

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN DATTALA,

Appellant,

vs.

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

Respondents.

No. 84762

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ANSWER TO PETITION FOR EN BANC RECONSIDERATION

Zachary T. Ball, Esq.
Nevada Bar No. 8364
THE BALL LAW GROUP LLC
1935 Village Center Circle, Ste. 120
Las Vegas, Nevada 89134
(702) 303-8600 – Telephone
zball@balllawgroup.com

Micah S. Echols, Esq.
Nevada Bar No. 8437
David P. Snyder, Esq.
Nevada Bar No. 15333
Charlie Finlayson, Esq.
Nevada Bar No. 13685
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Ste. 100
Las Vegas, Nevada 89107
(702) 655-2346 – Telephone
micah@claggettlaw.com
david@claggettlaw.com
charlie@claggettlaw.com

Attorneys for Respondent Precision Assets, LLC

INTRODUCTION

A basic principle of appellate practice is that the party challenging the lower court's decision must identify the basis of that decision and explain why it lacks merit. Here, the district court denied plaintiff John Dattala's motion for reconsideration on several grounds, including that the "findings" upon which he sought reconsideration were not binding on Precision Assets and, in any event, he had already engaged in an election of remedies. But Dattala neglected to address these issues in his appellate briefing, even after Precision discussed them in its answer. The panel correctly held that Dattala's failure to address or contest those issues meant he failed to demonstrate that the district court erred.

Dattala's petition for en banc reconsideration suffers from the same flaws as his prior pleadings—it ignores the panel's reasoning, never mentioning the panel's conclusion regarding waiver nor explaining why that conclusion was unsound. Although this Court should deny the petition on that basis, the panel's decision was also consistent with longstanding appellate principles and Dattala fails to cogently explain why reconsideration is appropriate under NRAP 40A(a). Accordingly, Precision respectfully requests that this Court deny his petition.

RELEVANT BACKGROUND

Dattala agreed to sell two real properties to Eustachius Bursey. 3 JA 570. In turn, Bursey agreed to sell the properties to Precision. 6 JA 649. Precision took out a loan from Acry Development, LLC and contracted with WFG National Title Insurance Company to hold escrow and insure title. *Id.* A thorough search of county records and other documents showed that Bursey held legal title to the properties. *See generally id.* at 711-23. WFG also obtained notarized Affidavits of Grantor, which expressly stated that Dattala had no rights in the properties and Bursey legally owned them. *Id.* at 641, 717. Bursey provided his own notarized affidavits indicating the same. *Id.* at 654, 656, 719, 722. WFG therefore released escrow and recorded Precision's title ownership of the properties. *Id.* at 662, 738.

I. Dattala sues, and the district court grants summary judgment to Precision.

Dattala sued Precision, Bursey, Acry, WFG, and a notary. 1 JA 182. While Dattala admitted that he sold Bursey the properties, he alleged that Bursey never finished paying for them and any documents stating otherwise were fraudulent and the product of a conspiracy between Bursey and a notary. He raised two relevant causes of action against

Precision: (1) a quiet title action requesting an order that he—not Precision—owns the properties, and (2) a request for declaratory relief on the same. *Id.* at 192-93.

Precision moved for summary judgment. 3 JA 576. In the motion, Precision claimed protection as a bona fide purchaser (BFP) under NRS 111.180 (providing that a purchaser who buys a property for valuable consideration has protection from another party’s fraud unless the purchaser knew or should have known of the fraud). *Id.* at 585. Precision explained that it purchased the properties in good faith after working with a title insurance and escrow company. The title insurance company conducted records checks and obtained multiple notarized documents, all of which indicated that Bursey owned the properties and appeared to be valid—and it had no reason to know of an alleged conspiracy involving a notary. *Id.* at 581-83. After argument, the district court granted summary judgment in favor of Precision. 7 JA 1701.

II. *Dattala drafts a default judgment order against Bursey and tries to use it against Precision.*

Dattala proceeded against Bursey and the notary. Bursey and the notary declined to participate, and Dattala received a default judgment against them. 7 JA 1574. After a “prove-up” hearing, the court awarded

Dattala \$355,533 (the remaining balance on the amount Bursey agreed to pay), plus more than one million dollars in treble and punitive damages—roughly 1.4 million dollars in total. *Id.* at 1594. That amount far exceeded the respectively paltry value of the properties.

