

*Supreme Court Case No.*  
*District Court Case No. A-21-837504-C*

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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AMANDA MARIE AVILA

*Petitioner,*

v.

EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY  
THE HONORABLE ADRIANA ESCOBAR,  
DISTRICT COURT JUDGE

*Respondent,*

ANNA MARYKE GREY; CHRISTOPHER VIGIL; RAISER LLC dba UBER, a  
Foreign Limited-Liability Company

*Real Parties in Interest,*

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**PETITION FOR WRIT OF PROHIBITION OR, IN THE  
ALTERNATIVE, WRIT OF MANDAMUS**

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Petition from the Eighth Judicial District Court of The State of  
Nevada, in and for the County of Clark, Case No. A-21-837504-C  
The Honorable Adriana Escobar

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### **NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certifies that Petitioner AMANDA MARIE AVILA is represented by the law firm McCormick, Barstow, Sheppard, Wayte & Carruth LLP. Moreover, the undersigned counsel of record certifies the following entities as described in NRAP 26.1(a) have a pecuniary interest in the outcome of this case: CSAA GENERAL INSURANCE COMPANY. No parent entity or publically held trust holds ten percent or more of the stock in CSAA General Insurance Company. Other than the parties and the above, Petitioner is not aware of any other person or entity with a possible interest.

Dated: July 29, 2022

McCORMICK, BARSTOW, SHEPPARD,  
WAYTE & CARRUTH LLP

By: /s/ Renee M. Maxfield  
Renee M. Maxfield  
Frank A Toddre, II  
Attorneys for Amanda Marie Avila

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By: /s/ Renee M. Maxfield  
Renee M. Maxfield  
Frank A Toddre, II  
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## **I. STATEMENT OF RELIEF SOUGHT**

Amanda Marie Avila (hereinafter “Avila” or “Petitioner”), petitions this Court for a Writ of Prohibition or, in the Alternative, Writ of Mandamus, instructing the District Court to vacate and reverse its November 2, 2021 Order Denying Avila’s Motion to Enforce Settlement Agreement in full. The effect of reversal would subsume the terms of that settlement and subsequently prohibit Plaintiff Grey from filing the current case against Ms. Avila and, as such, prohibit the Plaintiff from making the claims in her Complaint.

Alternatively, if the Court is not inclined to reverse the Order in its entirety Avila requests that this Court vacate and remand for further proceedings by way of an evidentiary hearing specifically regarding whether Defendant did timely communicate her acceptance of the demand and review whether the conditions precedent set forth by Grey at the District Court were clearly delineated or could reasonably be considered peripheral terms to acceptance of demand.

Avila respectfully requests that this Court issue a Writ of Mandamus in accordance with the prayer for relief in the Petition and direct the District Court to enforce its legally valid and therefore binding settlement reached between Avila, CSAA and Grey. The ruling has created an unjust result which will unfairly prejudice and burden Nevada insurance providers and set forth a deleterious effect



on an insurer's obligations to their insureds in settling their claims without judicial intervention.

**Routing Statement**

This Writ Petition may be retained by either Court. This case may be assigned to the Nevada Supreme Court, as the case does not fall within any of the categories that are presumptively assigned to the Court of Appeals. See Nev. R. App. P. 17(b). Additionally, the Writ raises a question of statewide public importance, as settlement plays an integral role in all civil cases. The Petition raises issues that bear directly upon all insurers doing business in Nevada and their processes in negotiations and executing responses to policy demands at a pre-litigation stage.

The Nevada Supreme Court may retain jurisdiction as the tort damages pled by Plaintiff exceed the \$250,000 threshold contemplated by NRAP 17(b)(5).

However, the Petitioner would suggest it may be retained by the Court of Appeals under NRAP 17(b)(6) as it seeks to enforce a settlement agreement involving a policy demand that falls under the \$75,000 threshold considered by this rule.

Without an early determination of this issue, Avila will be required to expend significant resources to complete discovery, prepare for and litigate this matter through trial, all in a case that may be considered resolved as to the claims raised against Avila in the event this Honorable Court finds in Avila's favor.

This is an Extraordinary Writ contemplated by Sec III, Rule 21(a). This case does not fall within the fast track appeals outlined in NRAP 3C, 3E or 28.

