

IN THE SUPREME COURT OF THE STATE OF NEVADA

DARIA HARPER, an individual; and
DANIEL WININGER, an individual,

Appellants,

vs.

COPPERPOINT MUTUAL INSURANCE
HOLDING COMPANY, an Arizona
corporation; COPPERPOINT GENERAL
INSURANCE COMPANY, an Arizona
corporation; LAW OFFICES OF
MARSHALL SILBERBERG, P.C., a
California Corporation; KENNETH
MARSHALL SILBERBERG aka
MARSHALL SILBERBERG aka K.
MARSHALL SILBERBERG, an individual,

Respondents.

Electronically Filed
Jan 25 2022 03:12 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No.: 82158

**RESPONDENTS COPPERPOINT MUTUAL INSURANCE HOLDING
COMPANY AND COPPERPOINT GENERAL INSURANCE COMPANY'S
MOTION TO TAKE JUDICIAL NOTICE**

COMES NOW Respondents, CopperPoint Mutual Insurance Holding Company and CopperPoint General Insurance Company ("Respondents"), by and through their attorneys, Dalton L. Hooks, Jr., Esq., and Alexander M. Brown, Esq., of Hooks Meng & Clement, and hereby moves the Nevada Supreme Court to take judicial notice of the Arizona Court of Appeals Opinion in *Harper v. Indus. Comm'n of Ariz.*, No. 1 CA-IC 21-0010, 2021 WL 6122141 at 1–3 (Ariz. Ct. App. Dec. 28,

2021) (unpublished disposition), a copy of which is attached hereto as Exhibit A. This Motion is filed pursuant to NRAP 27.

I. INTRODUCTION

Appellants filed their Notice of Appeal on November 24, 2020, regarding the district court's October 26, 2020, order. As of September 27, 2021, the parties had fully briefed the matter before the Nevada Supreme Court. As noted in Respondents' Answering Brief, and as further noted in Appellants' Reply Brief, the matter has been concurrently proceeding through the Arizona judicial system, including the Arizona Court of Appeals. On December 28, 2021, the Arizona Court of Appeals issued an Opinion on the issue of whether Arizona or Nevada law applies to Respondents' lien. Appellant Harper and Respondents CopperPoint were parties to the appeal before the Arizona Court of Appeals, and the Arizona Court of Appeals determined that Arizona law would apply to the CopperPoint lien. The Nevada Supreme Court should take Judicial Notice of the Arizona Court of Appeals Opinion in *Harper v. Indus. Comm'n of Ariz.*, as it impacts the same issues presented by the instant appeal.

II. RELEVANT FACTS

Respondents repeat the statement of facts discussed in their Answering Brief as if set forth fully herein. Further, to reiterate what is relevant, the dispute between

Respondents and Appellant Harper has been concurrently proceeding through the Arizona Industrial Commission, which entered an order on December 27, 2020 stating Respondents have a valid and enforceable lien on the proceeds of Appellants' Nevada medical malpractice settlement pursuant to ARS 23-1023. [Respondents' Answering Brief at pg. 2]. As further discussed in Appellants' Reply Brief, Appellants timely sought review of the Arizona Industrial Commission Order before the Arizona Court of Appeals. [Reply Brief at pg. 24.]

On December 28, 2021, the Arizona Court of Appeals, Division One, filed a Memorandum Decision in regards to the appeal. *Harper v. Indus. Comm'n of Ariz.*, No. 1 CA-IC 21-0010, 2021 WL 6122141 at 1–3 (Ariz. Ct. App. Dec. 28, 2021) (unpublished disposition). The Court noted that “Harper contends: (1) Nevada law applies to the enforcement of CopperPoint’s lien; and (2) Nevada law prohibits such enforcement against the Proceeds.” *Id.* at 4. As to the issue of whether Nevada or Arizona law applied to Appellant’s lien in the instant matter, the Arizona Court of Appeals stated:

When an employee receives workers’ compensation, the law of the state of compensation governs third-party actions, including lien subrogation.

...

Harper chose to file her claim in Arizona. Arizona law thus applies and permits CopperPoint’s enforcement of its lien against the Proceeds.

Id. Respondents now submit their Motion to Take Judicial Notice of the

Arizona Court of Appeals Opinion in *Harper v. Indus. Comm'n of Ariz.*

III.

ARGUMENT

I. The Supreme Court Should Take Judicial Notice of the Arizona Court of Appeals, Division One's Opinion in *Harper v. Indus. Comm'n of Ariz.*

In this matter, NRAP 27, NRS 47.130, and NRS 47.140 are relevant. NRAP 27 states in pertinent part that:

RULE 27. MOTIONS

(a) In General.

