IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 80376

GREGORY GARMONG,

Appellant

--against--

WESPAC; GREG CHRISTIAN,

Respondents

Appeal from the Second Judicial District Court of Washoe County, Nevada
Judge Lynne Simons, Case No. CV12-01271

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE

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.

Appellant Gregory Garmong is an individual. The undersigned has appeared as counsel for him at all times in the District Court and this Court.

There have been no other counsel for the appellant in the District Court or this Court.

/S/ Carl M. Hebert
CARL M. HEBERT, ESQ.

Attorney for appellant

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SUMMARY

A. Legal issues

Appellant Garmong's Opening Brief ("AOB") demonstrates that the arbitrator manifestly disregarded the law and facts both for Plaintiff's Motion for Partial Summary Judgment ("PMPSJ") and for the improper award of attorneys' fees. AOB also established, fully supported by facts of record and Nevada authority, that Wespac and Christian (collectively "Wespac Respondents") intentionally entered Nevada from California to defraud Appellant Garmong, and other elderly Nevadans, of retirement savings by concealing the prior and ongoing illegal actions of Respondent Christian and refusing to follow Nevada laws. Had the arbitrator followed the law the decision would necessarily have been in favor of Garmong.

Remarkably, the Answer does not address any of these violations, pretending they never happened. The one original argument raised for the first time by Wespac Respondents is summarized at Answering Brief 21: "[I]t is well established that an order denying summary judgment is not appealable after a hearing on the merits." This argument, which perhaps explains Wespac Respondents' refusal to address the issues raised by the AOB, is directly contrary to Nevada precedent. Wespac Respondents attempt to support this new argument solely with authority from other jurisdictions, but even these non-Nevada decisions do not support its position.

The Answering Brief declines to address the issues of the AOB. These include the arbitrator's disregard of the controlling facts of the case and the law of summary judgment, and of award of attorneys' fees. The strategy of the Answering Brief is to change the subject and to attack the person of the Appellant. This Reply points out many times that the Answering Brief "does not dispute" or "does not disagree with" the facts and law set forth in the AOB. That statement is true because the Answering Brief never addresses the points made in the AOB.

B. Policy focus of the Case

If an investment advisor company came to Nevada intending to defraud elderly clients, would that company disclose or conceal that it was intentionally refusing to obey Nevada's statutes designed to protect the public? Would that company disclose or conceal that its advisor employee had previously been disciplined and suspended by the Securities and Exchange Commission ("SEC") for defrauding clients? Would that company disclose or conceal its employee's other business ventures that prevented him from devoting the necessary time to the job of asset management that his elderly clients were paying for? Of course the company would conceal all of these facts, disregarding its fiduciary duty, because no one would deal with the company if there was a fair disclosure. The Wespac Respondents concealed all of this information.

If an elderly client brought an action against the company after it wasted his retirement savings, would it submit multiple false, perjured declarations to the Court? The Wespac Respondents did.

The arbitrator in this case disregarded all of these facts when presented as part of PMPSJ and decided the PMPSJ on a basis directly contrary to Nevada law. The District Court affirmed.

The basic policy question of this appeal is whether this Court will overturn an arbitration award which is clearly at odds with earlier decisions of the Court and the policies of the Nevada legislature to protect the elderly, especially when it is based on manifest error and a deliberate failure to follow the procedures upon which the parties agreed.

ARGUMENT

1.

ARBITRATOR'S DISREGARD OF THE PROCEDURAL, EVIDENTIARY AND SUBSTANTIVE LAW OF SUMMARY JUDGMENT IS APPEALABLE

A. The denial of PMPSJ is appealable after hearing under Nevada law.

Answering Brief at 21-26 argues that the pre-hearing denial of PMPSJ by the arbitrator is not appealable. Wespac Respondents, having no substantive rebuttal to

AOB's argument establishing that the arbitrator improperly denied PMPSJ (AOB 8-23), relies on the argument summarized at Answering Brief 21: "[I]t is well established that an order denying summary judgment is not appealable after a hearing on the merits." This statement is absolutely not true, and is contrary to long-established Nevada authority.

The Answering Brief cites no Nevada authority in support of its contention. It attempts to lead the Court down a path directly contrary to multiple holdings of this Court. Wespac Respondents put all of their eggs in one basket–its contention that the denial of PMPSJ is not appealable. By not contesting the substance of the errors, discussed at AOB 8-23 and herein, in the holdings of the arbitrator in his ruling on PMPSJ, Wespac Respondents concedes that Garmong prevails on the summary judgment issues. Bates v. Chronister, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (treating the respondents' failure to respond to appellant's argument in their answering brief as a confession of error).

