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

RESPONDENT'S/CROSS-APPELLANT'S AND RESPONDENT'S PETITION FOR EN BANC RECONSIDERATION

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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*, the panel did not heed this counsel, engaging in the same practices that the Court sharply rebuked. After briefing was complete, the panel ordered the parties to appear for oral argument regarding an issue that appellant/cross-respondent Ton Vinh Lee, D.D.S. never raised in the district court or in his appellate briefs. The panel ultimately used the issue that it sua

sponte raised to reverse the district court's award of attorney fees and costs under NRCP 68 (1998) in favor of respondent/cross-appellant Ingrid Patin and respondent Patin Law Group, PLLC (collectively "Patin").

In so doing, the panel abandoned its traditional role as a neutral arbiter and impermissibly acted as Dr. Lee's advocate. *See Hung v. Berhad*, 138 Nev., Adv. Op. 50, 513 P.3d 1285, 1288 (Ct. App. 2022). Without the benefit of adversarial scrutiny, the panel's order misstates the caselaw it relied upon, is contrary to the record, and created persuasive authority that this court cannot reconcile with Nevada jurisprudence. Accordingly, Patin urges this court to grant her petition for en banc reconsideration.

RELEVANT FACTS

Dr. Lee sued Patin for defamation, which the district court dismissed, and this court affirmed, *Lee v. Patin*, No. 82516, 2022 Nev. Unpub. LEXIS 647 (Nev. Sept. 12, 2022), with one justice dissenting, *id.* at *4-8 (Pickering, J., dissenting). During litigation, Patin served two offers of judgment 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 clearly demonstrates that Dr. Lee understood these offers, interpreting them consistent with their second paragraphs. 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. 9 AA 1295, 1301-03, 1310, 1314-16. He criticized Patin's offers' amounts for want of "genuine consideration of [his] damages." *Id.* at 1303, 1316. In his supplemental oppositions, he 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 accrued. *See id*. at 1349-50, 1360-61.

At a subsequent hearing, 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. *Id.* at 1466-67. He 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 Patin's offers' second paragraph, he later stated that "[Patin] offered to have judgment taken against [her] in favor of [him]." *Id*. at 1475. He again averred that Patin's offers were "invalid because [his attorney] fees were well in excess of $1,000." *Id*. at 1476.

The district court partially granted Patin's motion. *Id*. at 1369-84. In moving for reconsideration, Dr. Lee again described Patin's offers as being in the amount of $1,000 each. *Id*. at 1396. He again averred that Patin's offers were invalid because her 2 offers of $1,000 were less than his accrued attorney fees. *Id*. at 1401. He explicitly

stated, "if [he] had accepted [Patin's] offers of judgment, [he] would have received $1,000 for each Defendant." *Id*. at 1402.

At another subsequent hearing, 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. *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, but rather averred that "his [attorney] fees and costs [were] above each one of the offers." *Id*. at 1487-88. The district court denied Dr. Lee's motion to reconsider. *Id*. at 1495-96.

Dr. Lee appealed and Patin cross-appealed. In his opening brief, Dr. Lee again described Patin's offers as being in the amount of $1,000 each. AOB 4-5, 11. He 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. 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. *Id*. at 9-10.

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

The panel ordered oral argument, sua sponte directing the parties to address whether the offers were ambiguous. *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. 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. He later misrepresented the record, claiming that ambiguity permeated the moving papers in the district court and the briefing before the panel.

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

The panel reversed the district court's award of attorney fees, solely relying upon the issue that it sua sponte raised. Despite his repeated admissions that he understood her offers to mean that she would pay him $2,000 and that the district court enter would judgment against her, the panel concluded that it was "difficult to assess [Dr.] Lee's understanding at the time [Patin] made the offer[s]" and sua sponte concluded that Patin's offers were invalid due to their ambiguity. *Lee v. Patin*, No. 83213, 2023 Nev. Unpub. LEXIS 156 at *6-8 (Nev. Mar. 9, 2023). The panel acknowledged that it resolved the appeal on an issue that it sua sponte raised, but concluded that its intervention was

consistent with Nevada jurisprudence. *See id*. at *5-7. One justice dissented. *See id*. at *8-15 (Cadish, J., dissenting).

