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 PETITION FOR REVIEW BY THE SUPREME COURT

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Pursuant to NRAP 40B(a), this Petition presents for review six questions.

NRAP 40B(a) lists three relevant considerations that the Court may assess in deciding whether to grant review of each question. The listed factors are

> (1) Whether the question presented is one of first impression of general statewide significance;
>
> (2) Whether the decision of the Court of Appeals conflicts with a prior decision of the Court of Appeals, the Supreme Court, or the United States Supreme Court; or
>
> (3) Whether the case involves fundamental issues of statewide public importance.

In view of the word limits on this Petition, for each of the following questions the number(s) of each applicable factor(s) are listed, rather than the entire description of the factor.

Question 1. Whether appellate courts may, without explanation, omit to address questions/issues presented and decline to apply controlling precedent, statutes, Canons, and rules, and established facts.

Factors: (1), (2), (3)

Throughout this litigation the arbitrator, the District Court, and the appellate courts have chosen not to address questions/issues whose proper resolution would have benefitted the appellant, in his view, and have declined to follow controlling precedent, statutes, Canons, and rules, and established facts. This policy creates the

impression of the avoidance of the Judges' oath of office (NRS §§282.010-282.020); Nevada Code of Judicial Conduct ("NCJC") Canons 1-2 and related Rules; and precedent such as Whitehead v. Nevada Commission on Judicial Discipline, 111 Nev. 70 (1995). Specific examples are discussed in Questions 2-6. The discussions are necessarily brief, as the Order of Affirmance by the Court of Appeals did not address Questions 2-6, even though they were presented as issues in the appellant's opening brief.

Question 2. Whether the courts must apply controlling precedent to decide Plaintiff's Motion for Partial Summary Judgment ("PMPSJ").

Factors: (2),(3)

This matter was presented as Issue 1 in appellant's opening brief filed January 12, 2022 in the Court of Appeals ("AOB"),[1] but the Order of Affirmance filed July 21, 2022 ("Affirmance") omitted to address it for reasons which have not been explained.

During arbitration, appellant filed his PMPSJ. PMPSJ included 20 undisputed material facts ("UMFs") that were fully supported with admissible evidence (JA 1/61-

[1] The purpose of references to the AOB is to demonstrate that the questions raised here were presented to the Court of Appeals, not to incorporate by reference arguments from the AOB.

66). Based upon the UMFs, PMPSJ also included legal argument establishing respondents' liability (JA 1/61-102). Respondents opposed, without submitting any admissible evidence to dispute the UMFs and without submitting any legal basis to contest PMPSJ.

When ruling on PMPSJ, the arbitrator admitted (JA 3/0392:3) that "Many of the facts relied upon by Claimant [Garmong] are indeed 'undisputed,'" yet disregarded Plaintiff's UMFs and refused to apply the mandatory approach of Wood v. Safeway, Inc., 121 Nev. 724, 729 (2005) for adjudicating summary judgment motions. Instead, he issued an Order (JA 3/0391-0394) giving as his sole rationale for refusing to follow Wood and for denying the PMPSJ, that a "merits hearing" must be held as part of the resolution of PMPSJ to determine the credibility of witnesses. See Order JA 3/0392, third paragraph, stating: "A merits hearing is particularly appropriate where, as here, the resolution of the claims is so heavily dependent on the opportunity of the parties to test the credibility of the two principle [sic] witnesses[.]" The justices of the Court of Appeals agreed (JA 8/1323, full paragraph). Both the arbitrator and the Court of Appeals were aware of the controlling precedent, as pointed out in the first appellant's opening brief (JA 8/1279-80), that the credibility of affiants/declarants may not be weighed by an arbitrator or judge as part of resolution of a motion for summary judgment: Pegasus v. Reno Newspapers, Inc.,

118 Nev. 706, 713-714 (2002), holding, "Neither the trial court nor this court may decide issues of credibility based upon the evidence submitted in the motion [for summary judgment] or the opposition." Pegasus is in accord with the decision of the United States Supreme Court in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), holding: "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."

Wood is the controlling precedent on this issue. Neither the arbitrator nor the Affirmance nor the courts made any mention of this precedent, and all ruled in favor of the respondents on the issue. This omission to apply the law was contrary to the facts, because the arbitrator had expressly made the determination of credibility his reason for refusing to adjudicate the PMPSJ properly according to Wood, see Order JA 3/0392, third paragraph, quoted *supra*.

