IN THE COURT OF APPEALS 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

PETITION FOR REHEARING

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I. OBJECTIVE OF PETITION

This Petition petitions for rehearing and reversal of the Order of Affirmance dated July 21, 2022 ("Second Order") and, applying the doctrine of manifest injustice, of the Order of Affirmance of December 1, 2020 ("First Order").

II. RELEVANT LAW

A. The Required Content of this Petition is found in NRAP 40(a)(2)

NRAP 40(a)(2) governs the contents of petitions for rehearing:

> The petition shall state briefly and with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. Any claim that the court has overlooked or misapprehended a material fact shall be supported by a reference to the page of the transcript, appendix or record where the matter is to be found; any claim that the court has overlooked or misapprehended a material question of law or has overlooked, misapplied or failed to consider controlling authority shall be supported by a reference to the page of the brief where petitioner has raised the issue.

B. Law of the Case

Citing Clem v. State, 119 Nev. 615, 620 (2003), Second Order correctly states at p. 3: "The doctrine of law of the case states that '[t]he law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the

same.' " However, Clem is not a valid basis for asserting law-of-the-case doctrine in the present case. As held in Wheeler Springs Plaza, LLC v. Beemon, 119 Nev. 260, 266 (2003), "The doctrine only applies to issues previously determined, not to matters left open by the appellate court."

Second Order at 2 further states: "As an initial matter, of the seven issues raised by Garmong in his opening brief, five have already been addressed by this court in the previous appeal. *See Garmong v. Wespac,* No. 80376-COA (Nev. Ct. App. Dec. 1, 2020) (addressing the first five arguments raised by Garmong in this appeal)." Continuing, "*We decline to address the issues already resolved by Garmong's previous appeal."* (Emphasis in original).

There are three responses.

(1) No page numbers are given, so it is not clear where the issues of this Second Appeal are purportedly addressed in the First Order. In fact, they are not.

(2) Second Order at 2 lists five issues that purportedly had already been addressed in the First Order. These five issues were not presented and decided in the first appeal. Compare Issues set forth in (first) Appellant's Opening Brief of May 27, 2020 at page xvi with Issues set forth in (second) Appellant's Opening Brief of January 12, 2022 at page xiv. The two sets of issues are not remotely the same. The statement of Second Order at 2 is incorrect; the issues decided in the two appeals are

not identical.

(3) No rules of law were decided in the first appeal. It appears that the Court did not apply existing well-established precedent.

C. The Manifest-Injustice exception to law of the case.

For these reasons, the First Order does not establish a basis for applying the law-of-the-case doctrine in the Second Order. Even if the doctrine arguably had some impact, law-of-the-case still is not properly applied under the manifest injustice exception. A further consequence of a determination that the positions taken by the Second Order are incorrect is that the decisions on the First Appeal must be reversed.

Clem, 119 Nev.at 620, provides important exceptions to the doctrine, including an exception that is especially applicable here, "Manifest Injustice: “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.”

Arizona v. California, 460 U.S. 605, 618 n.8 (1983), held, “Under law of the case doctrine . . . 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.

See 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.

The holdings by this Court 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 v. Reno Newspapers, Inc., 118 Nev. 706, 713-14 (2002), Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), Wood v. Safeway, Inc., 121 Nev. 724, 729 (2005), Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52 (1981) and in violation of JAMS Rule 24. They work a manifest injustice and prejudice against Garmong and in favor of Wespac.

In regard to Issue 1, testing credibility of the witnesses was no more than a diversion by arbitrator Pro to avoid addressing the issues that would have required a decision in favor of Garmong. As an example, there was no attempt by Wespac to dispute Undisputed Material Facts ("UMFs") 13-20, dealing with false representations and withholding information by the Wespac fiduciaries. None of the evidence given by Wespac's witnesses in the summary judgment proceeding had any

bearing on these UMFs 13-20, and there could be no credibility issue. As demonstrated in the Motion for Reconsideration, 3/JA 374, these undisputed UMFs 13-20 were sufficient to grant PMPSJ on the Fourth-Seventh and Ninth Claims, and on Doubling of Damages. The arbitrator used the "credibility" argument to avoid the procedure mandated by Wood, and contrary to the precedent of Pegasus and Anderson.

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 v. County of Clark, 123 Nev. 625, 629 (2007) (change in law); Estate of Adams By and Through Adams v. Fallini, 132 Nev. 814, 818-19 (2016); Wheeler Springs Plaza, 119 Nev. at 260; 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).

