

RESNICK & LOUIS, P.C.

PRESCOTT T. JONES

Nevada Bar No. 11617

pjones@rlattorneys.com

DYLAN E. HOUSTON

Nevada Bar No. 13697

dhouston@rlattorneys.com

8925 W. Russell Road, Suite 220

Las Vegas, Nevada 89148

Telephone: (702) 997-3800

Facsimile: (702) 997-3800

Attorneys for Appellant

Ton Vinh Lee

Electronically Filed
May 23 2023 08:44 AM
Elizabeth A. Brown
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

TON VINH LEE,

Appellant,

v.

INGRID PATIN, an individual, and
PATIN LAW GROUP, PLLC, a Nevada
Professional LLC,

Respondents.

Supreme Court No. 83213

District Court Case No.: A-15-
723134-C

APPELLANT'S ANSWER TO RESPONDENTS'
MOTION FOR REHEARING

RESNICK & LOUIS, P.C.

PRESCOTT T. JONES

Nevada Bar No. 11617

DYLAN E. HOUSTON

Nevada Bar No. 13697

8925 W. Russell Road, Suite 220

Las Vegas, NV 89148

Attorneys for Appellant Ton Vinh Lee

I. INTRODUCTION

Despite Respondents best efforts to obfuscate the issues presently before this Court, they cannot escape the fact that this Court found that the offers of judgment served by Respondents were ambiguous and therefore “invalid as a matter of law.” See Order of Reversal filed March 9, 2023, p.7. Respondents claim that alleged judicial admissions made Appellant would allow this Court on rehearing to find that the offers of judgment were valid.

However, the Parties conduct, and alleged understandings of the offers of judgment shown through extrinsic evidence cannot overcome a finding that the offers were invalid as a matter of law. *Edwards Indus., Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 035, 923 P.2d 569, 575 (1996). The same would be true if the Parties had agreed to an illegal contract or attempted to litigate this matter in a court that lacked subject matter jurisdiction. In these scenarios, this Court could also find sua sponte that a contract did not exist, or that the case lacked subject matter jurisdiction regardless of whether either party made this argument on appeal.

The Parties alleged understanding of the offers of judgment cannot provide a basis for an award of attorneys’ fees if the offers are inherently ambiguous and fail to trigger the penalty provisions of NRCP 68 for this reason. Respondents’ Petition for Rehearing should be denied as the basis for this Court’s

Order of Reversal is did not overlook or misapprehend any material fact in the record, or a material question of law in the case.

Instead, precisely the opposite situation arose. This Court found sua sponte that a material question of law was **not** raised by the Parties. Thus, it ruled on this material question of law when conducting a de novo review of the appellate record. As such, Respondents' petition fails to meet the requirements for this Court to grant rehearing.

II. LEGAL ARGUMENT

A. STANDARD OF REVIEW

NRAP 40(c)(2) states that this Court may consider rehearings “[w]hen the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or ... failed to consider a statute procedural rule, regulation or decision directly controlling a dispositive issue in the case.” NRAP 40(c)(2). In *Gordon v. District Court*, 114 Nev. 744, 745, 961 P.2d 142, 143 (1998), this Court discussed the proper purpose for petitions for rehearing: “[u]nder our long established practice, rehearings are not granted to review matters that are of no practical consequence. Rather, a petition for rehearing will be entertained only when the court has overlooked or misapprehended some material matter, or when otherwise necessary to promote substantial justice.” (quoting *In re Herrmann*, 100 Nev. 149, 151, 679 P.2d 246, 247 (1984)).

Respondents' petition is materially defective since it has failed to demonstrate that either of these scenarios are present in this matter. Further, rehearing is not necessary to promote substantial justice since this Court correctly found that Respondents' offers of judgment were inherently ambiguous, and therefore invalid as a matter of law.