The "merits hearing" justification to determine credibility as part of the summary judgment proceeding is contrary to the law of summary judgment. Appellant should have prevailed in the arbitration at that stage based upon uncontested UMFs and controlling substantive law. At that point a "merits hearing" was improper, and PMPSJ should have been decided, in Appellant's favor, upon the

record. The claims of the first amended complaint have absolutely no dependence upon witness credibility, and no credibility question was raised by the respondents.

The Affirmance refused to discuss "credibility" and "merits hearing," as well as Wood, Pegasus, and Anderson, which is troubling to the appellant.

Question 3. Whether the arbitrator and the courts were required to adhere to the agreement of the parties, the order of the arbitrator, and JAMS Rule 24 in awarding fees and costs, but failed to do so.

Factors: (2), (3)

This matter was presented as Issue 4 in the AOB, but the Affirmance did not address it. A decision on this issue would have required a decision in Appellant's favor.

U.S. Design & Const. Corp. v. International Broth. of Elec. Workers, 118 Nev. 458, 462 (2002) held: "A district court is not permitted to award attorney fees or costs unless authorized to do so by a statute, rule or contract." The first step of the inquiry into the award of attorneys' fees and/or costs is whether there is an applicable statute, rule, or contract that authorizes an award attorneys' fees and costs.

During the course of the arbitration process, and as permitted by the arbitration rules, the parties and the arbitrator agreed that only certain of the Nevada Rules of Civil Procedure would be applied to govern the arbitration. The arbitrator

also entered an order to the same effect. On August 11, 2017, after a conference between the attorneys and the arbitrator, the arbitrator entered a "Discovery Plan and Scheduling Order" ("Scheduling Order"). One purpose of this Scheduling Order was to record and give notice to the parties and to the arbitrator exactly what rules would govern the arbitration. The Scheduling Order, JA 1/0014:17-20, stated:

> The parties have agreed that Rules 6, 16.1(a)(1)(A-D), 30, 33, 34, and 37 of the Nevada Rules of Civil Procedure and the deadlines for filing Oppositions and Replies found in Washoe District Court Rule 12 will generally govern this case unless the arbitrator rules otherwise.[2]

The parties did not agree that fee shifting pursuant to NRCP 68 would be part of the arbitration proceedings, and there was no other applicable law.

Scheduling Order JA 1/015:23 also entered an order to the same effect, stating, "IT IS SO ORDERED." followed by the arbitrator's signature.

After the arbitrator's award to the respondents, they sought an award of attorney's fees based on NRCP Rule 68. Pursuant to JAMS Rule 24, the Scheduling Order, and the agreement of the parties expressed in the Scheduling Order, NRCP Rule 68, authorizing offers of judgment, was not included in the set of rules governing the arbitration.

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[2] Scheduling Order JA1/0015:12-13 added NRCP 56 providing for summary judgment.

Regarding the provision "unless the arbitrator rules otherwise," JAMS Rule 24 prohibits the arbitrator from unilaterally ruling "otherwise." The parties must also agree before the arbitrator may change the rules governing the arbitration.

There was no statute, rule or contract term in effect in the arbitration authorizing an award of attorney's fees under NRCP Rule 68.

When the arbitrator changed the Scheduling Order to include NRCP 68 in the arbitration, he breached and disregarded JAMS Rule 24 providing that the parties and the arbitrator may agree on the rules governing the arbitration, and that the arbitrator "shall" be guided by those rules agreed upon by the Parties.

The arbitration was governed in part by the rules of JAMS. JAMS Rule 24(c) and (g) provides in relevant part:

> (c) In determining the merits of the dispute, the Arbitrator shall be guided by the rules of law agreed upon by the Parties . . . The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy. . . . (g) The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' Agreement or allowed by applicable law.

(Emphasis added). In short, the arbitrator may not make any award that is not within the agreement of the parties.

There was an agreement between the parties (JA 1/14:17-20 and JA 1/15:12-

13) listing a number of rules of civil procedure to be included in the governing law of the arbitration, but NRCP Rule 68 was never included. Thus, the arbitrator disregarded and violated the provision of Rule 24 that he "shall be guided" by those rules agreed upon by the Parties. Adherence by the arbitrator to the agreement of the parties is mandatory. The arbitrator had no choice under the law but to follow the "rules of law agreed upon by the Parties." Instead, he elected to disregard the rules of JAMS and the agreement of the parties. The courts affirmed his refusal to follow the laws. NRCP Rule 68 was therefore never "applicable law" in the arbitration.

