IN THE SUPREME COURT OF THE STATE OF NEVADA

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LUCIA CASTILLO, an individual and EDWIN PRATTS an individual Appellants, vs. UNITED FEDERAL CREDIT UNION, a federal credit union Respondent.	**SUPREME COURT CASE NO.: 70151** Appeal From Second Judicial District Court District Court Case No.: CV1500421 (Honorable Elliott Sattler, District Court Judge)
AND ALL RELATED CASES	

RESPONSE TO MOTION TO DEPUBLISH

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RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Identification of Appellant's Parent Corporations: Respondent United Federal Credit Union ("United") is a non-governmental party as addressed in NRAP 26.1. Furthermore United does not have a parent corporation or a publicly-held company that owns 10% or more of its stock.

Identification of Appellant's Attorneys: The following are names of all law firms whose partners or associates have appeared or who are expected to appear in this action on behalf of United (including proceedings in the district court):

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POINTS AND AUTHORITIES

I. Introduction

Amicus Curiae Progressive Leadership Alliance of Nevada and Nevada Justice Association (collectively "Amicus") ask this court to depublish *Castillo v United Federal Credit Union*, 134 Nev. Adv. Op. 3 (Nev. 2018) (the "Opinion"). This is the second and third time in this appeal that class action attorneys ask this Court to allow class action complaints to proceed in Nevada's District Courts notwithstanding the fact that Justice Court Rules of Civil Procedure ("JCRCP"), rules that this Court approved, expressly provide for class action suits. The request also disregards the longstanding requirement that plaintiffs must satisfy subject matter jurisdiction of Nevada's courts.

Both the Motion and the Joinder are untimely the Nevada Rules of Appellate Procedure ("NRAP"). Additionally, depublishing opinions is not permitted by the NRAP. Even if the Court were to consider the merits of the Motion, the reasons for the request: the effect on current pending actions, and the purported limitations in the JCRCP do not warrant depublication of the Opinion. By comparison, publishing the Opinion will comply with the NRAP and allow parties in Nevada class action cases to determine which Nevada court has subject

matter jurisdiction over their claims. The Court should deny the Motion and publish the Opinion as it clarifies a previously undecided rule of law.

II. Argument

A. There is No Rule of Appellate Procedure that Permits Depublishing an Opinion

Amicus moved the Court pursuant to NRAP 36(f) to depublish the Opinion. "Because the rules of statutory interpretation apply to Nevada's Rules of Civil Procedure, we interpret unambiguous statutes, including rules of civil procedure, by their plain meaning." *Logan v. Abe*, 131 Nev. Adv. Op. 31, 350 P.3d 1139, 1141–42 (2015) [1] (citations and punctuation omitted). It is well established that if the language of a statute is plain and unambiguous, there is simply no room for construction of that statute by the Court. *Nevada Power Company, v. Public Service Commission of Nevada,* 102 Nev. 1, 711 P.2d 867 (1986) (citing *Blaisdell v. Conklin*, 62 Nev. 370, 373, 151 P.2d 626 (1944)).

NRAP Rule 36(f) *only* addresses the ability of a party to ask the Court to publish previously unpublished opinions and orders. No portion of NRAP 36(f) mentions or addresses depublishing an opinion. NRAP 36(f) is clearly and unambiguously written. As such, this Court's well settled rules of construction do

[1] The search "interpret /s rule /3 appellate /3 procedure" returned no results for Nevada cases.

not permit the rule to be construed to include a previously unexpressed concept. Accordingly, the Motion should be denied with prejudice.

In Footnote 1 to the Motion, Amicus note that California has a rule of court that allows for opinions to be depublished. When interpreting NRAP 36(f) the Court presumes that NRAP 36(f) was enacted "with full knowledge of existing statutes relating to the same subject." *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 295, 995 P.2d 482, 486 (2000) (legislative enactment of statutes). Nevada's lack of such a rule of appellate procedure is an expression that the procedure is not permitted. "That which is enumerated excludes that which is not." *O'Callaghan v. District Cort*, 89 Nev. 33, 35, 505 P.2d 1215, 1216 (1973); *Arrington v. Wittenberg*, 11 Nev. 285, 287 (*expressio unius est exclusior alterius*). Accordingly, the Motion should be denied with prejudice.

B. The Motion is Untimely

NRAP 36(f) states that motions made pursuant to it "shall be filed within 15 days after the filing of the order." Amicus concede that their Motion was not timely filed. Accordingly it should be denied. NRAP 36(f)(1).

C. Courts Must have Jurisdiction to hear a Case

To invoke the power of any court, litigants must present the court with a case of controversy and have standing to prosecute the claims presented.

