IN THE SUPREME COURT OF THE STATE OF NEVADA

MB AMERICA, INC., a Nevada Corporation, No. 66860

Appellant,

vs.

ALASKA PACIFIC LEASING COMPANY,
a Alaska Business Corporation,

Respondent.
_____/

Electronically Filed
May 08 2015 08:55 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

MB AMERICA, INC., a Nevada Corporation, No. 67329

Appellant,

vs.

ALASKA PACIFIC LEASING COMPANY,
a Alaska Business Corporation,

Respondent.
_____/

APPEAL FROM SUMMARY JUDGMENT ENTERED OCTOBER 22, 2014
AND AWARD OF ATTORNEYS' FEES ENTERED JANUARY 13, 2015
(J. LIDIA S. STIGLICH, District Court Judge)

RESPONDENT, ALASKA PACIFIC LEASING COMPANY'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to Nevada Rule of Appellate Procedure ("NRAP") 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

There is no parent corporation of Alaska Pacific Leasing Company. There is no publicly held corporation that owns 10% or more of the stock of Alaska Pacific Leasing Company.

Attorney Holly Parker of the law firm Laxalt & Nomura, Ltd. has appeared for Alaska Pacific Leasing Company and is its attorney of record in this case.

Dated this 7th day of May, 2015.

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STATEMENT OF THE CASE

This is a premature action by MB America, Inc. ("MB") to enforce a mediation provision in the parties' Dealership Agreement ("the parties' Agreement" or "Contract") and to seek a judicial declaration that MB owes Alaska Pacific Leasing Company ("Alaska Pacific") no obligations under the parties' Agreement. The Contract contains a provision requiring that the parties submit issues concerning construction and interpretation of the Agreement to mediation with the rules of the American Arbitration Association ("AAA"), and that the parties can enforce the Agreement if the mediation does not result in a settlement within 180 days after submission to mediation. MB failed to make a proper request for mediation prior to seeking judicial relief (to either enforce the mediation provision or issue a declaration regarding MB's obligations under the Contract), and Alaska Pacific did not reject any such request.

The District Court concluded that a dispute exists between the parties that will involve interpretation of the parties Agreement such that the case must be mediated before a lawsuit can be filed; on this basis it granted Alaska Pacific's Motion for Summary Judgment. After Alaska Pacific succeeded on its Motion for Summary Judgment, the District Court properly awarded it litigation costs and attorneys' fees on the basis that Alaska Pacific prevailed on a significant issue in the litigation. MB has appealed the District Court's Orders granting Alaska

Pacific's Motion for Summary Judgment and granting Alaska Pacific attorneys' fees and costs.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The parties' Agreement contains a provision requiring them to submit any matter concerning construction or interpretation of the Agreement to mediation prior to bringing an action to enforce the Agreement. MB filed a lawsuit in Nevada to enforce the mediation provision in the Contract and to seek a declaration that MB owes Alaska Pacific no obligations under the parties' Agreement. Did the District Court properly grant summary judgment in favor of Alaska Pacific and dismiss MB's premature action without prejudice when there is no admissible evidence to create a genuine issue of material fact that MB made a proper mediation request or that Alaska Pacific rejected any such a request prior to MB initiating the Nevada lawsuit?

2. Did the District Court correctly conclude that Alaska Pacific prevailed on a significant issue in the litigation such that an award of attorneys' fees and costs was appropriate?

STATEMENT OF FACTS

This dispute arises from a Dealership Agreement under which Alaska Pacific was to sell crushing attachments and other products for MB in the State of Alaska. *See generally* Appellant's Appendix, Volume 1 ("AA1"), 1-10. After MB

terminated the Agreement, Alaska Pacific requested that MB reimburse it for certain rock crushing equipment and attachments Alaska Pacific purchased. Id. MB refused. Id. The parties agreed to submit disputes related to the Contract to mediation with AAA's rules and only to initiate a lawsuit if a mutually satisfying settlement could not be reached within 180 days of submitting the matter to mediation. AA1, 7-9. On June 6, 2014, however, MB prematurely filed a formal Complaint in Nevada to compel mediation and to obtain a judicial declaration that it owes Alaska Pacific no obligation under the parties' Agreement.[1] AA1, 1-10.

Whether characterized as a request to enforce the mediation provision or for declaratory relief concerning the rights and obligations of the parties, this action is premature.[2] MB filed the its lawsuit without making a proper request for mediation, without notice of rejection by Alaska Pacific of any such request, and without allowing 180 days to elapse after the parties' dispute was submitted to mediation before filing the lawsuit.

