IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 71276

MARIO LABARBERA, an Individual,

Appellant,

v.

WYNN LAS VEGAS, LLC DBA WYNN LAS VEGAS, a Nevada Limited Liability Company

Respondent.

Appeal from Judgment on Jury Verdict entered
August 3, 2016, and all orders made appealable thereby
District Court Case No.: A-14-695025-C
Eighth Judicial District Court of Nevada

RESPONDENT'S ANSWERING BRIEF

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DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1 (a), and must be disclosed:

Wynn Las Vegas, LLC, is a wholly-owned subsidiary of Wynn Resorts, Limited. Wynn Resorts, Limited is a publicly held company. No publicly held company owns 10% or more of Wynn Resorts, Limited's membership interest.

In the course of the proceedings leading up to this appeal, Wynn Las Vegas, LLC was represented by the following attorneys and law firms:

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These representations are made in order that the Justices of the Supreme Court or Judges of the Court of Appeals may evaluate possible disqualification or recusal. Dated this 16th day of June 2017.

SEMENZA KIRCHER RICKARD

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JURISDICTIONAL STATEMENT

Respondent Wynn Las Vegas, LLC ("Wynn") joins in the Jurisdictional Statement submitted by Appellant Mario LaBarbera ("LaBarbera") with the exception of LaBarbera's claim that the district court's order granting Wynn attorney's fees, costs, and interest is part of this appeal. LaBarbera filed his Notice of Appeal on September 9, 2016. (VI AA 1062.) The district court did not enter an order granting Wynn attorney's fees, costs, and interest until over three months later when it entered its Consolidated Order Entering Final Judgment on December 20, 2016. *Id.* 1073. LaBarbera never appealed the District Court's final consolidated order. Thus, it cannot be part of this appeal. NRAP 3A(b)(8).

ROUTING STATEMENT

This is a straightforward breach of contract case. Wynn filed suit against LaBarbera after he failed to repay $1,000,000 in credit instruments (gaming markers). The jury awarded Wynn a complete judgment on its markers and the district court enforced Wynn's express written right to attorney's fees, costs, and interest. There is no question of first impression or statewide public importance at stake here. NRAP 17.

STATEMENT OF THE ISSUES

A. Substantial Evidence.

The burden to overturn a jury verdict is rigorous and this Court will not set aside a verdict if it is supported by substantial evidence. Wynn sued LaBarbera after he failed to repay $1,000,000 in credit instruments (gaming markers). Ignoring Nevada statutory law for authenticating gaming records, and citing LaBarbera's own inconsistent testimony as the only grounds, the district court ruled that genuine issues of fact remained about Wynn's ability to authenticate LaBarbera's markers. At trial, Wynn presented testimony from multiple witnesses who all verified and authenticated the genuineness of Wynn's records, including LaBarbera's markers. Moreover, the jury heard LaBarbera's responses to Wynn's Requests for Admissions wherein he admitted that the signature "appeared" to be his own. In response, LaBarbera presented only his own self-serving, and inconsistent, deposition testimony wherein he admitted that he signed his Credit Application and Credit Agreement, but denied that it was his signature on his markers (although he refused to say they were forgeries). Unremarkably, the jury unanimously sided with Wynn, granting judgment in the full amount of LaBarbera's markers. Should this Court overturn the jury's verdict even though the evidence at trial overwhelmingly favored Wynn?

B. Abuse of Discretion.

The burden to reverse a district court's evidentiary rulings is equally daunting and requires a showing of palpable abuse. In his Opening Brief, LaBarbera throws every issue he can think of at the wall including the district court's justified decision to refuse his video-conferenced testimony, the timing of Wynn's witness disclosures, and LaBarbera's attempt to introduce evidence about his claimed gambling addiction (ludomania), intoxication, and language barriers. However, each of the district court's rulings were more than reasoned and supported by well-settled law and the facts, including LaBarbera's own testimony wherein he admitted that he never raised his supposed gambling addition, intoxication, or language barriers to Wynn. Should this Court second-guess well-supported rulings made by a trial court that oversaw this litigation from day one?

STATEMENT OF THE CASE

LaBarbera gambled on credit at Wynn's casino in 2008 and still owes Wynn the principal amount of $1,000,000. Wynn sued LaBarbera for breach of contract and went through the extensive process of having him served in his home country of Italy. After LaBarbera answered, Wynn took his deposition in Italy and moved for summary judgment.

Of course, this is not Wynn's first gaming marker. As it does with all markers, Wynn followed its strict protocols for documenting LaBarbera's request and agreement and verifying his identity and signatures before issuing him credit at its casino. Moreover, like all patrons who gamble on credit, Wynn maintained the extensive records proving LaBarbera's debt as a regular part of its business. Thus, it came as a surprise when the district court ruled against summary judgment, finding that a trial was needed for Wynn to authenticate LaBarbera's markers.

Although LaBarbera initially seemed to claim that his markers were forged, this defense was abandoned after he stated the opposite during his deposition. Of course, someone (obviously LaBarbera) signed his makers. Thus, it was blatant double-speak for LaBarbera to disclaim his signatures while simultaneously denying they were forged. However, the district court permitted LaBarbera to stand by this intellectually dishonest defense and embraced LaBarbera's last-minute interest in Wynn's burden to "authenticate" its gaming markers.

