IN THE SUPREME COURT OF THE STATE OF NEVADA

TON VINH LEE, AN INDIVIDUAL,
Appellant/Cross-Respondent,

vs.

INGRID PATIN, AN INDIVIDUAL,
Respondent/Cross-Appellant,

and

PATIN LAW GROUP, PLLC, A NEVADA PROFESSIONAL, PLLC,
Respondent.

No. 83213

RESPONDENTS'/CROSS-APPELLANTS' PETITION FOR REHEARING

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INTRODUCTION

Justice Ginsberg sagely noted, "[C]ourts are essentially passive instruments of government. They do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties." *United States v. Sineneng-Smith*, 590 U.S. ___, ___, 140 S. Ct. 1575, 1579 (2020) (alterations in original) (internal citation and internal quotations omitted). This counsel is sound, as "the crucible of adversarial testing is crucial to sound judicial [decision-making]," yielding insights and revealing pitfalls that courts cannot muster on their own. *Sessions v. Dimaya*, 584 U.S. ___, ___, 138 S. Ct. 1204, 1233-34 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). Despite relying upon *Sineneng-Smith*, this panel did not heed Justice Ginsberg's counsel and engaged in the same practices that the Court held warranted reversal. Specifically, this panel directed the parties to address whether respondents/cross-appellants Ingrid Patin's and Patin Law Group, PLLC's (collectively "Patin") offers of judgment were ambiguous, even though appellant/cross-respondent Ton Vinh Lee, D.D.S. never raised that issue in the district court or on appeal. The

panel then concluded that Patin's offers were ambiguous and reversed on that issue, despite Dr. Lee's own admissions that he interpreted Patin's offers consistent with their second paragraph. Given that this panel overlooked Dr. Lee's admissions regarding his interpretation of Patin's offers of judgment, given that this panel overlooked or misapplied jurisprudence entertaining plain error sua sponte, and given that this panel misapplied the offer of judgment authority it adopted sua sponte, Patin urges this panel to rehear the instant matter and address the arguments that the parties raised in their briefs.

MATERIAL FACTS

Patin served two offers upon Dr. Lee, stating in relevant part:

> Pursuant to Rule 68 of the N.R.C.P., Defendant, [PATIN], hereby offers to allow judgment to be taken in her favor, only, and against Plaintiff, TON VINH LEE, in the above-entitled matter in the total amount of ONE THOUSAND AND NO/100THS DOLLARS ($1,000.00), inclusive of all accrued interest, costs, and attorney fees, and any other sums that could be claimed by Defendant, [PATIN], against Plaintiff, TON VINH LEE, in the above-captioned action.
>
> Pursuant to Rule 68 of the N.R.C.P., the offer shall be open for a period of ten (10) days from the date of service of this Offer. In the event this Offer of Judgment is accepted by Plaintiff, TON VINH LEE, Defendant, [PATIN], will elect to

> pay the amount offered here within a reasonable time and obtain a dismissal of the claim as provided by N.R.C.P. 68(d), rather than to allow judgment to be entered against Defendant, [PATIN].

2 AA 289-90, 292-93.

The record before this panel clearly demonstrates that Dr. Lee understood these offers, interpreting them consistent with their second paragraphs until this panel's intervention. In opposing Patin's motions for attorney fees and costs, Dr. Lee described Patin's offers as being in the amount of $1,000 each. *See* 9 AA 1295, 1301-03, 1310, 1314-16. Indeed, Dr. Lee criticized Patin's offers' amounts for want of "genuine consideration of [his] damages." *Id.* at 1303, 1316. In his supplemental oppositions, Dr. Lee twice declared under oath that Patin served offers of judgment in the amount of $1,000, inclusive of sums that Patin could claim against him. *Id.* at 1347, 1358. He then averred that Patin's offers of judgment were insufficient to cover the attorney fees he had spent on the matter. *See id.* at 1349-50, 1360-61.

At the hearing on the motions, Dr. Lee contended that Patin's offers of judgment were invalid because subtracting Patin's offers from his attorney fees would result in a negative amount. *See id.* at 1466-67. Dr. Lee rhetorically asked the district court, "Why in the world would [I]

accept [a] $1,000 offer of judgment when [my] damages – we were looking potentially in the $1 million range at that point in time. Why in the world would [I] accept an offer of judgment for $1,000?" *Id*. at 1468. Consistent with the second paragraph of Patin's offers, *see* 2 AA 289-90, 292-93, Dr. Lee later stated that "[Patin] offered to have judgment taken against [her] in favor of [him]," 9 AA 1475. Dr. Lee again averred that Patin's offers were "invalid because [his] attorney's [sic] fees were well in excess of $1,000." *Id*. at 1476.

