IN THE SUPREME COURT OF THE STATE OF NEVADA

VERONICA JAZMIN CASTILLO, Appellant, vs. ARMANDO PONS-DIAZ, Respondent.	Supreme Court Case No.: 82267

Eighth Judicial District Court
Case No. A-19-789525-C

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The law firm representing Respondent Armando Pons-Diaz in the District Court and in this Court is ERIC BLANK INJURY ATTORNEYS.

Dated this 14th day of February, 2022.

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I. JURISDICTIONAL STATEMENT

This Court has jurisdiction over this Appeal by Defendant[1] pursuant to *NRAP* 3A(b)(1) (not *NRCP* 3A(b)(1), as asserted by Defendant) because the District Court's November 24, 2020, Judgment On Arbitration Award is a final order resolving all claims between all parties. *Respondent's Appendix*, RES001006-07.[2]

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[1] In compliance with NRAP 28, this Answering Brief "keep[s] to a minimum references to parties by such designations as 'appellant' and 'respondent[,]'" instead using the terms employed in the District Court (*i.e.*, "Defendant" and "Plaintiff"). *See* Nev. R. App. 28(d).

[2] Defendant's Opening Brief here references the Judgment On Arbitration Award — but Defendant inexplicably fails to include in her Appendix that document or the District Court's Order granting the Motion To Strike — *i.e.*, the two documents from which she appeals — or proof of service of written notice of entry of either, as required by NRAP 30(a)(2)(H), (J)(ii).

Because she fails to provide these required documents to this Court, Defendant also provides no *citations* to either document (as required by NRAP 28(a)(10)(A)) — although Defendant never actually references the contents of the Order granting the Motion To Strike Request For Trial De Novo *at all*. *Opening Brief*, *passim*.

Moreover, despite filing an Appendix comprising five volumes, Defendant fails to include "one alphabetical index for all documents . . . placed in each volume of the appendix[,]" as required by NRAP 30(c)(2). Instead, each of the five volumes contains only an index *for that volume*, with four of these truncated indices containing only one line, and the fifth containing three lines. *Appellant's Appendix, Vol. 1*, 2; *Vol. 2*, 2; *Vol. 3A* [sic], 2; *Vol. 4*, 2; *Vol. 5*, 2.

Therefore, per NRAP 30(a)(4), Plaintiff provides herewith "Respondent's Appendix," containing these "documents which should have been but were not included in the appellant's appendix[.]"

The November 24, 2020, Judgment On Arbitration Award was served on November 24, 2020, via the District Court's electronic e-filing and e-service system. Defendant's Notice Of Appeal was timely filed on December 23, 2020, pursuant to *NRAP* 4(a) (not *NRCP* 4(a), as asserted by Defendant). *Cf. Opening Brief*, 2.

II. ROUTING STATEMENT

This matter is presumptively assigned to the Court of Appeals under NRAP 17, as it is an "[a]ppeal from a judgment, exclusive of interest, attorney fees, and costs, of $250,000 or less in a tort case[.]" *See* Nev. R. App. P. 17(b)(2). Appellant's assertion that this matter somehow involves "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" is without substance or merit. *Opening Brief*, 1. The constitutionality of the court-annexed Arbitration program — including waiver of the right to a trial de novo, by, *e.g.*, failure to timely pay Arbitrator's fees or, as here, failure to participate in good faith in the Arbitration process — is well-settled.

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III. ARGUMENT [3]

A. STANDARD OF REVIEW

Defendant's Opening Brief fails to state the applicable standard of review, as required by NRAP 28(a)(10)(B). This Court reviews a District Court Order striking a Request For Trial De Novo for abuse of discretion. *Gittings v. Hartz*, 116 Nev. 386, 391 (2000). "An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or it disregards controlling law." *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. 78, 88 (2016) (citing *NOLM, LLC v. Cty. of Clark*, 120 Nev. 736, 739 (2004); *Bergmann v. Boyce*, 109 Nev. 670, 674 (1993)).

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[3] Pursuant to NRAP 28(b), this Answering Brief includes no "Issues Presented," "Statement Of The Case," Or "Statement Of Facts," as Plaintiff is not "dissatisfied" with these portions of the Opening Brief.

