IN THE SUPREME COURT OF THE STATE OF NEVADA

BENJAMIN B. CHILDS

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, THE HONORABLE ADRIANA ESCOBAR,

Respondents,

WLAB INVESTMENT, LLC, TKNR, INC., a California Corporation, and CHI ON WONG aka CHI KUEN WONG, an individual, and KENNY ZHONG LIN, aka KEN ZHONG LIN aka KENNETH ZHONG LIN aka WHONG K. LIN aka CHONG KENNY LIN aka ZHONG LIN, an individual, and LIWE HELEN CHEN aka HELEN CHEN, an individual and YAN QIU ZHANG, an individual and INVESTPRO LLC dba INVESTPRO REALTY, a Nevada Limited Liability Company, and MAN CHAU CHENG, an individual, and JOYCE A. NICKRANDT, an individual, and INVESTPRO INVESTMENTS LLC, a Nevada Limited Liability Company, and INVESTPRO MANAGER LLC, a Nevada Limited Liability Company and JOYCE A. NICKDRANDT, an individual and does 1 through 15 and roe corporation I-XXX,

Real Parties in Interest

Supreme Court No: 82967

District Court No: A-18-781917-C

BENJAMIN B. CHILDS' REPLY

Benjamin B. Childs, Esq.
Nevada Bar No. 3946
318 S. Maryland Parkway
Las Vegas, NV 89101
Telephone: 702-251-0000
Petitioner

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

INTRODUCTION

The real parties interest filed their Answer[1] on July 21, 2021. There is nothing in the Answer to justify denial of the Petition for a Writ of Mandamus or Prohibition.

ROUTING STATEMENT IN ANSWER IS WRONG

The routing statement on Page 2 of the Answer is wrong. The statement in the Answer is that the Supreme Court presumptively has jurisdiction because it involves an issue of judicial discipline or attorney discipline. This is incorrect. "Judicial discipline" refers to appeals to the Supreme Court from decisions of the Commission on Judicial Discipline.

---

[1]. The Answer filed July 21, 20121 was designated an Opposition. It is referred to as the Answer herein as this is what this Court ordered to be filed in it's June 24, 2021 Order Directing Answer and Granting Stay.

This is not such a case. Nor does this case involve attorney discipline from a decision by the State Bar grievance process.

ARGUMENT IN ANSWER IS THAT COMPLIANCE WITH LEGAL REQUIREMENTS IS IRRELEVANT

The Petition only addresses the illegality of NRCP 11 sanctions imposed on the prior counsel for the plaintiff the civil litigation. There was not even a scintilla of compliance with the requirements of NRCP 11. The Answer does not deny this. Petitioner will not restate the mandatory requirements from the Petition, which are undisputed.

The Answer cannot point to any evidence of compliance with the NRCP 11 requirements. Thus, the following facts are undisputed.

1. There was no compliance with the 21 day Safe Harbor requirement of NRCP 11(c)(2).
2. The defendants below never filed a separate motion specifically

stating the factual or legal statements that are supposedly without foundation. The only reference to Rule 11 in a motion is one paragraph in the Motion for Summary Judgment at page 30. [RA 36:14-19][2]

3. There was never a show cause hearing.

4. There is no evidence that the judgment entered by the the Court pursuant to NRCP 11 was "limited to what is sufficient to deter repetition of such conduct or comparable conduct by other similarly situated. *Id.* at 11(c)(2)" [PA 36:28 - 37:1] This is a quote directly from Defendants' own motion in district court.

The Answer spends three pages arguing that the failure to follow the procedural requirements of Rule 11 is "harmless error." [Answer Pages 17-20]. The complete failure to follow the legal requirements is not "harmless error". Rule 11 sanctions of $128,166.78 imposed by the

[2]. Real parties in interest filed either own appendix. Petitioner's Appendix [PA]and Respondnent's Appendix [RA] are used herein

Respondent Judge without any notice or hearing and in violation of every single requirement of Rule 11 hardly qualifies as “harmless error.” It is, in fact, very harmful.

Just the fact that harmless error is the best argument in the Answer bolsters Petitioner’s prayer for issuance of the writ. These are legitimate issues involving significant amounts of money. As pointed out above, the argument in the Routing Statement on page 2 of the Answer is that this involves attorney discipline, which Petitioner takes VERY seriously, having been a sole practitioner for thirty-one years with no disciplinary history. Nothing is more serious to Petitioner than ANY form of ethical allegation.

