No. 71348

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Jun 05 2019 11:48 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

EMILIA GARCIA,
Appellant,

v.

ANDREA AWERBACH,
Respondent.

APPELLANT'S REPLY BRIEF

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I.

INTRODUCTION

Respondent and Defendant Andrea Awerbach ("Andrea") expressly admitted that she gave her son Jared Awerbach ("Jared") permission to drive her car on the day he crashed into Appellant Emelia Garcia ("Emilia") in response to a request for admission made pursuant to NRCP Rule 36. Specifically, Andrea admitted that "... JARED AWEBACH was operating your vehicle on January 2, 2011, with your permission". (*See* Defendant Andrea Awerbach's Responses to Request for Admissions, Req., No. 2, I AA at 14).

The District Court denied Andrea's motion to withdraw or amend this admission after Plaintiff rested her case because the motion was untimely. Andrea has not cross-appealed. The district court decision refusing to withdraw the admission cannot be challenged at this point in the proceeding. The only question for this court is the legal effect of the admission under Rule 36 now that the district court has refused to allow it to be withdrawn or amended.

Once the District Court refused to allow the withdrawal of the admission, the matter was "conclusively established." It was therefore error for the district court to refuse to enter judgment as a matter of law and it was error to submit the issue of permissive use to the jury, because there was nothing left for the jury to decide.

Further, Emilia did not waive her right to enforce the admission. There was no evidence that had to be presented in Emilia's case in chief because the rebuttable presumption established by the court when it modified Judge Allf's sanctions order meant that Emilia had no burden in her case in chief. Judge Weise said as much when he modified the sanction. Once Andrea tried to rebut the presumption during the defense case, Emilia promptly showed the jury the admission, and even then continued to urge Judge Weise to take the issue away from the jury and enforce the admission. The Rule 36 admission entitled Emilia to a finding of permissive use as a matter of law, which Emilia requested over and over again.

Respondent tries to convince this court that there was no permissive use and that the admission is untrue, relying solely on Andrea's self-serving testimony. First and foremost, this evidence and argument is wholly immaterial to this appeal. It is well settled that failure to respond to a request for admissions will result in those matters being deemed conclusively established, "even if the established matters are ultimately untrue". *Smith v. Emery*, 109 Nev. 737, 43, 856 P.2d 1386, 1390 (1993) citing *Lawrence v. Southwest Gas Corp.*, 89 Nev. 433, 514 P.2d 868 (1973) and *Graham v. Carson–Tahoe Hosp.*, 91 Nev. 609, 540 P.2d 105 (1975). This seems harsh, but this harshness is a necessary to give meaning to the rule and accomplish its goals. In fact, the conclusive effect of an admission has been

characterized as a "sanction." *See Wagner v. Carex Investigations & Sec. Inc.*, 93 Nev. 627, 630–31, 572 P.2d 921, 922–23 (1977) ("The sanction for failure to serve timely answers or objections to requests for admissions is that all matters in the request are deemed admitted").

But in this case there is substantial evidence supporting the admission. In a claims note that Andrea attempted to conceal, she admitted giving her keys to Jared on the day of the incident. She admitted at trial that she had let Jared drive her car on other occasions prior to this incident. It is also undisputed that Jared injured Emilia driving his mother's car. There is no injustice in requiring Andrea's insurance carrier to answer for the injuries caused by the car they agreed to insure. In fact, Nevada public policy requires it.

Although it is unnecessary to reach the issue if the court gives Andrea's Rule 36 admission "conclusive" effect, the same result should obtain because Judge Weiss's inappropriate modification of Judge Allf's finding of permissive use as a matter of law should be vacated. Respondent argues that Judge Weise had discretion to vacate "erroneous" orders entered by Judge Allf, but this Court has previously found that Judge Allf's sanctions order was not erroneous. This is the law of the case. Compounding the appearance of impropriety, Judge Weise admitted on the record that he spoke to a disqualified judge and was modifying her

order based on her recollection of her intent. A modification that harmed the party represented by the attorney she was presumably biased against as much as Emilia.