In moving for reconsideration of the district court's order granting Patin's motions for attorney fees and costs in part, Dr. Lee again described Patin's offers as being in the amount of $1,000 each. *Id*. at 1396. Dr. Lee again averred that Patin's offers were invalid because her 2 offers of $1,000 were less than his accrued attorney fees. *See id*. at 1401. He explicitly stated, "if [he] had accepted [Patin's] offers of judgment, [he] would have received $1,000 for [sic] each Defendant." *Id*. at 1402.

At the hearing on the motion, Dr. Lee again averred that Patin's offers of judgment were invalid because the amount she offered was less than the attorney fees he had incurred. *See id*. at 1483-84. In

response, Patin argued that her offers provided that she would "give [Dr. Lee] a thousand dollars." *Id*. at 1485. Dr. Lee did not contest Patin's framing of the offers, but rather averred that "his attorney's [sic] fees and costs [were] above each one of the offers." *Id*. at 1487-88.

In his opening brief on appeal, Dr. Lee again described Patin's offers as being in the amount of $1,000 each. *See* AOB 4-5, 11. Dr. Lee again averred that Patin's offers were invalid because her $1,000 offers were less than the attorney fees that he had incurred. *Id*. at 14. He explicitly stated that "[i]f [he] had accepted [Patin's] offers of judgment, [he] would have received $1,000 from each Respondent." *Id*. at 15.

In his reply brief on appeal and answering brief on cross-appeal, Dr. Lee again described Patin's offers as being in the amount of $1,000 each. *See* ARB 6. He explicitly stated that, "[b]ased on the status of the case at the time of [Patin's] offers of judgment, the idea that [he] would accept $1,000.00 from each Respondent as settlement of his legitimate claims is unreasonable." *Id*. He again described Patin's offers as being in the amount of $1,000 each. *Id*. at 9. He then contended that he received a more favorable judgment because his attorney fees were greater than Patin's offers. *See id*. at 9-10.

Accordingly, Dr. Lee never averred that any part of Patin's offers were ambiguous in the district or in his briefs before this panel. *See* 9 AA 1292-305, 1307-18, 1345-50, 1356-61, 1393-402, 1460-78, 1480-92; AOB 1-23; ARB 1-11.

This panel ordered oral argument, directing the parties to address whether the offers were ambiguous sua sponte. *See Lee v. Patin*, No. 83213 (Nev. Nov. 30, 2022). During oral argument, Dr. Lee for the first time averred that Patin's offers were ambiguous. *See* Oral Argument at 2:55, *Lee v. Patin*, No. 83213, 2023 Nev. Unpub. LEXIS 156 (Nev. Dec. 12, 2022), https://nvcourts.gov/supreme/arguments/recordings/lee_vs._patin. Dr. Lee later misrepresented the record, claiming that ambiguity permeated the moving papers in the district court and the briefing before this court. *Compare id*. at 4:53, 8:18, 12:10, *with* 9 AA 1292-305, 1307-18, 1345-50, 1356-61, 1460-78, 1393-402, 1480-92; AOB 1-23; *and* ARB 1-11. Despite taking the position that Patin's offers would allow the district court to enter judgment against her in the hearing on Patin's motion for attorney fees and costs in the district court, *see* 9 AA 1475, Dr. Lee took the opposite position during oral argument before this court, averring that

he understood Patin's offers would allow the district court to enter judgment against him, *see* Oral Argument at 6:57, 9:38, *Lee*, 2023 Nev. Unpub. LEXIS 156. Dr. Lee repeatedly admitted that he understood that Patin would pay him $2,000 to resolve the matter. *See id.* at 9:20, 9:43, 10:48, 12:20, 31:53, 32:10.

