IN THE SUPREME COURT OF THE STATE OF NEVADA

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MEI-GSR HOLDINGS, LLC, AM-GSR HOLDINGS, LLC, and GAGE VILLAGE COMMERCIAL DEVELOPMENT, LLC, Appellants, v. ALBERT THOMAS, *et al.,* Respondents.	Case Nos. 85915 86092 86985 87243 87303 87566 87567

APPELLANTS' PETITION FOR REHEARING OF DECEMBER 29, 2023 ORDER

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I. INTRODUCTION

On December 29, 2023, this Court resolved a number of pending motions, including two pending orders to show cause, a motion to dismiss appeal, and a motion to consolidate ("Order"). This Order overlooked or misapprehended binding Nevada authority and persuasive authority when it relied on law that no party cited. The Order also failed to consider directly controlling and dispositive decisions from this Court. It did not mention—much less reconcile—the law it relied on with the binding, contradictory authority Appellants did raise. Not only did the Order overlook or misapprehend this binding, contrary authority, but the Order created *two* conflicting strands of Nevada law on *two* separate issues related to the provisional remedial nature of receiverships. Thus, rehearing is appropriate to resolve the overlooked or misapprehended law.

II. ARGUMENT

A. Legal Standard

Rehearing is proper where the panel "overlooked or misapprehended a material fact . . . or a material question of law" or "overlooked, misapplied or failed to consider a . . . decision directly controlling a dispositive issue." NRAP 40(c)(2). On rehearing, while parties may not "reargue matters they presented in their appellate briefs," *City of N. Las Vegas v. 5th & Centennial, LLC*, 130 Nev. 619, 624, 331 P.3d 896, 898 (2014), parties must ordinarily cite to their briefs where the material fact, question of law, or overlooked authorities appear, NRAP 40(c)(2).

B. The Panel Overlooked or Misapprehended Binding Nevada Law, Which Creates a Conflict Between Nevada Supreme Court Precedent.

The Panel misapprehended or overlooked controlling Nevada law, which, at best, created or recognized a conflict within this Court's precedent. As this Court has repeatedly recognized, held, and explained, a pre-judgment receiver—like the receiver here—is a provisional remedy that terminates upon entry of a final judgment on the merits. *See, e.g.*, *Direct Grading & Paving, LLC v. Eighth Jud. Dist. Ct.*, 137 Nev. 320, 324, 491 P.3d 13, 17 (2021) ("A provisional remedy is '[a] ***temporary remedy awarded before judgment and pending the action's disposition, such as*** a temporary restraining order, a preliminary injunction, ***a prejudgment receivership***, or an attachment,' that 'is intended to maintain the status quo by protecting a person's safety or preserving property.'" (emphasis added)); *Johnson v. Steel, Inc.*, 100 Nev. 181 183, 678 P.2d 676, 678 (1984) (holding that a "receiver *pendente lite* is an ancillary ***remedy*** used to preserve the value of assets ***pending outcome of the principal case***." (emphasis added)); *N5HYG, LLC v. Iglesia*, No. 83425, 2022 WL 2196855, at *1 (Nev. June 17, 2022) (parenthetically quoting 75 C.J.S. *Receivers* § 5 (2022) for the proposition that "***generally the appointment of a receiver 'is not the final or ultimate relief. . . . It is merely an ancillary remedy, or it is merely an auxiliary, incidental, and provisional remedy***'"); *see also Bowler v. Leonard*, 70 Nev. 370, 384, 269 P.2d 833, 840 (1954) ("Receivership is generally regarded as a ***remedy*** of last resort." (emphasis added)); *Hines v. Plante*, 99 Nev. 259, 261, 661 P.2d 880, 881-82 (1983) ("The

appointment of a receiver *pendente lite* is a harsh and extreme ***remedy*** which should be used sparingly and only when the securing of ultimate justice requires it." (emphasis added)).[1]

