

IN THE SUPREME COURT OF THE STATE OF NEVADA

WPH ARCHITECTURE, INC., a )  
Nevada Corporation, )  
 )  
Appellant, )  
 )  
vs. )  
 )  
EIGHTH JUDICIAL DISTRICT )  
COURT and THE HONORABLE )  
JESSIE WALSH, )  
 )  
Respondent, )  
 )  
and )  
 )  
VEGAS VP, LP, a Nevada Limited )  
Partnership, )  
 )  
Real Party in Interest. )

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**OPENING BRIEF**

**APPELLANT, WPH ARCHITECTURE, INC.'S**  
**OPENING BRIEF**

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1                   **APPELLANT WPH ARCHITECTURE INC.'S OPENING BRIEF**

2                   COMES NOW Appellant WPH ARCHITECTURE, INC. ("WPH"), by and through its  
3 counsel of record, and submits this Opening Brief pursuant to Nevada Rules of Appellate  
4 Procedure ("NRAP") Rule 28(a).

5                                   **I.       JURISDICTIONAL STATEMENT**

6                   This Court's exercise of jurisdiction in this matter is proper. Nevada Revised Statutes  
7 ("NRS") 38.247(1)(c) provides that an appeal may be taken from an order confirming or denying  
8 confirmation of an arbitration award. NRS 38.247(2) provides that such an appeal must be taken  
9 from an order or a judgment in a civil action.

10                  The Eighth Judicial District Court ("District Court") previously denied WPH's motion to,  
11 among other things, confirm in part, modify or correct an arbitration award involving Real Party  
12 in Interest, Vegas VP, LP ("Vegas VP"). Notice of Entry of the District Court's first Order was  
13 served on July 24, 2009 and filed on July 27, 2009.

14                  However, the District Court failed to otherwise confirm the remainder of the arbitration  
15 award. WPH subsequently filed a motion to clarify pursuant to the provisions of NRS 38.241(4)  
16 and NRS 38.242(2), and the District Court issued a second Order confirming the arbitration  
17 award. Notice of Entry of the District Court's second Order was filed and served on July 23,  
18 2009. Thus, WPH appeals the District Court's Order denying its motion to, among other things,  
19 confirm in part, modify or correct the arbitration award. To the extent that the second Order  
20 confirming the arbitration award grants WPH standing to appeal, it appeals from the second  
21 Order.  
22

1 WPH's appeal in this matter is timely. WPH's Notice of Appeal was filed on August 19,  
2 2009. Pursuant to NRAP Rule 4(a)(1), WPH's Notice of Appeal was filed no later than 30 days  
3 after the dates that both written Notices of Entry of Order appealed from were served (July 24,  
4 2009 and July 23, 2009, respectively).

## 5 II. STATEMENT OF THE ISSUES

6 This appeal presents an issue of first impression in Nevada. The principal issue in this  
7 appeal is whether Nevada's offers of judgment statutes, as set forth in Nevada Rules of Civil  
8 Procedure ("NRCPP") Rule 68 and NRS 17.115, apply to arbitration proceedings venued in  
9 Nevada when (i) an agreement provides that arbitration proceedings are governed by the laws of  
10 the Nevada, (ii) the project which is the subject of the dispute is located in Nevada, and (iii)  
11 throughout the entirety of the arbitration proceedings, including the prehearing and hearing  
12 briefings, the parties and the arbitration panel cited, relied upon, and applied Nevada law. This  
13 Court's review includes whether the arbitration panel exceeded its powers, arbitrarily and  
14 capriciously ignored the architectural agreement or manifestly disregarded the law. **It is clear**  
15 **that had Vegas VP filed suit in the Clark County District Court, then NRCPP 68 and NRS**  
16 **17.115 would apply.**<sup>1</sup>

## 17 III. STATEMENT OF THE CASE

18 This dispute arises out of a contract wherein Vegas VP engaged WPH to perform  
19 architectural services for a mid-rise condominium project known as the Metropolis Lofts and  
20  
21  
22

1 Flats located in Las Vegas, Nevada (the "Project"). After an unsuccessful mediation, on or about  
2 March 7, 2007, Vegas VP filed an arbitration demand with the American Arbitration Association  
3 ("AAA") for architectural malpractice claims against WPH related to the Project.

4 On March 5, 2008 WPH submitted a statutory Offer of Judgment to Vegas VP in the  
5 amount of \$100,000 ("First Statutory Offer") pursuant to NRCP 68 and NRS 17.115.<sup>2</sup> On April  
6 17, 2008, WPH submitted another statutory Offer of Judgment to Vegas VP in the amount of  
7 \$200,001 ("Second Statutory Offer").<sup>3</sup> Vegas VP did not accept *either* WPH's First Statutory  
8 Offer or Second Statutory Offer (collectively, "Statutory Offers").

9 A two-week arbitration took place before an AAA panel of arbitrators (the "Panel") and  
10 resulted in the Panel's January 6, 2009 Award of a complete defense verdict for WPH.<sup>4</sup>  
11 Thereafter, WPH submitted to the Panel a Post-Award Motion for Costs, Attorney's Fees and  
12 Interest based on, among other things, the fact that WPH had previously served its Statutory  
13 Offers to Vegas VP, both of which were *rejected*.<sup>5</sup> On February 13, 2009, the Panel denied  
14 WPH's Post-Award Motion.<sup>6</sup>

15 On April 7, 2009, WPH filed a motion in the Eighth Judicial District Court to, among  
16 other things, confirm in part, modify or correct the Award to order Vegas VP to pay WPH its  
17

---

18 <sup>1</sup> See NRCP 68 and NRS 17.115. See also NRS 38.238(1), which grants an arbitrator specific  
19 statutory authority to award attorney's fees and other reasonable expenses of arbitration, "if such  
an award is authorized by law in a civil action involving the same claim . . ."

20 <sup>2</sup> WPH's First Statutory Offer [WPH Appendix, Vol. 1a, Tab I, Exh. 2, Bates Nos. WPH 28-30.]

21 <sup>3</sup> WPH's Second Statutory Offer [WPH Appendix, Vol. 1a, Tab I, Exh. 3, Bates Nos. WPH 32-34]

22 <sup>4</sup> Panel's Award [WPH Appendix, Vol. 1a, Tab I, Exh. 1, Bates Nos. WPH 8-26.]

<sup>5</sup> See Affidavit of Jean A. Weil [WPH Appendix, Vol. 1a, Tab I, ¶¶ 12-13, Bates No. WPH 3.]

<sup>6</sup> Order Re: Post-Award Motion [WPH Appendix, Vol. 1a, Tab I, Exh. 9, Bates Nos. WPH 177-82]

1 attorney's fees, costs and interest as a result of Vegas VP rejecting WPH's Statutory Offers.<sup>7</sup> On  
2 May 8, 2009, Vegas VP filed an opposition.<sup>8</sup> On May 11, 2009, WPH filed a reply.<sup>9</sup>

3 The Eighth Judicial District Court denied WPH's motion without a hearing and without  
4 explanation.<sup>10</sup> Vegas VP was timely notified of the denial of WPH's first motion. The Notice of  
5 Entry of the District Court's first Order denying WPH's motion was served on July 24, 2009 and  
6 filed on July 27, 2009.<sup>11</sup> However, the District Court failed to confirm the remainder of the  
7 Award pursuant to NRS 38.242(3), NRS 38.241(4) and NRS 38.242(2). Thereafter, WPH filed  
8 a motion to clarify the District Court's Order regarding confirmation of the Award.<sup>12</sup> On or  
9 about July 17, 2009, the District Court granted WPH's motion to clarify and issued a second  
10 Order confirming the Award.<sup>13</sup>

#### 11 IV. STATEMENT OF FACTS

##### 12 A. The Metropolis Condominium Project

13 Vegas VP engaged WPH to perform architectural services for the Project pursuant to a  
14 written contract. The contract between WPH and Vegas VP is dated April 24, 2003  
15  
16

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17 <sup>7</sup> WPH's District Court Motion [WPH Appendix, Vol. 2, Tab II, Bates Nos. WPH 459-77.]