This Court addressed the appealability of pretrial denial of a motion for summary judgment in Cromer v. Wilson, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010), holding:

> A district court's order denying summary judgment is an interlocutory decision and is not independently appealable. GES, Inc. v. Corbitt, 117 Nev. 265, 268, 21 P.3d 11, 13 (2001). However, where a party properly

> raises the issue on appeal from the final judgment, this court will review the decision de novo.

(Emphasis added).

Garmong did properly raise the errors in the decision on PMPSJ at AOB 8-23.

GES, Inc. v. Corbitt, 117 Nev. 265, 268, 21 P.3d 11, 13 (2001) holds:

> An order denying summary judgment is not independently appealable; however, we may review the propriety of the district court's summary judgment ruling because GES has properly raised the issue in its appeal from the final judgment. Our review is de novo and without deference to the district court's findings. Summary judgment is appropriate only when there are no material issues of fact and the moving party is entitled to judgment as a matter of law.

(Emphasis added). Similarly, Benchmark Ins. Co. v. Sparks, 127 Nev. 407, 411, 254 P.3d 617, (2011), stated, in the context of a denial of a motion for summary judgment:

> Benchmark challenges the district court's order denying its summary judgment motion, an order which is generally not appealable. Cromer v. Wilson, 126 Nev. ——, ——, 225 P.3d 788, 790 (2010) ("A district court's order denying summary judgment is an interlocutory decision and is not independently appealable."). However, because the order appealed from was a "final judgment" within the meaning of NRAP 3A(b)(1), Benchmark's appeal is properly before this court. This court will review the district court's order de novo.

(Emphasis added).

The present case differs from Cromer, GES and Benchmark only in that the pre-hearing summary judgment motion was decided by an arbitrator, whose decision

was affirmed by the District Court. An arbitrator does not have authority to make a final determination, which is the province of the District Court. NRS §38.239. As provided in NRS §38.241 and NRS §38.242, Garmong brought a motion to vacate the arbitrator's decision (JA 3/370) to the District Judge. In an Order re Motions (JA 6/1095), the District Judge confirmed the award (JA 6/1110:6-8): "Plaintiffs Motions to Vacate Arbitrators Award of Denial of Plaintiffs Motion for Partial Summary Judgment and for the Court to Decide and Grant Plaintiffs Motion for Partial Summary Judgment is DENIED."

B. Answer's argument is based upon cases from other jurisdictions, which are not precedent in Nevada and are readily distinguishable.

Answering Brief at 21-26 argues that denial of a pretrial motion for summary judgment is not appealable after trial. All of the cases cited are from jurisdictions other than Nevada, which has reached the opposite conclusion as discussed above.

The Answering Brief at 22 argues that the principle underlying all of the non-Nevada decisions is that "An order denying a motion for partial summary judgment, on the other hand, is merely a judge's determination that genuine issues of material fact exist," citing as its primary authority Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1573 (Fed. Cir. 1986). That principle clearly does not apply to the facts of the present case. Here, the arbitrator's decision never determined that there were

genuine issues of material fact for trial. AOB 15-21 points out that the arbitrator's Orders (JA 3/0366 and JA 3/0391) did not discuss either the facts or the evidentiary or substantive law and mentions but does not apply the procedural law. In ruling on PMPSJ the arbitrator's Order JA 3/0392:3 admitted that **"Many of the facts relied upon by Claimant [Garmong] are indeed 'undisputed,'"** (emphasis added), yet disregarded PMPSJ's Undisputed Material Facts and the legal approach mandated by Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). The denial of PMPSJ by the arbitrator was not "a judge's determination that genuine issues of material fact exist." The case proceeded past PMPSJ only because the arbitrator disregarded Nevada's law of summary judgment.

The other non-Nevada cases[1] cited at Answering Brief 22-26 lead to the same end. The difference between those cases and the present case is that in these other cases the judge properly followed the two-step procedure for deciding motions for summary judgment: First determining whether there are any undisputed material facts, and then applying the law to those undisputed material facts. The arbitrator in the present case disregarded this mandatory procedure.

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[1] This Reply will not address all of these other non-Nevada cases, as they are not precedent in Nevada and are contrary to Nevada precedent, decided under the law of their respective jurisdictions, and have distinguishable facts as discussed concerning Glaros, *supra.*

2.

THE ARBITRATOR DISREGARDED THE PROCEDURAL, EVIDENTIARY AND SUBSTANTIVE LAW OF SUMMARY JUDGMENT

In most instances, the judicial officer deciding a motion for summary judgment at least makes an attempt to follow the law of summary judgment by addressing the movant's facts and their evidentiary basis, any contrary arguments and evidentiary facts set out by the non-movants, and the substantive law of the claims at issue in light of any undisputed material facts that remain after the initial inquiry. The appeal of the arbitrator's Orders in this case is difficult to present, as the Orders do not mention Garmong's Undisputed Material Facts ("UMFs"), the law of evidence that excludes the opposing arguments of Wespac, the claims at issue, or the substantive law as applied to the claims and the UMFs. The Court may be inclined to wonder how that could occur. But in fact the arbitrator here utterly disregarded the legal requirements for evaluating a summary judgment motion.

