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

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

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

Deaver|Crafton appeared for Respondent Patricia Sanchez in proceedings in the District Court and has appeared for Respondent before this Court.

DATED this 23rd day of September, 2021.

DEAVER|CRAFTON

By:

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I.

STATEMENT OF THE FACTS

This case arises out of an automobile accident in which the parties agreed to settle Respondent, PATRICIA SANCHEZ'S, claims against Defendants for $10,000.00. The specific factual history of the settlement is set forth above in the Affidavits of Nathan S. Deaver, Esq. and Brice J. Crafton, Esq., attached hereto to Respondent's Appendix as **Exhibit 1** and **Exhibit 2**, and forth the sake of brevity will not be reiterated here. However, there is no doubt that Key Insurance offered to settle this matter for $10,000.00 on behalf of its insured, Appellant Arce, instead of being faced with a Request for Trial *De Novo,* which would have prolonged this litigated matter for an additional 6-9 months. Plaintiff Sanchez, accepted the terms of the agreement to resolve this matter for $10,000.00 and thus the parties entered into an enforceable settlement on February 20, 2020. As proof of this agreement, please see Exhibit 1, which contains the email communications from Mr. Deaver to both Ms. Erika Cervantes, Key Insurance's assigned claims representative, as well as with Mr. Erich Storm, whom Key Insurance assigned to represent Defendant Arce. These email exchanges are also referenced in Mr. Deaver's affidavit above. *See* also **Exhibit 3**, which are the email exchanges between Mr. Crafton and Mr. Storm following the settlement of this matter and which are referenced in the Affidavit of Mr. Crafton, above.

II.

STANDARD OF REVIEW

The interpretation of the relevant rules of attorney conduct are reviewed on appeal under a *de novo* standard. *State ex rel. Cannizzaro v. First Judicial District Court in and For County of Carson City*, 136 Nev. 315, 466 P.3d 529 (Nev. 2020), citing *Dynamic 3D Geosolutions LLC v. Schlumberger Ltd.*, 837 F.2d 1280, 1284 (Fed. Cir. 2016). Whether judicial estoppel applies is a question of law that this Court will review *de novo*. *Déjà vu Showgirls v. State, Dep't of Taxation*, 334 P.3d 387, 391 (Nev. 2014).

This Court has "frequently expressed itself as to a district court's exercise of discretion in either setting aside a default judgment or refusing to do so." *Hotel Las Frontier Corp. v. Frontier Properties, Inc.*, 79 Nev. 150, 380 P.2d 293 (Nev. 1963). The general principle of review to be applied is that a lower court's exercise of discretion will not be disturbed in the absence of abuse. *Blakeney v. Fremont Hotel, Inc.*, 77 Nev. 191, 360 P.2d 1039 (Nev. 1961). Only a clear ignoring by the district court of established legal principles, without apparent justification, may constitute abuse of discretion. *Goodman v. Goodman*, 68 Nev. 484, 489, 236 P.2d 305, 307 (Nev. 1951).

III.

SUMMARY OF ARGUMENT

The current appeal arises out of Appellant's dissatisfaction with the conclusions and findings of the district court. In an attempt to achieve a different outcome, Appellant is trying to repurpose the same arguments that the district court found unpersuasive, mainly that: 1) the district court was in error for enforcing the settlement because it lacked the authority; and 2) that Respondent's counsel violated NRCP 4.2 by communicating with Key Insurance's adjuster without the permission of Appellant's counsel. As the district court found in its determination of Respondent's Motion for Relief from Judgment and to Enforce Settlement, Mr. Deaver did nothing in violation of the Nevada Rules of Professional Conduct when they negotiated a settlement with Key Insurances' adjuster, Ms. Cervantes. The Supreme Court of Nevada has ruled that it is improper or a violation of the NRCP for attorneys to continue settlement discussions with insurance adjusters, and as such, it has been common practice within the realm of personal injury law for such negotiations to continue in an effort to conserve judicial resources and promote settlement between parties.

IV.

ARGUMENT

1. EDCR 7.50 and NAR 19 Do Not Apply Because The Settlement Was Reached Prior To The Deadline to File A Request For Trial De Novo and Prior To Judgment Being Entered.

