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

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| RICHARD A. HUNTER, an individual,<br><br>Appellant,<br><br>vs.<br><br>WILLIAM GANG, an individual,<br><br>Appellee. | Case No.: 59691<br><br>Appeal from the Eighth Judicial District Court, The Honorable Douglas E. Smith Presiding. |

## RESPONDENT'S NOTICE OF SUPPLEMENTAL AUTHORITIES

Appellee, William Gang ("Gang"), hereby supplements his answering brief pursuant to NRAP 31(e). This supplemental authority is based on Eighth Judicial District Court Rule 1.90, NRCP 15(b), and the Nevada Supreme Court's decisions in Baughman & Turner v. Jory, 102 Nev. 582, 729 P.2d 488 (1986), Schmidt v. Sadri, 95 Nev. 702, 601 P.2d 713 (1979), and Schwartz v. Schwartz, 95 Nev. 202, 591 P.2d 1137 (1979). For the convenience of the Court and all parties to this appeal, Gang has attached a copy of these Rules and Opinions as Exhibits A-E.







15-901129

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**A. EDCR 1.90.**

Gang asks this Court to take note of EDCR 1.90 generally and, more specifically, EDCR 1.90(b)(1-2), (c)(3), (d)(1-2). Ex. A. These sections confirm:

- The mandate to district court judges to manage their dockets (EDCR 1.90(b)(1)).
- The mandate for each district court department to monthly dispose of or move to a dismissal calendar all complaints either not answered within 180 days of filing or pending longer than 12 months without action for six months (EDCR 1.90(b)(2)).
- The mandate for the caseflow review committee to report and make remedial recommendations to the chief judge of judges not adequately managing their dockets (EDCR 1.90(c)(3)).
- The mandate of the court administrator, not less than once each month, to provide each department with a list of cases not answered within 180 days of filing, and for the district court to set not less than monthly these cases lacking in prosecution for dismissal (EDCR 1.90(d)(1)).
- The mandate of the court administrator, not less than two times per calendar year, to provide each department with a list of cases 12 months old or older with no activity since the initial pleadings, and for the district court to set not less than two times per year these cases lacking in prosecution for dismissal (EDCR 1.90(d)(2)).

These provisions apply to Gang's Answering Brief at pages 16-20 (Section VI.A.).

**B. NRCP 15 AND RELATED CASE LAW.**

Gang asks this Court to take note of NRCP 15(b) and related case law regarding consent. NRCP 15(b) states:

> (b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may

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> be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Ex. B. Gang also asks the Court to take note of Baughman & Turner v. Jory, 102 Nev. 582, 729 P.2d 488 (1986). Specifically, Gang asks the Court to note the Opinion discussing how Respondent Jory impliedly consented to trial of an issue by not objecting at oral argument or in a responding brief. Baughman, at 583. Ex. C. Similarly, citing NRCP 15(b), Gang asks the Court to take note of Schmidt v. Sadri, 95 Nev. 702, 601 P.2d 713 (1979) discussing how it is rudimentary that when an issue is tried by implied consent those issues shall be treated as if they were raised. Ex. D. Schmidt, at 705; see also Schwartz v. Schwartz, 95 Nev. 202, 591 P.2d 1137 (1979) (the failure to amend does not affect the result). Ex. E.

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These provisions apply to Gang's Answering Brief and related arguments at pages 27-44 (Sections VI.C-G.).

Dated this 14th day of September, 2015.

MARQUIS AURBACH COFFING

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## CERTIFICATE OF MAILING

I hereby certify that on the 14th day of September, 2015, I served a copy of the foregoing **RESPONDENT'S NOTICE OF SUPPLEMENTAL AUTHORITIES** upon each of the parties by depositing a copy of the same in a sealed envelope in the United States Mail, Las Vegas, Nevada, First-Class Postage fully prepaid, and addressed to:

Mark E. Ferrario, Esq.
Tami D. Cowden, Esq.
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*Attorneys for Appellant*

and that there is a regular communication by mail between the place of mailing and the place(s) so addressed.

/s/ Rosie Wesp
Rosie Wesp, an employee of Marquis Aurbach Coffing

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# Exhibit A

**Rule 1.90. Caseflow management.**

**(a) Delay reduction standards.**

(1) Time to disposition. For criminal cases, the aspirational standard of the court is for 50% of all cases to be resolved within 6 months, 90% of all cases to be resolved within 1 year (with the last 10% being only life sentence or death penalty cases) and for 100% of the cases to be resolved within 2 years. It is the goal of the court to achieve a final resolution in 80% of its civil cases within 24 months of filing and a final resolution in 95% of its cases within 36 months of the date of filing. The court recognizes that there will be exceptional cases which will not be resolved within 36 months. The court also recognizes that 100% of all cases must be resolved within 60 months from the date of filing, unless there is a written stipulation by the parties to extend deadlines under NRCP 41(e).