The failures are discussed in the AOB, and summarized here with reference to the AOB. This is not a close call. A review of the arbitrator's orders (JA 3/0366 and JA 3/0391) reveals that they do not mention a single UMF, a single claim, or a single substantive authority, and do not follow the procedural authority of Wood v. Safeway, *supra.*

A. The arbitrator disregarded the proper procedure.

As discussed at AOB 9-15, Nevada's law of summary judgment (NRCP 56) involves a mandatory two-step process: First, evaluation of the movant's UMFs and, second, determination of whether the movant is entitled to judgment where there are UMFs sufficient to allow judgment on each respective claim. NRCP 56(c) mandates: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Emphasis added).

The arbitrator disregarded NRCP 56 and the precedent. The arbitrator paid lip service to, but did not apply, the procedure mandated by NRCP 56 and Wood v. Safeway, *supra.*

B. The arbitrator disregarded the evaluation of UMFs.

The arbitrator agreed with Garmong that many, indeed all, of the facts set forth as UMFs in PMPSJ were undisputed, stating: "Many of the facts relied upon by Claimant [Garmong] are indeed 'undisputed'" (arbitrator's Order JA 3/0392:3), yet did not identify which facts were "indeed undisputed" or mention any of Plaintiff's UMFs or the claims at issue. Had the arbitrator followed the proper procedure, the admittedly undisputed UMFs were sufficient to require a judgment in Garmong's

favor on PMPSJ.

C. The arbitrator's Orders disregarded the undisputed material facts at issue.

Answering Brief at 26 argues that the arbitrator identified disputed material facts in his order (JA 3/366-368), but that argument is unfounded. Never did the order identify a single UMF that the arbitrator determined to be either disputed or undisputed. The arbitrator never mentioned the UMFs at all. After admitting that "Many of the facts relied upon by Claimant [Garmong] are indeed 'undisputed,'" he never identified which UMFs were undisputed as the procedural law requires. The Answering Brief does not dispute this point.

D. Wespac's opposition to PMPSJ was ineffective because it presented no admissible evidence.

As discussed at AOB 13-15, Wespac did not submit any "evidence," as that term is defined at law, to oppose PMPSJ. The declaration of Respondent Christian was not made on personal knowledge, as the law requires. The documentary evidence was not authenticated. The Answering Brief does not dispute this point.

E. The arbitrator disregarded the substantive law of summary judgment.

AOB 15-21 points out that the arbitrator's Orders did not discuss either the

UMFs or the substantive law of each claim at issue in the summary judgment. The Answering Brief does not dispute this point.

F. Arbitrator's rationale for disregarding Nevada's law of summary judgment is legally incorrect.

The arbitrator sought to excuse his complete disregard for the law and facts by calling for a "merits hearing" as part of the summary judgment procedure to test credibility of the witnesses (JA 3/392, third paragraph). Garmong pointed out that assessing credibility as part of a summary judgment motion is directly contrary to law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) and Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713-14, 57 P.3d 82, 87 (2002). In any event, the arbitrator never held such a credibility hearing as part of the summary judgment proceeding. (AOB 22-23).

The Answering Brief does not dispute that refusing to decide PMPSJ on the applicable law, based upon the excuse of a "merits hearing" to evaluate credibility, is contrary to law.

3.

WESPAC'S DAMAGES CALCULATION IS BASED UPON A NET OUT OF POCKET THEORY REJECTED BY NEVADA

Although Wespac Respondents did not dispute the damages presented in

PMPSJ and the arbitrator did not address damages, the Answering Brief at 14-16 seeks to argue that there were no damages. This is based upon a peculiar "net out of pocket" theory often advanced by investment managers seeking to justify defrauding clients. This theory has been soundly rejected by the courts which have considered it, including the United States Supreme Court, and the federal Eighth, Ninth, and Eleventh Circuits. For example, as stated in Kane v. Shearson Lehman Hutton, Inc., 916 F. 2d 643, 646 (11th Cir. 1990), "'If the [netting] . . . . methodology espoused by [Shearson] were adopted, it could serve as a license for broker-dealers to defraud their customers with impunity up to the point where losses equaled prior gains.'" In Nesbit v. McNeil, 896 F.2d 380, 385-86 (9th Cir. 1990), the Ninth Circuit held:

> There is no reason to find that [plaintiffs] should be denied a recovery because their portfolio increased in value, either because of or in spite of the activities of the defendants

and that "gains in portfolio will not offset losses."

