

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

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Elizabeth A. Brown
Clerk of Supreme Court

NUVEDA, LLC,

Petitioner,

VS

EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, IN AND FOR THE
COUNTY OF CLARK, THE
HONORABLE ELIZABETH
GONZALEZ, DISTRICT JUDGE,

Respondent,

SHANE TERRY, PHIL IVEY, AND
DOTAN Y. MELECH, receiver for
CWNEVADA, LLC, a Nevada limited
liability company,

Real Parties in Interest.

Supreme Court Case No. 82469

Case: A-20-817363-B

Lead Case: A-17-755479-B

Other Consolidated Cases with Lead
Case:
A-19-791405-C and A-19-796300-B

**REPLY TO ANSWER TO PETITION FOR WRIT OF PROHIBITION OR,
IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS**

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DATED this 21st day of May, 2021.

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I. Introduction

Shane Terry, Phil Ivey, and Dotan Melech—the receiver for CWNevada, LLC, a Nevada limited liability company (collectively, “Real Parties in Interest”)¹, filed their answer to the petition for a writ on or about April 23, 2021 and supporting appendix. See Answer to Petition, Dkt. No. 11833 (“Answer”) and Appendix (Volume I, Dkt. 11835) and (Volume II, Dkt. 11836). According to the Answer, the issue before this Court is solely whether NuVeda, LLC, a Nevada limited liability company (“NuVeda” or “Petitioner”), waived its right to have an alternative district court judge preside over an evidentiary hearing on contempt under NRS 22.030(3). See Answer, page 1 (lines 8-10).

As a preliminary matter, the district court still has not entered an actual order to show cause why NuVeda should not be held in contempt. Minutes from the hearing on February 1, 2021 serve as the only basis for the evidentiary hearing on contempt. See NuVeda’s Appendix, Volume 1, pages 0077-0079 (contempt issue: merger of dissolved entities after revival). It was not until after NuVeda filed its status check and request for related relief on March 10, 2021 (see Volume II of Appendix of Real Parties in Interest, Dkt. 11836, RA 420-432), which was heard

¹ CWNevada, LLC shall be referred to herein as “CWNevada,” and Mr. Melch shall be referred to herein as the “Receiver.”

by the court on March 17, 2021, that the district court clarified that the “primary order that is at issue with this contempt proceeding is the November 24th, 2020, order.”² See Transcript of Proceedings attached as part of Volume II of the Appendix filed by Real Parties in Interest, Dkt. No. 11836 at RA 433-446 (specifically RA 443, lines 15-16). The district court order from November 24, 2020 (“Revival Order”) is included in NuVeda’s Appendix, Volume I, Dkt. 08254, at 0004-0006 (specifically, paragraph 1 of the Order at 0006) (“The Receiver may apply to the Nevada Secretary of State to revive CWNV and CWNV1 in accordance with NRS 86.580.”) (emphasis added). See also Volume I of the Appendix of Real Parties in Interest, Dkt. 11836, RA 178-181.³ While the minutes from the hearing on February 1, 2021 make it clear that the district court had no

² There is a sufficient record before this Court to conclude that there is no basis even to proceed to an evidentiary hearing on contempt regardless of whether Judge Elizabeth Gonzalez presides over the matter. There is no affidavit (or declaration) to support an order to show cause. See Declaration of Joe Coppedge included in the renewed motion to show cause attached as part of Volume II of the Appendix filed by Real Parties in Interest, Dkt. No. 11836 at RA 250-252. This declaration does not satisfy NRS 22.030(2) because it does not explain what conduct violated any order of the district court. See Awad v. Wright, 106 Nev. 407, 409, 794 P.2d 713, 714-15 (1990), abrogated on other grounds by Pengilly v. Rancho Santa Fe Homeowners Ass'n, 116 Nev. 646, 5 P.3d 569 (2000) (affidavit is jurisdictional).

³ This Court also should note that the district court ruled as part of the Revival Order that “[u]ntil CWNV and CWNV1 are revived, Dr. Pejman Bady as manager of NuVeda shall continue to act as trustee for CWNV and CWNV1.” Id. (paragraph 2) (emphasis added). The power of a trustee for dissolved limited liability companies is set forth in NRS 86.541(2).

objection to NuVeda reviving these entities (when the Receiver failed to do so), the district court believed merging them was a violation of the Revival Order.

