

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

Electronically Filed
Aug 10 2021 07:20 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

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

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I. INTRODUCTION

Defendant Nursing Home continues to raise new arguments regarding the Federal Arbitration Act, even though it failed to present that issue before the District Court and in its Opening Brief. As detailed below, Defendant Nursing Home's failure to raise the Federal Arbitration Act before the District Court, alone, is sufficient grounds for striking this argument. Moreover, the lack of an evidentiary record makes it impossible to determine whether interstate commerce, and hence the Federal Arbitration, is implicated. As such, 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 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). Contrary to Defendant Nursing Home's contention,¹ there is no clear exception to this rule.

¹ See Appellants' Response to Appellees' Motion to Strike Appellant's Reply Brief Argument Regarding the Federal Arbitration, at p.3.

Here, Defendant Nursing Home’s Rely Brief argument regarding the Federal Arbitration Act should be struck because it was not raised before the District Court and is, therefore, waived. Despite ample opportunity before the District Court—including three (3) briefs and two (2) hearings—Defendant Nursing Home never raised any argument regarding the Federal Arbitration Act. As such, these arguments are waived and should be struck from Defendant Nursing Home’s Reply Brief.

B. Defendant Nursing Home’s Reply Brief argument regarding the Federal Arbitration Act should be struck because it was not raised in its Opening Brief and lacks any evidentiary foundation.

Issues not raised in an appellant’s opening brief are deemed waived, unless consideration of said issues is in the interest of justice. *Bongiovi v. Sullivan*, 122 Nev. 556, 570 n.5, 138 P.3d 433, 444 n.5 (2006); *Powell v. Liberty Mutual Fire Insurance Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011).

Here, Defendant Nursing Home’s Rely Brief argument regarding the Federal Arbitration Act should be struck because it lacks any evidentiary foundation and, therefore, any consideration of the issue would be *against* the interest of justice. In its Opposition, Defendant Nursing Home demands that this Court look at the one-page Grievance and Arbitration Agreement and make a factual determination as to whether it implicates interstate commerce.² Importantly, because Defendant Nursing

² *Id.* at pp. 4–5.

Home appealed this matter just weeks into discovery, there is no evidence in the record regarding Defendant Nursing Home's operations or the implication of interstate commerce. Written discovery was never issued, depositions were never taken, nor were subpoenas ever served. The record is simply comprised of Plaintiffs' Complaint, the motion practice that gave rise to the instant appeal, and the transcripts of the underlying proceedings. Put simply—there is no evidentiary basis for determining the implication of interstate commerce. As such, considering Defendant Nursing Home's Federal Arbitration Act argument, which was not included in its Opening Brief, is *against* the interest of justice.

III. CONCLUSION

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

Dated this 10th day of August, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **REPLY IN SUPPORT OF MOTION TO STRIKE APPELLANTS' REPLY BRIEF ARGUMENT REGARDING THE FEDERAL ARBITRATION ACT**

was filed electronically with the Nevada Supreme Court on the 10th day of August, 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