

IN THE SUPREME COURT OF THE STATE OF NEVADA

WESTERN NATIONAL MUTUAL
INSURANCE COMPANY, A Minnesota
Corporation

Appellant,

v.

WILLIAM HARRY RESH, an individual,
Respondent.

Supreme Court Case No.
82475 Electronically Filed
District Court Case No. 2021-09:15 a.m.
A775815 Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S OPENING BRIEF

Appellant, Western National Mutual Insurance Company ("WNMIC"), pursuant to NRAP 28(a), by and through its counsel, Kurt C. Faux, Esq. and Jordan F. Faux, Esq. of The Faux Law Group, hereby submits its Opening Brief.

DATED this 15th day of September, 2021.

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

A. Parent corporations and listing any publicly held company that owns 10% or more of the party's stock:

Western National Mutual Insurance Company

Western National Insurance Group

B. The names of all law firms whose partners or associates have appeared for the party:

The Faux Law Group

C. Litigant pseudonyms: None

Attorney of Record for Appellants

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I. JURISDICTIONAL STATEMENT

A. Basis For The Supreme Court's Jurisdiction

The Supreme Court has jurisdiction to review these final Orders pursuant to NRAP 3A(b)(1).

B. Timeliness Of The Appeal

This Appeal is timely. On April 14, 2021, the District Court certified that the Findings of Fact and Conclusion of Law and Order Granting Summary Judgment and Order Granting Motion for Attorney's Fees and Costs as final pursuant to NRCP 54(b). The Notice of Appeal was filed thereafter on April 27, 2021.¹

C. Appeal Is From Final Orders

This Appeal is of the District Court's Findings of Fact and Conclusions of Law and Order Granting Summary Judgment and Order Granting Motion for Attorney's Fees and Costs. The District Court certified both Orders as final pursuant to NRCP 54(b).

WNMIC has standing to appeal both final Orders pursuant to NRAP 3A(b)(1).

¹ A more detailed description of the appellate procedural history is given in Section IV(B).

II. ROUTING STATEMENT

This case does not fall under any of the categories presumptively retained by the Supreme Court. The case falls under causes presumptively assigned to the Court of Appeals under NRAP 17(b)(7) – Appeals from post-judgment orders in civil cases.

The Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals because it is an appeal from final Orders – Findings of Fact and Conclusions of Law and Order Granting Summary Judgment and Order Granting Motion for Attorney’s Fees and Costs—entered in an action or proceeding commenced in the court in which the judgments are rendered pursuant to NRAP 3A(b)(1).

The Motor Vehicle Dealer Bond statute, NRS 482.345 limits recovery from the bond to “consumers” which are defined as “any person who comes into possession of a vehicle as a final user for any purpose other than offering it for sale.” NRS 482.345(10). The issue here is whether someone who consigns their vehicle for sale qualifies as a “consumer” as defined under NRS 482.345(10) and is therefore entitled to make a claim on a Motor Vehicle Dealer Bond. The District Court found that a consignor does fall under the statutory definition of “consumer” and granted Summary Judgment and Attorney’s Fees and Costs in favor of Resh. (MSJ Order; Attny Fees and Costs Order). The issue is important as it is a

question of first impression in Nevada and can have a large impact on who may recover from Motor Vehicle Dealer Bonds. The Nevada legislature limited recovery from Motor Vehicle Dealer Bonds to consumers and expanding the bond language to include consignors frustrates the purposes of the statute and expands coverage beyond what was reasonably expected by the surety when it issued the bond.

III. STATEMENT OF ISSUES PRESENTED ON APPEAL

Whether a consignor qualifies as “any person who comes into possession of a vehicle as a final user for any purpose other than offering it for sale” (a consumer) such that the consignor may make claim upon the Bond? NRS 482.345(10).

Whether a consignor is a consumer that can recover attorney fees and costs from a Motor Vehicle Dealer Bond?

Whether the District Court erred in granting summary judgment and attorney fees and costs to consignor on a claim against a Motor Vehicle Dealer Bond?

IV. STATEMENT OF THE CASE

A. Nature Of Case

This is an issue of first impression regarding the interpretation of the term “consumer” in the Motor Vehicle Industry License Bond statute, NRS 482.345. This matter involves a claim by a consignor against a Motor Vehicle Dealer Bond. Only consumers may make claim upon the Bond, (NRS 482.345(5)). The issue is whether a consignor qualifies as a consumer under the statute. The statute defines “consumer” as “any person who comes into possession of a vehicle as a final user for any purpose other than offering it for sale.” WNMIC asserts that there are no circumstances wherein a consignor can fall within this definition because the ultimate purpose of consignment is to dispossess the consignor and offer the Vehicle for sale to a different user. Further, there is already another statutory scheme in place to protect consignors.

The District Court did not agree with WNMIC. If Respondent Resh is not a consumer, then he is not entitled to recover any amounts for any losses from the Bond including any and all amounts for attorney fees and costs.