B. Appellants Alleged Judicial Admissions Cannot Provide a Basis for Attorneys' Fees When the Offers of Judgment Were Invalid as a Matter of Law

When conducting a review of an award of attorneys' fees under NRCP 68, this Court must determine whether "the offers of judgment were valid." *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 81, 319, P.3d 606, 616 (2014). If the offers of judgment here were invalid as a matter of law, then they cannot provide a basis for an award of attorneys' fees. The determination of whether an offer of judgment complied with NRCP 68 is a question of law that this Court reviews de novo. *In re Estate of Miller*, 125 Nev. 550, 552-53, 216 P.3d 239, 241 (2009).

The judicial admission doctrine advanced by Respondents is inapposite to the issue before the court, which is whether the offers of judgment were valid as a matter of law. Respondents correctly identify that a judicial admission is a "deliberate, clear, unequivocal statement" made by a party about a concrete fact" within his or her knowledge. *Reyburn Lawn & Landscape Designer, Inc. v. Plater Dev. Co.*, 1278 Nev. 331, 343, 255 P.3d 268, 276 (2011).

However, Respondents misapply this doctrine to this matter since the validity of the offers of judgment is not a question of fact.

Respondents' Petition cites five cases in addition to 29A Am Jur. 2d *Evidence* §§ 767-786 (2023) for the proposition that a "factual assertion" in a party's pleadings or moving papers constitutes a judicial admission. Respondents' Petition for Rehearing, p.9-10. However, there is no authority provided by Respondents for the proposition that a party can make a judicial admission as to whether an offer of judgment is valid. Respondents cannot provide such authority since the validity of an offer of judgment is a question of law. For this reason, an alleged judicial admission cannot be made as to whether an offer of judgment is valid.

If a judicial admission could serve as a basis for determining the validity of an offer of judgment, Respondents Petition would constitute a judicial admission that the offers of judgment are inherently ambiguous. Respondents urge the panel to accept "the second paragraph of Patin's offers as controlling," which amounts to a judicial admission that as written the offers of judgment are ambiguous and therefore invalid. Respondents' Petition for Rehearing, p.12.

An offer of judgment must be for a clear and definite amount. See *Stockton v. Kenworth v. Mentzer Detroit Diesel*, 101 Nev. 400, 404 705 P.2d, 145, 148 (1985). In order to prevent plain error, this Court addressed the validity of the

offers of judgment sua sponte since the offers of judgment are not clear and definite in amount due to contradictory language regarding which party would be paid if the offers were accepted. Respondents admit that the offers contain contradictory language, and this Court agreed.

Respondents have failed to demonstrate that rehearing is warranted since the material facts they claim were overlooked cannot provide a basis for a ruling that the offers of judgment were valid. Thus, Respondents petition should be denied.

C. This Court Did Not Overlook or Misapply Precedent Regarding Addressing Plain Error Sua Sponte

When awarding fees pursuant to NRCP 68, the District Court inherently makes a finding that an offer of judgment was valid, even if the District Court's order does not explicitly state this finding. In order to prevent plain error, this Court sua sponte raised the issue of whether Respondents offers of judgment were valid.

Respondents ask this Court to apply the second paragraph of the offers of judgment for an inescapable reason, because the offers of judgment were inherently ambiguous as to which party would be paying the judgment amount. The Parties arguments on appeal cannot waive the fact that the offers of judgment were invalid for this reason.

This Court properly applied *Zivotofsky ex. Re. Zivotofsky v. Kerry*, 576 U.S. 1 (2015), as the Parties here cannot waive the validity of the offers of judgment. The United States Supreme Court held in *Zivotofsky* that the failure of the Parties to invoke the correct interpretation of the law could not result in the court applying a correct interpretation thereof.

Further, the Court did not misapply the holding of *Certain Underwriters at Lloyd's of London v. KG Administrative Services, Inc.*, 855 F. App'x 260, 268 (6th Cir. 2021). Neither party in *KG administrative Services* offered a proper construction of the term “claim” in an insurance contract. Therefore, the Court raised the correct construction of this term sua sponte. Here, neither party contested the validity of the offers of judgment, and this Court found sua sponte that the offers of judgment were invalid. This question of law was properly raised such that Respondents could not affirm an order of attorneys' fees when the offers of judgment the award was based on was facially invalid.

