IN THE SUPREME COURT OF THE STATE OF NEVADA

MOTOR COACH INDUSTRIES, INC., Appellant, vs. A.K and K.K., minors, by and through their guardian MARIE-CLAUDE RIGAUD; SIAMAK BARIN, as executor of the ESTATE OF KAYVAN KHIABANI, M.D. (decedent); THE ESTATE OF KAYVAN KHIABANI, M.D. (decedent); SIAMAK BARIN, as executor of the ESTATE OF KATAYOUN BARIN, DDS (decedent); and the ESTATE OF KATAYOUN BARIN, DDS (decedent), Respondents,	Case No.: 78701 **RESPONDENTS' OPPOSITION TO MOTION TO EXCEED WORD LIMIT FOR OPENING BRIEF AND COUNTERMOTION TO DISMISS THE APPEAL**

Respondents hereby oppose Appellant Motor Coach Industries, Inc.'s ("MCI") motion to exceed word limit for Opening Brief and countermove to dismiss MCI's appeal with prejudice. After receiving three extensions, MCI was required to file its opening brief on or before December 4, 2019. Instead of timely filing a brief that complied with the Nevada Rules of Appellate Procedure, MCI filed a grossly oversized brief that was more than 100 pages and exceeded the maximum word count by 4,638 words—more words than are contained in the entire United States Constitution.[1]

[1] The United States Constitution contains 4,400 words. See https://www.constitutionfacts.com/us-constitution-amendments/fascinating-facts/ (last visited December 11, 2019).

Even though this Court "looks with disfavor" on motions to exceed the maximum page or word count, MCI also filed a separate motion to exceed word limit. Like its opening brief, MCI's motion to exceed word limit also violated the rules, which required MCI to attach a copy of the proposed brief to the motion and include a sworn declaration demonstrating diligence and good cause for the extension. Neither was done. MCI failed to comply with the procedural requirements and further failed to support its motion with the requisite showing of diligence and good cause. Given its blatant rule violations, its failure to demonstrate diligence or good cause, and its improperly-filed brief, MCI's motion to exceed word count should be denied, and its appeal should be dismissed.

ARGUMENT

A. MCI's request to exceed the extremely liberal maximum word count by an absurd 4,638 words must be denied.

In this matter, MCI appeals from a very straightforward failure to warn verdict. Under the Nevada Rules of Appellate Procedure, "[u]nless it complies with Rule 32(a)(7)(A)(ii) or permission of the court is obtained under Rule 32(a)(7)(D), an opening [] brief **shall** not exceed **30 pages**…." NRAP 32(a)(7)(A)(i) (bold added). Subsection (ii) provides that a brief that exceeds the page limit "is acceptable if it contains **no more than 14,000 words**…."

Rule 32(a)(7)(D) governs the circumstances in which this Court *may* grant permission to exceed the page or word counts. The Rule cautions, however, that

"[t]he court **looks with disfavor** on motions to exceed the applicable page limit or type-volume limitation" and that these motions "**will not be routinely granted**." Rule 32(a)(7)(D)(i) (bold added). The Rule further provides that these motions "will be granted **only upon a showing of diligence and good cause**." *Id*.

Procedurally, the Rule states that the motion "shall be filed on or before the brief's due date and **shall be accompanied by a declaration stating in detail the reasons for the motion**. NRAP 32(a)(7)(D)(ii) (emphasis added). It also directs that the motion "**shall** [] be accompanied by a single copy of the brief that the applicant **proposes** to file." NRAP 32(a)(7)(D)(iii) (bold added).

MCI complied with none of these rules. Its 108-page opening brief exceeds the page limit by **78 pages**. The brief also eclipses the more liberal 14,000 type-volume count by an eyepopping **4,638 words**.

In requesting permission to exceed the maximum word limit, MCI demonstrates neither diligence nor good cause for granting its motion. The verdict in this case was rendered on March 23, 2018. Despite having nearly **21 months** between the verdict and deadline to file opening brief, including three 30-day extensions, to revise its brief down to 14,000 words, MCI overshot its target by roughly 33%. This does not show diligence, and MCI doesn't even bother to defend its editing process.

MCI equally fails to show good cause for such a significant deviation from the liberal maximum word count. It merely offers sweeping, unsworn assertions that an extra 4,638 words are somehow necessary to "adequately address [] important topics…" and to include "extensive authorities [from] throughout the country…." Mot. at 2. In reality, however, the issues in this appeal are hardly novel. Even if they were more complex, they do not warrant such an inflated word count, as MCI requests. MCI's conclusory assertions do not establish otherwise.

MCI's motion is also procedurally flawed. It contains no declaration and no copy of the **proposed** brief, which MCI separately filed without prior permission. MCI's motion should be denied, and its oversized brief should be stricken.

There are good reasons why motions to exceed page and word counts are viewed with "disfavor" and rarely granted. As this Court has previously observed, appellants should not be able to throw every argument at the wall to see what may stick:

> Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues…. [T]he weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy. Like other mortals, appellate judges have a finite supply of time and trust; every weak issue in an appellate **brief** or argument detracts from the attention a judge can devote to the stronger issues, and reduces appellate counsel's credibility before the court. For these reasons, a lawyer who throws in every arguable point—"just in case"—is likely to serve her client less effectively than one who concentrates solely on

> the strong arguments. Hernandez v. State, 117 Nev. 463, 465-66 (2001) (internal quotations omitted).

Courts around the country also routinely deny or strike motions to exceed word limits and oversized briefs for similar reasons. See, e.g., State v. Johnson, 447 P.3d 783, 828 (Ariz. Sup. Ct. 2019) (striking oversized opening brief and directing appellant to refile within a more limited word count); Idaho Asphalt Supply v. State Dept. of Transp., 974 P.2d 1117, 1117 (1998) (refusing to allow an oversized answering brief, even though the brief included issues as part of respondent's cross-appeal).