18 <sup>8</sup> Opposition to District Court Motion [WPH Appendix, Vol. 2, Tab IV, Bates Nos. WPH 481-92.]

19 <sup>9</sup> Reply Re: District Court Motion [WPH Appendix, Vol. 2, Tab V, Bates Nos. WPH 493-501.]

20 <sup>10</sup> Denial of District Court Motion [WPH Appendix, Vol. 2, Tab VI, Bates No. WPH 502.]

21 <sup>11</sup> Notice of Entry of Order No. 1 [WPH Appendix, Vol. 2, Tab XII, Bates Nos. WPH 520-24.]

22 <sup>12</sup> WPH's Motion to Clarify [WPH Appendix, Vol. 2, Tab VII, Bates Nos. WPH 504-09.]

<sup>13</sup> After WPH's second motion was granted, proposed orders for both motions were sent to the District Court. The District Court executed the order granting WPH's second motion four days before the District Court executed the order denying WPH's first motion. See Order Granting Motion to Clarify [WPH Appendix, Vol. 2, Tab IX, Bates Nos. WPH 511-512.]

1 (“Architectural Agreement”).<sup>14</sup> The Architectural Agreement provides: “This Agreement shall  
2 be governed by the law of the principal place of business of the Architect.”<sup>15</sup> WPH’s principal  
3 place of business is Las Vegas, Nevada.<sup>16</sup>

4 **B. The Arbitration Proceedings and the Panel’s Award**

5 After an unsuccessful mediation, Vegas VP filed an arbitration demand with AAA for  
6 architectural malpractice claims against WPH related to the Project. A two-week arbitration  
7 hearing was held in Las Vegas, Nevada, from November 3, 2008 through November 14, 2008.<sup>17</sup>

8 In the arbitration, Vegas VP asserted that a portion of the change orders paid to the  
9 general contractor were the result of WPH’s professional negligence due to errors and/or  
10 omissions in the architectural design documents. Vegas VP sought \$1,486,666 (subsequently  
11 revised to \$1,455,276) for 76 separate Change Proposal Requests (“CPR’s”), which it asserted  
12 were attributable to and the responsibility of WPH.<sup>18</sup>

13 WPH asserted that it fulfilled all of its duties under the contract, performing at a level of  
14 acceptable standard of care based upon the contractual restraints that Vegas VP imposed.<sup>19</sup>  
15 WPH further argued that Vegas VP’s claims were barred by several contractual provisions and  
16 legal theories, including no breach of contract as WPH did not fall below the acceptable standard  
17 of care, the consequential damages waiver, the economic loss rule, and that the change orders  
18

19 <sup>14</sup> WPH Architectural Agreement[WPH Appendix, Vol.1a, Tab I, Exh.11, Bates No.WPH 192-211]

20 <sup>15</sup> WPH Architectural Agreement[WPH Appendix, Vol.1a, Tab I, Exh.11, ¶ 9.1, Bates No.WPH203]

21 <sup>16</sup> Declaration of Douglas Walton[WPH Appendix, Vol.1a, Tab I, Exh. 12, ¶ 2, BatesNo.WPH 213]

22 <sup>17</sup> See Affidavit of Jean A. Weil [WPH Appendix, Vol. 1a, Tab I, ¶ 2, Bates No. WPH 2.]

<sup>18</sup> See Affidavit of Jean A. Weil [WPH Appendix, Vol. 1a, Tab I, ¶ 4, Bates No. WPH 2.]

<sup>19</sup> See Panel’s Award [WPH Appendix, Vol. 1a, Tab I, Exh. 1, ¶ 10, Bates No. WPH 13.]

1 constituted betterment/value added for Vegas VP.<sup>20</sup> During arbitration, multiple witnesses were  
2 called from Nevada. Further, throughout the entirety of the arbitration proceedings, including  
3 the prehearing, hearing, and post-hearing briefings, the parties and the Panel cited, relied upon  
4 and applied Nevada law, except when Nevada law was silent on a particular issue. Even the  
5 Panel's Award cites, relies upon, and applies Nevada law.

6 On January 8, 2009, the Panel issued its Award and found that WPH "did not fall below  
7 an acceptable level of professional care to be deemed negligent, or in breach of the contract."<sup>21</sup>  
8 The Panel found that "WPH met is professional standard of care for the services rendered on this  
9 Project, whether based in a professional negligence claim or in a breach of contract claim."<sup>22</sup>  
10 The Panel made the following orders: (1) that Vegas VP shall take nothing on its claim and  
11 judgment is awarded in favor of WPH; (2) the parties shall bear their own attorney's fees, expert  
12 fees, and own costs and expenses of the arbitration; and (3) the parties shall equally share in the  
13 fees and costs of the Arbitrators.<sup>23</sup>

14 **C. WPH's Two Statutory Offers of Judgment**

15 **When the Panel issued its decision and Award on January 8, 2009, it did not know,**  
16 **nor could have known, that WPH had previously served two statutory Offers of Judgment**  
17 **to Vegas VP, both of which were rejected. (*supra*, p. 3, ln. 4-8.) Vegas VP did not accept**  
18 **either Offer, thus both were deemed rejected by operation of law.**

20 <sup>20</sup> See Panel's Award [WPH Appendix, Vol. 1a, Tab I, Exh. 1, ¶ 11, Bates Nos. WPH 13-14.]

21 <sup>21</sup> See Panel's Award [WPH Appendix, Vol. 1a, Tab I, Exh. 1, Ins. 1-4, Bates No. WPH 19.]

22 <sup>22</sup> See Panel's Award [WPH Appendix, Vol. 1a, Tab I, Exh. 1, Ins. 3-5, Bates No. WPH 21.]

23 <sup>23</sup> See Panel's Award [WPH Appendix, Vol. 1a, Tab I, Exh. 1, Ins. 18-24, Bates No. WPH 21.]



**D. WPH's Post-Award Motion for Costs, Attorney's Fees and Interest**

On January 13, 2009, WPH submitted a Post-Award Motion for Costs, Attorney's Fees, and Interest Thereon pursuant to Nevada statutes, including NRS 18.020 (statute providing for award of costs to a prevailing party as a matter of right) and NRS 17.115 and NRCP 68 (Nevada's statutes governing statutory offers of judgment).<sup>24</sup> On January 21, 2009, WPH submitted its operative Second Revised Motion for Costs, Attorneys' Fees, and Interest Thereon ("Post-Award Motion"), which differed from the original motion only by accounting for additional costs, attorneys' fees, and interest.<sup>25</sup> In support of the Post-Award motion, WPH concurrently submitted the operative Second Revised Verified Memorandum of Costs, Disbursements and Allowable Interest.<sup>26</sup>

On January 23, 2009, Vegas VP submitted its Opposition to WPH's Post-Award Motion.<sup>27</sup> On January 29, 2009, WPH submitted its Reply to Vegas VP's Opposition to WPH's Post-Award Motion.<sup>28</sup> Prior to ruling on WPH's Post-Award Motion, the Panel requested receipts, invoices and billing entries in support of the motion, which WPH immediately provided.<sup>29</sup> On February 6, 2009, WPH provided the Panel with a Supplemental Briefing in

<sup>24</sup> See Affidavit of Jean A. Weil [WPH Appendix, Vol. 1a, Tab I, ¶¶ 12-13, Bates No. WPH 3.]