Patin petitioned for rehearing, arguing that the panel clearly overlooked or failed to consider Dr. Lee's numerous admissions demonstrating that he understood Patin's offers consistent with the district court's interpretation and that the panel misapplied the caselaw that it relied upon. *See* Pet. Reh'g. The panel denied the petition. *Lee v. Patin*, No. 83213 (Nev. May 30, 2023). One justice dissented. *Id*. (Cadish, J., dissenting).

ARGUMENT

I. *Legal standard*

This court may reconsider a panel's decision where the panel acted contrary to Nevada jurisprudence or the panel's decision "involves a substantial precedential . . . or public policy issue." NRAP 40A(a). Here, the panel's sua sponte action is inconsistent with waiver and sua-sponte-action jurisprudence, judicial-admission jurisprudence, and offer-of-judgment jurisprudence, each of which constitute substantial precedential and public policy issues that are appropriate for this court's reconsideration. *See, e.g., In re Cay Clubs*, 130 Nev. 920, 927-28, 340 P.3d

563, 568 (2014); *Bass-Davis v. Davis*, 122 Nev. 442, 445, 134 P.3d 103, 104-05 (2006).

II. *The panel acted contrary to waiver and sua-sponte-action jurisprudence*

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 declining 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, this court 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); *Frantz v. Johnson*, 116 Nev. 455, 464-66, 999 P.2d 351, 357-58 (2000); *Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986), failed to apply controlling caselaw, *see Fox v. Warren*, No. 80668, No. 81212, 2021 Nev. Unpub. LEXIS 658 at *2 (Nev. Sept. 15, 2021), 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), 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).

When this court reversed on grounds that it sua sponte raised, 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 rules and caselaw in awarding Patin's request for attorney fees and costs, as it applied NRCP 68(f)-(g) (1998), weighed the *Beattie v. Thomas*, 99 Nev. 579, 587-89, 668 P.2d 268, 273-74 (1983), factors, and weighed the *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349-50, 455 P.2d 31, 33-34 (1969), factors. Thus, the panel's sua sponte intervention is inconsistent with *Fox*, *Frantz*, and *Bradley*. 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. 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 the panel's sua sponte intervention inconsistent with *Western Industries* and *Crow-Spieker #23*.

The panel also plainly misapplied *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), in justifying its sua sponte intervention. *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 sua sponte dismiss an untimely habeas petition where the state 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*, the panel took over the instant appeal, disregarding Dr. Lee's repeated admissions that he understood Patin's offers consistent with their second paragraph, disregarding the parties' proffered arguments, and ordering oral argument on an issue that it sua sponte raised. The panel's intervention induced Dr. Lee to adopt the panel's argument while his own arguments fell by the wayside. Oral Argument at 5:03-9:20, *Lee*, 2023 Nev. Unpub. LEXIS 156. Finally, the panel resolved the instant appeal on grounds that it sua sponte raised. Rather than comporting with the modest role the Court approved of in *Day*, the panel's actions parallel those that the Court sharply rebuked in *Sineneng-Smith*.

In *Zivotofsky*, the Court deemed that the appellant waived the argument that his consular report of birth abroad should list Jerusalem,

Israel as his birthplace. 576 U.S. at 9. Justice Thomas's dissent is therefore contrary to the majority, *see id*. at 41 n.2, rendering it forceless dicta, *Sellai v. Lemmon*, 62 Nev. 330, 337, 151 P.2d 95, 98 (1944). Regardless, the proposition from *Zivotofsky* that the panel relied upon 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). Given that the instant matter does not concern subject matter jurisdiction, *Zivotofsky* does not support the panel's sua sponte intervention.

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, the parties 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 the panel, as Dr. Lee repeatedly admitted that Patin's offers' second paragraph controlled. Thus, *KG*

Administrative Services is also inapposite and does not support the panel's sua sponte intervention.

Here, the panel raised a challenge to the district court's order on Dr. Lee's behalf, used that challenge to proffer a reason to find fault with the district court's order, and used that reason to reverse the district court. *See Hung*, 138 Nev., Adv. Op. 50, 513 P.3d at 1288. Such actions plainly constitute inquisitorial advocacy, which is anathema to the very premise of the adversarial system. *See Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). Not only did the panel plainly exceed the jurisprudential bounds that this court placed upon sua sponte action, it also misapplied the federal caselaw that it relied upon to justify its inquisitorial advocacy. The panel's intervention warrants reconsideration.

