

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 * * *

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

7 Appellant,

8 vs.

9 ROBERT CHUR, STEVE FOGG,
10 MARK GARBER, CAROL HARTER,
11 ROBERT HURLBUT, BARBARA
12 LUMPKIN, JEFF MARSHALL, ERIC
13 STICKELS, UNI-TER
14 UNDERWRITING MANAGEMENT
15 CORP., UNI-TER CLAIMS SERVICES
16 CORP., and U.S. RE CORPORATION,

17 Respondents.

18 ROBERT CHUR, STEVE FOGG,
19 MARK GARBER, CAROL HARTER,
20 ROBERT HURLBUT, BARBARA
21 LUMPKIN, JEFF MARSHALL, AND
22 ERIC STICKELS,

23 Appellants,

24 vs.

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

 Respondents.

Supreme Court No. 85668

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APPELLANT'S RESPONSE TO
RESPONDENT'S MOTION TO
STRIKE

Supreme Court No. 85728

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

5 Appellant,

6 vs.

7
8 ROBERT CHUR; STEVE FOGG;
9 MARK GARBER; CAROL HARTER;
10 ROBERT HURLBUT; BARBARA
11 LUMPKIN; JEFF MARSHALL; AND
12 ERIC STICKELS; UNI-TER
UNDERWRITING MANAGEMENT
CORP.; UNI-TER CLAIMS SERVICES
CORP.; AND U.S. RE CORPORATION,

13 Respondents.
14

Supreme Court No. 85907

15 Appellant COMMISSIONER OF INSURANCE FOR THE STATE OF
16 NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION
17 GROUP, INC., (“Commissioner”), by and through counsel, Hutchison & Steffen,
18 PLLC, hereby files this response (“Response”) to Respondent U.S. Re Corporation’s
19 Motion to Strike.
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22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **I. INTRODUCTION**

24
25 On May 10, 2023 in two separate appeals this Court issued an Order to Show
26 Cause (“OSC”) why each appeals should not be dismissed in whole or part. The
27 appeals were consolidated on June 9, 2023. On June 23, 2023, Commissioner
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1 responded separately to both OSCs. Shortly thereafter, on June 29 & 30, 2023, the
2 district court took action affecting the case below. On July 7, 2023, Respondents in
3 the cases filed separate responses regarding the OSCs. As these did not accurately
4 describe the circumstances, Commissioner requested leave to file a Reply. This was
5 granted on October 12, 2023. Commissioner filed a single Reply addressing the two
6 applicable consolidated appeals on October 26, 2023. U.S. Re Corporation (“U.S.
7 Re”) filed a Motion to Strike Commissioner’s Reply on November 13, 2023.

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9 At its core U.S. Re’s Motion to Strike is, in reality, a supplemental response to the
10 Commissioner October 26, 2023 Reply. Rather than limit its argument to a claim
11 Commissioner’s Reply exceeded the scope permitted by this Court, U.S. Re
12 responds to the arguments made in Commissioner’s Response and makes new ones
13 not related to the allegedly excessive Reply. As such, the Motion to Strike itself
14 cures any alleged excessive response made by the Commissioner. Additionally, the
15 arguments made by U.S. Re are not well founded. **II. LEGAL ARGUMENT**

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17 **A. The June 29, 2023 Order and the June 30, 2023 Satisfaction of Judgment**
18 **are void.**

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20 U.S. Re’s arguments regarding the June 29, 2023 Order and the June 30, 2023
21 Satisfaction of Judgment are wrong. These actions by the district court are void.¹

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23 This Court has held: “The point at which jurisdiction is transferred must [] be

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28 ¹ This will be discussed in more detail in response to U.S. Re’s Motion to Dismiss.

1 sharply delineated.” *Rust v. Clark Cnty. Sch. Dist.*, 103 Nev. 686, 688–89, 747 P.2d
2 1380, 1382 (1987); “Jurisdictional rules go to the very power of this court to act.
3 They must, accordingly, be clear and absolute in order to give all fair notice of what
4 is required to bring a matter properly before this court.” *Clark Cnty. Deputy*
5 *Marshals Ass’n v. Clark Cnty.*, 134 Nev. 924, 425 P.3d 381 (2018) *quoting Rust*, 103
6 Nev. at 688; “The point at which jurisdiction is transferred from the district court to
7 this court must be clearly defined.” *Mack-Manley v. Manley*, 122 Nev. 849, 855,
8 138 P.3d 525, 529–30 (2006) *citing Rust*, 103 Nev. at 688–89.