<sup>25</sup> *Id.*; See also WPH's Second Revised Post-Award Motion for Costs, Attorney's Fees and Interest Thereon [WPH Appendix, Vol. 1a, Tab I, Exh. 4, Bates Nos. WPH 36-89.]

<sup>26</sup> WPH's operative Second Revised Verified Memorandum of Costs, Disbursements and Allowable Interest [WPH Appendix, Vol. 1a, Tab I, Exh. 5, Bates Nos. WPH 91-94.]

<sup>27</sup> Opp. to Post-Award Motion [WPH Appendix, Vol. 1a, Tab I, Exh. 6, Bates Nos. WPH 96-101]

<sup>28</sup> Reply Re: Post-Award Motion [WPH Appendix, Vol. 1a, Tab I, Exh. 7, Bates No. WPH 103-66]

<sup>29</sup> See Affidavit of Jean A. Weil [WPH Appendix, Vol. 1a, Tab I, ¶¶ 18 - 32 Bates Nos. WPH 3-5.]

1 support of its motion.<sup>30</sup>

2 On February 13, 2009, the Panel issued an Order Denying WPH's Post-Award Motion  
3 (the "Panel's Order"). (*supra*, p. 3, ln. 13-14.) Notably, in denying WPH's Post-Award Motion,  
4 the Panel stated, "there are no documents which demonstrate that Nevada law would apply to  
5 this case. Put another way [sic], there was no decision made as to choice of law."<sup>31</sup> The Panel  
6 then expressed its reluctance to grant WPH's Motion, because "in authorizing the use of offers  
7 of judgment in arbitration proceedings, the Nevada Supreme Court has not made a  
8 pronouncement in this area of law. It has likely not been confronted with such an issue. So,  
9 even though Nevada may be the proper state, WPH is without a remedy."<sup>32</sup>

10 The Panel's Order further states that the Panel had no "express authority to grant fees and  
11 costs incidental to a declined offer of judgment" in the context of a private arbitration.<sup>33</sup> In the  
12 Panel's Order, the Panel specifically advised WPH that "the jurisdiction of this Panel is  
13 terminated," and WPH's remedy is "now with the Eighth Judicial District Court of the State of  
14 Nevada, In and For the County of Clark."<sup>34</sup> The Panel's Order did not address WPH's request  
15 for costs pursuant to NRS 18.020.

16 **E. WPH's Motion to the Eighth Judicial District Court for an Order Confirming in**  
17 **Part, Modifying or Correcting the Panel's Award**

18  
19 <sup>30</sup> WPH's Supplemental Briefing [WPH Appendix, Vol. 1a, Tab I, Exh. 8, Bates Nos. WPH 168-75]

<sup>31</sup> Order Re: Post-Award Motion [WPH Appendix, Vol. 1a, Tab I, Exh. 9, Ins. 16-17, Bates No. WPH 180.]

<sup>32</sup> Order Re: Post-Award Motion [WPH Appendix, Vol. 1a, Tab I, Exh. 9, ln. 1-3, Bates No. WPH 181]

<sup>33</sup> Order Re: Post-Award Motion [WPH Appendix, Vol. 1a, Tab I, Exh. 9, ln. 5-6, Bates No. WPH 181]

<sup>34</sup> Order Re: Post-Award Motion [WPH Appendix, Vol. 1a, Tab I, Exh. 9, Ins. 25-27, Bates No. WPH 181.]

1 On April 7, 2009, WPH filed a motion in the Eighth Judicial District Court to, among  
2 other things, confirm in part, modify or correct the Award to order Vegas VP to pay WPH its  
3 attorney's fees, costs and interest as a result of Vegas VP rejecting both of WPH's Statutory  
4 Offers ("District Court Motion"). (*supra*, p. 3, ln. 15- p. 4, ln. 2.) On May 8, 2009, Vegas VP  
5 filed an untimely opposition. (*Id.*) On May 11, 2009, WPH filed a reply. (*Id.*) The Eighth  
6 Judicial District Court denied WPH's motion without a hearing and without explanation. (*supra*,  
7 p. 4, ln. 3-10.) Thereafter, WPH filed a motion to clarify the District Court's Order regarding  
8 confirmation of the Award ("Motion to Clarify"). (*Id.*) Notice of Entry of the District Court's  
9 second Order granting WPH's Motion to Clarify was filed and served on July 23, 2009.<sup>35</sup>

10 **F. WPH's Appeal to the Nevada Supreme Court**

11 On August 19, 2009, WPH filed a Notice of Appeal<sup>36</sup> and Case Appeal Statement<sup>37</sup> with  
12 the Supreme Court of Nevada appealing from the Eighth Judicial District Court's Order denying  
13 WPH's subject District Court Motion to confirm in part, modify or correct the Award. To the  
14 extent that the District Court's second Order confirming the remainder of the Award grants  
15 WPH standing to appeal, WPH appeals same. On January 27, 2010, this Court issued an Order  
16 Reinstating Briefing.<sup>38</sup>

17 **V. SUMMARY OF THE ARGUMENT**

18 The Panel had the authority and jurisdiction to grant WPH's Post-Award Motion but  
19

20 <sup>35</sup> Notice of Entry of Order No. 2 [WPH Appendix, Vol. 2, Tab XI, Bates Nos. WPH 515-19.]

21 <sup>36</sup> WPH's Notice of Appeal [WPH Appendix, Vol. 2, Tab XIII, Bates Nos. WPH 525-28.]

22 <sup>37</sup> WPH's Case Appeal Statement [WPH Appendix, Vol. 2, Tab XIV, Bates Nos. WPH 529-34.]

<sup>38</sup> Order Reinstating Briefing [WPH Appendix, Vol. 2, Tab XV, Bates No. WPH 535.]

1 failed to award WPH, as a matter of right, its attorney's fees, costs and interest pursuant to  
2 applicable Nevada law, including Nevada's offer of judgment statutes as set forth in NRCP 68  
3 and NRS 17.115 and NRS 38.238(1), granting specific statutory authority to award attorney's  
4 fees and other reasonable expenses of arbitration. In doing so, the Panel exceeded its powers,  
5 arbitrarily and capriciously ignored the Architectural Agreement and manifestly disregarded the  
6 law in denying WPH's Post-Award Motion. The District Court had the authority to modify,  
7 correct, vacate and/or confirm in part the Arbitration Award pursuant to both statutory and  
8 common law but disregarded clear law by failing to modify, correct, vacate and/or confirm in  
9 part the Panel's Award to award WPH its attorney's fees and costs.

10 Nevada's offers of judgment statutes clearly apply to the arbitration proceedings. In fact,  
11 Nevada's offers of judgment statutes are substantive, and not merely procedural. However, the  
12 Panel was reluctant to grant WPH's motion without an express finding by this Court. If Vegas  
13 VP had instituted its dispute in Clark County District Court, NRCP 68 and NRS 17.115 clearly  
14 would have applied. Even if Vegas VP had instituted its dispute in federal court, NRCP and  
15 NRS would *still* have applied.

