IN THE SUPREME COURT OF THE STATE OF NEVADA

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SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION, **Appellant,** **vs.** **SIMONE RUSSO,** **Respondent.**	**Case No. 83115**	Electronically Filed Jun 08 2022 02:25 p.m. Elizabeth A. Brown Clerk of Supreme Court

APPEAL FROM ORDER ON DEFENDANT'S MOTION TO SET ASIDE AND/OR AMEND JUDGMENT, AND ORDER ON PLAINTIFF'S MOTION TO ENFORCE SETTLEMENT

EIGHTH JUDICIAL DISTRICT COURT
HONORABLE TIMOTHY WILLIAMS

APPELLANT'S OPENING BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION, Appellant, vs. SIMONE RUSSO, Respondent.	**Case No. 83115**

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. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: *None*

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

///

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Dated: June 8, 2022

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INTRODUCTION[1]

This appeal arises from an alleged trip-and-fall accident on property at the Sunrise Villas housing development in Las Vegas. Plaintiff/respondent Simone Russo sued appellant Sunrise Villas IX Homeowners' Association (Sunrise) and other defendants, alleging the accident resulted from a dangerous condition on the premises. An amended complaint added defendants Richard Duslak and Justin Sesman, who were alleged to have done landscaping work. Russo's amended complaint did not specifically allege Duslak and Sesman were employees of Sunrise, or that Sunrise was vicariously liable for the actions of Duslak and Sesman; and Sunrise's defense counsel found no evidence they were employees. Thus, Sunrise did not file answers for Duslak and Sesman, and defaults were entered against them.

The parties settled during trial. Russo's counsel, David Sampson, wanted to continue pursuing Duslak and Sesman, but the attorneys disagreed about how to handle them in the written settlement agreement/release. The dispute focused on whether Duslak and Sesman were Sunrise's employees (making Sunrise vicariously liable for their negligence), or independent contractors (with no likely vicarious liability). Defense counsel (Leonard Fink) argued that if Russo was contending Duslak and Sesman **were** employees, they should be included within Sunrise's

[1] This introduction does not contain appendix citations, but each fact will be supported by a citation later in this brief.

release, to protect Sunrise from subsequent vicarious liability claims. Alternatively, Fink contended they should be deemed independent contractors.

The district court held a hearing on the issue. To resolve the dispute, **Russo's counsel Sampson** suggested: "Could we perhaps enter a stipulation on the record here and now that **for purposes of this litigation they're not employees**?" The parties eventually agreed with this suggestion.

There had been a draft settlement agreement circulated among the parties, stating any provision impacting Russo's rights against Duslak and Sesman would be null and void. After Sampson made his suggestion about clarifying Duslak and Sesman were independent contractors, not employees, **Sampson drafted an addendum** to the settlement agreement, providing that, for purposes of the litigation, Duslak and Sesman would be considered independent contractors.

The parties signed the settlement agreement with the addendum, and the settling defendants (including Sunrise) paid their portions of the settlement. Satisfied that Russo's addendum protected Sunrise from future claims based upon liability for Duslak and Sesman, Fink did not attend the default prove-up hearing.

The default hearing was conducted in a shroud of secrecy. There was no audio or video recording. There was a court reporter, but she did not report the hearing. Russo was the only witness. The only exhibits were medical records, which were

not made part of the court record, and which did not contain medical opinions about injuries caused by the alleged accident at Sunrise.

Russo's counsel Sampson asked for a $25 million judgment, and he presented the judge with an already-prepared judgment. The judge signed it. The judgment contained no findings, and made no mention of whether Duslak and Sesman were independent contractors. Nor did the judgment contain any explanation for the $25 million award.

Sampson later asserted that Sunrise and its insurance carrier **are** responsible for Russo's $25 million judgment against Duslak and Sesman. Sunrise's insurance company filed a coverage declaratory relief action in federal court, which involves multiple parties, and which is still pending.

In the meantime, Russo filed a motion to enforce the settlement in the state court case, and Sunrise filed a motion for relief from the default judgment or to set it aside. The district judge granted Russo's motion and denied Sunrise's motion. The judge ruled the settlement agreement's addendum conflicts with other language in the settlement agreement, and therefore, the "as independent contractors" language in the addendum—which Sampson drafted, and to which all parties had agreed—is null and void. The judge ordered the "as independent contractors" clause in the addendum "severed and deleted" from the settlement agreement. Sunrise appealed.

This result is a travesty of justice. The default hearing was not even close to complying with mandatory requirements for such a hearing; the judgment does not comply with applicable requirements; and there are compelling reasons to set aside the judgment. Equally important, the district court erred by blue-penciling the settlement agreement and rewriting the agreement to sever and delete an important provision that had been drafted by Russo's counsel—and to which all parties had agreed.

The default judgment is contrary to principles of judicial integrity, and the judgment—if upheld by this court—will be an embarrassment to the Nevada judiciary. The district court's order must be reversed.

JURISDICTIONAL STATEMENT

This is an appeal from an "Order on Defendant's Motion to Set Aside and/or Amend Judgment and Order on Plaintiff's Motion to Enforce Settlement." 13 A.App. 2817. The order is an appealable special order after final judgment. NRAP 3(A)(b)(8); *Holiday Inn Downtown v. Barnett*, 103 Nev. 60, 63, 732 P.2d 1376, 1379 (1987). The appeal is timely because it was filed within 30 days after service of notice of entry. 13 A.App. 2836 (notice of entry served May 26, 2021); 15 A.App. 3288 (notice of appeal filed June 23, 2021).

ROUTING STATEMENT

This case should be retained by the supreme court under NRAP 17(a)(11) and (12), and NRAP 17(b)(5). The appeal involves questions of first impression, with implications of statewide importance; and the judgment is $25 million in a tort case.

STATEMENT OF ISSUES

1. Whether the district court erred by rewriting the settlement agreement to delete an important provision, without the consent of one of the parties.

2. Whether the district court erred by not granting relief from the default judgment, where the default prove-up hearing and the default judgment failed to comply with mandatory requirements.

STATEMENT OF THE CASE

Russo filed his complaint on April 6, 2017, and an amended complaint on January 16, 2018. 1 A.App. 1, 43. He obtained a default judgment against Duslak and Sesman on December 17, 2019. 2 A.App. 295. Sunrise moved to set aside the judgment, and Russo moved to enforce the settlement. 4 A.App. 930; 6 A.App. 1214. The district court issued an order on the motions on May 26, 2021. 13 A.App. 2817. This appeal followed.

STATEMENT OF FACTS

A. Russo's initial pleadings

Russo's complaint alleged that on August 27, 2016, he was injured when he tripped and fell on a cable/wire at a house in the Sunrise housing development. 1 A.App. 5-6. He sued multiple defendants, including Sunrise (homeowners' association), a cable TV company, the owner of the home where the accident occurred, and a property management company. 1 A.App. 2-5.

Russo subsequently moved to amend his complaint to add an individual defendant (the property manager for the house where the accident occurred). 1 A.App. 13-14. Russo's motion attached a proposed amended complaint. 1 A.App. 18-25.

Shortly thereafter, Russo filed a supplement to his motion, asserting he had learned of a mistake regarding the identity of the correct landscape company; and he sought to name an unidentified "Doe" landscaping company. 1 A.App. 28-29. He provided another proposed amended complaint, without naming any additional identified defendants. 1 A.App. 33-41. The district court granted Russo's motion to amend. 1 A.App. 42.

Russo's motion to amend and his supplemental motion had been filed in November and December of 2017. 1 A.App. 10, 26. Both motions assured the court

that "[n]o substantive changes have been made to Plaintiff's complaint." 1 A.App. 14:14 (first motion); 1 A.App. 29:3-4 (second motion).

The hearing at which the district court granted the amendment was on January 16, 2018. 1 A.App. 42. Court minutes do not reflect that Russo sought any other amendments of the two proposed complaints attached to his motions. *Id.* Nevertheless, on the same day as the hearing, Russo's counsel Sampson filed an entirely new amended complaint that was substantially different from the two proposed amended complaints accompanying his motions. 1 A.App. 43-51. Specifically, his filed amended complaint contained two new additional identified defendants in the case caption—Richard Duslak and Justin Sesman. 1 A.App. 43. Further, despite Sampson's assurances that there were no substantive changes, his filed amended complaint contained new substantive allegations in the body of the document, alleging that Duslak and Sesman "maintained and controlled" the premises where the accident occurred. 1 A.App. 45 (¶13). The amended complaint contained no other information about Duslak and Sesman, and it did **not allege** these individuals were Sunrise's employees or that Sunrise was vicariously liable for their actions.

Sampson obtained no permission from the court to file an amended complaint that was different from the two proposed complaints accompanying his motions—essentially substituting a new complaint instead of the proposed complaints he had

provided to the court (adding two new named defendants). 1 A.App. 45(¶13). Nor did Sampson mention Duslak and Sesman in his motion papers before he filed the new complaint on January 16, 2018.[2] 1 A.App. 10-42.

Because the amended complaint did not allege Duslak and Sesman were Sunrise's employees, and because defense counsel Fink had no evidence indicating they **were** employees, Fink did not file answers for them. 4 A.App. 932. Russo obtained defaults against them in September 2019. 1 A.App. 236, 240.

B. The settlement

In October 2019, Russo settled with all defendants except Duslak and Sesman, for a total of $355,000. 2 A.App. 245. Defendant Cox Communications filed a motion for a good faith settlement determination, to which Sunrise joined. 2 A.App. 242, 274. Sunrise's share of the settlement was $140,000. 2 A.App. 460. The district court approved the settlement.[3] 2 A.App. 285.

When the case settled, the attorneys stated general settlement terms on the record. 15 A.App. 3317. Sampson insisted the settlement did not include Duslak and Sesman, against whom default judgments would eventually be obtained.

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[2] The district court entered a written order, which was prepared and submitted by Sampson, granting the motion to amend. 1 A.App. 60. The order did not include any permission to file an amended complaint that was different from the two proposed amended complaints accompanying his motion.

[3] Despite the fact that Russo subsequently obtained a $25 million default judgment against two landscaping laborers, it is reasonable to assume he believed the case was only worth $355,000 when the case settled.

