No. 71348

IN THE SUPREME COURT OF THE STATE OF NEVADA

EMILIA GARCIA,
Appellant,

v.

ANDREA AWERBACH,
Respondent.

APPELLANT'S OPENING BRIEF

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RULE 26.1 DISCLOSURE

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.

1. Appellant Emilia Garcia is an individual.

2. Ms. Garcia has been represented by, and is represented in this Court by, D. Lee Roberts, Jr., Esq., Marisa Rodriguez, Esq., and Ryan Gormley, Esq. of the Law Firm WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC and Corey M. Eschweiler, Esq. of the Law Firm GLEN J. LERNER & ASSOCIATES.

3. Appellant Ms. Garcia was also represented below by Tim Mott, Esq., formerly of the Law Firm WEINBERG, WHEELER, HUDGINS, GUNN & DIAL and now with the Law Firm of VALIENTE MOTT, and Adam Smith, Esq., formerly of the Law Firm GLEN J. LERNER & ASSOCIATES and now with the Law Firm of ADAM SMITH LAW.

DATED this 12 day of October, 2018.

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JURISDICTIONAL STATEMENT

Under NRAP 3A(b)(1), an aggrieved party may appeal from a "final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered." Judgment was entered against Appellant Emilia Garcia and in favor of Respondent Andrea Awerbach on August 18, 2017, which was certified as final by the district court under NRCP 54(b) on August 21, 2017.

In its July 30, 2018, "ORDER DISMISSING APPEAL, DISMISSING CROSS-APPEAL IN PART, AND REINSTATING BRIEFING", this Court held that Emilia's cross-appeal may proceed as to that judgment and, to the extent necessary to afford complete review, any interlocutory orders affecting that judgment. The clerk of the court was also instructed to modify the caption to reflect that Emilia is the appellant and Andrea is the respondent to this appeal.

ROUTING STATEMENT

This is the appeal of a defense judgment in favor of Defendant and Appellant Andrea Awerbach in a civil tort case. Although millions of dollars are in dispute, this matter technically concerns an appeal from a judgment, exclusive of interest, attorney fees, and costs, of $250,000 or less in a tort case, which the court of appeals would normally hear. NRAP 17(b)(5). However, the Supreme Court should retain this appeal as a principal issue is a question of first impression involving common law and the interpretation of important statutes and rules. NRAP 17(a)(10).[1] Specifically, whether a disqualified judge may provide input to the presiding judge in a case from which she has been disqualified. Many other jurisdictions have determined that a disqualified judge may not affect the determination of any case from which she is barred and may only perform ministerial acts to have the case transferred to another judge. This Court has not had an opportunity to address this critical issue.

The Supreme Court should also retain this case because the Nevada Supreme Court is familiar with this case and has heard two prior writ petitions from this district court case, which both involved issues intertwined with the current appeal.

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[1] Effective October 21, 2018, this section will be renumber to NRAP 17(a)(11). *See* ADKT 501, ORDER AMENDING NEVADA RULE OF APPELLATE PROCEDURE 17.

See Awerbach v. District Court (Garcia), Case No. 68602, and *Garcia v. District Court (Awerbach)*, Case No. 69134.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Did the District Court err in failing to find permissive use as a matter of law, where Respondent Andrea Awerbach admitted permissive use in response to a Rule 36 request for admission, and where the trial court expressly refused to allow Respondent to withdraw the admission because the request to withdraw the admission was untimely?

(2) Did the District Court err when it allowed a disqualified District Court Judge to directly influence the rulings of the new presiding District Court Judge assigned to the case after disqualification of the first judge?

(3) Did the District Court err when the presiding District Court *Judge sua sponte* rescinded and modified a sanction entered by the previous District Court Judge, after the parties had prepared for trial and started *voir dire*, and despite the absence of new evidence or a finding of clear error?

STATEMENT OF THE CASE

Appellant Emilia Garcia ("Appellant" or "Emilia") is the Plaintiff in this civil lawsuit arising out of a January 2, 2011 motor vehicle collision (the "Collision") in Las Vegas, Nevada. Jared Awerbach ("Jared") and Andrea Awerbach ("Andrea") (collectively referred to as "Defendants"), are the Defendants in the action. Jared and his mother, Respondent Andrea Awerbach ("Andrea"), are the Defendants in the action. On the day of the Collision, Jared was driving his mother Andrea's vehicle. He was returning home from a drug deal (AA at Vol. XXVI, p. 6731-6735) after being observed "smoking out" with his customer (AA at Vol. XII, p. 2826-2828) before he got back behind the wheel. On his way back home, Jared failed to yield the right-of-way and crashed into the passenger side of Emilia's approaching vehicle. (*See* AA at Vol. XXVII, p. 6811 and Amended Complaint (1/14/13), at ¶ 9, AA at Vol. I, p. 22-28). Before the jury trial started, Jared was found by the trial court to be impaired as a matter of law. (Order Regarding Plaintiff's Motion for Partial Summary Judgment on Impairment (1/28/15), AA at Vol. III, p. 617-622).

