IN THE SUPREME COURT OF THE STATE OF NEVADA

CASE NO.: 82475

WESTERN NATIONAL MUTUAL INSURANCE COMPANY, A MINNESOTA CORPORATION

Appellant,

v.

WILLIAM HARRY RESH, AN INDIVIDUAL

Respondent.

Appeal from the Eighth Judicial District Court, Clark County, Nevada
(The Honorable Judge Eric Johnson)

RESPONDENT'S ANSWERING BRIEF

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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,	Nevada Supreme Court Case No. 82475 Eighth Judicial District Court Case No. A-18-775815-C **RESPONDENT'S ANSWERING BRIEF**

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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 Justices of this Court may evaluate possible disqualification or recusal.

1. Respondent William Harry Resh is an individual.

2. Respondent William Harry Resh is represented by the law firm of Sklar Williams PLLC, which is the same law firm that represented William Harry Resh in the Eighth Judicial District Court below.

SKLAR WILLIAMS PLLC

By: _____

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I. Routing Statement

Respondent William Harry Resh ("Dr. Resh") has no objection to the Supreme Court retaining this case. There are two inaccuracies, however, in Appellant Western National Mutual Insurance Company's ("WNMIC") Routing Statement, which warrant discussion. The first is WNMIC's misstatement of the issue on appeal. The issue on appeal is one of statutory construction, specifically, whether Dr. Resh was a "consumer" under NRS 482.345(10). If he was, the Vehicle Industry Business License Bond posted by WNMIC (the "Bond") would be available to him under NRS 482.345. *See* NRS 482.345(4) (providing that "[t]he undertaking on the bond is for the use and benefit of the consumer").

In its Routing Statement, WNMIC mischaracterizes the issue by stating that the issue presented is "whether someone who consigns their vehicle for sale" qualifies as a consumer under the statute. *See* Appellant's Opening Brief ("Opening Brief") at vii. WNMIC remarks that 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." *See id.* But nowhere in the Orders from which this appeal is taken does the lower court make that determination. Accordingly, WNMIC's characterization of the issue is misleading.

This distinction has important implications for routing purposes. The actual issue on appeal, *i.e.*, who qualifies as a consumer under NRS 482.345(10), has

widespread implications for the consuming public in Nevada. The Court's decision may establish the contours of who may be eligible to make a claim on a Vehicle Industry Business License Bond for the first time since the operative statutes were amended. Because the issue raises a question of statewide public importance, Dr. Resh respectfully submits that the Supreme Court should hear and decide this matter under NRAP 17(a)(12).

This leads to the next inaccuracy of WNMIC's Routing Statement, which suggests that this appeal arises from post-judgement orders, and thus, it is presumptively assigned to the Court of Appeals under NRAP 17(b)(7). The Order in which the Court decided that Dr. Resh was a "consumer" was not a post-judgment order, but rather, an order granting summary judgment. *See* Joint Appendix ("JA") 00413-17, Vol. II. While the order granting Dr. Resh's attorney's fees is technically a post-judgment order, the issue concerning that order is the same—was Dr. Resh a consumer? Because the primary issue does not arise from a post-judgment order, this Court should decide this appeal altogether, even if the collateral issue of attorney fees is presumptively heard by the Court of Appeals. *See* NRAP 17(a)(12), 17(d).

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II. Statement of Issues Presented on Appeal

1. Whether the lower court erred in concluding that Dr. Resh was a "consumer," as that term is defined at NRS 482.345(10).

2. Whether the lower court erred in awarding attorney's fees and costs against WNMIC under NRCP 68.

III. Statement of the Case

A. Nature of Case

The nature of the case is quite straightforward. Dr. Resh, a board-certified cardiologist with Nevada Heart and Vascular Center, attempted to sell his personal vehicle, a 2017 Audi R8 automobile, through auction. In order to do so, a family friend, 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"). Dr. Resh's vehicle sold at auction, and the proceeds were paid to Compadres. Compadres stole Dr. Resh's money. WNMIC furnished a Vehicle Industry Business License Bond for Compadres in the penal sum of $100,000, and Dr. Resh obtained summary judgment in the underlying action entitling him to such amount.