The Order did not address, mention, or otherwise distinguish these recent, dispositive, Nevada cases. Rather, it relied on two older Nevada cases that purported to hold that a final judgment in a receivership "action" occurs when the receiver prepares a final accounting. (Order at 23 (citing *Martin Co. v. Kirby*, 24 Nev. 205, 117 P.2d 2 (1911); *Alper v. Posin*, 77 Nev. 328, 363 P.2d 502 (1961)). However, *Kirby* is merely dictum, as *Alper* itself recognized. *Alper*, 77 Nev. at 331, 363 P.2d at 503 (recognizing the relevant portion of *Kirby* as "dictum"). Dictum, as this Court explained, is "of no consequence as an authority," and this Court often overrules or declines to follow earlier cases that "suffer[ ] from the same flaw" of relying on dictum. *Gumm v. Mainor*, 118 Nev. 912, 918, 59 P.3d 1220, 1224 (2002) (refusing to follow earlier Nevada cases in determining what constitutes a special order made after final judgment because the earlier opinions "suffer[ ] from the same flaw as the Comstock court's opinion—it is

[1] Appellants relied on these cases in the voluminous briefing on these matters. *See, e.g.*, *MEI-GSR Holdings, LLC v. Thomas et al.*, No. 86092, at **11-13 (Appellants' Response to May 8, 2023 Order to Show Cause June 13, 2023); *MEI_GSR Holdings, LLC*, No. 86092, at *3 n.2 (Appellants' Supplement to Response to May 8, 2023 Order to Show Cause July 13, 2023); *MEI-GSR Holdings, LLC*, No. 86092, at **8-9 (Motion to Set Aside or Strike NRCP 54(b) Certification of Amended Final Judgment and Appellants' Response to November 16, 2023 Order to Show Cause Nov. 28, 2023); *MEI-GSR Holdings, LLC*, No. 85915, at **6-7 (Appellants' Motion to Dismiss as Moot May 9, 2023).

dictum that is 'of no consequence as an authority'"); *see also Progressive Gulf Ins. Co. v. Faehnrich*, 130 Nev. 167, 174, 327 P.3d 1061, 1066 (2014) ("We thus reject as obiter dictum the suggestion in *Williams* that Nevada public policy requires coverage whenever applying foreign law would deny all recovery to an insured."); *Howell v. Ricci*, 124 Nev. 1222, 1231 n.23, 197 P.3d 1044, 1050 n.23 (2008) ("To the extent that our dicta in *Howell I* erroneously suggested otherwise, we reject that notion."); *Thran v. First Jud. Dist. Ct.*, 79 Nev. 176, 180, 380 P.2d 297, 300 (1963) ("We decline to be bound by the dictum thus expressed.").

Thus, rehearing is appropriate to reconcile the overlooked or misapprehended binding Nevada caselaw and prevent a conflict in this Court's precedent.[2]

C. The Panel Overlooked or Misapprehended the Numerous Persuasive Authorities Appellants Raised.

Next, the Panel overlooked or misapprehended Appellants' persuasive authorities, instead relying on contradictory cases that neither party raised, again, without reconciling those cases with the same jurisdictional cases Appellants proffered. The Panel relied on a string cite of California, New York, and Texas cases that neither party raised or cited to this Court to buttress its conclusion that the receiver was not terminated upon entry of a final judgment. (Order at 23-24). But the Order did not

[2] While maintaining the uniformity of this Court's precedent is grounds for en banc reconsideration, not panel rehearing, NRAP 40A(a), the Panel should nonetheless consider the potential split in this Court's precedent when considering the overlooked or misapprehended cases.

mention, analyze, or reconcile the numerous authorities from California, New York, and Texas that Appellants *did* raise that contradict the Panel's citations. *See Carpenson v. Najarian*, 62 Cal. Rptr. 687, 692 (Ct. App. 1967) ("***It is the rule that a receivership 'pendente lite' terminates with the rendition of the judgment*** . . . ." (emphasis added)); *Stier v. Don Mar Operating Co.*, 305 N.Y.S.2d 397, 398 (N.Y. App. Div. 1969) ("Since an order was not obtained to continue the receivership, ***it was terminated upon final judgment and respondent now lacks standing to maintain an action for rents***." (emphasis added)); *McMurrey v. McMurrey*, 168 S.W.2d 944, 945 (Tex. Civ. App. 1943) ("By implication, if not expressly, ***the receivership was terminated, as was the temporary injunction, by the entry of the final judgment, hence the appeal as to that phase of the case has become moot***." (emphasis added)).