Dattala drafted the default order against Bursey and Medina. In the order, which the district court signed, Dattala stated that his allegations against Bursey and the notary were deemed true, including his allegation that Bursey procured his signatures through fraud. *Id.* at 1583.

Dattala then sought to use the order he drafted as a cudgel against Precision. He filed a motion for reconsideration of the order granting summary judgment, 7 JA 1439, a supplement to that motion, *id.* at 1557, and a motion for declaratory relief, *id.* at 1597. Broadly, he argued in those filings that the order granting summary judgment conflicted with the language in the default order; specifically, that the district court's decision to grant summary judgment to Precision conflicted with its finding that Bursey and the notary committed fraud. *See, e.g., id.* at 1568, 1608.

The district court denied Dattala's post-judgment motions. 8 JA 1848, 1864. Relevant here, the district court first concluded that the default judgment order against Bursey and the notary was a sanction against them for failing to participate in the proceeding, and thus the "findings" therein did not bind Precision. *Id.* at 1866. Second, the district court concluded that Dattala engaged in an election of remedies by obtaining a money judgment against Bursey, meaning that he could not also get the properties back because then he would have a double recovery. *Id.* at 1849. Third, the district court concluded that Dattala's motion for declaratory relief, in which he sought title to the properties outright, was procedurally improper. *Id.* Finally, the district court concluded that Dattala failed to demonstrate that the deeds were void under NRS 111.175 and NRS 111.025. *Id.*

III. *Dattala neglects to challenge the district court's reasoning on appeal and the panel concludes that his derelictions constitute a waiver.*

Dattala appealed. Although his arguments were somewhat scattered, Dattala did not cogently discuss the first, second, or third grounds upon which the court denied his post-judgment motions. Nor did he ask this Court to remand for a trial. Instead, he argued that this Court had to conclude that he was the owner of the properties as a matter of

law because the deeds were fraudulent and thus void under NRS 111.125 and NRS 111.175. AOB at 2 (outlining the claims on appeal), 41 (prayer for relief).

Precision pointed out in its answer that Dattala focused on the merits of his underlying argument regarding the statutes, but the district court denied his post-judgment motions on other grounds that Dattala did not squarely address. RAB at 13. Specifically, Dattala neglected to contest the district court's conclusions that (1) reconsideration was inappropriate because the findings against Bursey and Medina were not binding against Precision; (2) reconsideration was inappropriate because he engaged in an election of remedies; and (3) his request for declaratory relief was procedurally improper.

Precision argued that Dattala was the appellant, and as such, he had the burden of demonstrating that the district court erred when it denied his motions for reconsideration and declaratory relief. *Id.* at 13. Precision further argued that Dattala's failure to address the district court's reasons for denying his motions and his failure to demonstrate that those reasons lacked merit constituted a waiver and left the district court's reasoning without contest. *Id.* at 13-16. Precision then explained

why the district court's conclusions, including its determination that Dattala engaged in an election of remedies, were appropriate under existing law. *Id.* at 17-18.

Dattala did not address, let alone dispute, any of Precision's arguments in his reply. He did not argue that he addressed the district court's reasoning, nor provide any argument as to why this Court should excuse his failure to so argue. He did not argue that his failure should not constitute a waiver under the circumstances. And he did not respond, in any way, to Precision's detailed arguments involving the election of remedies. Instead, he simply reiterated his belief that Bursey was a thief and disparaged Precision's arguments as mere "legal writing" and an "attempt to obfuscate the facts." ARB at 6.

The panel affirmed. In the order, the panel expressly noted that the district court rejected Dattala's post-judgment motions based on the election-of-remedies doctrine, yet Dattala failed to address or otherwise contest that issue. *Dattala v. Precision Assets*, No. 84762, 2023 Nev. Unpub. LEXIS 248 at *10 (Nev. April 21, 2023) ("As Precision notes on appeal, Dattala has altogether failed to address this basis for the district court's summary judgment."). The panel cited numerous cases from

Nevada and elsewhere which held that appellate courts can affirm on any ground supported by the record, and an appellant's failure to address the grounds upon which a lower court bases its decision amounts to a waiver. *Id.* After explaining that Dattala failed to address the district court's reasoning and did not challenge Precision's arguments in its answer, the panel concluded that Dattala failed to contest those arguments and thus failed to demonstrate that the district court erred. *Id.* ("We therefore affirm the district court's summary judgment based on its uncontested election-of-remedies determination.").