16 Thus, the Nevada Supreme Court should reverse the District Court's denial of WPH's  
17 District Court Motion, hold that NRCP 68 and NRS 17.115 apply to arbitration proceedings, and  
18 order that Vegas VP pay WPH its attorney's fees and costs as set forth herein, including all  
19 attorney's fees and costs incurred subsequent to the Panel's Award, during the District Court  
20 proceedings, in preparation of this Opening Brief and through final disposition of this appeal.

21 ////

22

1 VI. ARGUMENT

2 A. The Arbitration Panel Had the Authority to Grant WPH's Post-Award Motion and  
3 Award WPH Its Attorney's Fees, Costs and Interest

4 1. Nevada State Law Clearly Applied to the Arbitration Proceedings

5 As mentioned above, the Panel, in describing its rationale for its Order denying WPH's  
6 Post-Award Motion, stated that "there was no decision made as to choice of law" for the dispute  
7 between WPH and Vegas VP during arbitration. (*supra*, p. 8, lns. 2-9.)

8 However, in its Order, the Panel agreed that (i) the subject project is located in Nevada,  
9 (ii) AAA determined that Nevada was the venue for the arbitration proceedings, (iii) more  
10 witnesses were called from Nevada than Texas or any other jurisdiction during the arbitration,  
11 and (iv) throughout the entirety of the arbitration proceedings, including the entire prehearing  
12 and hearing briefings, the parties and the Panel cited, relied upon and applied Nevada law.<sup>39</sup>  
13 Even the Panel's Award cites, relies upon, and applies Nevada law.<sup>40</sup> *The Architectural*  
14 *Agreement expressly provides that the applicable law is that of the principal place of business*  
15 *of WPH, which in this case is Las Vegas, Nevada.*<sup>41</sup>

16 Thus, it begs the question – what *other* state's laws could conceivably apply to the  
17 arbitration proceedings? It is WPH's position that in light of the above, it would be absurd for  
18 any other state's laws to apply to the arbitration proceedings, and regardless, by virtue of the  
19 Panel's citation, reliance upon, and application of Nevada law, the Panel and Vegas VP

20 <sup>39</sup> Order Re: Post-Award Motion [WPH Appendix, Vol. 1a, Tab I, Exh. 9, lns.14-22, Bates No.  
21 WPH 180.]

22 <sup>40</sup> See Panel's Award [WPH Appendix, Vol. 1a, Tab I, Exh. 1, Bates Nos. WPH 8-26.]

1 effectively waived any argument that any *other* state's laws would be applicable. As such, the  
2 application of Nevada law (statutory and common law) to the AAA arbitration cannot honestly  
3 and reasonably be disputed.

4       **2.     Neither AAA Rules nor Nevada Statutes Constrained the Panel from Ruling**  
5       **on WPH's Post-Award Motion**

6       The Panel cited AAA Rule R-47 in its Order denying WPH's Post-Award motion stating  
7 that this rule constrained the Panel from holding that Nevada's statutory offers of judgment  
8 applied to arbitration proceedings. The Panel curiously cited NRS 38.237 and 38.242 as  
9 containing similar constraints, even after questioning whether Nevada law applied to the  
10 arbitration. (NRS 38.237 concerns changes to an arbitration award by an arbitrator and NRS  
11 38.242 concerns modification or correction of arbitration awards.)

12       However, AAA Rule R-47 does *not* constrain the Panel from granting WPH's Post-  
13 Award Motion. AAA Rule R-47 concerns modification of arbitration awards, and notes that a  
14 party may request that the arbitrator correct clerical, typographical, technical or computational  
15 errors in the award. Thus, Rule R-47 does not *limit* WPH's post-award remedies, but rather  
16 details a certain AAA procedure for corrections of an award. AAA Rule R-47 provides, "The  
17 arbitrator is not empowered to redetermine the merits of any claim already decided."<sup>42</sup> However,  
18 WPH did not request that the Panel revisit the merits of a claim that had been decided. Rather,  
19 WPH requested that the Panel decide the merits of its entitlement to fees and costs as the  
20 prevailing party. Thus, AAA Rule R-47 is not a rule of limitation constraining the Panel from

21       <sup>41</sup> Architectural Agreement [WPH Appendix, Vol. 1a, Tab I, Exh. 11, ¶ 9.1, Bates No. WPH 203]  
22

1 granting WPH's Post-Award Motion.

2       **3.     The Panel Had Express Authority to Grant WPH's Post-Award Motion and**  
3       **Award WPH Its Costs and Attorney's Fees**

4       Since Nevada law clearly applied to the arbitration proceedings, the Panel had *express*  
5 statutory authority to award WPH its attorney's fees and costs pursuant to NRS 38.238(1).

6       Under NRS 38.238(1), an arbitrator has specific statutory authority to award attorney's fees and  
7 other reasonable expenses of arbitration, "if such an award is authorized by law in a civil action  
8 involving the same claim . . ." Unfortunately, the Panel's Order Denying WPH's Post-Award  
9 Motion failed to address NRS 38.238(1).

10       Had the case been venued in the District Court, WPH clearly would have been entitled to  
11 recover its attorney's fees and costs pursuant to NRCP 68 and NRS 17.115. Thus, it is unclear  
12 what "express authority" the Panel was looking for in order to grant WPH its attorney's fees and  
13 costs if not the Nevada statutes themselves.

14       **4.     There Are No AAA Rules Which Conflict with Nevada's Statutory Offers of**  
15       **Judgment Statutes**

16       In the Order denying WPH's Post-Award Motion, the Panel mentions that "the NRCP  
17 would only apply if the AAA rules failed to address a particular discovery dispute."<sup>43</sup> **Thus, the**  
18 **Panel conceded that *some* Nevada law applied to the arbitration.** In any event, **there are no**  
19 **AAA rules regarding statutory offers of judgment.** Thus, Nevada's statutory offers of  
20 judgment do not conflict with the AAA rules and were applicable to the arbitration. Since the

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21 <sup>42</sup> See AAA Rule R-47 [WPH Appendix, Vol. 2, Tab IV, Bates No. WPH 491.]

AAA rules failed to address statutory offers of judgment, there is no conflict, and NRC 68 and NRS 17.115 must apply.

5. **The Panel Maintained Jurisdiction Over the Dispute Between the Parties From 2007 Through Its Order Denying WPH's Post-Award Motion**

It is evident from the Panel's ruling on WPH's Post-Award Motion, that the Panel did *not* relinquish jurisdiction of the parties' disputes prior to issuing its Award. Rather, the Panel made it abundantly clear that only *after* it made its Order denying WPH's Post-Award Motion it relinquished jurisdiction.<sup>44</sup> Thus, as the Panel had jurisdiction to make an Order denying WPH's Post-Award Motion, and the Panel expressly stated that its jurisdiction was terminated only after it issued its Order Denying WPH's Post-Award Motion, the Panel clearly had jurisdiction over the parties' dispute up to and through at least the date of its ruling on February 13, 2009. The Panel therefore had the authority to rule on and subsequently grant WPH's Post-Award Motion.