The Eighth Circuit was similarly unsympathetic to the net-out-of-pocket theory of damages. In a churning case, involving a commonly encountered form of securities fraud, Davis v. Merrill Lynch, Pierce, Fenner & Smith, 906 F. 2d 1206 (8th Cir. 1990) held:

> Merrill Lynch contends that Davis [the 87-year-old widow of the founder of the account] suffered no out-of-pocket losses because her account realized a net profit of over $53,000 during the time when the account was churned....
>
> We disagree with Merrill Lynch's argument that no actual damages were sustained because after deducting the unauthorized commissions, the account nevertheless realized a cumulative net profit of over $53,000 during

> the period it was churned. **The implications of this argument are disturbing. If we were to adopt Merrill Lynch's view, securities brokers would be free to churn their customers' accounts with impunity so long as the net value of the account did not fall below the amount originally invested. Churning is not excused by the fact that the account realizes a net profit.** In Nesbit, 896 F.2d at 386, the Ninth Circuit refused to offset the gains in portfolio against the losses in commissions . . . Because Mrs. Davis paid over $40,000 in commissions and would have earned over $50,000 more than she did had her account not been churned, it is nonsensical to argue that she did not suffer actual damages as a result of the churning."

(Bolding emphasis added). This was exactly the approach used by Wespac and addressed by Mr. Cramer, Wespac Respondents' expert to attempt to justify the defrauding of Garmong.

Nevada uses a different measure of damages. Shaw v. CitiMortgage, Inc., 201 F.Supp. 3d 1222, 1254 (D. Nev. 2016), applying Nevada law, stated: "Damages for a breach of contract claim are limited to those specifically outlined in the contract, if any, and those expectation damages sufficient to put the non-breaching party in the position it would have been in had the breach not occurred." In the present case, the loss or injury to Garmong first occurred after the letter of October 22, 2007 (Reply Appendix 0002-19), confirming his investment objectives as stated at the meeting in early October 2007 (RA 0048-0049) and instructing Defendants, "It is really important to me that you structure and manage my accounts so that they do not lose capital." (RA 0048, Tr. 119:20-120:3). Respondent Christian agreed to this objective. In response, over the next 16 months Defendants wasted $669,954.17 of

Garmong's retirement savings, without even a letter to him about the losses. What is most troubling is that Respondent Christian was fully aware of a strategy to avoid such losses, a "stop loss" strategy set forth in a letter from another defrauded client to Christian, Reply Appendix 0020-29: "[Y]ou detailed your company's [Wespac's] strategy of capital preservation through use of Stop Losses on all equity purchases. You emphasized the importance of this strategy in light of the stock market's volatility and the state of the economy." Respondents, who had a fiduciary duty to Garmong, did not apply this stop loss strategy to protect him and did not even disclose this strategy to their client, with the result that Wespac wasted $669,954.17 of his retirement savings capital.

4.

AOB READILY MEETS THE "CLEAR AND CONVINCING" EVIDENTIARY STANDARD USING DOCUMENTARY EVIDENCE

Standard of review. As quoted at AOB 5, "[t]he party seeking to attack the validity of an arbitration award has the burden of proving, by clear and convincing evidence, the statutory or common-law ground relied upon for challenging the award." Health Plan of Nevada v. Rainbow Med., 120 Nev. 689, 695, 100 P .3d 172, 176 (2004).

The Answering Brief at multiple locations asserts that the AOB did not meet

this "clear and convincing" standard. The term "clear and convincing" appears only in the Answering Brief's Table of Contents, Statement of Issues, quotation of the standard from Health Plan and Conclusion. It does not appear in the Argument in an attempt to demonstrate that the AOB does not meet this standard.

In Health Plan, the issue was whether the arbitrator exceeded his power, arising from a remand to the arbitrator for clarification. This issue involved judgment calls. In the present case, to the contrary, there is clear and convincing documentary evidence–the content of the arbitrator's two orders–that the arbitrator did not follow the law of Nevada in deciding PMPSJ. There is also clear and convincing evidence that the arbitrator decided PMPSJ on a basis that is directly contrary to Nevada law–his asserted need for a hearing on the merits.

As to attorneys fees, there is clear and convincing documentary evidence that the arbitrator made an order, pursuant to JAMS Rule 24 and the agreement of the parties, that NRCP 68 was not a rule governing the arbitration and never changed that order. There is further clear and convincing evidence that the parties contractually agreed that NRCP 68 was not a rule governing the arbitration, and the parties did not change that agreement. There is clear and convincing authority that no court or arbitrator may alter an agreement between the parties as to the governing rules of arbitration.

The Answer does not advance any facts or law that would call into question the clear and convincing evidentiary facts and the law establishing that the arbitrator disregarded the facts and law in deciding PMPSJ and the motion for attorneys fees.

5.