### **The Parties**

Amanda Marie Avila is the Petitioner in this matter. Real Party in Interest is Anna Maryke Grey (“Grey”) the Plaintiff. The co-Defendant Real Parties in interest are Christopher Vigil and Raiser, LLC d/b/a Uber. The Respondent is the Eighth Judicial District Court of The State of Nevada, in and for the County of Clark and the Honorable Adriana Escobar. Avila’s insurance carrier in the below action is AAA Insurance underwritten by CSAA General Insurance Company and the company may be referenced interchangeably with Avila during the below narrative.

## **II. ISSUES PRESENTED**

The Issues presented in this petition are limited in scope as to the following:

- 1: Did the District Court commit clear err in denying the Avila/CSAA Motion to Enforce Settlement when CSAA, on behalf of Avila, tendered their policy limits in a timely manner?
- 2: Whether there was a valid response to the demand for policy limits by Avila;
- 3: Did the District Court commit clear error by holding that the tender of policy limits did not trigger an enforceable settlement notwithstanding a valid

binding agreement and contractual writings between CSAA/Avila as set forth in the underlying Motion to Enforce Settlement Agreement.

4: Whether the District Court erred by failing to hold an evidentiary hearing to resolve the terms of the asserted offer and acceptance?

### **III. INTRODUCTION**

Boiled down to its essence, this case can be reviewed under the lens of Contracts 101. The first lesson in contracts can be narrowed down to the three elements—or building blocks--of a contract: Offer, Acceptance, and Consideration. While our court system has considered an infinite amount of permutations on these building blocks, the basic premise applies in this case.

The instant appeal stems from an offer submitted to CSAA/Avila by Grey, by and through her counsel, Avila's acceptance of that offer, by and through her insurer, and an agreement as to consideration to be paid to Grey.

It is black letter law that if there is ambiguity in a contract it be construed against the offeror. The offer was very clear in regards to the terms of acceptance as to monetary policy limit demand, and the deadline to assent. However, the offer relied upon permissive and indistinct language as it pertained to the necessity of accompanying documents including an affidavit from the insured as to assets and other insurance.

Avila maintains that these tangential terms and accompanying documents were not essential terms to acceptance and they understood acceptance and timing to be the conditions precedent to acceptance. Indeed, Avila accepted the offer in a timely manner and produced the affidavit within the month, showing an intent and understanding that it wished to accept the offer and complied as it understood by providing the accompanying documents once they were able to receive it.

Courts favor resolution. Avila and her insurer attempted to resolve this matter by way of tendering the policy limits when demanded by Grey, thus avoiding the need for costly litigation. Avila should not be penalized by her interpretation of a demand letter that contained permissive rather than express language as to the essential terms of the offer.

Avila would also suggest the District Court erred by failing to hold an evidentiary hearing. Given the potentially dispositive nature of the motion, the need to weigh witness credibility, and the inapposite stance of fact witnesses, an evidentiary hearing would have assisted the court in determining the parties understanding of the terms. Indeed, Nevada Jurisprudence cautions its District Courts from disregarding a settlement agreement, in the absence of a said hearing.

Therefore, Avila respectfully requests that this Court grant this Petition for Writ of Mandamus and/or Prohibition and reverse the order of the District Court.

#### **IV. STATEMENT OF FACTS**

The instant appeal and underlying litigation stems from an automobile accident which is alleged to have occurred on January 21, 2020.<sup>1</sup> Grey alleges she was a passenger in real party in interest Vigil's vehicle while Vigil was acting within the course and scope of his employment as an Uber driver when Defendant Vigil and Ms. Avila's vehicles collided.<sup>2</sup> The motion practice centers upon the District Court's interpretation of CSAA/Avila's acceptance of Grey's demand for policy limits.

##### **A. The Contract at Issue**

###### **1. The Offer**

On February 28, 2020, Plaintiff's counsel sent a written policy limits demand to Ms. Avila's insurer CSAA ("the Demand").<sup>3</sup> The Correspondence provided a demand for the insured's full policy limits stating in pertinent part: "Please accept this correspondence as a demand for your insured's policy limits which includes any and all applicable policies."<sup>4</sup>

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<sup>1</sup> PA-00084-00099, First Amended Complaint.