6. **Even If the Panel Did Not Have Jurisdiction to Grant WPH's Post-Award Motion, the District Court Had Such Jurisdiction**

This Court has already ruled that a District Court may review an arbitrator's award under statutory and common law grounds.<sup>45</sup> If the Panel did not have jurisdiction to award WPH its attorney's fees and costs, then surely the District Court did. Otherwise, Nevada's Uniform Arbitration Act (specifically NRS 38.238(1)) would be meaningless in the context of a private arbitration under the AAA Rules. Such a result would be an absurd application of Nevada

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<sup>43</sup> Order Re: Post-Award Motion [WPH Appendix, Vol. 1a, Tab I, Exh. 9, Ins. 11-12, Bates No. WPH 181]

<sup>44</sup> Order Re: Post-Award Motion [WPH Appendix, Vol. 1a, Tab I, Exh. 9, Ins. 25-26, Bates No. WPH 181.]



1 statutory and case law governing review of private arbitration awards.

2 **B. The Panel Should Have Granted WPH's Post-Award Motion and Awarded WPH Its**  
3 **Attorney's Fees and Costs**

4 As Nevada law clearly applied to the arbitration proceedings, the Panel should have  
5 granted WPH's Post-Award Motion and ordered that Vegas VP pay WPH its attorney's fees,  
6 costs and interest thereon.

7 **1. The Panel Should Have Awarded WPH Costs Pursuant to NRS 18.020**

8 The Panel had express authority to award mandatory costs to WPH, but failed to do so.  
9 Pursuant to NRS 18.020(3): "Costs *must* be allowed of course to the prevailing party against any  
10 adverse party against whom judgment is required, in the following cases...in an action for the  
11 recovery of money or damages, where the plaintiff seeks to recovery more than \$2,500."  
12 (Emphasis added.) This Court has clearly stated that, "Under NRS 18.020 the prevailing party in  
13 an action alleging more than \$2,500 in damages *is entitled to recover all costs as a matter of*  
14 *right.*" (*Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 430-31, 132 P.3d 1022, 1036  
15 (2006) (emphasis added).) As noted above, Vegas VP sought to recover more than \$1.4 million  
16 in damages for alleged errors and omissions against WPH. WPH was the prevailing party in the  
17 arbitration. Thus, it was *mandatory* that WPH be awarded allowable costs, including those set  
18 forth in NRS 18.005. The Panel manifestly disregarded the law by refusing to award such  
19 recoverable costs to WPH.

20 The amount of costs (including expert expenses) which WPH incurred in the arbitration

21  
22 <sup>45</sup> See *Graber v. Comstock Bank*, 111 Nev. 1421, 1426 (1995).

1 up to the time the Post-Award Motion was filed totaled \$385,256.52.<sup>46</sup> The Panel's Order  
2 denying WPH's Post-Award Motion does not address WPH's request for costs pursuant to NRS  
3 18.020 and Vegas VP's opposition to the Post-Award Motion does not substantively address the  
4 statute. Thus, because judgment was rendered in favor of WPH and against Vegas VP in the  
5 arbitration, WPH was entitled *as a matter of law* to recover the allowable costs which it  
6 incurred. Again, if Vegas VP's dispute was instituted in the District Court, NRS 18.020 would  
7 clearly have applied.

8 **2. The Panel Should Have Awarded WPH Its Costs, Attorneys' Fees and**  
9 **Interest Pursuant to Nevada's Offers of Judgment Statutes**

10 As set forth above, WPH issued two Statutory Offers. Vegas VP did not accept either  
11 Statutory Offer. Therefore, they were deemed rejected by operation of law. Both the legislative  
12 purpose behind the statutory offers of judgment and the express statutory language require a  
13 reversal of the Panel's denial of WPH's Post-Award Motion.

14 **a. Purpose of Statutory Offers of Judgment**

15 NRCP 68 and NRS 17.115 provide for statutory offers of judgment. "The purpose of  
16 NRS 17.115 and NRCP 68 is to save time and money for the court system, the parties and the  
17 taxpayers. They reward a party who makes a reasonable offer and punish the party who refuses  
18 to accept such an offer." (*Dillard Dept. Stores, Inc. v. Beckwith*, 115 Nev. 372, 382, 989 P.2d  
19 882, 888 (2000).)

20  
21 <sup>46</sup> See Affidavit of Jean A. Weil [WPH Appendix, Vol. 1a, Tab I, ¶ 25, Bates No. WPH 5.]; see  
22 also WPH's operative Second Revised Verified Memorandum of Costs, Disbursements and  
Allowable Interest [WPH Appendix, Vol. 1a, Tab I, Exh. 5, ln. 18, Bates No. WPH 92.]

1 In its Order, the Panel recognized this purpose and stated:

2 Offers of judgment are intended to induce the settlement of cases, preferably in the  
3 earlier stages of a lawsuit, to avoid the increased cost of litigation which inevitably  
4 follows the parties being at issue. The costs sought to be avoided by NRCP 68 (Offers  
5 of Judgment) and NRS 17.115 regard discovery (particularly the high cost of  
6 depositions), attorney's fees, expert fees, travel, lodging, but not limited to such fees  
7 and costs/expenses.<sup>47</sup>

8 NRCP 68 provides that if the offer of judgment is rejected and the offeree (Vegas VP)  
9 fails to obtain a more favorable judgment, "the offeree **shall** pay the offeror's [WPH] post-offer  
10 costs, applicable interest on the judgment from the time of the offer to the time of entry of the  
11 judgment and reasonable attorney's fees, if any be allow, actually incurred by the offeror from  
12 the time of the offer." (emphasis added) (NRCP 68(f)(2).) Here, Vegas VP rejected the  
13 Statutory Offers, and failed to obtain a more favorable judgment.

14 NRS 17.115 also deals with offers of judgment, and provides that if a party who rejects an  
15 offer of judgment fails to obtain a more favorable judgment, the court "**shall** order the party to  
16 pay the taxable costs incurred by the party who made the offer" and "may order the party to pay  
17 the party who made the offer any or all of the following:" (1) expert witness costs, (2) any  
18 applicable interest on the judgment, and (3) reasonable attorney's fees incurred by the party who  
19 made the offer. (NRS 17.115(4)(d) (emphasis added).)

20 "The purpose of NRCP 68 is to encourage settlement of lawsuits before trial." (*Allianz*  
21 *Insurance Co. v. Gagnon*, 109 Nev. 990, 994-95, 860 P.2d 720, 724 (1993).) WPH tried to settle  
22 the matter by way of the Statutory Offers **eight months** before the arbitration proceedings. Thus,

1 WPH sought to promote the purpose of both NRCP 68 and NRS 17.115. As such, Vegas VP  
2 should be penalized for rejection of WPH's Statutory Offers, and WPH should be rewarded with  
3 its post-offer costs (including expert expenses) and reasonable post-offer attorney's fees.

4 **b. Attorney's Fees Are Recoverable as a Matter of Course Under Both**  
5 **NRCP 68 and NRS 17.115**

6 "Under Nevada Rule 68, where an offeree rejects an offer of judgment and fails to obtain  
7 a more favorable judgment, the offeror's post-offer *attorneys' fees are recoverable as a matter*  
8 *of course*, subject only to considerations of good faith and reasonableness of the claims or  
9 defenses, the offer of judgment, and the requested attorney fees." (*Nicolaus v. West Side*  
10 *Transport, Inc.*, 185 F.R.D. 608, 613 (D. Nev. 1999) (emphasis added).) In its Opposition to  
11 WPH's Post-Award Motion, Vegas VP did not dispute *any* of WPH's requested costs and  
12 attorney's fees. WPH's incurred \$176,248.00 in attorney's fees from March 5, 2008 (the date of  
13 the First Statutory Offer) through the date of the filing of the Post-Award Motion. Therefore,  
14 the Panel should have awarded WPH its attorney's fees, as a matter of course, consistent with  
15 NRCP 68 and NRS 17.115.