(1) Application for Relief. An application for an order or other relief is made by motion unless these Rules prescribe another form. A motion must be in writing and be accompanied by proof of service.

NRAP 27 (a)(1). Further, NRS 47.130 states that:

NRS 47.130 Matters of fact.

1. The facts subject to judicial notice are facts in issue or facts from which they may be inferred.

2. A judicially noticed fact must be:

(a) Generally known within the territorial jurisdiction of the trial court;
or

(b) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,

so that the fact is not subject to reasonable dispute.

NRS 47.130 (2021). Additionally, NRS 47.140 states that:

NRS 47.140 Matters of law.

The laws subject to judicial notice are:

...

8. The constitution, statutes or other written law of any other state or territory of the United States, or of any foreign jurisdiction, as contained in a book or pamphlet published by its authority or proved to be commonly recognized in its courts.

NRS 47.140.

Here, the Arizona Court of Appeals addressed whether Nevada law or Arizona law applies to the enforcement of Respondents' lien. *Harper v. Indus. Comm'n of Ariz.*, No. 1 CA-IC 21-0010, 2021 WL 6122141 at 1–3 (Ariz. Ct. App. Dec. 28, 2021) (unpublished disposition). In doing so, the Arizona Court of Appeals determined that Arizona law applies to the CopperPoint lien, because Appellant “Harper chose to file her claim in Arizona.” *Id.* at 4. Pursuant to NRS 47.130, the Court may take judicial notice where a fact is “[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” NRS 47.130(2).¹ Accordingly, the Nevada Supreme Court should take judicial notice of the fact that the Arizona Court of Appeals has issued an opinion determining that Arizona law applies to Respondents' lien.

¹ The fact that this matter is currently before the Nevada Supreme Court is not a bar to taking judicial notice. In *Yellow Cab of Reno v. Second Judicial Dist. Court of Nev.*, 127 Nev. 583, 593 n.4 (2011) and *Jory v. Bennight*, 91 Nev. 763, 766 (1975), the Nevada Supreme Court took judicial notice pursuant to NRS 47.130.

Should the Nevada Supreme Court determine that the Arizona Court of Appeals opinion in *Harper v. Indus. Comm'n of Ariz.* is a matter of law rather than fact, NRS 47.140 also permits the Court to take judicial notice of a sister state's law. NRS 47.140(8). Under NRS 47.140, the Court may take judicial notice of the laws of a sister state "as contained in a book or pamphlet published by its authority or proved to be commonly recognized in its courts." *Id.* Pursuant to Ariz. S. Ct. R. 111(c), an unpublished opinion of the Arizona Court of Appeals is recognized "to establish claim preclusion, issue preclusion, or law of the case" between the parties to a matter, such as Appellant Harper and Respondents. Appellant Harper and Respondents were the parties before the Arizona Court of Appeals, and they are the exact same parties in the present appeal. Accordingly, the Nevada Supreme Court should take judicial notice of a sister state's law pursuant to NRS 47.140, should the Court decide that *Harper v. Indus. Comm'n of Ariz.* presents a legal matter.

Further, the Nevada Supreme Court's taking of judicial notice in this matter is particularly pertinent in light of the law of the case doctrine. According to the Nevada Supreme Court,

Under the law of the case doctrine, [w]hen an appellate court states a principle or rule of law necessary to a decision, the principle or rule becomes the law of the case and must be followed throughout its subsequent progress, both in the lower court and upon subsequent appeal. The law of the case doctrine is designed to ensure judicial consistency and to prevent the reconsideration, during the course of a single continuous lawsuit, of those decisions which are intended to put a particular matter to rest. The law of the case doctrine, therefore, serves

important policy considerations, including judicial consistency, finality, and protection of the court's integrity.

Tien Fu Hsu v. Cty. of Clark , 123 Nev. 625, 629–30 (2007).

Here, as noted above, the Arizona Court of Appeals decided that Arizona law applies to CopperPoint's lien. *Harper v. Indus. Comm'n of Ariz.*, No. 1 CA-IC 21-0010, 2021 WL 6122141 at 1–3 (Ariz. Ct. App. Dec. 28, 2021) (unpublished disposition). Under the law of the case doctrine, this ruling “becomes the law of the case and must be followed throughout its subsequent progress, both in the lower court and on subsequent appeal.” *Tien Fu Hsu*, 123 Nev. At 629–30. As a result, the Nevada Supreme Court should take judicial notice of the Arizona Court of Appeals' opinion in *Harper v. Indus. Comm'n of Ariz.*, which addressed the issue of whether Arizona or Nevada law applies to Respondents' lien.