As the Court indicated in Hernandez, page and word limits preserve judicial resources and protect the parties' individual interests. Respondents should not be forced to respond to a 108-page brief, containing 18,638 words. To adequately respond, Respondents would undoubtedly need to file their own oversized brief. This would effectively invite a paper war of geometrically increasing briefs. Respondents should not be drawn into this, and the Court should not have to review hundreds of pages of briefs to resolve the relatively straightforward issues in this appeal. MCI had ample time and opportunity to file an edited and revised brief that complied with the reasonable word count allowed under Nevada law. Respondents should not be punished and forced to answer a grossly oversized brief over the holidays for no reason other than MCI's utter lack of diligence.

B. MCI's failure to comply with the applicable rules and directives warrants dismissal of this appeal.

In 2013, this Court addressed a motion to exceed page limit and countermotion to dismiss the appeal under similar circumstances. See Rusk v. Nevada State Bd. of Architecture, Interior Design and Residential Design, 2013 WL 3969678 (Dkt. No. 61844) (July 30, 2013).[2] In Rusk, the Appellant's opening brief was originally due by May 6, 2013. Id. at *1. Although his motion to extend time was filed 11 days late, the Court granted Appellant's motion, allowing the brief to be filed on or before June 6, 2013. Id. The Court cautioned that no more extensions would be granted absent extreme and unforeseen circumstances. Id. Thereafter, Appellant moved for three additional short extensions on grounds that he was continuing to meet and confer with Respondent regarding a joint appendix. Id. Under the final request, Appellant's opening brief was to be due by June 21, 2013. Id.

On June 24, 2013, Appellant filed a proposed oversized opening brief. Id. At the same time, he filed a motion to exceed page limit under NRAP 32(a)(7)(D). Id. In his motion, Appellant "did not show diligence or good cause for exceeding the page limit except to say that the appeal raises 6 issues and the record is 1,230

[2] Respondents acknowledge that this case is unpublished and is not binding precedent. As this issue is rarely the subject of reported decisions, however, Respondents submit that Rusk is a relevant ruling for the Court's consideration.

pages…." Id. Appellant also failed to follow the rule's procedural requirements, as "he did not submit a copy of the brief with his motion." Id.

Respondent opposed the motion to exceed page limit and counter-moved to dismiss the appeal. Id. It argued that the appeal should be dismissed because it never joined in Appellant's appendix, which was the reason for the repeated extensions, and that "at no time during the time when appellant's counsel was asking respondent to agree to more time did he ever mention that he would be seeking to file a 69-page brief." Id. at 2. In opposition to the motion to dismiss, Appellant argued that his brief was timely because it was filed before midnight on Friday, June 21, 2013, but did not register as filed until Monday, June 24. Id. He also argued that his procedural errors were oversights and caused no prejudice to Respondent. Id.

This Court denied Appellant's motion to exceed page limit and granted Respondent's motion to dismiss. The Court concluded that the opening brief was not timely filed by the June 6 deadline or any of the deadlines requested in the subsequent motions for extension of time. Id. It also held that Appellant's failure to disclose his intent to file an oversized brief or comply with the Court's procedural rules further warranted dismissal:

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> … at no time before or after asking respondent to agree to more time did appellant ever mention that he would be seeking to file an oversized brief. Additionally, although appellant submitted his motion for excess pages to this court on June 21, he did not submit the brief with the motion as required under NRAP 32(7)(D). Id.

Based on these violations, the Rusk Court ordered the appeal dismissed.

Rusk is persuasive here. As in Rusk, despite stipulating with Respondents for its first extension and successfully moving for two additional extensions, MCI never once mentioned its intent to file an oversized brief that exceeded the 30-page limit by 78 pages or the 14,000-word limit by 4,689 words. Also like Rusk, MCI's motion to exceed word limit is substantively and procedurally defective. MCI does not show diligence or good cause for the additional words except to say that its appeal involves important issues and out-of-state authorities. Moreover, MCI does not attach to its motion a sworn statement or a copy of its proposed oversized brief. Although Rusk involved some timeliness issues that are slightly dissimilar to this case, it must be noted that MCI sought a significantly longer extension than the appellant in Rusk. Because these similar factors warranted dismissal of the appeal in Rusk, the same result should be granted in this case.

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C. At a minimum, MCI should be directed to refile an opening brief that contains no more than 14,000 words within 15 days.

Although dismissal is warranted, in the event that the Court elects not to dismiss this appeal, it should deny MCI's motion to exceed word limit and direct MCI to refile its brief in compliance with NRAP 32(a)(7)(A)(ii). Regardless of MCI's repeated rule violations and delays, there is no good cause to allow its grossly oversized opening brief to stand. Because this matter has dragged on for so long, Respondents respectfully submit that MCI should be required to refile its opening brief within 15 days.

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CONCLUSION

This Court has warned that rules exist for a reason and that they cannot be ignored when it is convenient for a litigant to do so:

> In the words of Justice Cardozo,
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> > Every system of laws has within it artificial devices which are deemed to promote… forms of public good. These devices take the shape of rules or standards to which the individual though he be careless or ignorant, must at his peril conform. If they were to be abandoned by the law whenever they had been disregarded by the litigants affected, there would be no sense in making them. Scott E. v. State, 113 Nev. 234, 239 (1997), quoting Benjamin N. Cardozo, *The Paradoxes of Legal Science* 68 (1928).

MCI's motion fails to demonstrate diligence or good cause, it violates this Court's rules and directives, and, accordingly, and for all of the forgoing reasons, the motion should be denied and the appeal should be dismissed.

Dated this 11th day of December, 2019.

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