15 A.App. 3321:23—3322:1; 3324:1-9. Nobody disagreed. Within days, however, a dispute arose about whether Duslak and Sesman were employees or independent contractors. The parties and the court discussed the situation regarding Duslak and Sesman at a hearing on October 18, 2019. 15 A.App. 3343. Sampson insisted the settlement did not affect Russo's rights against the two landscape laborers who had been defaulted. 15 A.App. 3353.

When the parties were unable to finalize settlement paperwork, Russo filed a motion to compel the settlement on November 1, 2019. 17 A.App. 3751. His motion provided copies of communications between counsel. 17 A.App. 3762-70. The court held a hearing on the motion on November 7, 2019, at which Sampson complained that the proposed release he received from the defendants provided it would include Sunrise's employees, which could potentially include Duslak and Sesman. 15 A.App. 3387-88. This was unacceptable to Sampson, because Russo wanted to continue pursuing the two individuals. 15 A.App. 3384-91.

Sunrise's counsel Fink explained there was no binding settlement without a finalized written agreement. 15 A.App. 3392-93. Fink indicated "the real hold up right now" is whether the proposed settlement release was intended to cover Duslak and Sesman if they were considered employees of Sunrise. 15 A.App. 3394:12-19. He argued: "There's never been one bit of evidence in this case that they were employees. It was always that they were independent contractors." 15 A.App.

3394:20-22. And he argued: "But as I'm sure the Court has dealt with thousands of settlements, when you settle with an entity, you are settling with the employees, too." 15 A.App. 3394:22-25.

Fink continued: "There's nothing in Mr. Sampson's amended complaint that even suggests or asserts that either one of these gentlemen [Duslak and Sesman] is an employee. There is nothing in any one of his disclosures that asserts they're employees." 15 A.App. 3395:1-5. He argued that, under the settlement, "not only is Sunrise getting itself out of the case, but it's also getting out its employees." 15 A.App. 3395:6-8. In other words, Fink was reminding everyone that if Russo was contending Duslak and Sesman were Sunrise employees, they should be included within Sunrise's release, to protect Sunrise from a subsequent vicarious liability claim. Alternatively, Fink contended they should be deemed independent contractors. 15 A.App. 3395-96.

Sampson acknowledged "if you release a party, you typically would be releasing their employees." 15 A.App. 3398:16-18. He conceded: "I don't think they're employees …" 15 A.App. 3399:23-24. Fink responded that when he agreed to settle on behalf of Sunrise, he understood the settlement would also cover Sunrise's employees (to avoid vicarious liability), but the settlement would not cover Duslak and Sesman as independent contractors. 15 A.App. 3403:23—3405:24. Fink also reminded everyone at the hearing that Sampson's amended complaint did

not allege Duslak and Sesman were Sunrise's employees; nor had Sampson's discovery disclosures assert Duslak and Sesman were Sunrise employees. 15 A.App. 3408:12—3409:22.

The judge recognized "this makes perfect sense," i.e., that if there was evidence Duslak and Sesman were employees, there would not have been a default entered against them, and answers would have been filed on their behalf. 15 A.App. 3415:4-12; 3415:24—3416:1 (judge recognizing that there is "a significant presumption they're not employees").

To break the impasse, **Sampson (Russo's counsel) suggested**:

> **MR. SAMPSON**: Could we perhaps enter a stipulation on the record here and now that **for purposes of this litigation they're not employees**?

15 A.App. 3415:13-15 (emphasis added). The following colloque then occurred:

> MR. FINK: Good, your Honor. Mr. Sampson made an interesting suggestion that I'd like to think about and that may work. That if we say for the purposes of this litigation they weren't employees. That may take care of all of this. I would just need to run that by my people. But that may take care of all of our concerns at that point, and then we can - - we can be done.
>
> THE COURT: How's that, Mr. Sampson?
>
> MR. SAMPSON: It was my suggestion, so I still totally agree with it.

15 A.App. 3418:4-14.

There had already been a settlement agreement circulated among the parties, providing for exclusion of Duslak and Sesman from the settlement. 2 A.App. 462 [¶4(i)]. It provided that any provision in the agreement that would "in any way impact" Russo's rights against Duslak and Sesman "shall be deemed null and void." 2 A.App. 462 [¶4(ii)]. After the dispute arose and Sampson made his suggestion—where Sampson proposed resolving the dispute with a stipulation that "for purposes of this litigation they're not employees" (15 A.App. 3415:13-15)—and after Fink obtained authority, the parties agreed to an addendum to the settlement agreement. **The addendum was drafted by Sampson**. 5 A.App. 1067-1071 (exhibit with email and attachment from Sampson containing his proposed addendum regarding the status of Duslak and Sesman as independent contractors); 7 A.App. 1481-82 (motion confirming Sampson as drafter). In all capital letters, Sampson's addendum stated, in part:

> **FOR THE PURPOSES OF THIS LITIGATION AND FOR ANY AND ALL ISSUES RELATED TO SIMONE RUSSO'S CLAIMS AND SETTLEMENT, . . . DEFENDANT RICHARD DUSLAK AND DEFENDANT JUSTIN SESMAN WERE . . . INDEPENDENT CONTRACTORS . . . .** (2 A.App. 481; bold emphasis added; capitalization in original).[4]

[4] The agreement's addendum at 2 A.App. 481 contains Sampson's signature, but not Fink's. Sunrise's appellate counsel could not find a fully-signed version in the record. But nothing in the record indicates anyone ever suggested that Fink never actually signed the addendum, or that the absence of a copy with his signature has any significance on the issues in this case.

During all the discussions leading to finalization of the settlement and the addendum, Sampson never hinted he believed the addendum he drafted was inconsistent with Russo's full rights to continue proceeding against Duslak and Sesman. Nor did Sampson ever hint he believed the addendum he drafted would negatively impact his own client's rights against Duslak and Sesman, such that the "null and void" clause in the body of the agreement would be triggered and would supersede the addendum's designation of Duslak and Sesman as independent contractors.

C. The default prove-up farce.

1. Proceedings at the hearing, and the judgment.

Satisfied with this language protecting Sunrise, Fink did not attend the default prove-up hearing against Duslak and Sesman. 4 A.App. 932. The hearing took place on December 17, 2019. 2 A.App. 294. There was no JAVS audio or video recording of the hearing. 13 A.App. 2862:8-10. There was a court reporter present, but she did not report the hearing—presumably because neither the judge nor counsel Sampson wanted the hearing reported—and she therefore cannot prepare a transcript. 13 A.App. 2862:6-8. And there is no record of the proceedings, other than clerk's minutes, which read in their entirety as follows:

> Simone Russo sworn and testified. Exhibits presented (see worksheets). Matter submitted. COURT ORDERED, Plaintiff's Application for Judgment by Default Against Richard Duslak and

> Justin Sesman GRANTED. Order presented to the Court and same signed IN OPEN COURT. (2 A.App. 294; capitalization in original).

Sampson had prepared a judgment in advance; he presented it to the judge; and the judge signed it without making any changes. 2 A.App. 295-96. Despite Russo's previous $355,000 settlement (including $140,000 for Sunrise's portion), the judgment Sampson presented to the judge was for $25 million, with the following breakdown:

Past medical expenses:	$592,846.46
Future medical expenses:	$250,000
General damages:	$24,157,153.54
Total:	$25,000,000

The judgment contains no findings of fact, conclusions of law, recitation of testimony, description of exhibits, or findings on whether Duslak and Sesman were Sunrise's employees, and no explanation for the enormous award of damages, including the bizarre award of general damages in the amount of $24,157,153.54 against two landscape laborers.[5]

[5] The general damages number was obviously calculated by taking the total $25 million requested by Sampson, then subtracting amounts for medical expenses, rendering a net amount of $24,157,153.54 for general damages. Thus, the general damages award was purely random and was not based on any rational analysis of Russo's general damages. Medical records, which do not show a catastrophic injury justifying a $25 million award, are discussed later in this brief.

2. Exhibits at the hearing.

Exhibits from the prove-up hearing were not in the record. 13 A.App. 2862. The clerk's minutes and the judgment contain no descriptions of exhibits or Russo's testimony. 2 A.App. 294. Sunrise's counsel attempted to obtain the exhibits, but discovered the exhibits were sent to a courthouse "vault." 2 A.App. 2862. Sunrise moved to obtain the exhibits. 13 A.App. 2858. Russo opposed the motion, trying to prevent Sunrise from obtaining them. 13 A.App. 2875-79. Although Russo made procedural arguments, he offered no argument regarding why the exhibits should be kept secret from Sunrise's defense counsel. *Id.*

The district court granted the motion, and defense counsel obtained the exhibits. 13 A.App. 2910. Sunrise filed the exhibits as part of the district court record. 13 A.App. 2961. These exhibits will be discussed in detail, below. In short, the exhibits provided no support for the $25 million award.

D. QBE's motion to intervene and to enforce the settlement.

Sunrise is insured with QBE Insurance Corp. 2 A.App. 315. In November 2020, nearly a year after obtaining the judgment against Duslak and Sesman, Russo attempted to obtain a judicial assignment of all rights held by Duslak and Sesman against QBE. 2 A.App. 306. In response, QBE moved to intervene. 2 A.App. 311. QBE noted there was a federal declaratory relief case involving insurance coverage for Duslak and Sesman. 2 A.App. 313. Russo withdrew his request for judicial

assignment, and consequently, QBE withdrew its motion to intervene. 2 A.App. 244-45.

QBE filed a second motion to intervene in January 2021, after Russo contended, in the federal declaratory relief action, that Duslak and Sesman were employees of Sunrise. 2 A.App. 450, 453. QBE contended that Russo's position conflicted with the settlement stipulation, which provided Duslak and Sesman were independent contractors, not employees. 2 A.App. 453-54. QBE's motion also requested enforcement of the settlement agreement, to preclude Russo from contending Duslak and Sesman were employees instead of independent contractors. 2 A.App. 452-54. Sunrise joined in QBE's motion to intervene. 3 A.App. 552-53.

Russo opposed the motion to intervene. 3 A.App. 556. Despite the settlement agreement's express provision (drafted by Sampson) that Duslak and Sesman would be considered independent contractors, Russo's opposition to the intervention motion asserted Russo had "never agreed" that Duslak and Sesman were not employees. 3 A.App. 573. Russo contended the independent contractor addendum his counsel drafted was "null and void" under an earlier provision in the agreement. 3 A.App. 579. The district court denied the motion to intervene. 12 A.App. 2619.