Jared was living in Andrea's household at the time of the Collision. Andrea regularly gave Jared permission to drive her car, even though Jared did not have a driver's license (AA at Vol. XXIV, p. 5585), did not have his own insurance and she knew he smoked of marijuana every day. (AA at Vol. X, p. 2459). Andrea

also knew that Jared had previously caused personal injury when driving her car without a license. (AA at Vol. XXIII, p. 5729). She claimed that she had denied Jared use of her car on the day of the collision. Not because Jared had no license. Not because Jared had previously wrecked her car into another victim. Not because she knew he was high. Rather, Andrea said she did not give him permission that day. (AA at Vol. I, p. 81)

This appeal deals only with whether Jared was driving Andrea's car with her permission when he smashed into Emilia and caused permanent injuries. Judge Allf found permissive use as a matter of law as a sanction for discovery abuse. (AA at Vol. III, p. 617-622). Andrea admitted permissive use in response to a request for admission. (AA at Vol. I, p. 13-21). Nevertheless, Judge Weiss changed Judge Allf's order during voir dire and allowed Andrea to contend at trial that there was no permissive use. (AA at Vol. IV, p. 946-947). An issue no one expected to be tried. Judge Weiss also denied Emilia's request for a continuance so she could prepare to try this new issue and take discovery no one had pursued because Judge Allf's sanction rendered the issue moot.

On March 10, 2016, the jury returned a verdict. (*See* Jury Verdict (3/10/16), AA at Vol. IV, p. 998-1000). The jury awarded $824,846.01 in past damages and $2,000,000 in punitive damages against Jared. No future damages were awarded. The jury also found that Andrea did not give express or implied permission to

Jared to use her vehicle on January 2, 2011, and did not negligently entrust her vehicle to Jared. (*See id.* at 999).

Emilia contends that she is entitled to a judgment in her favor on permissive use as a matter of law. This issue is of overwhelming importance because Jared did not have insurance. Without a finding of permissive use, there is no financially responsible person to answer for the injuries inflicted by Andrea's car.

STATEMENT OF THE FACTS

A. EMILIA FILES A COMPLAINT.

On March 25, 2011, Emilia filed a Complaint suing Jared for negligence and Andrea for negligent entrustment and joint liability pursuant to NRS 41.440, and asserted a claim for punitive damages against both Jared and Andrea. (*See* Complaint (3/25/11), AA at Vol. I, p. 1-6; *see a*lso Amended Complaint (1/14/13), at ¶ 9, AA at Vol. I, p. 22-28).

B. ANDREA'S ANSWER AND ADMISSION OF PERMISSIVE USE.

On January 23, 2012, Andrea answered Emilia's Complaint and admitted that she "did entrust the vehicle to the control of Defendant JARED AWERBACH." (*See id.* at ¶ 23; Defendants' Answer to Complaint, at ¶ 2, AA at Vol. I, p. 7-12). One year later, in response to Emilia's Amended Complaint, Andrea flipped her answer. (*See* Amended Complaint (1/14/13), at ¶ 23, AA at

Vol. I, p. 22-28; *see also* Answer to Amended Complaint (2/7/13), at ¶ 17, AA at Vol. I, p.7-12).

C. ANDREA ADMITTED PERMISSIVE USE IN RESPONSE REQUESTS FOR ADMISSION.

On June 5, 2012, Andrea responded to Emilia's Requests for Admissions in accord with her original Answer and once again admitted that she entrusted the operation of her vehicle to Jared with her "permission". ("Admit JARED AWEBACH was operating your vehicle on January 2, 2011, with your permission". Response: "Admit". (*See* Defendant Andrew Awerbach's Responses to Request for Admissions, Req., No. 2, AA at Vol. I, p. 14).

D. ANDREA'S ACTIVE CONCEALMENT OF THE CLAIMS NOTE.

During discovery, Appellant successfully moved the District Court to order Andrea to produce claims notes from her insurer, Liberty Mutual. On July 22, 2013, Andrea produced what appeared to be an exhaustive list of Liberty Mutual's claims notes. (*See* Second Supplement to List of Witnesses and Documents And Tangible Items Produced at Early Case Conference, AA at Vol. I, p. 36-60). However, Andrea's production secretly concealed a critical piece of evidence: the claims note, dated January 17, 2011, at 4:44 p.m., which had been redacted in order to make it appear as if that note was never created. (AA at Vol. I, p. 48).

Andrea furthered the concealment by creating a misleading privilege log, which indicated that "Adjustor's Claims Notes between January 2-17, 2011" have

been disclosed and only "notes after January 17, 2011, [have been] withheld." *Id.* The privilege log further confirmed that Andrea was only claiming privilege for the claims notes dated on or after "**January 18, 2011, et seq.**" *Id.* Andrea's surreptitious intent to conceal this evidence was discovered later by Appellant's Counsel as a result of their diligence.