B. Course Of Proceedings And Disposition Below

The main dispute is whether Resh qualifies as a “consumer” as defined by NRS 482.345(10), as only a “consumer” is entitled to make a claim upon the Bond. The statute defines a “consumer” as “any person who comes into possession of a

vehicle as a final user for any purpose other than offering it for sale.” WNMIC has at all times asserted that Resh is not a consumer because his sole purpose in forming a relationship with Compadres was to offer his Vehicle for sale. For this reason, Resh is not entitled to recover from the Bond either for his losses or his attorney fees and costs.

Motion to Dismiss

WNMIC filed a Motion to Dismiss and Motion for Attorney Fees and Costs, requesting the District Court dismiss Resh’s claim against the Bond and find that Resh does not meet the definition of a “consumer” because he is not the final user of the Vehicle and his purpose in forming a relationship with Compadres was to offer the Vehicle for sale at auction. Resh opposed, arguing that he was a “consumer” injured by Compadres Auto Sales and therefore a demand upon the Bond for compensation was proper.

The District Court ruled in favor of Resh, finding that Resh falls within the definition of “consumer” as set forth at NRS 482.345 and he intended to be the final user of the Vehicle, despite Resh’s admission that the purpose of consigning it at auction was to sell the Vehicle, i.e., to not be a user of the Vehicle at all.

Offer of Judgment

Resh submitted an offer of judgment to be entered against WNMIC and in favor of Resh in the total penal sum amount of \$100,000.00. WNMIC rejected the

offer because Resh is not a consumer and therefore not entitled to make claim upon the Bond. Resh is not a consumer because his purpose was to consign the Vehicle for sale at auction and not to possess the Vehicle as a final user for any purpose other than offering the Vehicle for sale.

Motion for Summary Judgment

Resh filed a Motion for Summary Judgment against WNMIC seeking an order by the District Court that Resh falls under the statutory definition of a “consumer” and is therefore entitled to make claim upon the Bond.

WNMIC opposed, reiterating its position that Resh does not meet the definition of “consumer” under the Bond statute because Resh’s goal was to dispossess himself of the Vehicle, transfer the title and possession to a new user, and sell the Vehicle at auction. As a result, Resh was not a consumer because he was not in possession of the Vehicle as a final user for any purpose other than offering it for sale.

The District Court granted summary judgment in favor of Resh and against WNMIC in the amount of \$100,000.00, the penal sum of the Bond, finding that Resh was a “consumer” as set forth at NRS 482.345 and he intended to be the final user of the Vehicle (“Liability Judgment”).

Motion for Attorney's Fees and Costs

Resh filed for Attorney's Fees and Costs under NRCP 68 for WNMIC's rejection of the Offer of Judgment; under NRS 18.010 to punish WNMIC for the alleged frivolous or vexatious claims and defenses against Resh; and under NRS 17.130(2) for interest as a prevailing party in this litigation. WNMIC objected.

The District Court granted Resh's Motion for Attorney's Fees and Costs based on only NRCP 68 and reference to the *Brunzell* factors of *Brunzell v. Golden Gate National Bank* factors (85 Nev. 345, 455 P.2d 31 (1969)). Judgment was entered against WNMIC in the amount of \$31,565.62 in fees and \$2,666.65 in costs ("Fee Judgment").

Appeals

WNMIC timely appealed both the Liability Judgment and Fee Judgment. The Nevada Supreme Court ordered dismissal of WNMIC's initial appeal of the Liability Judgment for a jurisdictional defect stating that Resh's claims against Compadres Auto Sales and Mr. Legaspi remained pending in the District Court such that the District Court's Liability Judgment was not final and therefore not appealable.

The parties then stipulated to have both the Liability Judgment and Fee Judgment certified as final pursuant to NRCP 54(b).

The District Court granted NRCp 54(b) certification of finality of both the Liability Judgment and Fee Judgment.

The Nevada Supreme Court subsequently consolidated WNMIC's appeals to form the instant Appeal.

V. STATEMENT OF THE FACTS

The facts were not and are not largely in dispute:

1) Dr. Resh was the owner of a 2017 Audi R8 automobile (hereinafter referred to as his "Vehicle"), VIN No. WUAKBAFX0H7903087. JA 00256 at ¶4.

2) In February and March 2018, Dr. Resh attempted to sell his Vehicle through auction with the assistance of a family friend, Robert Larson. JA 00256 at ¶5.

3) In order to sell Dr. Resh's Vehicle at auction, Robert Larson registered the Vehicle under the auto dealership known as Money Machine, LLC, d/b/a Compadres Auto Sales (hereinafter referred to as "Compadres"). JA 00258 at ¶¶5, 6.

4) In order to sell the Vehicle through the auction house known as Manheim, Robert Larson took the title to Dr Resh's Vehicle and the keys to Manheim. *Id.*

5) Dr. Resh's Vehicle sold at auction by Manheim for the sum of \$145,000. JA 00271.