At trial, Wynn met its burden with overwhelming evidence and LaBarbera provided nothing in return but his own self-serving testimony from his deposition. Disregarding LaBarbera's inconsistent double-talk about his signatures, a unanimous jury returned a full verdict in favor of Wynn. Following final judgment, the district

court awarded Wynn attorney's fees, costs, and interest. LaBarbera timely appealed the judgment but not the trial court's fee, costs, and interest award.

STATEMENT OF FACTS

The background of this case is straightforward. This is a gaming marker collection case that should have ended with Wynn receiving summary judgment. Instead, Wynn was forced to conduct a jury trial on the narrow legal issue of authentication.

A. Wynn Files Suit To Collect On LaBarbera's Markers.

In late March through early April of 2008, LaBarbera visited Las Vegas and gambled on credit at Wynn's casino. In order to obtain this credit, LaBarbera executed a Credit Application, Credit Agreement, and multiple Credit Line Increase agreements with Wynn. (IV RA 488-97.) During his time at Wynn, LaBarbera executed numerous credit instruments (gaming markers) in order to gamble on credit. *Id.* 498-548. This case concerns twelve of the markers that La Barbera executed in favor of Wynn. These instruments total $1,070,000. After applying amounts that LaBarbera had previously provided to Wynn, the outstanding principal balance of $1,000,000 remained due and owing. *Id.* 549-53.

After its multiple demand letters went unanswered, Wynn filed suit against LaBarbera on January 24, 2010, alleging claims for breach of contract, conversion,

unjust enrichment, and breach of the covenant of good faith and fair dealing. (I AA 1.) Because LaBarbera resides abroad in Italy, Wynn was unable to serve him with the Summons and Complaint until July 24, 2014. LaBarbera answered on September 16, 2014. *Id.* 9.

B. LaBarbera Attempts To Contradict His Own Testimony Regarding His Signatures.

After discovery opened, Wynn served LaBarbera with written discovery on October 29, 2014, and LaBarbera responded in January, 2014. In his responses to Wynn's Requests for Admission, LaBarbera admitted that it "appears to be" his signature on all the relevant agreements, including his Credit Application, Credit Agreement, and markers. (IV RA 559-70.) However, LaBarbera attempted to modify his admission six months later during his deposition in Rome, Italy. In particular, although LaBarbera still agreed that his signature appears on the Credit Application and Credit Agreement, he claimed that he did not recall signing the markers and does not believe that the signatures on his markers was his own. (I RA 82-90.) Notably, however, LaBarbera would not say that these signatures were forged. *Id.* 84.

Additionally, although LaBarbera testified in his deposition that he was intoxicated during his trip to Wynn, he could not provide any specific details of his intoxication and admitted that he never raised this issue with anyone at Wynn. (I

RA 165-66.) The same was true for LaBarbera's claimed gambling addiction and language barriers that he allegedly faced during his time at Wynn. *Id.* 69; 94; 133.

On September 11, 2015, LaBarbera filed a Motion to Dismiss or for Summary Judgment, challenging all of Wynn's claims, with the exception of its claim for breach of contract, under Nevada's statute of limitations. (I AA 36.) In response, Wynn voluntarily dismissed all but its breach of contract claim and the parties filed a stipulation withdrawing LaBarbera's motion on October 15, 2015. *Id.* 42.

C. The District Court Orders A Trial On The Narrow Issue Of Authentication.

After discovery closed, Wynn filed a Motion for Summary Judgment on November 9, 2015. (II RA 193.) Wynn's case for summary judgment was straightforward. LaBarbera admitted that he gambled at Wynn's casino and admitted that he signed the Credit Application and Credit Agreement. Wynn provided properly authenticated business records proving that LaBarbera's outstanding debt totaled $1,000,000. Because LaBarbera refused to pay these monies, Wynn was entitled to judgment on its claim.

LaBarbera filed his Opposition to Wynn's motion on January 21, 2016. Additionally, despite the fact that the dispositive motion deadline expired fifty-one days earlier, LaBarbera combined it with his own "Counter-Motion" for Summary Judgment. (III RA 273.) Searching about for any excuse to distract from his clear

liability, LaBarbera raised a host of issues in his Opposition/Counter-Motion including the claim that he repeats here that Wynn should be estopped by its "unclean hands" from enforcing its marker agreements.

However, the district court rejected almost all of LaBarbera's distraction with the exception of his inconsistent testimony about his signatures on his markers. In particular, despite LaBarbera's admissions in his responses to Wynn's Requests for Admission that the signatures "appears" to be his own, and his refusal to unequivocally deny that the signatures on the markers were his, the district court decided that a question of fact remained "of whether or not [the] documents were actually signed by [LaBarbera]." (IV RA 481.) Of course, the only dispute on this issue was between LaBarbera and himself. Wynn's authenticated records are clear.