E. Sunrise moves to set aside or amend the default judgment; Russo moves to "enforce" the settlement agreement; the district court blue-pencils the agreement.

On January 21, 2021, Sunrise moved to set aside and/or to amend the default judgment. 4 A.App. 930. The motion noted that, despite Russo's agreement to the contrary, Russo had taken the position after the settlement that Duslak and Sesman **were** Sunrise's employees. 4 A.App. 931, 937. The next day, Russo filed a "Motion to Enforce Settlement," in which he contended, in essence, that nothing in the settlement agreement (presumably including the addendum) could in any way negatively affect Russo's rights against Duslak and Sesman. 6 A.App. 1220.

A few days later, Russo filed opposition to Sunrise's motion to set aside the judgment. 6 A.App. 1341. Russo contended he never released Duslak and Sesman, even as employees. *E.g.*, 6 A.App. 1350. He asserted the "null and void" provision as essentially superseding the addendum language his counsel drafted. 6 A.App. 1350. And he contended nothing in the settlement could affect any of his rights against Duslak and Sesman. 6 A.App. 1360. Then, in his reply in support of his motion to enforce the settlement agreement, Russo ignored the limitation in the addendum, and he contended his rights against Duslak and Sesman were not affected or altered in any way by the settlement. 8 A.App. 1836.

On May 26, 2021, the district court entered an order, prepared entirely by Russo's counsel, dealing with both motions. 13 A.App. 2817. The order recited the settlement agreement's provision stating any language impacting Russo's rights against Duslak and Sesman would be null and void. 13 A.App. 2622. The order also recognized language in the agreement stating Duslak and Sesman were independent contractors. 13 A.App. 2829. The order did not attempt to harmonize these provisions—to give them both meaning and effect. Instead, the district court ruled that the "null and void" provision prevailed over the "independent contractor" provision, and "the language 'as independent contractors' as found in the stipulation is deemed null and void." 13 A.App. 2831. The district court then ruled: "**[T]he words 'as independent contractors' are severed and deleted from the Agreement** …, and the remainder of the Agreement and stipulation, with the words 'as independent contractors' deleted shall remain in full force and effect." 13 A.App. 2831 (emphasis added).

SUMMARY OF ARGUMENTS

I

There were grave flaws in the district court's decision to delete a provision in the settlement agreement. District courts have no power to rewrite settlement agreements or to delete provisions from an agreement. Yet that is exactly what the district court did in this case.

When Sunrise agreed to settle with Russo, Sunrise wanted to buy its peace completely. Sunrise needed protection from subsequent claims based upon vicarious liability for conduct of employees. Thus, Sunrise wanted standard language in the settlement papers releasing Sunrise's employees. When Russo insisted on being able to continue pursuing Duslak and Sesman, the settlement was falling apart. To break the impasse, **Russo's counsel** proposed a new provision stating that Duslak and Sesman would be considered independent contractors instead of employees, for purposes of the litigation. Russo's lawyer drafted the addendum provision to which everyone agreed, and settlement money was paid to Russo.

Russo later reneged and contended that the addendum conflicted with another provision in the settlement document—a provision which indicated that any limitations on pursuit of Duslak and Sesman would be null and void. The district court agreed with Russo, ruling the addendum was trumped by the other provision; the independent contractor provision in the addendum was null and void; and this provision was "severed and deleted" from the agreement.

The district court had no power to take this action, which effectively supported Russo's strategy of renegotiating the settlement to obtain an unjustified, unsupportable, and much larger amount of money. The district court should have applied rules of contract construction to give effect to all provisions in the settlement agreement. Had the district court done so, the agreement could have been enforced

to satisfy the rights of all the parties—not just Russo—with Duslak and Sesman deemed to be independent contractors.

II

Nevada Supreme Court opinions establish mandatory requirements for default prove-up hearings and judgments resulting from such hearings. Even in a default setting, the plaintiff must present substantial evidence that the damages are consistent with the claim, the damages resulted from the defendant's conduct, and the amount of damages is justified. A plaintiff is not entitled to unlimited or unjustifiable damages, simply because default was entered against the offending party. Moreover, default proceedings must comply with fundamental principles of due process, and a default judgment must be complete and explanatory.

Here, the default prove-up hearing and the judgment failed to comply with Nevada law. There was no evidence—let alone substantial evidence—showing any injuries caused by the Sunrise accident or justifying the $25 million award. The judgment contained no findings of fact or conclusions of law, and no explanation whatsoever for the astronomical award. The district court manifestly abused its discretion by denying relief from the judgment.

STANDARD OF REVIEW

Decision regarding motions to set aside default judgments are reviewed for abuse of discretion. *Minton v. Roliff*, 86 Nev. 478, 481, 471 P.2d 209, 210 (1970).

A trial court abuses its discretion when it acts in clear disregard of guiding legal principles. *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993). Contract interpretation is reviewed de novo. *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005).

ARGUMENTS

A. The district court erred by rewriting the settlement agreement and deleting a provision from the agreement.

1. The district court erroneously failed to apply numerous rules of contract interpretation governing review of the settlement agreement.

"Settlement agreements are governed by the general principles of contract law." *MMAWC, LLC v. Zion Wood Obi Wan Trust*, 135 Nev. 275, 279, 448 P.3d 568, 571 (2019). There were numerous rules of contract interpretation applicable to a district court's review of a settlement agreement. *Id.* at 279, 448 P.3d at 571-72. In the present case, the district court's ruling did violence to these basic canons of contract interpretation. Tested against applicable legal principles, the judgment must be reversed.

(a) In interpreting an agreement, a district court may not modify it or create a new or different one. *See Mohr Park Manor, Inc. v. Mohr*, 83 Nev. 107, 111, 424 P.2d 101, 104 (1967) (reversing district court order that declared option

contract null and void). It is a "fundamental rule of interpretation" that a court will not rewrite contract provisions. *See Plociennicz*ak *v. Duer*, 2020 WL 6231358 at *4 (Mich. Ct. App.; October 22, 2020; unpublished). A court is not at liberty to revise an agreement while professing to construe it. *Reno Club, Inc. v. Young Investment Co*., 64 Nev. 312, 323-324, 182 P.2d 1011 (1947).

In *Reno Club,* for example, the parties had an option agreement regarding a real property lease. In a declaratory judgment action between the parties, the district court entered an order which ostensibly interpreted the agreement, but which, as a practical matter, actually changed the agreement. The *Reno Club* court reversed, holding the district court erred by interpreting the agreement in a manner that changed the rights of the parties in the agreement and invalidated, rather than validated, provisions in the agreement. *Id.* at 324-27, 182 P.2d at 1017-18.

A related rule of contract interpretation is that courts do not rewrite contracts. *See Harrison v. Harrison*, 132 Nev. 564, 570, 376 P.3d 173, 177 (2016). Courts are not advocates, and courts do not draft contracts. *Id.* A party's request for a court to rewrite an agreement is a "request for the judiciary's advocacy," which should be denied. *Id.* A "judicially blue-penciled term's inclusion risks trampling the parties' intent." *Id.* Blue-penciling a provision into a contract "would be virtually creating a new contract for the parties," which is something a court "has no power to do." *Id.*, citing and quoting *Reno Club, supra.*

Nevada courts have "long refrained from reforming or 'blue penciling' private parties' contracts." *Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. 476, 483, 376 P.3d 151, 156 (2016).

In the present case, the district court expressly altered the settlement agreement by ordering that **"the words 'as independent contractors' are severed and deleted from the Agreement**," and by ordering that **"the remainder of the Agreement and stipulation, with the words 'as independent contractors' deleted shall remain in full force and effect."** 13 A.App. 2831 (bold emphasis added). In other words, the district court deleted three critical words from the settlement agreement, effectively gutting the entire addendum, while allowing the balance of the agreement to remain in full force and effect.

By judicially editing the settlement agreement, the district court changed the rights of the parties. When the parties settled during trial, Sunrise and its insurance carrier were about to pay a large amount of money to settle Russo's personal injury lawsuit against Sunrise. Like every settling defendant in every tort case, Sunrise wanted to make sure there was no potential for claims in the future arising out of the alleged accident. Because of this concern, Sunrise wanted the settlement agreement release to include all Sunrise employees, for whom Sunrise might be vicariously liable. And because Russo's amended complaint did not identify Duslak and

Sesman as employees, Sunrise's defense counsel wanted the settlement agreement to embrace all Sunrise employees, including potentially Duslak and Sesman.

When the settlement was unraveling because of Sampson's insistence on a carve-out for Duslak and Sesman—in the face of Sunrise's very appropriate insistence on protection against future liability—the parties and the district court discussed ways to resolve the dispute. At that point, Sampson attempted to resolve the problem by suggesting a stipulation that Duslak and Sesman would be considered independent contractors, for purposes of the litigation. When the parties agreed, Sampson drafted the addendum added at the end of the settlement agreement. All parties agreed in the addendum that Duslak and Sesman would be deemed independent contractors "for the purposes of this litigation and for any and all issues related to Simon Russo's claims and settlement." 2 A.App. 481. Sampson was fully aware of the "null and void" provision in the settlement agreement when he made his suggestion, when he drafted the addendum, and when he signed it. He would have never suggested his solution and drafted the addendum with its "independent contractor" provision if he intended it to be null and void.

When the district court ordered the independent contractor provision in the addendum to be severed from the settlement agreement, this left the remainder of the addendum meaningless and without any relevance or effect. The district court violated a fundamental rule of contract interpretation by altering the agreement,

blue-penciling it, judicially creating a new agreement, and thereby altering the rights of the parties without Sunrise's consent. This was reversible error.

(b) A court should harmonize contractual provisions and seek to ensure that no provision is rendered meaningless. *Pope Investments, LLC v. China Yida Holding, Co.*, 137 Nev. Adv. Op. 33, 490 P.3d 1282, 1289 (2021) (declarations in corporate merger agreement must be harmonized, to ensure that none of its provisions were rendered meaningless); *Vegas United Inv. Series 105, Inc. v. Celtic Bank Corp.*, 135 Nev. 456, 459, 453 P.3d 1229, 1231-32 (2019) (applying this rule to homeowner association CC&Rs); *Eversole v. Sunrise Villas VIII Homeowners Ass'n*, 112 Nev. 1255, 1260, 925 P.2d 505, 508 (1996) (applying rule to homeowners' association bylaws).

