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 OPENING BRIEF

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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 are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellant Gregory Garmong is an individual. The undersigned has appeared as counsel for him at all times in the District Court and this Court.

There have been no other counsel for the appellant in the District Court or this Court.

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

Attorney for appellant

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JURISDICTIONAL STATEMENT

There is jurisdiction in this Court under NRAP 3A(b)(8): "A special order entered after final judgment." The District Court made an award of attorney's fees post-confirmation of an arbitrator's final award. Lytle v. Rosemere Estates Prop. Owners, 129 Nev. 923, 925-26 (2013).

This is appeal from an order confirming an arbitration award, NRS 38.243(1), and awarding attorneys fees. *Id.* at (3). On March 11, 2019, the arbitrator issued his Final Award (AA 5/0727).[1] Garmong requested that the Final Award be vacated by the District Court, and on August 8, 2019 the District Court entered an order confirming the arbitrator's Final Award (AA 6/1095). Garmong moved to alter or amend this Order. Notice of entry of the District Court's Order Denying Motion to Alter or Amend was served and filed on December 9, 2019 (AA 7/1221). The District Court's Order Denying Motion to Alter or Amend was a final order which terminated the underlying case.

Garmong took an appeal. The Court of Appeals decided against him. Garmong v. WESPAC; and Greg Christian, No. 80376-COA, Order of Affirmance

[1] References to the Appellant's Appendix ("AA") include the volume number, a slash and the document number found in the lower right corner of each page followed, when appropriate, by a colon and the line number on the page.

entered on December 1, 2020.

Defendants/respondents WESPAC and Christian moved for attorney's fees. Defendants' Second Amended Motion for Attorney's, filed February 18, 2021. (AA 8/1331). The District Court awarded attorney's fees and confirmed the arbitration award (again) on July 12, 2021. Order Granting Defendants' Second Amended Motion for Attorney's Fees and Costs; Order Confirming Arbitrator's Final Award, filed July 12, 2021. (AA 9/1476).

On July 16, 2021 the District Court entered a "Final Judgment," which was an award of attorney's fees to the respondents. (SA 1).[2] On that same date WESPAC and Christian filed and served their written notice of entry of the Final Judgment. (SA 4).

On August 10, 2021 appellant Garmong filed a Notice of Appeal from the Final Judgment awarding attorney's fees. SA 9-10.

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[2] The "Final Judgment," written notice of entry of this judgment and the second notice of appeal in this case were inadvertently omitted from the Appellant's Appendix. Therefore, appellant Garmong has prepared and filed a short Supplemental Appendix ("SA") to supply the Court with these filings.

ROUTING STATEMENT

This is an appeal from a postjudgment order in a civil case. NRAP 17(b)(7). It is presumptively assigned to the Court of Appeals. NRAP 17(b)(5).

I. INTRODUCTION

This appeal is required because the underlying bases for the awards of fees-- the arbitration award, the rulings of the District Court and the Order of Affirmance by the Court of Appeals either did not address or deliberately overlooked a salient flaw in the handling of this case throughout. That is the misuse of the law of summary judgment as applied in the arbitration and the refusal of the trial court and the Court of Appeals to rectify the error. Garmong's Plaintiff's Motion for Summary Judgment ("PMPSJ") (AA 1/59-108) in the arbitration was never decided according to law, contrary to the mandatory requirement of Wood v. Safeway, Inc., 121 Nev. 724, 729 (2005). The arbitrator, in the face of *undisputed* material facts supporting the motion for summary judgment, denied it on the grounds that he wanted to hear the case to determine the credibility of the witnesses. See Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713-14 (2002) and Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), which prohibit credibility determinations as part of summary judgment proceedings and state the mandatory steps in adjudicating summary judgment motions.

Many of the matters germane to this second appeal were also pertinent to the first appeal, since the District Court relied upon the prior determinations of the first motion (AA 4/666-678) for fees in deciding the second motion (AA 8/1331-1335) for fees. In the first appeal the Court of Appeals ignored the governing law, or misstated

or brushed past it in its Order of Affirmance (AA 8/1318-1328) that decided the first appeal.[3] Alternatively stated, the substantive basis for respondents' second motion for fees was the decision in their favor on the first motion for fees granted by the arbitrator and affirmed by the district court and the Court of Appeals. The Order of Affirmance in the first appeal was relied upon by the District Court implicitly under the doctrine of law of the case. The holdings of the first motion for fees are so clearly erroneous that continued adherence to them would work a manifest injustice.

Hsu v. County of Clark, 123 Nev. 625, 629 (2007) holds: "The doctrine of the law of the case provides that the law or ruling of a first appeal must be followed in all subsequent proceedings, both in the lower court and on any later appeal." Clem v. State, 119 Nev. 615, 620 (2003), taken with Hsu, provides important exceptions to the doctrine, including change in law, change in evidentiary facts, and an exception that is especially applicable here: "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."

As the issues and legal questions are discussed *infra*, it is necessary to address

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[3] This Court declined to address the substance of the First Appeal, so the law effective for the remainder of the case, under the doctrine of law of the case, was decided by the Court of Appeals. This is troubling, because its Order of Affirmance incorrectly stated most of the important facts.

the correct law, the incorrect positions taken by the Order of Affirmance that allegedly constitute the law of the case, and the reasons that the positions of the Order of Affirmance are "so clearly erroneous that continued adherence to them would work a manifest injustice." And, as will be explained, a further consequence of a determination that the positions taken by the Order of Affirmance are incorrect is that its decisions on the first appeal must be reversed.

II. STATEMENT OF THE ISSUES

1. Whether the arbitrator, the District Court, and the Court of Appeals incorrectly refused to apply properly the controlling precedent of Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713-14 (2002) in relation to Garmong's Plaintiff's Motion for Partial Summary Judgment ("PMPSJ").

2. Whether in deciding PMPSJ the arbitrator, the District Court, and the Court of Appeals incorrectly refused to properly apply the law of the tortious breach of implied covenant of good faith and fair dealing (Fourth Claim of the first amended complaint), 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).

3. Whether the arbitrator, the District Court, and the Court of Appeals incorrectly refused to properly apply the mandatory procedures of Wood v. Safeway, Inc., 121 Nev. 724, 729 (2005) to decide PMPSJ.

4. Whether the arbitrator, the District Court, and the Court of Appeals incorrectly refused to properly apply JAMS Rule 24 in awarding attorneys fees to respondents.

5. Whether the arbitrator, the District Court and the Court of Appeals incorrectly refused to properly 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) prohibiting a court from revising the terms of an agreement between the parties.

6. Whether the District Court had a basis for awarding attorney's fees and costs, which are the basis of this Second Appeal.

7. Whether the District Court should have granted Garmong's motion for extension of time to file an opposition to the respondents' second amended motion for attorney's fees.

III. COMBINED STATEMENT OF THE CASE AND FACTS

A. STATEMENT OF THE CASE

Nature of the case: This was an action for negligent investment advice, breach of fiduciary and fraud brought by appellant Garmong, a retiree with savings to invest, against respondents Wespac and Christian, an investment advisory firm and financial advisor, respectively.

Course of the proceedings: Garmong filed a complaint in the Second Judicial District Court on May 9, 2012. The District Court compelled arbitration at the request of Wespac and Christian. Garmong took a petition for writ to this Court seeking to prevent arbitration. The petition was denied. See the Order Denying Petition for Writ of Mandamus or Prohibition in Case No. 65899, entered on December 12, 2014.

The parties proceeded to arbitration with JAMS. An arbitration hearing was held between October 16 to 18, 2018. On March 11, 2019 the arbitrator entered an award against appellant Garmong, which included an award of attorney's fees.