16 **c. WPH Was Also Entitled to An Award of Prejudgment Interest on**  
17 **Costs and Attorney's Fees Pursuant to NRS 17.130**

18 As set forth in WPH's Post-Award Motion, it was additionally entitled to an award of  
19 prejudgment interest on its costs and attorney's fees pursuant to NRS 17.130 and the *Albios* case,  
20 which sets forth the procedure for the computation of allowable interest. In order to narrow the

21 <sup>47</sup> Order Re: Post-Award Motion [WPH Appendix, Vol. 1a, Tab I, Exh. 9, Ins. 23-25, Bates No.  
22 WPH 180.]

1 issues regarding Nevada's statutory offers of judgment in this appeal, WPH incorporates by  
2 reference its arguments as set forth in its operative Post-Award Motion regarding recovery of  
3 interest on its costs and attorney's fees.<sup>48</sup> The total amount of allowable interest on costs and  
4 attorney's fees which WPH was seeking on the date it submitted its Post-Award Motion was  
5 \$37,020.16. WPH further seeks an award of interest on its costs and attorney's fees through  
6 final disposition on appeal.

7 **C. The District Court had the Authority to Vacate, Modify, and/or Correct the Panel's**  
8 **Arbitration Award and WPH's Post-Award Motion**

9 After the Panel denied WPH's Post-Award Motion, on April 7, 2009, WPH filed a motion  
10 in the District Court for an Order vacating in part, confirming in part, modifying and/or  
11 correcting the Panel's Arbitration Award and WPH's Post-Award Motion.

12 **1. Statutory Authority Under The Uniform Arbitration Act**

13 Nevada first adopted The Uniform Arbitration Act (the "Act") in 1969 and adopted the  
14 most recent version of the Act in 2001, which is codified in NRS 38.206 to 38.248. The Act  
15 governs private arbitrations in Nevada and the procedures for confirming, vacating, modifying or  
16 correcting such arbitration awards in the Nevada District Court.

17 **a. Jurisdiction and Venue**

18 Pursuant to NRS 38.244, a Nevada court having "jurisdiction over the controversy and the  
19 parties may enforce an agreement to arbitrate." Venue is appropriate in the court of the county  
20 in which the arbitration was held, which in this case is Clark County since the arbitration was

21 <sup>48</sup> See WPH's Second Revised Post-Award Motion for Costs, Attorney's Fees and Interest  
22

1 held in Las Vegas, Nevada. (NRS 38.246.) The Eighth Judicial District Court has jurisdiction  
2 over the controversy and parties, because (i) the Architectural Agreement was negotiated and  
3 executed in Clark County, Nevada; (ii) the Architectural Agreement provides that it shall be  
4 governed by the law of the principal place of business of the Architect, which is Las Vegas,  
5 Nevada; and (iii) the subject Project is located in Clark County, Nevada.

6 **b. Authority to Confirm, Vacate, Modify and/or Correct the Award**

7 An arbitration award can be *confirmed* by way of motion pursuant to NRS 38.239, which  
8 provides:

9 After a party to an arbitral proceeding receives notice of an award, he may make a  
10 motion to the court for an order confirming the award at which time the court shall  
11 issue a confirming order unless the award is modified or corrected pursuant to NRS  
12 38.237 or 38.242 or is vacated pursuant to NRS 38.241.

13 An arbitration award can be *vacated* by way of motion pursuant to NRS 38.241 if one of  
14 the specified grounds is satisfied. NRS 38.241(1)(d) provides that an arbitration award may be  
15 vacated if “an arbitrator exceeds his powers.” A motion to vacate the award must be made  
16 within 90 days after the party receives notice of the award. (NRS 38.241.) In the present case,  
17 the Panel’s Award was issued on January 8, 2009 and all parties received notice that same day.  
18 Therefore, the 90-day deadline expired on April 8, 2009 (WPH’s first motion to the District  
19 Court was thus timely filed on April 7, 2009.)<sup>49</sup>

20 An arbitration award can similarly be *modified or corrected* by way of motion within 90  
21 days after the party receives notice of the award. (NRS 38.242.) As explained herein, a motion

22 Thereon [WPH Appendix, Vol. 1a, Tab I, Exh. 4, Bates Nos. WPH 44-46.]

1 to vacate, modify or correct an arbitration award can be based on either statutory or common law  
2 grounds.

3       **2.       Common Law Authority for the District Court's Review of the Award**

4       The Nevada Supreme Court has developed a common law basis for review of arbitration  
5 awards outside of the statutory bases for relief under the Act. (see *Graber v. Comstock Bank*,  
6 111 Nev. 1421, 1426 (1995) (In Nevada, both “[c]ommon law grounds and statutory grounds  
7 exist for the review of arbitration decisions.”).) **Under the common law grounds, an**  
8 **arbitration award may be reviewed in order to determine whether the arbitrator's decision**  
9 **represents a “manifest disregard of the law.”** (*Id.* (emphasis added).) Under the manifest  
10 disregard standard, there must be an error that is “obvious and capable of being readily and  
11 instantly perceived by the average person qualified to serve as an arbitrator.” (*Id.*)

12       In *Clark County Education Association v. Clark County School District*, 122 Nev. 337,  
13 131 P.3d 5 (2006), this Court clarified the standards that apply for review of arbitration awards  
14 under the common law. This Court distinguished the two common law grounds under which a  
15 court may review private arbitration awards:

- 16       (1) whether the award is arbitrary, capricious, or unsupported by the agreement; and  
17       (2) whether the arbitrator manifestly disregarded the law. Initially, we take this  
18 opportunity to clarify that while the latter standard ensures that the arbitrator  
recognizes applicable law, the former standard ensures that the arbitrator does not  
disregard the facts or the terms of the arbitration agreement.

19 (*Id.* at 8.)

20       According to the Court, “the arbitrary and capricious standard limits a reviewing court’s

21  
22 <sup>49</sup> See WPH’s District Court Motion [WPH Appendix, Vol. 2, Tab II, Bates Nos. WPH 459-77.]

1 consideration to whether the arbitrator's findings are supported by *substantial evidence*, while  
2 the manifest disregard of the law standard limits the reviewing court's concern to whether the  
3 arbitrator *consciously ignored or missed the law*." (*Id.* at 9. (emphasis added).) As set forth  
4 below, it is clear that the Panel's denial of WPH's Post-Award Motion is: (1) disregards the  
5 Architectural Agreement, which expressly provides that the law of WPH's principal place of  
6 business (Nevada) shall govern the contract (satisfying the "arbitrary and capricious standard")  
7 and (2) constitutes a manifest disregard of the law. We therefore turn our attention to the  
8 underlying Award and the subsequent Order denying WPH's Post-Award Motion and apply both  
9 the statutory authority under the Act and the common law grounds for a District Court's review  
10 of the Award and the Order.

11 **D. The District Court Should Have Vacated, Modified and/or Corrected the Panel's**  
12 **Award and the Order Denying WPH's Post-Award Motion**

13 The District Court clearly had authority and jurisdiction to make an Order vacating in  
14 part, confirming in part, modifying and/or correcting the Panel's Arbitration Award and it should  
15 have corrected the Panel's Order denying WPH's Post-Award Motion consistent with NRCP 68  
16 and NRS 17.115. However, the District Court denied WPH's District Court Motion, without a  
17 hearing and without explanation. For the reasons set forth below, this Court should reverse the  
18 District Court's denial of WPH's District Court Motion.