"'Judicial Power' ... is the authority to hear and determine justiciable controversies." *Del Papa v. Steffen,* 112 Nev. 369, 377, 915 P.2d 245, 250 - 251 (1996). "Implicit in the concept of jurisdiction is the power to make a binding determination of the case or controversy before the court." *Laxalt v. Cannon,* 80 Nev. 588, 591, 397 P.2d 466, 467 (1964).

Amicus argue that the Opinion should be depublished because the issue of the mechanics of how justice courts would handle class suits was not adequately briefed by the parties. They further argue that the Opinion *could* cause motion practice or court action in various class action suits currently pending in Nevada's district courts. Amicus' arguments ignore the condition precedent for any court to hear a dispute is that it has subject matter jurisdiction over the proceeding. Indeed, subject matter jurisdiction is so fundamental that it "cannot be waived and may be raised at any time, or *sua sponte* by a court of review." *Vaile v. Eighth Judicial Dist. Court ex rel. County of Clark,* 118 Nev. 262, 276, 44 P.3d 506, 516 (2002) *see also Medina v. State*, 35 P.3d 443 (Colo. 2001); *Ajay Sports, Inc. v. Casazza*, 1 P.3d 267 (Colo. Ct. App.2000). The briefs that were submitted to the Court extensively discussed subject matter jurisdiction. Ultimately, the Court remanded the matter back to the district court because the Court found that the

Plaintiff had properly invoked the subject matter jurisdiction of the district court. *See* Opinion p. 6-8.

Although not expressly stated in the motion, it appears that the class action bar has routinely been alleging that the class' damages as a whole satisfy the jurisdictional limits of Nevada's District Courts as oppose to the individual class representative. While it is unclear how the pending class complaints were pled, it is clear that "[p]arties may not confer jurisdiction upon the court by their consent when jurisdiction does not otherwise exist." *Vaile*, 118 Nev. at 275, 44 P.3d at 515. A "lack of subject matter jurisdiction is a jurisdictional defect of the fundamental type .... where there is an entire absence of power to hear or determine the case." *Shisler v. Sanfer Sports Cars, Inc.*, 167 Cal.App.4th 1, 83 Cal.Rptr.3d 771, 775 (2008) (internal punctuation omitted). When a district court renders a judgment but lacks subject matter jurisdiction, the judgment is void. *See Vaile*, 118 Nev. at 275, 44 P.3d at 515.[2] Keeping currently pending cases before Nevada's district courts because they have proceeded without a challenge to the courts' jurisdiction is <u>not</u> a valid reason to depublish the Opinion. In fact, it would have the undesirable effect of allowing cases to proceed in front of courts

[2] *Del Papa v. Steffen*, 112 Nev. 369, 375, 915 P.2d 245, 249 (1996); *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990); *Harrah's Club v. Nevada State Gaming Control Bd.*, 104 Nev. 762, 764, 766 P.2d 900, 901–02 (1988); *State Indus. Ins. System v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984).

that have and would continue to issue void orders. Amicus' tacit admission that cases are improperly proceeding in Nevada's District Courts makes publishing the Opinion necessary to prevent Nevada Courts from making further decisions on matters in which they lack subject matter jurisdiction. Thus, the Motion should be denied.

D. The Small Claims Arguments are Without Merit

Amicus argue that if class plaintiffs are required to bring their cases in Justice Court almost all cases will proceed before the Small Claims Division of Justice Court and that they "may" be left without a forum. Amicus cited NRS 73.010 and JCRCP 88-100 as support for this claim. First, Amicus offer nothing other than their bare assertion that most cases would involve sums that are less than the jurisdictional ceiling of small claims court. Even if this were the case, NRS 73.010 and JCRCP 88 limit small claims cases to "cases for the recovery of money only" and they require the plaintiff to use a form substantially similar to the form set forth as JCRCP 89. *See* NRS 73.010; JCRCP 88; and JCRCP 89. The request for class certification would make the claim ineligible for small claims court because it is a request for relief that is in addition to money. Moreover, the complaint would not comply with the requirement that a small claims plaintiff file an affidavit that is substantially similar to the form set forth in

JCRCP 89. Complaints seeking to bring class action are not eligible to be heard in the Small Claims division of Justice Court. NRS 73.010; JCRCP 88; and NCRCP 89. They would be heard in Justice Court. JCRCP 23. Amicus' claims are not supported by the rules and statutes that the cited. Their Motion to debpulish should therefore be denied.