However, it should be noted that the final sentence of Defendant's Statement Of Facts — "The Court must reverse the granting of the Motion [To Strike][ ]" — is not a statement of fact, but is instead a conclusion of law, and is obviously one with which Plaintiff disagrees. *Cf. Opening Brief*, 3.

B. THE DISTRICT COURT'S GRANTING OF THE MOTION TO STRIKE THE REQUEST FOR TRIAL DE NOVO WAS NOT AN ABUSE OF DISCRETION, AS THAT COURT FOLLOWED CONTROLLING LAW AND MADE THE REQUIRED "SPECIFIC WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW."

1. The District Court Followed Controlling Law.

Defendant asserts that "[g]iven that Plaintiff/Appellant [sic] conceded liability, [her] personal participation in discovery was excused." *Opening Brief*, 3.[4]

Of course, this is an incorrect statement of the law. NAR 22(A) provides that "[t]he failure of a party or an attorney to either prosecute or defend a case in good faith during the arbitration proceedings shall constitute a waiver of the right to a trial de novo." While the concession of liability in personal injury case may influence what is considered "good faith" participation, there is no exception whereby a party conceding liability is "excused" from such "good faith" participation.

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[4] The Opening Brief incorrectly refers to Defendant Veronica Jasmin Castillo as "Plaintiff/Appellant" (rather than "Defendant/Appellant") twice, and also uses incorrect pronouns for Ms. Castillo (*i.e.*, male instead of female) at least seven times. *Opening Brief*, 2-3.

Clearly, Defendant's counsel simply used a well-worn template for the Opening Brief, neglecting even to adjust it to reflect his current client's sex.

To the contrary, this Court has held that "good faith" participation in the Arbitration process is equated with "meaningful participation," and that a party's conduct during Arbitration may fall short of the "good faith" standard if that conduct "compromise[s] [the opposing party's] ability to depose the proper parties and form an adequate arbitration strategy." *Casino Properties, Inc. v. Andrews*, 112 Nev. 132, 135 (1996) (affirming District Court's striking of Request For Trial De Novo).

This Court has also recognized that striking a Request For Trial De Novo essentially constitutes a case-ending sanction, and in 1994 this Court therefore specifically held that

> [w]e hereby adopt a similar principle [to that announced in *Young v. Johnny Ribeiro Building*, 106 Nev. 88 (1990))] for all future rulings under NAR 22(A). All forthcoming sanctioning orders under [NAR 22(A)] must be accompanied by *specific written findings of fact and conclusions of law by the district court* describing what type of conduct was at issue and how that conduct rose to the level of failed good faith participation.

Chamberland v. Labarbera, 110 Nev. 701, 705 (1994) (emphasis added).

As is shown below, the District Court clearly recognized its burden in adhering to this principle and therefore made extensive factual findings in support of the conclusion that Defendant's lack of "meaningful participation" had the effect

of "compromis[ing] [Plaintiff's] ability to depose the proper parties and form an adequate arbitration strategy." *Casino Properties, Inc.*, 112 Nev. at 135.[5]

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[5] As noted above, the Opening Brief makes no reference whatsoever to the actual contents of the District Court's Order granting the Motion To Strike, and also fails to include that Order in the Appendix, despite the clear requirement of NRAP 30(a)(2)(H) that this "order[ ] appealed from[ ]" be included in that Appendix.

In fact, despite Defense counsel's certification — under penalty of sanctions — 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[,]**

the Opening Brief contains *not a single citation* to Defendant's five-volume Appendix. *Opening Brief*, 13; *cf. id.*, *passim.*

The only citations in the entire Opening Brief — aside from the Nevada Constitution and Arbitration Rules, case law, and two citations to NRCP that should actually be to NRAP — are to "Ex. 1" through "Ex. 4" in Defendant's *Arbitration Brief*, with no citation to the *actual record* in this Appeal. *Id.* at 1, 2-3.

Presumably, Defense counsel's motivation for failing even to acknowledge the existence or contents of the very Order being appealed — or to provide a copy of that Order for this Court — is to distract this Court's attention from the actual substance of that Order, which readily defeats the asserted grounds for Defendant's Appeal.