Dattala petitioned for rehearing. In his petition, he argued for the first time that the district court should not have applied the election-of-remedies doctrine. Pet. Reh'g at 15. The panel denied rehearing, noting that Dattala had failed to address the doctrine in his opening brief and could not raise new points for the first time on rehearing. *Dattala*, 2023 Nev. Unpub. LEXIS 248 at *1 n.1 (stating that Dattala's arguments relating to Precision "do not warrant discussion because they were not raised in Dattala's appellate briefing").

Dattala's petition for en banc reconsideration followed. Precision submits this response pursuant to this Court's order.

ARGUMENT

This Court disfavors en banc reconsideration, only granting such petitions when doing so is necessary to secure or maintain jurisprudential uniformity or when a “substantial precedential, constitutional[,] or public policy issue” is present. NRAP 40A(a). A party seeking en banc reconsideration must demonstrate that the panel’s decision conflicts with other court authority by citing that authority and explaining how the decision is irreconcilable or must demonstrate that the panel’s decision involves a substantial presidential, constitutional, or public policy issue by setting forth the issue, specifying the nature of the issue, and demonstrating the impact of the panel’s decision beyond the litigants involved. NRAP 40A(c).

I. *Dattala fails to correctly identify the basis of the panel’s decision and discuss it in the context of NRAP 40A(a).*

NRAP 40A(c) makes clear that a petitioner who asserts that the panel’s decision conflicts with another decision, or involves an important issue worthy of consideration by the full court, must do more than make a passing reference to NRAP 40A(a) then pivot to the merits of his case. Rather, a petitioner must expressly identify the jurisprudential conflict that the panel’s decision creates and explain why they are irreconcilable,

or “set forth the issue, specify the nature of the issue, and demonstrate the impact of the panel’s decision beyond the litigants involved.” NRAP 40A(c).

Dattala pays lip service to NRAP 40A(a) but does not provide the specificity that NRAP 40A(c) requires. For example, he argues that various cases entitle him to relief, but does not explain how those cases conflict with panel’s holding that he failed to contest the election-of-remedies issue. *See generally* Pet. Recon. Nor does he explain how the panel’s decision that his inadequate appellate briefing resulted in a waiver raises a substantial constitutional, precedential, or public policy issue. *Id.*

In fact, mirroring the problems with his earlier pleadings, Dattala does not even mention the panel’s conclusion that he failed to cogently address the election of remedies doctrine in his appellate briefing and waived the right to contest it. Instead, he focuses on the merits of his claim that he is an innocent victim, and that this Court should interpret NRS 111.025, NRS 111.075, and NRS 111.180 to protect him, then briefly argues that the district court erred in its application of the election of remedies doctrine. Pet. Recon at 23-24. A party who does not accurately

describe the panel’s reasoning necessarily fails to demonstrate that its decision is inconsistent with Nevada jurisprudence or involves an issue important to the public at large.

Dattala’s failure to meaningfully address the strict requirements of NRAP 40A(a) should prompt this Court to deny his petition for en banc reconsideration outright.

II. *Dattala fails to demonstrate that the panel’s decision that he failed to meaningfully contest the election of remedies doctrine warrants en banc reconsideration.*

If this Court does not reject the petition outright, it should nevertheless conclude that Dattala fails to demonstrate that reconsideration is appropriate.

The crux of Dattala’s petition is that this Court should grant en banc reconsideration and declare him the owner of the properties because he was allegedly the victim of a fraud. Reh’g Pet. at 25-26. He suggests that the panel overlooked NRS 111.025 and NRS 111.175 when it affirmed. *Id.* at 2-3. Dattala is mistaken. The panel did not overlook these statutes—it never reached them because Dattala failed to properly challenge the district court’s determination that his judgment against Bursey amounted to an election of remedies. *Dattala*, 2023 Nev. Unpub.

LEXIS 248 at *10.