The Judgment in favor of Andrea on permissive use should be vacated, and judgment should be entered in favor of Emilia and against Andrea Awerbach.

II.

ARGUMENT

A. WHY "PERMISSIVE USE" IS IMPORTANT AND NEVADA'S LIBERAL INTERPRETATION OF WHAT IS REQUIRED TO ESTABLISH PERMISSION.

The sole issue in this appeal is whether Emilia established permissive use as a matter of law and is entitled to a judgment on this issue. This issue is important because it determines whether Andrea's liability insurer will have to answer for the personal injuries and other damages caused by the vehicle they accepted premiums to insure. Nevada Law *requires* that a liability insurance policy must extend to any person that is operating the vehicle with the "**express or implied permission of the named insured**." NRS 485.3091(1)(b) (emphasis added).

Respondent devotes a substantial portion of her brief trying to convince this Court that Andrea did not actually give permission for Jared to use her vehicle that day, and that her Rule 36 admission was untrue. While these arguments are irrelevant to the issue before the Court, because admissions are binding under Nevada law "even if the established matters are ultimately untrue," *Smith v. Emery*, 109 Nev. 737, 43, 856 P.2d 1386, 1390 (1993), there is substantial evidence to

support the both the Rule 36 admission and Judge Allf's finding of permissive use in the sanctions order overturned by Judge Weise.

In construing the record, it is important to understand that Nevada takes a very liberal view of "permission" in light of the public policy underlying the statute requiring liability insurance. In *U.S. Fid. & Guar. Co. v. Fisher*, 88 Nev. 155, 494 P.2d 549 (1972), the insurance company issued an auto policy to Ms. Link. Ms. Link allowed Mr. Fisher to use her car from time to time to run errands. Ms. Link was going on vacation. She asked Mr. Fisher to take her to the airport and then to park her car in his driveway while she was away. She told Mr. Fisher that he could move the car in case of an emergency. Mr. Fisher used the car while Ms. Link was out of town and got in an accident without her express permission to do so. In fact, the usage exceeded the express permission granted.

The insurance company filed for declaratory relief asking the court for authority to deny coverage. The court would not do it. Rather, the court adopted the most liberal of three rules called the "initial permission" rule. The court said that if a person has permission to use an automobile in the first instance, any subsequent use while it remains in his possession though not within the contemplation of the parties is a permissive use within the terms of the omnibus clause. 88 Nev. at 158, 494 P.2d at 551. The court explained:

> Zelda [Link] bought and paid for the protection of others who might drive her car. Conspicuous is the fact that she was vested with plenary authority to determine who should be the beneficiary of the contract. Whether she permitted one or a hundred to drive her car, the premium remained the same. The Company was paid for a policy under which Zelda as the named insured could extend the liability coverage to whomever she pleased.

88 Nev. at 159, 494 P.2d at 551.

The Court gives several reasons for adopting a such a broad interpretation of permission. Among them, the court reasonably suggests that ***after an accident happens, people may be inclined to deny there was permission for fear that their policy will be cancelled or they would be liable for the damages***. *Id.* citing *Odolecki v. Hartford Accident & Indem. Co.,* 264 A.2d 38 (N.J. 1970). The record suggests this is exactly what happened in the case at bar.

The portions of the claims note which Andrea's prior counsel whited out and attempted to hide establish that Andrea told her insurer days after the crash that she gave Jared the keys earlier in the day (XXIII AA 5725 and AA 5727 at lines 5-12), and "she thought [he] had returned the keys, but he didn't." (XXIII AA 5725, lines 5-6). Andrea admitted that she had let Jared drive the car before this accident (XXIII AA 5728), even though she disputed it was as often as Jared contended.

