, adjudication, or enforcement of charging liens. Therefore, the 2013 amendments to NRS 18.015 are immaterial to this appeal.

#### **B. The Court's Interpretation of Nevada's Charging Lien Statute.**

The Court has partially analyzed and/or interpreted both versions of the attorney charging lien statute.

##### **1. Morse v. Dist. Court, 65 Nev. 275, 195 P.2d 199 (1948).**

In Morse, which was decided while Section 8923 was in effect, the plaintiffs filed a motion to substitute counsel, wherein they requested that the district court order their former attorneys to release any claims to an attorney's lien and deliver their file to their new attorneys. Id. at 277-79, 195 P.2d at 200-01. At the time that the district court heard the motion, the litigation had not resulted in any recovery, judgment, or settlement. Id.

Interpreting Section 8923, the Court noted that the only applicable lien was a retaining lien, because there was no "verdict, report, decision, or judgment" to which a charging lien could attach. Nevertheless, the Court noted that a charging lien represented an attorney's "right to be paid out of a fund or judgment which he has been instrumental<sup>9</sup> in recovering for his client." Id. at 284, 195 P.2d at 203 (quoting Smyth v. Fidelity and Deposit Co. of Md., 192 A. 640, 643 (Pa. 1973)).

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<sup>9</sup> "Instrumental is defined as "serving as a means or influence; helpful." See Collin's English Dictionary, available at [www.collinsdictionary.com/dictionary/english/instrumental](http://www.collinsdictionary.com/dictionary/english/instrumental) (last visited Oct. 20, 2014).

In other words, the Morse Court recognized that an attorney can have an enforceable lien on the proceeds of a settlement or judgment that he was “helpful” in obtaining; it did not mandate that the attorney be representing the client at the time of settlement or judgment.

**2. Earl v. Las Vegas Auto Parts, 73 Nev. 58, 307 P.2d 781 (1957).**

Earl interpreted the immediate predecessor charging lien statute (NRS 18.010) to NRS 18.015. The case involved attorneys who represented a client in a personal injury action pursuant to a written engagement agreement. Prior to trial, the district court granted the client’s motion to substitute counsel. The court also retained jurisdiction to adjudicate the former attorneys’ compensation. Several months later, the attorneys filed notice of a charging lien in the same case. The case settled shortly thereafter. Id. at 60-61, 307 P.2d at 781-82.

A few weeks later, the district court entered an order fixing the substituted attorneys’ compensation. The substituted attorneys were present at the hearing that resulted in that order. When the client’s new counsel attempted to pay the court-ordered fee to the substituted attorneys, however, they rejected the check. They also failed to appeal the district court’s order or otherwise seek judicial review. Instead, they filed a separate suit based on their charging lien. When the substituted attorneys attempted to enforce their lien in that suit, the district court entered summary judgment against them on res judicata grounds (i.e., the trial court had already ruled on the issue of their compensation). Id., 307 P.2d at 781-82.

The Court affirmed the district court’s ruling as to the amount of the substituted attorneys’ fees. It also noted that the district court had jurisdiction over the substituted attorneys because they had appeared in the underlying action in which the fees were incurred, and it had jurisdiction over the subject matter because the fees were incurred in that action. Id., 307 P.2d at 783.

Although the facts presented in Earl are slightly different than those presented here, the case supports the general proposition that as long as the district court has jurisdiction over the parties and the subject matter, it can adjudicate and enforce a charging lien. Such is the case here: the district court obtained jurisdiction over the Settlement Proceeds when the Bourassa Firm filed its complaint in interpleader, and it obtained jurisdiction over McDonald Carano and its lien when it appeared in the case and sought to enforce the lien. Accordingly, Earl supports the conclusion that the district court should have enforced and adjudicated the lien in the interpleader action.

**3. Figliuzzi v. Dist. Court, 11 Nev. 338, 890 P.2d 798 (1995).**

The Court did not interpret the attorney charging lien statute again until it decided Figliuzzi in 1995, almost 20 years after the Nevada Legislature enacted NRS 18.015. In that case, a client retained a law firm to represent her in a domestic relations suit. She later became dissatisfied with the firm, and requested that it return her file. The firm refused to return the file, terminated its representation, and filed a motion to enforce its retaining lien. The suit was still pending at the time. Id. at 339-40, 890 P.2d at 799-800.