As this Court will review this issue under an abuse of discretion standard, it is important to remember that it remains undisputed that a settlement agreement was entered into according to the basic principles of contract law, and that the Honorable Judge Nancy Allf, found that "a valid contract was entered." *See* Transcript from June 11, 2020 Hearing, attached as **Exhibit 4**. As will be shown, there was no evidence provided at the district court level, or provided by the Appellant at this stage, that shows that the district court abused its discretion.

As such, EDCR 7.50 is inapplicable because that rule governs stipulations and orders, not settlement agreements. Furthermore, NAR 19 does not apply because the rule assumes the judgment was entered into appropriately according to the facts and circumstances of the case, which is not true in this instance.

a. A Settlement Was Reached According To Basic Contractual Principles.

A settlement agreement is a contract, which is governed by the principles of contract law. *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (Nev. 2005). When parties to a pending litigation enter into a settlement, they enter into a contract. *Mack v. Estate of Mack*, 125 Nev. 80, 95, 206 P.3d 98, 108 (Nev. 2009).

Therefore, there must be 1) an offer, 2) acceptance, 3) a meeting of the minds, and 4) consideration for a settlement to be enforceable. *May*, 121 Nev. At 672. "A valid contract cannot exist when material terms are lacking or are insufficiently certain and definite." *Id.*

First and foremost, at no point in this process has any denied that a settlement was reached. *See* Plaintiff's Motion for Relief from Judgment and Defendant's Motion in Opposition, attached as **Exhibit 5** and **Exhibit 6**. There is also no denial that Mr. Deaver informed Ms. Cervantes that a short trial request was to be filed unless the case were to resolve. For convenience sake, the audio recording of the conversation between Ms. Cervantes and Mr. Deaver regarding settlement has been transcribed below:

> Erika Cervantes: This is Erika on a recorded line. How can I help you?
>
> Nathan Deaver: Good morning Erika this is attorney Nathan Deaver in Las Vegas, NV. How are you doing today?
>
> Erika Cervantes: Good.
>
> Nathan Deaver: Do you need a claim number?
>
> Erika Cervantes: Give me a quick second. Ok. Go ahead with the Claim Number.
>
> Nathan Deaver: KILV112050
>
> Erika Cervantes: OK. Patricia Sanchez. Ok how can I help you?

Nathan Deaver: We demanded this pre-litigation and your last offer was like $7,000.00. We had like $9,000.00 something in meds. We're getting ready to file for a Request for Short Trial with the Judge trying to see if we can get this done before we move any further on this one (emphasis added).

Erika Cervantes: OK. Let's see.

Nathan Deaver: She's got $9,301.00 in meds with a cost letter of $15,000.00. We never even gave you a counteroffer because the client said to file on it, and she would get the injections but she did not.

Erika Cervantes: Sorry I just want to take a look at my initial evaluation and the letter we sent it's been a while since I have seen this.

Nathan Deaver: It's been a long time since we have spoken. No problem.

Erika Cervantes: We sent it out for peer review. Why, why why…she was in a 2018 Nissan SUV $1,269.00 in damages we were in a pick-up truck. No Police Report. Prior MVA in 2015.So I have looked at my notes and I see the top evaluation on this one and I will give you that number and then I will give you that number and then you can ya know.

Nathan Deaver: Mull it over.

Erika Cervantes: So, $6,500 is what we offered right?

Nathan Deaver: On 04/10/19 you offered $7,000.00.

Erika Cervantes: $9,000.00 would be that number.

Nathan Deaver: I have permission for $15,000.00 is there any way you can get me into the double-digit numbers? I can get this done today. In fact, she is coming in today if you could send me a release.

Erika Cervantes: So, your telling me that $10,000.00 can do it.

Nathan Deaver: If you could meet me in the middle at $12,500 ish which is not even quite the middle. Yeah, the $12,000.00 would be good enough.

Erika Cervantes: Yeah, with, I can't, I might be able to swing $10,000.00 after reviewing all the notes and multiple conversations with my supervisors we won't go for the $12,000.00.

Nathan Deaver: I'll tell you what if you give $10,000.00 I will get it done at least I can tell her that I pushed for the $15,000.00 and the $12,000.00.

Erika Cervantes: O.K.

