IN THE SUPREME COURT OF THE STATE OF NEVADA

JUAN MILLAN ARCE, AN INDIVIDUAL,

Appellant,

vs.

PATRICIA SANCHEZ, AN INDIVIDUAL,

Respondent.

Supreme Court Case No. 81862

District Court Case No.A-19-796822-C

APPELLANT'S OPENING BRIEF

Thomas A. Larmore, Esq.
DESERT RIDGE LEGAL GROUP
3037 East Warm Springs Road, Suite 300
Las Vegas, Nevada 89120
Telephone: (702) 765-0976
Facsimile: (702) 765-0981
Email: tlarmore@keyinsco.com
Attorneys for Appellant, Juan Millan Arce

NRAP 26.1 DISCLOSURE

No corporation that is the subject of NRAP 26.1 exists. Appellant is a natural person. However, the appeal is from a District Court Order directing Key Insurance Company, Inc., Appellant's automobile liability insurer, to make monetary payment to Respondent.

Desert Ridge Legal Group, formerly Storm Legal Group, appeared for Appellant Juan Millan Arce in proceedings in the District Court and has appeared for Appellant before this Court.

DATED this 20th day of August 2021.

DESERT RIDGE LEGAL GROUP

By:

/s/ Thomas A. Larmore
THOMAS A. LARMORE, ESQ.
Nevada Bar No. 7415
3037 East Warm Springs Road, Suite 300
Las Vegas, Nevada 89120
(702) 480-0813

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

I.
JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRCP 3A(b)(1) because the district court's September 15, 2020 order is a final order resolving all claims between all parties. The DATE order was served on September 17, 2020 by U.S. Mail. The notice of appeal was timely filed on September 28, 2020 pursuant to NRCP 4(a).

II.
ROUTING STATEMENT

This case raises as a principal issue a question of first impression involving the United States or Nevada Constitutions or common law and that the matters herein raised are of statewide public importance and is therefore presumptively retained by the Supreme Court pursuant to NRAP 17(a)(11).

III.
ISSUES PRESENTED FOR REVIEW

1. Is the settlement agreement void or voidable at the option of Appellant for Respondent's counsel's violation of NRPC 4.2?
2. Is Respondent estopped from enforcing the settlement agreement?
3. Did the district court properly set aside the judgment in favor of Appellant
4. Should the judgment in favor of Appellant be reinstated?

IV.
STATEMENT OF THE CASE

This is a personal injury action between Plaintiff/Respondent and Defendant/Appellant. Defendant/Appellant was insured under an automobile liability policy and his insurer provided a defense. The parties submitted the matter to the court-annexed arbitration program in Clark County, Nevada, and an award was rendered in favor of Defendant/Appellant and against Plaintiff/Respondent. Subsequently, counsel for Plaintiff/Respondent contacted the

claims representative for Defendant's/Appellant's automobile liability insurer without the knowledge or consent of counsel for Defendant/Appellant and settled the matter. Defendant/Appellant denied that the parties entered into an enforceable settlement agreement and obtained entry of judgment in his favor and against Plaintiff/Respondent pursuant to NAR 19(A). Plaintiff/Respondent subsequently filed a MOTION FOR RELIEF FROM JUDGMENT AND TO ENFORCE SETTLEMENT. The district court granted said Motion. Defendant/Appellant timely appeals from the district court's Order granting Plaintiff's/Respondent's MOTION FOR RELIEF FROM JUDGMENT AND TO ENFORCE SETTLEMENT.

V.
STATEMENT OF THE FACTS

Attached as Exhibit A is the Affidavit of former defense counsel, Erich Storm. Mr. Storm represented Appellant/Defendant Juan Millan Arce ("Appellant/Defendant") in this bodily injury case. Appellant/Defendant was insured by Key Insurance Company ("Key") which had issued him an automobile liability policy that was in force at the time of the accident in question. Erika Cervantes was the Key claims representative assigned to this case. Attached as Exhibit B is the Affidavit of Ms. Cervantes.

In February of 2020, the case was arbitrated and an Award was entered. The Arbitrator's written findings state that he found Plaintiff/Respondent to be unbelievable and so he awarded her nothing. Before Mr. Storm notified Ms. Cervantes that the defense had won at arbitration, Plaintiff's counsel, Nathan Deaver, went behind the Mr. Storm's back, telephoned Ms. Cervantes, and verbally settled the case for $10,000.00. Mr. Deaver did not tell Ms. Cervantes that the case had been arbitrated, much less that Mr. Deaver's client, Plaintiff/Appellant, lost because the arbitrator found that she had no credibility.