<sup>2</sup> PA-00086.

<sup>3</sup> PA-00023. Correspondence entitled "TIME LIMIT, POLICY DEMAND VIA CERTIFIED MAIL."

<sup>4</sup> *Id.*

The demand explicitly stated, “Our Client is now willing to accept Ms. Avila’s policy limits which includes and any all policies.”<sup>5</sup> The demand specifically premised that the demand must be accepted in writing by 5:00 p.m., March 30, 2020.<sup>6</sup>

## 2. The Acceptance

CSAA/Avila received the policy limits demand on March 4, 2020, having received it via certified mail.<sup>7</sup> CSAA/Avila sent their acceptance letter via facsimile to Plaintiff Counsel on March 30, 2020 at 2:29 p.m.<sup>8</sup>

The acceptance letter enclosed the release for Ms. Grey’s injury claim in the amount of the insured limit of \$25,000.<sup>9</sup>

Grey would set forth that the acceptance was untimely based upon the date stamp of the acceptance letter which had been automatically generated and setting

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<sup>5</sup> PA-00024.

<sup>6</sup> *Id.*

<sup>7</sup> PA-00026-00027. *Declaration of CSAA Representative Danielle McGough*

<sup>8</sup> *Id.*

<sup>9</sup> PA-00029.

forth March 31, 2020 as the date on the header.<sup>10</sup> Further records would evidence this date to be an auto generated template, essentially a scrivener's error.<sup>11</sup>

The real time records provided a time stamp evidencing the document was faxed in a timely manner on **March 30, 2020 at 2:29 p.m.** regarding 3<sup>rd</sup> Party Bodily Injury – Anna Grey, which was within the deadline requested in Grey's demand letter.<sup>12</sup>

## **B. Motion to Enforce Proceedings and Procedural Recitation**

### **1. Avila Sought to Enforce the Motion at the Onset of Proceedings**

The Motion to Enforce set forth that at its base level, the parties entered a binding and enforceable contract via settlement agreement.<sup>13</sup> By way of affidavit and a reasonable reading of the demand, Avila set forth their offeree understanding of the terms of the offer.<sup>14</sup> That being a) the tender of policy limit and b) by a date certain.

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<sup>10</sup> PA-00040.

<sup>11</sup> Due to an inadvertent error, the mailed correspondence was dated March 31, 2020 because the insurance system defaults to sending mailed correspondence the next day by the mailing center.

<sup>12</sup> PA-00031-00032.

<sup>13</sup> PA-00002.

<sup>14</sup> *Id*

The affidavit in support solely concentrates on the timeliness of the facsimile acceptance and explains the systemic functions that discuss time stamping and deliveries.<sup>15</sup>

## 2. The Opposition Brief Relied upon Ambiguous Terms

The Opposition brief below submits that a meeting of the minds did not occur because Avila failed to comply with certain conditions precedent.<sup>16</sup> Grey set forth that the settlement failed to materialize because CSAA/Avila failed to provide an affidavit of no insurance or a declarations page during the time the offer was open.<sup>17</sup>

In support of this contention, it sets forth that CSAA/Avila essentially rejected the offer by failing to provide the additional documentation.<sup>18</sup> At the same time it would suggest that because CSAA/Avila sent a declaration a month later, this was an implied acknowledgment of the terms.<sup>19</sup> However, the submission of the declaration page and affidavit of no assets following an agreement between the parties as to acceptance of Avila's policy limits came to fruition upon Plaintiff Counsel submitting a less intense and intrusive declaration of no assets.<sup>20</sup> This

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<sup>15</sup> PA-00026-00027.

<sup>16</sup> PA-00039.

<sup>17</sup> PA-00037.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> PA-00061, Correspondence from CSAA containing Updated Declaration Page.



would further support the conclusion that the affidavit of no assets was a request included in the demand, not a material term.

3. The Specific Language of the Demand

**DEMAND**

***Our client is now willing to accept Ms. Avila's policy limits*** which includes any and all policies. We are also requesting that your insured complete and sign the enclosed confidential affidavit regarding insurance and assets. This includes AAA providing documentation on the limits of all policies related to this loss.

