

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

NEVADA RESORT ASSOCIATION  
INTERNATIONAL ALLIANCE OF  
THEATRICAL AND STAGE  
EMPLOYEES LOCAL 720 PENSION  
TRUST ("IATSE"),

Cross-Claimant,

v.

JUDY CARMONA, Successor  
representative of Lupe N. Carmona,  
Deceased,

Cross-Defendant.

Case No. 2:04-CV-01310-KJD-RJJ

**ORDER**

Presently before the Court is Cross-Claimant's Motion for Summary Judgment (#34). Cross-Defendant filed a response in opposition (#45) to which Cross-Claimant replied (#56). Also before the Court is Cross-Defendant's Motion for Leave to File Motion for Summary Judgment (#71) to which Cross-Claimant replied (#73).

**I. Facts and Procedural History**

This dispute concerns the survivorship benefits from Lupe N. Carmona's ("LUPE") pension plans with Cross-Claimant IASTE and Hilton Hotels Retirement Plan ("HILTON"). Lupe originally designated Plaintiff Janis Carmona as the beneficiary of these plans, but he later petitioned the Clark

1 County District Court, Family Division (“Family Court”) for an order directing the pension plans to  
2 pay those benefits to Defendant/Cross-Defendant Judy Carmona (“Defendant”). Since that time the  
3 parties have litigated this issue at every level of state court as well as in Federal District Court,  
4 Federal Bankruptcy Court, the United States Supreme Court, and no doubt, will argue the merits of  
5 this Court’s orders before the Ninth Circuit Court of Appeals.

6 Lupe and Plaintiff married on March 7, 1988. On September 3, 1992, Lupe named Plaintiff  
7 as the beneficiary of survivor benefits on both the HILTON and IATSE plans. Lupe retired on  
8 October 1, 1992. On October 27, 1994, Lupe filed for divorce in Family Court. Prior to the divorce,  
9 both Lupe and Plaintiff contacted IATSE and HILTON to inquire whether he could change her as  
10 beneficiary. The providers informed them verbally and in writing that Plaintiff’s designation as  
11 beneficiary was irrevocable.

12 Pursuant to a settlement conference, the Family Court granted Lupe both his IATSE and  
13 HILTON pensions as his sole and separate property. During the marriage, Lupe’s benefits in his  
14 pension plans had increased more than Plaintiff’s own pension. The Family Court ordered Lupe to  
15 pay Plaintiff \$1,500.00 “as and for an equalization of the values of the marital portion of the pensions  
16 divided herein.” After the divorce, Lupe petitioned the Family Court for a Qualified Domestic  
17 Relations Order (“QDRO”) revoking Plaintiff’s designation as the beneficiary.

18 Lupe and Defendant Judy Carmona were married on November 30, 1997. That same month,  
19 Lupe filed a motion asking the Family Court to create a constructive trust for the benefit of his new  
20 wife, Defendant Judy Carmona. Lupe contended that the divorce decree awarded him the entirety of  
21 both pension plans, including the survivor benefits. He further asserted that Plaintiff would be  
22 unjustly enriched if she dispossessed him of this property. Plaintiff claimed that survivor benefits are  
23 not death benefits, but an irrevocable interest under both the IATSE and HILTON plans, and thus  
24 they were her sole property. On March 25, 1998, the Family Court held Plaintiff had not waived her  
25 rights to the survivor benefits, but the providers could change Defendant’s designation as beneficiary  
26 if they chose.

1           However, one day after Lupe's death on April 15, 1999, the Family court ordered the  
2 administrators of the IATSE and HILTON plans to change the beneficiary designation pursuant to  
3 Lupe's directions. The Family Court stated that it would order the establishment of a constructive  
4 trust for Defendant Judy Carmona's benefit if the administrators failed to make the change. Plaintiff  
5 argued that after Lupe's death, he and his estate were divested of any further interest in the pension  
6 plans, leaving Defendant Judy Carmona with no interest in the survivor benefits because those  
7 benefits were now vested in Plaintiff.

8           Plaintiff appealed the Family Court's orders to the Nevada Supreme Court. On October 21,  
9 2003, the Nevada Supreme Court affirmed the Family Court's order establishing a constructive trust.  
10 It found the divorce decree awarded Lupe his pension rights including the survivor benefits. The  
11 Court also addressed Plaintiff's argument that the Employee Retirement Income Security Act  
12 ("ERISA") preempted the Family Court's creation of a constructive trust relating to ERISA regulated  
13 benefits. The Court stated that although ERISA prohibits alienation of benefits other than to the  
14 designated participant or survivor beneficiary, the Retirement Equity Act ("REA") of 1984 provided  
15 an exception to ERISA's anti-alienation provision, which allowed the designation of an alternate  
16 payee through a QDRO.

17           The Nevada Supreme Court also found Plaintiff had waived her rights to the survivor benefits  
18 from Lupe's plans upon her receipt of the \$1,500.00 payment. Additionally, it found the Family  
19 Court's creation of the constructive trust was essential to effectuate Lupe's wishes and it would be  
20 inequitable to allow Plaintiff to retain the benefits because she was no longer married to Lupe at the  
21 time of his death.