WNMIC attempts to label Dr. Resh a "consignor" and argues that a person who sells a vehicle—irrespective of why that person came into possession of the vehicle—cannot be a consumer under NRS 482.345(10). Given the fact that the facts

underlying this case are not in dispute, the lower court granted Dr. Resh Summary Judgment, finding that he qualified as a consumer under the statute. It awarded Dr. Resh the full Bond amount, as well as his reasonable attorney's fees in connection with an Offer of Judgment. It is apparently WNMIC's position that Dr. Resh lost his designation as a "consumer" when he decided to sell his vehicle through auction.

B. Course of Proceedings and Disposition Below

WNMIC correctly points out that it filed a Motion to Dismiss and Motion for Attorney's Fees and Costs arguing that Dr. Resh lost his protection as a "consumer" when he decided to sell his vehicle at auction. The lower court denied WNMIC's motions.

Thereafter, Dr. Resh made an Offer of Judgment under NRCP 68 in the total penal amount of $100,000. WNMIC rejected the Offer without response. Dr. Resh ultimately filed a Motion for Summary Judgment since there were no remaining genuine issues of material fact, and the only issue remaining for the lower court was whether Dr. Resh qualified as a "consumer" entitled to make a claim on the Bond. WNMIC opposed the Motion for Summary Judgment, not asserting that there were any genuine issues of material fact, but arguing that an individual who attempts to sell his vehicle cannot be a "consumer" under NRS 482.345(10).

The lower court granted Summary Judgment in favor of Dr. Resh in the amount of $100,000. Dr. Resh filed a Motion for Attorney's Fees and Costs under

both NRCP 68 and NRS 18.010. WNMIC objected strictly on the grounds that Dr. Resh lost his designation as a "consumer" when he attempted to sell his vehicle.

The lower court granted Dr. Resh's Motion for Attorney's Fees and Costs after considering the *Beattie* Factors and finding that Dr. Resh's claim was brought in good faith, that the Offer of Judgment was reasonable and in good faith in both its timing and amount, that if Defendant's decision to reject and to proceed to trial was not grossly unreasonable, it was unreasonable in an obvious way and that the fees being sought by Dr. Resh were reasonable and justified in amount. In addition, the lower court confirmed that it had carefully considered the *Brunzell* Factors in determining the amount of attorney's fees to be awarded and specifically considered the qualities of the advocate, his ability, training, education, experience, professional standing and skill, the character of the work that was done, the work actually performed by Dr. Resh's counsel and the result achieved by Dr. Resh's counsel and the benefits derived. Judgment was therefore entered against WNMIC for attorney's fees in the amount of $31,565.62 and $2,666.65 in costs.

IV. Statement of the Facts

In its Opening Brief, WNMIC admits that the facts were not and are not in dispute.[1] Those facts which are not in dispute are as follows:

[1] Although to be precise, WNMIC inserts the word "largely" when it admits that the facts are not in dispute. *See* Opening Brief at 5.

1. Dr. Resh is a Board-certified cardiologist and is, and was during all times relevant herein, a resident of the state of Nevada. JA 00256 ¶ 2, Vol. II.

2. Dr. Resh was the owner of a 2017 Audi R8 automobile (hereinafter referred to as his "vehicle"), VIN No. WUAKBAFX0H7903087. *Id.* ¶ 4.

3. In February and March 2018, Dr. Resh attempted to sell his vehicle through auction, with the assistance of a family friend, Robert Larson. *See id.* ¶ 5; JA 00327 ¶ 2, Vol. II.

4. Robert Larson had assisted Dr. Resh with a similar task once before, when he helped him sell his 2013 Mustang 302 at auction in or around 2014. *See* JA 00327 ¶ 3, Vol. II.

5. In order to sell Dr. Resh's vehicle at auction, Robert Larson registered the vehicle under the auto dealership known as Compadres. JA 00258 ¶¶ 5-6, Vol. II.

6. 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. *See id.* ¶¶ 8-9.

7. Dr. Resh's vehicle sold at auction by Manheim for the sum of $145,000. *See* JA 00271, Vol. II.

8. Manheim prepared a check for $143,895 made payable to Compadres, and the check was given to Robert Larson. JA 00258 ¶ 10, Vol. II.

