CASE NO. 84762

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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JOHN DATTALA

Appellant

vs.

PRECISION ASSETS;
ACRY DEVELOPMENT LLC;
WFG NATIONAL TITLE INSURANCE COMPANY

Respondents

AMENDED PETITION FOR REHEARING

For Appellant JOHN DATTALA

Appeal from the Eighth Judicial District Court, Clark County, Nevada

District Court Case # A-19-794335-C

The Honorable District Court Judge Adriana Escobar

BENJAMIN B. CHILDS, ESQ.
Nevada Bar No. 3946
318 S. Maryland Parkway
Las Vegas, Nevada 89101
(702) 385-3865
Attorney for Appellant
JOHN DATTALA

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INTRODUCTION

Petitioner John Dattala [Dattala] seeks rehearing pursuant to NRAP 40 of the Order of Affirmance filed April 21, 2023 [the Order]. Rehearing is appropriate in these circumstances in subpart (c) (2):

> (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
>
> (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

There are several critical errors prejudicial to Dattala.

BASIS OF MOTION

1. The primary basis upon the decisions in the Order are made is incorrect. Footnote 4 mistakenly states that the court did not "expressly

determine{d] that there [was] no just reason for delay" and, therefore legally did not certify the FFCL as a final, appealable judgment. This is a direct misstatement of the fact.

The Findings of Facts, Conclusions of Law and Judgment [FFCL] filed 10/15/2021 [JA Vol 7, 1532 - 1556] was certified as a final, appealable judgment pursuant to NRCP 54(b). [JA 1554:14]

The FFCL [JA Vol. 7, 1548:20-23 and 1554:14] expressly states as follows :

> The Court expressly determines that there is no just reason for delay in entering final judgment in favor of Dattala against Bursey.
>
> The Court expressly determines that there is no just reason for delay in entering final judgment in favor of Dattala against Medina.
>
> ...
>
> 4. Pursuant to NRCP 54(b), this is certified as a final, appealable judgment.

Related to this error, the Order ignored the key word in NRCP 54(b), "otherwise", and thus incorrectly applied that statute. Because the Court did certify the FFCL under NRCP 54(b), it was not authorized to revise the judgment. This is discussed more fully below.

2. Bursey sold the property "unbeknownst to Dattala". There is not any reason to used the adjective "allegedly" before the word "unbeknownst" in the factual statement in the Order on page 1.

The FFCL expressly states : "Dattala did not know, and was never told" [JA Vol. 7, 1538:27, 1538:32]. It has never even been alleged that Dattala knew about Bursey's sales transactions until he discovered them weeks later

3. The election of remedies defense used to justify denial of Dattala's quiet title remedies is a misstatement of Nevada law.

This is discussed below.

4. NRS 111.025 and 111.175 were ignored.

The finding that these statutes were inapplicable because of the election of remedies defense is a an error which flows directly from the incorrect statement of Nevada law.

5. Notary Medina, who participated in the civil conspiracy with Bursey to commit fraud on Dattala, was WFG's agent.

Using it's own words, WFG National Title Insurance Company [WFG] described Medina as its "notary / signing agent". [JA Vol 5, 1132:10]

The FFCL contains specific factual findings, set forth below, that Medina was an agent of WFG and was within the scope of her agency when performing the notarial acts which resulted in Dattala's loss of his ownership interest in the Subject Properties [JA Vol 7,1546:8-18]

70. Medina at all relevant times was an employee or agent under the control of WFG.
71. Medina at all relevant times was either within the nature and scope of her employment as an employee of WFG or was acting as WFS's agent and was within the scope of her agency when performing the notarial acts described above.
72. Dattala is in the class of persons whom NRS 240.120(1)(d) is intended to protect and the injury to him is of the type against which NRS 240.120(1)(d) is intended to protect.
73. WFG is liable for damages Dattala incurred as a result

of Medina's negligence under the doctrine of respondeat superior.

There is not any reason to used the adjective "purportedly" before the word "admitted" in the factual statement in the Order on page 3.

Three separate pieces of evidence, including a factual finding in the FFCL, support the statement that Medina was WFG's agent during the events upon which Dattala's causes of action are based.

6. Dattala directly addressed the district court's reasoning in granting summary judgment in favor of WFG, and refusing to reconsider it's decision given new factual findings. The issues addressed were the principle's liability for the acts of it's agent and WFG's waiver of the right to contest the final factual findings in the FFCL.

Dattala directly addressed the final factual findings and Estate of Lomastro v. American Family Insurance Group, 124 Nev. 1060, 195 P.3d 339 (2008) holding in his December 2, 2021 Reply [JA Vol 8, 1810 - 1812] and at the hearing on the Motion for Reconsideration of the summary judgment order in favor of WFG [JA Vol 9, 2026:7-23]. While WFG can contest liability, it needs to produce contradictory evidence to dispute factual findings which are final, and unappealed, and entered AFTER the WFG's summary judgment.