The harmonization rule of contract interpretation goes hand-in-hand with the rule that every word in a contract must be given effect if at all possible. *See Royal Indem. Co. v. Special Service Supply Co.*, 82 Nev. 148, 150, 413 P.2d 500, 502 (1966) (applying harmonization rule, and reconciling provisions in construction bonding agreement). A court is not at liberty to disregard words used by the parties in a contract. *Id.* Nor can a court reject something the parties inserted into a contract, unless it is repugnant to another part of the contract. *Id.* Even if clauses in a contract appear to be repugnant to each other, "they must be given such an interpretation and construction as will reconcile them if possible." *Id.* at 151, 413 P.2d at 502.

As a general rule, a written contract and an addendum attached to the contract form a single agreement that is construed as a whole. *See Holcomb Condominium Homeowners' Ass'n, Inc. v. Stewart Venture, LLC*, 129 Nev. 181, 190, 300 P.3d 124, 130 (2013) (arbitration agreement contained in addendum attached to contract was deemed part of contract).

An analogous and highly persuasive opinion was recently issued in *BIS Global, Inc. v. Active Minds, Inc.*, 2022 WL 545006 (E.D. Va., Feb. 23, 2022; unpublished). In that case a seller provided a proposed contract, and the buyer requested certain changes. In response, the seller prepared an addendum dealing with the buyer's requested changes. After additional negotiations, the parties agreed on the contract and the addendum terms. *Id.* at *1.

The seller eventually filed suit against the buyer for breach of contract. The buyer moved to compel arbitration. The main body of the contract provided that any dispute "may" be resolved (at the seller's option) by arbitration. The addendum, however, provided any dispute "shall" be resolved by arbitration. The seller/plaintiff argued that the addendum should not be considered part of the contract, but the court rejected this argument. The court held "**the provisions in the Addendum are integrated into the Contract, [and they] override any conflicting terms in the body of the Contract**." *Id.* at *3 (emphasis added).

In reaching this decision, the court considered the email chain discussing negotiations between the parties, noting that "the parties executed the Contract with the intent that it include the Addendum." *Id.* at *7. Because the addendum's mandatory arbitration provision overrode the permissive provision in the body of the contract, the court concluded "that the mandatory arbitration provision in Clause 34 of the Addendum covers this contract dispute." *Id.; see also EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 651 (5th Cir. 1999) (a contract and subsequent modifications must be read as a whole, "giving effect to new provisions and discarding old provisions which are inconsistent with the new terms").

Here, the main body of the settlement agreement contained the "null and void" provision dealing with Duslak and Sesman. But when a dispute subsequently arose, Russo's counsel suggested and then drafted an addendum stating Duslak and Sesman would be considered independent contractors for all purposes of the litigation. The addendum was attached to the agreement. The main body of the agreement was prepared first, and the addendum was prepared (by Russo's counsel) second. The addendum was intended by all parties, including Russo, to clarify the settlement regarding Duslak and Sesman.

As in *BIS Global*, the addendum here was clearly intended to override the body of the agreement. Yet the district court made no attempt to reconcile and harmonize the null and void provision with the independent contractor provision.

The district court took a simplistic approach—finding that the independent contractor provision impacted Russo's rights against Duslak and Sesman, and therefore, the provision was null, void, and stricken from the settlement agreement. 13 A.App. 2830-31.

The district court could have easily harmonized the two provisions, giving each provision meaning and effect—thereby carrying out the intent of the parties. The district court should have construed the settlement agreement such that (1) Russo could continue pursuing Duslak and Sesman; (2) Russo would be able to obtain a default judgment against these two individual defendants; and (3) for purposes of any default judgment Russo might obtain against Duslak and Sesman, these two defendants would be deemed independent contractors (not Sunrise employees).

By harmonizing the provisions in this manner, Russo would have received everything he wanted (namely, settlement money from Sunrise and a default judgment against Duslak and Sesman). And Sunrise would have received the protection it was buying with the settlement money (namely, protection against future claims based on vicarious liability involving Sunrise employees).

(c) Any ambiguity in a contract should be construed against the drafter. *Am. First Fed. Credit Union v. Soro,* 131 Nev. 737, 739–40, 359 P.3d 105, 106 (2015) citing *Anvui, LLC v. G.L. Dragon, LLC,* 123 Nev. 212, 215–16, 163 P.3d

405, 407 (2007). This is a fundamental rule that has been applied in dozens of Nevada appellate opinions. *E.g.*, *Desert Valley Contracting, Inc. v. In-Lo Properties*, 2021 WL 818191 at *2 (Nev.; March 3, 2021; No. 79751; unpublished disposition); *MMAWC*, 135 Nev. at 279, 448 P.3d at 572. The rule is fully applicable to settlement agreements. *MMAWC*, 135 Nev. at 279, 448 P.3d at 572.

In the present case, the parties were deadlocked over the question of whether Duslak and Sesman would be deemed employees within the scope of the Sunrise release. As explained in more detail above, Sunrise's defense counsel Fink observed at a court hearing that there was an absence of any allegations, evidence, or discovery responses from Russo suggesting Duslak and Sesman were Sunrise employees. 15 A.App. 3394-95. He observed: "It was always that they were independent contractors." 15 A.App. 3394:20-22.

After Fink made these observations, Sampson acknowledged that "if you release a party, you typically would be releasing their employees," and he then expressly conceded: "**I don't think they're employees**" (referring to Duslak and Sesman). 15 A.App. 3398-99 (emphasis added). Even the district court recognized it "makes perfect sense" that Duslak and Sesman were **not** employees, and there is "**a significant presumption they're not employees**." 15 A.App. 3415:25 (emphasis added).

Russo's counsel Sampson made his proposal designed to break the impasse over language in the settlement agreement relating to Duslak and Sesman. Sampson stated: "Could we perhaps enter a stipulation on the record here and now that for purposes of this litigation **they're not employees**?" 15 A.App. 3415:13-15 (emphasis added). Fink then expressed his understanding of Sampson's proposal, which indicated that for purposes of the litigation, Duslak and Sesman would not be employees, and Fink stated "that may take care of all of our concerns at that point." 15 A.App. 3418:4-14. The district court asked for Sampson's response, to which Sampson stated: "It was my suggestion, so I still totally agree with it." *Id.*

Sunrise subsequently agreed to Sampson's proposal, and **Sampson drafted the addendum**. 5 A.App. 1067-1071 (exhibit to Sunrise motion to set aside judgment, including email from Sampson with attachment, at 5 A.App. 1071, consisting of proposed addendum regarding the status of Duslak and Sesman as independent contractors); 7 A.App. 1481-82 (motion confirming Sampson as drafter).

The addendum Sampson drafted stated, in all capital letters, that "**FOR THE PURPOSES OF THIS LITIGATION ... DEFENDANT RICHARD DUSLAK AND DEFENDANT JUSTIN SESMAN WERE … INDEPENDENT CONTRACTORS."** 2 A.App. 481 (capitalization in original; bold emphasis added).

In summary, Sampson made his proposal on the record at a hearing, and shortly thereafter he drafted the addendum with the "independent contractor" clause. The document he drafted was an addendum to a settlement agreement that already reserved Russo's right to proceed against Duslak and Sesman, and stated anything in the agreement that would "in any way impact" Russo's rights against Duslak and Sesman "shall be deemed null and void." 2 A.App. 462 [¶4(ii)]. Sampson cannot possibly have believed the "independent contractor" addendum provision he personally drafted would negatively impact his own client's rights against Duslak and Sesman to such an extent that the "null and void" clause in the body of the agreement would be triggered and would supersede the addendum. Otherwise, he would have known the addendum he drafted was null and void. If he honestly believed an independent contractor provision would impact his client's rights against Duslak and Sesman, certainly he would not have drafted it the way he did.[6]

Under settled rules of contract interpretation, the addendum Sampson drafted must be interpreted against Russo. The addendum cannot be construed as impacting Russo's rights against Duslak and Sesman, at least not to the extent of triggering the "null and void" provision. The addendum should be deemed to have no significant impact on Russo's rights against Duslak and Sesman, and no conflict with the

[6] The addendum did not negatively impact Russo's rights against Duslak and Sesman. Instead, the addendum only impacted his rights against Sunrise and QBE.

agreement's earlier provision reserving Russo's rights against these individual defendants. Interpreted against Russo, the provision was not null and void, and the district court erred by ruling that the provision should be deemed deleted from the settlement agreement.

(d) A contract should be construed, if logically and legally permissible, so as to effectuate valid contractual relations, rather than in a manner which would render the agreement invalid. *Vosburg Equipment v. Zupancic*, 103 Nev. 266, 267, 737 P.2d 522, 523 (1987). An interpretation which renders an agreement valid is preferred to one that makes the agreement void. *Mohr Park Manor*, 83 Nev. at 111, 424 P.2d at 104-105. Similarly, an interpretation that makes an agreement fair and reasonable is preferred to one that leads to harsh or unreasonable results. *Id.* A court should ascertain the intention of the parties from the language employed as applied to the subject matter in view of the surrounding circumstances. *Id.*

Here, instead of validating the agreement, the district court interpreted the settlement agreement in a manner that voided and deleted an important part of the agreement. The district court's interpretation of the agreement and the addendum also led to a harsh and grossly unreasonable result.

Under the district court's order striking the addendum provision that characterized Duslak and Sesman as independent contractors, Russo ending up

getting everything he wanted—if not **more** than he wanted. Russo got to pursue Duslak and Sesman with abandon, while at the same time being freed from the stricken addendum provision characterizing Duslak and Sesman as independent contractors.

On the other hand, Sunrise and its insurance company paid $140,000 as part of the settlement with Russo (2 A.App. 460), but Sunrise ended up with a release that was essentially worthless. Under the district court's ruling, Sunrise is still exposed to the exact vicarious liability claims that Sunrise sought to avoid with the addendum in the first place—vicarious liability claims based on the contention that Duslak and Sesman were Sunrise employees and not merely independent contractors. This is a harsh, unfair, and unreasonable interpretation of the agreement, and the district court erred by adopting this interpretation.