***You now have the opportunity to settle in the amount of your insured's policy limits.*** If settlement is not achieved within thirty days from the date of this letter, my client will seek full compensation from your client regardless of the limits of liability coverage. This demand must be accepted in writing by 5:00 p.m., March 30, 2020 or this offer is withdrawn.<sup>[21]</sup>

The query for the Court is whether the second sentence of this demand sets forth an essential term of contract, otherwise known as an intermediate or innominate term.

4. The District Court Issues a Ruling Without Holding an Evidentiary Hearing

The District Court held oral arguments with counsel present only.<sup>22</sup> In this regard it made four findings – The Offer had a very specific end time of March 30,

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<sup>21</sup> PA-00024.

<sup>22</sup> PA-00075, Order Denying Motion. Appearances October 19, 2021.

2020, that Avila/CSAA failed to timely accept, that Avila/CSAA did not comply with conditions precedent regarding supporting documentation, and there was no meeting of the minds.<sup>23</sup> Notably absent was testimony from any witnesses.

This appeal asks this Court to review the matters of timely acceptance, whether the request for additional documents were essential terms, and whether the District Court should have held an evidentiary hearing.

## **V. STANDARD OF REVIEW**

This Court defers to a district court's findings regarding whether a settlement agreement exists but independently reviews whether those facts satisfy the applicable legal standard.<sup>24</sup> A finding is clearly erroneous when it is not supported by substantial evidence.<sup>25</sup> Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion."<sup>26</sup>

Here, the District Court erroneously concluded that there was no meeting of the minds on all material terms of a settlement agreement, specifically as to the timeliness of CSAA/Avila tendering their policy limits acceptance via facsimile, and thus denying Motion to Enforce in its entirety. The District Court also erred in

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<sup>23</sup> PA-00076.

<sup>24</sup> *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005).

<sup>25</sup> *State Emp't Sec Dep't v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986).

<sup>26</sup> *Id.*

determining there were additional “conditions precedent” to the acceptance, when the language did not dictate the supposed mandatory nature of accompanying documentation.

Based upon the context and content of the acceptance letter, it clear that CSAA/Avila accepted the offer in full, and ultimately would avoid the necessity of subsequent litigation.

As there existed such evidence sufficient to demonstrate a meeting of the minds and compliance with the material terms, a binding contract was created that would have constituted a settlement of the below action, the District Court decision was arbitrary and capricious and subject to reversal.<sup>27</sup>

Alternatively, the District Court erred by not holding an evidentiary hearing. Material facts concerning the existence or terms of an agreement to settle were clearly in dispute. Oral arguments were not sufficient to determine the credibility of competing viewpoints.

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<sup>27</sup> *Gibellini v. Klindt*, 110 Nev. 1201, 1204, 885 P.2d 540, 542 (1994); *Brinkman v. Gilligan*, 583 F.2d 243, 248 (6th Cir. 1978) (concluding that the district court’s failure to consider the legal significance of undisputed evidence is clear error).

## **VI. LEGAL ARGUMENT**

### **A. Reasons Why The Court Should Hear The Petition**

The District Court committed clear error in denying the Motion to Enforce Settlement, where the communications between the parties established a settlement that should preclude Plaintiff from filing their litigation against Avila.

A writ will generally not issue unless the petitioner does not have a plain, speedy, and adequate remedy in the ordinary course of law.<sup>28</sup> Here, Avila has no such remedy other than undergoing costly years' long litigation of the case on its merits when there is essentially a question of jurisdiction presented at the infancy of the case. Such errors of law call for this Court (or the Court of Appeals) to issue a writ to prevent parties from incurring exorbitant or unwarranted legal fees/costs to try this case when the query is whether standing to hear the case exists. Considerations of sound judicial economy and administration further dictate mandamus. In the event this *corpus* would find the acceptance of the offer valid, it would be essentially impossible to claw back the proceedings of a trial and/or discovery that need not have ever occurred in the first place.

A motion for certification or reconsideration would not have provided plain, speedy, and adequate remedy given the requirements that Avila enter and Answer the pleadings following the denial of the Motion to Enforce.

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<sup>28</sup> *Bennett v. Eighth Jud. Dist. Ct.* 121 Nev. 802, 806, 121 P.3d 605, 608 (2005).