In the District Court Garmong moved to vacate the arbitration award. For their part Wespac and Christian moved to confirm the award. On August 8, 2019 the District Court entered an omnibus order confirming the award, including attorney's fees and costs, and denying Garmong's motion to vacate the award.

Garmong appealed. The appeal was referred to the Court of Appeals, which

entered an Order of Affirmance on December 1, 2020 in Case No. 80376-COA.

Wespac and Christian moved for additional attorney's fees under NRS 38.243(3) for the appeal. This was their second amended motion for attorney's fees and costs filed on February 18, 2021. The District Court granted this motion and awarded additional fees in a "Final Judgment" entered on July 16, 2021.

Garmong filed a notice of appeal in this second appeal on August 10, 2021.

Disposition below. The District Court entered a "Final Judgment" on July 16, 2021 awarding the respondents additional attorney's fees incurred on appeal post-arbitration confirmation.

B. STATEMENT OF THE FACTS

This is an appeal from a District Court Order awarding a second round of attorney fees and costs to respondents.

Respondents are financial advisors and planners who, by law, NRS 628A.020, have a fiduciary duty to their clients such as Garmong, including a duty of full disclosure. Appellant, over the age of 60 at all relevant times, entrusted a portion of his life savings to defendants/respondents Wespac and Christian (collectively sometimes "Wespac") to manage and provide for his retirement. Wespac is a California company that had recently opened an office in Reno to purportedly manage the financial investments of Nevada residents. In their initial dealings and later,

Wespac concealed from Garmong that defendant Christian had previously been disciplined and suspended by the governing body of financial advisors and planners, the United States Securities and Exchange Commission ("SEC"), for defrauding clients. Wespac also concealed that it had violated, and was continuing to violate, numerous regulatory laws of the State of Nevada governing financial advisors and planners, and foreign LLCs, as well as numerous SEC regulations. (These violations are discussed in detail at AA 8/1282-1290.

These factual misrepresentations and the concealment of information were all highly material because Garmong stated under oath that he "never, never, never would have remotely considered doing business with" defendants if he had known the truth of the information that defendants falsified and/or concealed. (AA 8/1290-1292).

This initial deception by Wespac, not discovered by Garmong until after Wespac had dissipated his savings and this lawsuit had commenced, set the tone for Wespac's dishonesty in their dealings. This dishonesty resulted in Wespac wasting hundreds of thousands of dollars of Garmong's hard-earned retirement savings at a time after he had retired and could not replace the losses by subsequent earnings.

Dr. Garmong was over 60 years of age at all relevant times. There have been many cases where this court (in the past) and other courts have reacted with shock to the intentional defrauding of the elderly by investment advisors and their ilk. See

discussion at AA 8/1303-1305, and case authority such as Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598 (2000) and Estate of Wildhaber ex rel. Halbrook v. Life Care Centers, 2012 WL 5287980 (D. Nev. 2012). As the U.S. Supreme Court stated in Washington v. Glucksberg, 521 U.S. 702, 731 (1997), "[T]he State has an interest in protecting vulnerable groups-including the poor, the elderly, and disabled persons-from abuse, neglect, and mistakes." These policy positions notwithstanding, the undisputed defrauding of Garmong by the Wespac respondents prompted not a whisper of response from the arbitrator, which was endorsed by the courts.

Plaintiff filed his Complaint and later FAC (AA 1/20-30) in the District Court. At an early stage Christian falsified three declarations to persuade the District Court to refer the matter to arbitration. During the arbitration, at the arbitrator's invitation, Garmong filed PMPSJ, which was fully briefed. In ruling on the PMPSJ the arbitrator admitted that "Many of the facts relied upon by Claimant [Garmong] are indeed 'undisputed,' " yet disregarded Plaintiff's Undisputed Material Facts ("UMFs") and refused to apply the mandatory procedural approach of Wood. The arbitrator excused his disregard for this precedent by calling for a "merits hearing" as part of the summary judgment procedure to test credibility of the witnesses, which is directly contrary to law such as Pegasus and which hearing he never held in any event. The arbitrator denied PMPSJ, and the District Court and the Court of Appeals affirmed,

each refusing to apply the controlling precedents.

The case proceeded to arbitration discovery and a three-day hearing, which resulted in the arbitrator's Final Award in favor of Wespac. In reaching this decision, the arbitrator disregarded both the facts and the law presented to him.

Early in the arbitration, the parties had contractually agreed upon, and the arbitrator had ordered (AA 3/0366-0369 and 3/0391-0394), the rules governing the arbitration, as permitted by JAMS, the arbitration agency. This agreed-upon governing law did not include NRCP Rule 68, providing for offers of judgment. About a month after this contractual agreement and order, Wespac nevertheless made an offer of judgement under NRCP 68, to which Garmong did not respond because it had been agreed that NRCP 68 was not a rule governing the arbitration. About 20 months later, after the arbitrator had ruled in favor of Wespac, the arbitrator awarded Wespac attorney's fees based upon the offer of judgment. The parties never changed their contractual agreement, and the arbitrator never changed his Order establishing that NRCP 68 was not included in the law governing the arbitration.

Garmong then brought motions to vacate the arbitrator's decisions. These were denied by the District Court. The first appeal followed. This appeal was referred to the Court of Appeals, which issued its Order of Affirmance (8/AA 1318). This Court summarily declined review.

The Order of Affirmance in the first appeal ignored respondents' fiduciary duty and its breach, the perjury by respondent Christian, and breach of contract by Wespac. Equally importantly, the Order of Affirmance refused to adhere to the controlling precedent governing summary judgment and the controlling rules of the arbitration.

Respondents then moved for further attorney's fees, which was granted by the District Court. This second appeal follows.

IV. SUMMARY OF THE ARGUMENT

Many material issues common to the two appeals were improperly addressed by the Order of Affirmance. For the issues that the Order of Affirmance attempted to decide, the doctrine of law of the case governs their applicability in this second appeal and also requires revision of the decision of the first appeal.

The Order of Affirmance addressed, although not correctly, whether the arbitrator properly refused to decide PMPSJ to hold a "merits hearing" to assess credibility and properly refused to apply the law on summary judgment set forth in Wood v. Safeway, Inc., 121 Nev. 724, 729 (2005). For those issues that the Order of Affirmance attempted to decide, the doctrine of law of the case governs. But, "[i]n order for the law-of-the-case doctrine to apply, the appellate court must actually address and decide the issue explicitly or by necessary implication." Dictor v. Creative Management Services, LLC, 126 Nev. 41, 44 (2010).

The primary issues that were not addressed at all by the Order of Affirmance were application of the rules of evidence in summary judgment proceedings, the application of the JAMS rules and the principles of contract between the parties as to the governing rules of the arbitration.

That some issues were wrongly decided by the Order of Affirmance of the first appeal and others are not addressed at all raises a complexity of issues both as to the continuing viability of the result of the first appeal, and how the issue is properly addressed in this second appeal.

V. ARGUMENT

V.A. STANDARDS OF REVIEW

1. De novo review of applicability and interpretations of questions of law of the case and exceptions.

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).

2. Awards of attorneys fees are reviewed for abuse of discretion

The District Court's decision to award attorney fees is within its discretion and will not be disturbed on appeal absent a manifest abuse of discretion. Capanna v. Orth, 134 Nev. 888, 895 (2018). But "an arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law." State v. Eighth Judicial Dist. Court (Armstrong), 127 Nev. 927, 931–32 (2011) "A manifest abuse of discretion is [a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." *Id.* at 932 (alteration in original) (internal quotation marks omitted)." City of Henderson v. Amado, 133 Nev. 257, 259 (2017).