6) Manheim prepared a check for \$143,895 made payable to Compadres and the check was given to Robert Larson. JA 00258 at ¶10.

7) Robert Larson personally delivered that check in mid-March 2018 to Ryan Najarro, general manager for Compadres, who he had worked with before. JA 00258 at ¶11.

8) Compadres deposited the check for \$143,895 into its bank account. JA 00293, 00294.

9) . Despite repeated demands, Compadres never paid Dr. Resh any of the sales proceeds for his Vehicle. JA 00256 ¶10.

10) Defendant Western National Mutual Insurance Company (hereinafter referred to as ("WNMIC")) furnished a Vehicle Industry License Bond for Compadres in the penal sum of \$100,000. JA 00262-00263.

11) Resh asserted claim upon the Bond, which WNMIC denied, and the lawsuit followed. JA 0067-0071.

VI. SUMMARY OF THE ARGUMENT

Every car dealer in the State of Nevada is required to obtain a license bond in order to get a license to sell cars to the public. NRS 482.345. The bond is “for the use and benefit of the consumer” and is meant to protect consumers from breach of a consumer contract, deceptive trade practice, fraud, fraudulent representation or violation of any of the provisions of NRS 482, NRS 41, NRS 97, NRS 104, NRS 104A or NRS 598. NRS 482.345(5), (6). The statute defines

“consumer” as “any person who comes into possession of a vehicle as a final user for any purpose other than offering it for sale.” NRS 482.345(10).

Here, WNMIC asserts that Resh is not a consumer. The facts here show that Resh formed his relationship with Compadres in order to dispossess himself of the Vehicle and find a new user via offering the Vehicle for sale at auction. JA 00256 at ¶5. The District Court ignored the plain language of the statute in order to find in favor of Dr. Resh. JA 00413-417.

Under the plain language of the statute, only “consumers” may assert a claim on the Bond and a “consumer” is not an individual whose purpose is to dispossess themselves of a vehicle to a new user by offering it for sale, such as a consignor. Resh used Mr. Larson to consign the Vehicle with Compadres Auto Sales for the purpose of selling the Vehicle at Manheim’s auto auction. JA 00256 at ¶5, 6. The statute does not permit consignors to assert claims against the Bond, only consumers, and because Resh is not a consumer he is not entitled to the protection of the Bond nor entitled to recover from the Bond.

Further, there already is another statutory scheme set up for the protection of consignors such as Resh. NRS 482.31771—31776. Neither those sections nor the Bond entitle consignors to recover from Motor Vehicle Dealer License Bonds. Only consumers may recover from said Bonds and a consignor does not qualify as

a consumer because a consignor is offering a vehicle for sale—the only proscribed act the disqualifies a person from being a consumer.

Because Resh is not entitled to recover from the Bond as a matter of law because he is not a consumer, he is also not entitled to recover attorney fees and costs from WNMIC under any legal theory.

VII. STANDARD OF REVIEW

A District Court's grant of summary judgment is reviewed de novo. *Wood v. Safeway*, 121 Nev. 724, 729 (Nev. 2005). The review is "without deference to the district court's findings." *Ges, Inc. v. Corbitt*, 117 Nev. 265, 268 (Nev. 2001) (citing *Caughlin Homeowners Ass'n v. Caughlin Club*, 109 Nev. 264, 266, 849 P.2d 310, 311 (1993)). Summary judgment is appropriate and "shall be rendered forth-with" when the pleadings and other on file evidence demonstrates that no "genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." *Wood*, 121 Nev. at 729; NRCP 56(c).

It has been noted by this Court that the review of motions for summary judgment along with the evidence and any reasonable inferences drawn, must all be viewed in a light most favorable to the non-moving party. *Id.*; *Lipps v. Southern Nevada Paving*, 116 Nev. 497, 498, 998 P.2d 1183, 1184 (2000) (citing *Butler v. Bogdanovich*, 101 Nev. 449, 451, 705 P.2d 662, 663 (1985)).

On appeal, this Court is "to determine whether the trial court erred in concluding that an absence of genuine issues of material fact justified its granting of summary judgment." *Lipps*, 116 Nev. at 499 (Nev. 2000) (quoting *Bird v. Casa Royale West*, 97 Nev. 67, 68, 624 P.2d 17, 18 (1981)).

VIII. LEGAL ARGUMENT

A. Resh Is Not a Consumer Under the Statute and Does Not Qualify As a Beneficiary of the Bond.

“[W]hen the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it. *Employers Ins. Co. of Nev. v. Chandler*, 117 Nev. 421, 425, 23 P.3d 255, 258 (2001). In conducting a plain language reading, we avoid an “interpretation that renders language meaningless or superfluous.” *In re George J.*, 128 Nev. 345, 348, 279 P.3d 187, 190 (2012) (internal quotations omitted).” *Nev. Dep't of Corrs. v. York Claims Servs.*, 131 Nev. 199, 203, 348 P.3d 1010, 1013 (2015). When a statute is ambiguous the Court “may look to [its] legislative history to ascertain the Legislature's intent.” *Potter v. Potter*, 121 Nev. 613, 616, 119 P.3d 1246, 1248 (2005).