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[1] In response to MB's assertion that Alaska Pacific sought relief in the form of a declaration that Alaska law should apply to the dispute, Alaska Pacific was permitted to plead and preserve the issue in response to MB's improper and premature claims for declaratory relief. This statement was not a concession that the dispute was properly brought.

[2] Following this appeal, the parties participated in a mediation/settlement conference process with the Nevada Supreme Court Settlement Judge Debbie Leonard, so MB's requested relief that the case be remanded so the District Court can order the parties to participate in mediation is moot.

The parties' Agreement sets forth a mediation provision in paragraph 13, which specifically states, "The parties agree that any disputes or questions arising, hereunder, including the construction or application of this Agreement shall be submitted to mediation between MB and Dealer with the rules of the American Arbitration Association . . . ." AA1, 9. The Agreement further provides in paragraph 13 "[i]f mediation between the parties does not result in a mutually satisfying settlement within 180 days after submission to mediation, then each party will have the right to enforce the obligations of this Agreement . . . ." AA1, 9.

Procedure M-1 of the AAA Commercial Mediation Procedures provides:

> Whenever, by stipulation or in their contract, the parties have provided for mediation or conciliation of existing or future disputes under the auspices of the American Arbitration Association or under these procedures, the parties and their representatives, unless otherwise agreed in writing, shall be deemed to have made these procedural guidelines, as amended and in effect as of the date of filing of a request for mediation, a part of their agreement and designate the AAA as the administrator of their mediation.

AA1, 42; AA1, 88.

Procedure M-2 of the AAA Commercial Mediation Procedures, entitled "Initiation of Mediation," provides that either party to a dispute may initiate mediation under the AAA's auspices by making a request to any AAA regional office or case management centers by telephone, email, regular mail, fax, or by filing a request online. AA1, 42; AA1, 88.

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Procedure M-2 of the AAA Commercial Mediation Procedures also describes the information that must be provided with a mediation request and the procedure for notifying the opposing party of a mediation request. AA1, 42; AA1, 88. Alaska Pacific never received any request or demand from MB to mediate any dispute under the Agreement before MB filed this lawsuit and is unaware of any steps having been taken by MB before commencement of this action to initiate a request for mediation with the AAA. AA1, 40.

MB claims that it sent a letter dated February 27, 2014 explaining that it would not repurchase or reimburse Alaska Pacific for equipment Alaska Pacific purchased, and explaining that any disputes or questions arising under the application of the Agreement shall be submitted to mediation pursuant to the rules of the AAA, but stating "[h]opefully, this will not be necessary." AA1, 145-146. The letter sets forth no request for mediation. Id.

MB also claims that Alaska Pacific's letter dated June 30, 2014 (which is dated 24 days after MB had already filed its lawsuit) threatened litigation in Alaska. AA1, 137-138. This correspondence states:

> Please note that Paragraph 13 ("Disputes and Mediation") of the Agreement does not apply in this matter as we do not contest MB America's right to cancel the agreement, but rather take issue with the fact that MB America acted in bad faith by accepting our payment for units which we were not obligated to purchase and then cancelling the Agreement less than eleven (11) months later.

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AA1, 138. Nowhere does this letter state that Alaska Pacific is rejecting a proper request for mediation by MB. Id. MB also fails to cite any specific admissible evidence of a specific verbal request for mediation or rejection of same by Alaska Pacific. AA1, 141-142.

Alaska Pacific filed a request for mediation with the AAA on September 4, 2014; it made the request with AAA's regional office in Fresno, California.[3] AA1, 97-119. MB did not agree to participate in mediation with AAA as the mediator. AA1, 142-143.

The District Court granted summary judgment on the basis that a dispute exists between the parties arising from the parties' mutually agreed upon contractual obligations such that they must submit the dispute to mediation prior to seeking judicial relief. AA1, 163-166. The Court specifically discussed that MB apparently asserted that mediation was unnecessary, and it filed the action to obtain a determination that no dispute exists between the parties. AA1, 165. However, the Court further noted that MB apparently agrees mediation is necessary if a dispute exists. AA1, 165. The Court determined that because MB did not challenge the validity of the provision and the dispute appears to arise from the parties' obligations under the Agreement, the parties were required to submit their dispute to mediation prior to submitting the dispute to the Court. AA1, 165.

[3] As discussed in more detail below, MB incorrectly asserts that the Alaska Pacific's request for AAA mediation was made in Alaska.