E. The Justice Court Rules of Procedure and Rules of Appeal are Flexible Enough to Accommodate Class Action Suits

Amicus argue that the JCRCP would transform class action suits into unrecognizable unjust proceedings. Amicus ignore the fact that when it enacted JCRCP 23, *this Court* determined that Justice Court was an appropriate forum for class actions suits. Iowa, Maryland, Kentucky, Rhode Island and Wyoming have considered the same question and concluded that smaller class action suits should proceed in their courts of lesser jurisdiction.[3] This Court's rejection of the plaintiff's authorities in the appeal was supported by both the facts of the case and the law.

Amicus also cite to the default discovery rules of the JCRCP claiming they will limit a class plaintiff's ability to prosecute a class action suit. JCRCP 25A(a)

[3] *Pollokoff v. Maryland Nat. Bank*, 418 A.2d 1201, 1210 (Md. Ct. App.1980); *Lamar v. Office of Sheriff of Daviess Cnty.*, 669 S.W.2d 27, 31 (Ky. Ct. App. 1984); *Albion Elevator Co. v. Chicago & N.W. Transp. Co.*, 254 N.W.2d 6, 12

expressly permits parties to seek leave of court to expand the default discovery rules. Moreover, when both sides are represented by counsel, they are free to stipulate to a discovery plan "without leave of court". JCRCP 24A(c). Amicus' concerns about conducting discovery are unfounded.

Amicus advance similar arguments regarding the appeal process from justice court (complaints of brief length and time). JCRCP 75(b)(1) expressly allows parties to request briefs that exceed the ten page limit and JCRCP 76B expressly allows parties to seek enlarged time for an appeal. Even if neither were granted, that would not be deprivation of justice as the defendants would be equally bound by the rules.

Amicus state that juries in Justice Court are smaller than in district court. Whether a class action case proceeds to trial in district or justice court, each juror receives the evidence and comes to a conclusion as to what they believe the verdict should be. Then then vote and the winning side delivers the verdict. Amicus failed to explain how a smaller jury would prejudiced a class plaintiff. Amicus assigned no prejudice to a smaller jury. The jury argument is without merit and does not support depublishing the Opinion.

(Iowa 1977); Berberian v. New England Tel. & Tel. Co., 369 A.2d 1109, 1114 (R.I. 1977); *Mut. of Omaha Ins. Co. v. Blury-Losolla*, 952 P.2d 1117 (Wyo. 1998)

Similarly Amicus' concerns about the conduct of the trial are overstated. JCRCP 39A(c) states that each side shall have 2 hours to present their respective cases, "unless a different time frame is granted by the court." As JCRCP 39A(g) requires the parties to meet with the court no later than "15 days before the scheduled trial…to discuss all matters needing attention prior to the trial date" the need for extended time to present a class case would be easily dealt with by the parties and the Court. Amicus' arguments regarding the JCRCP do not support depublishing the Opinion. The Court should deny the Motion with Prejudice.

F. Amicus Overstated the Award of Attorney's Fees

Amicus claim that NRS 69.020 and 69.030 would be the death knell of class action suits in Nevada if smaller value class actions suits were forced to proceed in Nevada's Justice Court. Amicus claim that the threat of paying a corporate defendant's attorney's fees for defending thousand member classes would make bringing such claims "unconscionable" on the part of the attorney. JCRCP 39(i)(1)(ii) caps the award of attorney's fees (whether pursuant to JCRCP 68 or statute) to $3,000 unless there is a written agreement between the parties allowing a greater award. Amicus' specter of massive attorney fee awards against a potential class plaintiff simply does not exist nor does it support depublishing the Opinion. The Motion should therefore be denied with prejudice.

G. Claims for Injunctive Relief are not affected by the Opinion

Amicus' argument regarding the conflict between the JCRCP and the Nevada constitution does not support depublication. The Opinion states that when injunctive relief is alleged district courts have jurisdiction to entertain class regardless of the amount of damages. *See* Opinion p. 8. Accordingly Amicus have not cited to the Court any legitimate reason to depubplish the Opinion. Accordingly, the Motion should be denied.

III. **CONCLUSION**

Amicus' Motion is not permitted by the NRAP, is untimely under the NRAP. Even if the Court were to reach the merits of Motion, the arguments invalid or completely overstated. In short, Amicus have not presented a compelling reason for the Court to take the extraordinary step of depublishing the Opinion which addresses an area of law for which there was no Nevada precedent. The Court should deny the Motion

Respectfully submitted this 10th day of May 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May 2018, the foregoing **RESPONSE TO MOTION TO DEPUBLISH** was served via this Court's electronic service to:

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