Despite Dr. Lee's repeated admissions that he understood Patin's offers, consistent with their second paragraph, to mean that she would pay him $2,000, *see* 2 AA 289-90, 292-93; 9 AA 1402, 1468; AOB 15; ARB 6; Oral Argument at 9:20, 9:43, 10:48, 12:20, 31:53, 32:10, *Lee,* 2023 Nev. Unpub. LEXIS 156, and despite his admission that he understood Patin's offers, consistent with their second paragraph, to mean that Patin offered to have the district court enter judgment against her in exchange for $2,000, *see* 2 AA 289-90, 292-93; 9 AA 1475, this panel concluded that it was "difficult to assess [Dr.] Lee's understanding at the time [Patin] made the offer[s]" and concluded that Patin's offers were invalid due to their ambiguity sua sponte, *see Lee v. Patin*, No. 83213, 2023 Nev. Unpub. LEXIS 156 at *6-8 (Nev. Mar. 9, 2023).

ARGUMENT

I. *Legal standard*

This panel may rehear a matter where it "overlooked or misapprehended a material fact . . . or a material question of law" or where it "overlooked, misapplied[,] or failed to consider a . . . decision directly controlling a dispositive issue." NRAP 40(c)(2). When arguing that the panel overlooked, misapplied, or failed to consider controlling authority, the petition ordinarily must cite to the pages in his or her briefs where he or she presented the authority. *See* NRAP 40(a)(2). Given that this panel raised legal questions that the Dr. Lee did not advance in the district court or before this court sua sponte, and given that this panel and adopted caselaw that Dr. Lee did not proffer in the district court or before this court sua sponte, Patin urges this panel to consider her arguments regarding the same, as this petition is her first opportunity for this panel to hear her contentions. *See Geary v. State*, 112 Nev. 1434, 1438, 930 P.2d 719, 722 (1996) (ordering additional briefing on issues that this court addressed sua sponte following a petition for rehearing).

II. *This panel overlooked Dr. Lee's admissions regarding his understanding of Patin's offers of judgment*

In finding that it could not determine his understanding of Patin's offers of judgment, this panel overlooked Dr. Lee's repeated acknowledgements that he interpreted Patin's offers' second paragraphs as controlling, which are judicial admissions that bind him.

A judicial admission is a "deliberate, clear, unequivocal statement" that a party makes "about a concrete fact" within his or her knowledge. *Reyburn Lawn & Landscape Designer, Inc. v. Plaster Dev. Co.*, 127 Nev. 331, 343, 255 P.3d 268, 276 (2011) (internal quotations omitted). While the Supreme Court of Nevada ordinarily will not deem trial testimony to be a judicial admission, *see id*. at 343-44, 255 P.3d at 276-77, it routinely deems the positions that a party takes in his or her moving papers as judicial admission, *see Elk Point Country Club Homeowners' Ass'n v. K.J. Brown, LLC*, 138 Nev., Adv. Op. 60, 515 P.3d 837, 841-842 (2022) (deeming the respondent's factual assertion in its complaint a judicial admission); *Smith v. Zilverberg*, 137 Nev., Adv. Op. 7, 481 P.3d 1222, 1229 n.6 (2021) (same); *River Glider Ave. Tr. v. Bank of N.Y. Mellon*, No. 79808, 2020 Nev. Unpub. LEXIS 899 at *1-2 (Nev. Sept. 18, 2020) (deeming the respondent's factual assertion in its motion a

judicial admission); *Greenland Super Mkt., Inc. v. KL Vegas, LLC*, No. 73806, No. 74931, 2019 Nev. Unpub. LEXIS 1271 at *5-6 (Nev. Nov. 21, 2019) (deeming the appellant's factual admission a judicial admission). Other jurisdictions and treatises further recognize that a party's factual admissions in open court may constitute a judicial admission. *See Rhone v. Bolden*, 608 S.E.2d 22, 28 (Ga. Ct. App. 2004) (deeming appellants' hearing statements a judicial admission); 29A Am. Jur. 2d *Evidence* §§ 767-768 (2023) (defining a judicial admission as "a voluntary concession of fact by a party or a party's attorney during judicial proceedings," including "[a]n admission in open court," which that party "may not controvert . . . on trial or on appeal").

