

IN THE SUPREME COURT OF THE STATE OF NEVADA

COMMISSIONER OF  
INSURANCE FOR THE STATE  
OF NEVADA AS RECEIVER OF  
LEWIS AND CLARK LTC RISK  
RETENTION GROUP, INC.

Appellant,

vs.

ROBERT CHUR; STEVE FOGG;  
MARK GARBER; CAROL  
HARTER; ROBERT HURLBUT;  
BARBARA LUMPKIN; JEFF  
MARSHALL; AND ERIC  
STICKELS

Respondents.

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ROBERT CHUR; STEVE FOGG;  
MARK GARBER; CAROL HARTER;  
ROBERT HURLBUT; BARBARA  
LUMPKIN; JEFF MARSHALL; AND  
ERIC STICKELS,

Appellants,

vs.

COMMISSIONER OF INSURANCE  
FOR THE STATE OF NEVADA AS  
RECEIVER OF LEWIS AND CLARK  
LTC RISK RETENTION GROUP,  
INC.

Respondents.

Supreme Court Case No. 85668

District Court Case No. A711535

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STEVE FOGG, MARK GARBER, Brown  
CAROL HARTER, ROBERT HURLBUT, Robert Supreme Court  
HURLBUT, BARBARA LUMPKIN,  
JEFF MARSHALL AND ERIC  
STICKELS' REPLY TO THE  
APPELLANT'S RESPONSE TO  
THE ORDER TO SHOW CAUSE  
FILED IN CASE 85668 ON MAY  
10, 2023

Supreme Court No. 85728

COMMISSIONER OF INSURANCE  
FOR THE STATE OF NEVADA AS  
RECEIVER OF LEWIS AND CLARK  
LTC RISK RETENTION GROUP,  
INC.

Appellant,

vs.

ROBERT CHUR; STEVE FOGG;  
MARK GARBER; CAROL HARTER;  
ROBERT HURLBUT; BARBARA  
LUMPKIN; JEFF MARSHALL; AND  
ERIC STICKELS; UNI-TER  
UNDERWRITING MANAGEMENT  
CORP.; UNI-TER CLAIMS  
SERVICES CORP.; AND U.S. RE  
CORPORATION

Respondents.

Supreme Court No. 85907

Respondents/Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric Stickels (collectively “Directors”), hereby respectfully submit their Reply to the Appellant’s Response to the Order to Show Cause Filed in Case 85668 on May 10, 2023.

## **I. ARGUMENT**

### **A. Appellant was Required to Timely Appeal the Final judgment.**

Appellant contends she was aggrieved by the Final Judgment, in part, because the Directors may use the Interlocutory Orders, “in the same way as the subject order

in *Valley Bank*.” This is a curious argument because *Valley Bank* was not about a party using an order for any particular purpose and this Court dismissed the appeal in *Valley Bank* because there was no final judgment. 110 Nev. 440, 445 (1994).

Here, there is no dispute that the Final Judgment was entered and there is apparently no dispute that Appellant was required to appeal the Final Judgment. Appellant herself contends that she was also aggrieved by the Final Judgment because it should have included but did not include liability against the Director Defendants. Appellant’s Response to the Order to Show Cause, P.7, Ll. 20-26.

**B. Appellant did not Appeal the Final Judgment.**

Contrary to Appellant’s assertions, Appellant did not actually appeal the Final Judgment. Appellant filed a Notice of Appeal identifying 17 interlocutory orders, never identifying the Final Judgment or a Notice of Entry of Order of the Judgment on Jury Verdict. Appellant then filed an Amended Notice of Appeal, this time identifying 24 interlocutory orders, but again, not identifying the Judgment on the Jury Verdict or the Notice of Entry of Order of the Judgment on Jury Verdict which perfects an appeal. *See* Motion to Dismiss filed in Case No. 85668.

Appellant’s post-judgment actions confirm that she did not appeal the Final Judgment. If Appellant is seeking review of the Final Judgment, why for the past year and a half since the Final Judgment has she continued a dispute to obtain an award of attorney’s fees and costs against Uniter/US Re based on the Final

Judgment? *See* Notice of Appeal in Case No. 85907, attached as **Exhibit A**. *See also* Docket, attached as **Exhibit B** at 30-32; US Re’s Motion to Dismiss and Enforce Settlement Agreement, attached as **Exhibit C**; Plaintiff’s Opposition to the Motion to Dismiss and Enforce Settlement Agreement, attached as **Exhibit D**; US Re’s Reply in Support of the Motion to Dismiss and Enforce Settlement Agreement, attached as **Exhibit E**; Transcript from June 8, 2023 hearing, attached as **Exhibit F**. Likewise, if Appellant is seeking review of the Final Judgment, why would she have filed suit against Uniter/US Re’s insurers for the entirety of the money damages awarded in the Final Judgment in a case called *Commissioner of Insurance of the State of Nevada as Receiver of Lewis and Clark LTC Risk Retention Group, Inc. v. Ironshore Specialty Insurance Co., et al*, filed in the U.S. District Court on April 10, 2023? Motion to Vacate Order Denying Motions for Reconsideration, attached as **Exhibit G**, at 102.