Although the Court noted that Nevada law recognizes both retaining liens and charging liens, it made clear that it was only ruling on the firm's retaining lien because the suit was still pending, and there was no verdict, judgment, decree, or money or property to which a charging lien could attach. Id. at 342, 890 P.2d at 801. Despite this express limitation, however, the Court stated – in dicta – that an attorney has a charging lien on a judgment or settlement that he has obtained for the client. Id. (citing Morse, 65 Nev. 275, 281, 195 P.2d 199, 202 (1948)).<sup>10</sup>

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<sup>10</sup> “In Nevada, there are two types of liens an attorney may hold to ensure that clients pay their attorney's fees: (1) a special or charging lien on the judgment or settlement the attorney has obtained for the client, NRS 18.015(1); . . . and (2) a

The Court's statement is curious for at least two reasons. First, as previously discussed, Morse never held that a charging lien is unenforceable if the attorney is not representing the client at the time of judgment or settlement – in fact, Morse clearly appears to suggest that the opposite is true. 65 Nev. at 284, 195 P.2d at 203. And second, Figliuzzi's reliance on Morse is entirely misplaced, because Morse interpreted Section 8923, which was: (a) not in effect at the time that Figliuzzi was decided, and (b) fundamentally altered by NRS 18.015. See discussion, *supra*.

**4. Argentina, 125 Nev. 527, 216 P.3d 779 (2009).**

In Argentina, a mining company hired a law firm to defend it in a personal injury suit. After three years of litigation, and near the end of trial, the firm negotiated a settlement in which the plaintiff agreed to dismiss all of his claims, and the company agreed to waive its right to recover attorney fees from the plaintiff. Thereafter, the district court granted the firm's oral motion for approval of the settlement. After the hearing, the mining company terminated its relationship with the firm because the company did not authorize the waiver of its right to recover attorney fees. In response, the firm filed a motion to adjudicate its attorney lien. 125 Nev. at 530, 216 P.3d at 781.

The Court held that the firm did not have an enforceable charging lien because the mining company did not "seek or obtain any affirmative recovery in the underlying action" (i.e., it did not place a claim, demand, or cause of action in the firm's hands, as required by NRS 18.015). Id. at 534, 216 P.3d at 783.

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general or retaining lien that entitles an attorney, if discharged by the client, to retain the client's papers, property or money until a court, at the request of the client, requires the attorney to deliver the retained items upon the client's furnishing of payment or security for the attorney's fees."



Instead of ending the analysis there, the Court cited both NRS 18.015 and Figliuzzi for the definition of a charging lien: “[a] charging lien is a lien on the judgment or settlement that the attorney has obtained for the client.” As previously discussed, however, NRS 18.015 expressly states that a charging lien attaches to “any” settlement or judgment “which is recovered on account of the suit or other action;” it does not state that a charging lien attaches only to a settlement or judgment “that the attorney has obtained for the client,” nor does it prohibit a withdrawing attorney from enforcing a charging lien. See NRS 18.015. Similarly, Figliuzzi went much further than necessary in making the statement – in dicta – that was later repeated by the Argentena Court without an analysis of the history of the Nevada charging lien statute and/or the relevant case law.<sup>11</sup>

In short, the charging lien definition that Argentena adopted from Figliuzzi was dicta that was unnecessary to any part of the holdings of either case, is not included in or supported by the plain language of NRS 18.015, and does not prevent the district court from enforcing McDonald Carano’s lien.

### **C. The Nevada State Bar Supports McDonald Carano’s Position.**

In a relatively recent Formal Opinion, the State Bar of Nevada Standing Committee on Ethics and Personal Responsibility answered the question of “when does a third party ‘have’ an ‘interest’ in [settlement] funds possessed by a lawyer?” State Bar of Nev. Standing Comm. On Ethics and Prof’l Responsibility Formal Op. No. 31, Nev. Law., Sept. 2005, at 25, 26. The Committee stated there was “no doubt” that Nevada law would recognize three such interests: “an attachment or garnishment upon the specific funds, a statutory attorney’s lien, and a court order

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<sup>11</sup> As Argentena makes clear, “[a] statement in a case is dictum when it is unnecessary to a determination of the questions involved;” and “[d]icta is not controlling.” *Id.* at 536, 216 P.3d at 785 (citations and internal punctuation omitted).

relating to the specific funds.” Id. (emphasis added). Thus, the Nevada State Bar recognizes and supports the position advanced by McDonald Carano.