9. Robert Larson personally delivered that check in mid-March 2018 to Ryan Najarro, general manager for Compadres, who he had worked with before. *Id.* ¶ 11.

10. Compadres deposited the check for $143,895 into its bank account. JA 00293-94, Vol. II.

11. Despite repeated demands, Compadres never paid Dr. Resh any of the sales proceeds for his vehicle. JA 00256 ¶ 10, Vol. II.

12. WNMIC furnished a Vehicle Industry License Bond for Compadres in the penal sum of $100,000. JA 00262-63, Vol. II.

13. As a result of Defendants' actions herein, Dr. Resh was required to retain the services of Sklar Williams PLLC to prosecute this matter. JA 00257 ¶ 12, Vol. II.

14. Dr. Resh intended to be the final user of the vehicle at issue. JA 414 at 2, Vol. II.

15. Compadres has wrongfully converted the sales proceeds of Dr. Resh's vehicle in the sum of $143,895. *Id.* ll. 26-27.

V. Summary of the Argument

WNMIC correctly points out in its Opening Brief that:

> 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 of 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 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." NRS 482.345(10).

Opening Brief at 6-7 (emphasis added).

Dr. Resh is board-certified cardiologist with Nevada Heart and Vascular Center. When he acquired his 2017 Audi R8 automobile, he undoubtedly was a member of the general public and a consumer. He came into possession of that vehicle as a final user and did not come into possession of the vehicle in order to offer it for sale. Dr. Resh was not at any time in the business of buying and selling automobiles, and he was not a car dealership or other entity in the business of selling cars.

WNMIC's argument, simply put, is that a consumer who decides to sell his or her car is no longer a consumer entitled to the protections set forth at NRS Chapter 482. WNMIC argues that once Dr. Resh accepted the assistance of a family friend, Robert Larson, to sell his vehicle through auction, Dr. Resh became a "consignor" and a whole different statutory scheme comes into play. Even though there is absolutely no dispute that Compadres stole the sale proceeds of Dr. Resh's vehicle, WNMIC argues that Dr. Resh was no longer protected under NRS Chapter 482 and WNMIC could ignore its obligations under the Bond. In a nutshell, WNMIC's argument comes down to this: a consumer who offers his vehicle for sale becomes

disqualified from being a consumer and loses his/her protection from breach of the 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 98. WNMIC then argues that since Dr. Resh is not a consumer, he also is not entitled to recover attorney's fees and costs under any legal theory.

But WNMIC's argument avoids the plain language of the operative statute, which is determinative of this issue. The operative statute, NRS 482.345(10), 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." As such, the only relevant fact is whether Dr. Resh intended to sell the vehicle at the time he purchased it. But WNMIC has offered no evidence to that effect.

Instead, the only evidence in the record shows that Dr. Resh is a cardiologist, he asked a family friend to help him sell his vehicle, and he was never engaged in the business of buying and selling vehicles. Because Dr. Resh was clearly a consumer at the time he came into possession of the vehicle as a final user, he is entitled to the protections of a consumer under NRS 482.345(10), and WNMIC's appeal must fail.

VI. Standard of Review

There is no dispute as to the standard of review. As pointed out by WNMIC, a District Court's grant of Summary Judgment is reviewed de novo. *Wood v.*

Safeway, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "Summary Judgment is appropriate and shall be rendered forthwith 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." *Id.* (quoting NRCP 56(a); *Tucker v. Action Equip. and Scaffold Co.*, 113 Nev. 1349, 1353, 951 P.2d 1027, 1029 (1997), *overruled on other grounds by Richards v. Republic Silver State Disposal, Inc.*, 122 Nev. 1213, 148 P.3d 684 (2006)).

Generally, this Court must determine whether the lower court erred in concluding that there were no genuine issues of material fact justifying the granting the Summary Judgment. In this case, there is no dispute that there are no genuine issues of material fact precluding Summary Judgment. The only issue on appeal is a question of law, specifically whether Dr. Resh lost his designation as "consumer" by attempting to sell his vehicle at auction.