(e) The best approach for interpreting an ambiguous contract is to delve beyond its express terms and "examine the circumstances surrounding the parties' agreement in order to determine the true mutual intentions of the parties." *Shelton v. Shelton*, 119 Nev. 492, 497, 78 P.3d 507, 510 (2003). This examination includes not only the circumstances surrounding the contract's execution, but also subsequent acts and declarations of the parties.[7] *Id.* The objective of interpreting

[7] *Shelton* also applied the rule of contract interpretation that a specific provision in a contract will qualify the meaning of a general provision. *Id. See also McDonald's Corp. v. Butler Co.*, 511 N.E. 2d 912, 909 (Ill. App. 1987) (where a contract contains

contracts is to discern the intent of the parties. *Soro*, 131 Nev. at 739, 359 P.3d at 106. Stipulations should generally be read according to their plain words unless those words are ambiguous, in which case the task becomes to identify and effectuate the objective intention of the parties. *Willick v. Eighth Judicial Dist. Court*, 138 Nev. Adv. Op. 19, 506 P.3d 1059, 1062 fn. 2 (2022).

Here, no amount of debating skill can overcome the fact that the addendum had an important purpose intended and understood by the parties. It was adopted by the parties to deal with Sunrise's concern over potential vicarious liability for negligence by anyone who might be proffered as a Sunrise employee (including Duslak and Sesman). Thus, the circumstances surrounding the addendum and its adoption by the parties establish the district court's error in voiding and deleting the provision dealing with Duslak and Sesman as independent contractors.

2. The district court's failure to apply these rules was reversible error.

A district court does not have discretion to ignore applicable rules of contract interpretation, and a district court's failure to apply these rules constitutes reversible

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conflicting clauses, the general clause should be subjected to such modification or qualification as the specific clause makes necessary). Here, the "null and void" provision was a general provision dealing with any part of the contract that effected Russo's rights against Duslak and Sesman. The addendum, however, was a very specific provision that designated Duslak and Sesman as independent contractors "for the purposes of this litigation and for any and all issues related to Simone Russo's claims and settlement." 2 A.App. 481. As such, the specific addendum provision must be read as qualifying the more general "null and void" clause that appears earlier in the agreement.

error. *E.g.*, *Mohr Park Manor*, 83 Nev. at 111, 424 P.2d at 104 (reversal for failure to comply with rule against modifying agreement); *Soro*, 131 Nev. 739, 350 P.3d at 106 (reversal where district court failed to comply with rule requiring construction of contract against drafter); *Pope Investments*, 137 Nev. at __, 490 P.3d at 1289 (reversal where district court failed to harmonize contract provisions).

In the present case, the district court failed to apply multiple rules of contract interpretation, any of which alone would justify reversal. Had the district court applied these rules—and applied them correctly—the district court would not have severed the independent contractor provision from the addendum. Applying de novo review, this court should reverse the district court's order and remand for entry of a new order upholding the independent contractor provision.

B. The district court erred by denying Sunrise's motion to set aside or alter the default judgment.

"Default judgments are punitive sanctions that are not favored by the law." *Leavitt v. Siems*, 130 Nev. 503, 515, 330 P.3d 1, 9 (2014). As the Supreme Court of New Mexico aptly observed: "Claims for large sums of money should not be determined by default judgments if they can reasonably be avoided." *United Salt Corp. v. McKee*, 628 P.2d 310, 313 (N.M. 1981).

1. Additional facts relating to the motion to set aside the judgment.

Russo obtained his $25 million default judgment against Duslak and Sesman on December 17, 2019. 2 A.App. 295. The record contains no indication that Russo did anything with his judgment for nearly a year, until November 2020. Instead, he appears to have been biding his time until some deadlines under NRCP 60(b) expired. On November 2, 2020, he filed a motion seeking a judicial assignment to himself of all rights that Duslak and Sesman had against anyone, including rights against Sunrise's insurance companies and "any other entities" against whom Duslak and Sesman had claims or actions (which presumably would have included Sunrise itself). 2 A.App. 308. In other words, Russo wanted a court order giving him all rights that Duslak and Sesman may have had against Sunrise or its insurance carriers at that time.

Two days later, on November 4, 2020, Russo's counsel sent a letter to Community Association Underwriting Agency, which was a company that managed Sunrise's insurance policy, as an agent of Sunrise's insurer, QBE. 2 A.App. 331:12. The letter requested payment of the judgment "against your insureds" (Duslak and Sesman). 2 A.App. 437.

QBE responded by filing a motion to intervene in the Russo case. 2 A.App. 311. QBE asserted, among other things, that the default judgment was improper, and that QBE was harmed by the claims made by Russo, Duslak, and Sesman against

QBE. 2 A.App. 313-19. QBE also opposed Russo's request for a judicial assignment of rights to Russo. 2 A.App. 311. Russo opposed QBE's intervention, and Russo withdrew his request for the judicial assignment of rights. 2 A.App. 387.

In light of Russo's withdrawal of his motion for the judicial assignment of rights, QBE withdrew its motion to intervene. 2 A.App. 444. QBE then filed a revised motion to intervene, to enforce the previous settlement. 2 A.App. 450. The motion observed that the settlement expressly precluded any contention by Russo that Duslak and Sesman were anything other than independent contractors for Sunrise. 2 A.App. 452-53. Yet in the federal case, Russo was disavowing this settlement term, and he was contending Duslak and Sesman **were** Sunrise's employees. 2 A.App. 453. QBE sought an order enforcing the settlement agreement's provision that called for any claims against Duslak and Sesman to be based solely on their status as independent contractors. 2 A.App. 453-56.

Sunrise filed a joinder to QBE's motion. 3 A.App. 552. Shortly thereafter, Sunrise filed a motion under NRCP 60(b) to set aside the default judgment, or in the alternative, to amend the judgment to reflect that liability against Duslak and Sesman was based solely on their status as independent contractors. 4 A.App. 930. QBE joined in Sunrise's motion to set aside. 5 A.App. 1186.

Russo responded by immediately filing his own motion to "enforce" the settlement. 6 A.App. 1214. His motion ignored the fact that he already received

Sunrise's settlement money. And his motion ignored the addendum that his counsel drafted – to which all parties agreed – indicating that Duslak and Sesman were **independent contractors** "for purposes of this litigation and for any and all issues related to Simone Russo's claims and settlement." 2 A.App. 481. Russo asserted that the court should enforce the settlement placed on the record at the hearing, not the written settlement to which the parties later agreed. 6 A.App. 1220. As noted above, the district court denied Sunrise's motion for relief from the judgment, and the district court granted Russo's motion (by striking the "independent contractors" provision from the written agreement).

2. Standing for the NRCP 60(b) motion.

a. Background for standing argument.

The default judgment was against defendants Duslak and Sesman, but not against Sunrise. When Sunrise moved to set aside the judgment under NRCP 60(b), Russo's opposition made a one-paragraph conclusory argument that Sunrise did not have standing to file the motion, because Sunrise was not a party to the judgment. 6 A.App. 1351. Russo cited no legal authority supporting his argument. *Id.* Then, without permission from the court, Russo's counsel filed a First Supplement to his opposition (8 A.App. 1825), a Second Supplement (9 A.App. 1848), and a Third Supplement (9 A.App. 1924). None of these supplemental oppositions mentioned standing.

Sunrise filed a reply, arguing that Sunrise had an interest in setting aside the judgment, and noting Duslak and Sesman were seeking damages from Sunrise in the federal case, based on their contention that they were former employees, and based upon the default judgment. 9 A.App. 1887. Sunrise also observed that even the attorney representing Duslak and Sesman at that time had not attempted to set aside the judgment, and he was attempting to pass the judgment through to Sunrise. *Id.* As such, Sunrise was the only party directly affected by the judgment. *Id.*

Moreover, previous motion papers had advised the district court of Russo's contentions in the federal litigation that Duslak and Sesman **were** Sunrise employees. *E.g.*, 3 A.App. 486-87, 494-95 (Russo alleging that Duslak and Sesman were "working as employees" for Sunrise).

The district court held a hearing on the motion for relief from the judgment. Russo did not argue Sunrise lacked standing. 17 A.App. 3608-3723. Russo submitted a proposed order denying Sunrise's motion, and the district court signed it. 13 A.App. 2817-31. The order did not say a word about Sunrise's standing. *Id.* Thus, it is apparent that the district court rejected Russo's token standing argument.

b. Sunrise had standing to challenge the judgment.

NRCP 60(b) provides that a court may grant "a party or its legal representative" relief from a judgment. "[R]elief may be granted to one who is not a party to the judgment if he demonstrates that he is directly injured or jeopardized

by the judgment." *Pickett v. Comanche Const., Inc.*, 108 Nev. 422, 427, 836 P.2d 42, 45 (1992). In *Pickett*, a group of homeowners filed an independent action under Rule 60(b) to set aside a judgment, although they were not parties to the judgment. The *Pickett* court held that because the judgment subjected the homeowners to liability, they properly brought the equitable action to set aside the judgment. *Id.*

Rule 60(b) does **not** state that only a judgment debtor may obtain relief from a judgment. Interpreting the analogous federal rule, federal courts hold that one must only be a party in the action, or a party's representative, in order to have standing to bring a Rule 60(b) motion. *Kem Mfg. Corp. v. Wilder*, 817 F.2d 1517, 1519–20 (11th Cir. 1987). Here, Sunrise is a party in the action. As such, Sunrise clearly has standing to assert Rule 60(b) relief.

Federal cases also apply an analysis similar to this court's analysis in *Pickett.* Federal cases make clear that the scope of Rule 60(b) is intended to reach individuals or entities "whose legal rights were otherwise so intimately bound up with the parties that their rights were directly affected by the final judgment." *Kem Mfg.* at 1520. For example, where plaintiffs enter into a settlement agreement and a judgment, with the intent to collect from a third party, the third party is strongly affected by the judgment and is entitled to standing to bring a Rule 60(b) motion. *See Grace v. Bank Leumi Trust Co. of N.Y.*, 443 F.3d 180, 188 (2d Cir. 2006), citing *Dunlop v. Pan Am. World Airways, Inc.*, 672 F.2d 1044, 1052 (2d Cir. 1982) (non-parties had standing

to invoke Rule 60(b) to amend a judgment, where they were sufficiently connected and identified with the suit).

A party is aggrieved when the district court's order substantially and adversely affects either a personal right or a property right. *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994); *see also Las Vegas Police Protective Ass'n Metro, Inc. v. Eighth Jud. Dist. Court*, 122 Nev. 230, 240, 130 P.3d 182, 189 (2006) (an aggrieved party may also suffer "[t]he imposition of some injustice, or illegal obligation or burden, by a court, upon a party, or the denial to him of some equitable or legal right.") (internal quotations omitted).