Following the District Court's Order granting summary judgment in favor of Alaska Pacific, Alaska Pacific sought reimbursement for litigation costs and attorneys' fees. Appellant's Appendix, Volume 2 ("AA2"), 174-184; AA2, 188-202. Alaska Pacific sought an award of fees as a prevailing party under the Contract, and on the basis that the suit was not properly brought such that fees were appropriate under NRS 18.010(2)(b). AA2, 188-199. The Contract allows a prevailing party to recover attorneys' fees and costs. AA1, 9. The District Court awarded Alaska Pacific costs and attorney's fees; the Court concluded that because Alaska Pacific had prevailed in seeking dismissal of the suit and the case had concluded, it was entitled to an award of fees as the prevailing party. AA2, 249-252.

SUMMARY OF THE ARGUMENT

MB's lawsuit is premature for two reasons: 1) MB's request that the District Court enforce the mediation provision was premature because MB failed to make a proper request for mediation that was rejected by Alaska Pacific before it filed suit and 2) MB's request for a declaration of its rights and obligations under the parties' Agreement would require interpretation and construction of the parties' Agreement such that dispute was required to be submitted to mediation before MB could bring a lawsuit. MB improperly urged the District Court to address the merits of this dispute in violation of the Contract.

Absent a proper request for mediation that was rejected by Alaska Pacific, MB could not seek judicial assistance to compel mediation. Without a proper request for mediation that was rejected by Alaska Pacific, and without waiting the required 180-day mediation period, MB could not seek a judicial declaration of its rights and obligations under the Contract. MB failed to cite admissible evidence to create a genuine issue of material fact that it made a proper request for mediation that was rejected, or that it waited the required period after submission to mediation to bring a lawsuit, so summary judgment was appropriate.

The statutes MB cites pertaining to declaratory relief do not allow a party to file an action for declaratory relief in violation of a contractual mediation provision. The Court was not required to stay the action pending mediation, and the authorities cited by MB regarding this issue pertain to arbitration, not mediation.

Because Alaska Pacific prevailed on a significant issue in the premature litigation as framed by MB's requests for relief (i.e. dismissal of MB's claims to compel mediation and for a declaration of its obligations under the Contract), the District Court properly awarded Alaska Pacific litigation costs and attorneys' fees.

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ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED MB'S PREMATURE COMPLAINT BECAUSE MB FAILED TO COMPLY WITH THE MEDIATION REQUIREMENTS SET FORTH IN THE PARTIES' AGREEMENT.

A. Standard of Review

"[T]his court reviews a district court order granting summary judgment de novo."[4] This Court may affirm on any ground supported by the record, even if the district court did not rely on the correct ground in reaching its decision.[5]

Summary judgment is appropriate when, "after a review of the record viewed in a light most favorable to the non-moving party, there remain no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law."[6] In making a motion for summary judgment, the moving party must inform the court of the basis for its motion.[7] The moving party meets its burden by demonstrating the non-moving party lacks evidence to support one or more of the

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[4] *Branch Banking & Trust Co. v. Windhaven & Tollway*, LLC, 2015 Nev. LEXIS 30 (Nev. 2015) (citing *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)).

[5] *Howell v. Ricci*, 124 Nev. 1222, 1231, 197 P.3d 1044, 1050 (2008) ("Thus, although the district court resolved this matter on different grounds, we affirm the district court's denial of the Howells' petition for judicial review because the district court's decision reached the correct result."); *Hotel Riviera v. Torres*, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981) ("If a decision below is correct, it will not be disturbed on appeal even though the lower court relied upon wrong reasons.")

[6] *Evans v. Samuels*, 119 Nev. 378, 380, 75 P.3d 361, 363 (2003); NRCP 56(c).

[7] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

prima facie elements of its claims.[8] The moving party can present affirmative evidence negating an essential element of the non-moving party's claim, or demonstrate the non-moving party lacks the quality and quantity of evidence necessary to support its burden of proving its claim.[9]

Once the moving party meets its burden, the non-moving party cannot rest upon the mere allegations set forth in its pleadings.[10] The non-moving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial. . . ."[11] This means the non-moving party must show more than "some metaphysical doubt as to the operative facts."[12] A nonmoving party "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture."[13] The summary judgment standard requires admissible evidence to create a genuine issue of material fact.[14] "A factual dispute

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[8] *NGA#2 Limited Liability Co. v. Rains*, 113 Nev. 1151, 1156, 946 P.2d 163, 167 (1997) (citing *Celotex*, 477 U.S. at 331).
[9] *Celotex*, 477 U.S. at 325.
[10] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
[11] *Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005) (internal citations and quotations omitted).
[12] *Id.* (internal citations and quotations omitted).
[13] *Id.* (internal citations and quotations omitted).
[14] *Id.* at 731, 1031; *Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983).

is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party."[15]

B. The District Court Properly Granted Summary Judgment Because MB Failed to Make a Proper Request for Mediation Before Seeking Judicial Assistance to Enforce the Mediation Provision, and to Wait the 180-Day Mediation Period Prior to Filing a Lawsuit to Seek a Declaration of its Obligations.