E. ANDREA'S CONCEALMENT OF EVIDENCE DURING HER DEPOSITION.

Appellant first deposed Andrea on September 12, 2013, approximately two months after Andrea served Appellant with the whited-out claims note. During the deposition, Andrea testified inconsistently with the whited-out claims note, which, of course, had not yet been uncovered by Appellant's counsel. (*See e.g.*, Andrea Awerbach's Depo. Tran. Vol I (09/12/13), at 21:1-23, AA at Vol. I, p. 81 (testifying Jared did not ask for permission to drive the car that day, that she did not know where Jared got the keys, that there was no regular place where she would leave the keys, and that she constantly hid the keys)). Andrea also admitted speaking with her insurer following the collision, but claimed ignorance whether the conversation was recorded or when the conversations occurred. (*Id.* at 26:12-19; AA at Vol. I, p. 86).

In fact, Andrea furthered the deception shortly after her first deposition by filing a Motion for Summary Judgment claiming it was undisputed she did not give Jared permission to drive her car on January 2, 2011. (*See* Defendant Andrea

Awerbach's Motion for Partial Summary Judgment, AA at Vol. I, p. 96-163). Again, this motion was made while Andrea was actively concealing evidence that contradicted her motion. Andrea ultimately withdrew her Motion for Partial Summary Judgment.

Andrea was deposed again on October 24, 2014, and again testified extensively to material information that clearly contradicted the claims note, which, at that point, had still not yet been uncovered by Appellant's counsel. (*See e.g.*, Andrea Awerbach's Depo. Tran. Vol II (10/24/14), at 82:1-18, AA at Vol. I, p.247 (testifying she hid the keys)). As previously stated and as detailed below, the withheld information did not come to light until Appellant independently obtained it from Andrea's insurer.

F. THE HIDDEN CLAIMS NOTE, WHICH WAS UNCOVERED ONLY THROUGH THE DILIGENCE OF APPELLANT'S COUNSEL, CONTRADICTED ANDREA'S DEPOSITION TESTIMONY.

Appellant discovered the concealed claims note on November 10, 2014, when Andrea's insurer, Liberty Mutual, produced the note in response to Appellant's subpoena *duces tecum*. The Liberty Mutual adjustor who created the note subsequently testified to the note's authenticity and confirmed the note accurately memorialized the adjustor's January 17, 2011, conversation with Andrea. (*See* Teresa Meraz's Depo. Transcript (11/10/14), at 15:19-23, AA at Vol. III, p. 595).

The contents of the concealed note contradict Andrea's adamant testimony at both of her depositions, wherein she vehemently claimed (i) that she constantly hid her keys for fear that her drug abusing son might have access to the car, (ii) that she never gave Jared permission to drive her vehicle, and (iii) that she had no idea how Jared obtained the keys on the day of the crash. The surreptitiously concealed portions of the claims note establish that Andrea told her insurer days after the crash that she had previously let Jared drive her car, she gave him the keys earlier in the day, and she usually kept the keys on the mantle. Amazingly, when Andrea was asked under oath about Jared claiming Andrea left the keys out, Andrea claimed her son was mistaken. (*See* Andrea Awerbach's Depo. Tran. Vol II (10/24/14), at 161:9-19, AA at Vol. II, p. 326). It seems clear that Andrea changed her story once she understood the legal ramifications of permissive use

G. JUDGE ALLF SANCTIONED ANDREA WITH A FINDING OF PERMISSIVE USE AS A RESULT OF ANDREA'S IMPROPER CONCEALMENT OF EVIDENCE.

On December 2, 2014, Emilia filed a motion to strike Andrea's Answer based on Andrea's intentional concealment of admissions made to her insurance company. (*See* Plaintiff's Motion to Strike Andrea Awerbach's Answer, AA at Vol. II-III, p. 392-580). On February 25, 2015, Judge Allf granted Emilia's Motion in part and issued a written decision (drafted by Judge Allf, not counsel) providing in relevant part:

> COURT FURTHER FINDS after review ***Andrea gave her son permission to use the car and a finding of permissive use is appropriate*** because the claims note was concealed improperly, was relevant, and was willfully withheld by Defendant Andrea.

(*See* Decision and Order, filed on February 25, 2015 (emphasis added), AA at Vol. III, p. 623-629).

On March 13, 2015, Andrea filed a Motion seeking reconsideration of Judge Allf's Order. (*See* Defendant Andrea Awerbach's Motion for Relief from Final Court Order (3/13/15), AA at Vol. III, p. 630-641). The Court denied Andrea's Motion and issued a second written decision, drafted by Judge Allf, not counsel:

> COURT FURTHER FINDS after review that here the Court did consider the *Ribeiro* factors and did enter the less severe sanction of finding there was permissive use rather than striking Defendant Andrea's answer as requested by Plaintiff's Motion. The finding of permissive use specifically relates to the content of the improperly withheld claims note, which included a statement by Defendant Andrea that she had given Defendant Jared permission to use her car at the time of the accident. The finding of permissive use does not prevent adjudication on the merits because Plaintiff still maintains the burden of showing causation and damages. The withholding of the note and the misleading privilege log was willful, and sanctions are necessary to "deter the both the parties and future litigants from similar abuses." *Id.* Although the note was withheld by previous counsel, Defendant Andrea's deposition testimony at both of her depositions was contrary to her statement to her insurance carrier. The sanction was crafted to provide a fair result to both parties, given the severity of the issue.

