IN THE SUPREME COURT OF THE STATE OF NEVADA

Margaret Reddy, Mohan Thalamarla, Max Global, INC. Appellants, vs. MEDAPPEAL, LLC, an Illinois limited liability company Respondent.	Supreme Court No. 83253

APPELLANTS' REPLY BRIEF

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APPELLANTS' NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations in order that the judges of this court may evaluate possible disqualification or recusal.

Appellants MARGARET REDDY and MOHAN THALAMARLA are individuals and have no parent corporations. MAX GLOBAL LLC is a limited liability company with no parent corporations.

The following law firms (with the listed attorneys) have appeared previously in this case:

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The following law firm is expected to appear in this court for Appellants:

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STANDARD OF REVIEW

The standard of review of Motions for Summary Judgment, pursuant to NRCP 56, from *Wood v. Safeway, Inc.* is that

> "This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court.[1] Summary judgment is appropriate and "shall be rendered forthwith" when the pleadings and other evidence on file demonstrate that no "genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law."[*Id.* at Footnote 2] This court has noted that when reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." [Id. At Footnote 3]. (*Wood v. Safeway, Inc.*, 121 Nev. 724, (2005)).

This court reviews de novo a district court's determination of personal jurisdiction. *Fulbright & Jaworski LLP v. Eighth Judicial District Court*, 342 P.3d 997 (Nev. 2015).

Similarly, this Court reviews questions of law under the de novo standard of review *Frantz v. Johnson*, 116 Nev. 455, 471, 999 P.2d 351, 361 (2000) (citations omitted).

Appellants address the findings of fact made from documentary evidence otherwise precluded from admission for legal reasons such as privilege and evidentiary inadmissibility during ruling on motions for summary judgment and as such, as it is involving a purely legal question, these rulings are reviewed de novo. *Settelmeyer & Sons v. Smith & Harmer*, 124 Nev. 1206, 1215 (2008).

PROCEDURAL BACKGROUND

Since the filing of Appellants' Opening Brief, the following has occurred in this case:

Respondent, in its Answering Brief, raised the issues of conspiracy jurisdiction, based on a settlement negotiated. As subject matter jurisdiction is never waived, Appellants address all law, if it were first raised on appeal as they are not only jurisdictional, but constitutional as well.

I. STATEMENT OF FACTS

A. ADDITIONAL STATEMENT OF DISPUTED FACTS

There are two key elements of this appeal that are vital to convey, one goes to the jurisdiction over the Appellants and what evidence has been received and characterized, the other goes to the legal ability of a non-contracting, non-resident Plaintiff LLC who has never attempted to register in Nevada to file a lawsuit in Nevada. These are two distinct and separate issues, both of which are material to the instant case and both of which are fully disputed.

Regarding jurisdiction, appellants have always contended that they had no contact with Respondent. While Respondent uses evidence of a negotiated settlement to argue that a conspiracy existed, (see Appellants Appendix v2, page 391,) the court cannot use this evidence for any

basis whatsoever. There are only two bases for making a connection between the appellants and the non-appealing defendants and they are both inadmissible as a matter of law: 1) conjectures and speculations made by V Reddy about his wife (Appendix Vol 3, pages 548-549) and 2) the settlement reached, previously discussed (Vol 2, page 391). Admitting them or in the alternative, using them as a basis for a finding of fact is contrary to Nevada law.

Second, Respondent confirms that Respondent never did any business in the State of Nevada. Further, Respondent did not contract with any Appellant and never registered with the State of Nevada as any type of entity to utilize the laws of the State of Nevada. Nonetheless, it filed a lawsuit in the State of Nevada, which is also undisputed.

While it is undisputed M Reddy had an employment relationship with Weinstein before the acts in this case accrued, it is a matter of law that any settlement that suggests M Reddy had an improper purpose in that employment relationship is inadmissible.

While it is undisputed M Thalamarla never had any connection with Weinstein or Brown, it is a matter of law that any evidence of a settlement is precluded from admissibility in a Court proceeding for any reason.