MB failed to cite any admissible evidence of a proper request for mediation in writing or any specific verbal request that Alaska Pacific rejected prior to MB's filing of its lawsuit. MB also failed to cite any evidence that it waited the required 180-day period following submission to mediation passed before it sought judicial relief to address the parties' dispute under the Contract. Accordingly, the District Court properly concluded MB's lawsuit involved a dispute that must first be submitted to mediation under the parties' Agreement. AA1, 163-166.

1. Prior to seeking judicial relief, MB was required to make a proper request for mediation.

The parties' Agreement requires them to submit any disputes or questions involving construction or application of the Agreement to mediation with the rules of AAA; if mediation does not result in settlement within 180 days after submission to mediation, then the parties can enforce the Agreement. AA1, 9. MB stated in the briefing below that "[t]he interpretation of this Agreement is what

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[15] *Wood,* 121 Nev. at 731, 121 P.3d at 1031; *Id.* at 731, 1031 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

forms the basis for this this [sic] declaratory relief action." AA1, 121. MB, therefore, concedes that it must follow the requirements of the Contract before bringing a lawsuit seeking interpretation of the Agreement.

The District Court found a dispute exists between MB and Alaska Pacific that arises from the parties' contractual obligations such that MB was required to submit the dispute to mediation before seeking judicial relief. AA1, 165. The Court further discussed that MB did not challenge the validity of the mediation requirements under the Contract, and MB appears to assert mediation is unnecessary if there is no dispute between the parties, but mediation is necessary if a dispute exists. AA1, 165. Fundamental to and implicit in the District Court's discussion (and the mediation provision in the parties' Agreement) is the proposition that MB was required to make a proper request for mediation before seeking judicial assistance to enforce the mediation provision and before seeking a declaration of its obligations.[16]

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[16] Even if the Court did not specifically address the issue of whether a proper mediation request must be made prior to requesting judicial assistance to enforce the mediation provision, this Court can uphold the District Court's findings for any reason supported by the record. *Howell*, 124 Nev. at 1231, 197 P.3d at 1050; *Hotel Riviera* 97 Nev. at 403, 632 P.2d at 1158.

2. **MB failed to cite sufficient admissible evidence it made a proper request for mediation, that Alaska Pacific rejected any such request, or that MB waited the required period prior to seeking a judicial declaration that it owes no obligations under the Contract.**

MB failed to meet its burden to identify admissible evidence[17] that it made a specific verbal or written request for mediation (consistent with the AAA rules or otherwise)[18], that Alaska Pacific rejected any such request, or that MB waited the required 180-day period prior to seeking a judicial declaration that it owes no obligations to Alaska Pacific under the Agreement.

MB cites the following documents as claimed evidence that it made a request for mediation that was rejected by Alaska Pacific. MB cites a letter it sent Alaska Pacific dated February 27, 2014 that purports to explain that any disputes or questions arising under the parties' Agreement must be submitted to mediation pursuant to the rules of AAA but then states, "[h]opefully that will not be necessary." AA1, 145-146. This letter sets forth no request for mediation.

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[17] *Wood v. Safeway, Inc.*, 121 Nev. at 731, 121 P.3d at 1031; *Collins,* 99 Nev. at 294, 662 P.2d at 616.

[18] As discussed below, Alaska Pacific believes that MB was required to make a request for mediation consistent with the AAA rules by submitting a mediation request to directly to AAA, just as Alaska Pacific did after MB brought this lawsuit. MB concedes it did not make such a request with AAA, so this fact alone demonstrates it did not comply with the Contract prior to seeking judicial relief to enforce the mediation provision. However, even in the light most favorable to MB, it fails to cite admissible evidence of *any* request for mediation, whether or not the request was submitted to AAA. Summary judgment was appropriate.

MB claims that it made verbal requests for mediation, but it cites no admissible evidence of a specific verbal request for mediation. MB specifically references an affidavit of its counsel, which states:

> [A]fter this [February 27, 2014] letter was sent out I spoke with representatives in Alaska for Pacific Leasing and advised them Plaintiff would participate in mediation but it would need to be in Reno, Nevada. Unfortunately, Alaska Pacific Leasing and Mr. Faulk ignored those requests and instead sent threatening letters indicating that the Defendant would be filing suit in Alaska.

AA1, 141.

