**IN THE SUPREME COURT OF THE STATE OF NEVADA**



**Case No. 83356**

**GREGORY GARMONG**,

*Appellant*

--against--

**WESPAC; GREG CHRISTIAN,**

*Respondents*

Appeal from the Second Judicial District Court of Washoe County, Nevada
Judge Lynne Simons, Case No. CV12-01271

# APPELLANT'S REPLY BRIEF

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## I. INTRODUCTION

The arbitrator, the District Court, the Court of Appeals, and the Supreme Court have all refused to decide Plaintiff's Motion for Partial Summary Judgment ("PMPSJ", AA 1/59-108), dated November 30, 2017, on the merits. The entire case would have been decided in early 2018 with a proper decision of PMPSJ, but it was not. Had the PMPSJ been decided according to Nevada law, the case would necessarily have been decided entirely in Dr. Garmong's favor. The appellant cannot explain the reluctance of the arbitrator and courts to address the issue.

This is the second appeal in the case dealing with attorneys fees. As summarized at First AOB (8/JA 1240-1317), pages xvi-xvii, and the Second AOB (January 12, 2022) pages xiv-xv, the primary issues of these appeals are the failure of the arbitrator and the courts properly to decide PMPSJ and the award of attorneys fees. This Second Appeal is Dr. Garmong's last chance to have the issue decided.

The case is also remarkable because in this Second Appeal Wespac seeks to rely upon the holdings of the appellate courts in the First Appeal as to liability and fees. That reliance is based upon the doctrine of law of the case established in the First Appeal. But there are at least two main reasons why that doctrine is inapplicable here: First, the facts were not correctly stated and the legal issues were never decided in the Order of Affirmance (AA 8/1318-1328) of the First Appeal, and, second, even

if they were decided, the "clearly erroneous/manifest injustice" exception to the doctrine of law of the case applies here.

## II. WESPAC'S ANSWER REFUSED TO ADDRESS THE PRIMARY SUBSTANTIVE ISSUES

Standard of review. The application and interpretation of the doctrine of law of the case, and exceptions thereto, are questions of law that are reviewed *de novo.* Estate of Adams By and Through Adams v. Fallini, 132 Nev. 814, 818-19 (2016). In assessing exceptions to the doctrine, the Court must evaluate whether the prior holdings are "so clearly erroneous that continued adherence to them would work a manifest injustice." Clem v. State, 119 Nev. 615, 620 (2003).

The second AOB, at 13-45, discusses the substantive law and facts that must be applied in deciding this Second Appeal.

The issues presented in the First Appeal were never decided by the appellate courts (or the arbitrator or the District Court).

Second AOB at 13-45 discusses the substantive issues, law, and facts underlying the Second Appeal. Wespac's Answering Brief refuses to discuss the issues, law, and facts, stating at 14, "In his Statement of the Issues, Appellant seeks to re-litigate other issues, including the denial of his motion for partial summary judgment and the issue of the applicability of NRCP Rule 68 in the Arbitration

proceedings[.]" This is a suggestion that the issues and argument found at Second AOB 13-45 have already been decided, but they have not. This is a different appeal, and at most Wespac can attempt to rely upon the doctrine of law of the case. Moreover, the Answering Brief points to no order or opinion where they were previously decided, and in fact there was no disposition of any type.

Although the Courts found against Dr. Garmong in the First Appeal, the issues that he posed were never addressed or decided according to Nevada law. Accordingly, there is no basis to assert either a prior decision on the substantive issues or the doctrine of law of the case.

As held by Wheeler Springs Plaza, LLC v. Beemon, 119 Nev. 260, 266 (2003), "Under the law-of-the-case doctrine, when an appellate court decides a rule of law, that decision governs the same issues in subsequent proceedings. The doctrine only applies to issues previously determined, not to matters left open by the appellate court." The doctrine does not apply to decisions where the issues were not addressed according to law. The issues raised by Dr. Garmong in the First Appeal were never determined by the appellate courts.

Even if the issues had been decided, those decisions are not applicable here because they were not properly decided according to Nevada law.

Further, as discussed at Second AOB 8-12, if there is an attempt to invoke the

doctrine of law of the case, the following exception applies. Clem v. State, 119 Nev. 615, 620 (2003) held: "We will depart from our prior holdings only where we determine that they are so clearly erroneous that continued adherence to them would work a manifest injustice." Similarly, Arizona v. California, 460 U.S. 605, 618 n.8, (1983), held "Under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." In this case a departure from the prior holdings of the Court of Appeals in the first appeal is justified.