III. *The panel acted contrary to judicial-admissions jurisprudence*

Without the benefit of adversarial scrutiny, the panel also made a dispositive conclusion that the record plainly controverts. In finding that it could not determine his understanding of Patin's offers of judgment, the panel was either ignorant of or willfully ignored Dr. Lee's repeated admissions that he interpreted Patin's offers consistent with their second paragraph. While not at issue in the parties' briefing, this

court cannot reconcile the panel's conclusion with judicial-admissions jurisprudence.

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). Nevada jurisprudence binds a party to the judicial admissions that he or she makes, precluding that party from changing his or her position later in the proceedings. *See Smith v. Zilverberg*, 137 Nev., Adv. Op. 7, 481 P.3d 1222, 1229 n.6 (2021); 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").

While this court ordinarily will not deem trial testimony to be a judicial admission, *see Plaster Dev. Co.*, 127 Nev. 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 admissions, *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); *River Glider Ave. Tr. v. Bank of N.Y. Mellon*, No. 79808, 2020 Nev. Unpub. LEXIS 899 at *1-2 (Nev. Sept. 18, 2020) (same for a factual assertion in a motion); *Greenland Super Mkt., Inc. v. KL Vegas, LLC*, No. 73806, No. 74931, 2019 Nev. Unpub. LEXIS 1271 at *5-6 (Nev. Nov. 21, 2019) (same for a factual admission). Other jurisdictions 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).

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, meaning that Patin offered to pay him $2,000 and that the district court would enter judgment against Patin. He deliberately made these admissions to persuade the district court that the *Beattie* factors weighed against an award of attorney fees and costs. His 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, Nevada jurisprudence ordinarily binds Dr. Lee to these

admissions and precludes him from changing positions on appeal. *See id.*

Rather than hold him to his admissions as Nevada law demands, the panel liberated Dr. Lee from the same, imposing its own view of his understanding of Patin's offers notwithstanding the record. Whether out of ignorance of his repeated admissions for want of adversarial scrutiny or out of willful disregard of the same, the panel's intervention warrants reconsideration.

IV. *The panel acted contrary to offer-of-judgment jurisprudence*

In declaring Patin's offers invalid, the panel sua sponte distinguished *Fleischer v. August*, 103 Nev. 242, 244-46, 737 P.2d 518, 520-21 (1987), sua sponte 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), and sua sponte 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). *See Lee,* 2023 Nev. Unpub. LEXIS 156 at *4-6. Patin addresses each in turn.

In *Fleischer*, this court considered whether subsequent conduct could resolve an otherwise ambiguous offer of judgment. 103 Nev. at 243-46, 737 P.2d at 519-21. The parties disputed whether an offer's terms, which the offeree accepted, precluded a separate award of costs. *See id.* at 243-44, 737 P.2d at 519-20. However, the record demonstrated that the offeror called the offeree prior to acceptance to clarify that the offer precluded a separate award of costs. *See id.* at 243-44, 737 P.2d at 519. Thus, even if the offer was ambiguous, this court concluded that the subsequent call clarified the terms such that the offeree understood what he was accepting. *See id.* at 246, 737 P.2d at 521.

The panel sua sponte distinguished *Fleischer*, concluding that using the parties' subsequent conduct to resolve ambiguity in an offer is appropriate where the conduct occurs before acceptance and inappropriate where the offeree rejects the offer. *See Lee*, 2023 Nev. Unpub. LEXIS 156 at *6. Contrary to the panel's sua sponte attempt to distinguish it, *Fleischer* expressly relied upon and quoted caselaw that considered extrinsic evidence to resolve ambiguity in an offer of judgment that the offeree rejected. *See* 103 Nev. at 246, 737 P.2d at 521 (citing

Boorstein v. City of New York, 107 F.R.D. 31 (S.D.N.Y. 1985)). *Boorstein* noted that the dispositive question regarding ambiguous offers of judgment is whether the offeree had "a clear understanding" of the offer's terms "in order to make an informed choice" regarding acceptance. 107 F.R.D. at 34. Thus, where the record demonstrates that the offeree "understood the terms he [or she] was rejecting" notwithstanding the offer's ambiguity, the offeree is properly subject to the penalty provisions for failing to beat the offer. *See id*. at 34-35.