(2) Time limits for discovery commissioner. Except in complex litigation as defined in NRCP 16.1(f), the discovery commissioner shall ensure that pretrial discovery is completed within 18 months from the filing of the joint case conference report. Discovery in complex litigation shall be completed within 24 months from the filing of the joint case conference report.

(3) Time limits for pretrial motions. All pretrial motions shall be heard and decided no later than 15 days before the date scheduled for trial.

(4) Time limits for matters under submission. Unless the case is extraordinarily complex, a judge or other judicial officer shall issue a decision in all matters submitted for decision to him or her not later than 20 days after said submission. In extraordinarily complex cases, a decision must be rendered not later than 30 days after said submission. Following the decision of the judge or other judicial officer, the prevailing party shall submit a written order to the judge or judicial officer not later than 20 days from the date of the decision.

(5) Time limits for entry of judgments. Unless the case is extraordinarily complex, a judge or other judicial officer shall order the prevailing party to prepare a written judgment and findings of fact and conclusions of law and submit the same not later than 20 days following trial. In extraordinarily complex cases, the attorney for the prevailing party shall submit a written judgment and findings of fact and conclusions of law to the judge or judicial official not later than 30 days following the conclusion of trial.

(6) Time limits for remands from Nevada Supreme Court. Any case remanded for further action by the supreme court shall be scheduled for a status check no later than 30 days from issuance of the remittitur.

**(b) Civil caseflow management.**

(1) Responsibility of trial judge. It is the clear responsibility of each individual trial judge to manage the individual calendar in an efficient and effective manner. Each judge is charged with the responsibility for maintaining a current docket.

(2) Dismissal calendar. Each department shall review its civil caseload for complaints not served or not answered within 180 days of filing and for civil cases pending longer than 12 months in which no action has been taken for more than 6 months. The cases shall either be disposed of or moved forward by means of a dismissal calendar held at least monthly in each department.

(3) Scheduling orders. The discovery commissioner shall issue a scheduling order in a civil case no later than 30 days from the filing of the joint case conference report. The scheduling order shall indicate whether the case is likely to take more than 4 weeks to try and at least 5 dates consistent with the settlement program on which the parties are requesting that a settlement conference be scheduled when all counsel plus those persons with settlement authority are available to attend at 10:30 a.m. Tuesday through Friday.

(4) Trial setting. Upon receipt of a scheduling order from the discovery commissioner, the trial judge shall issue a trial setting order within 60 days, setting the matter for trial no later than 12 months from the date of the discovery cut-off date set forth in the scheduling order.

(5) Trial date. The trial shall go forward on the date originally set, unless the court grants a continuance upon a showing of good cause. No trial date shall be continued pursuant to stipulation of the parties without approval of the trial judge. At the time a continuance is granted, the trial judge must set the case for trial at a time and date certain. The new trial date shall be set at the earliest available date within 9 months of original trial date.

(6) Number of trials. Each department must set a minimum of 10 cases for each full week of a trial stack. In determining the maximum number of cases to set, the judge should consider the following factors: the length of time between the filing of the trial order and the trial date, length of trial and fallout, or dispositions expected before trial date.

**(c) Caseflow review committee.**

(1) Purpose. The purpose of the committee shall be to review the status of all dockets to identify backlogs that require attention and to review compliance with court delay reduction standards.

(2) Procedures. The caseflow review committee shall monitor the caseflow of each department. To assist the committee in its review, each department, on or before the 15th day of the month, shall report the following information to the caseflow review committee as to the previous month:

(A) The number of scheduling orders received during the month.

(B) A list of cases for which scheduling orders have been received but no trial dates have been set.

(C) A list of all cases set to begin trial during the month and a report of disposition. For any cases continued, a reason given for the continuance and the number of prior trial continuances reported.

(D) A list of all cases sent to overflow trial calendar and a report of disposition or reason for non-disposition and next case action date.

(E) A report of matters (motions and trials) taken under advisement and which have been pending more than 30 days.

(F) Any other reports the committee deems useful to accomplish the purpose of the caseflow review committee.

(3) Recommendation to chief judge. When the caseflow review committee determines that an individual judge's docket has become backlogged due to inactivity, neglect, or inadequate management, it will recommend in writing to the chief judge appropriate action to bring the docket to current status. Prior to making such recommendation, a representative of the caseflow review committee must meet with the judge in question to discuss the problem. The action recommended by the caseflow review committee may include, but shall not be limited to the following remedial measures:

(A) Require the judge to attend proceedings with a judge (or judges) whose docket(s) is current, to observe the procedures employed to move the docket.