22           Plaintiff appealed this decision to the United States Supreme Court. On April 19, 2004, the  
23 United States Supreme Court denied certiorari. In addition to Plaintiff's appeals to the Nevada  
24 Supreme Court and the United States Supreme Court, on February 4, 2004, a United States  
25 Bankruptcy Court held that Plaintiff did not have a legal or equitable interest in the survivor benefits.  
26 Further, in two separate prior actions, this Court has denied Plaintiff relief. On August 14, 2001,

1 Chief Judge Philip M. Pro held that because ERISA permitted state and federal courts to exercise  
2 concurrent jurisdiction, the Court would not “relitigate issues where another court had jurisdiction  
3 and made a final determination.” Kester v. Gaston, Case No. CV-S-01-0431-PMP (PAL), Order,  
4 Doc. #36 at 4 (D. Nev. Aug. 14, 2001).

5 Then, on April 2, 2004, the Family Court issued an order requiring Plaintiff to deposit the  
6 survivor benefit funds she received into a constructive trust. The Family Court noted that both the  
7 Bankruptcy Court and the Nevada Supreme Court had ruled the funds in question were not Plaintiff’s  
8 property. That same day, the Family Court entered two domestic relations orders ordering the two  
9 plans to pay the survivor benefits either to Defendant Judy Carmona or to a constructive trust account  
10 for Defendant Judy Carmona’s benefit. On April 28, 2004, Plaintiff filed a Notice of Removal in  
11 Federal District Court for the District of Nevada. See Carmona v. Carmona, Case No. CV-S-04-  
12 0534-PMP (RJJ), Petition for Removal, Doc. #1 (D. Nev.).

13 On August 25, 2004, the Court remanded the action back to Family Court. The Court found  
14 that Plaintiff had failed to timely remove the case, and had waived her right to remove the ERISA  
15 claim. See id. at 6. The Court recited part of its previous order in CV-S-01-0431-PMP notifying  
16 Plaintiff that a “United States District Court does not have the authority to review a final judgment”  
17 of a state court proceeding citing Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and Dist. of  
18 Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). Id. at 7.

19 Plaintiff then filed suit in Federal District Court for the third time. In an attempt to avoid the  
20 results of claim and issue preclusion as well as the Rooker-Feldman doctrine, Plaintiff brought the  
21 present action alleging exclusive federal court jurisdiction and named the two pension trust funds as  
22 defendants in addition to Defendant Judy Carmona. Additionally, the IATSE Trustees filed a cross-  
23 claim against Defendant Judy Carmona seeking declaratory relief. Defendant Judy Carmona filed a  
24 motion to dismiss Plaintiff’s complaint and IATSE’s cross-claim. On September 30, 2005, the Court  
25 granted Defendant’s motion to dismiss Plaintiff’s complaint. However, the Court denied the  
26 application of the Rooker-Feldman doctrine against IATSE’s cross-claim finding that Defendant had

1 then offered insufficient information for the Court to find that IATSE and Plaintiff were in privity  
2 during the prior litigation. Now IATSE has filed a motion for summary judgment on its cross-claim  
3 and Defendant has filed a renewed motion for summary judgment.

## 4 II. Privity

5 In her motion for summary judgment, Defendant Judy Carmona again presses the Court to  
6 dismiss the cross-claim based on the application of collateral estoppel. As Defendant accurately  
7 identifies, the only contested prerequisite for the application of collateral estoppel is whether Plaintiff  
8 and Cross-Claimant IATSE were in privity with each other in the prior litigation. However, the  
9 Court cannot agree with Defendant that Plaintiff was the “virtual representative” of Cross-Claimant  
10 in the prior litigation. See Aeorjet Gen’l Corp. v. Askew, 511 F.2d 710, 719 (5th Cir. 1974).

11 “[P]arallel legal interests alone, identical or otherwise, are not sufficient to establish privity.”  
12 See Kourtis v. Cameron, 419 F.3d 989, 998 (9th Cir. 2005). “Both identity of interests and adequacy  
13 of representation are necessary.” Id. In this case, though Plaintiff and Cross-Claimant argue for the  
14 exact same proposition, it cannot be said that they had an identity of interests or that Plaintiff’s  
15 actions in the prior litigation adequately represented IATSE’s interests. Therefore, the Court denies  
16 Defendant’s motion for summary judgment on this issue. Furthermore, to the extent that Defendant  
17 seeks attorney’s fees from both parties under this logic, the Court denies Defendant’s motion for  
18 attorney’s fees.

## 19 III. IATSE’s Motion for Summary Judgment

20 Essentially, Cross-Claimant IATSE presses the same argument that has been made since the  
21 beginning of the litigation that the state court orders emanating from the divorce of Lupe and Janis  
22 divesting Janis of any right to a QJSA and replacing Janis with Judy are preempted by ERISA and  
23 are void.