Here, Dr. Lee repeatedly admitted in his briefs and in open court that he construed Patin's offers of judgment, consistent with their second paragraph, *see* 2 AA 289-90, 292-93, to mean that Patin offered to pay him $2,000, *see* 9 AA 1402, 1468; AOB 15; ARB 6; Oral Argument at 9:20, 9:43, 10:48, 12:20, 31:53, 32:10, *Lee,* 2023 Nev. Unpub. LEXIS 156, and that the district court would enter judgment against Patin, *see* 9 AA 1475. Indeed, Dr. Lee deliberately made these admissions to persuade the district court that the *Beattie v. Thomas*, 99 Nev. 579, 587-

89, 668 P.2d 268, 273-74 (1983), factors weighed against an award of attorney fees and costs, *see* 9 AA 1295, 1301-03, 1310, 1314-16, 1347, 3149-50, 1358, 1360-61, 1396, 1401-02, 1466-68, 1475-1476, 1483-84, 1487-88. Though not at issue in the district court or in the briefs before this panel, Dr. Lee's understanding of Patin's offers was a factual matter that was within his knowledge. *See Smith*, 137 Nev., Adv. Op. 7, 481 P.3d at 1229 n.6. Accordingly, the judicial admission doctrine attaches to these admissions, as Dr. Lee made them in his briefs and in open court. *See id.*; *River Glider Ave. Tr.*, 2020 Nev. Unpub. LEXIS 899 at *1-2; *Greenland Super Mkt.*, 2019 Nev. Unpub. LEXIS 1271 at *5-6.

Given that Dr. Lee repeatedly admitted that he understood that the second paragraph of Patin's offers controlled, the record before this panel belies its finding that it could not assess Dr. Lee's understanding of Patin's offers. Alternatively, given that Dr. Lee made such admissions in his briefs and in open court, and given that he deliberately made such admissions to persuade the district court to deny Patin's motions for attorney fees and costs, the judicial admission doctrine precludes Dr. Lee from taking the opposite position for the first time during oral argument. Thus, this panel overlooked material facts

regarding Dr. Lee's understanding of Patin's offers and failed to consider Nevada's judicial admission caselaw. Accordingly, Patin urges this panel to grant her petition for rehearing, accepting the second paragraph of Patin's offers as controlling and reviewing the district court's *Beattie* analysis for an abuse of discretion.

III. *This court overlooked or misapplied jurisprudence regarding addressing plain error sua sponte*

Appellate courts generally decline consideration of issues that the parties did not address, and only depart from this rule in "very limited circumstances," typically in situations regarding subject matter jurisdiction, issues of judicial administration seriously affecting the fairness or integrity of proceedings, issues of great public concern, purely legal questions, the right to maintain an action, or standing. *See* 5 Am. Jur. 2d *Appellate Review* § 575 (2023). This appellate rule aligns with the party presentation rule, a pillar of the adversarial system in which courts act as neutral arbiters that only decide the matters that the parties frame and present. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008).

Nevada courts follow this long-standing practice, recognizing the importance of the party presentation principle, *see Iliescu v. Reg'l*

Transp. Comm'n of Washoe Cnty., 138 Nev., Adv. Op. 72, 522 P.3d 453, 461 n.12 (Ct. App. 2022), and ordinarily decline to reach issues sua sponte, *see Glover-Armont v. Cargile*, 134 Nev. 361, 365 n.1, 426 P.3d 45, 50 n.1 (Ct. App. 2018); *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

Indeed, Nevada jurisprudence demonstrates that Nevada courts will only reach issues that the parties did not present in a civil matter where the district court failed to apply or misread a controlling statute, *see In re J.D.N.*, 128 Nev. 462, 469-71, 283 P.3d 842, 846-48 (2012) (addressing the admissibility of a juvenile division file in a parental rights termination matter); *Frantz v. Johnson*, 116 Nev. 455, 464-66, 999 P.2d 351, 357-58 (2000) (addressing the district court's failure to apply NRS 600A.090 in a trade secrets matter); *Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986) (addressing the district court's failure to apply NRS 104.3408 to a note enforcement action), failed to apply controlling caselaw, *see Fox v. Warren*, No. 80668, No. 81212, 2021 Nev. Unpub. LEXIS 658 at *2 (Nev. Sept. 15, 2021)

(addressing the district court's failure to apply *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990), before ordering case-terminating sanctions), failed to apply fundamental legal principals, *see W. Indus., Inc. v. Gen. Ins. Co.*, 91 Nev. 222, 229-30, 533 P.2d 473, 478 (1975) (addressing the district court's erroneous judgment allowing the respondents to receive damages for the value of their stock and to keep the stock, resulting in a double recovery), or otherwise made a conclusion that the record did not support, *see Crow-Spieker #23 v. Robert L. Helms Constr. & Dev. Co.*, 103 Nev. 1, 3, 731 P.2d 348, 350 (1987) (addressing the district court's erroneous conclusion that the respondent breached a contract where the plain language of the contract and the record demonstrated that no breach occurred and the appellant received substantial damages).