Like the February 27, 2014 letter, the statement in the affidavit references advising representatives of Alaska Pacific regarding mediation, but not a specific *request or demand* by MB that the dispute be mediated, or a clear rejection by Alaska Pacific of such a request.[19] The statement does not reference any specific verbal request, any particular Alaska Pacific representative to whom the representation was made, or the date the request was made. The general inadmissible statement fails to create a genuine issue of material fact concerning MB's pre-litigation compliance with the Contract. Moreover, the affidavit

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[19] Moreover, counsel's characterization/argument that the statement is request for mediation is not evidence and such a statement cannot establish the facts of this case. *See Jain v. McFarland*, 109 Nev. 465, 475-76, 851 P.2d 450, 457 (1993).

contains self-serving hearsay statements by MB that cannot serve as admissible evidence of a specific mediation request.[20]

MB also fails to cite any admissible evidence that Alaska Pacific rejected any specific request or demand for mediation prior to MB's filing of the lawsuit. MB cites a letter from Alaska Pacific dated June 30, 2014, which states that Paragraph 13 of the Agreement addressing Disputes and Mediation "does not apply in this matter as we do not contest MB America's right to cancel the agreement, but rather take issue with the fact that MB America acted in bad faith by accepting our payment for units which we were not obligated to purchase and then cancelling the Agreement less than eleven (11) months later." AA1, 138. This letter does not decline any specific request by MB to mediate or state that Alaska Pacific refuses to mediate.

Even more fundamentally problematic is the fact that the letter is dated 24 days after MB filed its lawsuit on June 6, 2014. MB cannot rely on a post-litigation letter as evidence of Alaska Pacific's refusal to participate in mediation before MB sought judicial assistance to enforce the mediation provision.

MB also did not submit a request to mediate to AAA, and Alaska Pacific rejected no such request. To the contrary, it was Alaska Pacific that submitted a

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[20] See NRS 51.035 ("Hearsay" means a statement offered in evidence to prove the truth of the matter asserted . . . ."); NRS 51.065(1) ("Hearsay is inadmissible except as provided in this chapter, title 14 of NRS and the Nevada Rules of Civil Procedure.")

request to mediate with AAA, and MB did not agree to participate. The parties' Agreement states that disputes or questions arising under the Agreement must be submitted to mediation "with the rules of the American Arbitration Association . . ." AA1, 9. Procedure M-1 of the AAA Commercial Mediation Procedures provides that whenever parties in their contract have provided for mediation "under the auspices of the American Arbitration Association or under these procedures, the parties . . . . shall be deemed to have made these procedural guidelines . . . a part of their agreement and designate the AAA as the administrator of their mediation." AA1, 42; AA1, 88. Procedure M-2 further provides that any party may initiate mediation with AAA by making a request with the AAA regional office. AA1, 42; AA1, 88.

In strict compliance with the parties' Agreement and the AAA rules incorporated into the Agreement, on September 4, 2014, Alaska Pacific submitted a request for mediation with AAA's regional office in Fresno, California. AA1, 97-119. MB incorrectly argues that Alaska Pacific submitted its AAA request in Alaska such that it was futile for MB to make such a request. Alaska Pacific, however, submitted its request to the regional office in Fresno, California, just as MB would have been required to do had it followed the above procedures. AA1, 97-119. Alaska Pacific's request did not state it would not participate in mediation in Reno; Alaska Pacific would submit that it is up to AAA to make the

determination where the mediation will take place. AA1, 97-119. Following Alaska Pacific's AAA mediation request, MB did not agree to participate in mediation with AAA. AA1, 142-143.

MB claims it was forced to file an action in Nevada after facing threats of imminent litigation in Alaska. MB cannot unilaterally decide that the proper remedy in this dispute was to prematurely file a lawsuit in Nevada in violation of the parties' Agreement. MB was required to make a proper request for mediation before seeking judicial intervention to compel mediation or a judicial declaration that it owes no obligations under the Contract. If Alaska Pacific had filed a lawsuit in Alaska without making a request for mediation or waiting the 180-day mediation period under the Contract, MB's remedy was to challenge the Alaska action based on Alaska Pacific's failure to comply with the Contract, just as Alaska Pacific did in this case.

MB claims that the Court's Order left it in a bizarre position of being unable to request a declaration of its rights. To the contrary, it was MB's failure to abide by the terms of the Contract that left it in the position where it stands now. MB failed to cite sufficient admissible evidence to create a genuine issue of material fact that it made a proper request for mediation that was rejected by Alaska Pacific before MB filed its lawsuit. Under either form of relief MB requests (enforcement

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of the mediation provision or a declaration of MB's obligations), therefore, the District Court properly dismissed MB's premature lawsuit.

3. MB's argument that it was not required to exhaust the administrative remedy of mediation fails to justify its premature lawsuit.