In light of the district court's ruling, the parties prepared for trial and Wynn filed its motions in limine on January 29, 2016. In particular, Wynn sought to exclude any evidence or argument of LaBarbera's claimed gambling addition, intoxication, or any alleged forgery. (I AA 45-105.) Citing well-settled law and LaBarbera's failure to raise his alleged gambling addition or intoxication with anyone at Wynn, the district court granted Wynn's motions to exclude this evidence. (II AA 235-60.)

However, despite LaBarbera's deposition testimony wherein he stated that he was not claiming that his signatures were forged, the district court refused to grant Wynn's motion to exclude evidence or argument regarding forgery. According to the district court, although "[t]hey're business records kept in the ordinary course, [w]ho signed them is Wynn's burden." (II AA 256.) In other words, even though LaBarbera's markers are authenticated business records that someone signed with LaBarbera's name (obviously LaBarbera), and LaBarbera refused to say that they were forged, the district court believed Wynn had something more to prove with a trial.

D. Wynn Discloses Additional Authentication Witnesses And LaBarbera Refuses Multiple Offers To Depose Them Before Trial.

Initially, the parties were scheduled for a March 14, 2016, and then April 11, 2016, trial stack. However, the trial date was rescheduled to June 13, 2016, after the Court ran out of time on the stack. In anticipation of the original trial date, the parties appeared for their pretrial conference on February 18, 2016. Prior to this conference, Wynn provided LaBarbera with its Third Supplement to its Rule 16.1 disclosures on February 10, 2016. (IV RA 461.)

In light of LaBarbera's freshly minted obsession with Wynn's authentication of its business records, Wynn identified the names of the casino service team leaders

(pit bosses), and pit administrators that verified LaBarbera's identity, and witnessed him sign his markers, at the time his markers were issued.

In conjunction with this disclosure, Wynn made multiple written and oral offers for LaBarbera to depose these additional witnesses and even to move the trial. (IV RA 461-73.) However, LaBarbera ignored or refused Wynn's offers. *Id.* Moreover, upon learning that one of these witnesses might not be available for trial, Wynn took the deposition of its own employee after providing notice to LaBarbera. However, LaBarbera refused to appear. *Id.* 472. Although LaBarbera filed an "Objection" to Wynn's disclosures, he never moved to exclude these witnesses from trial.

In fact, LaBarbera never even attempted to raise an objection to Wynn's disclosure with the district court until the first day of trial. As the district court recognized, LaBarbera's protest was too little too late. (II AA 384.) LaBarbera had been given months to depose Wynn's additional witnesses, but chose not to do so. As the district court instructed, LaBarbera's remedy was to file an appropriate motion for sanctions after the conclusion of trial, if he deemed it necessary. *Id.* LaBarbera never moved for sanctions.

E. Wynn Presents Overwhelming Evidence Of LaBarbera's Breach At Trial.

Again, the point of trial was for Wynn to authenticate its business records. Despite the declaration testimony of Wynn's custodian of records, LaBarbera's prior admissions and inability to unequivocally reject his signatures on his markers, the district court still disagreed that Wynn already met its burden to authenticate its business records.

Trial began on June 13, 2016, and ended June 15, 2016. During trial, Wynn presented testimony from its former Director of Credit and Collections, who held this position during the time of LaBarbera's visit. Additionally, Wynn's current Director of Casino Collections, who had served as its Manager of Casino Collections at the time of LaBarbera's visit, testified as well. Both of these witnesses repeatedly verified and authenticated the business records of Wynn, including LaBarbera's gaming markers. (*See e.g.*, III AA 573.)

Besides Wynn's directors, the casino service team leaders, and pit administrators that verified LaBarbera's identity, and signatures, at the time he actually obtained his markers testified as well. (IV AA 726-773; V AA 774-882.) Each of these witnesses explained to the jury how they fulfilled the strict protocol of verifying LaBarbera's identity and signatures with comparisons to his photo and signatures on file. Notably, despite the passage of over eight years, one of Wynn's

casino service team leaders even recalled meeting LaBarbera and speaking English with him at the time of his visit to Wynn. (V AA 856.)

For his part, LaBarbera presented only his own deposition testimony wherein he confirmed his signatures on his Credit Application and Credit Agreement but claimed to not recognize his own signatures on his markers. (V AA 913-40.) Moreover, LaBarbera's testimony confirmed that, despite his language barriers, he had been able to communicate with his host, Alex Pariente, while at Wynn. *Id.* 924.

Although LaBarbera appears to deny it now, the district court permitted his testimony wherein he claimed to be avoiding travel to the United States because of the criminal charges brought against him under Nevada's bad check laws. (V AA 943-47.) Indeed, the district court allowed LaBarbera to raise this issue with each of Wynn's witnesses, asking them what they knew about LaBarbera's criminal charges. (*See e.g.*, IV AA 611; 711.) Moreover, although there was no evidence in the record demonstrating why LaBarbera did not appear at trial, LaBarbera's counsel told the jury during closing that "[w]e know why Mr. LaBarbera is not here. He didn't want to be arrested." (V AA 995.)