(B) Refuse the approval of the judge's requests for the expenditure of funds not relating to items which impact the judge's productivity in disposing of cases.

(C) Require the judge to attend an educational program on docket management and develop a written plan for improvement.

(D) Curtail the judge's time away from the court.

(E) Recommend that the chief judge issue a letter of complaint to the Nevada Judicial Discipline Commission.

(4) Willful non-compliance. Should the chief judge determine that any judge's non-compliance with the delay reduction and caseflow management standards is willful and not a result of caseload or extraordinary circumstances, the chief judge shall report the same to the chief justice of the supreme court for further action.

**(d) Caseflow management reporting.**

(1) Complaints not served or answered within 180 days. Not less than once each month, the court administrator shall provide each department with a list of all civil cases which have not been served or answered within 180 days of the filing of the complaint. Upon receipt of the list, each judge shall determine the status of all such cases and shall, by motion with notice to the parties, set all cases lacking in prosecution for dismissal not less than monthly.

(2) Cases 12 months or older. Not less than 2 times per calendar year, the court administrator shall provide each department with a list of all civil cases 12 months or older, upon which there has been no activity since the initial pleadings. Upon receipt of the list, each judge may order a status report be filed, shall determine the status of all such cases and shall, by motion with notice to the parties, set all cases lacking in prosecution for dismissal not less than 2 times per year.

(3) Cases 36 months or older. In January and July of each year, the court administrator shall provide each department with a list of all civil cases 36 months of age or older. Upon receipt of the list, each judge may order a joint status report be filed by the parties, shall determine the status of all such cases, and shall submit a written status report to the chief judge in February and August, setting forth the status of each such case.

(4) Cases 48 months or older. In January of each year, the court administrator shall provide each department and the chief judge with a list of all cases which are 48 months of age or older. Upon receipt of the list, each judge may order a joint status report be filed by the parties, shall determine the status of all such cases and shall submit a written status report to the chief judge no later than 30 days from receipt of the report.

[Added; effective January 1, 2001; amended; effective January 17, 2012.]

# Exhibit B

## RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

**(a) Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

[As amended; effective January 1, 2005.]

**(b) Amendments to Conform to the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

[As amended; effective January 1, 2005.]

**(c) Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

**(d) Supplemental Pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

[As amended; effective January 1, 2005.]

# Exhibit C

102 Nev. 582
Supreme Court of Nevada.

BAUGHMAN & TURNER, INC., a Nevada corporation, Appellant,
v.
Dwight JORY, individually and in his capacity as a General Partner of La Mesa Associates, Ltd., a Nevada limited partnership, Respondent.

No. 17031. | Dec. 18, 1986.

Civil engineering firm sued vice-president of construction company which was general contractor for condominium projects. The Eighth Judicial District Court, Clark County, Paul S. Goldman, J., granted vice-president's motion for summary judgment, and engineering firm appealed. The Supreme Court held that genuine issue of fact existed whether vice-president was partner by estoppel in limited partnerships which owned condominium projects.

Reversed.

West Headnotes (1)

[1] **Judgment**⇐Evidence and Affidavits in Particular Cases

Material issue of fact precluded summary judgment in favor of vice-president of construction company which was general contractor for condominium projects, in suit for services rendered by civil engineering firm alleging vice-president was partner by estoppel in limited partnerships owning condominium projects, after vice-president impliedly consented to trial of issue of partnership by estoppel and engineering firm submitted affidavit and plat maps which raised issue. Rules Civ.Proc., Rule 15(b).

Cases that cite this headnote

**Attorneys and Law Firms**

****488** ***582** Lionel, Sawyer & Collins and Evan J. Wallach, Las Vegas, for appellant.

Darrell Lincoln Clark, Las Vegas, for respondent.

**OPINION**

PER CURIAM:

Baughman & Turner, Inc. ("Baughman") appeals from the district court's order granting Dwight Jory's motion for summary

  

judgment. Baughman provided civil engineering services for the development of two condominium projects. Jory is vice-president of the construction company which was the general contractor for those two condominium projects. Each condominium ****489** project was owned by a separate limited partnership. In its complaint, Baughman alleged that Jory was liable as an actual partner of only one of the limited partnerships, La Mesa Associates, Ltd. ***583** ("La Mesa"). Later, in response to Jory's motion for summary judgment, Baughman asserted that Jory was a partner by estoppel of both limited partnerships, La Mesa and Willowtree Associates, Ltd.

Jory impliedly consented to trial of the issue of partnership by estoppel pursuant to NRCP 15(b).[1] Baughman expressly raised the theory of Jory's liability as a partner by estoppel of both limited partnerships in its opposition to Jory's motion for summary judgment. Jory did not object in a responding brief or at the summary judgment hearing that this theory of recovery was not alleged in the complaint.