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11 This clearly defined point is when the appeal is perfected. *Foster v. Dingwall*,
12 126 Nev. 49, 52, 228 P.3d 453, 455 (2010)(holding upon perfection, the district court
13 is divested of jurisdiction to revisit issues that are pending before the appellate
14 courts). Perfection occurs upon the timely filing of a notice of appeal. NRAP 3. If
15 the notice of appeal is premature based on a tolling motion, the appeal will be
16 deemed timely upon resolution of the tolling motion. NRAP 4(a)(6).

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19 Here, Commissioner filed a Notice of Appeal on November 9, 2022. A
20 motion for reconsideration was filed on December 14, 2022. This was resolved no
21 later than April 12, 2023 when the order resolving the motion for reconsideration
22 was entered. This is the clearly defined point when the appeal was perfected, and
23 the district court was deprived of jurisdiction.²

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28 ² Since the order “vacated” the motion for reconsideration rather than just denying

1 When a court acts without jurisdiction, any orders issued or actions taken are
2 void. *See Stapp v. Hilton Hotels Corp.*, 108 Nev. 209, 212, 826 P.2d 954, 956
3 (1992)(holding order amending and offsetting judgment entered without jurisdiction
4 was void). Here the Order Vacating the April 12, 2023 Order and the resulting
5 Satisfaction of Judgment were issued without jurisdiction and are consequently void.
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8 U.S. Re also makes the surprising argument that the June 29, 2023 Order and
9 the Satisfaction of Judgment are collateral and independent from the appealed order.
10 The June 29, 2023 Order prepared by U.S. Re provides, in relevant part:
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12 IT IS HEREBY FURTHER ORDERED . . . Plaintiff's
13 appeal of this matter against the Corporate Defendants
14 should be dismissed.

15 June 29, 2023 Order, p. 2, lns. 16-18. Further, in U.S. Re's July 7, 2023 Response
16 it argues that as a result of the June 29, 2023 Order and the Satisfaction of Judgment
17 "this appeal should be dismissed in its entirety." July 7, 2023 Response, p. 4, and
18 that the appeal is moot. *Id.* at 7. Thus, U.S. Re's argument that the matters are
19 "collateral and independent" of this issues on appeal is, at best, disingenuous.
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21 **B. The Corporate Defendants are parties to the appeal.**

22 U.S. Re ignores the law providing that neither the Docketing Statement nor
23 the Case Appeal Statement are binding.
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27 it, the appeal may have been perfected on November 9, 2022. The motion was
28 plainly resolved by April 12, 2023.

1 NRAP 14(a)(4) provides that the statement of issues in the docketing
2 statement is not binding. Further, NRAP 3(a)(2) provides that a failure to take any
3 step other than timely filing does not affect the validity of the appeal. This would
4 include the case appeal statement filed pursuant to NRAP 3(f). A non-jurisdictional
5 oversight in the early filings of a case is not an appropriate basis to deny the
6 Commissioner its right to appeal an adverse decision, especially in a complex matter
7 with multiple appeals and an extensive case record. Appellant is in the process of
8 amending each to fix the oversight.

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12 Next, U.S. Re's argument regarding the Order to Show Cause doesn't make
13 sense. If this Court thought that the Corporate Defendants were not parties to the
14 appeal, the Court would have simply amended the caption accordingly. Instead, this
15 Court asked for cause why the corporate defendants should not be "dismissed" from
16 the appeal.

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18 Regardless, the docketing statement filed with this Court included a denial of
19 the Commissioner's motion for leave to file a fourth amended complaint which
20 implicated the Corporate Defendants, including U.S. Re. This denial of the motion
21 to amend is also listed in the Case Appeal Statement. The Commissioner was
22 aggrieved by the district court's decision not to allow additional claims against the
23 Corporate Defendants. *See* NRAP 3(a). Thus, the Corporate Defendants are proper
24 parties to the appeal.

1 **C. The Commissioner challenged the June 29, 2023 Order.**

2 U.S. Re’s argument that the Commissioner’s July 13, 2023 Motion did not
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4 contest the June 29, 2023 Order is patently incorrect. Even ignoring the caption of
5 that motion, the Commissioner requested the following therein: “For these reasons,
6 the Court should issue an order amending its June 29, 2023 Order regarding issuance
7 of a Satisfaction of Judgment.” July 13, 2023 Motion, p. 4, ln. 27 to p. 5, ln. 2. Thus,
8 the July 13, 2023 Motion challenges the satisfaction of judgment by seeking
9 reconsideration of the June 29, 2023 Order.
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12 The June 29, 2023 Order permitted the Satisfaction of Judgment, and in the
13 July 17, 2023 Motion the Commissioner repeatedly stated that portion of the Order
14 was incorrect. *See e.g.* July 13, 2023 Motion, p. 12 (arguing the district court’s order
15 was advisory); p. 10, (arguing Agreement was based on fraudulent
16 misrepresentations); pp. 9-10 (arguing the district court rewrote the Agreement).
17