3. Review of factual determinations is based upon a standard of "clearly erroneous and not supported by substantial evidence."

A district court's factual determinations will not be set aside unless they are clearly erroneous and not supported by substantial evidence. "Substantial evidence is that [evidence] which 'a reasonable mind might accept as adequate to support a conclusion.'" J.D. Constr., Inc. v. IBEX Int'l Grp., LLC, 126 Nev. 366, 380 (2010).

V.B. THE DOCTRINE OF LAW OF THE CASE AND ITS APPLICATION HERE

Respondents and the District Court raised the circumstances that require the

application of the doctrine of law of the case and exceptions thereto in this second appeal, and the consequences of applying the exceptions. Respondents brought a Second Amended Motion for Attorneys Fees. The District Court issued "Order Granting Defendants' Second Amended Motion for Attorney's Fees, Order Confirming Arbitrator's Final Award" ("Order Granting Defendants' Second Fee Motion"), which confirmed the grounds of the arbitrator's Final Award in connection with the second fee motion, after they had already been addressed in connection with the first fee motion. Accordingly, the doctrine of law of the case is implicated for matters actually decided in first appeal.

V.B.1. The Doctrine and its Exceptions.

"The doctrine of the law of the case provides that the law or ruling of a first appeal must be followed in all subsequent proceedings, both in the lower court and on any later appeal." Hsu v. County of Clark, 123 Nev. 625, 629 (2007). Hsu, 123 Nev. at 627 further held, "We conclude that, in some instances, equitable considerations justify a departure from the doctrine that the principles set forth in a first appeal are the law of the case on all subsequent proceedings." Clem v. State, 119 Nev. 615, 620 (2003), taken with Hsu, elaborated important exceptions to the doctrine, including change in law, change in evidentiary facts, and an equitable exception that is especially applicable here: "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." See also Arizona v. California, 460 U.S. 605, 618 n.8 (1983) ("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.

V.B.2 Application of the Exceptions to the Doctrine in the Present Case.

Application of the exceptions to the law of the case as stated in Clem clearly requires departing from the holding of the first appeal and denial of attorneys fees in this second appeal.

Departing from the prior holding of the first appeal raises the important question of whether the decision in the first appeal should stand, or must be modified, vacated, or reversed in the same case where the appellate courts continue to have jurisdiction. In many cases, the courts of Nevada and other jurisdictions have answered in the affirmative. That is, when a second appeal results in reversal under one of the exceptions, the appellate court also reverses the effects of the decision of the first appeal as a matter of equity. As succinctly stated in Union Light, Heat & Power C. v. Blackwell's Adm'r, 291 S.W.2d 539 (Ky. App. 1956):

The court should look to the effect of its own error rather than merely

> acknowledge that error was committed and let it go at that. It should wipe out the effect of the mistake in the first opinion rather than perpetuate the error which would otherwise result in great wrong to the litigant and establish a bad precedent. That is essential justice.

Treatises agree, as discussed in 5 C.J.S. Appeal and Error § 1151 "Law of the Case, Generally":

> An exception to the doctrine of the law of the case may be made where, if applied, a manifest injustice would result. Accordingly, the rule is inapplicable if it clearly appears that it is being used as an instrument of injustice and the error to be cured far outweighs any harm that may be done in a particular case, especially where no rights have accrued or become vested and no substantial change has been made in the status of the parties by reason of the former decision. The rule may also be disregarded for good cause, or due to extraordinary circumstances.

(Footnotes omitted).

The courts of Nevada have not stated a rule, but in numerous cases have amended the decision of the first appeal based upon injustices recognized in the second appeal. Examples include Hsu (change in law); Estate of Adams, *supra;* Wheeler Springs Plaza, LLC v. Beemon, 119 Nev. 260 (2003); State v. Greene, 129 Nev. 559 (2013); Rippo v. State, 134 Nev. 411 (2018) and in federal courts applying substantially the same standard, U.S. v. Real Property Located at Incline Village, 976 F.Supp. 1327 (D. Nev. 1997) (manifest injustice). See also the discussion in U.S. v. Alexander, 106 F.3d 874, 876-78 (9th Cir. 1997).

This Court cannot reach a judgment in this second appeal other than that the

holdings of the decision in the first appeal were "so clearly erroneous that continued adherence to them would work a manifest injustice." The Court of Appeals' Order of Affirmance completely ignored the precedent of Pegasus, Anderson, and Wood, *supra,* among other precedents, and used grossly inaccurate facts including, for example, ignoring the outright defrauding of Garmong and concealment of material information by the respondents. And as a consequence of either ignoring relevant facts or using incorrect factual assertions, the arbitrator and the District Court awarded attorney's fees against Appellant. This Court should remedy this manifest injustice.

VI. CONFIRMATION OF FINAL AWARD

The Order Granting Defendants' Second Amended Motion for Attorney's Fees; Order Confirming Arbitrator's Final Award states at AA 9/1483, lines 15-20:

> The Court finds an additional award of attorney's fees is appropriate. In the *Order re Motions* entered August 8, 2019, the Court affirmed the Arbitrator's award, and the Nevada Court of Appeals entered the *Order of Affirmance* confirming this Court's decision on December 1, 2020. The prerequisites to awarding attorneys fees in this matter have therefore been met. NRS 38.242(3).

The District Court has linked the decision of the Order of Affirmance of the first appeal to the decision of the second motion for attorney's fees. It is therefore necessary to assess the decision on Garmong's PMPSJ and the first motion for attorney's fees in relation to the second motion for attorney's fees, under the principles

of law of the case.

VII. MATTERS LINKING THE FIRST APPEAL AND THE SECOND APPEAL

VII.A. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

There is no doubt that the prior holdings that underlie the decision of the first appeal, and therefore this Second Appeal, "are so clearly erroneous that continued adherence to them would work a manifest injustice." The errors and manifest injustice are most clearly evident in the adjudication of PMPSJ.

Issue 1. Whether the arbitrator, the District Court, and the Court of Appeals incorrectly refused to apply properly the controlling precedent of Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713-14 (2002) in relation to PMPSJ.

During arbitration, appellant Garmong moved for summary judgment. PMPSJ included 20 undisputed material facts ("UMF") that were fully supported with admissible evidence (AA 1/61-66). Based upon the UMFs, PMPSJ also included legal argument establishing respondents' liability (AA 1/61-102). Respondents opposed, without submitting any admissible evidence to dispute the UMFs.

The arbitrator refused to follow the controlling precedent for adjudicating summary judgment motions. Wood, *supra*. Instead, he issued an Order (AA 3/0391-0394) giving as his sole excuse for refusing to follow Wood and for denying PMPSJ,

that a "merits hearing" must be held as part of the resolution of PMPSJ. See Order AA 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 judges of the Court of Appeals agreed, see Order of Affirmance (AA 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 (AA 8/1279-80), that the credibility of affiants/declarants may not be weighed by the arbitrator or a judge as part of resolution of a motion for summary judgment. Pegasus, 118 Nev. at 713-14, 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."

Pegasus is the controlling precedent. Neither the arbitrator nor the Order of Affirmance made mention of this precedent, and the Order of Affirmance at AA 8/1323 attempted to ignore this precedent by arguing that the determination of credibility

could be deferred until after the resolution of PMPSJ, to a later portion of the proceeding. This attempt to circumvent the law was contrary to the facts, because the arbitrator had expressly made the determination of credibility his reason for refusing to adjudicate PMPSJ properly according to Wood, see Order AA 3/0392, third paragraph, quoted above.