Nathan Deaver: Will you send me the release?

Erika Cervantes: Yes.

Nathan Deaver: O.K. thanks Erika.

Erika Cervantes: Thank you for your time.

Nathan Deaver: Bye.

Erika Cervantes: Bye

See also Plaintiff's Reply to Defendant's Opposition, attached as **Exhibit 7**, at 3:18-5:10.

As is made clear by this exchange, this case was resolved on February 20, 2020 for $10,000.00. The exchange clearly shows that all the basic principles of a contract were present during the negotiations. There was an offer from Ms. Cervantes (who according to her signed Affidavit, provided to the Court by

Appellant, has authority to negotiate on behalf of Key Insurance) of $10,000.00 to settle the case, in exchange for Plaintiff to forego her right to request a short trial de novo. Mr. Deaver clearly and unequivocally accepted the offer to settle. Therefore, according to the general principles of contract law, and Nevada case law, a valid contract and settlement existed.

b. EDCR 7.50 Is Inapplicable Because A Valid Settlement Was Reached.

Inexplicably, Appellant asserts that EDCR 7.50 precludes enforcement of this settlement because it was neither entered into the minutes of the court nor submitted in writing. *See* Appellant's Brief, on file with this Court, at p. 10, ¶ 1. EDCR Rule 7.50 states, "No agreement or *stipulation* between the parties or their attorneys will be effective unless the same shall, by consent, be entered in the minutes in the form of an order, or unless the same is in writing subscribed by the party against whom the same shall be alleged, or by the party's attorney (emphasis added)." Clearly, this Rule governs stipulations and orders, not settlement agreements or any other type of contract for that matter. This citation to EDCR 7.50 by the Appellant is a misapplication of the rule entirely. Furthermore, it attempts to undercut the fact that Respondent made the decision not to proceed with her right to request a short trial de novo based upon her reliance to the settlement agreement.

c. NAR 19 Does Not Apply As A Settlement Was Reached Prior To Judgment.

NAR 19 does state the judgment is "final" and "may not be appealed." Inherent in this rules assumptions, however, is that it was entered appropriately according to the facts and circumstances of the case. Here, it was not, and judgment should never have been entered considering the settlement that was reached on February 20, 2020.

As a matter of public policy, the judgment should be considered void *ab initio*, as it does not comport with the history of the case and was filed inconsistent to the settlement reached. Parties to a litigation should not be allowed to be "bailed out" of contractual agreements when they deliberately take advantage of the other party's reliance on an agreement, as Appellant did in this case. The district court has inherent authority to right this type of deliberate wrong as it has long since been established that "every court of record has inherent authority to amend its records so as to make them speak the truth." *Brockman v. Ullom*, 52 Nev. 267, 268 (Nev. 1930).

2. There Was No Violation of NRPC 4.2 That Would Make The Settlement Void.

One of Appellant's main arguments asserts that the settlement was void because Mr. Deaver violated NRPC 4.2 when he negotiated a settlement with Ms. Cervantes because Key Insurance, and by extension their adjuster Ms. Cervantes,

was a represented party. The issue with this contention is that there is no case law in Nevada that supports the contention that Appellant is attempting to make. NRPC 4.2 protects *represented parties* from unauthorized communications with adverse attorneys without their attorney's authorization (emphasis added). *See* NRPC 4.2. There are two main reasons why Rule 4.2 is inapplicable in this matter. First, Key Insurance was not a party to the litigation, and therefore cannot be a "represented party" under the definition of Rule 4.2. Second, Appellant's counsel, Mr. Storm, represented the Appellant, not Key Insurance. Thus, Rule 4.2 is inapplicable, and the settlement is not void as against public policy.

At the district court level, Appellant relied heavily on the Nevada Supreme Court's findings in *Nevada Yellow Cab v. Eight Judicial District Court*, 123 Nev. 44 (Nev. 2007), which he purported were dispositive of the current issue. The problem was, however, that *Nevada Yellow Cab* had absolutely nothing to do with the issues that arose in this matter, and the district court found it unpersuasive. *See* **Exhibit 4**, at 18:19-19:2. *Nevada Yellow Cab* involves a question of disqualification and conflict of interest where a lawyer's prior law firm represented an insurance company (ICW) and subsequently that lawyer was hired by ICW's insured, Nevada Yellow Cab, to file a bad faith action against ICW. *Nevada Yellow Cab*, 123 Nev. at 46-48. ICW argued that since the lawyer's prior law firm was routinely hired by ICW to represent its insureds, and that they were now being

sued as a party by said lawyer, that a conflict of interest existed which required disqualification. *Id.* at 52. *Nevada Yellow Cab* is, as the district court found previously, inapposite to the facts of this case and does not speak to whether an attorney can continue settlement negotiations with a claims adjuster after the matter is litigated.