The same is true with regard to the standard for reviewing the District Court's grant of attorney's fees to Dr. Resh. "Although a district court's decision regarding an award of attorney fees is generally reviewed for an abuse of discretion, where . . . the decision implicates a question of law, the appropriate standard of review is de novo." *See Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 82, 319 P.3d 606, 616 (2014) (citing *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006)). Because the issue of whether the grant of attorney's fees was appropriate

also turns on whether Dr. Resh was a "consumer," de novo review is appropriate for that issue as well.

VII. Legal Argument

A. Dr. Resh clearly falls under the definition of consumer and therefore qualifies as a beneficiary under the WNMIC Bond.

WNMIC cites the following language in its Opening Brief, from *Employers Ins. Co. of Nev. v. Chandler*, 117 Nev. 421, 425, 23 P.3d 255, 258 (2001):

> When the language of the statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it.
>
> Under NRS 482.345(10), the word "consumer" is defined as:
>
> [A]ny 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) (emphasis added).

WNMIC argues that the ordinary meaning of the statute is unambiguous. It then goes on to ignore the very language used in the statute. Whether someone is a consumer is determined when that person "comes into possession of a vehicle." Those are the words used in the statute. When Dr. Resh "came into possession of" his 2017 Audi R8 automobile, there is no evidence whatsoever that he did so for the purpose of offering it for sale. Dr. Resh is a Board-certified cardiologist with Nevada Heart and Vascular Center and is a member of the general public. There is no evidence, implication or inference that Dr. Resh came into possession of this vehicle for the purpose of selling it. On the contrary, the undisputed facts are that

Dr. Resh decided to sell his vehicle with the assistance of a family friend, Robert Larson. Based on the plain language of NRS 482.345(10), Dr. Resh is a person who came into possession of his vehicle as a final user for a purpose other than offering it for sale.

Since the statute in question is plain and unambiguous, it is clear that the lower court did not err in denying WNMIC's Motion to Dismiss and in granting Dr. Resh's Motion for Summary Judgment. Under the undisputed facts, Dr. Resh was consumer and was entitled to Judgment on the Bond, as well as his attorney's fees and costs. Despite the fact that WNMIC seems to admit that the language in the statute is plain and unambiguous, WNMIC goes on to devote the majority of its Opening Brief to discussing the legislative history of the statute and other sections of the Nevada Revised Statutes which are devoted to consignment agreements. As such, Dr. Resh is compelled to point out the fallacy of WNMIC's desperate attempts to avoid the language of the statute.

B. Definitions of consumer in other sections of the Nevada Revised Statutes are totally irrelevant.

WNMIC assiduously avoids discussing when the test of a consumer takes place. Once again, the statute specifically and unequivocally states that a court must look to when a person "comes into possession of a vehicle." When Dr. Resh came into possession of his 2017 Audi R8 automobile, there is absolutely no evidence that he did so with the intent of offering it for sale. Since WNMIC knows it cannot

explain away the words used in the statute, it devotes a great deal of time in its Opening Brief to arguing that other Nevada consumer protection statutes and statutes in other jurisdictions defining the term "consumer" should be substituted for the language in NRS 482.345(10).

The arguments raised by WNMIC basically take the position that a consumer can never be a seller. For example, WNMIC asserts the Nevada's deceptive trade practice statue defines a consumer 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." *See* Opening Brief at 11. While the statutes are inapposite, their definitions still describe Dr. Resh. Dr. Resh was a retail buyer who purchased his motor vehicle primarily for personal, family or household use. That is how Dr. Resh came into possession of the vehicle. There is nothing to suggest that Dr. Resh somehow magically lost his status as a consumer when he ultimately decided to sell his personal vehicle at auction.

WNMIC goes on to discuss Nevada's Uniform Commercial Code, Nevada laws regulating the sale of marijuana and Nevada's internet privacy laws. But none of those references in any way suggest that a consumer loses his status simply by attempting to dispose of what he has purchased.

WNMIC's citation of cases from other jurisdictions defining a consumer is equally unavailing. WNMIC's assertion that "[w]hether Resh is in the business of

buying and selling cars on a regular basis is not relevant," is belied by the language used in the statute. *See* Opening Brief at 14. The same is true for its assertion that "[w]hat is relevant is whether he was a 'consumer' under the Bond statute during this specific transaction." *Id.* Under the statute, the only relevant inquiry is whether Dr. Resh acquired the vehicle for the purpose of reselling it, and there is no evidence of such intent in this case.