Andrea has also denied that Jared ever asked for permission to drive that day (*see* Andrea Awerbach's Depo. Tran. (9/12/13), I AA at 81, lines 1-4), rebutting her contention that she expressly denied permission (how could she have denied permission if he never asked after receiving the keys and possession of vehicle). Under *Fisher,* these facts alone could establish permissive use. Andrea admitted she gave Jared the keys to the car, and before he returned the keys, Jared had used the car and injured Emilia. Andrea has testified to so many different versions of the facts it is hard to keep them all straight. But the important thing here is that there are versions of her testimony where her Rule 36 admission is absolutely true. There is certainly no fraud on the court is enforcing the admission.

As set forth in detail in the Opening Brief, Andrea initially and expressly admitted giving Jared permission to use the car in her first Answer to the Complaint and in response to a Rule 36 request for admission, then changed her mind after she got new counsel. It seems likely that Andrea changed her story once she understood the legal ramifications of permissive use.

Going back to the *Fisher* case, the court also explained that it was guided by an important public policy in taking a broad view of permission:

> An even more powerful argument in favor of the "initial permission" rule is the important policy of assuring that all persons wrongfully injured have financially responsible persons to look to for damages. In

other words, a liability insurance policy is for the benefit of the public as well as for the benefit of the named insured.

88 Nev. at 160, 494 P.2d 551.

It is the stated public policy of this State to ensure that all person wrongfully injured have a financially responsible person to look to for compensation. Andrea's insurance was for the benefit of the public – including Emilia. Jared testified that he used Andrea's car regularly. He ran her errands. He got her groceries. He drove the car with her permission, with her in it, during the trial, even though Jared still did not have a license! (XXIII AA 5747-5748). Nevada's public policy of assuring that all persons wrongfully injured have financially responsible persons to look to for damages should not be so easily subverted by a convenient, after the fact, denial of permission on a particular occasion, after an accident has happened, for the purpose of avoiding liability.

Fortunately, the court need not reach these matters of public policy in order to protect Emilia under the facts of this case. All the court needs do is enforce Andrea's Rule 36 admission in accordance with the law and justice will be done.

B. JUDGE WEISE REFUSED TO ALLOW THE WITHDRAWAL OF THE ADMISSION.

Andrea argues that Judge Weise "struck a compromise" when Andrea moved to withdraw her Rule 36 admission. (Respondent's Answering Brief at 18). That "[w]ithout withdrawing the admission altogether, he effectively downgraded

it to the status of an answer to interrogatory...." (*Id.*). This is a blatant misrepresentation of the record below. Here is what actually happened:

> THE COURT: All right. I'm not going to strike the question and answer. I think under Rule 36(b) it says, "Any matter admitted under this rule is conclusively established unless the Court, on motion, allows oral amendment of the admission."
>
> I think that's probably something that had to have been done before plaintiffs rested their case. It wasn't, so I'm not going to permit the withdrawal or amendment. You can't bring up the amendment to the admission.

(XXIV AA 5897, lines 2-11). Judge Weise did not strike a compromise, he clearly and unequivocally refused to allow withdrawal of the admission because he thought that should have been done before the plaintiff rested her case.

Even though the district court refused to allow the admission to be withdrawn, it did not believe that a Rule 36 admission was really conclusive, despite the literal language of the rule:

> THE COURT: .... [The fact that the court did not allow the withdrawal of the admission] Doesn't mean that you can't bring up the answer to the interrogatory, which is contradictory. I mean, if -- ***if I read this literally*** **[Rule 36]**, ***I think it would preclude you from***

bringing any evidence that contradicts this, but I don't think that's really the intention of the rule. .... You're just going to end up with a bunch of contradictory responses to the same issue. And the jury's going to have to sort that out.

(XXIV AA 5897, lines 11-25; XXIV AA 5898, line 1).

What the Respondent now claims was an exercise of discretion and an intentional "downgrading" of the admission to the status of an interrogatory answer was nothing more than a simple error of law which must be corrected by this court. The district court refused to give the admission preclusive effect because he did not think that was the intention of the rule. As explained below and in Emilia's Opening Brief, this is the clear intention of the rule, especially after the 1970 amendments to the federal rule, which have been adopted by Nevada.