The Bond is statutorily required in the State of Nevada to obtain a license as a motor vehicle dealer. The statute determines the Bond’s metes and bounds. NRS 482.345. Per the statute, the Bond is “for the use and benefit of the

consumer...” NRS 482.345(5), (6). The statute defines the term “consumer” as “any person who comes into possession of a vehicle as a final user for any purpose other than offering it for sale.” NRS 482.345(10). Based on the plain language of the statute, the Bond is for the benefit of “consumers” only and no other entities or persons. Therefore, to qualify as a “consumer” under the statute and be entitled to make claim upon the individual must: 1) be the final user of the vehicle and; 2) possess the vehicle for any purpose other than offering it for sale.

Here, the ordinary language of the statute is not ambiguous. Resh’s sole purpose in forming a relationship with Robert Larson and in turn Compadres, was to offer his Vehicle for sale. JA 00256 at ¶¶5-6. The only proscribed purpose in the definition of a “consumer” is to possess the Vehicle for any purpose other than offering it for sale. Here, Resh’s purpose was to consign the Vehicle at Manheim and auction it off. JA 00256 at ¶5, 6. Resh in fact did sell the Vehicle. JA 00256 at ¶7. Resh is not a consumer under the plain language of NRS 482.345, is not entitled to recover from the Bond, and as a result is not entitled to recover attorney fees under any applicable legal theory. The District Court erred by concluding otherwise.

**B. The Definition of Consumer in NRS 482.345(10) is Consistent With
Other Nevada Consumer Protection Statutes**

Other consumer protection statutes in Nevada also define a “consumer” as essentially the purchaser in a transaction, as that is the generally accepted definition of a “consumer.” “Consumers” are not defined as sellers or consignors. For example, Nevada’s deceptive trade practice statute defines a “consumer” in the automotive context as “a retail buyer who purchases a motor vehicle” or “a long-term lessee who leases a motor vehicle” “primarily for personal, family, or household use.” NRS 598.9702.

Nevada’s Uniform Commercial code defines a “consumer” as “a natural person who enters into a transaction primarily for personal, family or household purposes.” NRS 104.1201(k). Nevada’s laws regulating the sale of marijuana define a “consumer” as “a person who is 21 years of age or older who purchases marijuana or marijuana products for use by persons 21 years of age or older, but not for resale to others.” NRS 453D.030(3).

Nevada’s internet privacy laws define “consumer” as “a person who seeks or acquires, by purchase or lease, any good, service, money or credit for personal, family or household purposes from the Internet website or online service of an operator.” Black’s Law Dictionary defines “consumer” as “someone who buys

goods or services for personal, family, or household use, with no intention of resale.”

C. The Definition of Consumer in NRS 482.345(10) is Consistent With that in Other Jurisdictions

Likewise, other courts have similarly defined “consumer” in various contexts. In Oklahoma, the Oklahoma Supreme Court defined the term “consumer” by citing several dictionary definitions and finding that if a person “is the end user of the good or service at issue, then that person is a “consumer” with respect to that particular transaction. *Cont'l Res., Inc. v. Wolla Oilfield Servs. LLC*, No. 20-cv-00200-PRW, at *8-9 (W.D. Okla. July 9, 2021). A California Court of Appeals said that a “consumer” is a person who buys or uses goods or services without intent to resell. *Reilly v. InQuest Tech., Inc.*, 218 Cal.App.4th 536, 548 (Cal. Ct. App. 2013). The Iowa Supreme Court concluded that the statutory language and legislature intended the statutory bond provision to indemnify only “consumers”, citing to Blacks Law Dictionary 316 (6th ed. 1990) (alternatively defining consumer as a (1) "user of the final product," and (2) "buyer (other than for purposes of resale) of any consumer product"). *United Fire Cas. Co. v. Acker*, 541 N.W.2d 517, 519-20 (Iowa 1995).

Non-legal definitions also limit the definition of “consumer” to purchasers, not sellers. Merriam Webster’s Dictionary defines “consumer” as “one that

utilizes economic goods.” The Cambridge Dictionary defines “consumer” as “a person who buys goods or service for their own use.” The Oxford English Dictionary defines “consumer” as “a person who purchases goods and services for personal use.”

Here, the ordinary language of NRS 482.345 is not ambiguous. Only “consumers” may assert a claim and a “consumer” is not someone whose purpose is to offer the vehicle for sale, such as a consigner. Resh is not a consumer, is not entitled to make claim upon the Bond, and is not entitled to recover attorney fees and costs for pursuing his claim.