MB claims that given Alaska Pacific's prior rejections of its requests to mediate, MB was not required to formally exhaust mediation with AAA prior to bringing suit. As discussed above, a proper mediation request was required for MB to seek judicial relief to either enforce the mediation provision or to obtain a judicial declaration that it owed no obligation under the Contract. MB, however, made no specific request and Alaska Pacific did not reject any such request.

MB's clear goal in filing this lawsuit was to race to the Nevada courthouse to circumvent the mediation provision and obtain relief from the Nevada Court in the form of a declaration that MB owes no obligation to Alaska Pacific. MB claims that the result is nonsensical (i.e. that the District Court found it had to seek mediation before enforcing the mediation provision), but this argument ignores the implicit proposition in the District Court's ruling that MB must make a proper request for mediation prior to seeking judicial relief.

Mediation was an available remedy (and MB's pre-litigation obligation) under the Contract. As discussed in more detail above, a request for mediation was not futile because MB cites no admissible evidence of a specific rejection by

Alaska Pacific of mediation before MB filed its lawsuit. Even if Alaska Pacific's June 30, 2014 could be construed as a rejection of mediation, which it cannot, the letter is dated 24 days after MB filed this lawsuit, so it had no impact on MB's decision to file a premature lawsuit to enforce the mediation provision. MB failed to comply with the Contract; dismissal was appropriate.

C. Statutes Addressing Declaratory Relief Actions do not Allow a Party Seeking a Judicial Declaration to Violate the Party's Contractual Obligations.

MB's argument that it was not required to make a request for mediation prior to seeking declaratory relief under NRS 30.030 and NRS 30.040 is a new argument on appeal that should be disregarded by this Court.[21]

Even if the Court considers this argument, it is legally flawed: the statutes MB cites do not allow a party seeking judicial relief to violate mediation provisions in their contracts. NRS 30.030 provides that a District Court has power to declare rights as follows:

> Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is

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[21] Different arguments raised for the first time on appeal need not be considered by this Court. *Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989); *Montesano v. Donrey Media Group*, 99 Nev. 644, 650 n.5, 668 P.2d 1081, 1085 n.5 (1983); *Tupper v. Kroc*, 88 Nev. 146, 151, 494 P.2d 1275, 1278 (1972); *Dermody v. City of Reno*, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997); *Schuck v. Signature Flight Support of Nev., Inc.*, 245 P.3d 542, 544 (Nev. 2010).

> or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Although this statute allows the District Court to grant declaratory relief, and no objection may be made on the ground that the type of relief sought is declaratory relief, the statute contains no language allowing a party to violate a contractual pre-litigation mediation obligation.

Similarly, NRS 30.040(1) allows a party to a written contract to seek a determination of a question of construction of rights under a written contract. Nothing in this statute, however, allows a party to violate a contractual mediation provision like MB did in this case.

Alaska Pacific did not challenge the action merely because MB sought declaratory relief under the Contract, but on the basis that MB failed to comply with the mediation provision prior to bringing its lawsuit. Any request for declaratory relief to enforce the mediation provision or to seek a declaration of MB's rights and obligations under the Contract was premature because no clear request for mediation was made or rejected. The District Court properly granted summary judgment.

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D. Dismissal of MB's Premature Lawsuit was Proper, and there was no Requirement that the District Court Stay the Action.

Although MB requested that the District Court stay the action while the parties participated in mediation, it presented no argument that a stay was required under Nevada's Uniform Arbitration Act. This is a new issue on appeal that should be disregarded by the Court.

Moreover, Nevada's Uniform Arbitration Act does not require that the District Court stay an action under these circumstances. MB cites NRS 38.221 of the Act, which sets for the procedure for staying an action if the Court enforces a contractual *arbitration* provision, but not a mediation provision.

NRS 38.216, which governs the applicability of the sections under the Uniform Arbitration Act, and the specific sections cited by MB, provides as follows:

> 1. Sections NRS 38.206 to 38.248, inclusive, govern an agreement to arbitrate made on or after October 1, 2001.
> 2. NRS 38.206 to 38.248, inclusive, govern an agreement to arbitrate made before October 1, 2001, if all the parties to the agreement or to the arbitral proceeding so agree in a record.
> 3. On or after October 1, 2003, NRS 38.206 to NRS 38.248, inclusive, govern an agreement to arbitrate whenever made.

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This case concerns a mediation provision, not an arbitration provision, so the sections cited by Plaintiff are not applicable.[22]

Any similar statutes under the Nevada Arbitration Act also address arbitration and not mediation, so they are inapplicable to the issues in this case. For example, other provisions in the Act discuss the appointment of an arbitrator, the authority of the arbitrator, the process for an arbitration hearing and presentation of evidence at the hearing, the arbitration award, judgment on the award, and other issues having no application to a mediation process.