NuVeda contends the Revival Order is clear and unambiguous. Generally, an order for civil contempt must be grounded upon one's disobedience of an order that spells out "the details of compliance in clear, specific and unambiguous terms so that such person will readily know exactly what duties or obligations are imposed on him." See Southwest Gas Corp. v. Flintkote Co., 99 Nev. 127, 131 (Nev. 1983) (quoting Ex Parte Slavin, 412 S.W.2d 43, 44 (Tex. 1967) and citing Schiselman v. Trust Company Bank, 271 S.E.2d 183 (Ga. 1980); Hargis v. Fleck, 157 N.W.2d 103 (Iowa 1968); L.A.M. v. State, 547 P.2d 827 (Alaska 1976); and Caplow v. District Court, 72 Nev. 265, 302 P.2d 755 (1956)). Regardless of the existence of an affidavit/declaration under NRS 22.030(2), there is absolutely no support for the position that merging the revived entities violated the Revival Order (or any other order of the district court).

NRS 22.030(3) provides in part as follows: "if a contempt is not committed in the immediate view and presence of the court, the judge of the court in whose contempt the person is alleged to be **shall not preside at the trial of the contempt over the objection of the person.**" (emphasis added). NRS 22.030(3) does not

prescribe when a person who is alleged to have committed contempt must lodge its objection to the judge presiding over the trial on contempt. Presumably, a party alleged to have committed contempt can object under NRS 22.030(2) any time before commencement of the trial on contempt. "Where the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." State v. Jepsen, 46 Nev. 193, 196, 209 P. 501, 502 (1922), quoted in Erwin v. State of Nevada, 111 Nev. 1535, 1538-39, 908 P.2d 1367, 1369 (1995); Charlie Brown Constr. Co. v. Boulder City, 106 Nev. 497, 503, 797 P.2d 946, 949 (1990). However, where a statute has no plain meaning, a court should consult other sources such as legislative history, legislative intent and analogous statutory provisions. See Moody v. Manny's Auto Repair, 110 Nev. 320, 325, 871 P.2d 935, 938-39 (1994).

NuVeda objected on March 11, 2021 to the district court judge in Department 11 presiding over the evidentiary hearing on contempt, which was rescheduled from March 1, 2021 to April 5, 2021. There is no dispute as to whether NuVeda made an objection. Further, for the reasons set forth below, NuVeda contends that the basis for continuing the hearing to April 5, 2021 is irrelevant to

its rights under NRS 22.030(3). Waiver is not an issue here—disqualification is automatic upon lodging the objection. See Awad, 106 Nev. at 411 (concluding “[t]he purpose of the legislature in passing an automatic recusal was precisely to avoid such situations[]” of bias).⁴

II. Reply to Facts as alleged by Real Parties in Interest.

1. Paragraphs 1-24 of the Answer provides the procedural history of the case, which paragraphs are generally accurate for purposes of the petition before this Court. See Answer, pages 1-7. None of these facts as set forth in Paragraphs 1-24 have any bearing on the matter before this Court. However, NuVeda directs this Court’s attention to the following facts as alleged by the Real

⁴ In McCormick v. The Sixth Judicial Court, 67 Nev. 318, 218 P.2d 939 (1950), this Court stated that in cases of contempt arising outside the immediate view and presence of the court, the judge of such court in whose contempt the defendant is alleged to be shall not preside at trial over the objection of the defendant. The Court in McCormick discussed section 8943 of Nevada Compiled Law 1929, the very law which gave birth to NRS 22.030. The McCormick court stated that:

The legislature has thus declared the public policy of the state, not so much for the protection of an individual litigant, as for the preservation of the respect and high regard the public has always maintained for the courts. . . . And so the legislature of this state felt it important to eliminate the possibility of a reasonable apprehension that a judge might not be entirely free from bias in enforcing the orders and decrees of the court of which [she] he is the judge.

Id. at 331-32, 218 P.2d at 945 (emphasis added).

Parties in Interest for purposes of background:

(a) The district court *sua sponte* determined that the Receiver has “authority” over entities in which CWNevada is the majority interest holder, but it also recognized that actions taken by NuVeda may be valid. See Paragraph 7 of Answer. The district court did not define the Receiver’s authority in this decision or determine that CWNevada was the majority interest holder in any entity.

(b) The district court authorized the Receiver to revive (not reinstate as used interchangeably by Real Parties in Interest in their Answer) the previously dissolved entities. See Paragraphs 10 and 11 of Answer.

(c) The district court determined on or about February 1, 2021 that “cause was shown” by the Real Parties in Interest that NuVeda violated the district court’s orders **only to the extent** that NuVeda merged the entities (after it revived them). See Paragraph 23 of Answer.