19 **1. The District Court Improperly Ignored the Statutory Grounds to Grant**  
20 **WPH's Motion**

21 This Court has recognized both statutory and common law grounds for the review of  
22 arbitration awards. As to the statutory grounds, NRS 38.241(1)(d) provides that an arbitration



1 award may be vacated if “an arbitrator exceeds his powers.” It is clear that the Panel exceeded  
2 its powers by consciously ignoring Nevada law, which provides for recovery of attorney’s fees,  
3 costs and interest to WPH under the circumstances present in the instant case. Therefore, the  
4 District Court had statutory grounds to grant WPH’s District Court Motion and vacate those  
5 portions of the Arbitration Award inconsistent with NRCP 68 and NRS 17.115, but improperly  
6 ignored applicable statutory authority and denied WPH’s motion without explanation.

7       **2.     The District Court Improperly Ignored the Common Law Grounds to Grant**  
8       **WPH’s Motion**

9           **a.     The Panel’s Failure to Apply Nevada Statutory and Case Law Was**  
10          **Arbitrary, Capricious and Unsupported by the Architectural**  
11          **Agreement**

12           As set forth above, the Panel’s Order denying WPH’s Post-Award Motion states that  
13 there was no decision made as to choice of law and further asserts that there are no documents  
14 which demonstrate that Nevada law would apply to this case. The Order also makes clear that  
15 the Panel believed it did not have authority to decide and subsequently grant WPH’s Post-Award  
16 Motion when it clearly did. Thus, under the “arbitrary and capricious standard”, the Panel’s  
17 failure to acknowledge Nevada law is an express failure to follow the terms of the Architectural  
18 Agreement which compelled Nevada law to govern the dispute. The District Court thus should  
19 have granted WPH’s District Court Motion confirming in part, modifying and/or correcting the  
20 Panel’s Arbitration Award and WPH’s Post-Award Motion.

21           **b.     The Panel Manifestly Disregarded the Applicable Nevada Law by**  
22          **Failing to Award Costs, Attorney’s Fees, and Interest Pursuant to the**  
            **Applicable Nevada Statutes, and the District Court Should Have**  
            **Vacated, Modified and/or Corrected the Panel’s Award Accordingly**

1 In its Opposition to WPH's Post-Award Motion, Vegas VP cited *Clark County v.*  
2 *Blanchard Constr. Co.*, 98 Nev. 488, 491-92, 653 P.2d 1217, 1220 (1982) for the position that  
3 NRCP 68 and NRS 17.115 do not apply to an arbitration hearing. However, Vegas VP and the  
4 *Clark County* case relied on a *previous* version of the Act, NRS 38.125, which was *repealed by*  
5 *the Legislature in 2001*.<sup>50</sup> WPH's Architectural Agreement, which contains an agreement to  
6 arbitrate, was executed on April 24, 2003. Therefore, *NRS 38.125 was inapplicable to the AAA*  
7 *arbitration proceedings* and the legal basis for the decision in *Clark County* is no longer good  
8 law as it relates to arbitrations. The pertinent provisions of the current Act are significantly  
9 different than those relied upon in *Clark County*. The current Act, NRS 38.238(1), provides:

10 An arbitrator may award reasonable attorney's fees and other reasonable expenses of  
11 arbitration *if such an award is authorized by law in a civil action involving the same*  
12 *claim* or by the agreement of the parties to the arbitration proceeding.

(emphasis added.)

13 Clearly, NRCP 68 and NRS 17.115 permit the award of attorneys' fees "in a civil action  
14 involving the same claim." In other words, had this lawsuit been filed in the Clark County  
15 District Court, then NRCP 68 and NRS 17.115 would apply.<sup>51</sup> Those statutes apply in the  
16 instant AAA arbitration for that very reason, pursuant to the express language of NRS 38.238(1).

17 The United States Supreme Court has weighed in on this subject, when it stated,  
18

19 <sup>50</sup> NRS 38.125 provided: "Unless otherwise provided in the agreement to arbitrate, the  
20 arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred  
in the conduct of the arbitration, shall be paid as provided in the award."

21 <sup>51</sup> Notably, Nevada courts have only deemed NRCP 68 inapplicable in three discreet areas:  
divorce proceedings, child support cases and child custody matters, "which involve entirely  
22

1 By agreeing to arbitrate a statutory claim, *a party does not forgo the substantive rights*  
2 *afforded by the statute*; it only submits to their resolution in an arbitral, rather than  
3 judicial, forum. It trades the procedures and opportunity for review of the courtroom for  
4 the simplicity, informality, and expedition of arbitration.

5 *Mitsubishi Motors Co. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (emphasis  
6 added).

7 NRS 38.238(1) expressly authorizes the recovery of attorneys' fees and costs in  
8 arbitration pursuant to statutory offers of judgment, because "such an award is authorized by law  
9 in a civil action involving the same claim." (NRS 38.238(1).) Therefore, the Panel should have  
10 awarded WPH its costs, attorney's fees and interest, but expressly declined to do so. Thus, the  
11 Panel manifestly disregarded controlling law in Nevada. The District Court should have  
12 vacated, modified and corrected the Panel's Award in light of such a manifest disregard of  
13 controlling law but failed to do so. The District Court's denial of WPH's District Court Motion  
14 should therefore be reversed.

15 **3. The District Court Manifestly Abused Its Discretion by Failing to Award**  
16 **Costs, Attorney's Fees and Interest**

17 This Court has stated that the failure to award attorney's fees in the context of a statutory  
18 offer of judgment is an abuse of discretion. In *Trustees of the Plumbers and Pipefitters Union*  
19 *Local 525 Health and Welfare Trust Plan v. Developers Surety and Indemnity Co.*, 120 Nev. 56  
20 (2004), this Court held that the District Court abused its discretion by failing to award attorney's  
21 fees under Nevada's offer of judgment statute. The case arose out of a dispute between a surety  
22 and the beneficiary of the surety bond. The District Court held that the attorney's fees statutes  
different social considerations than other civil actions." *Leeming v. Leeming*, 87 Nev. 530, 533  
(1971).

1 (NRS 17.115, NRCP 68 and NRS 18.010) did not apply to surety bond disputes. This Court  
2 stated that the issue involved a question of law, which the Court reviewed *de novo*.

3 In reviewing the language in NRS 17.115 and NRCP 68, this Court reasoned that the  
4 plain language of NRS 17.115 and NRCP 68 both refer to a “party,” meaning any party, and an  
5 “offerree,” meaning any offeree. The Court held that the surety fell within the purview of NRS  
6 17.115 because the statutory language contains no exception for sureties. (*Id.* at 61.) The Court  
7 further reasoned that “[o]ur interpretation is consistent with the spirit of NRS 17.115 and NRCP  
8 68 because the Nevada Legislature aimed to promote settlement and avoid litigation.” (*Id.*  
9 (citing *Matthews v. Collman*, 110 Nev. 940, 950 (1994); *Fleischer v. August*, 103 Nev. 242, 245  
10 (1987).) This Court went on to state that precluding attorney’s fees recovery in surety bond  
11 disputes contradicts legislative intent because it removes the incentive to settle and create and  
12 incentive to litigate. (*Id.* at 62.) This Court also held that attorney’s fees should have been  
13 awarded pursuant to NRS 18.010(2)(a), as the prevailing party recovered no more than \$20,000.