Mr. Deaver made absolutely no attempt to notify Mr. Storm beforehand that

he intended to communicate with Ms. Cervantes, and Mr. Deaver did not have Mr. Storm's consent to speak with Ms. Cervantes. That was an ethical violation. Nevada Rule of Professional Conduct ("NRPC") 4.2 unambiguously states that an attorney shall not communicate with a represented person without first obtaining the consent of the represented person's lawyer.[1]

In a Motion, Plaintiff/Appellant requested the district court to reward her attorney's violation of NRPC 4.2 by entering an order enforcing the settlement and setting aside the judgment. The district court granted the Motion. This Court must reverse the district court's granting of the Motion because the settlement is void as against public policy.

Mr. Deaver's partner, Brice Crafton, represented Plaintiff during the litigation phase of the case. The action was referred to the Court-Annexed Arbitration Program. Mr. Crafton and Mr. Storm appeared at the arbitration hearing.

The Arbitrator filed and served an Award on February 11, 2020. *See*, Exhibit D. The Award's final sentence sums up the merits of Plaintiff/Respondent's case: "The Arbitrator finds that the [Plaintiff/Respondent] lacked credibility from her own testimony in pursuing these claims." The Arbitrator accordingly found for Defendant/Appellant and awarded Plaintiff/Respondent nothing.

Rather than attempt resolution of the matter with Mr. Storm, and without advising Mr. Storm of his intentions, Mr. Deaver instead initiated a call to Ms. Cervantes on February 20, 2020. *See*, Exhibit B. The call was recorded. A copy of the audio is attached as Exhibit E.[2]

When Mr. Deaver made the call, Ms. Cervantes was unaware that the matter had been arbitrated and that an award had been entered against Plaintiff/Respondent and in favor of Defendant/Appellant. Mr. Deaver, for his part, did not mention the

[1] Ms Cervantes, as Key's employee authorized to bind Key to settlement agreements, was also Mr. Storm's client for purposes of NRPC 4.2. See, Comment [7] to ABA Model Rule 4.2 (lending guidance to the interpretation of NRPC 4.2 pursuant to N.R.P.C. 1.0A).

[2] The audio is contained on a "thumb drive" that the defense mailed to both the district court and to Plaintiff/Respondent's counsel as an attachment to a file-stamped copy of this Opposition to the Motion.

word "arbitration," or that there had been a hearing of any kind, or that an award had been entered, or that the Arbitrator found against his client, or that he would file a request for trial de novo if he and Ms. Cervantes could not reach a settlement.

In fact, the only statement made that touched upon the status of the case was Mr. Deaver's idle remark that he was planning to file a "request for short trial," but first wanted to attempt settlement. Of course, there is no such thing as a "request for short trial," as Mr. Deaver well knows. One can only speculate about why he chose to invent that expression rather than simply use the correct and well-understood term of art, "request for trial de novo." [3]

If Mr. Deaver had been candid with Ms. Cervantes by revealing that his client lost at arbitration, Ms. Cervantes would not have settled[4] but would have spoken with the undersigned. In that case, Mr. Storm would have advised Ms. Cervantes that the case had virtually no value, and certainly nothing approaching $10,000.00.

After the improper communication that Mr. Deaver initiated with Ms. Cervantes, Mr. Crafton emailed Mr. Storm on February 20, 2020. In that communication, Mr. deaver explained that he had settled for $10,000.00 and cordially thanked the defense for avoiding the need for Plaintiff to file a "request for de novo short trial." *See*, Exhibit F.

On February 21, 2020 – a full 20 days before the time to file a request for trial de novo expired – Mr. Storm *specifically* told Plaintiff/Respondent's counsel in two emails that the defense did not consider the case settled. *See*, Exhibit G. The first e-mail stated, "***I suggest that you calendar the de novo date while we decide on this***

---

[3] Mr. Crafton's Affidavit advised the district court several times that Mr. Deaver told Ms. Cervantes that Plaintiff/Respondent was intending to file a "request for trial de novo." This is inaccurate. Those words were never used in the conversation between Ms. Cervantes and Mr. Deaver. *See*, Exhibit B.