2. The District Court Made The Required "Specific Written Findings Of Fact And Conclusions Of Law[.]"

The District Court's Order granting the Motion To Strike Request For Trial De Novo is a textbook example of the required "specific written findings of fact and conclusions of law . . . describing what type of conduct was at issue and how that conduct rose to the level of failed good faith participation." *Chamberland*, 110 Nev. at 705; *see also Respondent's Appendix*, RES001013-20.

In fact, that Order follows its initial recitation of NAR 22(A) by immediately citing precisely this requirement from *Chamberland*, followed by a three-paragraph explication of case law applying this principle.[6] *Respondent's Appendix*, RES001015.

Having thus acknowledged its heavy burden in striking the Request For Trial De Novo, the District Court then made the following "specific written finds of fact and conclusions of law" as required by this Court in *Chamberland*:

- "that Defendant failed to respond to interrogatories, requests for production, or appear at her deposition, which was noticed twice."
- "that Defendant failed to produce any of the documents requested by Plaintiff during discovery."

[6] It is worth noting that, rather than having the prevailing party draft the contents of the Order — as is the custom in the Eighth Judicial District — the District Court instead issued a Minute Order of its own creation, the language of which was then adopted essentially *verbatim* as the final Order. *Respondent's Appendix*, RES001008-12; *cf. id.* at 001013-20.

- "[that] Defendant's failure to participate in discovery and failure to provide the requested discovery *had a negative impact on Plaintiff's ability to adequately prepare for the arbitration proceedings and on Plaintiffs ability to present his case*."

Id. at RES001016 (emphasis added)

The District Court then expressly *acknowledges* that Defendant conceded liability "on the last day of discovery as a means to vacate the deposition of Defendant, who had already failed to respond to Plaintiff's discovery requests[.]" *Id.* at RES001016.

The District Court then notes that these failures by Defendant

> caused unnecessary burden and expense to Plaintiff. Plaintiff was unable to adequately conduct discovery due to Defendant's failure to respond to interrogatories and requests for production. This was exacerbated by Defendant's failure to appear for her deposition, which also caused Plaintiff to incur additional costs, and caused Plaintiff's counsel to spend unnecessary time preparing for Defendant's deposition, twice.

Id.

However, the failures and gamesmanship by Defendant did far more than cost Plaintiff's counsel time, money, and effort. Defendant failed to respond to Interrogatories and failed (twice) to appear for deposition, thereby depriving Plaintiff of *any* statement by Defendant *under oath* that could be used to address Defendant's allegations against Plaintiff, both in Defendant's recorded statement for the insurance company and in Defendant's Arbitration brief. *Id.* at RES001016-17.

This situation was especially problematic for Plaintiff, the District Court found, because "Defendant's Arbitration Brief consisted mainly of attacks on Plaintiff's credibility, citing [purported] contradictions in Plaintiff's discovery responses and deposition testimony." *Id.* at RES001017.

The District Court then found that, because Defendant failed to respond to Interrogatories, failed (twice) to appear for deposition, and did not attend the Arbitration Hearing, "Plaintiff had no opportunity to elicit any testimony from Defendant whatsoever." *Id.* at RES001017.

Defendant would undoubtedly protest that none of this mattered because Defendant had conceded liability and therefore "[her] personal participation in discovery was excused." *Opening Brief*, 3.

However, the District Court saw it very differently, finding that

> Defendant's Arbitration Brief explicitly called Plaintiff a liar, stating [b]ecause he has lied and been evasive, and because his case is reliant on the credibility of the oral representations made to his treatment providers. *Therefore, testimony about the accident was a necessary part of Plaintiffs case*. However, Plaintiff did not have the ability to elicit testimony from Defendant about *the nature and extent of the impact, the speed at which she was traveling, whether she applied the brakes, or whether Defendant herself sustained any injuries from the subject collision so as to address the attacks on Plaintiff's testimony*. Plaintiff was provided with Defendant's recorded statement, but had *no opportunity to obtain any testimony from Defendant under oath and did not have the ability to cross-examine Defendant* about the basis for her statements concerning Plaintiff's veracity as contained in her brief.

Respondent's Appendix, RES001017 (emphases added).

