

IN THE SUPREME COURT OF NEVADA

Sup. Ct. No. 70837

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Elizabeth A. Brown
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MICHAEL SARGEANT, ,)
Individually and on behalf of others)
similarly situated,)

Appellant,)

vs.)

HENDERSON TAXI,)

Respondents,)

Dist. Ct No.: A-15-714136-C

**APPELLANT’S PETITION FOR
REHEARING PURSUANT TO NRAP 40**

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INTRODUCTION

Appellant Michael Sargeant (“Sargeant”), pursuant to NRAP 40, petitions for reconsideration of the Order of Affirmance (the “Order”) filed on December 1, 2017 in Appeal No. 70837. Such Order contains a clear error in its recital of the proceedings and facts. In affirming the district court’s award of sanctions under NRS 18.010 it misapprehended material facts in the record and material questions of law by finding that Sargeant, in his motion for reconsideration: (1) Submitted “previously rejected arguments” and (2) “raised new unpleaded claims.” It also ignored, and violated, the well established legal principle, and this Court’s own precedents, that it is an abuse of discretion to impose sanctions on a party seeking clarification of unsettled legal issues.

ARGUMENT

I. THE ORDER OF AFFIRMANCE ERRONEOUSLY RECITES THAT THE UNION WAS A PARTICIPANT TO THE DISTRICT COURT PROCEEDINGS

The Order states at page 2: “Sargeant’s motion for reconsideration and opposition to the *Union’s* motion for summary judgment....” (italics provided). The union was not a party to the proceedings in the district court. It was the defendant in the district court, Henderson Taxi, that made the referenced motion.

II. THE ORDER ERRONEOUSLY FINDS THAT SARGEANT’S MOTION FOR RECONSIDERATION MADE “PREVIOUSLY REJECTED ARGUMENTS”

Sargeant stated in his motion for rehearing that he did not question the district court’s “denial of the relief plaintiff previously requested” and did “not seek to have the [district] Court reexamine or change its prior determinations.” AA¹ 22-23, 82. He sought alternative relief, if any was available, consistent with the district court’s order. AA 22-23. He did not resubmit any “previously rejected arguments.” He hypothesized as to two forms of relief he believed might be consistent with a “colorable” interpretation of that order and stated he was not advocating for a “specific interpretation” of the order but “seeking only clarification” of the order. AA 23-24. In the event the district court found neither of his two hypothesized forms of relief were available, something he agreed he was unsure of, he requested entry of final judgment so he could appeal or direction from the district court as to what, if any, relief was available to him. AA 24-25.

Sargeant’s reconsideration motion was directed to the district court’s prior order rejecting his request for class action certification and other relief. AA 16-20. His motion for reconsideration did not ask the district court to revisit the findings in that order or submit his “previously rejected arguments” that were presented in the motion from which that order arose. Neither the district court’s

¹ References are to Appellant’s Appendix.

order, nor this Court's Order, explain or identify how it did. That finding is completely conclusory and contrary to the record.

III. THE ORDER ERRONEOUSLY FINDS THAT SARGEANT'S MOTION FOR RECONSIDERATION "RAISED UNPLEADED CLAIMS"

There is no basis in law for finding that Sargeant's motion for reconsideration "raised unpleaded claims." That finding by the district court, and in this Court's Order, is unexplained. Neither the district court nor this Court's Order identify the implicitly abusive or frivolously asserted "unpleaded claim" made by Sargeant. Presumably such improper assertion of an "unpleaded claim" would be akin to seeking tort type relief (such as punitive damages) in what was purely pleaded as a breach of contract action.

Sargeant's claim in the district court was for unpaid minimum wages pursuant to the Nevada Constitution, Article 15, Section 16. AA 3-6. The district court had previously found that claim was subject to an "accord and satisfaction." AA 17. Sargeant's motion for reconsideration asserted that he never received the "satisfaction" (payment) component of the "accord and satisfaction." Appellant's Reply Brief, p. 6-10. If he was correct in that assertion, his right to relief did not arise from a new or different "unpleaded" claim but was the *exact same claim* for unpaid minimum wages that had never been extinguished. *Id.*, p. 6-7, citing

Moers v. Moers, 229 N.Y. 294, 300 (N.Y. Ct. App. 1920) (“A mere accord without a satisfaction is ineffective and does not supersede or discharge the original contract or claim.”) and other authorities. Sargeant’s theory of potential legal right that he presented in his motion for reconsideration did not rely upon any “unpleaded” claim but the same minimum wage claim in his complaint.

IV. THE ORDER ERRONEOUSLY SANCTIONS SARGEANT FOR SEEKING CLARIFICATION VIA RECONSIDERATION OF AN ORDER, DRAFTED BY HENDERSON, THAT CONTAINED AN AMBIGUITY AND DID NOT RECITE IT CONSTITUTED A FINAL JUDGMENT

It was an abuse of discretion for the district court, and this Court’s Order, to allow sanctions under NRS 18.010 to be awarded to Henderson when Henderson drafted the district court’s order found to be completely dispositive of Sargeant’s case. That order, which denied Sargeant’s motion for class certification and other relief, could have been drafted by Henderson to contain a statement that a final judgment was entered in favor of Henderson or dismissing Sargeant’s case. AA 16-20. It did not. As discussed in Sargeant’s opening brief, the wording of that order contained at least one colorably material ambiguity, as it simultaneously spoke of an “accord and satisfaction” finding by the district court that also “did not necessarily act as a waiver of minimum wage rights.” *See*, Appellant’s Opening Brief, p. 14-15; AA 28-29 where Sargeant asked the district court to

clarify this point and advise him if he had any “minimum wage rights” still that he could pursue; and the district court’s order, AA 17.

That this circumstance and result was an error of law is discussed at page 15 of Appellant’s Opening Brief, citing *Estate of Blas*, 792 F.2d 858 (9th Cir. 1986). (District court’s award of sanctions in response to motion for reconsideration was improper, motion raised legitimate arguments regarding unexplained and unclear findings of original order.) As also explained in Appellant’s Opening Brief, this Court’s jurisprudence conforms to this principle, that it is an abuse of discretion for the district court to sanction litigants who present a “novel issue” or litigate “unsettled issues.” *See*, pages 12-13 of Appellant’s Opening Brief and this Court’s prior opinions cited therein. It was an abuse of discretion, and an error by this Court, to allow the imposition of sanctions against Sargeant given the at least colorable ambiguity of the prior order of the district court. This Court’s Order rewards a party, here Henderson, who was responsible for an ambiguity or lack of clarity in an order it drafted when the opposing party, in good faith, and with an objectively reasonable basis, sought clarification of such order through a motion to reconsider. Such is not, and should not, be the law in Nevada.

CONCLUSION

The Panel misapprehended the facts and the law when it issued the Order. The Order is erroneous for reciting that there was participation in the district court

proceedings by the union, a non-party. The Order erroneously finds Sargeant engaged in conduct he did not engage in and that does not appear in the record. The Order also erroneously ignores the proper legal standard for imposing sanctions under this Court's precedents and allows sanctions for good faith and objectively reasonable conduct that sought clarification of unsettled and unclear rulings by the district court.

Dated: December 18, 2017

Respectfully submitted,

/s/ Leon Greenberg

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Certificate of Compliance With N.R.A.P Rule 28.2

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 a proportionally spaced typeface using 14 point Times New Roman typeface in wordperfect.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 1191 words.

Finally, I hereby certify that I have read this 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 sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 18th day of December, 2017.

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PROOF OF SERVICE

The undersigned certifies that on December 18, 2017, she served the within:

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