Andrea's trial counsel apparently understood the legal significance of Judge Weise refusing to allow the admission to be withdrawn, and tried to convince Judge Weise that he was really allowing a limited amendment of the admission (similar to what Andrea's appellant counsel is still trying to argue). Judge Weise refused to agree to this characterization of his ruling, and again stated that he was denying leave to amend the admission:

MR. TINDALL: So I think -- for clarification for the record, Your Honor, I think the Court's ruling should be that you are permitting

amendment to the extent that the interrogatories can be used because we have this conclusively established language. And what we don't want is a record that the Court can get overturned on because it didn't now rule that that is conclusively established. So we'd like the ruling to be you are allowing the amendment, and the amendment is the interrogatories get to come in as well.

THE COURT: No. I'm -- I'm allowing the interrogatory responses because it's -- it's a response under a different rule. Under Rule 36, I think the matter is deemed conclusively established as it relates to the request for admission. ***That's why I'm not going to allow the amended admission response.***

MR. TINDALL: I understand. Thank you.

THE COURT: I may be wrong, but it makes sense to me. May not make sense to the supreme court. We'll see.

(XXIV AA 5898, lines 3-22).

Judge Weise did not exercise his discretion to craft a limited withdrawal of the admission – he simply misunderstood the conclusive effect of the admission under Nevada law. Moreover, he invited this court to correct him if he was wrong. And he was.

C. "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). Because Judge Weise did not permit withdrawal or amendment of the admission of permissive use, the matter was "conclusively established". Rule 36 means exactly what it says. As the Nevada Supreme Court explained in *Wagner v. Carex Investigations & Sec. Inc.*, *93 Nev. 627, 631–32, 572 P.2d 921, 923–24 (1977),* "[t]hese admissions leave no room for conflicting inferences, and they are dispositive of the case." The *Wagner* court further explained that the Nevada rule "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)nform 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".

In *Smith v. Emery*, 109 Nev. 737, 742–43, 856 P.2d 1386, 1389–90 (1993), the Nevada Supreme Court held that, "[E]ven if a request is objectionable, if a party fails to object and fails to respond to the request, that party should be held to have admitted the matter." The court cites to *Jensen v. Pioneer Dodge Ctr., Inc.*,

702 P.2d 98, 100 (Utah 1985) for this holding. Looking to the full holding in Jensen sheds additional light on this issue:

> Utah R.Civ.P. 36(b) provides that those matters deemed admitted are conclusively established as true unless the trial court, on motion by the defendant, permits withdrawal or amendment of the admissions.[3] The trial court has the discretion to permit withdrawal or amendment of admissions when the presentation of the merits of the action would be served and the party obtaining the admissions fails to satisfy the court that he will be prejudiced in maintaining his action.[4] The trial court does not have discretion to unilaterally disregard the admissions. ...
>
> Therefore, late filing of the answers was not excused, and the matters contained in the request for admissions were at that time conclusively deemed admitted unless the trial court, upon motion by defendant, permitted withdrawal or amendment of the admissions. There is nothing in the record to indicate that defendant moved to amend or withdraw the admissions. Therefore, the matters admitted under Rule 36(a) were deemed conclusively established under Rule 36(b) and should have been treated as such by the trial court.

Jensen v. Pioneer Dodge Ctr., Inc., 702 P.2d at 100.

Plaintiff tries to argue the rule is otherwise by citing to a few cases where admissions where not given preclusive effect, such as *TransiLift Equip. Ltd. v. Cunningham*, 360 S.E. 2d 183 (Va. 1987) and *Avant, Inc. v. Polaroid Corp.*, 411 F. Supp. 898, 900 (D. Mass. 1977). These cases are inapposite.