The assertion of the "merits hearing" to determine credibility as part of the summary judgment proceeding was contrary to law of summary judgments and Garmong should have prevailed in the arbitration at that stage based on uncontested assertions of material facts. At that point there should not have been a need for any hearing. Aspects of the claims of the FAC have absolutely no dependence at all on witness credibility, and no credibility question was raised by the respondents. See the following Issue 2.

Issue 2. Whether in deciding PMPSJ the arbitrator, the District Court, and the Court of Appeals incorrectly refused to properly 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).

The factual bases of the Fourth-Seventh claims of the first amended complaint

are discussed in PMPSJ at pages AA 1/73-95 and of the Tenth Claim at AA 1/98-101. Repeating this full discussion is beyond the page limitations of this brief. But, to take an example, UMF 19 (AA 1/65-66) provided a sufficient factual basis to find each of Claims 4-7 and 10 in favor of. Garmong. 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. Garmong first learned of this concealment when he read that brief. AA 3/244, ¶ 34. There was no conceivable "credibility" issue there (even if determination of "credibility in adjudicating motions for summary judgment were not contrary to precedent) that would bar adjudication of the claims supported by UMF 19. See the Fourth Claim (AA 1/75:15-16, AA 1/77:23 and 28), Fifth Claim (AA 1/87:21), Sixth and Seventh Claims (AA 1:91:1-5), and Tenth Claim (AA 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 the Pegasus and Anderson precedent, was a way to justify an abuse of discretion against Garmong 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.

Issue 3. Whether the arbitrator, the District Court, and the Court of Appeals incorrectly refused to properly apply the mandatory two-step procedures of Wood to decide PMPSJ.

The point of the "merits hearing" argument by the arbitrator and the Court of Appeals was to avoid deciding PMPSJ according to the mandatory Wood procedural precedent, and to allow the arbitrator and the Court of Appeals erroneously to decide the case in favor of the respondents, contrary to the evidence and substantive law. Here, however, the proper procedural law must be set forth.

In the prior version of NRCP 56 under which PMPSJ was decided, NRCP 56(c)[4] provided, in relevant part:

> (c) The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(Emphasis added).

Applying NRCP Rule 56, Wood, 121 Nev. at 724, held:

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[4] Nalder v. Lewis, 136 Nev. Adv. Op. 24 at *10 n. 6 (2020), held that the prior version of a revised rule, in effect at the time the case was before the District Court, is to be applied.

> 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.'[5]

(Emphasis added).

Therefore, deciding a motion for summary judgment involves two steps. The arbitrator first must identify the undisputed material facts,[6] if any, and, second, must determine whether those undisputed material facts entitle the moving party to judgment as a matter of law. With these requirements in mind, PMPSJ included and supported with reference to the evidentiary record a set of twenty UMFs (AA 1/0061:21-0066:10).

The initial burden is on the moving party to "demonstrate that no genuine issue of material fact remains." If the moving party meets this initial burden, as PMPSJ did, Wood v. Safeway, 121 Nev. at 732, requires:

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[5] The procedures of Wood are mandatory, and do not give the arbitrator or judge the option of refusing to decide the motion for summary judgment to hold a "merits hearing" to assess credibility, and indeed such a merits hearing is expressly forbidden by binding precedent, Pegasus.

[6] The Order of Affirmance at 5 scolds: "Garmong claims that the arbitrator manifestly disregarded the summary judgment standard by not mechanically delineating which material issues were in dispute[.]" "[D]elineating which material issues were in dispute" is precisely what Wood required as the first step in its mandatory procedure for adjudicating a motion for summary judgment. Yet the arbitrator and the Order of Affirmance refused to follow this precedent.

> The nonmoving party 'must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him.' The nonmoving party " 'is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.' "

Respondents did not dispute any of Dr. Garmong's twenty UMFs with admissible evidence.

The next mandatory step under Wood was to determine whether "the moving party is entitled to a judgment as a matter of law." Following this determination process is mandatory, not discretionary, if there are undisputed material facts.

The arbitrator's Orders did not follow these mandatory procedural steps, but instead conceived the improper "merits hearing" excuse to avoid the mandatory procedure of Wood.

Not only must the Court address Pegasus and Wood for this second appeal, but must also return to the first appeal and apply this precedent to properly decide the PMPSJ.

A review of the arbitrator's two Orders (AA 3/0366-0369 and 3/0391-0394) regarding summary judgment reveals the basic flaws. The Orders do not discuss the applicable undisputed material facts or the procedural, evidentiary, or substantive law of summary judgment. These Orders are utterly unlike any proper orders purporting to decide summary judgment motions, as they disregard and ignore both the facts and

the law.

Application of the stated controlling precedent would have required a decision in appellant's favor.

The arbitrator issued the Order Denying Reconsideration (AA 3/0391-0394) contending as his sole reason for denying PMPSJ that a "merits hearing" must be held as part of the resolution of PMPSJ. See Order Denying Reconsideration (AA 3/0392, third paragraph). The Court of Appeals agreed, see Order of Affirmance (AA 8/1323, full paragraph), stating: "The arbitrator correctly concluded that it could only assess the credibility of the parties at a hearing on the merits with live testimony and cross-examination to determine which version of the events was more likely, (i.e., whether it was Wespac's investment decisions that caused a loss to Garmong's account or the 2008 Recession). Thus, rather than manifestly disregarding the law, the arbitrator correctly applied the law to the facts." This statement prompts two responses. First, the arbitrator made no such statement as that in parentheses. Second, the suggestion that the arbitrator did not manifestly disregard the law and correctly applied the law to the facts is simply false. Appellant Garmong cited and quoted both Pegasus and Anderson to both the arbitrator and the Court of Appeals (AOB, 8/AA 1279-80), establishing that the credibility of affiants/declarants may not be weighed by the arbitrator or a court as part of resolution of a motion for summary judgment.

The refusal to follow the precedent of Pegasus is a fundamental error of the arbitrator and the Court of Appeals. The artifice of a merits hearing as part of the resolution of PMPSJ allowed the arbitrator and the judges to rationalize their refusal to follow Wood and related cases dealing with summary judgment.

The holdings by the Court of Appeals in the first appeal "are so clearly erroneous that continued adherence to them would work a manifest injustice." The findings are clearly erroneous because they are directly contrary to controlling precedent in Pegasus, Anderson, and Wood and in violation of the judges' oath of office and Nevada Code of Judicial Conduct Canons 1 and 2 and associated Rules. They work a manifest injustice and prejudice against Dr. Garmong and in favor of the respondents, costing Dr. Garmong a further portion of his lost retirement savings and attorneys fees/costs.

In the event, the whole notion of testing credibility of the principal witnesses was no more than a diversion and dodge by the arbitrator to avoid addressing the issues that would have required a decision in favor of Garmong. As an example, there was no attempt by respondents to dispute Undisputed Material Facts 13-20, set forth at PMPSJ pages 7-8 (1/AA 61-66), and dealing with false representations or withholding information by the respondent fiduciaries. No testimony by respondents' witnesses in the summary judgment proceeding had any bearing on these UMFs 13-20. As

demonstrated in the appellant's opening brief in the first appeal 8/AA 1277 and 1280-1295, these UMFs were sufficient to require judgment in Garmong's favor on several of the claims. There was no "credibility" issue there. The arbitrator used the matter of "credibility" as a way to avoid the procedure mandated by Wood, and contrary to the precedent of Pegasus and Anderson.