While it is undisputed M and R Reddy are and were married, it is a matter of law that a mention of whether

marital privilege precludes her husband's statements about her being a "silent partner" as being admissible.

Respondent offers zero evidence that other than these inadmissible statements these Appellants have any connection to the State of Nevada. Since those statements are inadmissible as a matter of law, and since the Court gives no deference to the trial court on its legal rulings, it is clear that no Appellant had any contact with Nevada, thus no Personal Jurisdiction. The case must be dismissed for lack of jurisdiction.

II. ARGUMENT

A. THE SUPREME COURT HAS DESCRETION TO CONSIDER APPELLANTS' ARGUMENT REGARDING JURISDICTION MADE ON APPEAL

It is well established that arguments raised for the first time on appeal need not be considered by this court. (see *Diamond Enters., Inc. v. Lau*, 951 P.2d 73 (1997). The US Supreme Court made sure of that when it considered the issue and "[a]nnounced no general rule," instead leaving it "primarily to the discretion of the courts of appeals, to be exercised on the facts of the individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

Additionally, another US Supreme Court case, *Yee v. Escondido*, 503 U.S. 519, 534 (1992) holds that in narrow circumstances, "[o]nce a . . . claim is properly presented, a party can make any argument in support of that claim" on appeal.

However, there is much discussion among the circuits as to how much "raising" is enough to be considered on appeal.

There is no bright-line rule for determining whether an argument has been sufficiently raised below, and Circuit Courts have numerous, not uniform, guidelines, noting that a party 'must press, not merely intimate, an argument,' *Kelly v. Foti*, 77 F.3d 819, 823 (5th Cir. 1996), or that an argument cannot be raised in a 'perfunctory and underdeveloped' manner. *Kensington Rock Island L.P. v. American Eagle Historic Partners*, 921 F.2d 122, 124-25 (7th Cir. 1990). This is the Illinois rule.

In the 9th Circuit, the guideline is whether the party sufficiently apprised the trial court of the argument it is pressing on appeal, so that the trial court had an opportunity to rule on it. *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992); see also *Kensington*, 921 F.2d at 125 n.1.

The US Supreme Court has also ruled that a new version of a theme that was well developed in the trial court will be considered. For example, when a regulatory taking argument was not waived by a party who argued physical taking below because they were not separate claims, but 'separate arguments in support of a single claim-that the

ordinance effects an unconstitutional taking.' *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992).

Jurisdictional issues, of course, can be raised at any time, whether or not preserved at trial. See, *Swinney v. General Motors Corp.*, 46 F.3d 512, 517-18 (6th Cir. 1995), which can be thought of as a variation on the *Singleton* Rule. The US Supreme Court in *Singleton* stated that a court may be justified in reaching an issue not raised below 'where proper resolution is beyond any doubt.' 428 U.S. at 121.

In the instant matter, the issue of Judicial Estoppel was raised in the District Court in Appellant's original Motion to Dismiss for lack of personal jurisdiction. In their opposition on Page 17, Respondent states that Judicial Estoppel cannot be used to preclude Respondent from raising the issue of not suing Margaret in Illinois when it had the notice to sue her there, but merely mentioned her. This is simply not true.

Utilizing both the guidelines of the 7th and the 9th Circuit, Appellants explore the exact same doctrine as it was raised in the District Court by the RESPONDENT to keep them in the case despite lack of personal jurisdiction (see Appendix v 2, pages 385-387). Respondent cannot open the door to arguing Judicial Estoppel and then on Appeal state that Appellants cannot use it (Opposition page 17, line 25)

In keeping with the guidelines of both the 7th and 9th Circuit, the District Court was well briefed on the ideas of General and Specific Jurisdiction as well as how Judicial Estoppel would apply to the issue of jurisdiction. Therefore, even if this Court agrees with Respondent that the briefing of Judicial Estoppel in the Opening Brief was "creative" it was well briefed enough to be considered now.