Here, Dr. Lee clearly understood that Patin's offers' second paragraph controlled, and he provided no record that he had a contrary understanding. *See Cuzze v. Univ. & Cmty. Coll. Sys.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (noting that the appellant has the burden of making an adequate appellate record). The record therefore demonstrates that Dr. Lee understood Patin's offers' terms, enabling him to make an informed decision regarding acceptance. Given that applying NRCP 68(f)(2) (1998)'s penalty provision to Dr. Lee is plainly consistent with *Boorstein*, Patin urges this court to reconsider the panel's narrow reading of *Fleischer*.

Turning to the Nevada caselaw that the panel sua sponte applied, *Albios* did not concern the interpretation of ambiguity in an offer of judgment. *See id.* 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 this court held was an impermissible condition precedent. 101 Nev. at 403-04, 705 P.2d at 148-49. Here, Patin's offers did not contain any conditions precedent and specified a definite sum. Accordingly, the panel's sua sponte reliance upon *Albios* and *Stockton Kenworth* lacks merit and warrants reconsideration.

Turning to the panel's sua sponte adoption of federal caselaw, 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 the panel relied upon does not, nor could it, squarely address the ambiguity that the panel sua sponte raised. *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, the panel's reliance upon *Allen* for the proposition that courts do not consider extrinsic evidence where the offeree rejects the offer of judgment is plainly erroneous because the *Allen* offerees accepted the offer of judgment.[1] *Compare Lee*, 2023 Nev. Unpub. LEXIS 156 at *5, *with Allen*, 681 F. App'x at 843. Regardless, Dr. Lee's repeated admissions clearly demonstrate that he understood Patin's offers' terms such that he would not have to guess how the district court would construe the offer. Indeed, the district court construed Patin's offers in the same manner as Patin and Dr. Lee. Furthermore, *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), which is consistent with *Fleischer* and *Boorstein*. Accordingly, the panel's sua sponte reliance

[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). Regardless, that case provides that a party's clear indication that he or she understood an offer's terms will rebut the presumption of construing ambiguity against the offeror. *See id*. at 1244.

upon *Allen* and *Arkla Energy Resources* lacks merit and warrants reconsideration.

In advancing its construction of Patin's offers, "despite the parties' actual knowledge of the other's intent," the 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 preserving scarce judicial resources by punishing offerees that reject reasonable offers, *see Albios*, 122 Nev. at 419, 132 P.3d at 1029, which warrants reconsideration.

CONCLUSION

Rather than fulfill its constitutional role, the panel jettisoned the black robes of impartiality and donned the mantle of advocate. Without the benefit of adversarial scrutiny, the panel misstated the caselaw it relied upon, acted contrary to the record, and created persuasive authority that is inconsistent with Nevada jurisprudence. In granting the instant petition, this court will reject unrestrained inquisitorial advocacy, reaffirm its commitment to the adversarial

system, and restore Patin's constitutional right to have a neutral arbiter resolve the instant matter. Patin respectfully urges this court to act.

Dated this 2nd day of June 2023.

CLAGGETT & SYKES LAW FIRM

/s/ David P. Snyder

David P. Snyder, Esq.
Nevada Bar No. 15333

Attorney for Respondent/
Cross-Appellant, Ingrid Patin, and
Respondent, Patin Law Group, PLLC

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 typefaced of 14 points or more and contains 4,655 words; or

☐ Does not exceed _____ pages.

Dated this 2nd day of June 2023.

CLAGGETT & SYKES LAW FIRM

/s/ David P. Snyder

David P. Snyder, Esq.
Nevada Bar No. 15333

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *RESPONDENT'S/CROSS-APPELLANT'S AND RESPONDENT'S PETITION FOR EN BANC RECONSIDERATION* with the Supreme Court of Nevada on the 2nd day of June 2023. I shall make electronic service of the foregoing document in accordance with the Master Service List as follows:

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