[4] The settlement discussions between Mr. Deaver and Ms. Cervantes were not quite as simple as Mr. Deaver's Affidavit suggests. There was back and forth, then Mr. Deaver told Ms. Cervantes that if Key would offer to settle for $10,000.00, he would recommend to his client that she accept. It was he, not Ms. Cervantes, who first brought up that settlement number. *See*, Exhibit B.

end what the best course of action is." The second e-mail to Plaintiff's counsel that day said,

> It is disconcerting to me that your office would go behind my back and settle with the adjuster who advises your office did not inform her of the arbitration or its outcome. ***Under Nevada law, I have two clients in this case, and one of them is Key Insurance. I would expect at a minimum that you would notify me of your intentions to speak with an adjuster on one of my files***. [5]

VI.
SUMMARY OF ARGUMENT

Mr. Deaver violated NRPC 4.2 in contacting Ms. Cervantes behind Mr. Storm's back and settling after Appellant had a judgment in his favor. Furthermore, the district court lacked authority to enforce the settlement after Plaintiff/Respondent failed to timely request a trial de novo. Accordingly, the settlement in void. The district court's granting of the Motion should be reversed.

VII.

ARGUMENT

The specifically stated public policy behind NRPC 4.2 is to, among other things, promote the integrity of the judiciary by protecting non-lawyers from overreaching attorneys, and to protect the attorney-client relationship. *See*, Comment [1] to ABA Model Rule 4.2. Mr. Deaver's conduct plainly undermined this public policy. In fact, attorneys have been suspended for doing *exactly* what Mr. Deaver did. *See*, *In re Illuzzi*, 160 Vt. 474, 632 A.2d 346 (Vt. 1993).

1. The District Court Lacked Authority To Enforce The Settlement

In its Motion, attached hereto as Exhibit C, Plaintiff cited no legal authority

[5] Astoundingly, after the undersigned sent this email to Plaintiff's counsel, Mr. Deaver contacted Ms. Cervantes two more times by email, both on March 3, 2020, regarding the alleged settlement, without the undersigned's knowledge or consent. *See*, Affidavit of Nathan Deaver, paragraph 6; Exhibit 1 to the Motion.

by which the district court may enforce the settlement. First, EDCR 7.50 is inapplicable as Plaintiff/Respondent has not met either of its conditions (i.e., that the settlement be entered in the minutes as an order, or that there be a *written* settlement agreement signed by Key).

Second, NAR 18(B) states that an untimely request for trial de novo is jurisdictional. Plaintiff did not file a request for trial de novo. Defendant submitted that, since NAR 18(B) states that the case is now resolved, the Court cannot adjudicate the Motion.

Third, if no party has filed a request for trial de novo, NAR 19(A) *requires* that the prevailing party see to it that judgment is entered within 30 days of the Court's filing and serving notice that judgment may be entered. Mr. Storm complied with that rule. The distict court's had no jurisdiction to adjudicate the Motion.

From the outset, then, Plaintiff/Respondent's counsel knew that Key considered the settlement discussions unethical; they knew that Key was determining its rights concerning the settlement; and they knew that they should be prepared to file a request for trial de novo to preserve their client's rights. Despite knowing these things, Plaintiff/Respondent did not file a request for trial de novo. That failure set in motion court rules mandating that the defense file a judgment.

NAR 19(A) reads:

> Rule 19. Judgment on award.
>
> (A) Upon notification to the prevailing party by the commissioner that no party has filed a written request for trial de novo within 30 days after service of the award on the parties, *the prevailing party **shall** submit to the commissioner a form of final judgment in accordance with the arbitration award, including any grant of fees, costs and/or interest, which judgment **shall** then be submitted for signature to the district judge to whom the case was assigned; the judgment **must** then be filed with the clerk*. [Emphasis added]

On March 25, 2020, Mr. Storm complied with the dictates of NAR 19 and filed the required judgment. It is disingenuous for Plaintiff/Respondent to now argue that the undersigned "misrepresented" to the district court that the parties had not settled.

2. The Settlement is Void

The settlement is the offspring of Plaintiff/Respondent's counsel's violation of N.R.P.C. 4.2. That rule, which is from ABA Model Rule of Professional Conduct 4.2, states:

> **Rule 4.2. Communication With Person Represented by Counsel.**
>
> In representing a client, a lawyer *shall not* communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, ***unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order***. [Emphasis added].

Comment [1] to the Model Rules states:

> [1] This Rule contributes to the ***proper functioning of the legal system*** by protecting a person who has chosen to be represented by a lawyer in a matter against ***possible overreaching by other lawyers*** who are participating in the matter, ***interference by those lawyers with the client-lawyer relationship*** and the uncounseled disclosure of information relating to the representation. [Emphasis added].

Mr. Deaver violated these policy considerations. His decision to settle without disclosing to Ms. Cervantes that his client had lost at arbitration and that he was facing the prospect of filing a request for trial de novo was overreaching. Second, Mr. Deaver's conduct was an obvious interference in the attorney-client relationship between Mr. Storm and Key.