IV. CONCLUSION

The Court should grant the instant Motion to Take Judicial Notice. In *Harper v. Indus. Comm'n of Ariz.*, the Arizona Court of Appeals addressed whether Arizona or Nevada law should apply to Respondents' lien in this exact same case.

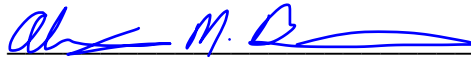
Wherefore Respondents, CopperPoint Mutual Insurance Holding Company and CopperPoint General Insurance Company, respectfully request that the Nevada Supreme Court provide the following relief:

1. That the Supreme Court take judicial notice of the Arizona Court of

Appeals, Division One's Opinion in *Harper v. Indus. Comm'n of Ariz.*,
No. 1 CA-IC 21-0010, 2021 WL 6122141 at 1–3 (Ariz. Ct. App. Dec.
28, 2021) (unpublished disposition)

Dated this 25th day of January 2022.

Respectfully Submitted,
By:

A handwritten signature in blue ink, appearing to read "Dalton L. Hooks, Jr.", is written over a horizontal line.

Dalton L. Hooks, Jr., Esq.
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CERTIFICATE OF SERVICE

The undersigned, an employee of the law firm of HOOKS MENG & CLEMENT, hereby certifies that on this 25th day of January 2022, a true and correct copy of **RESPONDENTS' MOTION TO TAKE JUDICIAL NOTICE** was served on the party set forth below by Notice of Electronic Filing via the CM/ECF system as maintained by the Court Clerk's Office as follows:

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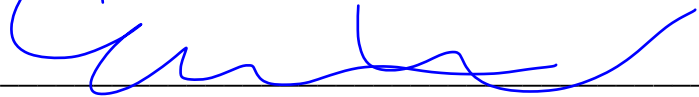
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Attorneys for Defendants Shoop A Professional law Corporation and

Thomas S. Alch

Dated this 25th day of January 2022.

A handwritten signature in blue ink, appearing to be 'C. Meng', is written over a horizontal line.

An Employee of HOOKS MENG & CLEMENT

EXHIBIT A

EXHIBIT A

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

DARIA HARPER, *Petitioner,*

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

ISLANDER RV RESORT, *Respondent Employer,*

COPPERPOINT GENERAL INSURANCE COMPANY, *Respondent Carrier.*

No. 1 CA-IC 21-0010
FILED 12-28-2021

Special Action - Industrial Commission
ICA Claim No. 20142-520533
Carrier Claim No. 14G01532
The Honorable Kenneth J. Hill, Administrative Law Judge

AFFIRMED

COUNSEL

Schiffman Law Office PC, Phoenix
By Alan M. Schiffman
Counsel for Petitioner Employee

Industrial Commission of Arizona, Phoenix
By Gaetano J. Testini
Counsel for Respondent

MEMORANDUM DECISION

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge Cynthia J. Bailey and Judge Maria Elena Cruz joined.

P E R K I N S, Judge:

¶1 Daria Harper appeals the Industrial Commission of Arizona's ("ICA") award declaring a worker's compensation lien enforceable against third-party recovery proceeds. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Harper injured her knee in 2014 while working for Islander RV Resort. CopperPoint General Insurance Company accepted her worker's compensation claim, and she received benefits. Harper's treatment included several surgeries. Complications from her second surgery led to emergency surgery in June 2015 at Valley Hospital in Las Vegas, Nevada. Negligence from her treatment in Nevada caused her to become a quadriplegic.

¶3 In August 2015, CopperPoint filed a Notice of Claim Status under A.R.S. § 23-1023(D), asserting its right to a lien on any proceeds Harper recovered from a third party for negligence. Harper did not respond to that notice. In 2016, she filed a medical malpractice lawsuit in Nevada against Valley Hospital and the doctors who treated her. Harper settled the matter in 2018 for \$6.25 million, including about \$1.25 million in attorneys' fees and costs. In October 2019, CopperPoint issued a second lien notice, asserting its statutory lien against the proceeds from the Nevada lawsuit ("Proceeds"). Harper filed a timely hearing request, claiming CopperPoint's lien could not reach the Proceeds.