After summary judgment was granted, the parties agreed to a "statement of the case as the record on appeal" pursuant to NRAP 10(e).[2] In this statement, Jory agreed that the matter of "[Baughman's] claim against [Jory] based upon the doctrine of partner by estoppel codified by N.R.S. 87.160" was an issue at the hearing on the motion. Pursuant to this agreed-upon statement of the case, Jory acknowledges that the partnership by estoppel theory was directly placed before the district court in a meaningful, understandable way and that he did not object to such theory as a matter before the district court.

In opposition to Jory's motion for summary judgment, Baughman submitted an affidavit and plat maps which, when construed most favorably to Baughman, support a finding that a genuine issue of fact exists as to whether Jory is a partner by estoppel.

Accordingly, the district court's order granting Jory's motion for summary judgment is reversed.

**All Citations**

102 Nev. 582, 729 P.2d 488

Footnotes

1 NRCP 15(b) provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

2 NRAP 10(e) provides that:

> In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented.

**End of Document**

# Exhibit D

95 Nev. 702
Supreme Court of Nevada.

Larrie SCHMIDT and Joyce Schmidt, Appellants,
v.
Fariborz SADRI, Bill Lashlee, Jack Matthews Realty, Respondents.

No. 10143. | Oct. 29, 1979.

Action was instituted for forcible entry and detainer. The Eighth Judicial District Court, Clark County, James A. Brennan, J., entered judgment for defendants, and plaintiffs appealed. The Supreme Court, Manoukian, J., held that: (1) because adequate proof of possession was a precondition to plaintiff's recovery in action, defendants' denial of that allegation allowed him to introduce any relevant evidence which might controvert fact of possession and, hence, to introduce evidence of abandonment notwithstanding their failure to plead it as an affirmative defense, and (2) it was reasonable to assume that a general denial of plaintiffs' alleged right to possession put defendants' claim of abandonment in issue in action and provided plaintiffs with sufficient notice.

Affirmed.

West Headnotes (13)

[1] **Pleading**⇨Necessity for Defense

An affirmative defense raises a matter which is beyond the limits of the plaintiff's prima facie case.

Cases that cite this headnote

[2] **Pleading**⇨Matters of Defense

Surprise and prejudice may result when evidence is admitted to prove a true affirmative defense that is without scope of plaintiff's complaint.

Cases that cite this headnote

[3] **Pleading**⇨Necessity for Defense
**Pleading**⇨Matters of Defense

If an affirmative defense is not pleaded, it is ordinarily deemed waived, and no evidence can be submitted relevant to that issue.

  

Cases that cite this headnote

[4] **Pleading**⇨Necessity for Defense

Statutory list respecting avoidance or affirmative defense is not exclusive and requires affirmative pleading for any matter which constitutes an avoidance or affirmative defense. NRCP 8(c).

1 Cases that cite this headnote

[5] **Pleading**⇨Matters of Defense

Evidence which merely controverts plaintiff's prima facie case does not constitute a confession or avoidance.

Cases that cite this headnote

[6] **Pleading**⇨General Issue or General Denial

If a particular issue arises by logical inference from allegations of plaintiff's complaint, a general denial is treated as being sufficient to put those matters in issue.

Cases that cite this headnote

[7] **Forcible Entry and Detainer**⇨Right of Possession and Constructive Possession
**Forcible Entry and Detainer**⇨Sufficiency of Actual Possession in General

Parties seeking to recover in an action for forcible entry and detainer were required to demonstrate that they had actual or constructive possession.

Cases that cite this headnote

[8] **Forcible Entry and Detainer**⇨Issues, Proof, and Variance

Where it was alleged in action for forcible entry and detainer that plaintiffs were rightfully in possession, it was natural for trial court and all parties to infer that defendants' denial of allegation placed abandonment in issue.

Cases that cite this headnote

  

[9] **Pleading**⚯General Issue or General Denial

A defendant is entitled under a general denial to introduce evidence which controverts any fact the plaintiff must prove in order to recover.

1 Cases that cite this headnote

[10] **Forcible Entry and Detainer**⚯Issues, Proof, and Variance

Because adequate proof of possession was a precondition to plaintiff's recovery in action for forcible entry and detainer, defendants' denial of that allegation allowed him to introduce any relevant evidence which might controvert fact of possession and, hence, to introduce evidence of abandonment notwithstanding their failure to plead it as an affirmative defense. N.R.S. 2.120; NRCP 8(b).

Cases that cite this headnote

[11] **Forcible Entry and Detainer**⚯Issues, Proof, and Variance

It was reasonable to assume that a general denial of plaintiff's alleged right to possession put defendants' claim of abandonment in issue in action for forcible entry and detainer and provided plaintiff with sufficient notice. N.R.S. 2.120; NRCP 8(b).