No fact or law supports Resh’s claim in this matter. There are no definitions of “consumer” that include sellers or consignors such as Resh. The facts show that Resh does not meet the definition of a “consumer” under the Bond statute because he did not intend to become the final user of the Vehicle. Rather, Resh’s intention was “to sell the aforementioned Vehicle through auction with the assistance of Robert Larson.” JA 00256 at ¶5). Having a purpose of offering the Vehicle for sale appears to be the only proscribed purpose in the statute.

As such, by his own admission, Resh’s intention was not to come into possession of the Vehicle as a final user for any purpose other than offering it for sale. Resh’s purpose in his own words was “to sell” the Vehicle. JA 00256 at ¶5, 6. The purpose of any relationship Resh may have had with Compadres Auto

Sales was to offer the Vehicle to auction for sale via consignment. *Id.* Resh used his representative, Mr. Larson, to consign the Vehicle with Compadres Auto Sales so it could be sold at Mannheim. JA 00256 at ¶¶5-7; JA 00258 at ¶¶5-10). There is no accepted definition of “consumer” in any context where a seller is included. Likewise, neither the Bond nor the statute permits consigners to assert claims against the Bond, only consumers. Whether Resh is in the business of buying and selling cars on a regular basis is not relevant. What is relevant is whether he was a “consumer” under the Bond statute during this specific transaction. Resh was not a consumer and is not entitled to recover from the Bond as a matter of law.

Notably, Mr. Larson is “in the business of assisting individuals in selling their vehicles at auction...” JA 00258 at ¶2. Resh states that he had used Mr. Larson’s assistance “in selling vehicles in the past.” JA 00256 at ¶5. These facts demonstrate that Resh had sold more than one car at auction through Mr. Larson in the past. It is not normal or customary for “consumers” to sell their vehicles at auction through third parties, nor does the Bond cover such transactions. These facts further support the conclusion that Resh is not a consumer entitled to recover from the Bond.

**D. Even if the Statute Were Ambiguous, The Legislative History and
Purpose of the Statute Support Limiting Claims to Consumers As
Defined by the Statute**

In determining the scope of the coverage of a bond, the court must “look to the language and purpose of the bond, and in doing so, to that of the statute.” *New Hampshire Ins. Co. v. Gruhn*, 99 Nev. 771, 772, 670 P.2d 941, 942 (1983). The purpose of the Bond in this action was clarified by the Nevada Legislature in 2013. The Legislative Counsel’s Digest reads as follows:

. . . NRS 482.345(6), has been interpreted literally to allow any individual person or group of persons (including a finance company) who is injured by the actions of a broker, manufacturer, distributor, dealer or rebuilder of motor vehicles to apply for compensation from the bond that section requires to be procured and filed. (*Western Sur. Co. v. ADCO Credit, Inc.*, 127 Nev. Adv. Op. No. 8, 251 P.3d 714 (Mar. 17, 2011)) This bill amends NRS 482.3333, 482.345 and 482.346 to provide that bonds procured pursuant to NRS 482.3333 and 482.345 and deposits made in lieu of such bonds pursuant to NRS 482.346 may be used to compensate only a consumer, for any loss or damage established, and no other person. (Emphasis added.

See A.B. 282, Legislative Counsel’s Digest, 77th Leg., 27th Spec. Sess. (Nev. 2013); *see also* *W. Sur. Co v. ADCO Credit, Inc.*, 127 Nev. 100, 251 P.3d 714 (2001), *overturned due to legislative action*). NRS 482.345 was revised in 2013 to limit claimants upon Motor Vehicle License Bonds to “consumers” only, overturning the Court’s decision in *Western v. ADCO*, 127 Nev. Adv. Op. 8; 251 P.3d 714 (2011). The District Court’s decision expands the limitations set forth in

the revised statute to include consignors. This expansion is not supported by the plain language of the statute, its purpose, or legislative history.

The plain language of the statute and the purpose of the statute as clarified by the Nevada Legislature demonstrate that the Bond is for the benefit of “consumers” only.

**E. The Legislature Already Provided Means and Protections for
Consignors Which Do Not Include Recovery From Motor Vehicle
Dealer Bonds Meant for Consumer Only**

NRS 482 already has provisions that address consignment agreements. NRS 482.31771—482.31776. None of those statutes give consignors the right to assert a claim against the subject Bond or any bond for that matter. For example, a “consignment” is defined as “any transaction whereby the registered owner or lienholder of a vehicle subject to registration pursuant to this chapter agrees, entrusts or in any other manner authorizes a consignee to act as his or her agent to sell, exchange, negotiate or attempt to negotiate a sale or an exchange of the interest of the registered owner or lienholder in the vehicle, whether or not for compensation.” NRS 482.31773. That is an apt description of the transaction that occurred in this case. Resh is the owner of the Vehicle and he entrusted it to others in order to sell it. (Resh Affdt. at 5). The Bond statute, NRS 482.345, does not

contain an exception for consigners or consignment agreements. Only “consumers” may assert a claim and Resh is not a “consumer”.