**D. Numerous Other Jurisdictions Have Adopted the Position Advanced by McDonald Carano.**

For various policy reasons, courts in several other jurisdictions have recognized that an attorney who withdraws prior to judgment or settlement can enforce a charging lien. See, e.g. Phelps Steel, Inc. v. Von Deak, 511 N.E.2d 42, 44 (Mass. Ct. App. 1987) (charging lien remains intact where attorney withdraws because of breakdown in attorney-client relationship); see also Rosen v. Rosen, 468 N.Y.S.2d 723, 724 (N.Y. 1983); Karras v. Alpha Corp., 528 N.W.2d 397, 401 (S.D. 1995); Jenkins v. Dist. Court, 676 P.2d 1201, 1204 (Co. 1984) (“There is little doubt that an attorney who withdraws from a case for justifiable reason . . . may recover compensation for his services”); Ambrose v. Detroit Edison Co., 237 N.W.2d 520, 533 (Mich. Ct. App. 1975) (attorneys had a valid charging lien where they withdrew for good cause before the client accepted settlement).

In Phelps Steel, for example, the court noted that a “breakdown of the lawyer-client relationship serves as good cause for withdrawal, without waiver of an attorney’s lien.” 511 N.E.2d at 44. This rule is necessary because when the “foundations of [the attorney-client relationship] deteriorate, it is not only impractical to persist in the relationship, it diminishes the integrity of the bar to do so.” Id. Thus, rather than forcing attorneys to continue to represent a difficult client in order to get paid, attorneys should be permitted to voluntarily withdraw for good cause, while still maintaining an enforceable charging lien. Id. The court also noted that the withdrawing attorney “had rendered substantially all of the services required to obtain a favorable result for [the client] at trial.” Id. Thus, there was a “solid basis” for enforcing the lien. Id.

On nearly identical facts as those that led to McDonald Carano's withdrawal in the underlying litigation, the South Dakota Supreme Court held that "[w]here an attorney has good cause to withdraw, the attorney's lien remains intact." Karras v. Alpha Corp., 528 N.W.2d at 401. In that case, the defendant offered to settle for \$75,000.00. Although the plaintiff's attorney advised the client to accept the offer, the plaintiff refused. Two months later, the attorney moved to withdraw due to significant differences in the direction of the case, and the district court found good cause for the withdrawal. The client obtained new counsel, who negotiated a \$125,000.00 settlement. When the withdrawing attorney became aware of the settlement, he served notice of his charging lien upon his former client and the defendant, and requested that his attorney fees be satisfied out of the settlement amounts. The court rejected the client's argument that the attorney waived his charging lien by voluntarily withdrawing, and held that the attorney had an enforceable lien against the settlement proceeds. Id.

Similarly, New York courts recognize that a charging lien survives the voluntary withdrawal of an attorney for just cause. In Rosen v. Rosen, the court held that "[w]here an attorney voluntarily withdraws from a case for just cause, he has a . . . charging lien which attaches to the proceeds of the judgment and cannot be affected by settlement between the parties." 468 N.Y.S.2d at 723. The court cited to New York's charging lien statute, New York Judiciary Law § 475, which is substantially similar to Section 8923:

From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may

come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination.<sup>12</sup>

Courts in New Mexico have also held that an attorney's voluntary withdrawal does not waive an otherwise enforceable charging lien. For example, in Rangel v. Save Mart, Inc., 142 P.3d 983 (N. M. Ct. App. 2006), the plaintiff hired a law firm to represent her in a personal injury suit. The firm filed suit on her behalf, answered interrogatories, defended her deposition, and participated in formal mediation. It also recovered \$5,000.00 from the defendant's insurer. Thereafter, the defendant made a settlement offer, which the plaintiff rejected. Id. As a result, the firm withdrew from the representation and filed a notice of charging lien. Id. at 983- 85.

Plaintiff's new counsel filed a motion to strike the firm's lien, on the grounds that the firm did not recover any money on her behalf. Id. at 985-86. In rejecting that argument, the court held that an attorney does not waive an enforceable charging lien by voluntarily withdrawing for good cause before a final settlement or judgment. Rather, "where an attorney makes significant contributions to a case before being discharged, he or she is entitled to claim a charging lien." Id. at 989.