F. A Unanimous Jury Finds In Favor Of Wynn.

Unremarkably, the jury unanimously sided with Wynn. As the verdict and judgment reflect, the jury found in favor of Wynn on its breach of contract claim and

awarded Wynn the full principal value of LaBarbera's $1,000,000 in markers. (VI AA 1013.) Following final judgment, but before Wynn received an award of its attorney's fees, costs, and interest, LaBarbera filed this appeal. *Id.* 1062.

SUMMARY OF THE ARGUMENT

LaBarbera's appeal can be divided into three equally unfounded parts. First, LaBarbera props up principles of equity, including the doctrine of unclean hands and laches, to attack the jury's verdict. However, Wynn sought no equitable relief and LaBarbera never raised a laches defense before the trial court. Thus, LaBarbera's attack must be rejected at the threshold.

Moreover, even if this Court looks past these important details, Wynn has not acted in bad faith. The law is well-settled that Wynn has a right to collect on its gaming markers and its markers are afforded the same protections as any other negotiable instrument. The mere fact that a patron cannot purchase groceries with Wynn credit is meaningless. The law protects Wynn's instruments and LaBarbera must pay his debt.

Wynn obeyed the district court's instruction to prove authentication and presented overwhelming evidence substantiating LaBarbera's debt. For his part, LaBarbera presented only his own self-serving and inconsistent testimony. The jury's verdict must stand.

Second, LaBarbera attacks the district court's exercise of its discretion and takes issue with nearly every ruling Wynn received in its favor, and at least one that it didn't. However, each and every one of the trial court's rulings was more than well-founded and supported by both the facts and well-settled law.

Despite LaBarbera's claims otherwise, the district court actually allowed him to introduce his evidence of his criminal case and bench warrant. Moreover, the district court was more than justified in following the standard of requiring live testimony at trial and permitting additional witnesses from Wynn who were disclosed months before the trial even began.

The district also did nothing but follow the law when it excluded LaBarbera's empty arguments about his gambling addiction and intoxication. Indeed, LaBarbera's own testimony proved that neither even applied. Finally, LaBarbera didn't object to the district court's instruction informing the jury on the law of his language defense. Thus, he cannot appeal this instruction now.

Third, LaBarbera contends that Wynn's award of attorney's fees, costs, and interest is too high. However, LaBarbera never appealed this award and fails to provide any support for his claim. Thus, the full amount of Wynn's judgment must stand. LaBarbera has no defense. His appeal must be denied.

ARGUMENT

A. The Jury's Verdict Must Stand.

This Court knows well the rigorous standard for overturning a jury's verdict: "this court 'will not overturn the jury's verdict if it is supported by substantial evidence, unless, from all the evidence presented, the verdict was clearly wrong.'" *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1261, 969 P.2d 949, 958 (1998) (citing *Bally's Employees' Credit Union v. Wallen*, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989)).

"The reviewing court 'must assume that the jury believed the evidence favorable to [the prevailing party] and made all reasonable inferences in [that party's] favor." *Id.*; *see also Polaris Indus. Corp. v. Kaplan*, 103 Nev. 598, 601, 747 P.2d 884, 886 (1987) ("The general rule is that where the evidence is conflicting and there is substantial evidence to support the judgment, it will not be disturbed.") (citing *Consolazio v. Summerfield*, 54 Nev. 176, 179, 10 P.2d 629, 630 (1932)).

As shown, there never should have been a trial. Wynn should have been granted summary judgment.[1] Regardless, Wynn presented testimony from multiple

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[1] As the Court knows, "[a] casino record is admissible if kept in the course of an activity which is regularly conducted by a gaming licensee or hotel." *State v. Tapi*a, 108 Nev. 494, 496, 835 P.2d 22, 24 (1992) (citing NRS 52.405(2), NRS 52.415 and NRS 51.135).

witnesses at trial authenticating LaBarbera's makers. As the jury heard, Wynn maintained LaBarbera's markers in the regular course of its business and its employees followed Wynn's strict protocols for verifying LaBarbera's identity and signature at the time he obtained his markers. LaBarbera's own self-serving, and inconsistent, testimony was no defense.

Aware of this, LaBarbera attempts to revisit his equitable argument from his untimely "Counter-Motion" for Summary Judgment that Wynn somehow has unclean hands. Moreover, LaBarbera raises a new argument that Wynn is barred by laches from collecting LaBarbera's debt. Of course, LaBarbera waived his laches defense by not raising it before the trial court. Moreover, both arguments are clearly flawed.

1. Equity Favors Wynn and Cannot Preclude Wynn's Legal Claim.

LaBarbera's argument about Wynn's supposed "unclean hands" must fail at its threshold. As the Court is aware, this doctrine only applies to equitable remedies. *Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 275, 182 P.3d 764, 766 (2008) ("The unclean hands doctrine generally bars a party from receiving ***equitable relief*** because of that party's own inequitable conduct.") (citation omitted) (emphasis added); *see also D.E. Shaw Laminar Portfolios, LLC v. Archon Corp.*, 570 F. Supp. 2d 1262, 1273 (D. Nev. 2008) ("[T]he

Nevada Supreme Court has contemplated the doctrine only in relation to equitable relief.") (citing *Banks v. Sunrise Hosp.*, 120 Nev. 822, 102 P.3d 52, 66 (2004); *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 5 P.3d 1043, 1050 (2000)). Wynn received no equitable relief from LaBarbera here. Thus, this argument fails.