## **B. Standards for Writ Petitions**

The decision to entertain a writ petition lies solely within the discretion of this Court.<sup>29</sup> “A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, or to control a manifest abuse or an arbitrary or capricious exercise of discretion.”<sup>30</sup> Mandamus is an extraordinary remedy, available only when there is no “plain, speedy and adequate remedy in the ordinary course of law.”<sup>31</sup>

There are multiple circumstances where a District Court decision is appropriate for writ review. For example, the Court is most likely to intervene in a case that presents substantial issues of general importance.<sup>32</sup> This Court can also consider writ petitions that present matters of first impression that may be dispositive in the particular case.<sup>33</sup>

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<sup>29</sup> *Smith v. Eighth Jud. Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

<sup>30</sup> *Cote H. v. Eighth Jud. Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 907–08 (2008) (internal quotation marks omitted); *See Sims v. Eighth Jud. Dist. Ct.*, 125 Nev. 126, 129, 206 P.3d 980, 982 (2009).

<sup>31</sup> NRS 34.170; *see also D.R. Horton, Inc. v. Eighth Jud. Dist. Court*, 123 Nev. 468, 474, 168 P.3d 731, 736 (2007).

<sup>32</sup> *See Poulos v. Eighth Jud. Dist. Ct.*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982); *see also Western Cab Company v. Eighth Jud. Dist. Ct.*, 133 Nev. 65, 67, 390 P.3d 662, 667 (2017) [“As a general principle, we practice judicial restraint,...however, [we] use our discretion to consider writ petitions when...judicial economy is served by considering the writ petition.”].

<sup>33</sup> *Humboldt Gen. Hosp. v. Sixth Jud. Dist. Ct.*, 132 Nev. 544, 547, 376 P.3d 167, 170 (2016).

The granting of a writ petition is more likely where a party will suffer serious and irreparable harm absent intervention.<sup>34</sup>

### **C. The District Court Erred in Denying the Motion to Enforce**

In *May v. Anderson*,<sup>35</sup> this Court held that the construction and enforcement of settlement agreements, like other contracts, are governed by contract law principles. A valid settlement agreement requires offer, acceptance, mutual assent, and consideration.<sup>36</sup> As relevant here, a settlement agreement requires a meeting of the minds between the contracting parties regarding the contract's essential terms.<sup>37</sup>

“Because a settlement contract is formed when the parties have agreed to its material terms...a party's refusal to later execute a document after agreement upon the ... 18 essential terms does not render the settlement agreement invalid.”<sup>38</sup> If there is no meeting of the minds on the material terms, a court cannot just enforce those terms to which only one party agrees.<sup>39</sup>

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<sup>34</sup> See *Poulos v. Eighth Jud. Dist. Ct.*, *supra*, at 455, 62 P.2d 1178.

<sup>35</sup> 121 Nev. 668, 670, 119 P.3d 1254, 1256 (2005),

<sup>36</sup> *Id.*

<sup>37</sup> *Certified Fire Prot. v. Precision Constr.*, 128 Nev. 371, 378, 283 P.3d 250, 255 (2012).

<sup>38</sup> *May v. Anderson*, 121 Nev. at 670.

<sup>39</sup> *Certified Fire Prot.*, *supra*, at 378.

Additionally, “[t]his court reviews a district court’s interpretation of a statute or court rule ... de novo, even in the context of a writ petition.”<sup>40</sup> “When a rule is clear on its face, we will not look beyond the rule’s plain language.”<sup>41</sup>

1. Oral and Written Communication Establishes a Settlement.

The documentary evidence admitted at the hearing shows that CSAA/Avila always intended to settle all of Grey’s claims, including those presented in the below lawsuit.

While the Court may look to the surrounding circumstances to determine the intent of the parties,<sup>42</sup> evidence that the parties intended to be presently bound must be convincing and subject to no other reasonable interpretation.<sup>43</sup> Importantly, the district court has no authority to force a condition to which the parties did not agree.<sup>44</sup>

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<sup>40</sup> *Marquis & Aurbach v. Eighth Jud. Dist. Court*, 122 Nev. 1147, 1156, 146 P.3d 1130, 1136 (2006).