When the Supreme Court of Nevada court reversed on an issue that it raised sua sponte, serious prejudice existed involving the plaintiff's ability to maintain the action, *see Fox*, 2021 Nev. Unpub. LEXIS 658 at *2, the plaintiff's ability to justly recover damages, *Bradley*, 102 Nev. at 105, 716 P.2d at 228; *W. Indus., Inc.*, 91 Nev. at 229-30, 533 P.2d at 478, or the defendant's ability to be free from judgments that the

record did not support, *Crow-Spieker #23*, 103 Nev. at 3, 731 P.2d at 350.

Here, the district court applied the controlling statutes and caselaw in awarding Patin's request for attorney fees and costs, as it applied NRCP 68(f)-(g) (1998), 9 AA 1374-75, weighed the *Beattie* factors, 9 AA 1372-75, and weighed the *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349-50, 455 P.2d 31, 33-34 (1969), factors, 9 AA 1375-81. Thus, this panel's sua sponte resolution is inconsistent with *Fox*, *Frantz*, and *Bradley*. Moreover, the district court's application of the same was consistent with Patin's offers' second paragraph, 9 AA 1371, 1374-75 (construing Patin's offers as Patin offering to pay Dr. Lee $2,000 and "offering [Dr. Lee] an early opportunity to take judgment against [Patin]"), which Dr. Lee admitted controlled, *see* 9 AA 1402, 1468, 1475. Thus, the district court's award of attorney fees and costs did not prejudice Dr. Lee, as it was consistent with his admitted understanding of Patin's offers, rendering this panel's sua sponte resolution inconsistent with *Western Industries* and *Crow-Spieker #23*.

Alternatively, this panel relied upon *Sineneng-Smith*, 590 U.S. at ___, 140 S. Ct. at 1579, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 41 n.2 (2015) (Thomas, J., concurring in the judgment in part and

dissenting in part), and *Certain Underwriters at Lloyd's of London v. KG Administrative Services, Inc.*, 855 F. App'x 260, 268 n.7 (6th Cir. 2021), to justify its sua sponte action. *See Lee*, 2023 Nev. Unpub. LEXIS at *6-7.

In *Sineneng-Smith*, the Court began by noting that departures from the party presentation principle ordinarily occur in defense of a pro se litigant's rights. 590 U.S. at ___, 140 S. Ct. at 1579. In explaining that the principle is supple and allows for "a modest initiating role," the Court cited *Day v. McDonough*, 547 U.S. 198, 202 (2006) (holding that the district court could dismiss an untimely habeas petition sua sponte where the state had miscalculated the tolling time). 590 U.S. at ___, 140 S. Ct. at 1579. The Court then contrasted *Day* with the matter before it, where the appellate court declined to decide the appeal on the parties' presentations, the appellate court ordered further briefing from amici on issues that the parties did not present, Sineneng-Smith rode with an argument [that the appellate court] suggested" and allowed "her own arguments . . . [to fall] by the wayside," and the appellate court resolved the appeal on issues that the parties did not present. *See id.* at ___, 140 S. Ct. at 1580-81. The Court ultimately held

that the appellate court's "takeover of the appeal" had "radical[ly] transform[ed]" the case "well beyond the pale," warranting reversal. *See id*. at ___, 140 S. Ct. at 1581-82.

Like the appellate court in *Sineneng-Smith*, this panel took over the instant appeal. This panel disregarded Dr. Lee's repeated admissions that he understood Patin's offers consistent with their second paragraph. *See* 9 AA 1402, 1468, 1475; AOB 15; ARB 6; Oral Argument at 9:20, 9:43, 10:48, 12:20, 31:53, 32:10, *Lee,* 2023 Nev. Unpub. LEXIS 156. This panel also disregarded the parties' proffered arguments. *See* AOB 1-23; RAB 1-36; ARB 1-11; RRB 1-13. Instead, this panel ordered oral argument on an issue that it raised sua sponte. *See Lee v. Patin*, No. 83213 (Nev. Nov. 30, 2022). This panel's interjection led Dr. Lee to adopt the argument that it suggested while his own arguments fell by the wayside. *See* Oral Argument at 5:03-9:20, *Lee*, 2023 Nev. Unpub. LEXIS 156. Finally, this panel resolved the instant appeal on grounds that it raised sua sponte. *See Lee*, 2023 Nev. Unpub. LEXIS 156 at *1-8. This is a far cry from the modest role the Court approved of in *Day*, which warrants rehearing.