Nevada law does not bar relief for parties who are not judgment debtors. The court recognized this principle in *Est. of Lomastro ex rel. Lomastro v. Am. Fam. Ins. Grp.*, 124 Nev. 1060, 195 P.3d 339 (2008), when it examined whether an insurance company could assert substantive defenses on behalf of a defendant whom it **did not insure** in an uninsured motorist claim filed by its insureds. The insurer intervened after entry of default but before default judgment, and tried to assert substantive defenses to liability. *Id.* at 1069, 195 P.3d at 346. The court permitted the insurer to intervene and contest the damages asserted against the defendant, even though there was no legal relationship between the defendant and the insurer. *Id.* The insurer had standing because it was potentially liable to pay the judgment entered against the defaulted defendant. *Id.* citing *Bliss v. Wiatrowski*, 724 A.2d 1264, 1269 (Md. Ct.

Spec. App.1999) ("[I]f an insurer can be bound by a default judgment order entered against an uninsured motorist, then the insurer should have the power to move to set aside the order of default and the default judgment, as its liability exposure hinges on the uninsured motorist's culpability").

Similar to the insurer in *Lomastro*, Sunrise had the right to seek relief from the default judgment entered against Duslak and Sunrise, because its liability exposure potentially hinged on culpability based upon vicarious liability. *See McCrosky v. Carson Tahoe Reg'l Med. Ctr.*, 133 Nev. 930, 933, 408 P.3d 149, 152 (2017) (defining vicarious liability as the liability that a supervisory party bears for the actionable conduct of its subordinate, and the supervisory party need not be directly at fault to be liable because of imputed fault).

An employer (or putative employer) has standing to challenge a default judgment entered against an employee, because of prejudice resulting from a potential claim of vicarious liability or inconsistent judgments. *United Salt*, 628 P.2d at 313-14. Therefore, a putative employer has the right to move to set aside a default judgment rendered against the alleged employee, even though the employer itself was not a judgment debtor in the judgment. *Id.*

Nevada, like other jurisdictions, also recognizes that when liability may be founded upon the employer-employee relationship, the employer is not bound by the employee's default. Indeed, "the answer of a co-defendant inures to the benefit of a

defaulting defendant when there exists a common defense as to both of them." *Leavitt v. Siems*, 130 Nev. 503, 515, 330 P.3d 1, 9 (2014) *citing Sutherland v. Gross*, 105 Nev. 192, 198, 772 P.2d 1287, 1291 (1989).

In the present case, the default judgment does not make findings of fact regarding whether Duslak and Sesman are independent contractors or employees of Sunrise. But Sunrise's Rule 60(b) motion correctly observed that, despite the settlement agreement, Russo was contending he did not release his claims against Duslak and Sesman in their capacities as Sunrise employees. 4 A.App. 932-33. Moreover, Duslak and Sesman themselves sued Sunrise in the federal case, contending they were employees and Sunrise is responsible for the judgment. 4 A.App. 932; 5 A.App. 1155-84. And as noted above, even Russo's own pleadings in the federal case asserted Duslak and Sesman were Sunrise employees. 3 A.App. 95 (referring to their "employment with SUNRISE," and they were "working as employees for SUNRISE").

With Russo, Duslak, and Sesman **all** contending that Sunrise is responsible for the $25 million default judgment—making this contention both in this action and in the related federal action—Sunrise is directly and immediately impacted by the judgment. Sunrise's rights are intimately bound up with the other parties, and Sunrise had standing to attack the default judgment under Rule 60(b).

3. A prove-up hearing must comply with legal requirements.

The mere fact that a default has been taken does not mean a district court has unbridled discretion at the default prove-up hearing. This issue is controlled by *Foster v. Dingwall*, 126 Nev. 56, 64, 227 P.3d 1042, 1047 (2010), where third-party plaintiffs had claims against opposing parties who engaged in sanctionable discovery abuse. This resulted in an order striking their pleadings and entering defaults. After a prove-up hearing on damages, the district court awarded compensatory and punitive damages of approximately $12 million to one third-party plaintiff and approximately $60 million to two others. *Id.* at 60-63, 227 P.3d at 1045-47. The third-party defendants appealed.

Foster established mandatory requirements for prove-up hearings and default judgments. In a default setting the plaintiff must "present sufficient evidence to show that the amount of damages sought is attributable to the tortious conduct." *Id.* at 64, 227 P.3d at 1047. The plaintiff must prove damages "supported by substantial evidence," and substantial evidence must exist for "each claim." *Id.* at 60, 66-67, 227 P.3d at 1045, 1049.

Although allegations in a complaint are deemed admitted as a result of a default, this does not relieve the plaintiff's obligations at the prove-up hearing. *Id.* at 68, 227 P.3d at 1050. The plaintiff still has an "obligation to present sufficient evidence to establish a prima facie case." *Id.* In a default setting—whether resulting

from a defendant's failure to answer or resulting from a discovery abuse sanction—the plaintiff's obligation to establish a prima facie case includes substantial evidence proving (1) the damages are consistent with the claim for which the plaintiff seeks compensation; (2) the defaulting defendant's conduct resulted in (i.e., caused) the damages; and (3) the amount of damages suffered by the plaintiff. *Id.*

Foster also emphasized that a plaintiff is **not** entitled "to unlimited or unjustifiable damages simply because default was entered against the offending party." *Id.* Default damages must be reasonable and consistent with principles of due process. *Id.*

The *Foster* court affirmed the award to one third-party plaintiff, who presented substantial evidence supporting his damages claim. *Id.* at 68-69, 227 P.3d at 1050-51. He testified extensively at the hearing concerning his work with a CPA to review 50,000 pages of business records supporting his damages; he gave detailed explanations for the damages; and he presented charts and other demonstrative evidence supporting his damages on each cause of action. *Id.* He also presented evidence on how the corporate directors had harmed him and how the harm caused the particular damages claimed. *Id.*

In contrast, *Foster* reversed the default award for the other third-party plaintiffs, because they failed to present any evidence supporting their claimed damages. Specifically, "the admission of the pleadings did not relieve [the

shareholders] of their responsibility to show that they were entitled to relief and that the amount of damages sought corresponded with the asserted causes of action." *Id.* at 70-71, 227 P.3d at 1051-52.

4. The prove-up hearing in this case failed to comply with *Foster*.

It is blindingly obvious that the district court record in this case is legally deficient for **any** default judgment, let alone a $25 million default judgment. Clerk's minutes show the presence of a court reporter, but neither the judge nor Russo's counsel asked her to report the proceedings. With this deficiency, the judge could have required a functioning JAVS system, to provide an audio/video source from which a transcript could be prepared. But there was no JAVS recording. Even with these two deficiencies, the judge could have instructed the courtroom clerk to provide detailed information in the court minutes. Yet the judge did not take this step.

And finally, even with all of these three deficiencies, the judge could have required Russo's counsel to provide a proposed judgment containing descriptions of testimony and exhibits, with adequate findings of fact and an explanation for the $25 million award. Or the judge could have prepared the judgment himself. None of these elementary steps were taken before the judge signed the $25 million default judgment.

5. The award was not supported by substantial evidence.

The record here demonstrates a complete absence of evidence—let alone substantial evidence—supporting the award of $25 million. Russo was the only witness at the hearing, and there is no record of his testimony. 2 A.App. 294; 13 A.App. 2862. There was no testimony by doctors, economists, life-care planners, or other experts. 2 A.App. 294. There were only nine exhibits, consisting of medical records and bills, and there is only one terse passing mention of the August 2016 fall. 14 A.App. 3011. Otherwise, the records do not mention the August 2016 alleged accident at all. There are no medical reports or opinions establishing Russo's injuries from the August 2016 fall, establishing any diagnoses relating to injuries from the fall, or otherwise indicating that Russo's medical problems were caused in any manner by the alleged trip-and-fall accident at Sunrise. 13 A.App. 2961 to 15 A.App. 3287.

In fact, the medical records presented at the prove-up hearing are replete with information raising serious questions about Russo's alleged injuries—and they in no way justify a $25 million award. For example, the records show a fall during the year before a pain management visit in 2014, which was two years **before** the August 2016 Sunrise incident. 15 A.App. 3233. In a physical therapy evaluation in April 2017, eight months after the alleged Sunrise fall, the evaluation contains a place for "Injury Date," but there is no injury date indicated. 15 A.App. 3271. Russo

presented to the physical therapist with poor balance, low back pain, and multiple other physical maladies, all without a single word mentioning an accident in August 2016. *Id.*

In early 2018 (less than two years after the 2016 Sunrise incident), Russo's physical therapy evaluation asked about any history of falls, and he answered "no." 14 A.App. 3022, 3028. He was also asked if he had any pending litigation, to which he answered "no," despite the fact that he had already filed his lawsuit for the Sunrise incident. *Id.* He saw a pain management specialist numerous times from 2014 (before the August 2016 Sunrise accident) until 2017. 14 A.App. 3060-3210 to 15 A.App. 3234. Records from this doctor (Kozmary) do not contain a word about an August 2016 accident. Indeed, the records consistently show "Pain since 1/2012," and "Adverse Events: none noted." *E.g.*, 14 A.App. 3060, 3064, 3068; 3095. Even the records for a visit to this doctor on September 13, 2016, which was approximately three weeks after the alleged Sunrise accident, did not contain a single word about the accident, and the records state: "Adverse Events: none noted." 14 A.App. 3095.

Medical bills presented at the prove-up hearing include numerous charges for treatment **before** the Sunrise accident. *E.g.*, 15 A.App. 3243. A summary of medical expenses prepared by Russo's counsel—and presented to the judge at the hearing—contained a $428,510 entry for a hospital, with no actual bill supporting this entry.

The hospital charge was included in the judge's award of past medical expenses, constituting nearly 73 percent of the award for past expenses. 13 A.App. 2969 (hospital bill included in summary of $592,846 total medical expenses); 2 A.App. 295 (same amount awarded on line in judgment for "Past Medical Expenses"). These records cannot possibly be considered "substantial evidence" supporting the award of $592,846 in past medical expenses.