Moreover, this doctrine "should only apply when the egregiousness of the party's misconduct constituting the party's unclean hands and the seriousness of the harm caused by the misconduct collectively weigh against allowing the party to obtain such a remedy." *Las Vegas Fetish & Fantasy Halloween Ball, Inc.*, 124 Nev. at 273, 182 P.3d at 765. "The party asserting this doctrine has the burden of proving its application" by showing "bad faith." *Omega Indus. v. Raffaele*, 894 F. Supp. 1425, 1431 (D. Nev. 1995) ("Dr. Raffaele fails to prove that Omega acted in bad faith by not reimbursing or crediting him for carpeting, painting and wallpapering the office."). "Bad intent is the essence of unclean hands." *Dollar Sys., Inc. v. Avcar Leasing Sys., Inc.*, 890 F.2d 165, 173 (9th Cir. 1989) (emphasis added).

LaBarbera never accused, much less proved, that Wynn engaged in any egregious misconduct or bad faith when it granted LaBarbera's request to gamble on credit. Wynn's right to collect its gaming debts is codified in Nevada law. *See* NRS 463.368. While LaBarbera spends page after page in his Opening Brief arguing about the differences between a gaming marker and a traditional personal check, this

Court has already ruled that "the language of … [Nevada's bad] check statute is abundantly clear and unmistakable. By its terms, NRS 205.130 applies to instruments that are drawn upon a bank, payable on demand, signed by the payor, and which instruct the bank to pay a certain amount to the payee." *Nguyen v. State*, 116 Nev. 1171, 1175-76, 14 P.3d 515, 518 (2000); NRS 205.130(1)(e). Thus, gaming "markers … fall within the purview of the bad check statute." *Id.* ("We therefore hold that these markers were 'checks' within the meaning of NRS 205.130(1)."). LaBarbera's attempt to paint Wynn as the bad actor must be rejected.

2. LaBarbera Waived Any Laches Defense.

LaBarbera's attempted reliance on the doctrine of laches must be summarily rejected as well. "A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Wynn can locate no record of LaBarbera raising a laches defense before the trial court. Thus, it is waived.

Moreover, even if this Court looks past LaBarbera's failure to raise laches below, he fails to demonstrate how enforcing Wynn's contract rights is inequitable. "Laches is an equitable doctrine which may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which

would make the grant of relief to the delaying party inequitable." *Building & Constr. Trades v. Public Works*, 108 Nev. 605, 610-11, 836 P.2d 633, 636-37 (1992) (citing *Erickson v. One Thirty-Three, Inc.*, 104 Nev. 755, 766 P.2d 898 (1988)). "***Especially strong circumstances must exist, however, to sustain a defense of laches when the statute of limitations has not run***." *Id.* (citing *Lanigir v. Arden*, 82 Nev. 28, 409 P.2d 891 (1966)) (emphasis added).

As LaBarbera concedes, Wynn filed its breach of contract claim in time. Moreover, LaBarbera fails to demonstrate any change of circumstances that would make Wynn's claim inequitable. As the record demonstrates, LaBarbera gambled, lost, went home, and failed to pay his debt despite Wynn's multiple demands.

LaBarbera lives in Italy. Thus, service took much longer than it typically does in a case involving a domestic defendant. As the service documents reflect, Wynn was forced to have its Summons and Complaint translated into Italian and obtain special authorization from Italian authorities before having them served. (I RA 1-32.) By no means did Wynn act unreasonably. Laches cannot apply.

B. The Trial Court Did Not Abuse Its Discretion.

LaBarbera's remaining points in his Opening Brief all address the district court's exercise of its discretion on pretrial matters and questions of evidence. Therefore, the standard is "abuse of discretion." *M.C. Multi-Family Dev., L.L.C. v.*

Crestdale Assocs., Ltd., 124 Nev. 901, 913, 193 P.3d 536, 544 (2008) (This Court "review[s] a district court's decision to admit or exclude evidence for abuse of discretion, and … will not interfere with the district court's exercise of its discretion absent a showing of palpable abuse."). "[I]f trivial errors are committed by the trial court which do not prejudice the substantial rights of the complaining party, they will be disregarded …." *Murphy v. Southern Pac. Co.*, 31 Nev. 120, 127, 101 P. 322, 329 (1909). While LaBarbera throws everything at the wall in his brief, nothing comes even close to sticking.

1. LaBarbera Was Permitted to Raise His Criminal Charges With Witnesses and in Closing.

LaBarbera's attack on the district court's determinations regarding his criminal charges and bench warrant is difficult to comprehend considering that the district court specifically *permitted* LaBarbera to introduce his deposition testimony on the issue and *permitted* his counsel to question Wynn's witnesses about their knowledge of the criminal charges. (*See e.g.*, V AA 947) ("I received a District Attorney's notification and basically a mandate for my arrest."). Moreover, despite the absence of any evidence to prove it, LaBarbera's counsel told the jury during his closing that

"[w]e know why Mr. LaBarbera is not here. He didn't want to be arrested." *Id.* 995. Thus, LaBarbera's counsel crossed the line from advocate to witness.

