

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAIDE, L.L.C. d/b/a GENTLE
SPRING CARE HOME; SOKHENA
K. HUCH; MIKI N. TON,

Appellants,

v.

CORINNE R. DILEO, as Special
Administrator for the Estate of Thomas
DiLeo; THOMAS DILEO, JR., as
Statutory Heir to Thomas DiLeo; and
CINDY DILEO, as Statutory Heir to
Thomas DiLeo,

Respondents.

Case No. 81804

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Elizabeth A. Brown
Clerk of Supreme Court

Appeal from the Eighth Judicial District
Court, the Honorable Adriana Escobar
Presiding

**MOTION TO STRIKE APPELLANTS' REPLY BRIEF ARGUMENT
REGARDING THE FEDERAL ARBITRATION ACT**

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I. INTRODUCTION

Despite having three (3) briefs and two (2) hearings before the District Court, and an Opening Appellate Brief, Defendant Nursing Home raises a new issue for the first time in its Reply Brief: the applicability of the Federal Arbitration Act. The Nevada Supreme Court has made abundantly clear that issues not raised before the District Court are waived on appeal and, similarly, issues not raised in an Opening Brief are waived. *Wolff v. Wolff*, 112 Nev. 1355, 1363–1364, 929 P.2d 916, 921 (1996); *Powell v. Liberty Mutual Fire Insurance Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011). Pursuant to this clear-cut authority, Plaintiffs respectfully request the Court strike Defendant Nursing Home’s Federal Arbitration Act arguments from its Reply Brief.

II. LEGAL ARGUMENT

A. Defendant Nursing Home’s Reply Brief argument regarding the Federal Arbitration Act should be struck because it was not raised before the District Court and is, therefore, waived.

Issues not raised before the District Court are waived on appeal. *Wolff*, 112 Nev. at 1363–1364, 929 P.2d at 921 (citing *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981)).

Here, Defendant Nursing Home’s Reply Brief argument regarding the Federal Arbitration Act should be struck because it was not raised before the District Court and is, therefore, waived. The instant issue on appeal arises from a District Court

Order from Defendant Nursing Home's Motion to Compel Arbitration and Plaintiffs' Motion for Rehearing on Defendant Nursing Home's Motion to Compel Arbitration. As such, Defendant Nursing Home had two (2) hearings on the instant issue and three (3) briefs (i.e. a Motion to Compel Arbitration, a Reply in Support of Motion to Compel Arbitration, and an Opposition to Plaintiffs' Motion for Rehearing on Nursing Home's Motion to Compel Arbitration). Despite ample briefing and oral argument opportunity before the District Court, Defendant Nursing Home never raised the Federal Arbitration Act. As such, these arguments are waived and should be struck from Nursing Home's Reply Brief.

B. Defendant Nursing Homes' Reply Brief argument regarding the Federal Arbitration Act should be struck because it was not raised in its Opening Brief and is, therefore, waived.

"Issues not raised in an appellant's opening brief are deemed waived." *Powell v. Liberty Mutual Fire Insurance Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (citing *Bongiovi v. Sullivan*, 122 Nev. 556, 570 n.5, 138 P.3d 433, 444 n.5 (2006); NRAP 28(a)(8)). Moreover, the Nevada Supreme Court has explicitly found that failure to raise NRS 597.995's validity or application under the Federal Arbitration Act deems the issue waived. *MMAWC v. Zion Wood Obi Wan Trust*, 135 Nev. 275, 278 n.3, 448 P.3d 568, 571 n.3 (2019) (citing *Fat Hat, LLC v. DiTerlizzi*, 385 P.3d 50 (Nev. 2016)).

Here, Defendant Nursing Home’s Reply Brief argument regarding the Federal Arbitration Act should be struck because it was not raised in Defendant Nursing Home’s Opening Brief. Similarly, the applicability of the Federal Arbitration Act was not listed among the Issues on Appeal in Defendant Nursing Home’s Docketing Statement. Thus, these arguments are waived and should be struck from Defendant Nursing Home’s Reply Brief.

C. Defendant Nursing Homes’ Reply Brief argument regarding the Federal Arbitration Act should be struck because it lacks any evidentiary foundation.

Only if it is in the interest of justice will the Court entertain a new issue raised in a Reply Brief that was not previously raised in an Opening Brief. *Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3.

Here, entertaining Defendant Nursing Home’s new Reply Brief argument regarding the Federal Arbitration Act is not in the interest of justice because it lacks any evidentiary foundation. Specifically, under *Zion Wood Obi Wan Trust*, the Federal Arbitration Act only preempts NRS 597.995 if the underlying agreement implicates interstate commerce. 135 Nev. at 278 n.4, 448 P.3d at 571 n.4 (citing *U.S. Home Corp. v. Michael Ballesteros Trust*, 134 Nev. 180, 186–87, 415 P.3d 32, 38–39 (2018)). In the instant case, the subject agreement—the one-page Grievance and Arbitration Agreement—only concerns resident grievances and disputes that arise from care at Defendant Nursing Home’s single-family residential home located in

Clark County, Nevada. App. Vol. I at 00093. There is absolutely no evidence in the record that suggests the underlying agreement implicates interstate commerce and, therefore, entertaining Defendant Nursing Home's new arguments would be contrary to the interest of justice.

III. CONCLUSION

Based on the foregoing, Plaintiffs respectfully requests the Court strike Defendant Nursing Home's Federal Arbitration Act arguments from its Reply Brief.

Dated this 27th day of July, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **MOTION TO STRIKE APPELLANTS’
REPLY BRIEF ARGUMENT REGARDING THE FEDERAL
ARBITRATION ACT** was filed electronically with the Nevada Supreme Court on
the 27th day of July, 2021. Electronic Service of the foregoing document shall be
made in accordance with the Master Service List as follows:

John Orr
S. Vogel

I further certify that I served a copy of this document by mailing a true and
correct copy thereof, postage prepaid, addressed to:

n/a

/s/Noel Raleigh
An employee of Cogburn Law