¶4 In May 2020, CopperPoint issued a notice asserting a lien of about \$3.2 million against future benefits owed to Harper and suspending benefit payments to Harper until she paid the lien in full. Harper filed a declaratory judgment action in Nevada, claiming that Nevada law precluded CopperPoint's lien from reaching the Proceeds. The Nevada trial court dismissed the action in October 2020, concluding Arizona law applied

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to the lien and Nevada law did not preclude CopperPoint from enforcing it. Harper appealed that ruling.

¶5 Before the Nevada trial court issued its ruling, the ICA held a hearing on Harper's challenge to CopperPoint's October 2019 lien notice. Harper did not dispute the lien's validity, but she argued Nevada law governed the lien and prohibited CopperPoint from reaching the Proceeds. CopperPoint argued Harper could not challenge the lien because she failed to request a hearing when CopperPoint issued the 2015 lien notice. CopperPoint also contended Arizona law governed the lien and permitted enforcement against third-party recovery proceeds.

¶6 The Administrative Law Judge ("ALJ") determined Harper could challenge the lien because "CopperPoint effectively reopened the issue when it issued the [October 2019 lien notice], which [Harper] timely protested." After concluding Arizona law governed the lien's enforceability, the ALJ declared CopperPoint's lien enforceable against the Proceeds under A.R.S. § 23-1023(D). Harper requested administrative review, and the ALJ affirmed his ruling. This special action review followed. We have jurisdiction to review an ICA award under A.R.S. §§ 12-120.21(A)(2), 23-951(A) and Arizona Rule of Procedure for Special Actions 10.

DISCUSSION

¶7 We defer to the ALJ's factual findings but review questions of law *de novo*. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14 (App. 2003).

¶8 An Arizona worker injured on the job may sue a third party for compensation when the third party's negligence contributed to the worker's injury. But to the extent the worker accepts workers' compensation benefits, Arizona law creates a lien in favor of the workers' compensation insurance carrier for recovery of the amount of benefits paid when a third party also compensates the worker for her injuries. A.R.S. § 23-1023(D).

¶9 These liens "require the third party to pay what he would normally pay if there were no workers' compensation, to reimburse the carrier for its compensation expenditure, and to allow the compensation beneficiary to enjoy the excess of the damage recovery over compensation." *Mannel v. Indus. Comm'n*, 142 Ariz. 153, 155 (App. 1984). And § 23-1023(D) "furtheres the general policy of preventing an employee from obtaining the double recovery that would result if he received both compensation

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benefits and damages from a third party.” *Martinez v. Indus. Comm’n*, 168 Ariz. 307, 310 (App. 1991).

¶10 Both parties assert legal error in the ICA’s Award. CopperPoint contends Harper cannot challenge the lien because she failed to protest the initial lien notice. But CopperPoint disregards the lien notice it issued in October 2019. Harper timely protested the October 2019 lien notice, and she challenged the lien’s applicability to the Proceeds. CopperPoint’s October 2019 lien notice informed Harper of her right to request a hearing if she disagreed with it. *See* A.R.S. § 23-947(A) (allowing 90 days to request a hearing after a party issues a lien notice). The ALJ did not err in allowing Harper to challenge the lien’s applicability to the Proceeds.

¶11 Harper contends: (1) Nevada law applies to the enforcement of CopperPoint’s lien; and (2) Nevada law prohibits such enforcement against the Proceeds.

¶12 When an employee receives workers’ compensation, the law of the state of compensation governs third-party actions, including lien subrogation. *Quiles v. Heflin Steel Supply Co.*, 145 Ariz. 73, 77 (App. 1985). In *Quiles*, a California company’s employee sustained an injury while working in Arizona. The employee filed a workers’ compensation claim in California and received benefits from the insurance carrier. The insurance carrier later sued a third party for negligently injuring the employee in Arizona, seeking recovery for benefits paid to the employee. We held that California’s compensation law applied, rendering the insurance carrier a proper party plaintiff. *Id.* at 78; *see also Cofer v. Indus. Comm’n*, 24 Ariz. App. 357, 358 (App. 1975) (injured workers choose where to file their claims). The Arizona Supreme Court approved our *Quiles* holding in *Jackson v. Eagle KMC L.L.C.*, 245 Ariz. 544 (2019).

¶13 Harper chose to file her claim in Arizona. Arizona law thus applies and permits CopperPoint’s enforcement of its lien against the Proceeds.

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CONCLUSION

¶14

We affirm.



AMY M. WOOD • Clerk of the Court
FILED: JT