### **C. Appellant has Waived any Right to Appeal the Final Judgment.**

Even if this Court finds that Appellant did attempt to appeal the Final Judgment, Appellant has waived its right to do so. “No litigant is permitted to a review of an entire judgment or decree, all parts of which are mutually interdependent, after he has acquiesced in its terms by enforcing it or taking advantage of the provisions in his favor.” *Hummel v. Roberts*, 70 Nev. 225, 230, 265 P.2d 219, 220 (1954) (internal citations omitted). Likewise, “[a] party who

accepts benefits of a judgment waives the right to appeal ‘because a party may not follow two legally inconsistent courses of action.’” *Wheeler Springs Plaza LLC v. Beemon*, 119 Nev. 260, 264, 71, P.3d 1258, 1261 (2003) (internal citations omitted).

A party “who voluntarily acquiesces in, ratifies or recognizes the validity of a judgment” waives or is estopped from his right to appellate review. *See Basic Refractories v. Bright*, 71 Nev. 248, 253, 286 P.2d 747, 749 (1955). “Acquiescence” is simply implied consent to the judgment. *Id.* All that is required is that the party “clearly and unmistakably show an inconsistent course of conduct or an unconditional, voluntary, and absolute acquiescence, with the intent, as has been held to ratify or confirm the judgment.” *Id.*

This is precisely what Appellant has done. As but one example, on April 10, 2023, after accepting \$5,200,000 in funds from Uniter/US Re as a settlement of the Final Judgment, Appellant sued Uniter/US Re’s insurers for the totality of the Final Judgment. *See* Exhibit G at 128. Appellant makes no mention of any appeal and simply alleges that “Judgment was entered against the Judgment Debtors [Uniter/US Re] in Dept. 27 of the Eighth Judicial District Court on December 30, 2021, in the amount of \$19,059,997.28. On December 2, 2022, the Court further awarded Plaintiff \$1,814.863.61 in attorneys’ fees and costs, for a total judgment in favor of Plaintiff and against the Judgment Debtors jointly and severally in the amount of \$20,874,860.89.” *Id.* at 130. Appellant seeks a ruling that the insurers, “owe

Plaintiff the remaining unpaid amounts of the Judgment pursuant to the applicable insurance contract” and “other further relief as deemed appropriate.” *Id.* at 133.

Appellant consented to the Final Judgment by, at the very least, voluntarily suing thereon for the entirety of the awarded amount. The Final Judgment resolved all claims and disputes and did not in any way acknowledge Appellant’s right to appeal the Order Denying the Motion for Leave to Amend. *See Basic Refractories*, 71 Nev. at 253, 286 P.2d at 749. Such actions constitute a waiver.

## **II. CONCLUSION**

Because Appellant was aggrieved by the Final Judgment, Appellant was required to appeal the Final Judgment. Appellant did not timely identify the Final Judgment in the Notice of Appeal and waived its right to appellate review of the Final Judgment. Thus, there is no jurisdiction for this Court to review the Final Judgment and all interlocutory orders preceding it.

Dated this 7<sup>th</sup> day of July, 2023.

LIPSON NEILSON P.C.

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## **CERTIFICATE OF SERVICE**

Pursuant to NRAP 25, I certify that I am an employee of LIPSON NEILSON P.C. and that on the 7<sup>th</sup> day of July, 2023, a true and correct copy of the foregoing **RESPONDENTS ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL AND ERIC STICKELS' REPLY TO THE APPELLANT'S RESPONSE TO THE ORDER TO SHOW CAUSE FILED IN CASE 85668 ON MAY 10, 2023** was filed and served electronically with the Clerk of the Nevada Supreme Court in accordance with the master service list as follows:

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Commissioner of Insurance for the State of Nevada as  
Receiver of Lewis & Clark LTC Risk Retention Group, Inc.

And by United States First Class Mail, in a properly addressed envelope with adequate postage affixed thereon, addressed as follows:

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