2. Paragraphs 25-39 of the Answer are the facts advanced by the Real Parties in Interest in support of their contention that NuVeda waived its rights under NRS 22.030(3). The Real Parties in Interest (through its counsel, Joe Coppedge), **emailed** (i.e., no motion was filed) the district court to request assistance resolving the substantive disputes among the parties over the timing and procedure for depositions of the Receiver and Dr. Pejman Bady (as well as the date

of the evidentiary hearing). See Paragraph 30 of Answer. NuVeda (through its counsel, Mitchell Stipp) responded to the email request for relief by the Real Parties in Interest to Mr. Coppedge (with a copy to the district court). *NuVeda did not under any circumstances request that the district court continue the evidentiary hearing initially scheduled on March 1, 2021 as falsely alleged by the Real Parties in Interest.* See Paragraph 31 of Answer (citing to footnote 32, which references Mr. Stipp’s email included in Volume II of the Real Parties in Interest’s Appendix at RA 400-411). As should be clear from Mr. Stipp’s email, NuVeda *opposed any intervention* by the district court on the disputes and stated clearly and unequivocally as follows: “NuVeda is prepared to move forward with the receiver's deposition on February 9, 2021 as noticed *and the hearing on March 1, 2021.* Dr. Bady will not be present for the hearing. However, NuVeda will designate a substitute PMK.”⁵ (emphasis added). The district court *sua sponte* continued the evidentiary hearing from March 1, 2021 to April 5, 2021 (purportedly to accommodate the surgery of Dr. Bady).⁶

3. On March 10, 2021 (before the evidentiary hearing was held), NuVeda exercised its rights under NRS 22.030(3). See Paragraph 36 of Answer.

⁵ “PMK” refers to person most knowledgeable.

⁶ Dr. Bady appreciates the court’s consideration of the circumstances of his surgery but not at the expense of the substantive rights of NuVeda.

III. The Points and Authorities raised by Real Parties in Interest in their Answer Lack Merit.

The Real Parties in Interest have not provided through its Answer any basis for “waiver” of NuVeda’s rights under NRS 22.030(3). The Real Parties in Interest rely primarily on the case of Sturrock v. State of Nevada, 95 Nev. 938, 604 P.2d 341 (1979), which held that a criminal defendant who has been denied his right to a preliminary hearing (but has failed to pursue a pretrial remedy through a writ of mandamus) "has waived any impropriety regarding the trial court's inaction." In other words, by failing to pursue a writ and proceeding to trial, the criminal defendant in Sturrock waived any impropriety regarding the trial court's inaction. Id. at 943. To support its rationale, Sturrock cited to analogous situations where this Court also held that the failure to bring an issue to the appellate courts in a timely manner results in a waiver of the objection. Id. at 943 (citing George v. State, 89 Nev. 47, 505 P.2d 1217 (1973); Skinner v. State, 83 Nev. 380, 432 P.2d 675 (1967); Oberle v. Fogliani, 82 Nev. 428, 420 P.2d 251 (1966); Ex parte Merton, 80 Nev. 435, 395 P.2d 766 (1964)).⁷ **Here, NuVeda did not wait until**

⁷ Real Parties in Interest also cite to Davis v. State, which appears to be an unpublished opinion concerning an appeal from a judgment of conviction. See Case No. 68219 (Nev. App. Feb. 4, 2016). While NuVeda accepts the general proposition that failure timely to object can constitute a waiver, this Court in Davis actually held that appellant’s failure to object at his sentencing hearing **still did not**

after the evidentiary hearing on contempt to pursue its remedies before this Court. In fact, NuVeda filed its petition *before* the evidentiary hearing and only after Judge Gonzalez refused on multiple occasions to recuse herself. See NuVeda's Appendix 0080-0093 (Volume No. 1) (specifically 0088-0089); NuVeda's Appendix 0097-0110 (Volume 2) (same as status check but with order shortening time); NuVeda's Appendix 0114-0125; NuVeda's Appendix 0126-0127. Further, NuVeda requested the assistance of the Chief Judge of the Eighth Judicial District Court before filing its writ petition, but the Chief Judge refused to intervene. See Emergency Motion to Stay Contempt Proceedings and Exhibits A-1, A-2 and B attached thereto (Dkt. No. 08306). Accordingly, NuVeda exhausted its remedies before seeking the intervention of this Court before the evidentiary hearing was scheduled to begin on April 5, 2021. In this regard, the cases cited by the Real Parties in Interest *actually support* NuVeda's position. NuVeda did not proceed to the evidentiary hearing—after which it sought relief from this Court. If participated in the evidentiary hearing, then NuVeda concedes that it may have waived its rights under NRS 22.030(3).

divest the State of Nevada of its due process burden to prove each element of the sentence enhancement beyond a reasonable doubt (or to make an affirmative showing of the constitutional validity of the prior misdemeanor convictions). Id. at 5 (citing Hobbs v. State, 127 Nev. 234, 241, 251 P.3d 177, 178 (2011)).