WESPAC RESPONDENTS DO NOT DISPUTE THE FUNDAMENTAL FACTS UNDERLYING PMPSJ, NOR DO THEY DISPUTE THAT THEY CAME TO NEVADA TO SCAM THE ELDERLY

During discovery prior to PMPSJ, several important facts were developed, establishing that Wespac Respondents had recently come to Nevada to operate a scam on the elderly. These facts were introduced as UMFs in support of PMPSJ, were not disputed by Respondents then, or now, yet were disregarded by the arbitrator. In fact, the words "fraud," "suspension" and "discipline" do not appear in the Answering Brief. Wespac Respondents prefer to pretend that these issues were never raised and are not relevant to the lawsuit.

Specific facts, disregarded by the arbitrator, follow:

- Wespac Respondents entered into Nevada with the objective of defrauding Nevada citizens, especially the elderly, directly contrary to the stated policy of the legislature and the courts of protecting the elderly from physical and financial abuse. (AOB 1; 23-24; 26; 46).

- Wespac Respondents had a fiduciary duty to Garmong. (AOB 14:7-14; 24:7-8; 26:11-16; especially 27:17-28:4; 44:8-12), which they ignored in defrauding him.

- Wespac Respondents intentionally breached their fiduciary duty by failing to disclose Christian's prior discipline and suspension by the SEC for defrauding clients (AOB 26-28), which regulates the financial industry.

- Christian made intentionally false statements to the SEC that he had no conflicting business interests and concealed this information from Garmong (AOB 32).

- Christian's made multiple (at least three) perjured statements to the Court in this case (AOB 32-33).

- Wespac intentionally breached its fiduciary duty by failing to disclose that it had failed to follow SEC rules requiring it to have a Code of Ethics (AOB 31).

- Wespac intentionally breached its fiduciary duty by concealing its refusal to obey Nevada law requiring it to carry insurance or a bond (NRS §628A.040) (AOB 29-30) to protect its victims, to be licensed as investment advisors (NRS §90.330) (AOB 28-29) and to register as a foreign LLC (NRS §86.544) (AOB 30-31)

- The significance of Wespac Respondents' deceptions and fraud. As discussed at AOB 33-34, the issue here is not whether Wespac Respondents violated Nevada and federal laws designed to protect the public, as those violations are a

matter for the government. The issue here is the significance of Wespac Respondents' concealment of those violations of law from Garmong, contrary to their fiduciary duty to him. As his Declaration stated, he never would have dealt with the Wespac Respondents if they had disclosed their violations of law and other acts such as Christian's prior disciplining and suspension by the SEC. See quotation at AOB 33-34 from Garmong's PMPSJ Declaration ¶ 35 (JA 3/244:28-245:14).

- Wespac Respondents did not dispute that the arbitrator manifestly disregarded the procedural, evidentiary and substantive law of summary judgment, and completely disregarded the law of false statements and concealed facts by a fiduciary.

- Wespac Respondents did not dispute that the arbitrator manifestly disregarded the fact that Plaintiff was an elderly person over the age of 60 years, and manifestly disregarded the provisions of NRS §598.0933 and §598.0977 that grant special protection to the elderly.

- Wespac Respondents did not dispute that the arbitrator manifestly disregarded the reprehensible preying of Respondents upon the elderly.

- Wespac Respondents did not dispute that arbitrator manifestly disregarded the governing statutory and case authority law.

6.

THE GROUNDS FOR VACATING THE ARBITRATOR'S DENIAL OF PMPSJ ARE FULLY ESTABLISHED AND NOT CONTROVERTED BY THE ANSWER

Standard of review. "The party seeking to attack the validity of an arbitration award has the burden of proving, by clear and convincing evidence, the statutory or common-law ground relied upon for challenging the award." Health Plan of Nevada v. Rainbow Med., 120 Nev. 689, 695, 100 P .3d 172, 176 (2004).

AOB 38-48 discusses the statutory and nonstatutory grounds for vacating the arbitrator's denial of PMPSJ. The Answering Brief does not dispute these grounds. The Respondents lack of a response to these issues is a concession that they are meritorious. Bates v. Chronister, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984).

The following lists the grounds for vacating and the location in the AOB where the discussion is found.

A. Statutory grounds for invalidating the arbitrator's denial of PMPSJ.

- Wespac Respondents did not dispute that the arbitrator disregarded law and facts in deciding PMPSJ. (AOB 38-45).

- Wespac Respondents did not dispute that they procured the award by fraud (AOB 38-41).

- Wespac Respondents did not dispute that there was no complete, unambiguous valid agreement containing an arbitration clause (AOB 41-45).

If there had been such an agreement, the Answering Brief could have quickly disposed of this issue by identifying its location in the record. Answering Brief at 31-33 argues that there was such an agreement, but never points to its location in the record. The reason is straightforward–there is not, and never was, such an agreement. The Answering Brief never identifies in the record a complete Agreement which, as discussed at AOB 10-11, by its own terms must include three different Exhibits A, three different Exhibits B, and a completed Confidential Client Profile including the missing critical pages 10-11.