The Order of Affirmance at AA 8/1323 posits: "First, Garmong claims that the arbitrator manifestly disregarded the summary judgment standard by not mechanically delineating which material issues were in dispute, and failing to explain why the undisputed material facts did not entitle him to summary judgment." (Emphasis added). As discussed in the opening brief of the first appeal, 8/AA 1267, "Applying Rule 56, Wood, 121 Nev at 729, held:

> 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.' "

Arbitrator's Order AA 3/0392:3 admitted that "Many of the facts relied upon by Claimant are indeed 'undisputed.' " Yet in a striking examples of ignoring the law to reach a desired result, the arbitrator refused to follow the mandatory procedure quoted above from Wood. The use of the word "mechanically" in the above quote from the Order of Affirmance is apparently intended to cast doubt on the Garmong's insistence

that the arbitrator follow the requirement of identifying which UMFs are not in dispute, but that is exactly what Wood required.

As discussed in Wood, the whole point of a motion for summary judgment is for the parties to set forth their cases in writing with supporting documents and declarations, to see if there is any reason to go forward to a trial. In the present case, the arbitrator, as confirmed by the Order of Affirmance, disregarded Wood so that he could then decide the case any way he wanted.

The arbitrator's Orders denying PMPSJ (AA 3/0366-0369 and 3/0391-0394), were arbitrary and capricious in that they disregarded the undisputed material facts–not a single one of the UMFs or the claims was mentioned, although the arbitrator candidly admitted that "many" (in fact, all) of the UMFs were "undisputed." Order at AA 3/0367 indicated awareness of the procedural requirements of Wood, but then the arbitrator disregarded Wood by not applying its holdings a single time as to either facts or law. The Orders disregarded the procedural, evidentiary and substantive law applying to each of the claims of the FAC.

Wespac did not dispute any of the UMFs with admissible evidence–valid declarations or otherwise. Wespac submitted a purported Christian declaration (AA 3/0265-0270), that Garmong objected to, see Reply (AA 3/0290:8-16 and 03/0292:1-23), because it was not made on the "personal knowledge" of the declarant (AA

3/265:9-12), as required by NRCP 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge[.]"), as well as for other reasons discussed at AA 3/0290:8-0308:12.

In their Opposition (AA 3/0246-0282) to PMPSJ, respondents did not properly dispute any of the UMFs by presenting admissible evidence, or dispute the governing law. As provided in NRCP 56(c), quoted above, where there are no undisputed material facts, "The judgment sought shall be rendered forthwith[.]" (Emphasis added). The arbitrator disregarded this mandatory procedural precedent, as well as the applicable evidentiary rules and the applicable substantive rules.

Had the arbitrator followed the mandatory procedure of Wood instead of evading this precedent by the "merits hearing" bit of misdirection, this case would have properly been decided by summary judgment at that stage of the arbitration and not proceeded further.

The arbitrator's Orders disregarded the evidentiary law governing summary judgment.

Garmong's Reply (AA 3/0283-0308:12) and Motion for Reconsideration (AA 3/0375:11-18) discussed the mandatory law of evidence and admissibility of evidence in summary judgment proceedings, and the reasons that this law required exclusion of the material submitted by defendants. The two Orders (AA 3/0366-0369 and 3/0391-

0394), and the Order of Affirmance, disregarded this mandatory law completely.

NRCP 56(e) provided:

> Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith . . . an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(Emphasis added). Adherence to NRCP 56(e)'s standard of admissible evidence to dispute material facts is mandatory and the arbitrator's consideration of the Christian declaration, which does not comply with the rule, constituted a manifest disregard of the law . Havas v. Hughes Estate, 98 Nev. 172, 173 (1982). The "personal knowledge" requirement is mandatory, Coblentz v. Hotel Employees & Restaurant Employees Union, 112 Nev. 1161, 1172 (1996). ("Affidavits supporting or opposing a motion for summary judgment shall be made on personal knowledge[.]") The requirement for attachment of sworn or certified copies of exhibits is likewise mandatory. Havas, 98 Nev. at 173. The Christian declaration (AA 3/0264-270, especially 03/0265:9-13) was not made on "personal knowledge."

The arbitrator's two Orders (AA 3/0366-0369 and 3/0391-0394) disregarded this mandatory law completely. There is not one word in either Order addressing the matters of evidence and admissibility, even though the authority cited in the prior paragraph makes consideration of such matters mandatory. See also State v. Eighth Judicial Dist. Court (Armstrong), 127 Nev. 927, 931-32 (2011), dealing with evidence.

The arbitrator's Orders disregarded the substantive law of the Claims.

Addressing the second step of Wood, PMPSJ (AA 1/0066:12-1/104:7) demonstrated how each claim of the FAC was supported by various of UMFs 1-20. For each claim, the nature of the claim and the specific elements of the respective claim were stated with reference to the governing law, followed by a section "Application to the Present Facts" in which the governing law was applied on an element-by-element basis to the appropriate UMFs.

Most of the arbitrator's 2-1/2 page initial Order (AA 3/0366-0368) dealt with history and the contentions of the parties. The Order at AA 3/0367, fourth paragraph, indicated that it was aware of some relevant precedent, but thereafter disregarded and failed to apply that law. Identifying the applicable precedent does not establish that it was properly applied.

The paragraph bridging pages AA 3/0367-0368 and the first paragraph on page AA 03/0368, a total of 10 lines, was the entirety of the substance of the arbitrator's

Order dealing with resolution of PMPSJ. After noting that the parties had expended much energy and time on the Motion, Opposition and Reply, "nearly 100 pages accompanied by voluminous declarations and exhibits," the Order stated: "Under the circumstances, the Arbitrator finds the claims in dispute are not amenable to resolution on summary judgment." No legal authority for such a statement was given, and there is none. The basis of this statement was apparently that "Moreover, it appears that issues of fact and credibility pervade in assessing the merit of the claims in dispute." There was no discussion of any basis for the contention that there were issues of fact and credibility. Moreover, this statement contradicts the arbitrator's admission that "Many of the facts relied upon by Claimant are indeed 'undisputed.'" No specification was made of the facts that were not in dispute.

But most importantly, this attempt to sidestep the procedure mandated by Wood is directly contrary to the precedent of Pegasus. The arbitrator and the Court of Appeals were aware of the law forbidding credibility determinations on motions for summary judgment, and chose to manifestly disregard and deliberately ignore it in the present case to reject the approach mandated by NRCP Rule 56 and Wood. Ignoring the governing law was a manifest abuse of discretion.

There was no mention or discussion at all in either Order (AA 3/0366-0369 and 3/0391-0394), or by the Order of Affirmance, of the UMFs set forth at PMPSJ AA

1/0061:22-0066:10. "The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant." Wood, 121 Nev. at 731.

Having made the admission that there were undisputed material facts, the arbitrator was required by Wood to evaluate the claims. The arbitrator's Orders disregarded this mandate. The Orders and the Order of Affirmance did not address a single one of the claims of the FAC at issue, and whether the undisputed facts were sufficient to require decision in favor of Garmong on any of the claims, thereby disregarding the governing law. In fact, the Orders and the Order of Affirmance did not even mention the Claims of the FAC.

Garmong does not contend that the arbitrator made an error in attempting to apply the law and in his interpretation of the law. To the contrary, it is apparent from the arbitrator's two Orders (AA 3/0366-0369 and 3/0391-0394) that he completely disregarded the governing procedural, evidentiary and substantive law. There was no arbitrator's interpretation to dispute. The arbitrator did not mention the procedural, evidentiary, or substantive law at all, thereby manifestly disregarding it. Such manifest disregard of the law is a basis for vacating the arbitrator's decision on PMPSJ.