7. Dattala directly addressed the district court's reasoning in granting summary judgment in favor of Precision Assets in his Reply Brief on pages 1 - 7.

Dattala directly addressed the final factual findings at the November

16, 2021 hearing on a Motion for Reconsideration of the summary judgment order in favor of Precision Assets [JA Vol. 9, 1991:2-19], and at the December 16, 2021 hearing on the Motion for Declaratory Relief [JA Vol 9, 2009:19-25]. In fact, Dattala produced additional evidence in the form of declaration from Bursey. [JA Vol 8, 1814-1817]

DISCUSSION

1. ALL FACTS WERE PROVEN ON OCTOBER 13, 2021

All facts in the FFCL were proven by "the sworn testimony of Dattala to the Court on October 13, 2021 and the documentary exhibits admitted into evidence on October 13, 2021." [JA Vol 7 1535:12-14 and 1543:16-19]

The hearing on both WFG and Precision Assets' summary judgment motion was September 28, 2021. [JA Vol 9, 1894 -1987, JA Vol 7, 1701:26 and JA Vol 7, 1720:22] This was BEFORE the October 13, 2021 hearing which resulted in the FFCL. [JA Vol 7, 1534:21-22] Since the FFCL was certified as a final judgment, the plain language of NRCP 54(b) mandates that the FFCL cannot be revised. However, even if it was not certified, if anything was to be revised it would have to be the two summary judgment orders since there were final factual findings entered AFTER September 28, 2021 which contradicted the facts upon which those summary judgment order were entered, not the other way around.

The findings in the FFLC were final on October 15, 2021, and the appeal deadline passed on November 16, 2021. There was no new evidence or law presented after October 15, 2021 to support amending the

existing factual findings, nor making any new findings. There never ANY motion to revise either the factual findings or the legal conclusions of the FFCL. Again, the FFCL was entered after the September 28, 2021 summary judgment hearings, plus it was final under NRCP 54(b).

On page 5, the Order states the Rule 54(b) decision could be revised at any time prior to final judgment. That is what NRCP 54(b) plainly states:

> (b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or

> the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

The key word here is "Otherwise" in the start of the second sentence. What this means is that once the NRCP 54(b) certification is completed, the court no longer has authority to revise any portion of the certified judgment. It could not be any clearer.

The Respondents were fully aware that Dattala filed suit against several defendants and made various claims against those defendants. This is permissive legal pleading per NRCP 8(d)(3) "Inconsistent Claims or Defenses. A party may state as many separate claims or defenses as it

has, regardless of consistency."

That is just common sense civil practice. A plaintiff may have claims against some parties on one or more theories of liability and claims against others on different theories of liability.

In this case, Respondents knew that Dattala was seeking judgment against other parties by default. Yet, Respondents did not intervene nor participate in those proceedings even with the opportunity to do so.

When the default judgments were entered, notice of entry was provided to all parties including Respondents. [JA Vol 7, 1532] They did nothing.

In Rae v. All American Life and Casualty Co., 85 Nev. 920, 605P.2d 196 (1979), this court upheld an order denying a motion to set aside a default. Rae's answer was stricken, default entered and the default

judgment granted. A year later, he moved to set it aside but was denied at the trial court. On appeal, he claimed that the judgment was not "final' under NRCP 54(b) because there was one other named defendant but who had not been served. The Supreme Court held that a named party who has not been served is not a "party" until served and brought into the civil action. This court said exactly what Dattala contends here: "Because the default judgment was final, and appellant had actual notice of it shortly after its entry, he should have filed a motion to set it aside within the prescribed time limit ...". Id @ 923. The Rae trial court was affirmed in refusing to set aside a default judgment when appellant failed to file timely act. This is the same fact pattern, except the facts are more egregious in the instant case because in this case no action was taken bey Respondents.

On page 4 of the Order, this court cited Estate of Lomastro v. American Family Insurance Group, 124 Nev. 1060, 195 P.3d 339 (2008) but misapplies the law, as did the District Court. The facts are rather convoluted in Lomastro. An insurance company intervened in an action to contest an uninsured motorist claim but had done so after the plaintiffs had sued the vehicle owner and obtained a default but not a default judgment.

This court held that the intervening insurer had notice of the lawsuit against the vehicle owner but failed to intervene in time to fully protect its legal interests. It could not contest liability but it could contest damages.

In the instant case, Respondents had notice and a full opportunity to participate in the same case against the defendants that were being defaulted by Dattala. Respondents intentionally did not participate in the default prove up proceedings. They are bound by the FFCL and can't

contest it on those facts and legal points that were raised and ruled upon.

Dattala was the non-moving party in the WFG summary judgment motion. He was not accorded the requirement that “evidence, and any reasonable inferences drawn from it” all be viewed in his favor.