(*See* Decision and Order (4/27/15), AA at Vol. III, p. 642-646).

On August 12, 2015, Andrea filed a Writ of Mandamus or Prohibition (Case No.: 68602) requesting that this Court vacate Judge Allf's permissive use sanction.

Andrea's Petition was denied on September 11, 2015. The parties then relied on Judge Allf's permissive use sanction for the next year and prepared for trial believing the issue of permissive use was resolved and no longer an issue for trial. This governed the totality of the parties' trial preparation, including drafting motions in limine and making crucial strategic decisions regarding witnesses, evidence, trial counsel[2], and trial presentation.

H. JUDGE ALLF RECUSES HERSELF.

On August 27, 2015, Judge Allf recused herself because of a conflict with Jared's newly (and possibly strategically) associated counsel, Randall Tindall. (*See* Notice of Department Reassignment, AA at Vol. III, p. 647-649). Judge Allf had previously recused herself when Mr. Tindall had appeared before her. On September 8, 2015, Emilia requested Mr. Tindall be disqualified and the action re-assigned to Judge Allf. During the September 15, 2015, hearing on Emilia's Motion, the District Court denied Emilia's request to reassign the case back to Judge Allf, but made it clear: ***"I'm going to follow what her rulings were."*** (*See* Sep. 15, 2015 Hearing Transcript, at 20:19:20, AA at Vol. IV, p. 920) (emphasis added). On November 10, 2015, Emilia filed a Writ of Mandamus (Case No.:

[2] WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC. first appeared for Emilia after the sanction was entered, and reasonable relied on the sanction finding permissive use in negotiating a contingency fee for the trial of the case.

69134) requesting that Jared's Counsel, Randall Tindall, be disqualified and that the case be reassigned to Judge Allf's Department. Emilia's Petition was denied.

I. JUDGE WEISS SUA SPONTE REVERSES JUDGE ALLF'S PERMISSIVE USE SANCTION DURING VOIR DIRE.

On February 8, 2016, approximately one year after Judge Allf issued her sanction order; approximately nine months after she reaffirmed that order; six months after she recused herself from the action based on the strategic retention of Mr. Tindall; and one-half day into voir dire, the District Court orally vacated and modified both of Judge Allf's permissive use orders, *sua sponte*, apparently based on a conversation the Judge Weiss had with Judge Allf regarding her intent when she issued the permissive use sanction:

> THE COURT: . . . We're outside the presence of the jury. I know that one of the things that you guys wanted me to tell you how we're going to handle is this issue of permissive use. ***So I talked to Judge Allf this morning to try to figure out what was her intention when she entered that order***. I don't think she understood the difference between permissive use and auto negligent entrustment. That being said, *it was her intention* that her ruling would result in a rebuttable presumption, not a determination as a matter of law, ***even though that's what the order says***. I'm not going to change from permissive use to negligent entrustment, even though I think that's probably what she envisioned. But I am going to make it a rebuttal presumption as it relates to the permissive use. So -- and that's based upon what her intention was.

(*See* Feb. 8, 2016, Hearing Transcript, at 61:8-25 (emphasis added), AA at Vol. VII, p. 1615).

As expressly indicated by Judge Weise on the record, the reversal of Judge Allf's permissive use sanction was based upon a discussion with Judge Allf (who had long ago recused herself due to a conflict) as to her recollection of her intention – an apparent recollection in direct conflict with the plain language of her orders. Judge Weiss acknowledged that Judge Allf's recollection of her intent contradicts the plain language of both of the orders drafted by Judge Allf (not counsel), which the parties had relied upon in preparation for trial:

> MR. ROBERTS: -- I'm somewhat taken aback by this. We weren't there at the time. So I've been mainly relying on the order in preparing to try the case. ***The order says nothing about rebuttable presumption. It says that permissive use is found as matter of law as a sanction.***
>
> THE COURT: ***I know.***

(*Id.* at 63:11-17; AA at Vol. VII, p. 1617) (emphasis added). Even Andrea's counsel (the beneficiary of the reversal) recognized the parties' inability to anticipate a reversal of the permissive use order in preparing for trial:

> MR. MAZZEO: But it does throw a wrench in the works because we didn't anticipate as -- as we're preparing for trial, I'm sure both sides were not looking at this case in terms of, okay, what evidence do we need now to rebut the ruling on permissive use.

(*Id.* at 62:20-63:1; AA at Vol. VII, p. 1616).

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J. EMILIA FILES A BRIEF ASKING THE DISTRICT COURT TO RECONSIDER ITS DECISION.

