

**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  
Feb 08 2022 04:12 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Case No.: 82158

**RESPONDENTS' REPLY TO APPELLANTS' RESPONSE TO MOTION  
TO TAKE JUDICIAL NOTICE, AND RESPONSE TO APPELLANTS'  
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 further 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2021) (unpublished disposition). Additionally, Respondents submit their Response to Appellants' separate Motion for Judicial Notice. This Reply and Response is filed pursuant to NRAP 27.

## **I. INTRODUCTION**

Appellants filed their Response to Appellants' Motion for Judicial Notice on February 1, 2022, arguing that *Harper v. Indus. Comm'n of Ariz.* is not final because the court did not issue a mandate, that the opinion lacks precedential value, and that the opinion did not undergo a conflict of law analysis. Separately, Appellants move the Nevada Supreme Court to take judicial notice of their Petition for Review to the Arizona Supreme Court.

Appellants err. The fact that the Arizona Court of Appeals has not issued its mandate due to Appellants' Petition for Review to the Arizona Supreme Court is not a bar to this Court's taking judicial notice. Further, as will be discussed and explained in detail below, citation to *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 Dec. 28, 2021) (unpublished disposition) is permitted and the Arizona Court of Appeals opinion did contain a conflict of law analysis. In response to Appellants' separate Motion for Judicial Notice, Respondents point out that the Arizona Supreme Court's grant of review is discretionary.

## **II.** **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.***

#### **A. The Fact that the Arizona Court of Appeals did Not Issue its Mandate is Not a Bar to this Court's Taking Judicial Notice.**

Pursuant to Rule 24 of the Arizona Rules of Civil Appellate Procedure, “[t]he mandate is the final order of the appellate court, which may command another appellate court, superior court or agency to take further proceedings or to enter a certain disposition of a case.” Rule 24 further states that where, as is the case here, a party seeks review before the Arizona Supreme Court, the clerk will issue a mandate when the Arizona Supreme Court denies the petition, or alternatively, when the Arizona Supreme Court has entered a disposition in the case, if it retains the same.

In other words, the Arizona Court of Appeals' issuance of a mandate is a procedural entry that occurs upon the final disposition of an appeal and commands the lower court to take further proceedings in accordance with the same. While Appellants are correct that the Arizona Court of Appeals has not yet issued a mandate due to Appellants' timely filing of a Petition for Review with the Arizona Supreme Court, the opinion is effectively final and would not be changed unless and until the Arizona Supreme Court first grants review, and then reverses the Arizona

Court of Appeals. And despite Appellants' claim that the Arizona Court of Appeals decision is erroneous, they did not file a Petition for Reconsideration in regards to the same, as allowed by Rule 22 of the Arizona Rules of Civil Appellate Procedure.

**Exhibit C.** While Appellants have chosen to seek discretionary review before the Arizona Supreme Court, the status of *Harper v. Indus. Comm'n of Ariz.* is what the Arizona Administrative Commission's administrative law judge found and the Arizona Court of Appeals affirmed: Respondents' lien is valid.

**B. Citation to the Opinion is Permitted to Establish Res Judicata, Collateral Estoppel, or the Law of the Case.**

Appellants argue that the law of the case doctrine does not apply because "[t]he key words are 'of that case' which refers to the specific case and parties," and that *Harper v. Indus. Comm'n of Ariz.* "is the law of the Arizona case, not the Nevada case." Response at pg. 5. Appellants' objection here is without merit. Ms. Harper is the exact same appellant in *Harper v. Indus. Comm'n of Ariz.*, CopperPoint is the exact same respondent, and the validity of the same exact CopperPoint lien is at issue before both the Arizona Court of Appeals and this Court. This Court should not allow Appellants to litigate the same issue between the same parties in different states, and then claim that they are somehow different cases and parties. Appellants' argument here is a nonstarter.

Additionally, Appellants argue that *Harper v. Indus. Comm'n of Ariz.* may not be cited pursuant to *Sw. Airlines Co. v. Arizona Dep't of Revenue*, 197 Ariz. 475, 478, 4 P.3d 1018, 1021 (Ct. App. 2000). There, the Arizona Court of Appeals stated that:

Southwest also asks us to take judicial notice of some unpublished attorneys' fee decisions of this court and the supreme court that support Southwest's interpretation of section 12-348(E). In reply, the County asks us to either strike Southwest's reference to unpublished decisions or to consider some unpublished decisions that the County cites in support of its interpretation of the statute. We grant the motion to strike, and we do not consider the unpublished decisions cited by either party. Arizona Rule of Civil Appellate Procedure 28(c) provides as follows:

The parties' citations to unpublished decisions do inform this court of conflicting decisions and, hence, of the arguable need for a published opinion, but the parties are using those unpublished decisions mainly as support for the merits of their respective positions, a use that is plainly prohibited by Rule 28(c).

*Id.*

Clearly, there is no indication that the parties in *Sw. Airlines Co.* sought to introduce unpublished decisions regarding the identical parties and identical issues. Accordingly, *Sw. Airlines Co.*, does not stand for the proposition that a party may not introduce unpublished opinions regarding their own case, and the same is unavailing to Appellants.