Wespac's response

Wespac's Answer does not disagree with (or even address) the analysis of law of the case set forth at AOB 8-12 or the substantive legal and factual analysis presented at AOB 13-45 that the arbitrator, the District Court, and the Court of Appeals all failed to properly apply the governing law in relation to subject matter of the First Appeal. Instead, the Answer at 14 argues only that "Appellant seeks to re-litigate other issues[.]" To the contrary, it was Wespac that necessitated the discussion of law of the case and whether the earlier decision of the Court of Appeals, affirmed by the Supreme Court, applied to this Second Appeal.

The appellate courts are now called upon to decide whether the holdings under which the First Appeal were decided, as stated in Clem, "are so clearly erroneous that

continued adherence to them would work a manifest injustice."

The Court should also consider the substantive issues pursuant to the plain-error doctrine.

Standard of review. Plain error is a legal issue, reviewed *de novo*. *See* Green v. State, 119 Nev. 542, 545 (2003).

A further reason for this Court to consider the substantive issues raised at Second AOB 13-45 is the plain error doctrine.

As held in Patterson v. State, 111 Nev. 1525, 1530 (1995), this Court may address plain error *sua sponte*. "An error is 'plain' if 'the error is so unmistakable that it reveals itself by a casual inspection of the record.' Landmark Hotel & Casino, Inc. v. Moore, 104 Nev. 297, 299-300 (1988), described "plain error," as an error "so substantial as to result in a miscarriage of justice." That definition accurately characterizes the many errors made in the adjudication of PMPSJ and set forth in the Second AOB at 13-45. Ringle v. Bruton, 120 Nev. 82, 96 (2004) further elaborated: "Irreparable and fundamental error is error that, if not corrected, would result in a substantial miscarriage of justice or denial of fundamental rights and is only present when it is plain and clear that no other reasonable explanation for the verdict exists."

The substantive issues raised at Second AOB 13-45 have been discussed by Dr. Garmong throughout this lawsuit, and have been steadfastly ignored by the

arbitrator, the District Court, the Court of Appeals, and the Nevada Supreme Court.

Proper decision of the substantive issues is independent of denial of Appellant's Motion for Extension of Time

A subsidiary matter, discussed next, is the denial of Appellant's Motion for Extension of Time. The substantive issues discussed at Second AOB 13-45 were raised and briefed from the time of the arbitrator's evasion of Nevada law and are not part of the process leading to Appellant's Motion for Extension of Time, and accordingly are considered apart from the denial of that Motion.

## III. DENIAL OF APPELLANT'S MOTION FOR EXTENSION OF TIME.

Standard of review. A district court's order denying a motion for an extension of time is reviewed for an abuse of discretion. *See* Saavedra-Sandoval v. Wal-Mart Stores, Inc., 126 Nev. 592, 598 (2010).

Abuse of discretion by District Judge

As set forth at Second AOB 46, "The denial was an abuse of discretion." There followed a discussion of the abuses.

A. First AOB at 45-52 discusses the denial of Dr. Garmong's Motion for Extension of Time. Specifically, the District Court's Order Denying Motion for Extension of Time (AA 9/1454-1465) at AA 9/1462:13-20 sets forth three reasons

for denying Plaintiff's Motion: "The public's interest in expeditious resolution of appeals," "the parties' interests in bringing litigation to a final and stable judgment," and "judicial administration concerns." Second AOB at 47-49 set forth a chronology of events demonstrating that there was no harm to concerns of judicial administration caused by the short delay in deciding the Motion. Second AOB at 49 demonstrated that there was no prejudice to either party's interests in granting the short extension requested by Dr. Garmong, and in any event the ignoring of Nevada law by the District Court cannot be said to lead to a "final and stable judgment." Second AOB at 49-50 pointed out that the District Judge identified no factual basis for the third argument, "judicial administrative concerns." This argument was purely make-weight. In short, denial of the Motion for Extension of Time was an abuse of discretion, because it was not based upon any facts in the record, and was contrary to the actual sequence of events as demonstrated by the chronology presented in the Second AOB at 47-49. Clark County Liquor and Gaming Licensing Bd. v. Simon & Tucker, 106 Nev. 96, 97 (1990); City Council of City of Reno v. Irvine, 102 Nev. 277, 279-80, n. 4 (1986); Casey v. Albertson's Inc,, 362 F.3d 1254, 1257 (9th Cir. 2004).