This aspect of the Scheduling Order, expressly stating the rules that would govern the arbitration, was not altered or amended by any subsequent orders issued by the arbitrator. Indeed, this aspect of the Scheduling Order was not ever altered or amended by the arbitrator, nor did the parties ever change their contractual agreement as stated in the Scheduling Order.

Plaintiff adhered to the agreement and Scheduling Order throughout the period of the arbitration. The respondents violated the arbitrator's Order. They served an offer of judgment pursuant to NRCP Rule 68 (JA 1/0017-0018) in the arbitration on September 12, 2017, almost exactly one month after they contractually agreed that offers of judgment pursuant to NRCP 68 would not be included within the scope of rules governing the arbitration, and the arbitrator had so ordered. The

respondents did not, then or later, seek to modify their agreement with appellant, or move the arbitrator for relief from the terms of the Scheduling Order to include NRCP 68 in the rules governing the arbitration. Plaintiff did not accept Wespac's offer of judgment under NRCP 68, because he knew that the parties had agreed, and the arbitrator had ordered, that NRCP 68 would not be applicable to this arbitration.

On February 15, 2019, after an interim award in their favor, the respondents filed a motion for attorney fees and costs pursuant to Rule 68 (JA 4/0666-0694). This motion was based solely on their purported offer of judgment of September 12, 2017. Appellant filed an Opposition (JA 04/0695-0726) based upon several grounds, primarily that the rules of the arbitration did not permit offers of judgment.

The Scheduling Order provided that only certain enumerated rules of the NRCP would "govern this case unless the arbitrator rules otherwise." Neither the final award nor any other order of the arbitrator ruled that the Scheduling Order should be modified to add Rule 68 to the enumerated rules governing the arbitration, and that Rule 68 should be retroactively made part of the rules governing the arbitration. Had the final award made such a finding, the retroactive nature of the arbitrator's attempt to add Rule 68 would have been clear. In any event, the arbitrator could not alter the terms of the contractual agreement between the parties.

The arbitrator's award and its affirmation in the District Court and the Court

of Appeals is truly dismaying to the appellant. After the parties agreed, and the arbitrator ordered, that "The parties have agreed that only Rules 6, 16.1(a)(1)(A-D), 30, 33, 34, 37 (and 56) of the Nevada Rules of Civil Procedure" would govern the case, as set out in the Scheduling Order, the arbitrator unilaterally, without notice and retroactively reformed the agreement of the parties, and his own Order, to add Rule 68, twenty months after the parties had made their agreement and the Scheduling Order was entered, barring offers of judgment from the arbitration.

The arbitrator disregarded JAMS Rule 24's limitation of the award of attorney's fees to grounds agreed to by the parties, which did not include Rule 68.

The earlier affirmance at JA 8/1326 , appeal no. 80376-COA, , misinterpreted the agreement and order, stating:

> The scheduling order (to which Garmong never objected) lists a few procedural rules that would govern, but it also expressly reserves the right of the arbitrator to apply other rules, providing that various listed rules will govern 'unless the [a]rbitrator rules otherwise.' Thus, the scheduling order clearly and expressly confers authority on the arbitrator to decide which rules apply.

Appellant never objected to this provision because he had read JAMS Rule 24, knew that the arbitrator did not have unfettered authority to change the rules without agreement of the parties, and believed that the rules would be obeyed by the arbitrator.

As to "reserving the right," there is no such mechanism under the JAMS rules. The arbitrator had no discretion to grant attorneys fees contrary to the agreement of the parties. JAMS Rule 24(c) states, "The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement." JAMS Rule 24(g) states, "The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' Agreement or allowed by applicable law." The arbitrator felt he had unfettered discretion to do anything he wanted, but that is not the case.

Here, the parties agreed to the governing rules of the arbitration, and those rules did not include NRCP Rule 68. Conversely stated, nowhere did the parties agree, and nowhere did the arbitrator order, that Rule 68 would have effect in the arbitration.