NRS 482.31771—482.31776 already contain various provisions for protection of consignors, including required contract terms, obligations of the consignee which include setting up trust accounts, the manner in which the vehicle should be operated, filing of UCC-1 documents, notice requirements, and other important requirements. Recovery from the dealer license Bond is not one of the remedies listed.

The case may be different if Resh traded in the Vehicle as part of the purchase of another vehicle from Compadres Auto Sales because the purpose of that relationship is to become the end user of a vehicle, not for the purpose of resale. As stated above, the only purpose of any relationship between Resh and Compadres Auto Sales was to offer the Vehicle for sale, which disqualifies Resh from being a “consumer” per NRS 482.345(10). JA 00256 at ¶¶5, 6.

Resh is not a “consumer” because: 1) he is not the final user of the Vehicle and wished to dispossess himself of it; and 2) he offered the Vehicle to auction for sale via consignment. *Id.* Neither the Bond nor the statute permit consignors to assert claim against the Bond.

F. Resh Has Failed to Prove Compadres Auto Sales Committed Any Acts Covered By the Bond Statute and Is Not Entitled to Recover From the Bond.

The Bond is for the “use and benefit of the consumer and includes any breach of a consumer contract, deceptive trade practice, fraud, fraudulent representation or violation of any of the provisions of this chapter or chapter 41, 97, 104, 104A or 598 of NRS by the representative of any licensed distributor or the salesperson of any licensed dealer, manufacturer or rebuilder who acts for the dealer, distributor, manufacturer or rebuilder on his or her behalf and within the scope of the employment of the representative or salesperson.” NRS 482.345(5).

Here, Resh has failed to prove breach of a consumer contract, deceptive trade practice, fraud, fraudulent representation, or violation of any of the aforementioned chapters of the NRS. First, no admissible evidence of any consumer contract has been provided. In fact, Resh has not alleged that he had any contract with Compadres Auto Sales at all. In fact, the record presented does not provide any explanation whatsoever for why Compadres Auto Sales would agree to allow Mr. Larson to sell vehicles at auction under its name. There is no evidence of any consideration exchanged between Resh/Mr. Larson and Compadres Auto Sales in order for a contract to be formed. There is no admissible evidence that Compadres Auto Sales agreed to be a fiduciary for Resh or Mr.

Larson in the transaction. In fact, the facts presented indicate that Compadres Auto Sales did not even know about the sale of the Vehicle until after it was already completed. JA 00258 at ¶¶5—11.

Next, Resh has failed to prove fraud or fraudulent misrepresentation by clear and convincing evidence. Under Nevada law, Resh has the burden of proving each and every element of his fraud/fraudulent misrepresentation claim by clear and convincing evidence: (1) A false representation made by the defendant; (2) defendant's knowledge or belief that its representation was false or that defendant has an insufficient basis of information for making the representation; (3) defendant intended to induce plaintiff to act or refrain from acting upon the misrepresentation; and (4) damage to the plaintiff as a result of relying on the misrepresentation. *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 446—47, 956 P.2d 1382, 1386 (1998).

Here, no admissible evidence has been provided that Compadres Auto Sales ever made any representations at all to Resh or Mr. Larson. Resh has also provided no evidence that Compadres Auto Sales knew or believed that any representations it made were false or that Compadres Auto Sales intended Resh or Mr. Larson to act or refrain from acting based upon any representations. According to Mr. Larson, he is the one that registered the car at Manheim under Compadres Auto Sales' name. JA 00258 at ¶¶5-10. There is no evidence that

Compadres Auto Sales even knew the sale was happening until Mr. Larson showed up at their offices with a check for \$143,895.00 made out to Compadres Auto Sales. JA 00258 at ¶11. Mr. Larson has reason to try to blame Compadres Auto Sales for Resh's missing funds to shield himself from his own liability. Larson's testimony that Compadres Auto Sales promised to cash the check and give the money to Larson or Dr. Resh is inadmissible hearsay to which WNMIC objected. JA 00301 at ll. 12—15.

Compadres Auto Sales did nothing to induce Resh or Mr. Larson to place the Vehicle for sale at auction under its name. There is no admissible evidence that Compadres Auto Sales agreed to sell or consign Resh's Vehicle on his behalf. The facts show that Mr. Larson acted unilaterally before Compadres Auto Sales made any representations at all. JA 00258 at ¶¶5—11. Neither Resh nor Mr. Larson acted or refrained from acting in reliance on anything Compadres Auto Sales may have said or done and there is no admissible evidence that Compadres Auto Sales made any promises to either of them. In short, Resh has failed to prove fraud/fraudulent misrepresentation by clear and convincing, admissible evidence.