Wespac's Answer did not respond to this point and the chronology at all, thereby implicitly conceding that the point was correct.

B. As discussed at Second AOB 46-47 and his Declaration, Dr. Garmong's counsel lost track of this deadline, which did not have a date certain, and consequently missed it as a result of excusable neglect (AA 8/1424). See Motion for Extension of Time and accompanying Declaration of Carl M. Herbert. Wespac's Answer did not address excusable neglect at all, thereby tacitly conceding it.

In Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 395 (1993), the United States Supreme Court set forth the factors to be considered in assessing "excusable neglect," as paraphrased by Pincay v. Andrews, 389 F.3d 853, 855 (9th Cir. 2004), (1) the danger of prejudice to the non-moving party, (2) the length of delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the moving party's conduct was in good faith. The District Court did not consider the facts of record and thereby abused its discretion in denial the Motion for Extension.

Under the present facts, factor (1) is established in favor of a finding of excusable neglect because neither the District Court nor Wespac asserted any prejudice to Wespac, the non-moving party. Factor (2) also favors a finding of excusable neglect in light of the demonstration of the unchallenged chronology set out at Second AOB at 47-49, proving that there was no delay. Factor (3) also favors

a finding of excusable neglect because the inadvertent error was not within the reasonable control of Dr. Garmong's counsel in view of the absence of a date certain for the filing. As to factor (4), as soon as Dr. Garmong's counsel was apprised of his inadvertent mistake, he immediately proceeded with the filing of the required papers. There was no bad faith delay.

Wespac's Answer does not address this point, thereby conceding it.

C. As discussed at Second AOB 50-51, counsel for Wespac violated the letter and spirit of Nevada Rule of Professional Conduct ("RPC") Rule 3.5A.

As set forth at Second AOB 51, RPC 3.5A, entitled "Relations With Opposing Counsel," states:

> When a lawyer knows or reasonably should know the identity of a lawyer representing an opposing party, he or she should not take advantage of the lawyer by causing any default or dismissal to be entered without first inquiring about the opposing lawyer's intention to proceed.

The sense and spirit of RPC 3.5A is not to take advantage. Not surprisingly, Wespac interprets Rule 3.5A much more narrowly. In Wespac's view, their employees and attorneys are free to engage in sharp practice with their clients, other attorneys, and the public generally as long as the result is not termination of the case.

This is an important difference in viewpoints for this Court to resolve. "This court reviews a district court's interpretation of a statute or court rule—in this case,

SCR 155(4)(a)—de novo, even in the context of a writ petition." Marquis & Aurbach v. Eighth Jud. Dist. Ct., 112 Nev. 1147, 1156 ( 2006).

D. As a supplement to Rule 3.5A, other jurisdictions have suggested the need for "professional courtesy" and the "golden rule." See Second AOB at 51-52.

In Wespac's view, professional courtesy and the golden rule operate in one direction only, to its benefit only. On several occasions, Dr. Garmong's counsel extended professional courtesies to Wespac's counsel during the lawsuit, for example, granting him additional time to file a paper when he was moving his office. That same courtesy should have been reciprocated.

## IV. DENIAL OF MOTION TO STRIKE

As discussed at AOB 39-45, the second award of attorney's was based upon improper declarations of Mr. Bradley and Mr. Hume.

Bradley Declaration

Wespac offered a first Declaration of Mr. Bradley, which Dr. Garmong challenged with his Motion to Strike because *inter alia*, there was no evidence that it was made upon personal knowledge, as required by law. Even Mr. Bradley recognized that there was no evidence that his declaration was made on personal knowledge. So with the Reply he submitted an untimely "Supplemental Declaration of Thomas C. Bradley," which did state, "I, Thomas C. Bradley, declare under penalty

of perjury to the following facts, knowing them to be true of my own personal knowledge," and a new set of facts. Defendant's Opposition to Plaintiff's Motion to Strike explained, "In any event, counsel has attached a supplemental declaration that includes the words 'personal knowledge.'" The District Judge ignored Mr. Bradley's admission of insufficiency of his original Declaration, and made a factually unsupported conclusion "The Court is satisfied Mr. Bradley's first declaration is legally sufficient." No findings of fact were made to support the District Court's finding of "satisfaction." Appellant and this Court have no basis for assessing whether the District Court's "satisfaction" was legally supportable.