As to the argument advanced in the Answer that somehow granting summary judgment justifies imposition of Rule 11 sanction, there is extensive and consistent federal case authority contradicting that

argument. The fact that summary judgment was granted is not a basis for Rule 11 sanctions. Miltier v. Downes, 935 F.2d 660 (4th Cir. 1991) Imposition of Rule 11 sanctions was overturned for abuse of discretion when Plaintiff presented facts that made a prima facie case. Warren v. City pf Carlsbad, 58 F.3d 439, 1995 U.S. App. Lexis 15328 (9th Cir. 1995)

Additionally, the Court must keep in mind that all doubts should be resolved in favor of Petitioner. Rodick v. City of Schenectady, 1 F.3d 1341, 1350 (2nd Cir 1993)

PETITIONER REQUIRED TO ADDRESS THE ISSUE BY WRIT

On Page 21, the Answer argues that the writ cannot be issued because Petitioner has rights to appeal.

The Petitioner was not a party to the underlying law suit. He was

solely the attorney for the plaintiff below. The plaintiff and petitioner parted company after the Motion for Summary Judgment was filed and after the Opposition to that motion was filed.

Another attorney appeared in the case on September 10, 2021. [PA Vol 2, 264-266] Petitioner had no standing to appear in the case on any issue after the new attorney appeared. Petitioner has no appeal rights and has to proceed by writ. The Petition cited to Marquis & Aurbach v. Eighth Judicial District Court, 122 Nev. 1147, 1154, 146 P.3d 1130, 1135 (2006) as support for this.

As additional authority, the Nevada Supreme Court has twice ruled in published decisions that an attorney or law firm that has been sanctioned lack standing to appeal and must seek relief via an extraordinary writ. See Watson Rounds P.C. v. Eighth Judicial District Court, 131 Nev. 783, 786-

7, 358 P.3d 228, 231 (2015); and Public Emplyees Ret. System v. Gitter, 133 Nev. 126, 135, 393 P.3d 673, 682 (2017)

This argument about appeal rights in the Answer is not likely the product of a mistake of law or a misunderstanding since the Answer cited and argued the Watson Rounds case, supra, at length on pages 19-20. Petitioner cites NRPC 3.3(a)(2), which is that an attorney from cannot knowingly "Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel". In other words, the case cited extensively in the Answer directly contradicts the argument made by real parties in interest, and directly supports the fact that Petitioner's only remedy was by extraordinary writ.

Finally, the Petition is not appealing the district court case. Plaintiff is

appealing in two separate appeals, those being case # 82835, filed May 3, 2021 and case # 83051, filed June 6, 2021. All issues on appeal, including the basis of the trial court's factual findings and its legal conclusions, will be addressed in those appeals by the parties. The district court's factual findings will be reviewed for substantial evidence and its legal conclusions de novo. Weddell v. H2O, Inc., 128 Nev. 94, 101, 271 P.3d 743, 748 (2012).

One glaring factual finding, which was in the April 7, 2021 Amended Order Granting Summary Judge presumptively prepared by the court but mysteriously on pleading paper with defense counsel's name and contact information on the left side of every 41 pages of it, is that "Discovery ended October 30, 2020. The Court will not agree to enlarge discovery." [PA Vol 1, 235:8-9] This is directly contrary to the Order Granting Defendants'

Motion to Enlarge Discovery (First Request) on an Order Shortening Time filed November 4, 2020 which did extend the close of discovery on defendants' motion to March 2, 2021. [PA Vol 1, 3:1]

The April 7, 2021 Order is further discussed below.

MYSTERY OF GENESIS OF THE APRIL 7, 2021 AMENDED ORDER

Commencing on the bottom of page 16, the Petition questions the genesis of the April 7, 2021 Order [PA Vol 1, 193 - 237] as follows :

> The email chain commencing April 2, 2021 in which Petitioner was involved is attached [App. Vol. 1, 186 - 192] , although obviously other communications must have transpired of which Petitioner is not aware.

It's noted that the Respondent Judge's law clerk's email appropriately

admonishes everyone to “avoid *ex parte* communications” [PA Vol 1 190].

The Answer states on page 3 as follows :

> Despite Petitioner’s baseless assertion on pages 16 and 17 of the Petition, the Interested Parties’ counsel did not communicate with the court regarding the amendment of the MSJ Order. The Interested Parties are unaware of the impetus for the amendment and, upon information and belief, assume that the district court acted on its own accord amending and filing the MSJ Order.

The April 7, 2021 Order [PA Vol 1, 195 - 237] was created on 41 pages of pleading paper with defense counsel’s name and contact information on the left side of every 41 pages of it. How could a 41 page order drafted on defense counsel’s customized pleading letterhead be done without the knowledge or consent of defense counsel?

