IN THE SUPREME COURT OF THE STATE OF NEVADA

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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, ERIC STICKELS, UNI-TER UNDERWRITING MANAGEMENT CORP., UNI-TER CLAIMS SERVICES CORP., and U.S. RE CORPORATION, Respondents.	Supreme Court No. 85668 Electronically Filed Jun 16 2023 02:43 PM Elizabeth A. Brown Clerk of Supreme Court **APPELLANT'S OPPOSITION TO MOTION TO DISMISS**
ROBERT CHUR; STEVE FOGG; MARK GARBER; CAROL HARTER; ROBERT HURLBUT; BARBARA LUMPKIN; JEFF MARSHALL; AND ERIC STICKELS, Appellants, vs. THE STATE OF NEVADA COMMISSIONER OF INSURANCE AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC., Respondents.	Supreme Court No. 85728

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; UNI-TER UNDERWRITING MANAGEMENT CORP.; UNI-TER CLAIMS SERVICES CORP.; AND U.S. RE CORPORATION, Respondents.	Supreme Court No. 85907

Appellant COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC., ("Appellant"), by and through their counsel, Hutchison & Steffen, PLLC, hereby submit their opposition to Respondents Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric Stickels ("Respondents" or "Director Defendants") Motion to Dismiss Appellant's Appeal ("Motion"). This Opposition is based on the following memorandum of points and authorities as well as all exhibits thereto, and all papers and pleadings on file herein.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Respondents' Motion is based entirely on the inaccurate assertion by Respondents that Appellant did not appeal the final judgment in this matter, entered on December 30, 2021 ("Final Judgment"). This assertion by Respondents is false. In reality, both notices of appeal (original and amended), make clear that the Final Judgment was included in this appeal. Moreover, Respondents entirely ignore the Appellant's Docketing Statement filed on December 13, 2022 ("Docketing Statement"), and with good reason. The Docketing Statement makes clear that the Appellant is appealing from the Final Judgment, in addition to the order and judgment dismissing Respondents from the underlying matter. Accordingly, the Motion should be denied.

II. STATEMENT OF FACTS

1. On August 10, 2020, the trial court entered its Order Denying Plaintiff's Motion for Leve to File Fourth Amended Complaint.

2. On August 10, 2020, the trial court entered its Findings of Fact, Conclusions of Law and Order Denying Plaintiff's Motion for Leave to File Fourth Amended Complaint.

3. On August 14, 2020, the trial court entered its Order granting Respondents' Motion for Judgment on the Pleadings.

4. On August 14, 2020, the trial court entered its Judgment in favor of

Respondents.

5. On September 10, 2020, the trial court entered its Findings of Fact, Conclusions of Law and Order Denying Appellant's Motion for Reconsideration of Motion for Leave to Amend Regarding Director Defendants (*i.e.* Respondents).

6. On December 30, 2021, the Final Judgment on jury verdict was entered. *See* Exhibit 1 hereto.

7. On November 9, 2022, Appellant filed her Notice of Appeal ("First Notice of Appeal") commencing appeal no.: 85668 identifying several interlocutory orders, as well as the Final Judgment, as the subject of the appeal. Respondents do not challenge the timeliness of the appeal. The First Notice of Appeal included several orders and judgments, and specifically identified "all related orders and judgments entered herein" which includes the Final Judgment.

8. On November 18, 2022, Appellant filed her Amended Notice of Appeal ("Amended Notice of Appeal") identifying several interlocutory orders, as well as the Final Judgment, as the subject of the appeal. The Amended Notice of Appeal also included several orders and judgments, and specifically identified "all related orders and judgments entered herein" which includes the Final Judgment.

9. On December 13, 2022, Appellant filed her Docketing Statement confirming the appeal included an appeal from the Final Judgment. A copy of the Docketing statement is attached as Exhibit 1 hereto for the Court's convenience.

10. In response to paragraph 21, Appellant confirmed she was appealing

from the Final Judgment:

> 21. **Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**
>
> Explain how each authority provides a basis for appeal from the judgment or order: **The basis for appeals herein are pursuant to NRAP 3A(a) and (b), final judgment entered in an action**, and all related final orders of the district court.

See Exhibit 1, at p. 15 (emphasis added).

11. Further, in responses to paragraph 24, which asks "Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below:", the Appellant marked "Yes" as the Appellant was appealing from, *inter alia*, the Final Judgment. *See id*. at p. 16.