Regarding the wording of the original Bradley Declaration, for some reason Mr. Bradley omitted the express language referencing "personal knowledge," which normally appears in Declarations. That admission in itself raises a serious doubt concerning the personal knowledge of the declarant of the facts set forth in the listing of charges that accompanied the Declaration. The Reply gives no reason why Mr. Bradley omitted a straightforward statement that he had personal knowledge of the facts set forth in the listing of charges. The only possible explanation is that he did not have such personal knowledge when he filed his original Declaration. Perhaps somehow he gained "personal knowledge" when he prepared his Supplemental Declaration. But we will never know.

Wespac falsely argues that Dr. Garmong demands that a Declaration contain the words "personal knowledge." Dr. Garmong made no such assertion. But he does assert that, at the very least, something in the Declaration should establish evidentiary foundation that the Declaration was in fact made on "personal knowledge." The District Judge's Order Denying Motion to Strike states,

> The Court is satisfied Mr. Bradley's first declaration is legally sufficient because 'it states positively the facts and circumstances upon which such belief is founded' as required by Morgan. Id. For example, Mr. Bradley details the ten reasons he believes his hourly rate of $395.00 per hour is fair. Additionally, Mr. Garmong cites no authority which strictly requires the words 'personal knowledge' to be included in the declaration and it is clear Mr. Bradley's declaration is based on facts he has personal knowledge of.

That is, according to the District Court the original Bradley Declaration establishes an hourly rate.

But the original Declaration also asserts an alleged number of hours expended. There is absolutely nothing to suggest that Mr. Bradley had "personal knowledge" that the number of hours stated in the supporting documentation was correct. Mr. Bradley does not assert that he contemporaneously prepared any records of his hourly expenditures and that those records were used to prepare the supporting documentation, not does he assert that he himself prepared the supporting documentation. By omitting the statutory language "personal knowledge," Mr.

Bradley left himself open to questions as to how the supporting documentation came into existence. He provided no information on that point.

District Courts are required to provide findings of fact for use of the parties and the appellate Court. Schwartz v. Est. of Greenspun, 110 Nev. 1042, 1050 (1994) held,

> However, we caution the trial bench to provide written support under the Beattie factors for awards of attorney's fees made pursuant to offers of judgment even where the award is less than the sum requested. It is difficult at best for this court to review claims of error in the award of such fees where the courts have failed to memorialize, in succinct terms, the justification or rationale for the awards. Such findings are of special importance where, as here, large sums are awarded as fees.

Particularly where, as here, the District Court is attempting to replace the plain requirement of Rule 56 of "personal knowledge" with some vague reference to something else which is undefined, it is required to set forth findings of fact to identify exactly what that something else is. There is simply no legally sufficient Declaration of Mr. Bradley of record to support the second amended motion for attorney's fees.

Wespac's Answering Brief does not respond to this point. There is absolutely nothing in the record to suggest that Mr. Bradley had "personal knowledge" of the exact figures appearing in the supporting documentation, or how he allegedly knew that they were "true and correct."

Hume Declaration

There is no mention of the Hume Declaration in the Answering Brief, and Wespac therefore concedes that it was improper as it was not timely filed.

## V. SUMMARY AND CONCLUSION

Wespac tacitly concedes the principal issue, the fact that the arbitrator, the district court, the Court of Appeals, and the Supreme Court have refused to discuss PMPSJ substantively. This Court should now rectify this oversight and decide the Plaintiff's Motion for Partial Summary Judgment. Additionally, this Court should find that the District Court abused its discretion by refusing an extension of time to file an opposition to Wespac's supplemental motion for attorney's and remand the case back to the District Court to decide the issue of fees on the merits.

/S/ Carl M. Hebert
CARL M. HEBERT, ESQ.

Counsel for plaintiff/appellant Garmong

## ATTORNEY'S 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 WordPerfect 12 in 14 point Times New Roman.

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 petition exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains **3,151** words.

3. Finally, I hereby certify that I have read this 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 15th day of April, 2022.

/S/ Carl M. Hebert
CARL M. HEBERT, ESQ.

Counsel for Appellant Garmong

**PROOF OF SERVICE OF APPELLANT'S OPENING BRIEF**

I, Carl M. Hebert, certify that, on April 15, 2022, I served the Appellant's Reply Brief on Thomas C. Bradley, Esq., counsel for respondents Wespac and Greg Christian, through the Court's electronic filing system to his e-mail address, tom@tombradleylaw.com, consistent with Nevada Electronic Filing and Conversion Rule 9(c).

DATED this 15th day of April, 2022.

/S/ Carl M. Hebert
CARL M. HEBERT, ESQ.

Counsel for appellant Garmong