The Nevada Rules of Evidence preclude the introduction of offers of settlement. Pursuant to NRS 48.105:

> "1. Evidence of:
> (a) Furnishing or offering or promising to furnish; or
> (b) Accepting or offering or promising to accept,
> a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, **is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible**." Emphasis added.

The only allowed uses of settlement evidence are:

> "2. This section does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." See NRS 48.105.

During summary judgment, Respondent introduced evidence of a settlement between the government and Appellants. This was done not for a permissible purpose, but for an impermissible purpose of advancing the idea that the settlement is evidence of a conspiracy for the purpose of

establishing jurisdiction (see Appendix vol 2, page 391 and Opposition page 14, lines 16-23). As this is a question of jurisdiction, the US Supreme Court allows this issue to be raised on appeal. See *Singleton* 428 U.S. at 121, as well as *Swinney v. General Motors Corp.*, 46 F.3d 512, 517-18 (6th Cir. 1995).

As stated in the Opposition, there are really only two sets of facts that were introduced to attempt to demonstrate Appellants participated in a conspiracy, for the sole purpose of improperly establishing good cause for jurisdiction. This is NOT one of the allowed purposes of NRS 48.105 and therefore, it was error for the District Court to admit this evidence to establish any fact that would lead to the Court taking "conspiracy jurisdiction" over the Appellants. As such, there can be no personal jurisdiction and the Complaint must be dismissed to these Appellants.

Additionally, NRS 49.295 states in pertinent part:

> "1. Except as otherwise provided in subsections 2 and 3 and NRS 49.305:
> (a) A married person cannot be examined as a witness for or against his or her spouse without his or her consent.
> (b) No spouse can be examined, during the marriage or afterwards, without the consent of the other spouse, as to any communication made by one to the other during marriage.

In the instant case, Respondent took testimony made by V Reddy in a Bankruptcy proceeding where he was speculating

about his wife's employment to establish that his speculation is evidence of a conspiracy that she participated in (see Appendix vol 3, page 548-549 and vol 8, page 1903, as well as Opposition page 14, lines 1-15).

Notwithstanding the lack of definition of "silent partner" the District Court used this evidence against M Reddy over her objection and her statements made under oath that she was not a party to the conspiracy.

The general rule in Nevada is that statements made in violation of the marital privilege that preclude testifying without the permission of the other spouse are not admissible. NRS 49.295(1)(b).

While it may be a finding of fact, the rule that allows this fact to be incorporated as a finding by the District Court is a matter of law. As the law is clear and the *Singleton* Rule applies (that a court may be justified in reaching an issue not raised below 'where proper resolution is beyond any doubt.' 428 U.S. at 121.), whether or not this is raised for the first time on appeal is not dispositive. It is so clear, that it shall be included in the discussion that the resolution of facts asserted in violation of the NRS 49.295(1)(b) privilege are not to be utilized by the District Court.

As the District Court utilized facts in violation of the marital privilege, those facts must be removed from the

District Court's findings of fact. As there are no other facts in the record that support Appellants' involvement in the conspiracy, it is clear that Nevada holds no jurisdiction over these Appellants and the Complaint needs to be dismissed as against them.

B. AN UNLICENSED FOREIGN LLC CANNOT START LITIGATION IN A STATE WHERE IT IS NEITHER LICENSED NOR DOES ANY BUSINESS

In "exceptional cases or particular circumstances where injustice might otherwise result," appellate courts have found it acceptable "to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

Additionally,

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy." *Id.*

Whether to enforce the general rule is left to "the appellate court's discretion." *In re Marriage of Priem*, 214 Cal. App. 4th 505, 511 (2013) (addressing new issue because it concerned a matter of statutory interpretation); *Canaan v. Abdelnour*, 40 Cal. 3d 703, 722 (1985).