24 Generally speaking, ERISA preempts any and all state laws insofar as they relate to any  
25 employee benefit plan. See 29 U.S.C. § 1144; Boggs v. Boggs, 520 U.S. 833, 841 (1997). Any  
26 vested participant in an ERISA pension plan that does not die before the annuity starting date must

1 take their benefits in the form of a qualified joint and survivor annuity (“QJSA”). See 29 U.S.C. §  
2 1055 (a)(1).

3 Additionally, the general rule is that ERISA pension plan benefits may not be assigned or  
4 alienated. See 29 U.S.C. § 1056(d)(1). A spouse may waive the QJSA by written consent during the  
5 ninety (90) day period before the employee’s spouse retires. See 29 U.S.C. § 1055(c)(7)(A). IATSE  
6 also suggests that there are no exceptions to this general rule. However, IATSE clearly fails to  
7 mention the effect of the Retirement Equity Act of 1984 which creates an exception to ERISA’s  
8 general anti-alienation provision by permitting pension benefits to be disbursed to former spouses  
9 and dependents. See Trustees of the Directors Guild v. Tise, 234 F.3d 415, 419 (9th Cir. 2000).

10 The question that arises in this case is whether a state domestic relations order issued after  
11 the participant’s retirement can substitute an alternate payee for the surviving spouse. The Ninth  
12 Circuit recognizes that they have never addressed this issue. See id. at 423 n.6. Recently, the Ninth  
13 Circuit held that a domestic relations order could only designate a spouse or former spouse as the  
14 beneficiary of surviving spouse annuity resulting from the preretirement death of a participant. See  
15 Hamilton v. Wash. State Plumbing & Pipefitting Ind. Pension Plan, 433 F.3d 1091, 1100-1101 (9th  
16 Cir. 2006).

17 IATSE cites the Fourth Circuit case Hopkins v. AT&T Global Info. Solutions Co., 105 F.3d  
18 153, 157 n.6 (4th Cir. 1997)(citing 29 U.S.C. § 1055(f)) for the proposition that “Surviving Spouse  
19 Benefits may not be paid to a spouse who marries a participant after the participant’s retirement[.]”  
20 However, while 29 U.S.C. § 1055 allows plans to make that exception, it does not require it in every  
21 case. IATSE has provided no evidence that its plan has such an exception. Furthermore, IATSE  
22 relies upon Hopkins for the proposition that surviving spouse rights vested in Plaintiff upon  
23 retirement and no domestic relations order could effect her right to those benefits notwithstanding  
24 the divorce. See id.

25 Instead, this Court prefers the reasoning followed by the Ninth Circuit in Tise and the Hawaii  
26 Supreme Court in Torres v. Torres, 60 P.3d 798, 820-22 (Haw. 2003). Those courts interpreted 29

1 U.S.C. § 1056 (d)(3)(B)(I) differently than the Fourth Circuit did in Hopkins. The Fourth Circuit  
2 read that section as requiring domestic relations orders to recognize an alternate payee's right to  
3 benefits payable "to a participant[.]" Hopkins, 105 F.3d at 156-57. Both the Ninth Circuit and the  
4 Hawaii Supreme Court have recognized the influence of the preceding words "with respect[.]" Tise,  
5 234 F.3d at 424 ("Only this reading of the statutory phrase "benefits payable with respect to a  
6 participant under a plan" is consistent with the statutory scheme as a whole"); Torres, 60 P.3d at  
7 820-21; see also Dorn v. Int'l Bhd. of Elec. Workers, 211 F.3d 938, 943 n.11 ("Use of the phrase  
8 'with respect to' makes clear that alienability under a QDRO is not limited to those benefits that are  
9 'payable' to a participant...but may also make other plan benefits such as the surviving spouse's  
10 annuity available[.]").

11 Therefore, in accordance with the applicable reasoning in these cases, the Court finds that a  
12 domestic relations order may designate a spouse or former spouse as the beneficiary of a surviving  
13 spouse annuity after the participant has retired. Though both parties have urged the Court in their  
14 briefs to determine whether the domestic relations orders in question here are "Qualified Domestic  
15 Relations Orders", the Court declines to do so. Cross-Claimant did not seek such relief in its  
16 complaint, though it could have done so. Defendant also could have sought appropriate relief, but  
17 has failed to affirmatively plead for such. Therefore, since Cross-Claimant has failed to establish  
18 that the state court orders are preempted by ERISA as sought in its complaint, the Court denies its  
19 motion for summary judgment and dismisses its complaint.

#### 20 IV. Conclusion

21 Accordingly, IT IS HEREBY ORDERED that IATSE's Motion for Summary Judgment  
22 (#34) is **DENIED**;

23 IT IS FURTHER ORDERED that IATSE's cross-claim is **DISMISSED**;

24 IT IS FURTHER ORDERED that the Clerk of the Court enter **JUDGMENT** for Cross-  
25 Defendant Judy Carmona and against Cross-Claimant IATSE;

1 IT IS FURTHER ORDERED that all other outstanding motions are **DISMISSED as moot.**

2 DATED this 14<sup>th</sup> day of March 2006.

3  
4 

5 \_\_\_\_\_  
6 Kent J. Dawson  
7 United States District Judge  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26