On February 10, 2016, two days after the District Court's oral pronouncement of its intention to *sua sponte* amend Judge Allf's prior orders, and before the court drafted a written order, Appellant filed a brief asking the court to reconsider its decision. (*See* Plaintiff's Trial Brief Regarding Permissive Use (2/10/16), AA at Vol. IV, p. 933-945). Appellant explained in detail how permissive use had been established as a matter of law by Judge Allf's orders, by Andrea's Answer to the original Complaint, and by her permissive use admission. (*See generally id.*). Appellant's counsel also argued these points in open court. (*See* Trial Transcript (2/10/16), at 139:24-143:11, AA at Vol. IX, p. 2135-2139). The District Court did not issue an oral order from the bench. (*Id.* at 147:19-148:2; AA at Vol. IX, p. 2143-2144).

On February 12, 2016, the District Court filed an Order it drafted modifying Judge Allf's prior orders, which reversed Judge Allf's sanction that permissive use was established as a matter of law, and imposed a rebuttable presumption that permissive use was established against Andrea. (*See* Order Modifying Prior Order of Judge Allf (2/12/16), AA at Vol. IV, p. 946-947). The modifying Order did not address Appellant's argument with regard to Andrea's permissive use admission. (*See generally id.*).

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K. EMILIA ASKS FOR JUDGMENT AS A MATTER OF LAW ON PERMISSIVE USE.

On March 7, 2016, once both sides had rested, Emilia's Counsel requested Judgment as a Matter of Law on the issue of permissive use. (*See* Trial Transcript (3/7/16), at 146:25-148:25) AA at Vol. XXIV, p. 5948-5950). Counsel addressed the lack of "evidence from which a reasonable juror could find that [Andrea], indeed, met [her] burden of proof" as it related to the 2/12/16 Order establishing a rebuttable presumption of permissive use. (*See id.* at 146:25-148:25). Counsel further stressed how Andrea's permissive use "admission conclusively established permissive use as a matter of law" as set forth in NRCP 36(b), entitling plaintiff "to directed verdict [*i.e.*, judgment as a matter of law] on that motion." (*Id.* at 147:15-20 and 148:11-14; AA at Vol. XXIV, p. 5949-5950). The District Court denied Emilia's request. (*Id.* at 148:15-25; AA at Vol. XXIV, p. 5950).

L. JURY INSTRUCTION NO. 14 REQUIRED THE JURY TO FIND PERMISSIVE USE.

On March 8, 2016, the jury received the Jury Instructions. (*See* Jury Instructions (3/8/16), AA at Vol. IV, p. 962). Jury Instruction No. 14 read as follows:

> In this case, as permitted by law, Plaintiff, Emilia Garcia, served on the Defendant, Andrea Awerbach, a written request for the admission of the truth of certain matters of fact. You will regard as being conclusively proved all such matters of fact which were expressly admitted by the Defendant, Andrea Awerbach, or which Defendant, Andrea Awerbach failed to deny.

(*Id.*). Jury Instruction No. 14, consistent with NRCP 36(b), seemed to give the jury no choice but to find that permissive use had been conclusively established as a result of Andrea's Response to Request for Admission Number 2, which the district court had refused to allow Andrea to amend.[3]

Remarkably, Andrea's counsel was improperly allowed to argue that permissive use was not conclusively established because she had not "failed to deny" the request for admission. The alleged "denial" was in an interrogatory answer served ***after*** she had admitted permissive use in response to the request for admission. This argument was improper as a matter of law. Once admitted, the matter was conclusive established "unless the court on motion permits withdrawal or amendment of the admission". NRCP Rule 36(b). It is undisputed that the court never permitted withdrawal of the admission. In fact, the Court specifically denied a request to amend the admission as untimely filed. There was nothing for the jury to decide on the issue of permissive use and a finding of permissive use should have been directed as a matter of law.

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[3] This begs the question -- why not simply grant judgment as a matter of law on permissive use instead of inviting error by instructing the jury that Andrea was conclusively bound by her admission and then giving counsel leeway to argue inconsistently with the instruction?

M. EMILIA FILES A MOTION FOR NEW TRIAL.

On May 26, 2016, Emilia filed a motion for a new trial or, in the Alternative, for additur based on a number of reasons, including jury misconduct in performing an experiment with a juror having a similar spine condition which led the jury not to award any future damages. (*See* Plaintiff's Motion for a New Trial or, in the Alternative, for Additur, AA at Vol. V, p. 1001-1030). On August 17, 2016, the District Court granted Emilia's motion for new trial and denied Emilia's request for additur. (*See* Notice of Entry of Order Re: Post-Trial Motions (8/17/16), AA at Vol. VI, p. 1487-1498). The District Court awarded a new trial "on all issues". (*Id.*).