In addition to the plain language of NRS 482.345(10) supporting the District Court's grant of Summary Judgment to Dr. Resh, the remaining language of NRS 482.345 supports the same conclusion. For example, NRS 482.345(5) provides that "[t]he undertaking on 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 [specific statutory violations] by the representative of any licensed distributor or the salesperson of any licensed dealer, manufacturer," or other similar licensees. NRS 482.345(6) similarly provides that "[t]he bond must provide that it is for the use and benefit of any consumer of the dealer, distributor, [or other similar licensee], for any loss or damage established." Importantly, the statutory language does not limit the Bond's availability to a consumer's purchase of vehicles, as WNMIC suggests, but instead, it leaves broad the circumstances in which a consumer may be entitled to execute on the bond, including breach of a consumer contract or any fraudulent conduct. Because the statutory language of

NRS 482.345 directly conflicts with WNMIC's reading of its "consumer" definition, WNMIC's proposed definition cannot stand. *See U.S. Design & Const. Corp. v. Int'l Broth. Of Elec. Workers*, 118 Nev. 458, 461-62, 50 P.3d 170, 172 (2002) (providing that "where . . . statutory language is ambiguous or otherwise unclear, the court will construe it according to that which [is] reasonable and public policy would indicate the legislature intended. Under such circumstances, the intent of the legislature may be determined by examining the entire statutory scheme") (internal quotations omitted).

C. The legislative history of NRS 482.345 absolutely supports the conclusion that Dr. Resh is a consumer.

WNMIC next argues that the legislative history should be looked at to determine the scope of the Bond's coverage. Before proceeding, Dr. Resh reminds this Court that if a statute is clear on its face, the Court will not look beyond its plain language. See *Zohar v. Zbiegien*, 120 Nev. 733, 737, 334 P.3d 402, 405 (2014) (citing *Wheble v. Eighth Judicial Dist. Court*, 128 Nev. 119, 122, 272, P.3d 134, 137 (2012)). In Dr. Resh's opinion, this Court need not look beyond the plain language of NRS 482.345(10), to conclude that he is in fact a consumer.

In an abundance of caution, however, Dr. Resh is compelled to respond to this portion of the Opening Brief, which looks to the statute's legislative history. As set forth in *Zohar v. Zbiegien*, 120 Nev. at 737, 334 P.3d at 405:

> [W]hen a statute is susceptible to more than one reasonable interpretation, it is ambiguous, and [the Court] must resolve that ambiguity by looking to the statute's legislative history and 'construing the statute in a manner that conforms to reason and public policy.

Since WNMIC has gone down this road, Dr. Resh welcomes the opportunity to discuss the legislative history of the statute at issue. NRS 482.345 previously stated that "any person" injured by the action of the dealer may apply for compensation under the bond. In *W. Sur. Co v. ADCO Credit, Inc.*, 127 Nev. 100, 251 P.3d 714 (2011), a finance company made a claim under the dealer bond. The finance company argued that under the plain meaning of the phrase "any person" it was a proper claimant and the statute was intended to extend protection to a class larger than simply consumers. *See id.* at 101-02, 251 P.3d at 715-16. The Nevada Supreme Court held that the defrauded finance company could make a claim under the bond under the plain language used in what was then NRS 482.345. *Id.* at 104-06, 251 P.3d at 716-18.

The Nevada Legislature in 2013 recognized that the bond was intended to protect consumers since there is other recourse available in other situations, such as with finance companies, which are unavailable to consumers. The Nevada legislature therefore modified the statute by changing the phrase "any person" to "consumers." The following exchanges that took place during the legislative hearings on this amendment before the Assembly Committee on Transportation are revealing:

Dan L. Wulz, Deputy Executive Direct, Legal Aid Center of Southern Nevada, Inc.:

"I have worked with Assemblyman Aizley in putting this bill together and also worked with the Legislative Counsel Bureau (LCB) on language. It was an issue I brought to Assemblyman Aizley's attention in light of the Nevada Supreme Court case that he mentioned. We are here to have the law say what I think most of us, including administrative law judges at the Department of Motor Vehicles (DMV), thought that the law meant. That is, that the bond was meant to protect consumers. So we are correcting an oversight which a Nevada Supreme Court case named *Western Surety Co. v. ADCO Credit, Inc.* [127 Nev. Adv. Op. No. 8, 251 P.3d 714 (2011)] made clear: that using the words "any person" in this statute means not just a consumer, but also a finance company can be a claimant under a dealer bond.