Finally, in Robinson v. Campbell, 661 P.2d 479 (N.M. Ct. App. 1983), the plaintiff hired a law firm to file a complaint, seeking both damages and rescission. The trial court granted damages, but denied rescission. The firm appealed the decision on behalf of the plaintiff, which resulted in a remand for further proceedings. The law firm did not represent the plaintiff after remand, and the plaintiff recovered additional damages. Thereafter, the firm asserted a charging

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<sup>12</sup> Morse made several references to the numerous "informative opinions" of the Court of Appeals of New York dealing with charging liens. 65 Nev. at 273, 195 P.2d at 203.

lien against the plaintiff's recovery, based on the firm's prior trial work. Id. at 482-83.

The plaintiff challenged the lien, arguing that the firm did not perform any work in obtaining the judgment after remand. The court rejected that argument, holding that the firm's lien was enforceable because the judgment was "necessarily based upon the efforts of [the law firm] in the first trial." Therefore, the plaintiff's contention that the firm did not contribute to the judgment was "frivolous." Id. at 484.

In short, numerous jurisdictions have held that an attorney who performs a substantial amount of work on a client's behalf has an enforceable charging lien, even if the attorney withdraws prior to the entry of judgment or receipt of settlement proceeds.

**E. Any Other Interpretation of NRS 18.015 is Inequitable.**

Finally, any other interpretation of NRS 18.015 than that advanced by McDonald Carano would encourage clients to utilize an attorney to perform the work necessary to prepare the case for settlement, intentionally disrupt the attorney-client relationship so that the attorney withdraws, then finalize the settlement that the withdrawing attorney performed most or all of the work to obtain. If the withdrawing attorney could not assert a charging lien in that situation, the client would obtain a windfall at the attorney's expense. Such a result would clearly be inequitable, and would force attorneys to choose between getting paid or withdrawing from representing clients with whom they cannot agree about the course of the representation. Phelps Steel, 511 N.E.2d at 44.

#### **IV. COOPER'S SEPARATE MALPRACTICE ACTION IS RRELEVANT.**

A tangential issue in the interpleader action was the separate malpractice lawsuit that Cooper filed against McDonald Carano in October 2012, which the Bourassa Firm argued prevented the district court from adjudicating McDonald Carano's lien. See, e.g., JA Vol. 2 at 313:18-27 (Tab 18). McDonald Carano took the position that the issue of malpractice is of no consequence to the interpleader action because Cooper was not a party to that action, he had no claim to any amount of the Settlement Proceeds, and his interests relative to McDonald Carano were sufficiently protected in the separate action. JA Vol. 2 at 327:3-17 (Tab 19); 372:13-373:11 (Tab 27). Moreover, Cooper did not assert legal malpractice as a defense to McDonald Carano's claim for fees, so Argentena is inapplicable on the issue of malpractice as it pertains to the adjudication or enforcement of McDonald Carano's charging lien. Id. In any event, the malpractice issue is no longer an issue because Cooper's malpractice action was dismissed with prejudice in February 2014. JA Vol. 2 at 389-392 (Tab 30).

#### **CONCLUSION**

The district court erred in holding that Argentena prohibits the enforcement of McDonald Carano's charging lien in the interpleader action because McDonald Carano withdrew from representing Cooper prior to the time of settlement. Because that conclusion is contrary to the plain language and legislative history of the attorney charging lien statute, the Court's interpretation of that statute, the opinion of the Nevada State Bar, persuasive precedent from courts in numerous other jurisdictions, and fundamental principles of equity, the Court should enter an order reversing the final disbursement order.

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Dated: October 21, 2014.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point Times New Roman font. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 6,873 words. Finally, I certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the Nevada Rules of Appellate Procedure.

Dated: October 21, 2014.

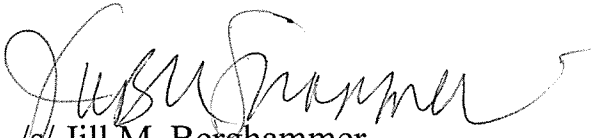
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**CERTIFICATE OF MAILING**

I hereby certify that I am an employee of the law firm of McDonald Carano Wilson LLP and, on October 21, 2014, I caused a copy of the foregoing **APPELLANT'S OPENING BRIEF** to be electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (EFlex). Participants in this case who are registered with EFlex as users will be served by EFlex.

A handwritten signature in black ink, appearing to read "Jill M. Berghammer", is written over a horizontal line.

/s/ Jill M. Berghammer

An employee of McDonald Carano Wilson LLP