Comment [2] to Model Rule 4.2 makes clear that the rule is not somehow inapplicable to represented insurance companies, but it applies to everybody who is represented:

> [2] This Rule applies to communications with ***any person who is represented by counsel*** concerning the matter to which the communication relates. [Emphasis added].

Comment [3] states that it is irrelevant that Ms. Cervantes consented to the communication:

> [3] ***The Rule applies even though the represented person initiates or consents to the communication***. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule. [Emphasis added].

Also respecting Comment [3], Mr. Deaver's incorrect statement in his affidavit that Ms. Cervantes offered to settle the case for $10,000.00 is nothing more than a repudiation of Comment [3]. Sophistry aside, however, whether Mr. Deaver or Ms. Cervantes made the offer is immaterial. Mr. Deaver was absolutely barred from discussing the case with Ms. Cervantes without the undersigned's prior consent.

Last, NRPC 4.2, pursuant to Comment [7], includes as a represented person Ms. Cervantes since she has the authority to bind Key to settlements:

> [7] In the case of a ***represented organization***, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter ***or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability***.
>
> Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is

> represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4. [Emphasis added].

The Motion's contention that counsel's misconduct is justified because "everybody does it" and that it is par for the course in the Las Vegas legal community is both wrong and beside the point. *See*, *Cronin v. Eighth Judicial Dist. Court ex rel. County of Clark*, 105 Nev. 635, 781 P.2d 1150 (1989). There, the Nevada Supreme Court held that neither a lawyer's negligence nor ignorance of the rule that a lawyer cannot communicate with a represented person without first obtaining the consent of the person's lawyer can excuse the ethical breach.

See also, *In re Illuzzi*, *supra*. There, as here, a personal injury attorney improperly contacted the defendant's insurance company's claims representative without obtaining the prior consent of defendant's counsel who had been hired by the insurance company to defend its insured.[6] The attorney was suspended by the relevant disciplinary body and he appealed to the Vermont Supreme Court. He made the same argument that counsel makes here: "Everybody does it." In rejecting that excuse, the Vermont Supreme Court held:

> Respondent contends that the Board should have considered as a mitigating factor that direct contact between attorneys and adjusters, even if unethical, is the standard custom and practice in the insurance business in Vermont. Respondent points out that in its first report, the hearing panel stated that "there is a clear practice in the Plaintiff's and defense bar in Vermont of allowing such contact," and that in its second report, the panel again acknowledged that the practice occurs in Vermont, stating that there was "considerable evidence" of its existence. We find little merit to this argument. As we stated in the previous appeal:

[6] In Vermont, as in Nevada, there was in force a rule of ethics prohibiting an attorney from contacting a represented party without the prior consent of the represented party's lawyer.

> "***Given the absence of ambiguity in the rule, we find irrelevant respondent's contention that it is the common and accepted practice for Vermont attorneys to have direct contact with insurance companies whose defense counsel have not consented to such contact.*** Moreover, we note that the testimony on the practice of insurance attorneys in Vermont is in conflict. [Citation omitted].)

632 A.2d at 353.

The settlement is void and unenforceable. In Nevada, all contracts where the purpose is to create situations that tend to operate to the detriment of public interest are against public policy and are void. *See, Western Cab Co. v. Kellar*, 90 Nev. 240, 523 P.2d 842, appeal dismissed, cert. denied. 420 U.S. 914 (1974).

Whether fraud is committed to secure a contract is not a relevant inquiry when a court determines if an agreement is void as against public policy. *See*, *King v. Randall*, 44 Nev. 118, 190 P. 979, 980-981 (1920). There, the Nevada Supreme Court held a contract void as against public policy. The court cited with approval the following passage from *Elkhart Lodge v. Crary*, 98 Ind. 238, 49 Am. Rep. 746:

> ***It is not necessary that actual fraud should be shown; for a contract which tends to the injury of the public service is void***, although the parties entered into it honestly and proceeded under it in good faith. ***The courts do not inquire into the motives of the parties in the particular case to ascertain whether they were corrupt or not, but stop when it is ascertained that the contract is one which is opposed to public policy.*** Nor is it necessary to show that any evil was in fact done by or through the contract. ***The purpose of the rule is to prevent persons from assuming a position where selfish motives may impel them to sacrifice the public good to private benefit***. [Emphasis added].