The bill, and my comments are with respect to the bill as proposed to be amended, presents a win-win-win opportunity. It is a win for surety bond companies, as they would only have to pay consumers. This should result in reduction of the premium for obtaining the surety bond. It is a win for car dealers. If the surety bond premium is reduced, then they have to pay a lower premium. It is a win for consumers. The entire bond will be available to satisfy only consumer claims. It is a win for the courts and DMV in administering the claims, as the bill brings clarity. The only entities that lose under the bill are creditors of car dealers like finance companies. Under the bill they can no longer make a claim on the bond. But dealer creditors have available to them other means of obtaining security. They can require a dealer to purchase a separate bond of some kind or put up collateral in their contract as a condition for doing business. So today after the Western Surety decision in the Nevada Supreme Court, we are here to correct an oversight.

Over the years, in amending the statute in 2001 and 2005, I believe it was always Assemblywoman Barbara Buckley's intent to make clear that the surety bond was for the protection of consumers, nor creditors or car dealers.

Minutes of the Meeting of the Assembly Committee on Transportation, 2013 Leg., 77th Sess. 16-17 (Nev. Apr. 4, 2013) (emphasis added).

Assemblywoman Carlton:

I am looking at the definition of consumer. It means "any person who comes into possession of a vehicle as a final user for any purpose other than offering it for sale." Does that mean this goes from owner to owner to owner, because cars can have multiple owners?

Assemblyman Aizley:

I believe it means in the original transaction the consumer who buys from the auto agency or the seller, and that is it.

Assemblywoman Carlton:

So the consumer can mean the seller also if they are in possession of the vehicle. Would you say so?

Assemblyman Aizley:

I think so.

Id. at 15.

Assemblyman Hardy:

I would like to have clarification of what a consumer is. It is any individual that purchases a vehicle? It is not just an individual; it can be a company, or anybody that purchases. Is that correct?

Scott McKenna, Committee Counsel:

I would like to clarify that my reading of the text of A.B. 282, would define consumer as an end user who is not intending to resell a vehicle at retail. That is what I think the term comes down to. I can provide more detail if that is desired.

Minutes of the Meeting of the Assembly Committee on Transportation, 2013 Leg., 77th Sess. 40 (Nev. Apr. 9, 2013) (emphasis in original).

These remarks make it clear that the purpose of the change in language was to change the result in a fact pattern akin to *W. Sur. Co v. ADCO Credit, Inc. supra.*

The legislation was meant to protect members of the consuming public and not business entities in the business of buying and selling cars. Dan Wulz, then Deputy Executive Director of the Legal Aid Center of Southern Nevada, made it clear in his remarks above, that the only entities that would lose under the provision being made were creditors of car dealers like finance companies. These dealer creditors have available to them other means of obtaining security, but consumers—like Dr. Resh—do not.

D. Calling Dr. Resh a "consignor" does not change the instant analysis.

Throughout its Opening Brief, WNMIC recognizes that the sole issue before the lower court was whether Dr. Resh was a "consumer" as that term is defined in NRS 482.345(10). In its attempt to avoid the obvious answer to that question, WNMIC attempts to introduce the concept of "consignment of vehicles" in a separate section of the Nevada Revised Statutes, namely NRS 482.31771, *et. seq.* This obvious attempt to distract the Court is as unavailing as it was before the lower court.

Initially, the legislative history of those statutes dealing with vehicle consignment sales demonstrates that the fact pattern presented here is not a consignment agreement. In discussing Assembly Bill 271, legislative officials agreed:

> [Mrs. Vonne Chowning, Chairwoman,] commented the Committee was not interested in regulating individuals who sold their friend's car for compensation, only those people who were licensed as consignment dealers. The Committee would work to clarify the language for Assemblyman Carpenter.