N. EMILIA FILES A RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW ON THE ISSUE OF PERMISSIVE USE.

On May 26, 2016, Emilia filed Plaintiff's Renewed Motion for Judgment as a Matter of Law on the issue of permissive use based on the conclusive effect of Andrea's Response to Request for Admission Number 2, pursuant to NRCP 36(b). (*See* Plaintiff's Renewed Motion for Judgment as a Matter of Law, AA at Vol. V, p. 1283-1303). On August 22, 2016, the District Court denied Emilia's Renewed Motion for Judgment as a Matter of Law "based upon the same reasoning that the Motion was denied previously." (*See* Notice of Entry of Order Re: Minute Order of 8/22/16, AA at Vol. VI-VII, p. 1499-1502).

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O. THE COURT ENTERS JUDGMENT ON THE JURY VERDICT, AS TO ANDREA ONLY.

On August 18, 2017, after the failure of the Supreme Court settlement conference and additional motion practice, the Court entered and filed the Judgment Upon Jury Verdict. (*See* Judgment Upon Jury Verdict, AA at Vol. VII, p. 1508-1512). The district court entered judgment against Jared and in favor of Emilia in the amount of $2,824,846.01. The district court also entered final judgment against Emilia and in favor of Andrea on all issues based on the jury's findings that Andrea did not give express or implied permission to Jared to use her vehicle on January 2, 2011, and did not negligently entrust her vehicle to Jared. (*See id.* at Vol. VII, p. 1511-1512)

Three days later, pursuant to the order of August 12, 2016 granting Emilia a new trial, the district court filed an order vacating the judgment against Jared. (*See* Order Vacating Judgment as to Jared Awerbach Only, filed August 21, 2017, AA at Vol. VII, p. 1503-1507). This order also denied Jared's request for a new trial as moot, as a new trial had already been granted to Emilia and there was no need to reach Jared's motion seeking the same relief. (*Id.*)

P. THE TRIAL COURT CERTIFIES THE JUDGMENT IN FAVOR OF ANDREA AS FINAL PURSUANT TO NRCP 54(B).

Even though Andrea obtained a judgment in her favor on August 18, 2017, the subsequent "Order Vacating Judgment as to Jared Awerbach Only" meant that the

judgment in her favor did not resolve all claims against all parties. In order to enter a "final judgment" in favor of Andrea, the district court determined and certified:

> ... that the August 18, 2017 "Judgment Upon Jury Verdict" constitutes a "final judgment" as to all claims between plaintiff and Andrea Awerbach. There is no just reason to delay such finality.

(*See* Order Vacating Judgment as to Jared Awerbach Only, filed August 21, 2017, AA at Vol. VII, p. 1503-1507).

Q. EMILIA FILES A TIMELY APPEAL OF THE FINAL JUDGMENT IN FAVOR OF ANDREA.

Emilia filed a timely notice of appeal of the final judgment entered against her and in favor of Andrea, notice of entry of which was served on August 21, 2017. (*See* Notice of Appeal, filed September 19, 2017, AA at Vol. VII, p. 1513-1554). Out of an abundance of caution, Emilia also broadly filed an appeal of "All judgments and orders in this case." On *July 30, 2018,* this Court held that Emilia's appeal may proceed as to the August 21, 2017, judgment and, to the extent necessary to afford complete review, any interlocutory orders affecting that judgment.

SUMMARY OF THE ARGUMENT

Judge Weiss's inappropriate modification of Judge Allf's finding of permissive use as a matter of law should be vacated as it was entered (1) after the District Court improperly received guidance and instruction from a disqualified

judge, (2) despite there being no new evidence or a finding of clear error to warrant reconsideration or modification of Judge Allf's sanction, and (3) despite the alternative and independent grounds that Respondent Andrea Awerbach had admitted permissive use in a Rule 36 admission which she was never permitted to withdraw. Judgment should be entered in favor of Emilia and against Andrea Awerbach on the issue of permissive use.

ARGUMENT

I. "PERMISSIVE USE" WAS CONCLUSIVELY ESTABLISHED AS A MATTER OF LAW BY ANDREA'S ADMISSION.

NRCP 36(b) states, in pertinent part, "[a]ny matter admitted under this rule is ***conclusively established*** unless the court on motion permits withdrawal or amendment of the admission." (emphasis added). In *Wagner v. Carex Investigations & Sec. Inc.*, 93 Nev. 627, 631-32, 572 P.2d 921, 924 (1977), this Court addressed NRCP 36(b) and elaborated on the Rule by explaining that a Rule 36 admission is akin to a stipulation drafted by counsel for use at trial and may not be rebutted by contradictory evidence:

> This provision adopts the language of F.R.C.P. 36(b), approved by the United States Supreme Court on March 30, 1970. According to the federal Advisory Committee Notes, ***the rule was intended to clarify that "(i)n form and substance a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial,*** rather than to an evidentiary admission of a party," ***and therefore is not rebuttable by***

> ***contradictory testimony of the admitting party.*** 4A Moore's Fed.Prac. P 36.01(7), at 36-13 (1974).

(emphasis added).