Resh had not alleged nor proven any deceptive trade practice. Resh has also failed to prove any violations by Compadres Auto Sales of NRS 41, 97, 104, 104A or 598 by admissible evidence.

In sum, Resh has failed to submit admissible evidence that proves Compadres Auto Sales committed any of the prohibited acts covered by the Bond. As such, Resh is not entitled to recover from the Bond.

G. Robert Larson Bears the Liability in This Case

1. Mr. Larson Was Acting As an Unlicensed Motor Vehicle Dealer

In Nevada, a motor vehicle dealer means any person who:

(d) Is engaged wholly or in part in the business of selling vehicles or buying or taking in trade vehicles for the purpose of resale, selling or offering for sale or consignment to be sold or otherwise dealing in vehicles, whether or not he or she owns the vehicles. NRS 482.020(1)

Nevada law prohibits a person from engaging in the activities of a dealer unless that person obtains both “a new vehicle dealer’s, used vehicle dealer’s, manufacturer’s, distributor’s, rebuilder’s or lessor’s license certificate or similar license or permit by every city within whose corporate limits the person maintains an established place of business and by every county in which the person maintains an established place of business outside the corporate limits of a city” and a license from the Nevada DMV. NRS 482.322(1). A person who acts as a dealer without these licenses is guilty of a misdemeanor for a first offense, a gross misdemeanor for a second offense, and a category D felony for any third and subsequent offense. NRS 482.322(5).

Here, Mr. Larson admits that he was acting as a motor vehicle dealer under Nevada law because he offers vehicles for sale at auction JA 00228 at ¶2. Mr. Larson offered Resh's Vehicle for sale at auction without a dealer's license. JA 00315-316. His name does not appear on the list of licensed dealers or brokers that is available on the Nevada DMV's website. (*Id.*) No evidence has been submitted that he was licensed. It also explains his need to list the car under another dealer's name at the Manheim auction. JA 00258 at ¶5. Even if Compadres Auto Sales had "stolen" Resh's money, Compadres Auto Sales would not have been involved at all if it were not for Mr. Larson violating Nevada statute by acting as an unlicensed motor vehicle dealer. If Mr. Larson had followed the law, then he would have to post his own bond to cover his own acts (in addition to the requirements outlined below) and neither Compadres Auto Sales nor WNMIC would be involved in this case at all.

2. **Mr. Larson Did Not Follow the Requirements for a Consignee Under NRS 482.31771—482.31776**

Consignors are not covered by motor vehicle dealer bonds as set forth in NRS 482.345, the applicable statute in this case. This is because the Legislature enacted another set of provisions, NRS 482.31771—482.31776, to protect consignors. Mr. Larson apparently failed to follow any of the requirements of this section, which all serve to protect Resh as well as Mr. Larson himself. Because

Mr. Larson is in the business of assisting individuals in selling cars at auction (JA 00258 at ¶2), he is a consignee as defined by the statute. NRS 482.31772

(“Consignee” means any person licensed pursuant to this chapter to sell or lease vehicles, or any person who holds himself or herself out as being in the business of selling, leasing or consigning vehicles.”)

All consignees are required to have written agreement with the registered owner or lienholder of the vehicle to be sold. NRS 482.31774-31775. This written contract must include the following contents:

1. The names of the consignor and consignee;
2. The date on which the consignment contract was entered into;
3. A complete description of the vehicle subject to the consignment contract, including the vehicle identification number, the year, make and model of the vehicle, and the number of miles registered on the odometer of the vehicle at the time that the consignment contract is entered into;
4. The term of the consignment contract;
5. The name of each person or business entity holding any security interest in the vehicle to be consigned;
6. The minimum sales price for the vehicle and the disposition of the proceeds therefrom, as agreed upon by the consignor and consignee; and

7. The signatures of the consignor and consignee acknowledging all the terms and conditions set forth in the consignment contract.

Here, Mr. Larson failed to have any written contract with Resh at all. None of the required terms have been met. Further still, NRS 482.31776 set forth the fiduciary duties of the consignee, which are specifically designed to protect the consignor because the Legislature understands that the keys and title to the vehicle may need to be surrendered by the consignor before the sale just as occurred in this instance. JA 00256 at ¶6.

The fiduciary duties include:

1) opening a separate trust account in a federally insured bank for the deposit of consignment funds/purchase price of consigned vehicles which cannot be commingle or used for any other purpose;

2) requires that the consignor file a UCC1 form with the Secretary of State in order to protect the consignor's interest in the vehicle and provide written notice of same in the written consignment contract that includes the words "If the [UCC1] form is not filed as required, YOU MAY LOSE YOUR VEHICLE THROUGH NO FAULT OF YOUR OWN." NRS 482.31776(1)(b).

3) Notify the consignor in person as soon as the sale money is paid. NRS 482.31776(5).

4) Prohibits the consignee from operating the vehicle. NRS 482.31776(6).