### **C. The Arizona Court of Appeals Conducted a Conflict of Law Analysis.**

Appellants state that the Arizona Court of Appeals “did not contain a conflict of laws analysis.” Response at pg. 5. In reality, the conflict of laws analysis is

plainly apparent on page 4 of the opinion, where the Court analyzed the facts in light of *Quiles v. Heflin Steel Supply Co.*, 145 Ariz. 73, 77 (App. 1985).

## **II. Response to Appellants' Motion for Judicial Notice.**

In response to Appellants' Separate Motion for Judicial Notice of their Petition for Review to the Arizona Supreme Court, Respondents respectfully advise this Court that said review is discretionary. Rule 24 of the Arizona Rules of Civil Appellate Procedure.

## **III. CONCLUSION**

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 grant the instant Motion for Judicial Notice.

Dated this 8<sup>th</sup> day of February 2022.

Respectfully Submitted,  
By:



Dalton L. Hooks, Jr., Esq.

Nevada Bar. No. 8121

Alexander M. Brown, Esq.

Nevada Bar No. 11928

*Attorneys for Respondents*

CopperPoint Mutual Insurance Holding Company  
and CopperPoint General Insurance Company

## **CERTIFICATE OF SERVICE**

The undersigned, an employee of the law firm of HOOKS MENG & CLEMENT, hereby certifies that on this 8th day of February 2022, a true and correct copy of **RESPONDENTS' REPLY TO APPELLANTS' RESPONSE TO MOTION TO TAKE JUDICIAL NOTICE, AND RESPONSE TO APPELLANTS 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:

JASON R. MAIER, ESQ.  
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Attorneys for Defendants Shoop A Professional law Corporation and  
Thomas S. Alch

Dated this 8th day of February 2022.

A handwritten signature in dark ink, appearing to read "Emmanuel Alch", is written over a horizontal line.

An Employee of HOOKS MENG & CLEMENT



**EXHIBIT B**

**EXHIBIT B**



DIVISION ONE  
FILED: 1/28/22  
AMY M. WOOD,  
CLERK  
BY: RB



## Court of Appeals

AMY M. WOOD  
CLERK OF THE COURT

STATE OF ARIZONA  
DIVISION ONE  
STATE COURTS BUILDING  
1501 WEST WASHINGTON STREET  
PHOENIX, ARIZONA 85007

Phone: (602) 452-6700

Fax: (602) 452-3226

January 28, 2022

Tracie K. Lindeman, Clerk  
Arizona Supreme Court  
402 Arizona State Courts Building  
1501 West Washington  
Phoenix, Arizona 85007

Dear Ms. Lindeman:

RE: ASC No. CV-22-0023-PR  
COA1 No. 1 CA-IC 21-0010

HARPER v. ISLANDER/COPPERPOINT

The Court's MEMORANDUM DECISION was filed on December 28, 2021.

A Petition for Review was filed in the Arizona Supreme Court on January 27, 2022. The record is transmitted to your Court as follows:

X Briefs (Opening Brief; Answering Brief; Reply  
Brief) (e-Registered)

AMY M. WOOD, CLERK

By rab  
Deputy Clerk

Enclosures (as noted)  
cc (letter only):

Alan M Schiffman  
Kirk A Barberich  
Gaetano J Testini

**EXHIBIT C**

**EXHIBIT C**

**Court of Appeals, Division One**  
**Industrial Commission**

**1 CA-IC 21-0010**

**HARPER v. ISLANDER/COPPERPOINT**

**Appellate Case Information**

Case Filed: 24-Feb-2021  
Case Closed:

**Dept/Composition**

**Department D**

Hon. Cynthia J Bailey  
Hon. Jennifer M Perkins  
Hon. Maria Elena Cruz

**Side 1. DARIA HARPER, Petitioner**

**(Litigant Group) HARPER**

- Daria Harper

**Attorney for: Petitioner**

Alan M Schiffman, Esq. (AZ Bar No. 4257)

**Side 2. THE INDUSTRIAL COMMISSION OF ARIZONA,**

**Respondent,**

**ISLANDER RV RESORT,**

**Respondent Employer,**

**COPPERPOINT GENERAL INSURANCE COMPANY,**

**Respondent Carrier., Respondent**

**(Litigant Group) ICA**

- Industrial Commission of Arizona

**Attorney for: Respondent ICA**

Gaetano J Testini, Esq. (AZ Bar No. 20941)

**(Litigant Group) ISLANDER/COPPERPOINT**

- Islander RV Resort, Respondent Employer

**Attorney for: Respondent Employer/Carrier**

- Copperpoint General Insurance Company, Respondent Carrier

Kirk A Barberich, Esq. (AZ Bar No. 11386)

**CASE STATUS**

Jan 28, 2022....**Pending in ASC**

PREDECESSOR CASE(S)	Cause/Charge/Class	Judgment/Sentence	Judge, Role <Comments>	Trial	Dispo
ICA 20142-520533					
INSCA 14G01532			Comments: (none)		