Courts are most willing to invoke this exception when pure questions of law are "presented on the facts appearing in the record." *Ward v. Taggart*, 51 Cal. 2d 736, 742 (1959); *Burdette v. Rollefson Constr. Co.*, 52 Cal. 2d 720, 725-26 (1959); *UFITEC, S.A. v. Carter*, 20 Cal. 3d 238, 249

n.2 (1977) ("Although a party may ordinarily not change his theory on appeal, the rule does not apply when the facts are not disputed and the party merely raises a new question of law.").

When the facts relating to a new argument on appeal "appear to be undisputed" and "probably no different showing could be made on a new trial," as in this case where Respondent has asserted numerous times that it has never done business in Nevada, then "it is deemed appropriate to entertain the contention as a question of law on the undisputed facts and pass on it accordingly." *Panopulos,* 47 Cal. 2d at 341.

In the instant case, Respondent is a foreign LLC who has never done business in Nevada and has never been licensed in Nevada.

The seminal case of *AA Primo Builders, LLC v Washington*, 126 Nev. 578 (2010) stands for the concept that Plaintiff can disregard its legal obligations and still sue. However, the facts of that case distinguish its holding from the facts in the instant matter.

In *AA Primo*, the Plaintiff was a NEVADA LLC. The ruling in *AA Primo* was that a Nevada LLC is entitled to sue and be sued even if in a default status, because it once was organized as a company which wanted to be licensed in Nevada as a Nevada business. This is not the case with the instant matter.

In the instant matter, as is seen in the Complaint, Respondent is a not an LLC organized under NRS 86.274 but

is organized in a foreign state and is thus under the provision of NRS 86.5463 and NRS 86.544. NRS 86.5463 states:

> "If a foreign limited-liability company has filed the initial or annual list in compliance with NRS 86.5461 and has paid the appropriate fee for the filing, the cancelled check or other proof of payment received by the foreign limited-liability company constitutes a certificate authorizing it to transact its business within this State until the last day of the month in which the anniversary of its qualification to transact business occurs in the next succeeding calendar year."

In fact, in *AA Primo*, the Nevada Supreme Court specifically addresses this issue by stating that perhaps this is a challenge under NRCP 17.

NRCP 17 states in pertinent part:

"(b) Capacity to Sue or Be Sued. Capacity to sue or be sued is determined as follows:
(1) for an individual, including one acting in a representative capacity, by the law of this state;
(2) for a corporation, by the law under which it was organized, unless the law of this state provides otherwise; and
(3) for all other parties, by the law of this state."

The problem is that for LLC's this issue is not that helpful either, as NRCP 17(b) only addresses corporations and not LLCs. There is no particular common law ruling that addresses the exact circumstance before this court. However the clear language of the cited NRS chapter 86 rule does. It states that this Foreign LLC (a circumstance not addressed in AA Primo), cannot maintain this lawsuit in this current configuration. Therefore, as to this

circumstance, this complaint must be dismissed as to these Defendants.

It is an UNDISPUTED FACT that Respondent is a foreign LLC and was not licensed when it began the lawsuit. The statute does not address the COMMENCEMENT of a lawsuit as whether that constitutes transacting business or not. Appellants believe that since commencing a lawsuit is not listed as an activity that is "not doing business" then commencing a lawsuit is doing business in the state of Nevada. As such, by doing business in the State of Nevada without a license, Respondent is in violation of NRS chapter 86 as such is prohibited from filing this lawsuit. Plaintiff must dismiss and refile the lawsuit after it is reinstated.

CONCLUSION

For all of the reasons set forth, Appellants request remand of all causes of action.

Dated this 12th day of May, 2022

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ATTORNEY'S CERTIFICATE

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:

[X] This brief has been prepared in a monospaced typeface using MICROSOFT WORD with Courier New typeface, 12 point font.

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:

[X] Does not exceed 15 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 12th day of May, 2022

Respectfully submitted,

/s/ Andrew Wasielewski

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that this document and the Appendix was filed electronically with the Nevada Supreme Court on May 12, 2022. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Michael H Singer
Supreme Court Settlement Judge

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