5) Requires the consignee to maintain a written log with specific information regarding the vehicle and consignment agreement. NRS 482.31176(7).

6) Requires the consignee to pay restitution to the consignor if funds are diverted. NRS 482.31176(8).

As these statutes demonstrate, the requirements and duties of consignee are very specific and designed specifically to protect the consignor.

Here, there is no evidence that Mr. Larson complied with any of the statutes or duties required of a consignee. If Mr. Larson had done so, Resh would have been more than adequately protected and the facts of this case would be very, very different. By failing to follow the requirements of NRS 482.31774-31775, it is Mr. Larson that is liable for Resh's loss and not WNMIC. For this reason, Mr. Larson has reason to seek to place the blame on others such as Compadres Auto Sales.

H. Resh Was Complicit In Mr. Larson's Unlawful Acts, Which Bars

Recovery

In general, a party is not entitled to recovery due to damages incurred because of the party's own inequitable conduct. *See Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 275, 182 P.3d 764, 766 (2008). Whether a party's connection with an action is sufficiently offensive to bar equitable relief, two factors must be considered: (1) the egregiousness of the misconduct at issue, and (2) the seriousness of the harm caused by the misconduct. *Las Vegas*

Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc., 124 Nev. 272, 276, 182 P.3d 764, 767 (2008). The public has constructive knowledge of state law. *Sengel v. IGT*, 116 Nev. 565, 572, 2 P.3d 258, 262 (2000).

Here, Resh was complicit in Mr. Larson's unlawful acts which caused his own damages. Resh admits to using Mr. Larson's services several times in the past in order to sell vehicles. JA at 00256 at ¶5. By choosing to use an unlicensed dealer and choosing not to follow the statutory requirements for vehicle consignment sales, Resh failed to avail himself of the various statutory protections required for consignees such as Mr. Larson's own license bond, a UCC1 filing statement to protect his interest in the vehicle, notice provisions, and separate trust account. Resh cannot recover from WNMIC for failing to protect his own assets by choosing to sell his Vehicle through an unlicensed consignee and ignoring Nevada law.

Resh has constructive knowledge of the laws regarding vehicle consignments. It is Resh and Mr. Larson's failure to follow Nevada law with regards to vehicle consignments that has led to Resh's alleged loss. But for their failure, there would be no claim against WNMIC as the alleged acts done by Compadres Auto Sales would never have taken place. The only reason Mr. Larson and Resh needed Compadres Auto Sales was because Mr. Larson had no license

and, per his own testimony, could not put the Vehicle for sale without it. JA 00258 at ¶5.

Any reasonable, responsible person would have taken steps to ensure that the consignment of a vehicle valued at between \$145,000.00 to \$160,000.00² would be done according to Nevada law. For reasons unknown Resh and Mr. Larson decided not to follow Nevada law. WNMIC is not liable for the damages suffered as a result.

I. Resh Is Not Entitled to Collect Attorney Fees and Costs Because He Was Not a Valid Claimant Upon the Bond

The District Court awarded attorney fees and costs based on NRCP 68. JA 000509—00510. In determining whether to award fees and costs under NRCP 68, the trial court must carefully evaluate the following factors: (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount. *Beattie v. Thomas*, 99 Nev. 579, 588-89 (Nev. 1983).

²After Mr. Larson sold the Vehicle at auction for \$145,000.00, the Vehicle was sold 36 days later at the same auction for \$160,000.00. JA at 00268; 00271.

Here, the *Beattie* factors do not support an award in favor of Resh because he is not a consumer and therefore not a valid claimant upon the Bond. Resh should not have been awarded any amounts based upon the plain language of the statute. JA 00424 at ll. 15—19; *see also* JA 00422—423. Had the District Court properly determined that Resh was not a valid claimant, Resh would not have received a result more favorable than his Offer of Judgment and would not have been awarded attorney fees and costs based on NRCP 68 as the offer was neither reasonable nor brought in good faith. If this Court determines that Resh is not a consumer and not entitled to make claim upon the Bond, then reversal of the award of attorney fees and costs is a natural consequence.

IX. CONCLUSION

In conclusion, WNMIC requests that the Court reverse the District Court's conclusions of law that Resh is a consumer that is entitled to make claim upon the Bond and entitled to recover attorney fees and costs in pursuit of his claim against the Bond. WNMIC seeks an order from this Court that based upon the facts alleged, Resh is not a consumer as a matter of law and that he is not entitled to make claim or recover any amounts from the Bond and that judgment should be entered in favor of WNMIC.

X. CERTIFICATE OF COMPLIANCE WITH RULE 28.2

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 Microsoft Word for Microsoft 365 MSO in 14 point Times New Roman.

2. I further certify that this brief complies with the page- or -type- volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains 6,450 words.

3. Finally, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to 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 15th day of September, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of September, 2021, I served a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF AND JOINT APPENDIX** to the following via the Court's electronic filing system:

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