The Panel also overlooked Appellants' authority from the United States Supreme Court and various secondary sources that overwhelmingly recognize that prejudgment receivers are temporary remedies that terminate upon entry of a final judgment. *MEI-GSR Holdings, LLC*, No. 86092, at *14 (Appellants' Response to May 8, 2023 Order to Show Cause June 13, 2023). Once more, the Order did not mention or analyze these authorities, nor did it reconcile these authorities with its conclusion.[3]

Putting aside the potential party presentation issues that arise when the Court

[3] Appellants raised these cases in their briefing. *See, e.g.*, *MEI-GSR Holdings, LLC*, No. 86092, at **14-15 (Appellants' Response to May 8, 2023 Order to Show Cause June 13, 2023); *MEI-GSR Holdings, LLC*, No. 85915, at **6-7 (Appellants' Motion to Dismiss as Moot May 9, 2023).

disregards the parties' authorities in favor of its own research,[4] it is clear that the Panel overlooked Appellants' authority as the Order did not attempt to reconcile the competing lines of authority from the jurisdictions it relies on. Therefore, rehearing is proper.

D. The Panel Overlooked or Misapprehended the Law When it Allowed the NRCP 54(b) Certification of a Remedy.

The Panel's order further overlooked binding Nevada authority when it concluded that the district court properly certified its amended final judgment as final. As detailed above, a receivership is a remedy, not a cause of action. By its plain terms, NRCP 54(b) allows a district court to certify "claims," not remedies. As Appellants' briefing explained, the weight of authorities, including Wright and Miller, which this Court relies on when interpreting the Nevada Rules of Civil Procedure, explain that "[a]n order with regard to a provisional remedy does not go to an independent claim in a multiple-claim action and ***cannot be given finality for purposes of appeal by Rule 54(b)***." Wright & Miller, *11A Fed. Prac. & Proc. Civ.* § 2936 (3d ed.) (emphasis added); *see also Empower Aviation, LLC v. Butler Cty. Bd. of Comm'rs.*, 924 N.E.2d 862, 865 (Ohio App. 2009) ("A provisional remedy is a remedy other than a claim for relief. Therefore, an order granting or denying a provisional remedy is not subject to the requirements of

[4] *State v. Bristol*, 654 S.W.3d 917, 924 (Tenn. 2022) (explaining that the "principle of party presentation is a defining feature of our adversarial justice system" and that the "judicial role is not to research or construct a litigant's case or arguments for him or her" (citations and internal quotation marks omitted)).

Civ. R. 54(B).").[5] The Order did not mention or analyze this authority, or the plain language of NRCP 54(b). Thus, rehearing is appropriate as the Panel overlooked or misapprehended this controlling and dispositive law.

III. CONCLUSION

For these reasons, the Court should grant Appellants' Petition for Rehearing of December 29, 2023 Order.

DATED this 16th day of January 2024.

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[5] Appellants raised these authorities in their briefing before this Court. *See, e.g.*, *MEI-GSR Holdings, LLC*, Nos. 85915, 86092, 86985, 87243, 87303, 87566, 87562, at *8 (Motion to Set Aside or Strike NRCP 54(b) Certification of Amended Final Judgment and Appellants' Response to November 16, 2023 Order to Show Cause Nov. 28, 2023).

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition for rehearing 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 has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Garamond font.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 or 40A because it is proportionally spaced, has a typeface of 14 points or more, and contains 1,733 words.

DATED this 16th day of January 2024.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and pursuant to NRAP 25(b) and NEFCR 9, on this 16th day of January 2024, I electronically filed the foregoing **APPELLANTS' PETITION FOR REHEARING OF DECEMBER 29, 2023 ORDER** with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Courts E-Filing system (Eflex). Participants in the case who are registered with Eflex as users will be served by the Eflex system.

/s/ Shannon Dinkel
An employee of Pisanelli Bice PLLC