B. Nonstatutory grounds for invalidating the arbitrator's award.

- Wespac Respondents did not dispute that arbitrator's Final Award was arbitrary, capricious or was unsupported by the agreement and disregarded the facts or the terms of the arbitration agreement.

- Wespac Respondents did not dispute that arbitrator disregarded law and facts (AOB 45-49).

- Wespac Respondents did not dispute that arbitrator manifestly disregarded the procedural, evidentiary and substantive law of summary judgment, and completely disregarded the law of false statements and concealed facts by a fiduciary.

(AOB 45-46).

- Wespac Respondents did not dispute that the arbitrator manifestly disregarded the fact that Garmong was an elderly person over the age of 60 years, and disregarded the provisions of NRS 598.0933 and 598.0977 that grant special protection to the elderly. (AOB 46).

- Wespac Respondents did not dispute that arbitrator manifestly disregarded the reprehensible preying of the Wespac Respondents upon the elderly. (AOB 47-48).

7.

THE AWARD OF ATTORNEYS' FEES WAS CONTRARY TO THE AGREED-UPON LAW GOVERNING THE ARBITRATION

Standard of review. "The party seeking to attack the validity of an arbitration award has the burden of proving, by clear and convincing evidence, the statutory or common-law ground relied upon for challenging the award." Health Plan of Nevada v. Rainbow Med., 120 Nev. 689, 695, 100 P .3d 172, 176 (2004).

AOB 49-57 addresses the errors in the arbitrator's award of attorney's fees, and Answering Brief 33-49 is a purported response. As established at AOB 50-51, under the authority of JAMS Rule 24, the parties agreed, and the arbitrator had ordered, that the rules governing the arbitration would not include NRCP 68, and

never changed this ruling. The parties entered a binding agreement that the rules governing the arbitration would not include Rule 68. The Answering Brief concedes these points by not addressing them, and instead raises matters not asserted in the AOB. That is, the Answering Brief does not meet the question of whether a Rule 68 offer of judgment could properly be made after the arbitrator's order and agreement of the parties set forth in the Scheduling Order, which was the matter raised in the appeal. Instead, the Answering Brief discusses questions that come into play only if an offer of judgment could properly be made.

The Answering Brief seeks to change the subject and to debate matters that were never raised in the AOB, an example being the discussion of "reasonableness" at Answering Brief 39-42.

The key points raised in the AOB and not mentioned or disputed in the Answering Brief are as follows:

A. JAMS Rule 24 provides that the arbitrator "shall" follow the rules "agreed upon by the Parties."

The arbitration was conducted under the rules of JAMS ("Judicial Arbitration and Medication Service"). JAMS Rule 24 provides that parties may decide the governing rules of arbitration, that the arbitrator is bound by that agreement between the parties, and that agreement would determine the rules governing grant of

attorneys fees. (AOB 50-51) JAMS Rule 24(c) provides: "In determining the merits of the dispute, the Arbitrator shall be guided by the rules of law agreed upon by the Parties." (Emphasis added). There is no provision for the arbitrator to subsequently and unilaterally change the rules of law agreed upon by the parties. The Scheduling Order set forth the rules of law agreed upon by the Parties, and ordered by the arbitrator, which were "Rules 6, 16.1(a)(1)(A-D), 30, 33, 34 and 37 of the Nevada Rules of Civil Procedure." (JA 1/0014:17-20). The arbitrator exceeded his authority by attempting to retroactively add NRCP 68 to the governing rules, without agreement or consent of the parties.

Answering Brief at 46-48 argues that "Judge Pro's interpretation of the Discovery and Scheduling Order is entitled to great weight." This argument is inapplicable, because "interpretation" suggests "discretion." Under JAMS Rule 24(c), the arbitrator had absolutely no discretion to change unilaterally the terms of the Order defining the rules that would govern the arbitration, which did not include Rule 68. Rule 24(c) provides, that the "arbitrator shall be guided by the rules of law agreed upon by the Parties." Because both parties did not agree to add Rule 68 to the list of rules governing the arbitration, the arbitrator would have exceeded his authority under Rule 24(c) if he had attempted unilaterally to make this change of adding Rule 68.

B. The parties agreed, and the arbitrator ordered, that NRCP 68 was not a governing rule.

Wespac did not dispute that the arbitrator's order did not include NRCP 68 in the rules governing the arbitration. See the prior subsection and AOB 51-54.

C. Under JAMS Rule 24, once the parties have agreed upon the rules governing the arbitration, the arbitrator may not change the rules governing the arbitration without an agreement of the parties to change the rules. The parties never agreed to change the rules governing the arbitration to include Rule 68. The arbitrator never attempted to change the Scheduling Order to include Rule 68. Rule 68 was never included in the rules governing the arbitration.