Cases that cite this headnote

[12] **Pleading**⚯Objections to Evidence as Not Within Issues

When an issue not raised by pleadings is tried by express or implied consent of parties, those issues shall be treated as if they were raised in pleadings. NRCP 15(b).

2 Cases that cite this headnote

[13] **Pleading**⚯Objections to Evidence as Not Within Issues

Fact that plaintiffs failed to object to defendants' introduction of initial evidence of abandonment in action for forcible entry and detainer was appropriately construed by trial court as implied consent to admission of other

evidence.

Cases that cite this headnote

**Attorneys and Law Firms**

***702 **714** David M. Printz, Las Vegas, for appellants.

Rogers, Monsey & Woodbury, John M. Sacco, Las Vegas, for respondents.

***703 OPINION**

MANOUKIAN, Justice:

In this appeal from a judgment in favor of respondents, defendants below, we are asked to determine whether the trial court erred in permitting respondents to introduce evidence of abandonment in an action for forcible entry and detainer, notwithstanding respondents' failure to plead it as an affirmative defense. We discern no error.

Appellants, plaintiffs below, Larrie and Joyce Schmidt, were tenants in a house owned by respondent Fariborz Sadri in Las Vegas, Nevada. Sadri decided to sell the residence and entered into an exclusive listing with the respondent Jack Matthews Realty and Matthews' salesman, Bill Lashlee. On June 15, ***704** 1976, Sadri entered into an agreement to sell his property to Mr. and Mrs. James Connors. Respondent Lashlee visited the property on June 21, 1976 and, believing appellants had abandoned the premises, helped clean the house to expedite the occupancy by the new owners.

Thereafter, the Schmidts filed an action in district court for forcible entry and unlawful detainer, trespass, conversion, and infliction of mental distress. The complaint specifically alleged that they were in actual, peaceful and quiet possession of the premises when the action of the respondents occurred. Respondents filed an answer generally denying the allegations in the complaint except for the admission that co-defendant Lashlee was the authorized agent of Jack Matthews Realty.

During trial, the judge allowed evidence to be presented concerning abandonment although it had not been specifically pleaded as a defense. Appellants objected to the admission of further evidence on abandonment after failing to object to evidence which had already been presented on the issue.

The trial court found in favor of the defendants on the basis of the abandonment of the premises. This appeal ensued.

[1] [2] [3] An affirmative defense raises a matter which is beyond the limits of the plaintiff's prima facie case. Surprise and prejudice may result when evidence is admitted to prove a true affirmative defense that is without the scope of the plaintiff's complaint. See Mason v. Hunter, 534 F.2d 822, 825 (8th Cir. 1976). If an affirmative defense is not pleaded, it is ordinarily deemed waived, and no evidence can be submitted relevant to that issue. Chisholm v. Redfield, 75 Nev. 502, 508, 347 P.2d 523, 526 (1959).

****715** [4] [5] [6] Appellants contend that abandonment is an affirmative defense though it does not fall within the statutory list enumerated in NRCP 8(c).[1] The procedural list is, by its express terms, not exclusive and it requires affirmative pleading for any matter which constitutes an avoidance or affirmative defense. It is true, however, that evidence which merely controverts the plaintiff's prima facie case does not constitute a confession or avoidance. ***705** Pangborn v. National Advertising Co., 93 Nev. 168, 170, 561 P.2d 456, 457 (1977). If a particular issue arises by logical inference from the allegations of the plaintiff's

complaint, a general denial is treated as being sufficient to put those matters in issue. Id.

[7] [8] [9] Appellants, in order to recover below, were required to demonstrate that they had actual or constructive possession. Courchaine v. Bullion Mining Co., 4 Nev. 369, 373-74 (1868); Mallett v. Uncle Sam Mining Co., 1 Nev. 188, 200-201 (1865). In reviewing the complaint, we note that it alleged that the appellants were rightfully in possession. A fortiori, it was natural for the trial court and all parties to infer that respondents' denial of that allegation placed abandonment in issue. Moreover, a defendant is entitled under a general denial, to introduce evidence which controverts any fact the plaintiff must prove in order to recover. Federal Deposit Insurance Corp. v. Siraco, 174 F.2d 360, 362 (2d Cir. 1949); Parkening v. Mullen, 396 P.2d 487, 489 (Okl.1964).