According to the district court, NuVeda waived its rights under NRS 22.030(3) because it allegedly requested that the evidentiary hearing be continued at a hearing on February 22, 2021. See NuVeda's Appendix 0111-0113 (Volume 2); see also Transcript of Proceedings attached to Volume II of Real Parties in Interest's Appendix at RA 433-446. At the hearing on March 17, 2021 to consider NuVeda's objection under NRS 22.030(3), the following dialogue occurred with Judge Gonzalez before oral argument:

THE COURT: So if I could start with NuVeda since I have both of you.

Mr. Stipp, you requested a hearing. And one of the requests you're making is that I assign the contempt proceeding to another Judge. I have a question before I ask you for your argument. You ready?

MR. STIPP: Yes, ma'am.

THE COURT: Why didn't you ask me that before, on February 22, I granted the request to continue the hearing?

MR. STIPP: Your Honor, at the time it wasn't clear to me whether or not we could make that objection at that time.

THE COURT: Okay. It's your motion, Mr. Stipp.

Id. at RA 434 (lines 3-15).

There was a hearing scheduled on February 22, 2021 in the district court case, but the hearing concerned matters involving Mr. Terry's causes of action (and the district court's refusal to dismiss his case).⁸ Despite the error, the district court's position seems to be that continuing the evidentiary hearing for the benefit of Dr. Bady constituted a waiver of NuVeda's rights under NRS 22.030(3). See Transcript of Proceedings attached to Volume II of Real Parties in Interest's Appendix at RA 443 (lines 10-14). While NuVeda attempted to clarify the factual errors by the district court at the same hearing, its efforts were not successful. Id. at RA 444 (lines 2-22).

As this Court is aware, Nevada has significant case law on the issue of waiver (which the Real Parties in Interest simply ignore). A waiver is the intentional relinquishment of a known right. Reno Realty v. Hornstein, 72 Nev. 219, 301 P.2d 1051 (1956); see also Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007). In order to be effective, a waiver must occur with full knowledge of all material facts. See Friendly Irishman v. Ronnow, 74 Nev. 316, 319, 330 P.2d 497, 499 (1958). Further, a waiver may be implied from conduct which evidences an intention to waive a right, or by conduct

⁸ The matter before the district court was a request to stay Mr. Terry's case pending a writ petition, which the district court denied. The writ petition is also before this Court. See Case No. 82767.

which is inconsistent with any other intention than to waive the right. Mahban v. MGM Grand Hotels, Inc., 100 Nev. 593, 691 P.2d 421 (1984). Whether there has been a waiver is ordinarily a question for the trier of fact. Id. at 595, 691 P.2d at 424. In this case, NuVeda believes it had the right to object under NRS 22.030(3) any time before the evidentiary hearing on contempt actually commenced. A request for a continuance (even if actually made to the district court) is not conduct which evidences an intention to waive a right to have another district court judge preside over the evidentiary hearing on contempt. From NuVeda's perspective, it did not matter which district court judge presided at the time (because Dr. Bady was unavailable on March 1, 2021).

The Answer argues one final point. The Real Parties in Interest contend that NuVeda also waived its rights under NRS 22.030(3) because it did not object thereunder in its opposition to the renewed motion for an order to show cause. As to this point, the district court did not base its decision not to recuse on any failure by NuVeda to exercise its rights under NRS 22.030(3) on or before the show-cause hearing. Regardless, NuVeda's position is the exercise of any right under NRS 22.030(3) did not accrue until the district court heard and decided the renewed motion for an order to show cause. There is no basis (and the Real Parties in Interest do not cite to any authority) to require parties opposing a motion for an

order to show cause to object to the judge presiding over the hearing on contempt in advance of the hearing on the motion.

III. Conclusion.

For the reasons set forth in NuVeda's petition and reply, NuVeda seeks the following relief:

1. An order disqualifying Judge Gonzalez from presiding over the evidentiary hearing on contempt.
2. An order to the Chief Judge of Eighth Judicial District Court to randomly assign the responsibility of presiding over the evidentiary hearing to another district court judge.

DATED this 21st day of May, 2021.

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CERTIFICATE OF COMPLIANCE AND VERIFICATION

1. The reply has been prepared in a proportionally spaced typeface using Microsoft Word, Version 16.11.1, in 14 point, Times New Roman.
2. The reply does not exceed 15 pages.
3. I hereby certify that I have read the reply, 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 reply complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 21. I understand that I may be subject to sanctions in the event that the reply is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of May, 2021, I filed the foregoing **REPLY TO ANSWER TO PETITION FOR WRIT OF PROHIBITION OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS**, using the court's electronic filing system.

Notice of the filing of the reply was made upon acceptance by the Nevada Supreme Court using the District Court's electronic filing system to the following e-service participants in District Court Case No. A-17-755479-B and by mail to the addresses as indicated:

Judge Elizabeth Gonzalez:

Dept11lc@clarkcountycourts.us

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