12. In addition, paragraph 27 of the Docketing Statement requests the appellant to attached file-stamped copies of, among other things, "Any other order challenged on appeal." *Id*. at p. 17.

13. In response, Appellant attached hundreds of pages of exhibits, including the Final Judgment. *See* Exhibit 1 hereto, at page 75 of 599, which is the Final Judgment.

14. Accordingly, Respondents' assertion that Appellant did not appeal

from the Final Judgment is false and misleading.[1] As such, because the Motion is based entirely on this inaccurate assertion by Respondents, the Motion must be denied.

III. LAW AND ARGUMENT

A. Because Respondents' assertion that Appellant did not appeal from the Final Judgment is false, the Motion must be denied.

As noted above, Respondents' assertion that Appellant did not appeal from the Final Judgment is false. Respondents' deception is made all the more clear considering that the Respondents filed a response to the Docketing Statement which confirms clearly that the Final Judgment is appealed from, and yet Respondents fail to admit this basic fact.

Further, even states which follow the Final Judgment rule, including Texas, have acknowledged that for purposes of an appeal, there can be multiple 'final judgments.' *See Wagner v. Warnasch*, 156 Tex. 334, 339, 295 S.W.2d 890, 893 (1956) ("The consent judgment was admittedly a final judgment, and if the order was also a final judgment, then there were two final judgments in the same case."). Moreover, the Nevada Supreme Court, as well as other courts have recognized that the label given to an order is not dispositive. *See e.g.*, *Lee v. GNLV Corp.*, 116 Nev.

[1] In fact, this Court conducted its own review and found no jurisdictional defect with respect to the Respondent Director Defendants as it is clear from the relevant documents that Appellant appealed from, among other things, the Final Judgment. The Court ordered Appellant to address issues pertaining to the appeal related to the corporate defendants only given that the Final Judgment results from a jury verdict against them, which response Appellant will file on June 23, 2023.

424, 427, 996 P.2d 416, 418 (2000) ("More recently, in *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994), we reiterated that "[t]his court determines the finality of an order or judgment by looking to what the order or judgment actually *does*, not what it is called." We thus found labels to be inconclusive when determining finality; instead, we recognized that this court has consistently determined the finality of an order or judgment by what it substantively accomplished."); *see also Louisville & N.R. Co. v. Lovelace*, 24 Ga. App. 616, 101 S.E. 718, 720 (1919) ("In this sense, there may be two final judgments in the same case, either one of which operates to end the litigation."); Hayes v. Kerns, 387 N.W.2d 302, 305–06 (Iowa 1986) ("Our case law is clear that there may be two final judgments or decrees "in the same cause, the one settling the substantial merits of the case, and the other based upon further necessary proceedings, from each of which an appeal will lie."); *Green v. Advance Homes, Inc.*, 293 N.W.2d 204, 207 (Iowa 1980) ("A case, for purposes of appeal, may have more than one final order. Such an initial final order must establish the substantial rights of the parties and must place beyond the issuing court the power to return the parties to their original positions." (citations omitted)); *Lyon v. Willie*, 288 N.W.2d 884, 887 (Iowa 1980) ("Two final orders are possible in a single case, one putting it beyond the power of the court to put the parties in their original positions in relation to a specific issue, and the other adjudicating remaining issues in the case."). Regardless, the issue of whether the judgment dismissing the Respondents from the underlying litigation is a 'final

judgment' for purposes of appeal is not necessary to address as it is clear the Appellant appealed from the Final Judgment.

Moreover, the Respondents' two unpublished cases on which it entirely relies for its specious argument do not change the analysis, and in fact, demonstrate that the Respondents themselves are aware of the falsity of their position. For example, in the unpublished decision in *Brandt v. Smith*, 501 P.3d 992, 2022 WL 178118, Case No. 83667 (Unpub. January 19, 2022), the Respondents admit in their Motion that the appellant there acknowledged that he was not appealing the final judgment. *See* Motion at p. 7. Similarly, the unpublished decision in Abts v. Arnold-Abts, 466 P.3d 1289, 2020 Nev. Unpub. LEXIS 703, Case No. 81296, 81297 (Unpub. July 16, 2020) is likewise inapposite. There the Court found that an order granting a motion to set aside a default judgment is not an independently appealable order, and that an order dismissing some, but not all, claims and allowing appellant to amend her complaint is not appealable as a final judgment. *Id*. No such order is the subject of this appeal. Accordingly, the Motion should be denied.