The judgment awards $250,000 for future medical expenses. 2 A.App. 295. The only "evidence" of future medical care is a four-sentence letter from a surgeon, indicating $250,000 for future surgery. 15 A.App. 3286. This letter contains no mention of the August 2016 accident at Sunrise, or for that matter, **any** opinion or explanation as to causation for the $250,000 future surgery expense. *Id.* As mandated by *Foster*, a default judgment must be supported by substantial evidence establishing the damages are "attributable to the tortious conduct" of the defaulting defendant. *Foster*, 126 Nev. at 60, 64, 227 P.3d at 1047, 1049. The letter fails to satisfy this requirement.

Finally, the judgment includes more than $24 million in general damages, with no explanation. 2 A.App. 296. Even in a default setting, "the law does not permit arriving at the amount [of damages] by pure conjecture." *Kelly Broad. Co. v. Sovereign Broad., Inc.*, 96 Nev. 188, 193, 606 P.2d 1089, 1093 (1980) *superseded by statute on other grounds*. Here, the sparse medical records—which contain no

causation opinions linking the records and bills to the Sunrise accident—cannot possibly be deemed to support the huge general damages award.[8]

In summary, the evidence presented at the hearing was not even in the neighboring galaxy of "substantial evidence" supporting causation and damages amounts. The award is at odds with all reason, justice, and caselaw dealing with default judgments. And as noted above, the judgment, if upheld, will be a source of embarrassment to the Nevada judiciary and to our judicial standards in default cases.

6. Sunrise and its insurance carrier were unaware of these failures.

Meaningful appellate review is inextricably linked to the availability of an accurate record of the lower court proceedings regarding the issues on appeal; therefore, a party is entitled to have the most accurate record possible of his or her district court proceedings. *See Preciado v. State*, 130 Nev. 40, 43, 318 P.3d 176, 178 (2014).

When Sunrise and QBE challenged the judgment by moving to set it aside or to modify it (or to enforce the addendum), they were not aware of the full nature of

[8] In *Stephenson v. El-Batrawi*, 524 F.3d 907, 917 (8th Cir. 2008), the district court's award of default damages was error, where the district court did not identify with specificity how it reached damages of $50 million, the "exact amount" requested by the plaintiff. The district court failed to state the basis upon which each category of damages was calculated, and failed to refer to evidence in the record to support the $50 million award. The Eighth Circuit found the district court's "generic reference" to evidentiary support for the damages left the appellate court with an inadequate record, mandating reversal. *Id.*

the district court's failures to comply with requirements for default prove-ups. Motion papers by Sunrise and QBE repeatedly complained about the sparse record and the lack of available information. For example, when Sunrise filed its motion to set aside the default judgment, Sunrise argued:

> Compounding matters, the docket includes no record of the evidence submitted to substantiate the judgment while the hearing was not transcribed. See Exhibit 9 [clerk's minutes]. Given this, the HOA [Sunrise] cannot determine the basis for the judgment entered against Duslak and Sesman. 4 A.App. 932 (fn. 4).

When Sunrise filed its reply in support of the motion, Sunrise also complained:

> Meanwhile, no record exists for the Default Judgment at issue. In the absence of a record, no one has the ability to confirm what representations Plaintiff made to this Court regarding Duslak's and/or Sesman's liability and whether the representations were in accordance with the express terms found within the Global Settlement Agreement. 9 A.App. 1884.

Sunrise's reply also argued:

> NRCP 60(a) allows a court to correct clerical mistakes, oversights and omissions. SUNRISE was not, and has not been privy, to the arguments Plaintiff made or the evidence he presented in the proceedings resulting in the Default Judgment against Duslak and Sesman. Furthermore, SUNRISE does not have access to the pleadings or the proceedings on the record. It does not know if there was a clerical mistake, omission or oversight in reaching that Default Judgment. 9 A.App. 1888.

QBE filed a brief on the issue, to which Sunrise joined [8 A.App. 1671] complaining:

> Unfortunately, no record exists in connection with the default judgment (i.e., no documents, no transcript). Despite repeated requests, counsel for Plaintiff has refused to produce copies of documents presented to this Court in connection with the default judgment such that no understanding exists as to the basis for the judgment. 7 A.App. 1476 (fn. 2).

Similarly, Sunrise filed another motion paper that complained:

> Compounding matters, the docket includes no record of the evidence submitted to substantiate the judgment [because the] hearing was not transcribed. *See* Motion to Set Aside Exhibit 9. Given this, the [sic] SUNRISE cannot determine the basis for Plaintiff's Judgment against Duslak and Sesman. 7 A.App. 1498 (fn. 3).

Sunrise also asserted:

> SUNRISE does not have any documentation or information related to what Plaintiff submitted for the Default Judgment, so it does not know what happened. … SUNRISE is concerned that the Default Judgment might be void pursuant to NRCP 60(a), (b)(3), (b)(4) and/or (d)(3), if not a total mistake. At this point, SUNRISE is certainly not accusing Plaintiff's counsel of having engaged in any type of fraud. It's just that SUNRISE has no way of knowing what actually did occur without seeing the documents. 7 A.App. 1510.

Under these circumstances, it is perfectly understandable why the motion to set aside the default judgment did not provide the detailed information that became known later—after Sunrise's defense attorneys procured a court order allowing them to obtain the exhibits from the clerk's vault. Nonetheless, when the motion was

argued and decided, the district court and Russo's counsel were aware of the paucity of evidence that had been presented at the prove-up hearing.

7. The judgment itself is defective.

As noted, the default judgment in this case failed to include any findings of fact or conclusions of law. It also failed to recite any evidence and failed to provide an explanation for the huge award.

As a general rule, a district court order should be written in a manner that allows meaningful appellate review. *Cf. Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 94, 787 P.2d 777, 780 (1990) (in a sanctions default case, the better practice is to include an express and careful discussion of relevant factors in the order; a district court's multi-page recitation of findings of fact and conclusions of law exemplifies an order leading to a default judgment).

This court has cautioned district courts to make express, detailed findings of fact, in order to clarify their reasoning and, if necessary, facilitate appellate review. *See Clark County School District v. Bryan*, 136 Nev. 689, 693 n. 3, 478 P.3d 344, 353 n. 3 (2020) (dealing with findings after bench trial); *Willard v. Berry-Hinckley Indus.*, 136 Nev. 467, 471, 469 P.3d 176, 180 (2020) (dealing with NRCP 60(b) determination). A lack of findings supporting a district court's decision hampers meaningful appellate review, even when such review is deferential, because without

adequate findings the appellate court is "left to mere speculation." *See Jitnan v. Oliver*, 127 Nev. 424, 433, 254 P.3d 623, 629 (2011).

Nevada caselaw requires district courts to make express findings in a variety of contexts. *E.g.*, *Willard*, 136 Nev. at 471, 469 P.3d at 180 (district court must issue explicit and detailed findings on NRCP 60(b)(1) determination); *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015) (child custody orders); *Young*, 106 Nev. at 93, 787 P.2d at 780 (imposition of sanctions); *Rosky v. State*, 121 Nev. 184, 191, 111 P.3d 690, 695 (2005) (clear factual findings are vital in ruling on motion to suppress); *cf. In re Cantrell*, 329 F.3d 1119, 1123 (9th Cir. 2003) (default judgment must contain express findings for purposes of issue preclusion).

Even in cases where express findings are not required, such findings are still encouraged and preferable, to facilitate appellate review. *E.g.*, *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015) (order regarding attorneys' fee award).

The district court in this case essentially rubber-stamped the judgment that Russo's counsel handed the court at the prove-up hearing. The judgment was bare-bones, at best, containing virtually no information except the dollar amounts that Russo's counsel had already filled in. The judgment reflects no judicial evaluation of evidence, no judicial thought process, and no exercise of sound judicial discretion. To preserve the integrity of the Nevada judiciary, this court should not approve such a default judgment—in **any** amount, let alone $25 million.

8. Plain error applies.

An earlier section of this brief explains why Sunrise's motion to set aside the default judgment was unable to provide more detailed attacks on the judgment. Even if this court determines that Sunrise's motion could have done a better job in identifying and arguing deficiencies in the evidence and in the default judgment, this court should nevertheless evaluate the deficiencies under the plain error doctrine.[9]

Plain error exists when the error is "clear under current law." *See Gaxiola v. State*, 121 Nev. 638, 648, 119 P.3d 1225, 1231 (2005). An error is "plain" if the error is so unmistakable that it reveals itself by a casual inspection of the record. *Torres v. Farmers Ins. Exchange*, 106 Nev. 340, 345 n. 2, 793 P.2d 839, 842 n. 2 (1990) (plain error doctrine applied, and judgment reversed, where trial judge failed to comply with caselaw requiring judge to examine relevant insurance policies).

"The ability of this court to consider relevant issues *sua sponte*, to prevent plain error, is well established." *Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986). Plain error applies where clearly controlling law was not applied by the trial court. *See id.* (failure to apply statute). Plain error is error which "seriously effects the integrity or public reputation of the judicial proceedings."

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[9] The district court's errors relating to the default judgment also have constitutional due process implications. *Foster*, 126 Nev. at 68, 227 P.3d at 1050 (default damage award must be in accord with principles of due process). Constitutional issues may be raised for the first time on appeal. *Livingston v. Washoe County*, 112 Nev. 479, 482, 916 P.2d 163, 166 (1996).

Parodi v. Washoe Medical Center, 111 Nev. 365, 368, 892 P.2d 588, 590 (1995). It occurs when, for example, a trial judge fails to comply with Nevada Supreme Court case precedent. *Id.; see also Wallace v. Wallace*, 112 Nev. 1015, 1021, 922 P.2d 541, 544-45 (1996) (plain error applied, and judgment reversed, where trial judge failed to make findings required by caselaw); *Tahoe Village Homeowners Ass'n v. Douglas County*, 106 Nev. 660, 662 n. 1, 799 P.2d 556, 558 n. 1 (1990) (plain error applied, and judgment reversed, where trial court failed to recognize cause of action based on caselaw).

The plain error doctrine is not limited to trial court failures to comply with statutes and caselaw. This court will also reverse and remand due to insufficient evidence where there is plain error or manifest injustice. *See Holderer v. Aetna Cas. and Sur.*, 114 Nev. 845, 853, 963 P.2d 459, 464-65 (1998) (lack of evidence establishing comparative negligence); *Avery v. Gilliam*, 97 Nev. 181, 183, 625 P.2d 1166, 1168 (1981) (plain error applied, and judgment reversed, where verdict was manifestly contrary to the evidence).