Even if the Act were otherwise applicable to mediation provisions, MB failed to follow the correct procedure to invoke judicial relief under the Act. Pursuant to NRS 38.218, a party seeking judicial relief related to an arbitration provision must take the following action:

> 1. Except as otherwise provided in NRS 38.247, an application for judicial relief under NRS 38.206 to 38.248, inclusive, must be made by motion to the court and heard in the manner provided by rule of court for making and hearing motions.
> 2. Unless a civil action involving the agreement to arbitrate is pending, notice of an initial motion to the court under NRS 38.206 to 38.248, inclusive, must be served in the manner provided by rule of court for the service of a summons in a civil action. Otherwise, notice of the motion must

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[22] Even the unpublished Nevada Supreme Court decision cited by MB, *AJS Constr., Inc. v. Pankopf*, 2013 Nev. Unpub. LEXIS 1448 (Nev. 2013), addresses a case involving an arbitration provision, but not a mediation provision. The reasoning of this case, therefore, is equally inapplicable.

be given in the manner provided by rule of court for serving motions in pending cases.

MB never made any such motion. The District Court was not required to stay the action.

Authorities from other jurisdictions are instructive that dismissal is appropriate following a party's failure to comply with pre-litigation contractual mediation requirements. In *Brosnan v. Dry Cleaning Station Inc.*, 2008 U.S. Dist. Lexis 44678 (N.D. Cal 2008), for example, the Brosnans sued Dry Cleaning Station, Inc. for fraud and breach of contract arising from a franchise agreement to authorize a dry cleaning store. The franchise agreement required that the parties mediate all disputes involving the franchise agreement for a minimum of four hours before instituting a lawsuit against the other party. The defendants filed a motion to dismiss the Brosnans' claims because the Brosnans failed to engage in mediation as required under the agreement.

The Brosnans admitted they failed to mediate, but they sought a stay of the litigation rather than dismissal. The court granted the defendants' motion to dismiss and stated that "failure to mediate a dispute pursuant to a contract that makes mediation a condition precedent to filing a lawsuit warrants dismissal."[23]

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[23] *Brosnan*, 2008 U.S. Dist. Lexis 44678 at 2.

The court found that a dismissal without prejudice, not a stay, was appropriate because the defendants did not seek a stay and the *Brosnans* did not cite any authority supporting a mere stay.[24]

A similar result occurred in *DeValk Lincoln Mercury, Inc. v. Ford Motor Company*, 811 F.2d 326 (7th Cir. 1986). In *DeValk*, the lower court enforced a pre-litigation mediation provision at the summary judgment stage.[25] Pursuant to a dealership agreement, the plaintiffs were owners and managers of a Ford car dealership.[26] The agreement required that any controversy or claim by plaintiffs with respect to any termination of the dealership agreement by Ford must be appealed through mediation within 15 days after receipt of notice of termination.[27] The agreement expressly provided that mediation was a condition precedent to a party's right to pursue any other remedy available under the dealership agreement.[28] Plaintiffs' dealership was terminated and defendant Ford was to repurchase the remaining inventory.[29] A dispute arose during this process, and plaintiffs negotiated with Ford for several months.[30]

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[24] *See also Loancraft v. First Choice Loan Svcs., Inc.*, 2012 U.S. Dist. LEXIS 24493 at *3 (E.D. Mich., Feb. 27, 2012) (dismissing without prejudice to allow mediation to occur).
[25] *Id.* at 328, 335-38.
[26] *Id.* at 328.
[27] *Id.* at 335.
[28] *Id.* at 335.
[29] *Id.* at 329.
[30] *Id.* at 329.

Plaintiffs then sued Ford for several causes of action including breach of the dealership agreement.[31] Defendants moved for summary judgment, in part upon plaintiffs' failure to comply with the pre-litigation mediation clause.[32] The lower court granted summary judgment and the Seventh Circuit Court of Appeals affirmed.[33] The Seventh Circuit held that the mediation clause was straightforward and required plaintiffs to submit any "protest, controversy, or claim" to mediation and further stated that mediation is a condition precedent to any other remedy available at law including litigation.[34]

In short, MB cites no Nevada authority that required the District Court to stay the action in the context of a mediation provision, as opposed to dismissing the lawsuit. An order staying this case would only have rewarded MB's failure to comply with the parties' Agreement by filing a premature lawsuit. The fact that MB ultimately refused Alaska Pacific's mediation request, which was made while the litigation was still pending, suggests that a stay of the litigation would have been futile. The District Court properly dismissed the lawsuit without prejudice until such time as MB complied with the mediation provision. The dismissal should be affirmed.