In the arbitrator's Final Award of April 11, 2019, the arbitrator granted the respondents' motion and awarded attorney's fees based upon NRCP 68, which was not part of the governing law of the arbitration. JA 5/0736-0737.

The arbitrator disregarded the fact that the scheduling Order set forth separately (1) the agreement between the parties and (2) an order of the arbitrator that NRCP 68 would not be part of the governing law of the arbitration. Neither subsequently changed.

The paragraph quoted *supra* from the Scheduling Order included both an agreement between the parties and an order of the arbitrator, each setting forth the governing rules of the arbitration as permitted by JAMS Rule 24. The agreement between the parties could be modified only by a subsequent new agreement between the parties, and there was no such new agreement. The arbitrator has no authority to change the agreement between the parties contrary to the JAMS rules. The arbitrator did have the authority to change his own order, but only with the agreement of the parties. But he never sought agreement of the parties to change his order, nor did he change his order, nor did he give Appellant notice that he intended to do so. The record contains no evidence of the arbitrator ever ruling that NRCP 68 would be included in the rules governing the arbitration.

Thus, when the District Court's order on the second motion for fees (JA 9/1476-1486) based its award on the Order of Affirmance (JA 9/1481-1923 and 9/1483:15-21), it based its Order on holdings that were "so clearly erroneous that continued adherence to them would work a manifest injustice."

The assessment of fees against the appellant was directly contrary to the law and constituted a manifest injustice against the appellant and left the appellant wondering whether the courts were biased against him. The Order of Affirmance should be reversed for this reason.

Question 4. Whether the arbitrator, the District Court and the Order of Affirmance incorrectly refused to apply Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52 (1981) and All Star Bonding v. State of Nevada, 119 Nev. 47, 49 (2003), which prohibit a court from revising the terms of an agreement between the parties.

Factors: (2), (3)

This matter was presented as Issue 5 in the AOB, but the Affirmance refused to address it. Scheduling Order, JA 1/0014:17-20, stated not just an order of the arbitrator, but also a contractual agreement between the parties:

> The parties have agreed that Rules 6, 16.1(a)(1)(A-D), 30, 33, 34, and 37 of the Nevada Rules of Civil Procedure and the deadlines for filing Oppositions and Replies found in Washoe District Court Rule 12 will generally govern this case unless the arbitrator rules otherwise.

(Emphasis added). Neither the arbitrator nor any court were at liberty unilaterally to change this contractual agreement between the parties. Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52 (1981), held: "Under well-settled rules of contract construction a court has no power to create a new contract for the parties which they have not created or intended themselves," and All Star Bonding, 119 Nev. at 49, held: "We have previously stated that the court should not revise a contract under the guise of construing it. Further, '[n]either a court of law nor a court of equity can

interpolate in a contract what the contract does not contain.'"

Yet the arbitrator, affirmed by the courts, did exactly that. He revised the contract between the parties to add Rule 68 to the provisions governing the arbitration.

There is no evidence of record that the parties revised their contractual agreement set forth in the Scheduling Order that NRCP 68 was not included in the rules governing the arbitration. By arbitrarily, unilaterally and retroactively changing the provision of the Scheduling Order that Rule 68 was not included in the rules governing the arbitration, the arbitrator impermissibly violated the agreement between the parties and the precedent of Old Aztec and All Star Bonding (as well as the provisions of JAMS Rule 24, discussed above). Accordingly, it was and is improper to award attorneys fees under NRCP Rule 68.

Question 5. Whether in deciding PMPSJ the arbitrator, the District Court, and the Court of Appeals incorrectly refused to apply the law of Tortious Breach of Implied Covenant of Good Faith and Fair Dealing (Fourth Claim of the FAC), breach of the Nevada deceptive trade practices act (Fifth Claim), breach of fiduciary duty (Sixth Claim), breach of fiduciary duty of full disclosure (Seventh Claim), and Breach of NRS 628A.030 (Tenth Claim).

Factors: (2), (3)

This matter was presented as Issue 2 in the AOB, but the Affirmance refused to address it.