As Wynn demonstrated before trial, LaBarbera's arrest warrant itself is not proof of anything but his criminal charges. LaBarbera never testified that he would not appear at the trial as a result of his bench warrant and never presented any other evidence in support of this claim. His counsel made this improper leap in front of the jury. *Jain v. McFarland*, 109 Nev. 465, 475-76, 851 P.2d 450, 457 (1993) ("Arguments of counsel are not evidence and do not establish the facts of the case."). The district court gave LaBarbera what he wanted and committed no error.

2. The District Court Rightfully Precluded Video Conferencing.

Although LaBarbera himself never explained his absence from trial, this did not stop his counsel from arguing for leave to testify via video conference.[2] However, this Court has already made it clear that absent a showing of "compelling circumstances and upon appropriate safeguards," telephonic or video conference testimony is not permissible at trial. *Barry v. Linder*, 119 Nev. 661, 668, 81 P.3d 537, 542 (2003) (upholding the denial of a request to testify telephonically because

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[2] Notably, LaBarbera's counsel initially took the opposite position, telling the District Court that he didn't believe his client would want to appear via video conference due to the expenses involved. (II AA 246.)

the defendant had "failed to establish exigent circumstances"); *see also Aqua Marine Prod. v. Pathe Computer,* 551 A.2d 195, 200 (N.J. Super. Ct. App. Div. 1988) (concluding that the trial court erroneously permitted telephonic testimony absent special circumstances); *Rose v. State*, 742 S.W.2d 901, 905 (Ark. 1988) (excluding a police officer's telephonic testimony at a suppression hearing because it was not shown that he was unavailable).

As the Advisory Committee Notes to Nevada Rule of Civil Procedure 43(a) explain:

> The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.[3]

As shown, Wynn travelled to Rome, Italy to take LaBarbera's testimony. Following Wynn's examination, LaBarbera's counsel examined him at length. Thus,

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[3] "As the Advisory Committee Notes to Federal Rule of Civil Procedure 43(a) explain, the rule is intended to permit remote testimony when a witness's inability to attend trial is the result of 'unexpected reasons, such as accident or illness,' and not when it is merely 'inconvenient for the witness to attend the trial.'" *Eller v. Trans Union, LLC*, 739 F.3d 467, 478 (10th Cir. 2013) (quoting Fed. R. Civ. P. 43(a) advisory committee's note). Therefore, it is the rule, not the exception, that trial testimony be taken orally in open court.

LaBarbera's testimony was preserved for trial. If LaBarbera wanted to testify live, then it was incumbent upon him to make the proper arrangements. Even assuming his counsel's arguments about his bench warrant are true, his failure to address his criminal charges cannot fairly be called "compelling circumstances."

Moreover, LaBarbera failed to demonstrate how he intended to preserve the appropriate safeguards. The district court's decision to forbid this procedure was more than justified. *See Air Turbine Tech., Inc. v. Atlas Copco AB*, 410 F.3d 701, 714 (Fed. Cir. 2005) (the plaintiff improperly waited until one month before trial to file its motion to have witnesses testify by video conference and requiring plaintiff to read deposition transcripts of foreign witnesses did not give defendants "an unfair tactical advantage because this circumstance occurs all time in civil litigation").

3. LaBarbera Refused Wynn's Multiple Offers To Depose Its Witnesses.

LaBarbera's attack on the district court's decision to permit Wynn's additional witnesses is also unfounded. This Court knows well the burden for discovery sanctions. "Generally, sanctions may only be imposed where there has been willful noncompliance with a court order or where the adversary process has been halted by the actions of the unresponsive party." *GNLV Corp. v. Service Control Corp.*, 111

Nev. 866, 869, 900 P.2d 323, 325 (1995) (citing *Fire Ins. Exchange v. Zenith Radio Corp.*, 103 Nev. 648, 651, 747 P.2d 911, 913 (1987)).

As shown, LaBarbera's defense of Wynn's marker claims was a moving target. LaBarbera's "authentication" defense did not develop until summary judgment. In truth, there was no question of authentication. LaBarbera's gaming markers were part of Wynn's regular business records and they were properly authenticated by Wynn's custodian of records in support of Wynn's Motion for Summary Judgment. Despite this, the district court still ordered a trial.

Wynn's additional witnesses only confirmed the testimony already provided by its custodian of records. They corroborated Wynn's strict process for verifying LaBarbera's identity and signature at the time he obtained his markers. Moreover, while Wynn also disclosed its former Director of Credit and Collections, most of her testimony was almost identical to testimony she had provided in a similar trial that LaBarbera's counsel defended only months earlier, in December of 2015. (II AA 382.)

As LaBarbera is forced to acknowledge, Wynn disclosed its additional witnesses four months before trial and provided him with multiple oral and written offers to depose them. However, LaBarbera ignored or refused Wynn's offers.