In *TransiLift Equip.,* TransiLift not only completely failed to offer the admissions into evidence, it "did not even inform the trial court that it was relying upon Rule 4:11 admissions until after the jury had returned its verdict". 234 Va. 84, 92, 360 S.E.2d 183, 188 (1987). There is no similarity in *TransiLift* to what happened below. Moreover, the rationale offered by the Virginia court has no relevance here:

> A practical rationale exists for the rule that a party who wishes to rely on Rule 4:11 must introduce the admissions into evidence. If admissions are not offered for introduction into evidence, the trial judge would not know whether to disregard the admissions or to tell the jury to consider the admitted facts as conclusively established.

Id., 234 Va. 84, 91, 360 S.E.2d 183, 187 (1987). Andrea's Rule 36 admissions were entered into evidence, and Judge Weise certainly knew about them and Emilia's intent to rely upon them well before the case went to the jury.

Similarly, in *Avant* the admissions were not provided to the Court until after both sides had rested. The district court ruled that if "... Avant wished to place

into evidence such stipulations and admissions, it should have done so during the presentation of its case before it rested. *Avant*, 441 F. Supp. At 900. Once again, this case has no application here.

Finally, Respondent cites to *Wright & Miller* (Respondent's Answering Brief at 30), but this treatise support Emilia. Although *Wright & Miller* cite to *Avant* and similar cases, they are ultimately critical of their holdings:

> The holdings just described seem to overlook the purpose of Rule 36 and also to ignore the distinction between evidential admissions and judicial admissions. The salutary function of Rule 36 in limiting the proof would be defeated if the party were free to deny at the trial what he or she has admitted before trial. ...

8B Fed. Prac. & Proc. Civ. § 2264 (3d ed.)

D. Plaintiffs Did Not Waive the Conclusive Effect of the Admission, But Rather Repeatedly Tried to Cause the Court to Enforce It.

Andrea claims that Emilia somehow waived the right to rely on the Rule 36 admission by not seeking to use it early enough and not objecting enough to the district court's refusal to give it conclusive effect. The record does not support this contention. From the very time that the district court indicated that it was going to allow Andrea to contest permissive use, throughout the trial, and again after the

verdict, Emilia repeatedly argued the preclusive effect of the admission. Emilia waived nothing.

When Judge Weise decided to withdraw the sanction before opening statements, Emilia's counsel made the following argument:

> ... But more importantly, they responded to a request for admission on permissive use, and we've indicated that here in our pleadings, that -- where she admitted permissive use in response to a request for admission. Not just failed to respond, but admitted permissive use.
>
> Now, when she got new counsel, she filed an amended response denying permissive use. But at that time, this is when the motion for sanctions was being made, we were moving to strike their answer altogether. We got a finding of permissive use. It doesn't matter that they tried to amend their answer. But the statute, NRS 36B, is clear that if you admit something, the only way to get relief from that admission is upon motion to the Court and upon a showing. And they've never filed a motion for relief from the admission they properly made under 36A, long before the Court made a finding of permissive use as a sanction.
>
> So there is still a binding admission in place which they've never moved for relief from, and it's simply too late to move for relief from

that admission now that the trial has started. We'd be prejudiced in our preparation, the same way we believe we're prejudiced by the modification of Judge Allf's sanction order.

(IX AA 2138, lines 8-25; IX AA 2139, lines 1-12). Because it was error for the district court to refuse to give conclusive effect to the admission, this argument alone would have preserved error.