Minutes of the Assembly Committee on Transportation, 1999 Leg., 70th Sess. 5 (Nev. Mar. 16, 1999).[2]

It is hard to envision a clearer articulation of what individuals are meant to be regulated by the Nevada Statutes concerning vehicle consignment sales. Moreover, even if Dr. Resh was a "consignor,"[3] then Compadres was obviously the "consignee," as that term is defined at NRS 482.31772. A consignee is a person licensed 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. This section of the Nevada Revised Statues goes on to require strict safeguards for the benefit of the consignor, including required contract terms, obligations to setting up trust accounts, the filing of UCC-1 documents, notice requirements and a variety of other requirements. If this were a consignment, Compadres would have had to fulfill each

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[2] The Court may consider the legislative history of the consignment statutes, as there appears to be a dispute as to whether they govern Dr. Resh's conduct. *See Zohar v. Zbiegien*, 120 Nev. at 737, 334 P.3d at 405.

[3] Notably, a "consignor" is not even a defined term or class set forth in the statutes referenced by WNMIC. Even if it were, NRS 482.31776 provides only criminal penalties for a consignee who converts funds in a trust account, and does not confer any remedial benefits, *i.e.*, the protections afforded by the Bond statutes, to persons who have been wronged by a consignee.

and every one of these requirements. Compadres did not do any of those things which are required under the consignment statutes in the Nevada Revised Statutes. There was no consignment contract, no separate trust account, no notices, etc. Compadres simply stole Dr. Resh's money. What WNMIC is arguing is that a dealer like Compadres may commit deceptive trade practices, commit fraud, make fraudulent representations or even steal a consumer's money, and in such case the type of bond that was posted pursuant to NRS 482.345(5) is beyond the reach of the consumer. If that were the case, the bonding requirement set forth in NRS 482.345(5) becomes illusory.

E. Only a bonding company could argue that stealing a consumer's money does not constitute a deceptive trade practice, fraud, fraudulent representation or violation of law.

WNMIC devotes pages 18-21 of its Opening Brief to the proposition that, even if Dr. Resh was a "consumer," the bond is beyond his reach since Dr. Resh failed to prove there was "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. . . ." There are certain arguments that are so specious that they almost defy response. Once again, Dr. Resh is compelled to point out that it is undisputed that an employee of Compadres stole the proceeds of the sale of his 2018 Audi R8 automobile. *See* Opening Brief at 5-6. If Dr. Resh is a "consumer," he is entitled to the penal amount of the Bond under

NRS 482.345(5). For WNMIC to argue that even if Dr. Resh was a "consumer," he is not entitled to the protection of the bond, is unworthy of further comment.

F. WNMIC's attempt to shift liability to Robert Larson is disingenuous at best.

The Court will note that Robert Larson was not made a party to this litigation and was merely a family friend who assisted Dr. Resh in attempting to sell his vehicle through auction. JA 00256 ¶ 5, Vol. II; JA 00327 ¶ 2, Vol. II. In an obvious attempt to divert the lower court's attention, WNMIC argued for the first time when it opposed Dr. Resh's Motion for Summary Judgment that Robert Larson should have had a license as a motor vehicle dealer. The argument then morphs into the surety company escaping liability if Robert Larson should have had a license but did not. Such an obvious attempt to escape liability deserves only short shrift.

The Court must first be reminded that WNMIC presented absolutely no affidavits, documentary evidence or evidence of any kind to refute any of the factual allegations set forth in the Affidavits of William Resh and Robert Larson filed below. *See generally* JA 00256-59, Vol. II; JA 00327-28, Vol. II. There is no genuine issue of fact but that Robert Larson is a family friend of the Resh family who assisted Dr. Resh in selling his 2017 Audi R8 automobile. JA 00327 ¶ 2. There is no genuine issue of fact that Robert Larson registered Dr. Resh's automobile with Compadres Auto Sales, a dealership he had worked with in the past. *Id.* ¶ 5. There is no genuine issue of fact but that all of the Manheim records list Compadres Auto

Sales as the vehicle dealer in this transaction. JA 00271, 00293-94, Vol. II. There is nothing either in the Manheim documents or anything else which would indicate that Robert Larson was acting as the vehicle dealer.

