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

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' PETITION FOR EN BANC RECONSIDERATION

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

Respondents' Petition does nothing more than reargue the same issues that were denied on their Petition for Rehearing. Respondents clearly failed to meet the standard for en banc reconsideration, or even make arguments in support of the standard. Therefore, Respondents' Petition must be denied.

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.

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. 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.

II. LEGAL ARGUMENT

A. STANDARD OF REVIEW

Pursuant to NRAP 40A(a), "[e]n banc reconsideration of a decision of a panel of the Supreme Court is not favored and ordinarily will not be ordered except when (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue." NRAP 40A(a).

Pursuant to NRAP 40A(c), "a petition based on grounds that full court reconsideration is necessary to secure and maintain uniformity of the decisions of the Supreme Court or Court of Appeals shall demonstrate that the panel's decision is contrary to prior, published opinions of the Supreme Court or Court of Appeals and shall include specific citations to those cases. If the petition is based on grounds that the proceeding involves a substantial precedential, constitutional or

public policy issue, the petition shall concisely set forth the issue, shall specify the nature of the issue, and shall demonstrate the impact of the panel's decision beyond the litigants involved… Matters presented in the briefs and oral arguments may not be reargued in the petition, and no point may be raised for the first time." NRAP 40A(c).

Respondents' petition is materially defective since it has failed to demonstrate the stringent standard imposed for en banc reconsideration is present in this matter. Respondents fail to argue reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals. Therefore, their petition relies solely on the latter portion of NRAP 40A(a).

Respondents' contend that the panel's decision to reverse sua sponte was inconsistent with prior jurisprudence on various issues. Petition for En Banc Reconsideration, p.8. However, Respondents fail to address, let alone demonstrate, the impact of the panel's decision beyond the litigants involved. Therefore, Respondents' Petition is materially defective and must be denied.

B. The Panel Did Not Act Against Waiver or Sua Sponte Jurisprudence

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,

the panel sua sponte raised the issue of whether Respondents offers of judgment were valid. The panel did not misapply any precedent in this respect.

Respondents asked the panel 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 as a matter of law for this reason.

The panel properly applied *Zivotofsky ex. Re. Zivotofky 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 an incorrect interpretation thereof.

Further, the panel 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 the panel misapplied jurisprudence in raising the validity of the offers of judgment sua sponte is without merit. The panel correctly applied the case law cited in the Order of Reversal. Therefore, there is no basis for this Court to order en banc reconsideration, and Respondents' petition must be denied.

C. 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. *Id*. 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 argument 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, but rather, a question of law***.

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 En Bank Reconsideration, p.16-18. Notably, 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 this Court to accept "Patin's offers consistent with their second paragraph," which amounts to a judicial admission that as written the offers of judgment are inherently ambiguous and therefore invalid. Respondents' Petition for En Banc Reconsideration, p.15.

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, the panel 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 the panel agreed.

Respondents have failed to demonstrate that en banc reconsideration is warranted since any alleged judicial admissions cannot provide a basis for a ruling that the offers of judgment were valid. Thus, Respondents petition should be denied.

D. The Panel Did Not Act against Offers of Judgment Jurisprudence

Respondents cannot and do not dispute that as a threshold matter, the panel had to 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 the panel's Order of Reversal, and it is not reasonably in dispute. This panel's Order of Reversal 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 whether subsequent conduct could resolve an otherwise ambiguous offer of judgment. 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 En Banc Reconsideration, p.21. Yet, precisely who would be paying that sum is ambiguous and the reasoning behind the panel's Order of Reversal.

Finally, Respondents argue 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). Respondents' Petition for En Banc Reconsideration, p.22.

However, Respondents misconstrue the *Dowd* ruling since the Court therein found that the offer of judgment at issue was **not** ambiguous despite Appellant's assertion that it was ambiguous. In *Dowd*, "the Defendant's offer of

judgment clearly set forth the dollar amounts that the City was willing to pay to settle this matter." *Dowd v. City of L.A.*, 28 F. Supp. 3d 1019, 1038-41 (C.D. Cal. 2014). Therefore, Dowd has no bearing on the issues before this Court, which arise over an inherently ambiguous offer of judgment served by Respondents. As such, Respondents' Petition must be denied.

E. Respondents Fail to Argue Any Impact of the Panel's Decision Beyond Litigants Involved

Pursuant to NRAP 40A(c), Respondents are required to demonstrate that there is an impact on the panel's decision beyond the litigants involved. Respondents' Petition fails to argue that there is any impact on the panel's decision beyond the litigants involved. Obviously, without even advancing this argument, Respondents cannot demonstrate such an impact actually exists. By failing to address this aspect of NRAP 40A, Respondents' Petition is materially defective and must be denied by this Court.

III. CONCLUSION

Respondents' Petition for En Banc Reconsideration should be denied as they fail to address the impact of this matter beyond the litigants in this case. Further, Respondents do not argue that the panel's decision is contrary to prior, published decisions of the Supreme Court or Court of Appeals with specific citations. As such, there is no basis for en banc reconsideration, and Respondents petition must be denied.

DATED this 18th day of July, 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 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 18th day of July, 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 EN BANC RECONSIDERATION** was served this 18th day of July, 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.