Incredibly, Andrea contends it was "too late" for Emilia to offer the admissions into evidence after she had rested her case in chief, "even under the guise of rebuttal evidence". (Respondent's Answering Brief at 30). Respondent has apparently forgotten the procedural posture of the case after Judge Weise modified Judge Allf's sanction. Instead of the finding of permissive use as a matter of law (as expressly ordered by Judge Allf), Judge Weise instead imposed a rebuttable presumption. Emilia was therefore not required to offer the Rule 36 admission in her case in chief.[1] Emilia was not required to adduce *any evidence* on

[1] It is not clear that there was any obligation to put the admissions into evidence at all to give the admission binding effect. *See Am. Tech. Corp. v. Mah*, 174 F.R.D. 687, 689 and 690 (D. Nev. 1997) ("... a party's "failure to respond, either to an entire request or to a particular request, is deemed to be a [judicial] admission of the matter set forth in that request or requests." 8A Charles A. Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2259, at 549–550 (2d. ed.1994). Since unanswered requests for admission are automatically deemed judicially admitted under Rule 36(a), no court intervention is required. ... The Defendants' failure to respond to ATC's requests for admission automatically deemed the matters as admitted. Since court intervention is not required to invoke

this issue in her case in chief because she had no burden because of the presumption. Emilia did not have to put on any evidence of permissive use until Andrea attempted to rebut the presumption and Emilia chose to do so.

In explaining the effect of his order establishing a rebuttable presumption of permissive use, Judge Weise specifically told the parties that Emilia did not have to offer any evidence of permissive use and could rely solely on the presumption:

> So I don't think it's still a finding as a matter of law that 41.440 is met. It's a rebuttable presumption that it's met, which means that the jury shall presume that she gave permission to her son to drive the vehicle unless that evidence is rebutted and the jury's convinced that it's been rebutted.
>
> You guys can come up with the language of that instruction. But I don't know that – there's prejudice to the plaintiff because, yes, it changes things a little bit, but there's still a presumption. You don't have to put on any evidence and there's still a presumption.

(VII AA at AA at 1631, lines 1-12). In light of the rebuttable presumption and this guidance from the district court, it is disingenuous of Respondent to contend that Emilia waived the Rule 36 admission by not introducing it in her case in chief.

Rule 36(a), an order restating Rule 36 would be surplusage").

Ultimately, when Andrea took the stand in her defense case and tried to dispute permissive use, Emilia confronted her on cross examination with the admission and showed the admission to the jury. (XXIV AA at 5914-5915). This was, once again, more than sufficient to preserve the issue. There was no waiver and the admission went into evidence in a timely manner.

Shortly thereafter, both parties rested and Emilia promptly moved for judgment as a matter of law, relying heavily on the conclusive effect of the Rule 36 admission:

> ... I think what pushes us over the top is the admission. The -- under the rules, the admission conclusively establishes permissive use as a matter of law; and, therefore, we're entitled to directed verdict on that motion.

(XXIV AA 5949 at 15-20).

Judge Weise reminded counsel that he had allowed the contradictory interrogatory answer into evidence, to which Emilia's counsel responded:

> MR. ROBERTS: I guess I'm confused. Because if it's conclusively established and they're not being allowed to amend, how could there be an issue of fact for the jury?
>
> THE COURT: That goes back to Mr. Tindall's argument. And -- and I said -- I read it as being conclusively presumed as it related to Rule

36. That's why I didn't allow the amended admission response, but I was going to allow additional discovery responses because I knew they were inconsistent.

MR. ROBERTS: Okay. Well, I still want to make my motion.

THE COURT: That's fine.

MR. ROBERTS: You can deny it.

THE COURT: Okay. Denied.

(XXIV AA 5950 at 11-25).

Once again, Emilia preserved the issue. Because Emilia preserved the issue that was error to submit the issue of permissive use to the jury *at all*, it was unnecessary to keep objecting to every instruction and every verdict form which gave the jury discretion to ignore the admission. Any instruction and any verdict form would have been equally objectionable if they allowed the jury discretion to disregard the admission.

E. Forcing The Requesting Party to Litigate Admitted Issues Defeats the Purpose of Rue 36.

As noted above, the Nevada Supreme Court in *Wagner* relied upon the federal Advisory Committee Notes to support its interpretation of Rule 36. In making its recommendation to make admissions conclusive, the Advisory Committee pointed out the obvious: "Unless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to

prove the very matters on which he has secured the admission, and the purpose of the rule is defeated". 48 F.R.D. 487, 534.