In this case, the default prove-up hearing was rife with fundamental errors. There was a blatant failure to comply with *Foster*—an opinion that was only nine years old at the time of the hearing—which established clear, mandatory requirements for default prove-up proceedings. The district court's failure to comply with *Foster* is revealed by even the most casual inspection of the record. There was

plain error here under any standard. The district court should have granted relief and set aside the judgment.[10]

9. There were valid grounds for relief under NRCP 60, and the requests for relief were timely.

Under NRCP 60(a), relief from a judgment is available to correct a clerical mistake or a mistake arising from oversight or omission. There is no time limit in NRCP 60(a). Under NRCP 60(b), the court may grant relief from a judgment for (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or misconduct; (4) the judgment is void; (5) the judgment has been satisfied; or (6) "any other reason that justifies relief." A motion asserting reasons (1), (2), or (3) has a six-month time limit. NRCP 60(c)(1). This time limit does not preclude a court's power to entertain an independent action to relieve a party from a judgment, order, or proceeding. NRCP 60(d)(1).

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[10] If necessary, the plain error doctrine can also apply to the district court's order blue-penciling the settlement agreement and striking a clause from the addendum. Contract interpretation and procedural issues involving settlement agreements can be reviewed and assessed through the plain error doctrine, even if not raised in the trial court. *See WW v. DS*, 482 P.3d 1084 (Hawai'i, 2021) (trial court's procedures regarding settlement agreement reviewed under plain error doctrine); *Morrison v. Morrison*, 247 So.3d 604, 608 (Fla. App. 2018) (interpretation of settlement agreement reviewed under plain error doctrine); *cf. United States v. Tolentino*, 766 Fed. Appx. 121, 127 (5th Cir. 2019) (interpretation of criminal plea agreement was subject to plain error doctrine).

In this case, as described in detail above, Russo agreed to treat Duslak and Sesman as independent contractors for all purposes in the litigation. When the district court rendered its default judgment, the judgment prepared by Russo did not state a designation of Duslak and Sesman as employees or independent contractors. The judgment was silent on this point. For more than six months, Russo and his counsel never gave the slightest hint they would renege on their agreement. They revealed their hidden intent approximately 11 months later, in the federal litigation, when they finally asserted Russo's contention that Duslak and Sesman were Sunrise employees. *E.g.*, 3 A.App. 486-87, 494-95 (Russo alleging that Duslak and Sesman were "working as employees" for Sunrise).

During all that time, Sunrise had no reason to suspect Russo would change his position, and Sunrise had no reason to seek relief from the judgment. Sunrise moved for relief from the judgment promptly upon learning Russo had changed his position and was abandoning his agreement to treat Duslak and Sesman as independent contractors for all purposes in the litigation. 4 A.App. 930. Sunrise also moved to amend the judgment under NRCP 59, to clarify that Duslak and Sesman were independent contractors. *Id.*

The district court found the request to amend the judgment was untimely, because it was not filed within 28 days after entry of the judgment, as required by NRCP 59. 13 A.App. 2823-24. The district court also found Sunrise's requests for

relief under subparts (1), (2), and (3) of Rule 60(b) were untimely because the requests were not made within six months allowed by Rule 60(c)

Although Rule 60(c) does not expressly recognize any exceptions to the six-month limit, this case literally cries out for application of judicial estoppel, which is a doctrine that runs throughout the law. Judicial estoppel applies when a party has taken two inconsistent positions in litigation, with the first position accepted by the court and being totally inconsistent with the party's second position. *Marcuse v. Del Webb Communities, Inc.*, 123 Nev. 278, 287–88, 163 P.3d 462, 468–69 (2007). The central purpose of judicial estoppel is to guard the judiciary's integrity, and thus, a court may invoke the doctrine at its own discretion. *Id.*

In the present case, Russo's counsel made a suggestion in open court, to resolve a serious dispute concerning a release in a personal injury settlement. The other parties agreed with the suggestion. Russo's counsel drafted an addendum that incorporated his suggestion and stated that, for purposes of the litigation and the settlement, Duslak and Sesman would be considered independent contractors. Later, he obtained a $25 million judgment, which he prepared for the judge's signature; but the judgment was silent regarding the status of Duslak and Sesman. Then, Russo's counsel radically changed his position. He contended Duslak and Sesman **were** employees of Sunrise. And amazingly, he even contended that the addendum he drafted—to break the stalemate over the settlement—was null and void. Russo

should be judicially estopped from contending that Sunrise's motion for relief from the judgment was untimely under the first three subparts of Rule 60(b).

The district court also found the motion for relief to be without sufficient grounds under all subparts of NRCP 60(b). 13 A.App. 2824-28. These grounds will be discussed separately, as follows.

a. Relief should have been granted under NRCP 60(a).

Although there was no clerical mistake, the default judgment was rendered upon an oversight or omission. The judgment was rendered after a default prove-up hearing that utterly failed to comply with *Foster*'s mandatory requirements. The oversight was the district court's failure to require substantial evidence to support the huge amount of damages Russo was seeking. And the omission was the district court's reliance on exhibits that did not establish causation and did not establish past and future medical expenses related to the Sunrise accident. The omission was also the district court's failure to render a judgment that provided any findings, conclusions, or explanations for the $25 million award.

b. Relief should have been granted under NRCP 60(b)(1).

The district court's order finds no mistake, surprise, or excusable neglect. 13 A.App. 2824. This was clear error. The judgment was rendered after a default prove-up hearing that did not include substantial evidence of causation, medical expenses, or nearly $25 million in general damages. And the judgment was

minimalist, with no findings or explanations for the damages award, and with no findings with regard to the status of Duslak and Sesman as independent contractors (despite the fact that the district judge was fully aware of the previous dispute regarding the settlement and the parties' resolution of the dispute via the independent contractors provision).

From Sunrise's standpoint, there was undeniable mistake, surprise, or excusable neglect. Sunrise had every reason to rely on the addendum and to believe Russo would comply with it. Sunrise had no reason to believe Russo would subsequently take the opposite position, or that Russo would contend the addendum suggested and drafted by his own counsel was null and void.

c. Relief should have been granted under NRCP 60(b)(2).

This subpart of Rule 60(b) deals with newly discovered evidence. There was certainly newly discovered evidence that came to light or came into existence after the judgment. This evidence consisted of the fact that the prove-up exhibits (which were not part of the public record and which were kept in the inaccessible "vault") did not contain substantial evidence to support the judgment, and the fact that Russo secretly intended to abandon the mandatory addendum provision and to assert employee status of Duslak and Sesman.

d. Relief should have been granted under NRCP 60(b)(3).

This subpart of Rule 60(b) affords relief when there has been fraud, misrepresentation, or misconduct by the opposing party. Here, there may not have been fraud or misrepresentations in the traditional sense of a blatant lie told by someone who knew the statement was false. But there was certainly a misrepresentation of Russo's intent to comply with his agreement regarding the independent contractors addendum drafted by his counsel. Indeed, the fact that Russo waited more than six months to disclose his true intent (after the time limit for relief under Rule 60(b)(1), (2) and (3) had expired), supports a strong inference or presumption that this was his intent all along. Further, from Sunrise's standpoint, Russo's orchestration of the addendum scenario, coupled with his delay in disclosing his intent to renege on the addendum agreement, can also be characterized as misconduct of an opposing party.

e. Relief should have been granted under NRCP 60(b)(4).

This subpart applies where a judgment is void. Here, the district court declined to declare its own judgment void. But the judgment was based entirely upon a prove-up hearing that clearly failed to comply with mandatory requirements of *Foster*; and the judgment contained no findings, conclusions, or explanations justifying the staggering $25 million award. The word "void" means something that is not valid or legally binding. *Black's Law Dictionary* (online version, 2021). A

void judgment is one that has no legal force or effect. *Id.* The highly unusual circumstances of this case—coupled with the need to protect the integrity of Nevada's judiciary—compel a determination that the judgment is void.

f. Relief should have been granted under NRCP 60(b)(6).[11]

This subpart calls for relief from a judgment for "any other reason that justifies relief." It is a relatively new provision in Rule 60(b). It is modeled after a similar federal rule. The U.S. Supreme Court explained that the similar rule "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949). It is a broad catchall provision that acts as a "grand reservoir of equitable power to do justice in a particular case." *Kile v. United States*, 915 F.3d 682, 687 (10th Cir. 2019).

In this case, sound principles of justice, fairness, and equity call for relief from the judgment under this broad catchall provision. The facts in this case are highly unusual and extreme—with a $25 million default judgment resulting from an improper prove-up hearing—all stemming from a settlement agreement addendum that set the stage for the subsequent events. The judgment should have been set aside under this subpart of the rule.

[11] NRCP 60(b)(5), which deals with a judgment that has been satisfied, is not applicable.

g. The motion could have been treated as an independent action to relieve Sunrise from the impact of the judgment.

Finally, Rule 60(d)(1) allows a party to file an independent action for relief from a judgment, notwithstanding the time limit in subpart (c)(1). Although Sunrise's motion for relief was not titled as a motion for independent relief, the motion clearly requested the functional equivalent of such relief. This court looks at what a paper does, not what it is called. *See AA Primo Builders v. Washington*, 126 Nev. 578, 585, 245 P.3d 1190, 1195 (2010) (a motion for reconsideration can be considered a tolling motion to alter or amend); *cf. Valley Bank of Nevada* at 445 ("This court determines the finality of an order or judgment by looking to what the order or judgment actually does, not what it is called."). The district court could have—and should have—considered Sunrise's motion to be an independent action seeking relief from the judgment.

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CONCLUSION

For the reasons established in this brief, the district court committed reversible error that cannot stand. This court should reverse and vacate the order striking the "independent contractor" clause from the addendum, and this court should reverse the default judgment and remand for further proceedings that comply with *Foster*—proceedings in which defense counsel is given a fair opportunity to participate.

Dated: June 8, 2022

/s/ Robert L. Eisenberg

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CERTIFICATE OF COMPLIANCE

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 Times New Roman in 14-point font size.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief otherwise exempted by Rule 32, and beginning with the Statement of the Case, the brief contains 13,984 words.

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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume numbers, 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: June 8, 2022

/s/ Robert L. Eisenberg
ROBERT L. EISENBERG

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of LEMONS, GRUNDY & EISENBERG, and on this date the foregoing Appellant's Opening Brief and Appendix Volumes 1-17 were electronically filed with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

David Sampson
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DATED: June 8, 2022

/s/ Margie Nevin
Margie Nevin