Addressing an analogous situation, this Court has made it clear on multiple occasions that "[i]t is well settled that failure to respond to a request for admissions will result in those matters being deemed conclusively established." *Smith v. Emery*, 109 Nev. 737, 742-43, 856 P.2d 1386, 1390 (1993) (citing *Woods v. Label Inv. Corp.,* 107 Nev. 419, 425, 812 P.2d 1293, 1297 (1991) (overturned on other grounds); *Dzack v. Marshall,* 80 Nev. 345, 347, 393 P.2d 610, 611 (1964)). Further, and very telling as to the conclusive effect of a Rule 36 admission, "[t]his is so even if the established matters are ultimately untrue." *Id.* at 742-43, 1390 (citing *Lawrence v. Southwest Gas Corp.,* 89 Nev. 433, 514 P.2d 868 (1973); *Graham v. Carson–Tahoe Hosp.,* 91 Nev. 609, 540 P.2d 105 (1975)).

Moreover, and directly applicable to the present case, this Court has held that a belated response to a request for admission "purporting to deny the matters already admitted by operation of NRCP 36" will not overcome the conclusive admission where relief to amend or withdrawal was not requested or given. *Lawrence*, 89 Nev. at 433-34, 514 P.2d at 869 (affirming district court's granting of summary judgment wherein appellant initially failed to respond to a request for admission and belatedly attempted to respond to the request for admission without requesting relief to amend or withdrawal).

Here, Andrea expressly admitted Jared operated her vehicle on January 2, 2011 with her permission: Request Number 2 asked Andrea to "Admit JARED AWEBACH was operating your vehicle on January 2, 2011, with your permission". Her response was "Admit". (*See* Defendant Andrea Awerbach's Responses to Request for Admissions, Req., No. 2, AA at Vol. I. p. 14).

Although Andrea attempted to recant her admission, similar to the appellant in *Lawrence*, she did so without requesting permission to withdraw or amend her admission. It was not until Plaintiff had rested her case at the close of all evidence that Andrea's counsel orally moved for permission to amend the response. The Court, however, unequivocally denied this untimely oral motion. As a result, not only should the issue of permissive use never have been presented to the jury, consistent with this Court's holding in *Wagner*, Andrea should have never been permitted to introduce or argue evidence contradictory to the conclusively established Rule 36 admission.

Further highlighting the District Court's error, Jury Instruction Number 14 *required* the jury to find permissive use as a result of Andrea's Admission. Specifically, Jury Instruction Number 14 stated, in part: "You will regard as being conclusively proved all such matters of fact which were expressly admitted by the Defendant, Andrea Awerbach, or which Defendant, Andrea Awerbach, failed to deny." Thus, not only did the jury disregard this Instruction, the District Court also

ignored *its own* Instruction when it failed to grant Appellant's Renewed Motion for Judgment as a Matter of Law.

Consistent with the plain language of NRCP 36(b) and this Court's precedent, Andrea's admission "conclusively establishe[s]" as matter of law that she gave permission to Jared to operate her vehicle on January 2, 2011. It was error by the District Court to allow Andrea to present contradictory evidence and to allow the issue of permissive use to be decided by the jury in light of Andrea's Rule 36 admission and, as a result, this Court should compel the District Court to vacate its order that inappropriately modified Judge Allf's permissive use sanction

II. JUDGE WEISS HAD NO BASIS TO RECONSIDER, LET ALONE MODIFY, JUDGE ALLF'S PERMISSIVE USE SANCTION.

This Court has established that a successor district court judge may reconsider a previously decided issue only if "substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) (citing *Little Earth of United Tribes v. Department of Housing,* 807 F.2d 1433, 1441 (8th Cir.1986); *see also Moore v. City of Las Vegas,* 92 Nev. 402, 405, 551 P.2d 244, 246 (1976) ("Only in very rare instances in which *new issues of fact or law* are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted." (emphasis added))).

Consistent with this principle, Illinois has recognized that "[p]rior interlocutory orders should be vacated or amended by a successor judge only after careful consideration, especially if there is evidence of judge shopping." *Legget v. Kumar*, 212 Ill. App. 3d 255, 274 (Ill. 1991). Further, the Mississippi Supreme Court found that it is improper to reverse an order the parties "justifiably relied upon . . . for over a year . . . as they prepared the case for trial." *Franklin v. Franklin*, 858 So. 2d 110, 122 (Miss. 2003) (overturning trial court's order that reversed the original trial court's ruling since the original ruling was made within the judge's discretion and the "lawyers justifiably relied upon th[e] order for over a year . . . as they prepared the case for trial"; and further finding that the reversal of the original trial court's ruling "reache[d] an inequitable result"). This case is no different.

The District Court's decision to reconsider and overturn Judge Allf's long standing permissive use sanction was improper and unfairly prejudiced Appellant's ability to present her case at trial. No new evidence was presented to the District Court to warrant reconsideration, let alone the modification, of the permissive use sanction. Further, there was never a finding of clear error by the District Court.