<sup>41</sup> *Morrow v. Eighth Jud. Dist. Court*, 129 Nev. 110, 113, 294 P.3d 411, 414 (2013).

<sup>42</sup> *Davis v. Nat’l Bank*, 103 Nev. 220, 223, 737 P.2d 503, 505 (1987),

<sup>43</sup> *Tropicana Hotel Corp. v. Speer*, 101 Nev. 40, 43, 692 P.2d 499, 502 (1985).

<sup>44</sup> *See Canfield v. Gill*, 101 Nev. 170, 697 P.2d 476 (1985) (holding court was without authority to change the terms of an agreement); *Dolge v. Masek*, 70 Nev. 314, 268 P.2d 919 (1954) (order for specific performance of a settlement agreement is improper where there was, in fact, no agreement); *Estate of Travis v. Special Adm’rs*, 102 Nev. 433, 434, 725 P.2d 570, 571 (1986) (court cannot force a compromise by ordering parties to execute a document that includes terms to which they have not agreed)

2. Subsequent Communication Acknowledges the Settlement.

After CSAA tendered the policy limit, the parties continued to acknowledge that dismissal was a requisite term. Subsequent activity may be used to show acknowledgement of the terms of an agreement.<sup>45</sup>

CSAA tendered the limits and then proceeded to process the paperwork requested in the demand. Not only do these steps establish acknowledgment of the request, but at the same time, demonstrates that CSAA/Avila did not understand the language to require a simultaneous condition of providing an affidavit regarding insurance and assets.

3. The District Court Should Not Have Denied the Motion

It is black letter law that the offer is construed against the offeror.<sup>46</sup> Here, the parties are disputing the conditions precedent of the demand. The base terms of the settlement—tender of policy limits in exchange for the resolution of claims—the consideration—were met.

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<sup>45</sup> See *Hodge v. Hayes*, 729 F.Supp. 718, 720 (D. Nev. 1989) (using post-agreement activity to prove acknowledgment of terms of agreement).

<sup>46</sup> *McCrary v. Bianco* 122 Nev. 102, 131 P.3d 573 (2006). See e.g. *Real Estate Pros v. Byars*, 90 P.3d 110, 113–15 (Wyo. 2004) (stating that ambiguity in offer generally should be construed against offeror but that offer referring to “all claims” was not ambiguous and included claim for attorney fees); see also *State Drywall v. Rhodes Design & Dev.*, 122 Nev. 111, 119, 127 P.3d 1082, 1087 (2006) (concluding that, absent language to the contrary, defense offers of judgment are presumed to include pre-offer prejudgment interest).



Avila sets forth that the attachments were tangential to acceptance and that the decision to tender and the timing are the only essential conditions of the demand. CSAA/Avila satisfied the one condition it understood to be essential. The declarations page would only confirm the existence and amount of policy limits, which Grey and her representatives were already well aware of by way of reading their demand letter.

CSAA/Avila did not make a counter-offer. The response was timely. The response did not amend any terms. The response did not add any terms. Grey may not repudiate the offer after the fact as a mechanism to open up the policy limits through re-interpretation of its offer. If Grey and counsel meant for those declarations to be mandatory, the demand letter should have provided mandatory language rather than suggestive.

As noted below, rather than summarily denying the Motion, an evidentiary hearing should have been held to determine whether the additional requests in the settlement agreement were essential terms and whether the Avila letter constituted a counter-offer or a valid acceptance.

**D. The Court Erred by Failing to Conduct an Evidentiary Hearing**

“Courts should not summarily enforce [or disregard] a settlement agreement, in the absence of an evidentiary hearing, where material facts concerning the

existence or terms of an agreement to settle are in dispute.”<sup>47</sup> If the parties disputed whether the terms of the settlement agreement were material and therefore constituted a counteroffer, the district court should hold an evidentiary hearing.<sup>48</sup>

*May* instructed that a district court erred in determining that a settlement agreement contained added material terms without making any findings of facts or conclusions of law. Without an evidentiary hearing to resolve what the terms of the asserted settlement agreement were, and their materiality, the *May* Court found the district court erred in summarily rejecting the motion to enforce settlement. Put simply, when relief from judgment or jurisdiction hinges on factual issues and credibility determinations, an evidentiary hearing should be held to determine entitlement to relief or satisfaction.