The fact that Appellant recognizes that neither *Nevada Yellow Cab* nor any other legal authority from this Court supports the contention that Key Insurance was a "represented party" in accordance to NRPC 4.2 is evidenced by its absence from Appellant's Opening Brief when it was the bedrock of his original opposition. Instead, Appellant is basing this appeal on comments to Rule 4.2 that he contends support his position. However, Appellant runs into the same issue now that he did at the district court level. The comments to NRPC 4.2 only discuss "represented parties" and there is no legal authority from the Nevada Supreme Court that supports Appellant's contention that Key Insurance was a represented party.

Instead, Appellant is relying on a Vermont Supreme Court decision from *In re Illuzzi*, 160 Vt. 474, 632 A.2d 346 (Vt. 1993) that appears to support his contentions that Respondent's counsel violated the ethical rules. *See* Appellant's Opening Brief at p.13, ¶ 2. There have been various cases and ethics opinions that have established that although the lawyer representing the defendant-insured in a personal injury matter may be retained and paid by the insurer, the client is

nevertheless the insured, not the insurer. [N.Y. State 721 (1999); N.Y. State 716 (1999); *American Employers Ins. Co. v. Goble Aircraft Specialties, Inc.*, 205 Misc. 1066, 131 N.Y.S.2d 393 (Sup. Ct. 1954).].

In addition to the above-mentioned cases, New York State has a similar rule as NRPC 4.2. Unlike Nevada, the New York State Bar Association has issued a guidance regarding their rule and the continued communication with an insurance adjuster. The guidance reads:

> The question brings into play DR 7-104(A)(1) of the New York Code, usually referred to as the "no-contact" rule:
>
> A. During the course of the representation of a client a lawyer shall not:
>
> 1. Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so."
>
> Is the adjuster for the carrier a represented party who may not be contacted by plaintiff's attorney? In other words, does the lawyer assigned by the insurer to represent the policy holder represent the adjuster?
>
> The Committee answered this question "No." The Committee said:
>
> 40 years ago in N.Y. State 4 (1964), we stated that: "[W]e see nothing improper in an attorney for a claimant entering into negotiations with the adjuster, even where the negotiations include discussion of the legal aspects of liability." We adhere to this conclusion, which is consistent with our many subsequent opinions on the ethically complex tripartite relationship that

> exists among an insurance company, assigned counsel and a policyholder, in holding that contact with the adjuster is not contact with the policyholder.

See NYSBA's Committee on Professional Ethics in Opinion 785 (2/1/05).

While New York's stance on these matters are not binding to this Court, they are persuasive and are directly in line with the common practice of this jurisdiction. Moreover, continued communication with an adjuster, in an effort to resolve matters which would otherwise drag on to congest the court's docket and thereby result in the unnecessary expenditure of taxpayer resources, should not be stonewalled because an insurer assigns counsel to its insured. This has never been a reason to cease settlement negotiations, as settlement of litigated claims are, and always have been, encouraged.

None of Appellant's accusations regarding a Rule 4.2 violation are valid considering that Ms. Cervantes/Key Insurance is not a represented party. All of the comments to NRPC 4.2 cited by Appellant are equally inapplicable because Key Insurance was not a party to this lawsuit and was not a represented organization, Appellant was. Therefore, the settlement is not void due to public policy considerations because no violation of the professional rules of ethics existed.

V.

CONCLUSION

For the aforementioned reasons, Respondent respectfully requests that this Honorable Court uphold the findings and conclusions of the district court.

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 2999 words; or

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3. 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 this 23rd day of September, 2021.

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CERTIFICATE OF SERVICE

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

[ ] 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 the parties listed below; and/or

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

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