2. THE COURT ERRED ON THE ELECTION OF REMEDIES LAW

On Pages 7-10 of the Order this Court affirmed the summary judgment on the grounds of election of remedies. It is claimed that since Dattala could not pursue a quiet title action against Precision because he had a monetary judgment for damages against Bursey In Footnote 8 on Page 8 of the Order, the court correctly observed that as a practical matter, the judgment may be uncollectible.

The statement on Page 8 of the Order that allowing a judgment against Bursey, who is a prisoner in the Nevada Department of Corrections for fraud, would result in Dattala receiving an “impermissible double recovery” is legally incorrect. There has been NO recovery. And inconsistent judgments are allowed.

Second Baptist Church v. First Nat'l Bank, 89 Nev. 217, 510 P.2d 630 (1973) holds that a payee on a fraudulent check could sue both the bank for paying a check over a stop payment order, and the recipient of the funds. In the same exact fact pattern, Dattala’s claim against Bursey for conspiracy, fraud and contractual issues, and Dattala’s claim against Precision Assets for quiet title “were coexistent but not inconsistent. The filing of the claim against Polk was in no sense a ratification of the unauthorized payment by the bank. Both remedies were available to the

drawer of the check with the limitation that there could be but one satisfaction." Id. @ 220 (1973) This is clear Nevada law that allows coexistent claims.

This is not only logical, but consistent with other states' law. Holmes Reg'l Med. Ctr., Inc. v. Allstate Ins. Co., 225 So. 3d 780, 788, (Fla. 2017) holds "if the remedies are consistent, only 'full satisfaction' of the claim will constitute an election of remedies. Thus, a party may get more than one judgment, so long as there is only one recovery."

Clayton v. Heartland Res., Inc., 754 F. Supp. 2d 884, 892 (W.D. Ky. 2010) held the same way as follows :

> In the present case, double recovery will only be an issue if Plaintiffs are able to recover their full judgment against Heartland. Because Heartland is currently in bankruptcy proceedings, it is unlikely that Plaintiffs will recover their full $18,000,000 judgment.

Simply substitute Dattala as the Plaintiff in the above quote, and Bursey as the judgment debtor, who is incarcerated, and "it is unlikely that Dattala will recover" any of his judgment. Footnote 8 on Page 8 of the Order states as much. But he is entitled to recover his ownership interest in the Subject Properties, which ownership interest was never transferred by him.

CONCLUSION

The main mistake in the Order is that the failure to acknowledge that the NRCP 54(b) procedure was followed. Once the NRCP 54(b) procedure is completed, the judgment is final. The factual findings were neither appealed, nor a motion filed to alter or amend them. Finally, the factual

findings in the FFCL were made after factual findings were entered to grant the summary judgment. If any factual findings would be altered, it would be the ones supporting the summary judgments, not the one in the later filed FFCL. Thus, the basis of the Order is incorrect.

Secondly, the election of remedies analysis is based on an incorrect statement of Nevada law. Election of remedies is intended to void multiple recoveries. There is nothing in the record indicating that Dattala would receive a multiple recovery by awarding him his property interest in the Subject Properties.

Thirdly, because the election of remedies was incorrectly cited as a basis for summary judgment against Precision Assets, the impact of NRS 111.025 and 111.175 were ignored. Bursey purportedly transferred Dattala's ownership interest in the Subject Properties after committing

fraud on Dattala. Bursey's conveyances are therefore void pursuant to the clear language of NRS 111.025 and NRS 111.175.

> NRS 111.025 Conveyances void against purchasers are void against their heirs or assigns. Every conveyance, charge, instrument or proceeding declared to be void by the provisions of this chapter, as against purchasers, shall be equally void as against the heirs, successors, personal representatives or assigns of such purchaser
>
> NRS 111.175 Conveyances made to defraud prior or subsequent purchasers are void. Every conveyance of any estate, or interest in lands, or the rents and profits of lands, and every charge upon lands, or upon the rents and profits thereof, made and created with the intent to defraud prior or subsequent purchasers for a valuable consideration of the same lands, rents or profits, as against such purchasers, shall be void.

Rehearing should be granted as the Order overlooked or misapprehended a material fact in the record or a material question of law in the case, as set forth above.

CERTIFICATE OF COMPLIANCE PURSUANT TO RULES 40 AND 40A

I hereby certify that this petition for rehearing/reconsideration or answer 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 Petition has been prepared in a proportionally spaced typeface using Wordperfect in Arial, font size 14.

I further certify that this brief complies with the page or type-volume limitations of NRAP 40 because contains 2,795 words.

Dated May 8, 2023

/s/ Benjamin B. Childs

_____

Benjamin B. Childs
Nevada Bar No. 3946
318 S. Maryland Parkway
Las Vegas, NV 89101
Telephone: 702-251-0000
Attorney for Petitioner