In *Zivotofsky*, the Court deemed that the appellant waived the

argument that his consular report of birth abroad list Jerusalem, Israel as his place of birth. 576 U.S. at 9. Justice Thomas's dissent is contrary to the majority, *see id.* at 41 n.2, rendering it dicta and of no force, *Sellai v. Lemmon*, 62 Nev. 330, 337, 151 P.2d 95, 98 (1944). Regardless, the case that Justice Thomas relied upon for that proposition is inapposite, as it concerned subject matter jurisdiction, *see Equal Emp. Opportunity Comm'n v. Fed. Lab. Rel. Auth.*, 476 U.S. 19, 23-24 (1986), which parties cannot waive, *see Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011). Thus, this panel misapplied *Zivotofsky* and the caselaw Justice Thomas's dissent relied upon, which warrants rehearing.

In *KG Administrative Services*, the parties disputed the proper construction of the term "claim" in an insurance contract. 855 F. App'x at 268. However, both parties failed to proffer reasonable constructions of that specific term, *see id.* at 268 n.7, and the court merely applied the plain and unambiguous definition that the insurance contract provided, *see id.* at 268. Here, Dr. Lee and Patin only disputed whether Patin's offers' were inclusive of Dr. Lee's attorney fees, costs, and interest in the district court and in their briefing before this panel, *see* 9 AA 1349-50, 1360-61, 1400-02, 1422-25, 1460, 1463, 1466-67, 1475-76, 1483-85;

AOB 4-6, 10-16; RAB 25-28; ARB 6, 9-10, as Dr. Lee repeatedly admitted that Patin's offers' second paragraph controlled, *see* 9 AA 1402, 1468, 1475; AOB 15; ARB 6; Oral Argument at 9:20, 9:43, 10:48, 12:20, 31:53, 32:10, *Lee,* 2023 Nev. Unpub. LEXIS 156. Thus, this panel misapplied *KG Administrative Services*, which warrants rehearing.

IV. *This court misapprehended the offer of judgment authority that it adopted sua sponte*

In declaring Patin's offers invalid, this panel applied *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 419, 132 P.2d 1022, 1028 (2006), and *Stockton Kenworth, Inc. v. Mentzer Detroit Diesel, Inc.*, 101 Nev. 400, 404, 705 P.2d 145, 148 (1985), sua sponte, and adopted *Allen v. City of Grovetown*, 681 F. App'x 841, 845 (11th Cir. 2017), *Arkla Energy Resources v. Roye Realty & Developing, Inc.*, 9 F.3d 855, 867 (10th Cir. 1993), and 12 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3002 (3d ed. 2022), sua sponte. *See Lee,* 2023 Nev. Unpub. LEXIS 156 at *4-5.

Fed. R. Civ. P. 68(a) only permits a party defending a claim to allow judgment against himself or herself. *See Marek v. Chesney*, 473 U.S. 1, 5 (1985). Thus, the federal authority that this panel relied upon does not, nor could it, squarely address the ambiguity that this panel

raised sua sponte. *See Allen*, 681 F. App'x at 844-45 (reviewing whether an offer of judgment was inclusive of attorney fees); *Arkla Energy Res.*, 9 F.3d at 866-67 (concluding an offer of judgment was invalid where the offeror "offered to allow judgment against itself for 100,000 Mcf of gas," which had an uncertain value). Furthermore, this panel's reliance upon *Allen* for the proposition that courts do not consider extrinsic evidence where the offeree rejects the offer of judgment is strange considering that the plaintiffs in *Allen* accepted the offer of judgment.[1] *Compare Lee*, 2023 Nev. Unpub. LEXIS 156 at *5, *with Allen*, 681 F. App'x at 843. Regardless, *Federal Practice & Procedure* § 3002 n.31 expressly provides caselaw where courts considered extrinsic evidence to resolve ambiguity in an offer of judgment that the offeree rejected, *see Dowd v. City of L.A.*, 28 F. Supp. 3d 1019, 1038-41 (C.D. Cal. 2014), and the Supreme Court of Nevada has considered extrinsic evidence to resolve ambiguity in an offer of judgment, *see Flesicher v. August*, 103 Nev. 242, 246, 737 P.2d 518, 521 (1987).