Respondents' argument that this Court misapplied judicial precedent in raising the validity of the offers of judgment sua sponte is without merit. This Court correctly applied the case law cited in the Order of Reversal. Therefore, there is no basis for this Court to order rehearing, and Respondents' petition must be denied.

D. This Court Did Not Misapprehend Authority Pertaining to Offers of Judgment

Respondents cannot and do not dispute that as a threshold matter, this Court must determine if the offers of judgment supporting the District Court's award of attorneys' fees were valid. *Gunderson*, supra. This is the most critical authority cited in this Court's Order of Reversal, and it is not reasonably in dispute. This Court's opinion is based on the inherent ambiguity in the offers of judgment, which Respondents concede is present when claiming this Court should direct its focus to the second paragraph of the offers.

Respondents argue that this Court has "considered extrinsic evidence to resolve ambiguity in an offer of judgment." Respondents' Petition for Rehearing, p.20. However, when considering extrinsic evidence in *Flesicher v. August*, 103 Nev. 242, 246, 737 P.2d 518, 521 (1987), this Court was presented with a conversation between counsel that occurred *before the expiration of the offer* that clarified the ambiguity. *Flesicher* is distinguishable in this respect since the extrinsic evidence Respondents rely on are alleged judicial admissions made after the expiration of the offers of judgment under consideration here.

Respondents argue that "Patins' offers did not contain any conditions precedent and specified a definite sum." Respondents' Petition for Rehearing, p.21. Yet, precisely who would be paying that sum is ambiguous and the reasoning behind this Court's Order of Reversal.

III. CONCLUSION

Respondents' Petition should be denied since it failed to present a material fact or question of law that this Court overlooked or misapprehended. Further, Respondents do not argue that this Court failed to consider a statute procedural rule, regulation or decision directly controlling a dispositive issue in the case. As such, there is no basis for a rehearing, and Respondents petition must be denied.

DATED this 23rd day of May, 2023.

RESNICK & LOUIS, P.C.

/s/ Dylan E. Houston

PRESCOTT T. JONES
Nevada Bar No. 11617
DYLAN E. HOUSTON
Nevada Bar No. 13697
8925 W. Russell Road, Suite 220
Las Vegas, NV 89148
Attorneys for Appellant Ton Vinh Lee

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

2. I further certify that this opening brief complies with the page- or type-volume limitations of NRAP 40 because, it is proportionally spaced, has a typeface of 14 point or more, consists of no more than 10 pages or contains no more than 4,667 words.

DATED this 23rd day of May, 2023.

RESNICK & LOUIS, P.C.

/s/ Dylan E. Houston

PRESCOTT T. JONES
Nevada Bar No. 11617
DYLAN E. HOUSTON
Nevada Bar No. 13697
8925 W. Russell Road, Suite 220
Las Vegas, NV 89148
Attorneys for Appellant Ton Vinh Lee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing **APPELLANT'S ANSWER TO RESPONDENTS' PETITION FOR REHEARING** was served this 23rd day of May, 2023, by:

[X] BY ELECTRONIC SERVICE: by transmitting via the Court's electronic filing services the document(s) listed above to the Counsel set forth on the service list on this date as follows:

Christian M. Morris, Esq.
NETTLES MORRIS
1389 Galleria Dr., Suite 200
Henderson, NV 89014
Attorney for Defendant Ingrid Patin

Kerry J. Doyle, Esq.
DOYLE LAW GROUP
7375 S. Pecos Rd., #101
Las Vegas, NV 89120
Attorney for Defendant Patin Law Group, PLLC

/s/ Susan Carbone

An employee of RESNICK & LOUIS, P.C.