All of the law disregarded by the arbitrator was either known to the arbitrator or disclosed to the arbitrator by Garmong in his briefs. The Orders evidence the

disregard and refusal of the arbitrator to consider the law.

A review of the two Orders (AA 3/0366-0369 and 3/0391-0394) shows that the arbitrator did not address at all, and utterly and manifestly disregarded, the substantive law of the claims. The arbitrator instead candidly admitted that "Many of the facts relied upon by Claimant are indeed 'undisputed,'" but then disregarded the UMFs, and disregarded the controlling substantive law, based upon a legally incorrect concept of including a "merits hearing" as part of a summary judgment proceeding.

VII.B. FIRST AND SECOND AWARDS OF ATTORNEYS FEES

Issues Common to Both First and Second Awards of Attorney's Fees

Issue 4. Whether the arbitrator, the District Court, and the Court of Appeals incorrectly refused to properly apply JAMS Rule 24 in awarding attorneys fees to Respondents.

Regarding the first award, 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 a statute, rule, or contract applicable to this arbitration that authorizes an award attorneys' fees and costs.

During the course of the arbitration process, and as permitted by the 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 telephone conference between the attorneys for the parties and the arbitrator, in which the parties were heard, the arbitrator entered a "Discovery Plan and Scheduling Order" ("Scheduling Order," AA 1/0014:17-20). 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, 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.

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

Scheduling Order at AA 1/014:23 also entered an order to the same effect, stating, "IT IS SO ORDERED." followed by the arbitrator's signature.

Wespac sought an award of attorney's fees based on NRCP Rule 68. Pursuant to JAMS Rule 24, the Order of August 11, 2017, and the Agreement of the parties expressed in the Order of August 11, 2017 (AA 1/0014:17-20), NRCP Rule 68 was not included in the set of rules governing the arbitration.

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 authorizing an award of attorney's fees under Rule 68 in the arbitration.

When he attempted to implicitly change the Order to include NRCP 68 in the arbitration, the arbitrator 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 provided:

> (c) In determining the merits of the dispute, the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator shall be guided by the rules of law and equity that he or she deems to be most appropriate. 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).

There was an agreement between the parties (AA 1/14:17-20) listing a number of rules of civil procedure to be included in the governing law of the arbitration, but excluding by omission NRCP Rule 68 from the rules governing the arbitration. Thus, the arbitrator "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 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.

Notably, the original Agreement (AA 1/224-2/230) had no provision for fee shifting.

The arbitrator disregarded the fact that at the outset of arbitration, the parties agreed, and the arbitrator ordered, that NRCP 68 would not be included in the governing rules of the arbitration, and that the agreement and the order were never changed.

In their agreement, and as ordered by the arbitrator, there was no provision that NRCP Rule 68 would be applicable law in the arbitration. NRCP Rule 68 is therefore not "applicable law."

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. Wespac decided that it would break the agreement with Garmong and violate the arbitrator's Order. Wespac served an Offer of Judgment pursuant to NRCP Rule 68 (AA 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. This discreditable approach was consistent with Wespac's prior dealings with Garmong. Wespac did not, then or later, seek to modify their agreement with Garmong, or move the arbitrator for relief from the terms of the Scheduling Order so as to include NRCP 68 in the rules governing the arbitration. Plaintiff did not accept Wespac's Offer of Judgment under NRCP 68, because the parties had agreed, and the arbitrator had ordered, that NRCP 68 would not be applicable to this arbitration. Had Garmong known that he would be subject to a potential fee award under NRCP 68, he might have made other tactical decisions than he did.

On February 15, 2019, after an Interim Award in their favor, Wespac filed a Motion for Attorney Fees pursuant to Rule 68 and Costs (AA 4/0666-0694). This

Motion was based solely on their purported Offer of Judgment of September 12, 2017. Garmong filed an Opposition (AA 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 attempted to rule 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 attempted to make such a finding, the retroactive nature of the arbitrator's attempt to add Rule 68 would have been clear. And, in any event, the arbitrator could not alter the terms of the contractual agreement between the parties.

The arbitrator's award is truly galling. 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, th arbitrator sought unilaterally, without notice, and retroactively to alter that 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.

The arbitrator disregarded JAMS Rule 24's limitation of the award of attorney's fees to grounds agreed to by the parties, and that the parties had not agreed that NRCP 68 would be a governing rule of the arbitration.

The Order of Affirmance at AA 8/1326 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.

Garmong 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 naively believed that the rules would be obeyed by the arbitrator and upheld by the courts.

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 <u>within the scope of the Parties' agreement</u>." (Emphasis added). 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) <u>if provided by the Parties' Agreement or allowed by</u>

applicable law." (Emphasis added).

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 that Rule 68 would have effect in the arbitration.

In the arbitrator's Final Award of April 11, 2019, the arbitrator granted Wespac's Motion, and awarded Wespac attorney's fees based upon NRCP 68 which, as stated above, was not part of the governing law of the arbitration. AA 5/0736-0737.

The arbitrator disregarded the fact that the Order set forth separately (1) an 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 Garmong 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 (AA 9/1476-1486) based its award on the confirmation of the arbitration award in the Order of Affirmance (AA 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."

Issue 5. Whether the arbitrator, the District Court and the Court of Appeals incorrectly refused to properly 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) prohibiting a court from revising the terms of an agreement between the parties.

As discussed above, the "Scheduling Order" (AA 1/0014:17-20) stated not just an order of the arbitrator, but 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).

The arbitrator, the District Court, and the Court of Appeals were not at liberty to change this contractual agreement between the parties, as prohibited by Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52 (1981), holding: "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, commenting: "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.'"

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.

In summary, the arbitrator unilaterally decided to add NRCP 68 to the governing rules of the arbitration, approximately 20 months after the parties had contractually agreed, and the arbitrator had ordered, that Rule 68 would not, by omission, be a

governing rule of the arbitration. In so doing, the arbitrator violated JAMS Rule 24 and Nevada precedent set forth in Old Aztec Mine and All Star Bonding. The District Court and Court of Appeals approved this abuse of the arbitrator's authority. The result was that Garmong has been improperly assessed $156,734.46 in fees and costs. These violations are "so clearly erroneous that continued adherence to them would work a manifest injustice" under Clem v. State.

Issue Applicable Only to Second Award of Attorneys Fees

Issue 6. Whether the District Court had a basis for awarding attorneys fees and costs on the second motion for fees.

The second amended motion for fees (AA 8/1331-1335) filed on February 18, 2021 was accompanied by a document entitled Declaration of Thomas C. Bradley ("First Bradley Declaration") (AA 8/1338-1339), counsel for WESPAC, Motion Exhibit 1. The first Bradley Declaration starts: "I, Thomas C. Bradley, declare under penalty of perjury to the following," followed by numbered paragraphs of statements. Significantly, there is no assertion that the first Bradley Declaration is made on Mr. Bradley's "personal knowledge," nor any other evidence that the Declaration is made on "personal knowledge."

It concludes with: "I swear under penalty of perjury that foregoing statements in this declaration are true and correct." Again, no mention of "personal knowledge."

The content of the first Bradley Declaration between these two statements is the attempted justification for a post-arbitration award of fees to WESPAC. Mr. Bradley recognized that his first declaration was defective; on May 6, 2021 he filed a Supplemental Declaration (AA 8/1437-1438) to attempt to remedy the defects. The District Court relied on the first Bradley Declaration in making a fee award. Respondents also filed a Declaration of Michael Hume (AA 8/1439) on May 6, 2020, about 2-1/2 months after the second amended motion for fees (AA 8/1331-1335) was filed on February 18, 2021. Respondents did not file motions seeking late filing of either of the two new declarations.