18 Further, the Commissioner sought: “a full evidentiary hearing on the issue of
19 waiver pursuant to NRCP 5.” July 13, 2023 Motion, p. 12, lns. 17-19. The Order is
20 how the district court ordered the entry of the satisfaction judgment.
21

22 Plainly, Commissioner challenged the June 29, 2023 Order by way of tolling
23 motions.
24

25 **D. The Commissioner did not exceed the scope of this Court’s order**
26 **permitting a reply in light of this Court’s consolidation of appeals.**
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28 This Court consolidated the appeals pursuant to NRAP 3(b)(2). The effect of

1 the consolidation was not expressly stated and the rule itself provides little
2 assistance. Law on the effects of consolidation of appeals is sparse, and should be
3 considered case-by-case basis. *See* § 3949.2 Joint or Consolidated Appeals, 16A
4 Fed. Prac. & Proc. Juris. § 3949.2 (5th ed.) *citing* *United States v. Tippet*, 975 F.2d
5 713, 718 (10th Cir. 1992). *See also* U.S.Ct. of App. D.C.Cir. Handbook, Part
6 V.A.(explaining “once cases are consolidated, they are treated as one appeal for most
7 purposes”). When two cases are consolidated and the two records are incorporated,
8 “the facts, argument and the law apply equally to the two cases.” *City of New Albany*
9 *v. Ray*, 417 So.2d 550, 553 (Miss.1982). Despite this, most of these authorities also
10 note that the consolidated case can also maintain their separate identities.
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14 This Court consolidated the various appeals on June 6, 2023.³ It set the
15 deadline for the responses to the Orders to Show Cause on the same day. By the
16 time the Reply was due, this Court had not issued a decision regarding Case No.
17 85668, suggesting this Court was waiting on the Commissioner’s Reply in that case
18 as well. Further, all the appeals emerge from the same case and only have different
19 procedural facts. Given the consolidated appeals, closeness of the issues, and the
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24 ³ On the docket, each entry after consolidation contains “Nos. 85668/85728/
25 85907”. While certainly not binding on this Court, these factors led Commissioner
26 to believe this Court was expecting, or at least allowing, discussion on each matter
27 subject to an OSC.
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1 fact this Court's jurisdiction was implicated, the Commissioner took the approach
2 of ensuring this Court had all relevant information and argument needed to make a
3 decision by way of the Reply. As such, providing a clear summary showing that this
4 Court had proper jurisdiction and countering Respondent's incorrect arguments
5 regarding the supplemental proceedings below seemed the proper course of action.
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8 Regardless, an appellate court has an independent obligation to consider the
9 presence or absence of its appellate jurisdiction sua sponte. *LeChase Constr. Servs.,*
10 *LLC v. Argonaut Ins. Co.*, 63 F.4th 160 (2d Cir. 2023)(emphasis added); *see also*
11 *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011) (noting that courts
12 may consider subject matter jurisdiction sua sponte). If the information provided by
13 the Commissioner is useful to this Court, this Court should consider it.⁴
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16 **III. CONCLUSION**

17 As noted, the Motion to Strike is really nothing more than a response to the
18 Commissioner's Reply with additional argument, but these arguments are obviously
19 wrong.
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21 The district court lost jurisdiction over the case when the motion for
22 reconsideration was resolved on April 12, 2023. Since NRAP 12A was not followed,
23 the June 29, 2023 Order and the June 30, 2023 Satisfaction of Judgment are void.
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27 ⁴ To the extent it is necessary, Commissioner would request it be permitted to
28 supplement its response in Case No.85668 accordingly.

1 U.S. Re's claim that these are collateral orders is -- at best -- disingenuous.

2 Since Commissioner was aggrieved by the denial of leave to amend regarding
3 claims against the Corporate Defendants, they are proper parties in this appeal
4 regardless of whether mentioned in the non-binding case appeal or docketing
5 statements, particularly since the relevant orders were listed and included.
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8 The Commissioner plainly challenged the June 29, 2023 Order in its July 17,
9 2023 Motion.

10 The Commissioner felt it appropriate to provide a full reply given the
11 consolidated appeals and the continued fluid nature of the case given the district
12 court's extra-jurisdictional acts. Regardless, given U.S. Re's own foray into several
13 ultra vires arguments in its Motion to Strike, its request to strike Commissioner's
14 Reply on that basis is strained and disingenuous.
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17 As such, U.S. Re's Motion to Strike should be denied in its entirety.

18 Dated this 20th day of November, 2023.
19

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