[10] [11] In the instant case then, it is clear that, because adequate proof of possession was a precondition to plaintiff's recovery, the respondents' denial of that allegation allows them to introduce any relevant evidence which might controvert the fact of possession. Pangborn v. National Advertising Co., 93 Nev. at 169, 561 P.2d at 457; Parkening v. Mullen, 396 P.2d at 489. In addition, the 1951 legislature authorized this court to promulgate rules to regulate civil practice and procedure. The legislature envisioned that such rules would serve to simplify existing judicial procedures and promote the speedy determination of litigation upon its merits. NRS 2.120. On January 1, 1953, this court adopted the Nevada Rules of Civil Procedure, which are based primarily upon the federal rules. Nevada, then, is a notice pleading state, and it is reasonable to assume that a general denial of the plaintiff's alleged right to possession put the claim of abandonment in issue and provided appellants with sufficient notice. See NRCP 8(b).

[12] Finally, it is rudimentary that when an issue not raised by the pleadings is tried by express or implied consent of the parties, those issues shall be treated as if they were raised in the pleadings. Poe v. La Metropolitana Co., 76 Nev. 306, 308-09, 353 P.2d 454, 455-56 (1960); NRCP 15(b).[2] Appellants failed to satisfy the trial court that the admission of the complained of evidence would prejudice them in any legally cognizable way.

***706 **716** [13] The fact that appellants failed to object to the introduction of the initial evidence of abandonment was appropriately construed by the trial court as implied consent to the admission of other evidence. See Kaye v. Smitherman, 225 F.2d 583, 593, 594-95 (10th Cir. 1955), Cert. denied, 350 U.S. 913, 76 S.Ct. 197, 100 L.Ed. 800 (1955).

We affirm the judgment of the district court.

MOWBRAY, C. J., and THOMPSON, GUNDERSON and BATJER, JJ., concur.

**All Citations**

95 Nev. 702, 601 P.2d 713

Footnotes

1 NRCP 8(c) provides in part:

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

2 NRCP 15(b) provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleading the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a

continuance to enable the objecting party to meet such evidence.

**End of Document**

# Exhibit E

95 Nev. 202
Supreme Court of Nevada.

Lilly SCHWARTZ, Appellant,
v.
Eugene L. SCHWARTZ, Respondent.

No. 9857. | March 15, 1979.

In action by former wife against husband seeking to recover arrearages in spousal and child support, the First Judicial District Court, Carson City, Frank B. Gregory, J., entered judgment dismissing wife's complaint, and wife appealed. The Supreme Court held that: (1) issue of res judicata was not properly before trial court, and thus judgment of dismissal predicated thereon could not be upheld, and (2) equivocal and limited testimony of wife was not sufficient to satisfy husband's burden of proof as to each element of affirmative defense of res judicata.

Reversed and remanded.

West Headnotes (7)

[1] **Judgment**⇐Necessity of Pleading Former Adjudication in General

Res judicata is affirmative defense which must be specifically pleaded, and, normally, failure to plead res judicata is considered as waiver thereof. NRCP 8(c).

1 Cases that cite this headnote

[2] **Pleading**⇐Objections to Evidence as Not Within Issues

Failure to amend pleadings does not affect result of trial of issues tried by express or implied consent of the parties. NRCP 15(b).

4 Cases that cite this headnote

[3] **Judgment**⇐Issues, Proof, and Variance

Party surprised by such development as raising of issue of affirmative defense of res judicata at trial must be given reasonable opportunity to respond.

3 Cases that cite this headnote

[4] **Judgment**⇨Issues, Proof, and Variance

Where there was no reference to res judicata as a defense, or to factual issues involved, during pretrial discovery, opening remarks of counsel or at any time prior to cross-examination of former wife in action by wife seeking to recover arrearages in spousal and child support, and when issue did arise counsel for wife was surprised and understandably unprepared and objected to pursuit of issue, issue of res judicata was not properly before trial court, and thus judgment of dismissal predicated thereon could not be upheld. NRCP 8(c).

1 Cases that cite this headnote

[5] **Judgment**⇨Nature and Requisites of Former Adjudication as Ground of Estoppel in General

Application of doctrine of res judicata requires showing that has been previous action between same parties involving same subject matter in which final judgment on the merits has been rendered with respect to same cause of action.

1 Cases that cite this headnote

[6] **Evidence**⇨Matters of Defense and Rebuttal

Since averments of affirmative defense are taken as denied or avoided, each element of defense must be affirmatively proved and burden of proof rests with party asserting defense.

4 Cases that cite this headnote

[7] **Child Support**⇨Weight and Sufficiency

Equivocal and limited testimony of former wife, which was only evidence upon which order of dismissal was predicated, was not sufficient to satisfy former husband's burden of proof on issue of res judicata in action by wife to recover arrearages in spousal and child support.

Cases that cite this headnote

**Attorneys and Law Firms**

  

***202 **1138** Kenneth J. Jordan, Carson City, for appellant.

Eck & Harkins, Ltd., Carson City, for respondent.