Among other authority, the Advisory Committee pointed to the Yale Law Journal for this proposition, which explains the rationale underlying the rule in more detail:

> If Rule 36 is to fulfill its function, the admissions it produces should be held conclusive at trial: A proposition that stands admitted should be deemed established without further proof, and disproof should not be permitted. Unless admissions are given this effect, they will do little either to ease the burdens of trial preparation or to facilitate the trial itself. If a contention may be disputed even though it has been admitted, the party asserting the contention must be fully prepared to prove it and the tribunal hearing the case will have to debate and resolve it.

Ted Finman, The Request for Admissions in Federal Civil Procedure, 71 Yale L.J. 371, 418 (1962). *See also Tillamook Country Smoker, Inc. v. Tillamook Cty. Creamery Ass'n.*, 333 F. Supp. 2d 975, 984–85 (D. Or. 2004), aff'd sub nom. *Tillamook Country Smoker, Inc. v. Tillamook Cty. Creamery Ass'n*, 465 F.3d 1102 (9th Cir. 2006).

Allowing a party to litigate admitted issues will set a horrible precedent. Despite admissions, parties will have to exhaust discovery and prepare to litigate and meet their burden of proof. The salutary purpose of admissions will be completely defeated and they will be reduced in effect to an interrogatory answer.

F. ANDREA IMPROPERLY BLAMES HER PRIOR COUNSEL.

Andrea tries to distance herself from the admission of permissive use in her first Answer and her admission of permission use in response to the Rule 36 request for admission by claiming that her attorney admitted permissive use – not her. This is of no legal effect. In *Wagner v. Carex Investigations & Sec. Inc.*, 93 Nev. 627, 630–31, 572 P.2d 921, 923–24 (1977), the appellant's attorney declared that responses to the request for admissions had been dictated, but were not transcribed by his secretary, and that he had not noticed the failure to serve the responses. The court gave the admissions conclusive effect anyway, noting that "this court has upheld lower court rulings which rejected law office oversights as acceptable excuses").

G. JUDGE ALLF'S PERMISSIVE USE SANCTION WAS NOT ERRONEOUS AS A MATTER OF LAW, AND JUDGE WEISE HAD NO AUTHORITY TO ALTER IT.

Respondent argues that Judge Weise had authority to modify Judge Allf's sanctions order because "the district court is empowered to correct erroneous rulings." (Respondent's Answering Brief at 39 citing Gibson Tile Co., 122 Nev. at

466, 134 P. 3d at 705 n.4). There is a fatal flaw in this argument. Judge Allf's sanctions order was not erroneous. This is the law of the case.

Andrea challenged the propriety of Judge Allf's sanctions order by filing a Petition for Writ of Mandamus or, Alternatively, of Prohibition (the "Writ Petition") with the Nevada Supreme Court in 2015. According to the Nevada Supreme Court,

> Petitioner [Andrea] argues that the district court's sanction was improper because she did not violate a court order by willfully concealing an entry on her insurance claim log during the discovery process. This argument is unavailing. *Fire Ins. Exch. v. Zenith Radio Corp.*, 103 Nev. 648, 651–52, 747 P.2d 911, 913–14 (1987) (upholding the imposition of sanctions for a discovery abuse occurring in the absence of a violated court order); *see Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990) (recognizing that the imposition of a discovery sanction is discretionary with the district court).

See Awerbach v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark, No. 68602, 2015 WL 5432113, at *1 (Nev. Sept. 11, 2015).

Andrea argued Judge Allf's sanction was too harsh because it "basically precludes Petitioner from contesting her liability . . . ." Writ Petition at p. 9, lns. 1-

2. The Nevada Supreme Court found Andrea's arguments to be "unavailing" and denied any relief, upholding Judge's Allf's sanctions order. *See* Order filed Sept. 11, 2015 (citations omitted). These statements were not mere dicta, and Andrea cannot now argue once again that Judge Allf's sanctions order was "erroneous."