The Answer did not disagree that once the parties and the arbitrator decided on the rules governing the arbitration, the rules could not be changed without the agreement of the parties. The Answer did not disagree that the arbitrator never attempted to change this aspect of his Scheduling Order providing for the exclusion of NRCP 68. The Answer does not identify any arbitrator's order subsequent to the Scheduling Order where the arbitrator gave notice of an intended change, or sought to add NRCP 68. (AOB 55).

D. The Scheduling Order also set forth a contractual agreement of the parties that NRCP 68 would not be included in the rules governing the arbitration; Wespac waived any opportunity to seek fees under NRCP 68.

The arbitrator could conceivably, though he did not, change the terms of the Scheduling Order to include Rule 68, if he had the agreement of the parties to the change. But even more significant than the arbitrator's order, the Scheduling Order memorialized a contractual agreement between the parties providing that Rule 68 would not be a governing rule of the arbitration. (AOB 55).

Wespac did not dispute the existence of the contract between the parties that NRCP 68 was not included in the rules governing the arbitration. Retroactively adding Rule 68 to the rules governing the arbitration would have required the arbitrator to alter unilaterally the terms of the contractual agreement between the parties. No court or appointed official may unilaterally alter the terms of an agreement between two parties. As discussed at AOB 43, All Star Bonding v. State of Nevada, 119 Nev. 47, 49, 62 P.3d 1124 (2003), held: "We have previously stated that the court should not revise a contract under the guise of construing it. Further, neither a court of law nor a court of equity can interpolate in a contract what the contract does not contain." That is, a court may not unilaterally change the terms of a contract between two parties.

Answering Brief at 42-46 argues that Wespac Respondents did not "waive" their "right" to serve an Offer of Judgment. Of course they did when they voluntarily and intentionally agreed to a set of governing rules for the arbitration that did not include NRCP 68, as quoted above from the Scheduling Order. Wespac Respondents did not raise any objection that they had been coerced into this agreement. The Wespac Respondents just changed their minds and proceeded in violation of the rules of the arbitration.

E. Wespac Respondents dishonestly made an offer of judgment under Rule 68, a month after they contractually agreed, and the arbitrator ordered, that the governing rules of the arbitration did not include NRCP 68.

A month after the parties had contractually agreed that the governing rules of the arbitration did not include Rule 68, and the arbitrator had so ordered, the Wespac Respondents made an offer of judgment. Garmong did not respond, inasmuch as a month earlier the parties and the arbitrator agreed that Rule 68 would not be included in the set of rules governing the arbitration. The Wespac Respondents did not ask Garmong to alter the parties' earlier agreement, nor did they ask the arbitrator to change his order that NRCP 68 would not be included.

F. Wespac Respondents do not disagree that the granting of attorneys' fees under Rule 68 was a complete breach of trust by the arbitrator.

See AOB 56. Garmong accepted and relied upon the arbitrator's order, which Garmong mistakenly thought was made in good faith, that Rule 68 was not to be included in the governing rules of the arbitration. Consequently, Garmong did not pursue other legal strategies that he might have used, if he had known that NRCP was actually a governing rule.

8.

THE ANSWER'S *AD HOMINEM* ATTACKS ON GARMONG

With no basis in law or fact to support its positions, the Answering Brief takes Wespac Respondents' usual approach of mudslinging, because they have no arguably valid legal arguments.

Garmong is reluctant to descend to the level of the Respondents, but fears if he does not respond the Court might conclude that he has no response. Garmong's responses follow.

- **Without making any reference to the brief itself, Answering Brief at 8-9 accuses Garmong of personally attacking the "character" of the arbitrator "throughout his Opening Brief."**

Reply: Garmong has never attacked the arbitrator personally, but has attacked

his holdings that disregarded the law. There was no more of an "attack" than there is in any appeal of the decision of a judicial figure who disregards the law and facts. Wespac Respondents' claim of "attack" is simply an attempt to divert attention from the misdeeds of the Wespac Respondents which bear directly on this lawsuit.

- **Answering Brief at 9-10 accuses Garmong of being a "vexatious litigant."** Reply: "Vexatious litigant" is a status that requires a holding of a court, and Garmong has never been declared a "vexatious litigant." See Jordan v. State ex rel. Department of Motor Vehicles, 121 Nev. 44, 58-62, 110 P.3d 30, 41-44 (2005) *abrogated on other grounds in* Buzz Stew, LLC. v. City of North Las Vegas, 124 Nev. 224, 181 P.3d 670 (2008). This accusation is an attempt by Wespac to draw attention away from the issues of the case.