## *203 OPINION

PER CURIAM:

The principal issue presented in this appeal from the judgment below dismissing appellant-plaintiff's complaint is whether the affirmative defense of res judicata, upon which the dismissal was predicated, was properly before the court. We hold that it was not, and therefore reverse and remand for a new hearing.

## THE FACTS

Appellant initiated this action, seeking amounts she claimed were due from respondent, her former husband, under a California decree of divorce entered in 1965 and a subsequent stipulation filed by the parties in Los Angeles Superior Court in 1973, as spousal and child support. Respondent's answer denied that any arrearages were due and owing; no affirmative defenses were raised.

At trial during cross-examination, appellant was asked by counsel for respondent whether she had attempted "to bring this matter to judgment in California." Appellant replied: "I think I got two judgments that he was supposed to pay and then he moved to Nevada." Counsel for respondent asked whether the judgments were for the full amount appellant was claiming in the present action. Appellant answered, "Yes," but upon questioning by the court, said merely, "I don't remember the figures, but the figures I added entered in alimony and child support, this is what Mr. Schwartz owes me." Counsel for appellant then interposed an objection to the line of questioning, which the court overruled.[1]

***204 **1139** At the conclusion of appellant's testimony, respondent moved to dismiss the action on the basis of res judicata. Counsel for appellant argued that appellant had been confused by the legal term, and was referring to various orders to show cause. He further argued that no affirmative defense had been pleaded or previously raised. N.R.C.P. 8(c). The court, however, ruled that appellant was "bound by her own testimony", and granted respondent's motion and dismissed the complaint.

## THE DEFENSE OF RES JUDICATA

[1] Res judicata is an affirmative defense that must be specifically pleaded. N.R.C.P. 8(c). Normally, failure to plead res judicata is considered a waiver thereof. See, e. g., Tolotti v. Eikelberger, 90 Nev. 466, 530 P.2d 106 (1974). Cf. ***205** Coray v. Hom, 80 Nev. 39, 389 P.2d 76 (1964) (statute of frauds); Second Baptist Ch. v. First Nat'l Bank, 89 Nev. 217, 510 P.2d 630 (1973) (election of remedies).

In certain circumstances, however, the Nevada Rules of Civil Procedure do permit an affirmative defense to be considered, even though it has not been raised by the pleadings. See N.R.C.P. 15. As has been noted of the Federal Rules of Civil Procedure, "Doubtless, when there is no prejudice and when fairness dictates, the strictures of this rule (8(c)) may be relaxed. Under Rule 15 the district court may and should liberally allow an amendment to the pleadings if prejudice does not result." Jakobsen v. Massachusetts Port Authority, 520 F.2d 810, 813 (1st Cir. 1975). See, e. g., Marschall v. City of Carson, 86 Nev. 107, 464 P.2d 494 (1970). In the case at hand, respondent made no application to the court for permission to amend, and none was granted.

[2] Rule 15(b) does provide that "(w)hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Failure to amend does not, in such circumstances, affect the result of the trial of these issues. United Tungsten v. Corp. Svc., 76 Nev. 329, 353 P.2d 452 (1960); Gershenhorn v. Stutz, 72 Nev. 293, 304 P.2d 395 (1956).

In Poe v. La Metropolitana Company, 76 Nev. 306, 353 P.2d 454 (1960), for instance, ****1140** this court found that the defense of fraud in the application for an insurance policy had been tried by implied consent. The court noted that counsel for the defendant had raised the issue in his opening argument, that counsel for plaintiff had specifically referred to the matter as an issue in the case, that the factual issue had been explored in discovery, that no objection had been raised at trial to the admission of evidence relevant to the issue. See also Young Elec. v. Last Frontier, 78 Nev. 457, 375 P.2d 859 (1962) (issue virtually the "sole subject" of testimony); Whiteman v. Brandis, 78 Nev. 320, 372 P.2d 468 (1962) (evidence received without objection); United Tungsten v. Corp. Svc., supra (appellant's counsel agreed with court's characterization of the matter as the major issue in the case); Choate v. Ransom, 74 Nev. 100, 323 P.2d 700 (1958) (no objection raised to evidence or request for opportunity to refute).

Not so in the instant case. In contrast to Poe, there was no reference to res judicata as a defense, or to the factual issues involved, during pre-trial discovery, opening remarks of counsel, or at any time prior to the cross-examination of appellant. When the issue did arise, counsel for appellant was surprised, ***206** and understandably unprepared. He objected to the pursuit of the issue, once its import became clear; he specifically argued, in opposition to respondent's motion immediately following appellant's testimony, on the ground that the issue had not been raised in the pleadings. His requests to reopen for further testimony by his client, and for reservation of the court's ruling until records could be secured, merely underscored the difficulties occasioned by his lack of prior notice of the issue.