In fact, the Nevada Supreme Court's decision denying Andrea's Writ Petition and upholding Judge Allf's sanction thus became the law of the case, binding on the parties and the trial court. Once the Nevada Supreme Court weighed in, the trial court was powerless to depart from the consequences of its decision that the sanctions order was proper.

This is especially true in light of Judge Weise's justification for departing from the law of the case and modifying Judge Allf's already-upheld order. Specifically, Andrea admits Judge Wiese modified the order because it would have precluded Andrea from contesting liability—the exact argument already considered and rejected by the Nevada Supreme Court on Andrea's Writ Petition. *See* Respondent's Answering Brief at pp. 11-15. Even a different argument, however, would not justify the trial court's departure from the law of the case. *See Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975) ("The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings.")

An appellate court's decision "is the law of the case, not only binding on the parties and their privies, ***but on the court below*** and on this court itself." *Sherman Gardens Co. v. Longley*, 87 Nev. 558, 563, 491 P.2d 48, 51-52 (1971) (emphasis added) (citing *Wright v. Carson Water Co.,* 22 Nev. 304, 308, 39 P. 872, 873-874 (1895)). "A ruling of an appellate court upon a point distinctly made upon a previous appeal is, in all subsequent proceedings in the same case upon substantially the same facts, ***a final adjudication, from the consequences of which the court cannot depart.***" *Id.* (emphasis added). "When a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum, but is a judicial act of the court which it will thereafter recognize as a binding decision." *State v. Loveless*, 62 Nev. 312, 320, 150 P.2d 1015, 1019 (1944) (citing *Chase v. Am. Cartage Co.*, 176 Wis. 235, 238, 186 N.W. 598, 599 (1922)).

H. Judge Weise Admitted That He was Influenced by Judge Allf's Unspoken Intent, Inconsistent with her Written Orders, and Articulated for the First Time after she Recused Herself.

Respondent contends that "Judge Weise arrived at his decision independently', so that his conversation with Judge Allf was harmless. (Respondent's Answering Brief at 47). This is belied by the record. Judge Weise explained that he was trying to give effect to Judge Allf's true intention, even though that intention was at odds with orders she drafted herself:

> .... So she envisioned a rebuttable presumption whereby the jury would be able to hear both things that were said. Because I think that it's – I don't know that I would have entered the same order. I am trying to give effect to what Judge Allf did based on what her intention was.

(VII AA at 1630, lines 19-25). Judge Allf clearly influenced this case after she recused herself.

Respondents also argue that because Judge Allf's perceived bias was against one of Jared's defense counsel, and "the sanction order did not concern Jared, there is no reason to suppose that Judge Allf's comments were tainted by bias". (Respondent's Answering Brief at 47). Respondents overlook that the modification of the permissive use sanction, if allowed to stand, has caused Jared to lose his insurance coverage for this accident, at least as to indemnity for any judgment against him. This is why Jared's lawyers below joined in Emilia's opposition to the modification of the sanction. (IX AA 2141, lines 20-23).[2]

I. ALL OTHER ISSUE RAISED IN THE OPENING BRIEF ARE PRESERVED AND NOT WAIVED.

[2] It is a mystery how counsel for Respondent, who also represents Jared, can advocate for a result here that is contrary to Jared's positions taken below and if successful would deprive his other client of insurance coverage.

In order to respect the Court's time, Appellant will not repeat arguments raised in the opening brief. To the extent not expressly conceded, Appellant relies upon and does not waive the arguments and authority previously addressed to the Court.

III.

CONCLUSION

For all the foregoing reasons, Appellant requests that this Court issue an Order vacating the district court's judgement on the jury verdict in favor of Andrea, and direct a finding of permissive use as a matter of law.

DATED this 5th day of June, 2019.

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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 6,145 words (less than 7000 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 5th day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of June, 2019, the foregoing **APPELLANT'S REPLY BRIEF** 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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