**DESCENDENT CASE(S)**

ASC CV-22-0023-PR

**CASE DECISION**

**28-Dec-2021 MEMORANDUM DECISION**

Jennifer Perkins.....Author  
Cynthia Bailey.....Concur  
Maria Cruz.....Concur

Filed: 28-Dec-2021

Mandate:

Decision Disposition

**Affirmed**

**25 PROCEEDING ENTRIES**

- 24-Feb-2021 FILED: Special Action - Industrial Commission; Certificate of Service (Petitioner)
- 25-Feb-2021 FILED: Writ of Review  
FILED: Certificate of Mailing re: Writ of Review
- 25-Feb-2021 FILED: Notice of Appearance as Counsel of Record; Certificate of Service (Respondent Employer)
- 2-Mar-2021 RECEIPT No.: 2021-00258 ; \$280.00, Authorization: Ref1: 60034410809, Applied to: HARPER - Class A Filing Fee (\$280.00)  
Paid for: Schiffman Law Office PC - By nCourt LLC

**Court of Appeals, Division One****Industrial Commission****1 CA-IC 21-0010****HARPER v. ISLANDER/COPPERPOINT****25 PROCEEDING ENTRIES**

5.	4-Mar-2021	RECEIPT No.: 2021-00267 ; \$140.00, Authorization: #62020216525, Applied to: ISLANDER/COPPERPOINT - Class B Filing Fee (\$140.00) Paid for: Lundmark Barberich La Mont & Slavin PC - By nCourt LLC
6.	10-Mar-2021	FILED: Notice of Appearance; Certificate of Service (Respondent)
7.	10-Mar-2021	FILED: e-Record on Appeal: ALJ Hearing File (2 Volumes) Claims File (1 Volume)
8.	7-Apr-2021	FILED: Stipulation For Extension of Time To File Opening Brief; Certificate of Service of Stipulation for Extension of Time to File Opening Brief (Petitioner)
9.	8-Apr-2021	ORDERED: Stipulation For Extension of Time To File Opening Brief (Petitioner) = DENIED. Barbara Vidal Vaught ProTem Judge - Author
10.	8-Apr-2021	FILED: Amended Stipulation for Extension of Time to File Opening Brief; Certificate of Service of Amended Stipulation for Extension of Time to File Opening Brief (Petitioner)
11.	9-Apr-2021	ORDERED: Amended Stipulation for Extension of Time to File Opening Brief (Petitioner) = GRANTED. Due date EXTENDED from Monday, 04-12-2021 to Wednesday, 05-12-2021. Barbara Vidal Vaught ProTem Judge - Author
12.	12-May-2021	FILED: Petitioner's Opening Brief; Certificate of Compliance; Certificate of Service of Opening Brief (Petitioner)
13.	18-Jun-2021	FILED: Respondent Employer's and Carrier's Answering Brief; Certificate of Compliance; Certificate of Service; Certificate of Filing (Respondent)
14.	13-Aug-2021	FILED: Stipulation for Extension of Time to File Reply Brief; Certificate of Service of Stipulation to Extend Time to File Reply Brief (Petitioner)
15.	13-Aug-2021	ORDERED: Stipulation for Extension of Time to File Reply Brief (Petitioner) = GRANTED. Due date EXTENDED from Tuesday, 07-13-2021 to Tuesday, 09-21-2021. Barbara Vidal Vaught ProTem Judge - Author
16.	21-Sep-2021	FILED: Petitioner's Reply Brief; Certificate of Compliance re: Reply Brief; Certificate of Service of Reply Brief (Petitioner)
17.	21-Sep-2021	FILED: Motion to Hold Matter in Abeyance Pending Final Determination of Nevada Law; Certificate of Service of Motion to Hold Matter in Abeyance Pending Final Determination of Nevada Law (Petitioner)
18.	5-Oct-2021	FILED: Respondent Employer's and Carrier's Opposition to Petitioner's Motion to hold Matter in Abeyance Pending Final Determination of Nevada Law; Certificate of Service; Certificate of Filing (Respondent Employer/Carrier)
19.	10-Oct-2021	FILED: Reply in Support of Motion to Hold Matter in Abeyance Pending Final Determination of Nevada Law; Certificate of Service of Reply in Support of Motion to Hold Matter in Abeyance Pending Final Determination of Nevada Law (Petitioner)
20.	19-Oct-2021	ORDERED: Motion to Hold Matter in Abeyance Pending Final Determination of Nevada Law (Petitioner) = DENIED. Hon Kent E Cattani - Author
21.	27-Oct-2021	CLNDR: CONFERENCE, Department D, 12-1-21, COURTROOM 1.
22.	28-Dec-2021	MEMORANDUM DECISION (Affirmed) Hon Jennifer M Perkins - Author; Hon Cynthia J Bailey - Concur; Hon Maria Elena Cruz - Concur
23.	28-Dec-2021	FILED: Memorandum Decision Distribution List
24.	28-Jan-2022	FILED: Email Notice from ASC re: Petition for Review filed 1/27/22; request for partial record
25.	28-Jan-2022	FILED: Letter forwarding partial record to Arizona Supreme Court