14 In the present case, there is no question that WPH and Vegas VP are “parties” and that  
15 WPH was an “offeree”. The central question is whether the Act permits the recovery of  
16 attorney’s fees under Nevada’s statutory offer provisions for a private arbitration award. As  
17 noted above, NRS 38.238(1) provides: “An arbitrator may award reasonable attorney’s fees and  
18 other reasonable expenses of arbitration *if such an award is authorized by law in a civil action*  
19 *involving the same claim . . .*” (emphasis added.) Clearly, an award under the statutory offer  
20 provisions in WPH’s favor would be “authorized by law in a civil action involving the same  
21 claim.” Therefore, the District Court’s failure to correct, modify or vacate the Panel’s improper  
22

1 denial of an award of attorney's fees and costs to WPH pursuant to NRS 17.115 and NRCP 68  
2 constitutes a manifest abuse of discretion. The District Court had authority and jurisdiction to  
3 review the Panel's denial of WPH's request for attorney's fees and costs but chose to improperly  
4 deny WPH's motion without explanation. The issue before the District Court was a pure  
5 question of law, which it failed to answer.

6 4. **NRCP 68 and NRS 17.115 Are Substantive State Law and Should Apply in**  
7 **Arbitration Proceedings**

8 It is clear that Nevada state law applied to the arbitration proceedings. However, NRCP  
9 68 and NRS 17.115 were particularly applicable to the arbitration proceedings, as these rules are  
10 *substantive law* rather than procedural. In fact, and for the reasons set forth below, if Vegas VP  
11 had filed its dispute in federal court, NRCP 68 and NRS 17.115 would have applied in that  
12 forum, as the rules are *substantive law*.

13 The Court in *Mitsubishi Motors* held that by agreeing to submit a claim to arbitration, a  
14 party does not forgo substantive rights afforded by statute. (*Mitsubishi Motors Co. v. Soler*  
15 *Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).) Thus, to the extent that the applicability of  
16 Nevada's offers of judgment statutes to arbitration proceedings turn on whether such laws are  
17 substantive or procedural, NRCP 68 and NRS 17.115 are clearly *substantive law*.

18 This inquiry has been fleshed out by the federal courts, since in a diversity case the courts  
19 need to undergo an *Erie* analysis to determine whether a state law is substantive or procedural in  
20 deciding its potential application. The first step in an *Erie* analysis is to determine whether the  
21 stated law involved is procedural or substantive. If the law is procedural, the federal law will  
22 apply, if the law is substantive, the court will apply the law of the forum state. (*Walsh v. Kelly*,

1 203 F.R.D. 597, 598-99 (D. Nev. 2001).)

2 Statutes allowing for recovery of attorney's fees are generally considered *substantive* for  
3 *Erie* purposes. (*McMahan v. Toto*, 256 F.3d 1120, 1132 (11th Cir. 2001).) Therefore, such  
4 statutes would be applied in diversity cases unless they conflicted with a valid federal statute or  
5 procedural rule. (*Walsh, supra*, 203 F.R.D. at 598-99.) Nevada's offers of judgment statutes  
6 allow for recovery of attorney's fees. Thus, the controlling authority interprets NRCP 68 and  
7 NRS 17.115 as substantive law, rather than procedural. In *MRO Communications, Inc. v.*  
8 *American Tel. & Tel. Co.*, the Ninth Circuit Court of Appeal addressed Nevada's statutory offers  
9 of judgment:

10 Under Nevada and New Jersey law, a prevailing defendant is entitled to recover  
11 attorneys' fees if an offer of judgment is rejected...**Nevada law permits a**  
12 **prevailing defendant to recover attorneys' fees incurred after an offer of**  
13 **judgment is rejected by the plaintiff. It would be unjust and a violation of the**  
14 **national policy described in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817,**  
15 **82 L.Ed. 1188 (1938), to reach a different result here simply because the forum**  
16 **is federal.**

17 197 F.3d 1276, 1281-83 (9th. Cir. 1999) (emphasis added).

18 Thus, NRCP 68 and NRS 17.115 are clearly substantive state law which should be  
19 applied regardless of forum. Such statutes would even apply if Vegas VP had filed its dispute in  
20 federal court. Under *MRO Communications*, it would be equally unjust to not apply Nevada  
21 substantive law (NRCP 68 and NRS 17.115) simply because the dispute was resolved in an  
22 arbitral forum.

## 20 5. Public Policy Mandates Enforcement of WPH's Statutory Offers

21 Public policy favors arbitration as an effective method of dispute resolution. Public  
22

1 policy also favors statutory offers of judgment as an efficient way to settle disputes. Public  
2 policy would not be served by any decision which holds that statutory offers *may not* be given  
3 full force in an arbitration proceeding. Further, if statutory offers of judgment are enforceable in  
4 private arbitration proceedings, it will encourage parties to resolve disputes in an arbitral forum.  
5 Conversely, if statutory offers of judgment are *not* enforceable in private arbitration proceedings,  
6 parties will be deprived of an effective tool to resolve disputes and will likely elect to clog the  
7 courts rather than litigate their disputes in an arbitral forum.

8 NRCP 68 and NRS 17.115 both concern statutory offers of judgment. "The purpose of  
9 NRS 17.115 and NRCP 68 is to save time and money for the court system, the parties and the  
10 taxpayers. They reward a party who makes a reasonable offer and punish the party who refuses  
11 to accept such an offer." (*Dillard Dept. Stores, Inc. v. Beckwith*, 115 Nev. 372, 382, 989 P.2d  
12 882, 888 (2000).) "The purpose of NRCP 68 is to encourage settlement of lawsuits before trial."  
13 (*Allianz Insurance Co. v. Gagnon*, 109 Nev. 990, 994-95, 860 P.2d 720, 724 (1993).) *WPH*  
14 *attempted to settle this matter at mediation a year and a half before the arbitration hearing.*  
15 *WPH again tried to settle this matter by way of statutory offers nearly eight months before the*  
16 *arbitration hearing.* Thus, WPH sought to promote the purpose of both NRCP 68 and NRS  
17 17.115. As such, Vegas VP should be penalized for rejection of WPH's Statutory Offers, and  
18 WPH should be rewarded with its post-offer costs and reasonable post-offer attorney's fees, as  
19 set forth above.

## 20 VII. CONCLUSION

21 This Appeal presents a matter of first impression in Nevada. The Panel had the authority  
22

1 and jurisdiction to grant WPH's Post-Award Motion but failed to award WPH, as a matter of  
2 right, its attorney's fees, costs and interest pursuant to applicable Nevada law, including  
3 Nevada's offers of judgment statutes as set forth in NRCP 68 and NRS 17.115. In doing so, the  
4 Panel exceeded its powers, arbitrarily and capriciously ignored the Architectural Agreement,  
5 which compelled that Nevada law govern the dispute and manifestly disregarded the law in  
6 denying WPH's Post-Award Motion. The District Court had the authority to modify, correct,  
7 vacate and/or confirm the Arbitration Award to award WPH its attorney's fees and costs  
8 pursuant to both statutory and common law bases but disregarded clear law by failing to do so.

9 Thus, the Nevada Supreme Court should reverse the District Court's denial of WPH's  
10 District Court Motion, hold that NRCP 68 and NRS 17.115 apply to arbitration proceedings and  
11 order that Vegas VP pay WPH its attorney's fees and costs as set forth herein, including all  
12 attorney's fees and costs incurred subsequent to the Panel's Award, during the District Court  
13 proceedings, in preparation of this Opening Brief and through final disposition of this appeal.

14 DATED this 4 day of May, 2010.

15 WEIL & DRAGE, APC

16  
17 By: 

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