The factual bases of the Fourth-Seventh claims of the first amended complaint are discussed in PMPSJ at pages JA 1/73-95 and of the Tenth Claim at JA 1/98-101. Repeating this full discussion is beyond the page limitations of this petition. But, to take an example, UMF 19 (JA 1/65-66) provided a sufficient factual basis to find each of Claims 4-7 and 10 in favor of appellant. UMF 19, concealment by respondents of the disciplining and suspension by the SEC of respondent Christian, is based solely upon Christian's own admission in defendants' opening arbitration brief. (JA 1/ 34:26-35:4) Appellant first learned of this concealment when he read that brief in September, 2018, over a decade after he had been defrauded by respondents Wespac and Christian. JA 3/244, ¶ 34. There was no conceivable "credibility" issue there (even if determination of "credibility" in adjudicating motions for summary judgment was not contrary to precedent) that would bar adjudication of the claims supported by UMF 19. See the Fourth Claim (JA 1/75:15-16, JA 1/77:23 and 28), Fifth Claim (JA 1/87:21), Sixth and Seventh Claims (JA 1:91:1-5), and Tenth Claim (JA 1/100:14). That is, the assertion by the arbitrator and the Court of Appeals of the need for "merits hearing" to assess "credibility" as part of the summary judgment resolution, besides being contrary to Pegasus and

Anderson precedent, was a way to justify an abuse of discretion against Appellant by refusing to apply Wood. There can be no doubt that these holdings were "so clearly erroneous that continued adherence to them would work a manifest injustice." They may not serve as the underlying basis for the award of fees and costs in this second appeal and, under the principles discussed above, demand reversal of the decision of the first appeal, no. 80376-COA referenced above.

Question 6. Whether appellate courts should adhere to prior decisions under the law-of-the-case principle where the prior decisions are so clearly erroneous that continued adherence to them would work a manifest injustice.

Factors: (2),(3)

The Affirmance at numerous locations relied upon "law of the case." This principle applies only where the matter has actually been decided previously by an appellate court in the case, AOB pg. 6. Dictor v. Creative Management Services, LLC, 126 Nev. 41, 44 (2010). In this case, the arbitrator and courts refused to decide many of the questions/issues presented to them. Questions 2, 3, 4, and 5 have never been decided by any court in this case, even though Appellant had presented them as issues or questions for decision.

These matters were discussed at AOB pages 7-10 and 39, but were never adjudicated by any appellate court.

The Affirmance completely misapplied Clem v. State, 119 Nev. 615 (2003). In assessing applicability of this exception to the doctrine of law-of-the-case, the court must first evaluate under Dictor whether the matter has been previously adjudicated by an appellate court in the case, and then determine whether the prior holdings are "so clearly erroneous that continued adherence to them would work a manifest injustice." Clem, 119 Nev. at 620. Affirmance at 3 states: "Garmong argues that this court's misapplication of the law should allow us to depart from the doctrine of law of the case. But this argument is misleading and misconstrues the standard for departing from the law of the case." The proper standard is as stated previously, "manifest injustice." There is no question that a manifest injustice, by avoiding issues and holding directly contrary to precedent, was visited upon the appellant.

Appellant did apply this correct standard. Specific instances of such "manifest injustice" resulting from appellate decisions in this case, together with references to the record, are discussed at AOB pages xi-xiii, 7, 10, 12, 13, 16, 21, 37, 39, and 53, *inter alia*. The Affirmance does not refute or even discuss these instances, thereby implicitly admitting that they are genuine "manifest injustices" under the Clem standard, which justify a departure from the law-of-the-case doctrine.

SUMMARY AND CONCLUSION

This case is particularly frustrating to the appellant because the arbitrator, the District Court, and the appellate courts have persistently not decided valid issues raised by the appellant and which should have been decided in his favor. Striking examples are the refusal to follow the precedent of Pegasus, Anderson, Wood. Old Aztec, and All Star Bonding, the violation of JAMS Rule 24, the distortion of the agreement and order from the arbitrator's Scheduling Order, and introducing Rule 68 long after the parties and the arbitrator had agreed, and the arbitrator ordered, that it should not be part of the arbitration process.

The Court should rectify the obvious manifest injustice done to the appellant by reversing the earlier holdings and deciding this appeal in his favor.

DATED this 7th day of December, 2022.

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

Counsel for appellant

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 **4,042** 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 7th day of December, 2022

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

Counsel for Appellant

PROOF OF SERVICE OF APPELLANT'S PETITION FOR REVIEW

I, Carl M. Hebert, certify that, on December 7, 2022, I served the Appellant's Petition for Review by the Supreme Court 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 7th day of December, 2022.

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

Counsel for appellant Garmong