[1]The offeree in *Utility Automation 2000, Inc. v. Choctawhatchee Electric Cooperative, Inc.* also accepted the offeror's offer of judgment. *See* 298 F.3d 1238, 1240 (11th Cir. 2002).

Here, Dr. Lee clearly understood that Patin's offers' second paragraph controlled. *Compare* 2 AA 289-90, 292-93, *with* 9 AA 1402, 1468, 1457; AOB 15; ARB 6; Oral Argument at 9:20, 9:43, 10:48, 12:20, 31:53, 32:10, *Lee,* 2023 Nev. Unpub. LEXIS 156. Thus, the record before this panel clearly demonstrates that Dr. Lee understood exactly what Patin was offering and that he would not need to guess what the district court would do if he failed to beat the offers. Accordingly, this panel misapprehended *Allen* and *Arkla Energy Resources*, which warrants rehearing.

Turning to the Nevada caselaw that this court applied sua sponte, *Albios* did not concern the interpretation of ambiguity in an offer of judgment. *See* 122 Nev. at 417-26, 132 P.3d at 1027-33. *Stockton Kenworth* concerned an offer of judgment that placed a condition of the offeree transferring good title of a vehicle, which the Supreme Court of Nevada held was an impermissible condition precedent. 101 Nev. at 403-04, 705 P.2d at 148-49. Here, Patins' offers did not contain any conditions precedent and specified a definite sum. *See* 2 AA 2 AA 289-90, 292-93. Furthermore, Dr. Lee repeatedly admitted that he understood that Patin's offers' second paragraphs controlled. *Compare* 2 AA 289-90, 292-

93, *with* 9 AA 1402, 1468, 1475; AOB 15; ARB 6; Oral Argument at 9:20, 9:43, 10:48, 12:20, 31:53, 32:10, *Lee,* 2023 Nev. Unpub. LEXIS 156. Thus, this panel misapprehended *Albios* and *Stockton Kenworth*, which warrants rehearing.

CONCLUSION

The record before this panel clearly demonstrates that "'a meeting of the minds'" occurred between Dr. Lee and Patin, as both parties understood that Patin's offers' second paragraph controlled, which renders the offers valid. *See Flesicher*, 103 Nev. at 246 (quoting *Boorstein v. City of New York*, 107 F.R.D. 31, 34 (S.D.N.Y. 1985)). In advancing its construction of Patins' offers, "despite the parties' actual knowledge of the other's intent," this panel allowed Dr. Lee to decline a reasonable settlement and "assert a 'Gotcha!' defense" to NRCP 68's penalty provisions with the benefit of hindsight. *Prince v. Invensure Ins. Brokers, Inc.*, 232 Cal. Rptr. 3d 887, 894 (Ct. App. 2018). This clearly frustrates NRCP 68's policy of encouraging settlement and saving the judiciary's, the parties', and the taxpayer's money by punishing an offeree that rejects a reasonable offer. *See Albios*, 122 Nev. at 419, 132 P.3d at 1029. Given that this panel overlooked Dr. Lee's admissions regarding

his interpretation of Patin's offers of judgment, given that this panel overlooked or misapplied jurisprudence entertaining plain error sua sponte, and given that this panel misapplied the offer of judgment authority it adopted sua sponte, Patin urges this panel to rehear the instant matter and address the arguments that the parties raised in their briefs.

Dated this 7th day of April 2023.

CLAGGETT & SYKES LAW FIRM

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition 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 it is prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

I further certify that this petition complies with the page- or type- volume limitations of NRAP 40 or 40A because it is either:

☒ Proportionally spaced, has a typeface of 14 points or more, and contains 4,656 words; or

☐ Does not exceed _____ pages.

Dated this 7th day of April 2023.

CLAGGETT & SYKES LAW FIRM

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *RESPONDENTS'/CROSS-APPELLANTS' PETITION FOR REHEARING* with the Supreme Court of Nevada on the 7th day of April 2023. I shall make electronic service of the foregoing document in accordance with the Master Service List as follows:

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