LaBarbera even refused to attend the deposition that Wynn conducted of its own employee out of concern for preserving his testimony for trial.

LaBarbera never moved for sanctions or to exclude these witnesses from trial. Instead, LaBarbera waited until the first day of trial to raise his apparent protest with the district court. As the district court recognized, LaBarbera's protest was too little too late. (II AA 384.) Wynn's timing did not warrant the severe sanction of excluding its witnesses. Rather, LaBarbera's remedy was to move for sanctions from Wynn after trial. Tellingly, LaBarbera never filed for sanctions. LaBarbera had every opportunity to conduct the discovery he wanted. He chose to do nothing.

4. LaBarbera's Supposed Gaming Addiction is Forbidden by Nevada Statutory Law.

LaBarbera's attempted reliance on his supposed gambling addiction (ludomania) is patently disingenuous. LaBarbera admitted that he never informed anyone at Wynn that he suffered from a gambling addiction before gambling on credit. (I RA 132-33.) Even if he had, Nevada statutory law specifically provides that a "patron's claim of having a mental or behavioral disorder involving gambling . . . ***[i]s not a defense*** in any action by a licensee or a person acting on behalf of a

licensee to enforce a credit instrument or the debt that the credit instrument represents . . . ." NRS 463.368(6)(a).

As this Court has repeatedly recognized, "when the language of a statute is plain and unambiguous, such that it is capable of only one meaning, this court should not construe that statute otherwise." *MGM Mirage v. Nev. Ins. Guar. Ass'n*, 125 Nev. 223, 228-29, 209 P.3d 766, 769 (2009); *see also Sheriff, Clark County v. Burcham*, 124 Nev. 1247, 1253, 198 P.3d 326, 329 (2008) ("where the legislative intent is clear, we must effectuate that intent"). By the plain language of NRS 463.368(6)(a), LaBarbera cannot cite his gambling addiction as a defense here. Thus, the district court again committed no error.

5. LaBarbera Never Testified That He Was Incapacitated While Executing His Gaming Agreements With Wynn.

LaBarbera also admitted that Wynn did not force him to consume alcohol while he was gambling at Wynn. Moreover, he executed multiple gaming markers, over multiple days, and he never complained to anyone with Wynn that he was too intoxicated to gamble or sign the markers. During his testimony, LaBarbera could not identify any specific facts about how much he drank, when he drank or for how

long. He merely stated that he voluntarily drank while gambling because "attractive women" offered him drinks. (I RA 134-35.)

Despite this, LaBarbera still tries to pretend that he has a capacity defense to Wynn's claims. However, the defense of voluntary intoxication is a disfavored one. "The party asserting incompetence must prove that status 'at the time of the disputed transaction, . . . an extremely heavy [burden]." *DuFort v. Aetna Life Ins. Co.*, 818 F. Supp. 578, 583 (S.D.N.Y. 1993) (citation omitted). If intoxication is relied upon as a defense, "it must be shown that a man was incapable of exercising judgment, of understanding the proposed engagement, and of knowing what he was about when he entered into the contract, or else it would be held binding." *Seeley v. Goodwin*, 39 Nev. 315, 324, 156 P. 934, 937 (1916); *Christensen v. Larson*, 77 N.W.2d 441, 446 (N.D. 1986) ("If intoxication alone is relied on as a defense, it must be to such a degree that the party who wishes to avoid his contract … must have been deprived of his reason and understanding, to such an extent that he is incapable of comprehending the nature and consequences of his act …."); *see also Babcock v. Engel*, 58 Mont. 597, 194 P. 137 (1920) ("Intoxication must be so deep and excessive as to deprive one of his understanding. If intoxication is relied on as a defense, it

must be to such a degree that the party who wishes to avoid his contract on this ground must have been deprived of his reason and understanding.").

Moreover, it is worth noting that even if LaBarbera was legally incapacitated, "[a] party must actively choose—or 'elect,' to invalidate a voidable contract." *Sununu v. Philippine Airlines, Inc.*, 792 F. Supp. 2d 39, 56 (D.D.C. 2011). "The power of avoidance … terminates if the incapacitated party, upon regaining capacity, affirms or ratifies the contract." *Hernandez v. Banks*, 65 A.3d 59, 67 (D.C. Ct. App. 2013); *Yannuzzi v. Commonwealth*, 390 A.2d 331, 332 (Pa. Commw. 1978). Once a party ratifies a contract, it may not later withdraw its ratification and seek to avoid the contract." *Mo. Pac. R.R. Co. v. Lely Dev. Corp.*, 86 S.W.3d 787, 792-93 (Tex. Ct. App. 2002). Ratification may be inferred by a party's course of conduct and need not be shown by express word or deed." *Id.* "Any act inconsistent with an intent to avoid a contract has the effect of ratifying the contract." *Id.*

As shown, LaBarbera lacked any evidence of legal incapacity and failed to raise this issue until after being sued by Wynn. Even if the district court had permitted his counsel to read his testimony about "attractive women" bringing him drinks, LaBarbera never claimed that he lacked any and all understanding of his actions. Quite the opposite, he admitted that Wynn did not force him to consume alcohol. LaBarbera's vague and unsubstantiated allegations of intoxication do not

demonstrate that he lacked the capacity to sign his gaming markers or Credit Agreement. Proving this, LaBarbera stipulated to Wynn's jury instruction on intoxication. (V AA 806.) Thus, LaBarbera can point to no error, or prejudice, from the district court's refusal to permit his testimony.