On that point, Dattala argues that the district court misapplied the election of remedies doctrine. Reh’g Pet. at 23. But, as explained throughout, he neglected to make that argument in his opening brief and did not respond when Precision discussed the doctrine in its answer.¹ Because Dattala did not address the district court’s application of the doctrine or respond to Precision’s arguments, the panel concluded that he failed to demonstrate that the district court erred. *Dattala*, 2023 Nev. Unpub. LEXIS 248 at *10.

The panel appropriately concluded that Dattala’s failure to meaningfully discuss the election of remedies doctrine constituted a waiver and otherwise left the issue without contest. It is a basic appellate principle that the appellant has the burden of demonstrating that the lower court erred (or abused its discretion). *See, e.g., Moore v. State*, 134 Nev. 262, 264, 417 P.3d 356, 359 (2018). Meeting that burden requires

¹ While it would have been improper for Dattala to raise the issue for the first time in his reply, see *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011), his failure to address the issue after Precision raised it as a ground for affirming the judgment also amounted to a confession of error, see *Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984).

the appellant to identify the lower court's reasoning and explain why that reasoning lacks merit. *Hung v. Berhad*, 138 Nev., Adv. Op. 50, 513 P.3d 1285, 1286 (Ct. App. 2022). Nevada appellate courts have consistently held that an appellant's failure to challenge the grounds upon which the district court based its decision results in a waiver. *See, e.g., 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 (2006). And the Court of Appeals has recently discussed that principle in detail, explaining that when a district court denies a claim for multiple reasons, the appellant must contest each of those reasons to obtain relief. *Hung*, 138 Nev., Adv. Op. 50, 513 P.3d at 1286 (“[W]hen a district court provides alternative bases to support its ultimate ruling, and an appellant fails to challenge the validity of each alternative basis on appeal, this court will generally deem that failure a waiver of each such challenge and thus affirm the district court’s judgment.”).

Dattala further fails to demonstrate that the panel’s decision was wrong, let alone that it conflicts with another Nevada appellate court decision. The panel’s waiver determination is consistent with this prior

Nevada appellate court cases. *Compare Dattala*, 2023 Nev. Unpub. LEXIS 248 at *10 (“Dattala has altogether failed to address this basis for the district court’s summary judgment in favor of Precision, which otherwise appears to be legally sound. We therefore affirm the district court’s summary judgment based on its uncontested election-of-remedies determination”), *with Edwards.*, 122 Nev. at 330 n.38, 130 P.3d at 1288 (“On appeal Edwards neglected to address in his briefs or in his memoranda of supplemental authority the district court’s dismissal [of specific claims]. In this way, Edwards neglected his responsibility to cogently argue, and present relevant authority, in support of his appellate concerns. Thus, we need not consider these claims”).

Dattala does not point to any decision from the Nevada Supreme Court or Court of Appeals which conflicts with the panel’s conclusion, nor endeavor to explain how the panel’s rationale regarding waiver raises a serious issue of public policy worthy of en banc reconsideration. Accordingly, this Court should deny his petition.

III. *Dattala otherwise fails to demonstrate that this Court should reconsider the panel’s decision en banc.*

If Dattala wanted to challenge the district court’s decision to deny his motion for reconsideration based on the election of remedies, then he needed to explain in his opening brief why the district court’s application of the doctrine was wrong. At a minimum, he needed to address the doctrine in his reply after Precision discussed it at length in its answer and cited numerous cases supporting its position. Dattala cannot belatedly raise the issue now. *See* NRAP 40A(c) (“[N]o point may be raised for the first time [in a petition for en banc reconsideration].”).

Even if this Court were to ignore Dattala’s failure to address or contest the district court’s application of the doctrine in his earlier appellate pleadings, he fails to demonstrate that the district court erred. His argument focuses on the notion that his default judgment against Bursey is uncollectible because Bursey has no money and is incarcerated. *Pet. Recon.* at 23-24. But Dattala does not support these assertions with citations to the record and therefore this Court must disregard them. *See* NRAP 28(a)(1)(a). What is more, Precision cited persuasive authority establishing that the election of remedies doctrine can bar recovery even if the remedy elected is largely uncollectible, including in cases where a

petitioner seeks property and a monetary sum. RAB at 17-18. Dattala provides no argument or authority supporting a contrary position, and his cursory argument on the doctrine's application is not sufficiently developed to warrant reconsideration.