Similarly, the District Court failed to hold an evidentiary hearing to resolve what the material terms of the demand were. The record reflects that CSAA/Avila proceeded under the belief that the only conditions to acceptance were as to the policy limit and the timing. Grey later contends that the acceptance was improper because it did not attach documents noted in the demand letter.

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<sup>47</sup> *Maya Swimwear Corp. v. Maya Swimwear, LLC*, 885 F.Supp.2d 229, 234 (D. Del. 2012) (citing to *Tiernan v. Devoe*, 923 F.2d 1024, 1031 (3d Cir. 1991)).

<sup>48</sup> See *May*, *supra* 121 Nev. at 672–75; see also *Jones v. SunTrust Mortg., Inc.*, 128 Nev. 188, 191, 274 P.3d 762, 764 (2012).

There is no mandatory language. A reasonable fact finder could have found either parties' interpretation reasonable. For this reason, the District Court should have held an evidentiary hearing to consider both sides rather than summarily adjudicating the matter based upon lawyer representations.

In reviewing the affidavit in support of CSAA/Avila's Motion to Enforce, it is readily apparent the company considered the timeliness paramount, which material term was satisfied. Thus, the central query is whether the CSAA/Avila complied with the terms of the settlement agreement in its acceptance of the offer.

The District Court should have conducted an evidentiary hearing to determine the materiality of the terms and the circumstances of the acceptance in question. Accordingly, it erred in summarily rejecting the Motion to Enforce.

In this regard, the evidentiary hearing would have been necessary for the following reasons. First, it would have reviewed the materiality of purported conditions precedent cited by Grey as to the necessity of an affidavit of no other assets and whether the acceptance needed to include a declaration page with the limits of all policies with the simultaneous written confirmation of the intent to pay the policy limits.

Additionally, the evidentiary hearing would have helped the District Court to determine whether the policy limit letter demanding additional documentation was reasonable. In other words, the evidentiary hearing would have established whether

it was reasonable for CSAA to be required to make a determination on tender of limits, and simultaneously within that time period, secure documentation from its insured (who was also entertaining criminal proceedings) as to her other assets. The failure to conduct an evidentiary hearing on these issues leaves a record devoid of proof regarding the controlling facts and issues that govern the outcome of this matter.

## **VII. CONCLUSION**

In sum, Avila requests that this Court compel the District Court to vacate its Order denying her Motion to Enforce Settlement; compel the District Court to order that Motion to Enforce Settlement be granted, and in concert, order the dismissal of Grey's case against Avila with prejudice, with all parties to bear their own fees and costs.

Dated: July 29, 2022

**McCORMICK, BARSTOW, SHEPPARD,  
WAYTE & CARRUTH LLP**

By:           /s/ Renee M. Maxfield            
Renee M. Maxfield  
Frank A Toddre, II  
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### VERIFICATION

STATE OF NEVADA           )  
  )  
COUNTY OF CLARK        )

Under penalty of perjury, the undersigned declares that She is the attorney for the Petitioner named in the foregoing petition and knows the contents thereof, that the pleading is true of her own knowledge, except as to those matters stated on information and belief, and that as to such matters she believes them to be true. This verification is made by the undersigned attorney, pursuant to NRS § 15.010, on the ground that the matters stated, and relied upon, in the foregoing petition are all contained in the prior pleadings and other records of the Court and the District Court, true and correct copies of which have been included in the appendix submitted with the petition.

Dated this 29<sup>th</sup> day of July, 2022.

By: /s/ Renee M. Maxfield  
Renee M. Maxfield

## **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:

1. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, Times New Roman, 14 points;

2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 5,805 words.

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3. I hereby certify that I have read this Petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: July 29, 2022

McCORMICK, BARSTOW, SHEPPARD,  
WAYTE & CARRUTH LLP

By: /s/ Renee M. Maxfield  
Renee M. Maxfield  
Frank A Toddre, II  
Attorneys for Amanda Marie Avila

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 29<sup>th</sup> day of July, 2022, a true and correct copy of this completed **PETITION FOR WRIT OF PROHIBITION OR, IN THE ALTERNATIVE, WRIT OF MANDAMUS** upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

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