6. LaBarbera Stipulated To The Court's Instruction Regarding His Alleged Language Barrier.

LaBarbera also stipulated to Wynn's jury instruction that a language barrier cannot be a defense to a contract. (V AA 810.) Thus, he waived any challenge to this instruction on appeal. *Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983.

Regardless, LaBarbera was clear during his deposition that he was able to communicate with his host. Despite this, LaBarbera never asked anyone, including his host, to translate the terms of his gaming markers or any of his other contracts with Wynn.[4] (I RA 65-67; 70; 90.) Of course, it was LaBarbera's obligation to learn the terms of his contracts before he signed them; he cannot blame Wynn. As the United States Supreme Court observed: "It will not do for a man to enter into a

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[4] While LaBarbera makes repeated reference to the fact that his casino host, Alex Pariente ("Pariente"), did not testify at trial, Wynn was never in the position to "refuse" to produce Pariente. As Wynn's witnesses confirmed, Pariente no longer works for Wynn. Wynn never concealed Pariente's location from LaBarbera. If LaBarbera wanted to take Pariente's deposition, he could have subpoenaed him before the close of discovery. He failed to do so.

contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained." *Upton v. Tribilcock*, 91 U.S. 45, 50, 23 L. Ed. 203 (1875).

Thus, "[i]n the absence of fraud, the fact that an offeree cannot read, write, speak, or understand the English language is immaterial to whether an English-language agreement the offeree executes is enforceable." *Morales v. Sun Constructors, Inc*., 541 F.3d 218, 221-23 (3d Cir. 2008); *see also Paper Express, Ltd. v. Pfankuch Maschinen*, 972 F.2d 753, 757 (7th Cir. 1992) (parties should be held to contracts, even if the contracts are in foreign languages or the parties cannot read or understand the contracts due to blindness or illiteracy); *Shirazi v. Greyhound Corp*., 401 P.2d 559, 562 (Mont. 1965) (holding Iranian student subject to limitation contained in baggage receipt and stating that "[i]t was incumbent upon [the plaintiff],

who knew of his own inability to read the English language, to acquaint himself with the contents of the ticket").

The district court's instruction was an accurate statement of the law. That is precisely why LaBarbera stipulated to it. LaBarbera should not be permitted to complain now.

C. LaBarbera Failed To Appeal Wynn's Award Of Fees, Costs, And Interest.

Finally, while LaBarbera briefly complains about the district court's award of attorney's fees, costs, and interest, he failed to appeal the order awarding these amounts. LaBarbera filed his appeal on September 9, 2016. However, the district court did not enter an order awarding attorney's fees, costs, and interest until it entered its Consolidated Order Entering Final Judgment Against Defendant on December 19, 2016. (VI AA 1073.) LaBarbera never appealed this Order. Thus, he is barred from raising it now. *See Mahaffey v. Investor's Nat'l Sec. Co.*, 102 Nev. 462, 725 P.2d 1218 (1986); NRAP 3A(b)(8).

Moreover, even if the Court looks past this defect, LaBarbera provides *no grounds* to overturn the district court's award. Pursuant to the terms of the credit instruments LaBarbera executed, LaBarbera expressly agreed to pay "all costs of collection, including accrued interest at the rate of 18% per annum, attorney's fees and court costs …." (*See e.g.*, IV RA 498-500.) Based upon these clear terms, and

the factors set forth by this Court in *Brunzell v. Golden Gate Nat'l Bank*, the district court awarded Wynn its costs, interest, and attorney's fees. (VI AA 1073.) Other than general complaints about the total amount, LaBarbera provides no basis to overturn this award. It must be upheld.

CONCLUSION

For the foregoing reasons, Wynn respectfully asks this Court to uphold the jury's verdict and the district court's award of attorney's fees, costs, and interest. LaBarbera's appeal lacks any merit.

Dated this 16th day of June 2017.

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AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 16th day of June 2017.

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CERTIFICATE OF COMPLIANCE

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 Microsoft Word 2016 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 8,363 words.

Pursuant to NRAP 28.2, 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), which requires every assertion regarding matters in the record to be supported by a reference to the page 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 this brief is not in

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conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 16th day of June 2017.

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STATEMENT OF RELATED CASES

Respondent hereby certifies that, to Respondent's knowledge, there are no cases or appeals pending before this Court related to the present appeal.

Dated this 16th day of June 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2017, I electronically filed the foregoing with the Supreme Court of Nevada by using the Court's electronic filing system. I certify that all participants in the case are registered and that service will be accomplished by the Supreme Court of Nevada's electronic filing system.

/s/ Olivia A. Kelly
An Employee of Semenza Kircher Rickard