Dattala's remaining arguments similarly fail. Dattala contends that the district court had to reconsider its grant of summary judgment in Precision's favor once the district court signed the default order which "found" that Bursey committed fraud. The district court rejected that argument, explaining that its "findings" in the default order only applied to Bursey and the notary under *LoMastro v. American Family Insurance Group*, 124 Nev. 1060, 1070, 195 P.3d 339, 346 (2008), and did not bind Precision. 8 JA 1866. Yet, as Precision pointed out in its answer, Dattala failed to address that issue in his opening brief or explain why the district court's reliance on *LoMastro* was misplaced. RAB at 15 n.3. Par for the course, Dattala did not respond to Precision's argument in his reply. Dattala's failure to provide any argument on that issue in his earlier briefing, especially after Precision raised it as an alternative ground for affirmance, also amounts to a waiver and leaves the district court's reasoning without contest.

Dattala argues that both the panel and the district court got “everything” wrong. Pet. Recons. at 16. But it is Dattala who declined to properly address the district court’s orders in his prior appellate briefing even after being warned of the consequences of doing so. It is Dattala who similarly declined to address the panel’s determination that his derelictions amounted to a waiver. And it is Dattala who declined to squarely address the standards for en banc reconsideration under NRAP 40A(a). Dattala’s troubling pattern of ignoring issues he finds to be inconvenient in favor of various strawman arguments should end here.

CONCLUSION

Dattala is eager for this Court to address his novel discussion of the interplay between NRS 111.025, NRS 111.175, and NRS 111.180 in a published opinion. But the panel concluded that Dattala’s inadequate appellate briefing prevented it from reaching that issue, and Dattala fails to demonstrate that the panel’s decision conflicts with another Nevada appellate decision or involves an important question relevant to the public at large. This Court should deny Dattala’s petition. Alternatively,

Precision respectfully maintains that the district court neither erred nor abused its discretion for the reasons explained more fully in its answer.²

Dated this 24th day of July 2023.

CLAGGETT & SYKES LAW FIRM

/s/ Charles. L. Finlayson

Micah S. Echols, Esq.
David P. Snyder, Esq.
Charles L. Finlayson, Esq.

THE BALL LAW GROUP LLC
Zachary T. Ball, Esq.

*Attorneys for Respondent
Precision Assets*

² Importantly, Dattala does not ask this Court to vacate the order granting summary judgment to Precision and remand for a trial. Instead, he asks this Court to find as a matter of law that he, not Precision, is the true owner of the properties. Pet. Recon. at 27. Even if this Court were to agree with the other arguments raised in the petition, it would be inappropriate to issue an order directing the district court to quiet title in his favor.

CERTIFICATE OF COMPLIANCE

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 it is prepared in 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 3,472 words; or

☐ Does not exceed _____ pages.

Dated this 24th day of July 2023.

CLAGGETT & SYKES LAW FIRM

/s/ Charles. L. Finlayson

Charles L. Finlayson, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **ANSWER TO PETITION FOR EN BANC RECONSIDERATION** with the Supreme Court of Nevada on the 24th day of July. I will electronically serve the foregoing document in accordance with the Master Service List as follows:

Zachary T. Ball, Esq.
zball@balllawgroup.com
THE BALL LAW GROUP LLC
1935 Village Center Circle, Ste. 120, Las Vegas, Nevada 89134
(702) 303-8600 – Telephone
Attorneys for Respondent, Precision Assets

Benjamin B. Childs, Esq.
ben@benchilds.com
318 South Maryland Parkway, Las Vegas, Nevada 89101
(702) 251-0000 – Telephone
Attorneys for Appellant, John Dattala

John G. Benedict, Esq.
john@benedictlaw.com
LAW OFFICES OF JOHN BENEDICT
2190 East Pebble Road, Ste. 260, Las Vegas, Nevada 89123
(702) 333-3770 – Telephone
Attorneys for Respondent, Acry Development LLC

YanXiong Li, Esq.
yli@wrightlegal.net
Lukasz I. Wozniak, Esq.
lwozniak@wrightlegal.net
WRIGHT, FINLAY & ZAK, LLP
(702) 475-7964 – Telephone
7785 West Sahara Avenue Ste. 200, Las Vegas, Nevada 89117
Attorneys for Respondent, WFG National Title Insurance Company

/s/ Anna Gresl

Anna Gresl, an employee of
CLAGGETT & SYKES LAW FIRM