- **Answering Brief at 9-10 accuses Garmong of being wealthy and well educated, as though this justifies their scam on him.**

Reply: Garmong admits to being well educated, but he is less wealthy than he was prior to the wasting of his assets by Wespac. Garmong admits that he worked hard over the years and saved for his retirement, which made him a perfect victim for Wespac Respondents. The point of this argument is apparently that Wespac Respondents believe that they were justified in wasting Garmong's money, and

charging him for the privilege, because he had it and they wanted it.[2] Answering Brief at 10 points out that Garmong did not entrust his bond fund to Wespac. Garmong can only say, "Thank goodness, that they did not have access to that fund to waste it."

As to well educated, the education did not relate to investment management, which is why he hired the Wespac Defendants. Wespac has proved that even an educated person can be deceived by experienced confidence men willing to conceal information and lie in order to defraud him.

- **Answering Brief at 10-11 asserts that the present lawsuit is "frivolous."**

Reply: This assertion is supported only by a statement from Wespac's paid consultant. By way of assessing his credibility, the consultant intentionally used the improper and misleading "net out of pocket" calculation to attempt to support his arguments in favor of Wespac Respondents.

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[2] Because he had worked hard, saved his money for retirement, was elderly, was experiencing diminishing capacity, and needed financial counseling, Garmong was a perfect target for the fraud practiced by Wespac Respondents. One is reminded of the exchange attributed to the bank robber Willie Sutton, which may be paraphrased as: "Why do you defraud the elderly"? Answer: "That's where the money is and they are an easy target." In Wespac's view, there is no point to defrauding clients who do not have money to take.

- **Answering Brief at 27-28 makes multiple accusations of "misleading the court' against Garmong.**

Reply. The statements there are false, as Garmong made none of the statements attributed to him. It is ironic that Wespac would make such accusations, when it attempted to convince the Court that "[I]t is well established that an order denying summary judgment is not appealable after a hearing on the merits." (Answering Brief at 21), directly contrary to Nevada law.

The Answering Brief's reliance upon mudslinging is apparently for three purposes: First, an attempt to create ill will in the members of this Court; second, to draw attention away from the issues of the case; third, to draw attention away from the actual fraudulent actions of Wespac Respondents, including the concealment of Wespac's intentional violations of Nevada law (AOB 28-31); the concealment by Christian of his prior disciplining and suspension by the SEC for defrauding clients (AOB 26-27); Christian's false statements to the SEC (AOB 32); and Christian's false affidavits filed during this lawsuit (AOB 32-33). The evidence established that if Garmong had known about any of these multiple instances of fraud by Wespac Respondents, he would never have dealt with them (AOB 33-35).

The merits speak for themselves and clearly and convincingly favor Garmong.

SUMMARY AND CONCLUSION

Garmong appreciates that the Court seeks to dispose of litigation by arbitration where possible. But should there not at least be a valid, complete contract including an agreement to arbitrate? Should not the arbitrator at least obey the law of Nevada, and not disregard the law and facts? Should not the arbitrator follow the stated policies of Nevada of protection of the elderly? Should not the arbitrator obey his own arbitration rules? The agreement to arbitrate by a party is not an abandonment of the rules and law to the whim of the arbitrator.

Proper resolution of the legal issues is clear. In deciding PMPSJ, the arbitrator disregarded the relevant law and the established facts. His denial of PMPSJ must be reversed. Likewise, the arbitrator's granting of attorneys' fees under NRCP 68 to Wespac Respondents, contrary to the arbitrator's order and the parties express agreement that NRCP 68 would not be within the scope of rules governing the case, must be reversed.

But there is an equally important policy decision for this Court. The people of Nevada, through their legislature and governor, and prior Supreme Court decisions, have sought to protect Nevada's citizens, and especially the elderly, from predation by out-of-state companies like Wespac that come to Nevada to defraud its citizens. Here there is no question that Wespac Respondents deceived the elderly Garmong

from the outset by actively concealing material information, and later deceived the courts with falsified affidavits. This Court needs to send a unmistakable message to such predators that they are not to continue their dishonest practices here, and that Nevada's citizens are not fair game for them.

DATED this 7th day of August, 2020.

/S/ Carl M. Hebert
CARL M. HEBERT, ESQ.

Counsel for appellant Garmong

ATTORNEY'S 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 a proportionally spaced typeface using WordPerfect 12 in 14 point Times New Roman.

2. 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 petition exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,819 words.

3. 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 7th day of August, 2020.

/S/ Carl M. Hebert
CARL M. HEBERT, ESQ.

Counsel for Appellant

PROOF OF SERVICE OF APPELLANT'S REPLY BRIEF

I, Carl M. Hebert, certify that, on August 7, 2020, I served the Appellant's Reply Brief on Thomas C. Bradley, Esq., counsel for respondents Wespac and Greg Christian, through the Court's electronic filing system to his e-mail address, tom@tombradleylaw.com, consistent with Nevada Electronic Filing and Conversion Rule 9(c).

DATED this 7th day of August, 2020.

/S/ Carl M. Hebert
CARL M. HEBERT, ESQ.

Counsel for appellant Garmong