In *King, supra*, the plaintiff, as does Plaintiff/Respondent in this case, argued that a "deal is a deal," and that he should not be deprived of the benefits of his

bargain. The Nevada Supreme Court disagreed:

> The courts cannot draw the line and say that up to a certain point a contract which is made to influence the creation of a situation repugnant to the interest of the public is not against public policy, and hence is valid, but beyond that point it is void; and ***therefore it must be asserted that all contracts the purpose of which is to create a situation which tends to operate to the detriment of the public interest are against public policy and void,*** whether in a particular case the purpose of the contract is effectuated.

Id. at 981-982 (emphasis added).

In sum, N.R.P.C. 4.2 is not a joke. Mr. Deaver's failure to comply with this rule of ethics constitutes a blatant violation of a clearly announced public policy directed specifically at the type of conduct in which he engaged. Defendant/Appellant submits that the Court must hold the settlement agreement void as against policy.

3. The District Court Lacked Jurisdiction to Enforce the Settlement

EDCR 7.01 states that "PART VII. GENERAL PROVISIONS," applies to actions commenced in the Eighth Judicial District Courts, actions such as the present matter. EDCR 7.50 requires that, for the alleged settlement to be enforceable, it must be entered into the court minutes as an order and with the consent of all parties**;** *or*, it must be in writing and signed by the party against whom enforcement is sought. Neither condition of EDCR 7.50 is met. Therefore, EDCR 7.50 is inapplicable.

Second, the ADRs deprive the district court of jurisdiction to rule on the Motion. First is NAR 18 (B), which deals with the filing of trial de novo requests. It states, "The 30-day filing requirement is jurisdictional; an untimely request for trial de novo shall not be considered by the district court." This provision terminates any proceedings other than the court's entry of judgment. Entry of judgment is governed by NAR 19. Defendant submits that Plaintiff's decision to forego filing a request for trial de novo terminates her ability to see her Motion

adjudicated.

NAR 19(A) and (B) require that, where no trial de novo is requested, judgment ***must*** be entered on an arbitration award within 30 days of entry of notice from the courts to do so. A judgment so entered is not appealable except in narrow circumstances that do not apply here:

> Rule 19. Judgment on award.
>
> (A) Upon notification to the prevailing party by the commissioner that no party has filed a written request for trial de novo within 30 days after service of the award on the parties, the prevailing party ***shall*** submit to the commissioner a form of final judgment in accordance with the arbitration award, including any grant of fees, costs and/or interest, which judgment ***shall*** then be submitted for signature to the district judge to whom the case was assigned; the judgment ***must*** then be filed with the clerk.
>
> (B) A judgment entered pursuant to this rule shall have the same force and effect as a final judgment of the court in a civil action, but may not be appealed. Except that an appeal may be taken from the judgment if the district court entered a written interlocutory order disposing of a portion of the action. Review on appeal, however, is limited to the interlocutory order and no issues determined by the arbitration will be considered. [Emphasis added]

Defendant/Appellant submits that the district court did not have the authority to adjudicate the Motion.

///

///

///

///

///

///

///

///

VIII.

CONCLUSION

For the aforesaid reasons, Defendant/Appellant respectfully requests that the district court's grant of the Motion be reversed.

ATTORNEY 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 Microsoft Word in 14-point Times New Roman type style.

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 brief exempted by NRAP 32(a)(7)(C), it is either: Proportionately spaced, has a typeface of 14 points or more and contains 4220 words; or

///

///

///

///

///

///

///

///

///

///

///

3. Finally, I hereby certify that I have read this appellate 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 appropriate references to 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: August 23rd 2021.

/s/ Thomas A. Larmore

THOMAS A. LARMORE, ESQ.
Nevada Bar No. 7415
DESERT RIDGE LEGAL GROUP
3037 E. Warm Springs
Road, Suite 300
Las Vegas, Nevada
89120

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of August 2021, I served a true and complete copy of the foregoing **APPELLANT'S OPENING BRIEF addressed** to the parties below as follows:

[X] by placing a true and correct copy of the same to be deposited for mailing in the U.S. Mail, enclosed in a sealed envelope upon which first class postage was fully prepaid; and /or

[ ] via facsimile; and or

[ ] by hand delivery to parties listed below; and or

[X] by electronic service via E Flex through the Supreme Court of the State of Nevada.

NATHAN S. DEAVER, ESQ.
Nevada Bar No. 11947
BRICE J. CRAFTON, ESQ.
Nevada Bar No. 10558
DEAVER I CRAFTON
810 E. Charleston Blvd.
Las Vegas, NV 89104
Telephone (702)385-5969
Facsimile (702)385-6939
Attorneys for Respondent

/s/ Luz T. Macias
Desert Ridge Legal Group