Whether Robert Larson was acting as an unlicensed motor vehicle dealer does not present a genuine issue of fact precluding summary judgment. WNMIC did not attempt to add Robert Larson as a third-party defendant to this lawsuit, nor does it present any evidence whatsoever that the proximate cause of Dr. Resh's damages is anything other than an employee of Compadres stealing Dr. Resh's money. This is a red herring that is closer in color to crimson. Accusing Robert Larson of violating Nevada statutes in no way relieves WNMIC from liability for an employee having stolen Dr. Resh's money.

The party against whom a Motion for Summary Judgment is filed must come forward with admissible evidence which demonstrates that there is a genuine issue of fact remaining for trial. WNMIC has come forward with nothing which would raise a genuine issue of fact that Robert Larson was acting as an unlicensed motor vehicle dealer, and that even if he was, that was the proximate cause of the damages suffered by Dr. Resh. WNMIC does not escape liability by arguing, without a single fact or piece of evidence, that Robert Larson is primarily responsible for Dr. Resh's loss. It is a hollow argument set forth by a desperate litigant.

WNMIC concludes that "[e]ven 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." *See* Opening Brief at 22. Blaming Robert Larson for Compadres having stolen Dr. Resh's money cannot be taken seriously.

G. Claiming that Dr. Resh was complicit in Robert Larson's "unlawful acts" is the ultimate insult to consumers in Nevada.

Dr. Resh understands that litigants often feel compelled to make alternative and somewhat novel arguments in the name of advocacy. It is with this argument that WNMIC destroys any remaining credibility it might have had in this litigation before the trial court and here on appeal. WNMIC is apparently arguing that Robert Larson should have obtained a motor vehicle dealer license, that Dr. Resh should have known of this requirement, and as a result, Dr. Resh has no redress from an employee of Compadres having stolen money from him. WNMIC actually articulates that Dr. Resh was "complicit" in Robert Larson's alleged and unlawful acts and he is therefore the cause of his own damages. The way WNMIC articulated its position before the lower court is as follows:

> The purpose of the Bond is not to protect consignors looking to save a few bucks by using unlicensed third parties to sell their very expensive luxury sports cars at auction.

JA 00311, Vol. 2II at 16, lines 12-14 of the Opposition to Motion for Summary Judgment.

The callousness of WNMIC's position is wonderfully exemplified by this attack on Dr. Resh. WNMIC's argument is basically that Dr. Resh would not have had his money stolen had he not used the services of its principal, Compadres, and therefore it is Dr. Resh's fault that he was the victim of this crime. WNMIC is apparently asking this Court to conclude that the Nevada Legislature did not intend to protect people like Dr. Resh who attempt to sell their private vehicles at auction. The lower court was obviously unimpressed by so far-fetched an argument and this Court should be as well.

H. There is no real argument regarding attorney's fees.

The only argument raised by WNMIC on the issue of attorney's fees is that Dr. Resh is not a consumer and therefore not entitled to make a claim on the bond for recover attorney's fees. If this Court affirms the lower court's decision, the award of attorney's fees and costs must be affirmed as well.

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VIII. Conclusion

In conclusion, the lower court did not err in granting Dr. Resh Summary Judgment against WNMIC and in awarding attorney's fees and costs under NRCP 68. The lower court's decision should be affirmed in all respects.

Dated this 12 day of November, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Respondent's Answering 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 Answer has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in size 14 font in double-spaced Times New Roman type.

I further certify that I have read this Answering Brief and that it complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the Answer exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and has 5,904 words.

Finally, I hereby certify that I have read this Answering 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 Answer complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this Answer regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be

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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 12th day of November 2021.

SKLAR WILLIAMS PLLC

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25, I certify that I am an employee of SKLAR WILLIAMS PLLC. On November 12, 2021, I caused a copy of the **RESPONDENT'S ANSWERING BRIEF** to be served electronically and/or hand delivered, in a sealed envelope, on the date and to the addressee(s) shown below:

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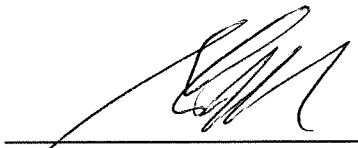

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