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[31] *DeValk Lincoln Mercury, Inc. v. Ford Motor Company*, 811 F.2d at 328.
[32] *Id.* at 328.
[33] *Id.* at 335.
[34] *Id.* at 335.

II. THE DISTRICT COURT PROPERLY AWARDED ALASKA PACIFIC ATTORNEYS' FEES AND LITIGATION COSTS.

A. Standard of Review

An award of attorney's fees and costs is reviewed for an abuse of discretion.[35] This court will not disturb a trial court's findings of fact unless they are "'clearly erroneous and not based on substantial evidence.'" [36] A district court's factual determinations will be upheld if they are supported by substantial evidence.[37] "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion."[38]

B. The District Court Properly Awarded Attorneys' Fees in Favor of Alaska Pacific Because it Succeeded on Significant Issues in the Litigation as Framed by MB's Pleadings and Requested Relief.

The parties' Agreement supports an award of attorneys' to the prevailing party.[39] AA1, 9. A party prevails "'if it succeeds on any *significant* issue in

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[35] *Berkson v. Lepome*, 245 P.3d 560, 568 (Nev. 2010).
[36] *Chateau Vegas Wine v. So. Wine & Spirits*, 265 P.3d 680, 684 (Nev. 2011) (quoting *Beverly Enterprises v. Globe Land Corp.*, 90 Nev. 363, 365, 526 P.2d 1179, 1180 (1974)).
[37] *Horgan v. Felton*, 123 Nev. 577, 581, 170 P.3d 982, 985 (2007).
[38] *Id.*
[39] Alternatively, the award of attorneys' fees was appropriate under NRS 18.010(2) because MB's premature action was inappropriately filed. The award is also supported by the record for this reason.

litigation which achieves some of the benefit it sought in bringing suit.'"[40] "To be a prevailing party, a party need not succeed on every issue."[41]

MB brought this action to seek enforcement of a mediation provision and for a declaration that it owes no obligation to Alaska Pacific under the contract. Alaska Pacific obtained a dismissal of the Complaint on the basis that the entire action was premature because MB did not first comply with a mediation provision in the parties' Contract. Accordingly, it prevailed on a significant issue in the litigation as framed by the relief MB requested. There was no requirement that the dismissal be with prejudice for Alaska Pacific to be a prevailing party. The award of fees and litigation costs was not a punishment, but an appropriate consequence of MB's failure to comply with the Contract. The District Court's award of costs and attorneys' fees, therefore, was proper and the award should be affirmed.[42] AA2, 249-252.

CONCLUSION

MB filed a premature lawsuit without first complying with the mediation provision in the parties' Agreement. Accordingly, the District Court properly granted summary judgment in favor of Alaska Pacific. The award of attorneys'

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[40] *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 343 P.3d 608, 615 (Nev. 2015) (quoting *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005)).

[41] *Id.*

[42] The award of fees was also appropriate under NRS 18.010(2)(b).

fees and costs was also appropriate because Alaska Pacific obtained dismissal of MB's premature claims.

DATED this 7th day of May, 2015.

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ATTORNEY'S NRAP 28.2 CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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:

This brief has been prepared in proportionally spaced typeface using Microsoft Word version 2003 with 14 point font size in Times New Roman type style.

2. I further certify that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding parts of the brief exempted by NRAP 32(a)(7)(C), the brief does not exceed 30 pages.

3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

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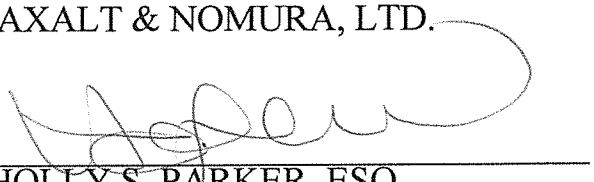

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AFFIRMATION PURSUANT TO NRS 239.B.030

The undersigned does hereby affirm that the preceding document DOES NOT contain the social security number of any person.

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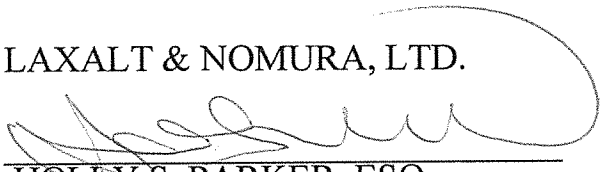

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of May, 2015, I electronically filed the preceding **RESPONDENT, ALASKA PACIFIC LEASING COMPANY'S ANSWERING BRIEF** with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

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