Declarations in support of a motion must be filed with the motion, not months later. NRCP 6(c)(2); District Court Rules, Rule 13; Rules of Practice for the Second Judicial District Court, Rule 12. The Court may not take cognizance of the Hume Declaration, and may not award the fees/costs WESPAC requested.

Declarations in support of attorney fee awards must be based upon personal knowledge. See NRCP Rule 56(c)(4). Muniz v. United Parcel Serv., Inc., 738 F.3d 214, 222 (9th Cir. 2013); Mardirossian & Assocs., Inc. v. Ersoff, 62 Cal.Rptr.3d 665, 674–75 (Cal. App. 2007). To the point, Morgan v. Board of County Commissioners of Eureka County, 9 Nev. 360, 368 (1874) observes: "An affidavit which states no fact within the knowledge of the person making it would be of but little weight in any legal

proceeding. Such an affidavit does not establish any fact required by the law to be established[.]"

Declarant Bradley did not swear of his own personal knowledge to the facts stated in his declaration attached as Exhibit 1 to the second amended motion for fees. Therefore, the declaration should be stricken. As a result, the second amended motion for fees lacked adequate factual support and should have been denied on that basis.

In his declaration Mr. Bradley also claimed recovery of the costs of securities arbitration consultant Michael Hume for 31.75 hours of his services at a total price of $3,175.00. Exhibit 1 to second amended motion for fees, at ¶ 5. (8/AA 1337). The time and effort expended by Mr. Hume was not reported by Mr. Bradley on personal knowledge and therefore this item of recovery should be denied.

The Muniz case is instructive. There plaintiff's counsel submitted a declaration in support of a motion for attorney's fees swearing to the hours that his paralegal (also his wife) spent on the case. There was no declaration from the paralegal. The 9th Circuit Court of Appeals rejected the paralegal fees for lack of evidentiary support:

> Our decision on this issue is controlled by the Federal Rules of Evidence. Hearsay is a statement by someone who does not testify at a hearing and which is offered to prove the truth of the matter asserted in the statement. FED. R. EVID. 801(c). Here the matter asserted in the statement is the hours expended by Ms. Jaffe [the paralegal] in this case and contained in the spreadsheet. We are satisfied that the only reasonable interpretation of Mr. Jaffe's [plaintiff's counsel] declaration is that Ms. Jaffe provided

> this information to him. It was therefore hearsay and the district court's conclusion to the contrary clearly mistaken.

Id. at 223. Here, too, Mr. Bradley's declaration at ¶ 5 is hearsay and therefore cannot serve as a basis to recover Mr. Hume's consultant's fee.

There is an additional problem with Mr. Hume's fee. It was an item of costs under NRS 18.005(5) (expert witnesses) or (17)(all other reasonable and necessary expenses). As such it should have been included in a memorandum of costs filed within 5 days from entry of judgment. NRS 18.110(1). There was no memorandum of costs filed in this case; consequently, the defendants cannot recover Mr. Hume's consulting fee.

The District Court 's Order at AA 9/1473:9-11 stated that the court was "satisfied Mr. Bradley's first declaration is legally sufficient" to establish personal knowledge. But nothing in the Declaration suggests personal knowledge of the billing records that became Exhibits 2-5 of the second motion for fees. (8/AA 1340 to 1413). For all anyone knows, Bradley's time records were kept by a secretary or paralegal or outside billing agency, and he had no personal knowledge of them. (The District Court's Order at AA 9/1473:17-23 refused to consider this point, asserting that Garmong's arguments were first raised in the Reply, although the District Court's Order at AA 9/1473:9-16 raised *sua sponte* what it considered arguments in

respondents' favor. Out of fairness the District Court should have considered points against respondents as well. In the event, however, Garmong's point was first raised in the Reply because the first facially valid Bradley Declaration that required further reply, the Supplemental Declaration, was submitted with the Opposition.)

The Order Denying Motion to Strike, filed July 7, 2021, at AA 9/1473:2-16 explains the basis of its decision that the originally filed Bradley Declaration was legally sufficient.

> Pursuant to NRCP 56(c)(4), an affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated. 'An affidavit which states no fact within the knowledge of the person making it would be of but little weight in any legal proceeding.' Morgan v. Board of Com'rs of Eureka Cty., 9 Nev. 360, 368 (1874).
>
> 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.

In order to reach this result, the District Court misquoted Morgan. Morgan actually states:

> We think, as a general rule, that when the law requires any fact to be established by an affidavit, without prescribing its form, if made upon 'information and belief,' it will be insufficient, unless it states positively the facts and circumstances upon which such belief is founded. Such is the rule in regard to affidavits and attachments.

That is, the quotation, mischaracterized by the District Court as a general rule,

is limited to affidavits made "upon information and belief." The Bradley Declaration was not made "upon information and belief."

The Bradley Declaration does not set forth the "circumstances" underlying the alleged "facts" set forth therein. For example, they might have been estimated by a secretary well after the fact. He does allege that invoices are "true and correct," but there is no explanation of what that means and does not suggest how he knows they are "true and correct," inasmuch as he claims no "personal knowledge" of them.

NRCP 56(c)(4) states,

> (4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

There is nothing to establish that Mr. Bradley "is competent to testify" concerning the billing records at Exhibits 2-5 to the second amended motion for fees. They are presumably of his time, but there is no explanation of how they became Exhibits 2-5.

Further, the Order does not set forth any findings of the facts and circumstances upon which the District Court's belief was founded, to which the above quotation refers. Order Denying Motion to Strike at 8:9-12 stated: "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." 9/AA 1473: 2-16. District Courts are required to provide findings of fact for use of the parties and the appellate Court:

> 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.

Schwartz v. Est. of Greenspun, 110 Nev. 1042, 1050 (1994). 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, 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.

VIII. OTHER ORDERS OF THE DISTRICT COURT

I. The District Court improperly denied Appellant's Motion for Extension of Time

Issue 7. Whether the District Court should have granted Garmong's motion for extension of time.

Garmong missed a deadline for opposing respondents' second amended motion

for attorneys fees, and the District Court denied his motion for a short extension, which included a proposed opposition. As will be demonstrated, there was no prejudice in allowing the extension. The denial was an abuse of discretion.

C. There was no prejudice or delay in the proceedings resulting from the late filing of the opposition to the second amended motion for fees.

- Under the District Court's Order of March 1, 2021 (AA 8/1329-1330), appellant had "10 calendar days after the Nevada Supreme Court has acted on the plaintiff's petition for review of the Order of Affirmance of the Court of Appeals entered in appeal no. 80376-COA in which to file points and authorities in opposition to the defendants' second amended motion for attorney's fees." There was no date certain set for filing points and authorities. The Supreme Court denied the Petition for Review on April 6, 2021, with the result that the deadline for filing points and authorities was April 16, 2021.

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).

Garmong's counsel became aware of the missed deadline when Wespac's counsel filed a request for submission for decision of the second amended motion for attorney's fees on April 21, 2021, without calling the deadline to the attention of Garmong's counsel. At that point an opposition was late by five days (the due date

was April 16, 2021).