Real parties in interest make a factual statement based “information and belief” which is illogical and defies belief. The Answer is assuming

that the district court acted on it's own accord, but in acting "on it's own accord" the district court used defense counsel's customized pleading letterhead. It certainly appears that defense counsel had to cooperate to allow it's unique customized pleading paper to be used to draft that order. There's no other possible explanation about how the April 7, 2021 was drafted and filed using defense counsel's customized pleading letterhead.

As the April 7, 2021 email states, the proposed Order to Show Cause wasn't applicable "in light of the Amended Order (attached) filed on April 7, 2021." [PA Vol 1, 187]

This confirms the admitted lack of compliance with NRCP 11(c). It affirmatively evidences the steps taken to avoid compliance with the Rule.

///

///

JUDGMENT WAS EXPRESSLY ENTERED PURSUANT TO NRCP 11

The real parties in interest claim that fees could also have been imposed pursuant to NRS 18.010(2)(b) or NRS 7.085.

That argument fails for two indisputable reasons.

First, NRS 7.085 was not addressed in the trial court. Despite 1,849 pages in their appendix, real parties in interest cite to nothing to support their argument on Page 2 of the Opposition that judgment was entered based on either NRS 18.010(2)(b) or NRS 7.085. Judgment was entered solely based on NRCP 11. [PA Vol 2, 258, 17 - 22] *See* Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981), stating that nonjurisdictional issues not raised in the trial court are waived.

Second, the judgment at issue was expressly entered only under Rule 11. [PA Vol 2, 258:17 - 22] The fact that Defendants raised the

issue of NRS 18.010(2)(b) evidences that the trial court was aware of that statute, but expressly rejected it as a basis for entry of judgment.

Further, again, even by the Defendants' own argument and legal citation in the trial court, the only attorney fees that can be imposed under Rule 11 are those directly pertaining to the offending Rule 11 issues. Attorney fees cannot be awarded for all of the fees incurred by the moving party. Defendants' own motion in district court states that any judgment entered by the the Court pursuant to NRCP 11 is "limited to what is sufficient to deter repetition of such conduct or comparable conduct by other similarly situated. *Id.* at 11(c)(2)" [PA 36:28 - 37:1]. There is no evidence that this was even considered.

///

CONCLUSION

The Answer offers no legal reason why the writ should be denied.

First, the answer argues that compliance with mandatory legal requirements is irrelevant. This is totally unsupported and is an absurd argument.

Next, the real parties in interest argue that the Petition should be dismissed because the Petitioner had an adequate remedy by appeal; therefore, a writ is improper. Clear controlling authority cited above supports Petitioner's writ application on this issue. Petitioner has no standing to appeal,

Finally, arguing that alternative statutes could have been a basis for an award of fees is meritless. NRS 18.010(2)(b) was raised by Defendants, but was rejected by the court as a basis for entry of judgment.

This Court cannot speculate about what other outcomes could have occurred based on other circumstances. Petitioner is solely addressing what happened, which is that a judgment was entered solely and expressly based on NRCP 11. [PA Vol 2, 258, 17 - 22]

Since there was no compliance with the mandatory requirements of NRCP 11, the writ should issue mandating the Respondent Court to vacate the $128,166.78 judgment against Petitioner, and thereby also the Plaintiff, contained in the May 25, 2021 Order.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply 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 Petition has been prepared in a proportionally spaced typeface using Wordperfect in Arial, font size 14.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7), it is proportionately spaced, has a typeface of 14 points or more and contains 2,366 words.

Finally, I hereby certify that I have read this Reply 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 application 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 requirement of the Nevada Rules of Appellate Procedure.

/s/ Benjamin B. Childs
_____
Benjamin B. Childs
Nevada Bar No. 3946
Petitioner

CERTIFICATE OF MAILING

I hereby certify that on this July 26, 2021, I served this , upon the following parties by placing a true and correct copy thereof in the United States Mail, priority mail, in Las Vegas, Nevada with first class postage fully prepaid:

Honorable Adriana Escobar
Nevada Eighth Judicial District Court
Department 14
200 Lewis Ave.
Las Vegas, NV 89155

Aaron Ford, Esq.
Attorney General
Nevada Department of Justice
100 North Carson Street
Carson City, NV 89701

Steven L. Day, Esq
Day & Nance
1060 Wigwam Parkway
Henderson, NV 89074

Michael B. Lee, Esq.
Michael Mathis, Esq.
Michael B. Lee, P.C.
1820 E. Sahara Ave., Suite 110
Las Vegas, NV 89104

/s/ Benjamin B. Childs
_____
Benjamin B. Childs
Nevada Bar No. 3946
Petitioner