B. Notices of appeal are liberally construed.

Pursuant to NRAP 3(c)(1)(B), a notice of appeal should "designate the judgment, order or part thereof being appealed," and given Nevada's policies, the general designation used by Appellant is sufficient. Further, the judgment being appealed from can certainly be inferred from the text and timing even without the clear and specific references in the notices and Docketing Statement.

Further, it has long been the policy of this Court to construe notices of appeal liberally, *Thiess v. Rapaport*, 57 Nev. 434, 66 P.2d 1000, 1002 (1937), and to hold them sufficient if, by fair construction or reasonable intendment, the court can say that the appeal is taken from the judgment. *Id.*[2] The filing of a simple notice of appeal was intended to take the place of more complicated procedures to obtain review, and the notice should not be used as a technical trap for the unwary draftsman. *Winston Prod. Co. v. DeBoer*, 122 Nev. 517, 526, (2006).

Given Nevada's policy of liberal construction of notices of appeal, use of the phrase "and all related orders and judgments entered herein" satisfies the requirements for a notice of appeal. *See, e.g., Luz v. Lopes*, 358 P.2d 289, 293 (Cal. 1960) (concluding that an appeal from "all orders and rulings ... which are adverse to [the appellants]" was sufficient to perfect an appeal from a default judgment that was not specifically identified in the notice of appeal): *Blink v. McNabb*, 287 N.W.2d 596, 598–99 (Iowa 1980) (finding a notice of appeal that identified the specific date of a final judgment, along with "all [o]rders, findings, [r]ulings and [o]pinions of the Court in the above entitled cause prior to, during, and subsequent to trial" to comply

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[2] See NRAP 3(a)(2) which provides: "An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court to act as it deems appropriate, including dismissing the appeal." Given this rule and given the notice of appeal was timely, if the Court were to find the final judgment should be specifically referenced, the appropriate act would be to allow an amendment.

with the requirement that an appellant "shall specify ... the decree, judgment, order or part thereof appealed from"); *Gates v. Goodyear*, 155 P.3d 1196, 1199 (Kan. App. 2007) ("Utilization of 'catch-all' language, such as 'and from each and every order or ruling entered against the appellant' or 'from all underlying adverse rulings' in a notice of appeal has been recognized as sufficiently inclusive to perfect appeals from otherwise unspecified rulings."); *Virgin Islands Taxi Ass'n v. Virgin Islands Port Auth*., 67 V.I. 643, 673–74 (2017)(notice of appeal indicating "[a]ll rulings adverse" sufficient to allow review of unspecified order reversing contempt findings and related sanctions).

Thus, the Notice of Appeal and Amended Notice of Appeal as written are plainly sufficient to confer jurisdiction to this Court. The Final Judgment appealed from can be inferred from the circumstances.

Dismissal of an appeal is not warranted where the intention to appeal from a specific judgment may be reasonably ***inferred*** from the text of the notice and where the defect has not materially misled the respondent. *Collins v. Union Fed. Sav. & Loan Ass'n*, 97 Nev. 88, 89–90, 624 P.2d 496, 497 (1981). Indeed, the intention of the appellant can be inferred from the date of the filing of the notice of appeal. *Id.*

The notice of appeal was filed after a tolling motion related to the final judgment was ruled upon by the district court, as noted, the notice of appeal referenced "all related [] judgments entered herein," and the docketing statement referenced the Final Judgment specifically and attached it as an order from which

appeal was taken. As such, the Appellant's intent to appeal upon a final judgment can certainly be inferred. Respondents have not shown any prejudice. Accordingly, the Motion should be denied.

III. CONCLUSION

For all these reasons, Appellant respectfully submits that the Motion must be denied in its entirety, and requests such other and further relief as the Court deems appropriate.

Dated this 16th day of June, 2023.

HUTCHISON & STEFFEN, PLLC

/s/Brenoch Wirthlin

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this 16th day of June, 2023, I caused the above and foregoing document entitled: **APPELLANT'S OPPOSITION TO MOTION TO DISMISS** to be served via NOTICE OF ELECTRONIC FILING through the Electronic Case Filing System of the Nevada Supreme Court with the submission to the Clerk of the Court, who will serve the parties electronically.

/s/Danielle Kelley
An employee of Hutchison & Steffen, PLLC