[3] As the court said in Jakobsen v. Massachusetts Port Authority,supra, 520 F.2d at 815, "(w)hile the Federal Rules reflect a universal trend away from stereotyped pleading, they do not presage abandonment of the requirements that parties be given reasonable advance notice of the major issues to be raised." See F. James & G. Hazard, Civil Procedure s 5.5 (2d ed. 1977). The concomitant of such a requirement, and of the mandate of N.R.C.P. 1, that the rules be interpreted so as to provide for a just determination of every action, is the requirement that the party surprised by such a development be given a reasonable opportunity to respond. See Parks v. Quintana, 86 Nev. 847, 477 P.2d 869 (1970). See also MBI Motor Company, Inc. v. Lotus/East, Inc., 506 F.2d 709 (6th Cir. 1974); United States v. 47 Bottles, More or Less, Etc., 320 F.2d 564 (3d Cir. 1963). In this case, appellant was provided with neither reasonable notice of the issue nor an opportunity to respond.

[4] [5] [6] [7] We conclude, therefore, that the issue of res judicata was not properly before the trial court and the judgment of dismissal predicated thereon may not be upheld. We reverse and remand for a new hearing.[2]

**All Citations**

95 Nev. 202, 591 P.2d 1137

Footnotes

1 The full account of this exchange is as follows:
Q: (Counsel for Respondent): Did you ever attempt to bring this matter to judgment in California?
A: (Appellant): Yes, we've been in court lots of times.
Q: And what happened to those?
A: I think I got two judgments that he was supposed to pay and then he moved to Nevada.
Q: And did you tell
THE COURT: Did I understand that some of this arrearage was reduced to judgment in California?
(Counsel for Respondent): I think it all was, your Honor.
(Counsel for Appellant): I don't have any records of that, your Honor.
THE COURT: I'll want to know more about that, (Counsel for Respondent). I hope you'll pursue this more fully.
(Counsel for Respondent): That's what I'm trying to obtain from the Defendant (sic).
(Counsel for Respondent): You say you got two judgments against Mr. Schwartz in California?
A: That's right. As far as I know. If that's called judgment.
Q: And what did you do with those judgments?

  

A: What'd I do with the judgments?
Q: Did you collect any money on the judgments?
A: Not a bit.
Q: How much were those judgments for?
A: Exactly what was entered in the judgment.
Q: For the full amount your (sic) claiming today?
A: Yes.
THE COURT: What was that answer, please?
A: I don't remember the figures, but the figures I added entered in alimony and child support, this is what Mr. Schwartz owes me.
Q: Was there anything ever done? Did Mr. Schwartz ever go to Court, you and Mr. Schwartz ever go to Court after your divorce other than those two times you just mentioned?
A: Oh, yes, we went to Court more than once.
Q: What happened in those Court proceedings?
(Counsel for Appellant): I think I'm going to have to object unless there is some record of that. There were so many times that we're talking about, it's kind of confusing. I think the witness has already answered that the only judgments or stipulations she's mentioned are the ones that's already been offered into evidence. And besides the divorce decree, interlocutory and the final decree, that's it.
(Counsel for Respondent): Your Honor, if this matter has already been litigated, which is something that I've just found out about, it seems to me we've got a res judicata problem and we've got an action that should have been brought on a judgment rather than on the basis of a new action for arrearages.
THE COURT: I agree. Most thoroughly. The objection is overruled.

[2] Even if we were to rule that the issue of res judicata had been properly raised, the evidence before the court below did not conclusively establish this defense.
As has been observed, "(a)pplication of the doctrine of Res judicata requires a showing that there has been a previous action between the same parties involving the same subject matter in which a final judgment on the merits has been rendered with respect to the same cause of action." Bryson v. Guarantee Reserve Life Insurance Company, 520 F.2d 563, 566 (8th Cir. 1975). Since the averments of an affirmative defense are taken as denied or avoided (Jones v. Barnhart, 89 Nev. 74, 506 P.2d 430 (1973); N.R.C.P. 8(d)), each element of the defense must be affirmatively proved. United States v. Truckee-Carson Irrigation Dist., 71 F.R.D. 10 (D.Nev.1975). The burden of proof clearly rests with the defendant. See, e. g., Rosenbaum v. Rosenbaum, 86 Nev. 550, 471 P.2d 254 (1970).
The equivocal and limited testimony of appellant, which was the only evidence upon which the order of dismissal was predicated, does not meet these standards. (The court on remand may permit either party to file an amended pleading, pursuant to the guidelines of N.R.C.P. 15(a).)

**End of Document**