The District Court's Order Denying Motion for Extension of Time, issued June 11, 2021, at AA 9/1462:13-20 sets forth the District Court's reasons for denying Garmong's Motion for Extension of Time to File Opposition to Defendants' Second Amended Motion for Attorney's Fees and Costs; Opposition Points and Authorities(AA 8/1418-1424):

> In Huckabay Props. V. NC Auto Parts, 130 Nev. 196, 198, 322 P.3d 429, 430 (2014), the Nevada Supreme Court explained the policy of deciding cases on the merits 'is not absolute and must be balanced against countervailing policy considerations.' These considerations include 'the public's interest in expeditious resolution of appeals, the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing side, and judicial administrations concerns, such as the court's need to manage its sizeable and growing docket.' Id., 130 Nev. at 198, 322 P.3d at 430-31.

The Order Denying Motion for Extension of Time (AA 9/1454-1465) at AA 9/1462 asserted as 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."

1. Objectively, there was no delay in the proceedings, as shown by the chronology of the motion proceedings:

- On April 26, 2021, Appellant filed Motion to Strike Mr. Bradley's Declaration (AA 8/1414-1417) as insufficient under the rules. There was no deadline

for the filing of this Motion to Strike, since it was not an opposition and there had been no ruling on respondent's second amended motion for fees and costs. This Motion to Strike established a briefing cycle for filing an opposition (14 days) and a reply (7 days), Washoe District Court Rule 12 (2), (4) that lasted until May 17, 2021.

- Appellant's Motion for Extension of Time to Oppose the Motion for Attorneys Fees and Costs (AA 8/1418-1424) (including a proposed Opposition), was filed April 27, 2021, 11 days after the due date of April 16, 2021, and one day after the Motion to Strike. The proposed Opposition pointed out, among other things, that the Declaration of Thomas Bradley submitted with Respondent's Motion for Fees and Costs did not meet the requirements for a declaration filed in support of a motion for fees.

- Respondent filed an Opposition to Appellant's Motion for Extension of Time (AA 9/1429-1439) on May 6, 2021, including two Declarations. One of the Declarations was an attempt to remedy the shortcomings of Mr. Bradley's Declaration filed with the Motion for Fees and Costs, and the other was another required Declaration completely absent from the Motion for Fees and Costs.

- Over a month later, on June 11, 2021, the District Court issued its Order Denying Motion for Extension of Time (AA 9/1454-1465).

- Another month later, on July 7, 2021, the District Court issued its Order

Denying Motion to Strike (AA 9/1466-1475). The Motion for Extension of Time had been filed, opposed, and decided before the resolution of the Motion to Strike, so the argument that the extension of time somehow delayed the proceedings or the resolution of the case is utterly groundless.

The Court issued its Order Granting Defendants' Second Amended Motion for Attorney's Fees; Order Confirming Arbitrator's Final Award (AA 9/1476-1486) on July 12, 2021, five days later. There was no delay occasioned by Dr. Garmong being a few days late in opposing the Motion for Attorney's Fees.

2. The Order Denying Motion for Extension of Time at AA 9/1462 asserted as a second ground for denial "prejudice to the opposing side."

First, Respondent did not assert any prejudice. It was not proper for the District Court to take up advocacy on behalf of Respondent to assert a factual position that Respondent had not itself advanced.

Second, there was no prejudice to Respondent because, as pointed out above in the chronology, the resolution of the Motion for Extension of Time was complete prior to the time that the Motion for to Strike was decided.

3. The Order Denying Motion for Extension of time (AA 9/1462) asserted as a third ground for denial "judicial administrations concerns, such as the court's need to manage its sizeable and growing docket."

No reason or factual basis for this argument was given.

D. The Court's delay in issuing Order Denying Motion for Extension of Time effectively mooted the matter.

As discussed above in relation to the chronology of events, by the time the Court had issued its Order, the Motion to Strike had been fully briefed. There was no basis for denying Dr. Garmong's Motion for Extension of Time. Further, there is also this policy consideration: "The district court must also consider this state's bedrock policy to decide cases on their merits whenever feasible[.]" Willard v. Berry-Hinckley Industries, 136 Nev. 467, 470 (2020).

E. Counsel for Respondents violated the letter and spirit of Nevada Rule of Professional Conduct Rule 3.5A

Counsel for Garmong overlooked the filing deadline, which was triggered by the order of the Supreme Court denying review under NRAP 40B. The reason that counsel overlooked this deadline was that there was no date certain when the District Court's Order was issued.

The Rules of Professional Conduct anticipate situations of this sort and provide that there shall not be a default. In this instance, when counsel for the defendants noticed that the plaintiff had not filed an opposition to the second amended motion for fees by April 16, 2021, he filed a request for submission of the second amended motion

for fees to the court for decision. He did not inquire of plaintiff's counsel whether he intended to file an opposition. Rule of Professional Conduct Rule 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." Here, counsel for the defendants essentially took a default against the plaintiff on the second amended motion for fees by not inquiring of Garmong's counsel whether he intended to file an opposition. This was a violation of RPC 3.5A, or at least the spirit of it, justifying an extension of time to file an opposition. It was not the fault of defendants' counsel that Garmong' counsel overlooked the deadline, but not "taking advantage of the lawyer by causing a default" required he at least call, which he did not do. Exhibit 1, Declaration of Carl M. Hebert (AA 8/1424), counsel for Garmong.

B. As an adjunct to Rule 3.5A, other jurisdictions have suggested the need for "professional courtesy" and the "golden rule."

Courts of other jurisdictions have suggested that the tactic employed by counsel for respondents is inappropriate. As stated in Ahanchian v. Xenon Pictures, Inc., 624 F.3d 1253, 1263 (9th Cir. 2010), in the same context of a missed deadline with no prejudice or other adverse effects:

> Our adversarial system relies on attorneys to treat each other with a high degree of civility and respect. *See Bateman,* 231 F.3d at 1223 n. 2 ("[A]t the risk of sounding naive or nostalgic, we lament the decline of collegiality and fair-dealing in the legal profession today, and believe courts should do what they can to emphasize these values."); *Peterson v. BMI Refractories,* 124 F.3d 1386, 1396 (11th Cir.1997) ("There is no better guide to professional courtesy than the golden rule: you should treat opposing counsel the way you yourself would like to be treated."). Where, as here, there is no indication of bad faith, prejudice, or undue delay, attorneys should not oppose reasonable requests for extensions of time brought by their adversaries.

See Dornbach v. Tenth Jud. Dist. Ct., 130 Nev. 305, 311 (2014) (a factor in exercising discretion on missed deadlines is whether "the delay has otherwise impeded the timely prosecution of the case."). Here, the minimal delay did not did not burden the prosecution of the case.

On several occasions 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.

IX. SUMMARY AND CONCLUSION

This case and appeal are about whether arbitrators are free to exercise unfettered discretion in arbitral proceedings and whether the courts should tolerate it. Striking examples of the arbitrator's misuse of his contractual authority were the blatant refusal to follow precedent in Pegasus, Anderson, Wood. Old Aztec, and All Star Bonding, the

violation of JAMS Rule 24, and the distortion of the agreement and order from the arbitrator's Scheduling Order and the introduction of Rule 68 long after the parties and the arbitrator had agreed it should not be part of the arbitration process. All of these transgressions and the failure of the Court of Appeals to correct them in the first appeal mandate that they be rectified in this second appeal under the "manifest injustice" exception to the law of the case doctrine.

Appellant Garmong respectfully requests that this Court reverse the holding of the first appeal and decide this second appeal in his favor, in particular reversing the award of attorney's fees to respondents Wespac and Christian.

DATED this 12th day of January, 2022.

/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 **12,363** 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 12th day of January, 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 January 12, 2022, I served the Appellant's Opening 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 12th day of January, 2022.

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

Counsel for appellant Garmong