The rules of the Nevada District Courts also precluded Judge Wiese from reversing Judge Allf's sanction order. District Court Rule 18(1) provides that: "When any district judge shall have entered upon the trial or hearing of any cause,

proceeding or motion, or made any ruling, order or decision therein, no other judge shall do any act or thing in or about such cause, proceeding or motion, ***unless upon the written request of the judge*** who shall have first entered upon the trial or hearing of such cause, proceeding or motion". (emphasis added). Whatever may have been orally discussed between Judge Weise and Judge Allf, the record contains no written request from Judge Allf asking Judge Weise to modify her prior order. In fact, such a written request from a disqualified judge would have been improper. As the Nevada Supreme Court explained under similar facts:

> Judge Whitehead's decision regarding the alleged conflicts between the prosecution and the civil bar was the decision in the case and his conclusion that the District Attorney's Office exercised its prosecutorial function independent of outside influence was binding. We conclude, therefore, that Judge Schouweiler violated District Court Rule 18(1) in finding otherwise.

State v. Babayan, 106 Nev. 155, 165, 787 P.2d 805, 812-13 (1990)

Judge Weiss's modification of the permissive use sanction is particularly concerning in light of the concerns of judge shopping. Specifically, and as discussed in great length in Appellant's November 10, 2015 Petition for Writ of Mandamus (Case No.: 69134), it was Jared's association of attorney Randall Tindall (after the entry of the permissive use sanction) that resulted in Judge Allf reusing herself on August 27, 2015. If Andrea disagreed with Judge Allf's sanction, her remedy was to appeal the sanction at the proper time. She should not

have been allowed to force a new judge on the case and then convince the new judge to overturn Judge Allf's exercise of discretion.

III. A RECUSED JUDGE MUST NOT HAVE ANY INFLUENCE ON A CASE AFTER RECUSAL.

"Patently a judge who is disqualified from acting must not be able to affect the determination of any case from which he is barred." *Arnold v. E. Air Lines*, 712 F.2d 899, 904 (4th Cir. 1983); *see also Doe v. Louisiana Supreme Court*, 1991 WL 121211 (E.D. La. June 24, 1991). "[C]ourts have almost uniformly held that a trial judge who has recused [herself] should take no other action in the case except the necessary ministerial acts to have the case transferred to another judge." *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 457 (5th Cir. 1996); *see also Stringer v. United States,* 233 F.2d 947, 948 (9th Cir. 1956) (acknowledging that after disqualification, judges are confined to performing only the "mechanical duties of transferring the case to another judge or other essential ministerial duties short of adjudication"); *Moody v. Simmons,* 858 F.2d 137, 143 (3d Cir. 1988) (holding that once a judge has disqualified herself, she may only perform the ministerial duties necessary to transfer the case to another judge any may not enter any further orders in the case, except for "housekeeping" ones), *cert. denied*, 489 U.S. 1078, (1989); *El Fenix de P.R. v. The M/Y Johanny*, 36 F.3d 136, 142 (1st Cir. 1994) ("recused judge should take *no further action* except to enable administrative reassignment of

the case" (emphasis in original)). This Court has not yet addressed this issue of law.

Appellant urges this Court to adopt the well-reasoned approach that "a judge who is disqualified from acting must not be able to affect the determination of any case from which he[/she] is barred." Consistent with this approach, once Judge Allf disqualified herself, she was not permitted to have any influence on this case. Her recusal ended her involvement, and any further influence by Judge Allf that caused the District Court to modify the permissive use sanction was improper. Further, Judge Allf's recollection as to her intention when initially entering the permissive use sanction, approximately one year prior, is conclusively rebutted by her second order affirming the sanction. A judge's belated recollection of her intention cannot prevail over the plain terms of her written orders. This is a formula for anarchy, uncertainty, and loss of faith in the integrity of the judicial system.

Appellant urges this Court to hold that "a judge who is disqualified from acting must not be able to affect the determination of any case from which he[/she] is barred", and, as a result, compel the District Court to vacate its order that inappropriately modified Judge Allf's permissive use sanction, which the parties justifiably relied upon for approximately one year in preparation for trial.

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CONCLUSION

The parties justifiably relied on the permissive use sanction for almost one year prior to trial. Appellant was unquestionably prejudiced by the untimely and improper overturning of the permissive use sanction. For all the foregoing reasons, Appellant requests that this Court issue an Order compelling the District Court to vacate its February 12, 2016 Order Modifying Prior Order of Judge Allf, and to reinstate Judge Allf's finding of permissive use as a matter of law.

DATED this 12 day of October, 2018.

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RULE 28.2 CERTIFICATE OF COMPLIANCE

1. 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 14 point, double-spaced, Times New Roman font.

2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 6,184 words.

3. I hereby 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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to

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be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 12 day of October, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of October, 2018, the foregoing **APPELLANT'S OPENING BRIEF and APPENDICES** was filed electronically with the Nevada Supreme Court's eFlex system, which shall be served in accordance with the service list as follows:

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