On these bases, the District Court found that "Plaintiff's inability to conduct any discovery or elicit any testimony from Defendant negatively impacted Plaintiff's case such that Defendant did not meaningfully participate in the Arbitration proceedings resulting in bad faith participation." *Id.*

However, having thus "describe[ed] what type of conduct was at issue and how that conduct rose to the level of failed good faith participation[,]" the District Court then went *even further*, spelling out in detail *exactly* what Defendant did (or failed to do) and why those failures justified striking Defendant's Request For Trial De Novo.

Even though Defendant had conceded *liability*, Plaintiff still had the burden to prove the elements of *negligence*, including causation and damages. On this topic, the District Court found that

> standing alone, a lack of medical experts is not a sufficient basis to strike a Request for Trial de Novo[;] however in this matter Plaintiff received no discovery from Defendant. This left [Defense] counsel's arguments in the late-filed Arbitration Brief as the only evidence regarding Plaintiff's medical treatment contained in the proceedings record. Therefore, although *defense counsel argued that causation and damages were the only issues to be decided after counsel conceded liability* on the last day of discovery in order to avoid Defendant's re-noticed deposition, *Defendant produced no evidence during the Arbitration proceedings that provided a basis for Plaintiff to ascertain what causation and damages defenses were being presented*.

Id. at RES001018 (emphases added).

Finally, noting that Defendant — after having essentially failed to participate in the entire Arbitration process — then failed to oppose Plaintiff's Motion For Attorney's Fees, Costs, And Interest, thereby "demonstrat[ing] a pattern [of] lacking meaningful participation in the Arbitration proceeding resulting in a lack of a good faith defense in this case such that sanctions pursuant to NAR 22(A) are warranted." *Id.*

IV. CONCLUSION

It would be difficult to envision a District Court more thoroughly and completely discharging its responsibility to provide "specific written findings of fact and conclusions of law . . . describing what type of conduct was at issue and how that conduct rose to the level of failed good faith participation." *Chamberland*, 110 Nev. at 705.

Contrary to Defendant's assertion, Defendant's concession of liability did *not* relieve her of the obligation to "participate meaningfully" in the Arbitration process, and her failure to do so — by failing to respond to Interrogatories and Requests For Production, failing (twice) to appear for deposition, and failing to attend the Arbitration Hearing — deprived Plaintiff of the necessary sworn testimony and other information to present his case (and counter Defendant's) regarding the essential elements of causation and damages.

The District Court painstakingly articulated detailed *findings of fact* spelling out Defendant's myriad failures during the Arbitration process and equally detailed *conclusions of law* explaining why those failures "compromised [Plaintiff's] ability to depose the proper parties and form an adequate arbitration strategy." *Casino Properties, Inc.*, 112 Nev. at 135; *see also Respondent's Appendix*, RES00101320.

The District Court then concluded: "Defendant . . . failed to meaningfully participate in the Arbitration proceedings and failed to defend this case in good faith; pursuant to NAR 22(A) such failure shall constitute a waiver of the right to trial de novo." *Id.* at RES001018. On that basis, the District Court granted Plaintiff's Motion To Strike Defendant's Request For Trial De Novo. *Id.* at RES001019.

In so doing, the District Court provided a textbook explanation pursuant to *Chamberland* and its progeny. Thus, the District Court followed controlling law and made the required "specific written findings of fact and conclusions of law[,]" such that it was within the District Court's discretion to deny Defendant's Request For Trial De Novo. *Gittings*, 116 Nev. at 391 ("We conclude that the district court was within its discretion in denying appellant's request for trial de novo."); *see also MB Am., Inc.*, 132 Nev. at 88; *NOLM, LLC*, 120 Nev. at 739; *Bergmann*, 109 Nev. at 674.

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The District Court's Order granting the Motion To Strike Defendant's Request For Trial De Novo, as well as the Judgment On Arbitration Order, therefore should be affirmed.

Dated this 14th day of February, 2022.

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CERTIFICATE OF COMPLIANCE PER NRAP 28.2

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 2010 v. 14.0.7162.5000 in 14-point Times New Roman type.

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:

[x] Proportionately spaced, has a typeface of 14 points or more, and contains 2,798 words; or

[ ] Does not exceed 30 pages.

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 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 14th day of February, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of February, 2022, I served the foregoing, **RESPONDENT'S ANSWERING BRIEF**, on counsel via this Court's electronic filing and service system, upon the following:

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