The Court cannot reasonably 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 looked past the precedent of Pegasus, Anderson, and

Wood, *inter alia,* and used patently inaccurate facts including, for example, failing to consider the outright defrauding of Garmong and concealment of material information by the Wespac fiduciaries. And as a consequence of either disregarding 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.

III. MATTERS OVERLOOKED OR MISAPPREHENDED

The fundamental issues of this appeal, as set forth in the Appellant's Opening Brief of January 12, 2022, have never been decided according to law; see the following subsections.

Issue 1. Whether the arbitrator, the District Court, and the Court of Appeals did not properly apply the controlling precedent of Pegasus in relation to PMPSJ.

Filed during arbitration, Plaintiff's Motion for Partial Summary Judgment included 20 UMFs that were fully supported by admissible evidence (JA 1/61-66). PMPSJ also included (JA 1/66-104) extensive valid legal argument establishing Wespac's liability, developed from the UMFs. Wespac's Opposition (JA 3/ 246-282) did not include any admissible evidence to dispute Garmong's UMFs, and no viable legal arguments. JA 3/283-320, especially JA 3/288-89; JA 3/307-08.

The arbitrator issued an Order (JA 3/0391-0394) giving as his sole rationale for refusing to follow the controlling authority in Wood, and for denying PMPSJ, that a "merits hearing" must be held as part of the resolution of PMPSJ. Order JA 3/0392, third paragraph, states: "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[.]"

Both the arbitrator and this Court were aware of the controlling precedent, as pointed out in the first AOB (JA 8/1279-80), that the credibility of affiants/declarants may not be weighed by the arbitrator or judge as part of resolution of a motion for summary judgment. See 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, 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."

First Order at 7 stated: "Garmong invites us to substitute our own assessment of the witness's credibility for that of the arbitrator[.]" That statement is incorrect. Garmong's position is drawn from the Pegasus and Anderson: No court may make

assessments of witness credibility in deciding a motion for summary judgment.

Without mentioning the controlling precedent of Pegasus or Anderson or citing any authority supporting its position, First Order held that the arbitrator correctly ignored the controlling precedent of Pegasus and Anderson, and refused to decide PMPSJ as required by controlling precedent in Wood (see Issue3, *infra*).

This principle of law and the above-cited precedent are completely overlooked by the Orders. The Second Order disregarded the fact that the First Issue had not been decided according to Pegasus, the well-established law.

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 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).

Other than listing these issues at pages 2-3, the First Order does not mention these issues at all, thereby refusing to address them. The same occurred with the Second Order.

The Second Order overlooked the fact that the Second Issue was not decided

previously.

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

Applying NRCP Rule 56, , Wood, 121 Nev. at 724, 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.'[1]

(Emphasis added).

Under Wood, deciding a summary judgment motion involves two steps. The arbitrator (and the reviewing court) first must identify the undisputed material facts, 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 (JA 1/0061:21-0066:10) and applied the governing procedural,

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

evidentiary and substantive law.[2]

The objective of the "merits hearing" argument by the arbitrator was apparently to avoid deciding PMPSJ according to the mandatory Wood precedent. To this day PMPSJ has never been decided by a court under the directives of Wood.

Arbitrator's Order, JA 3/0392:3, admitted that "Many of the facts relied upon by Claimant are indeed 'undisputed.' " Yet in a striking example of results-driven decision making, even with this admission the arbitrator refused to follow the mandatory procedure quoted above from Wood. The arbitrator refused even to identify which UMFs were undisputed, contrary to NRCP 56(d) in effect at the time.

The two Orders did not even mention the UMFs, the controlling authority of Wood, or the procedures required by Wood at all. The Second Order overlooked the fact that the Third Issue was not decided previously.

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[2] Issue 3 deals solely with the summary judgment motion PMPSJ, not with the later arbitration hearing. The Orders' references to alleged facts of that hearing are irrelevant to deciding PMPSJ. This Court may not attempt to supplement Wespac's inadequate facts in its opposition to PMPSJ by using other facts from the later hearing, which was governed by different evidentiary and procedural standards.

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

"Scheduling Order" of August 11, 2017 (JA 1/0014-0015) stated (JA 1/0014:17-20) the 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.[3]

(Emphasis added).

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

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[3] To rationalize the actions of the arbitrator in defiance of the listed rules of the arbitration, First Order at 10 points out that Garmong had also acted outside the listed rules. First Order alleged that Garmong had improperly pursued summary judgment and reconsideration motions, and alleging that such motions were not permitted by the listed governing rules. First Order ignored that Scheduling Order ¶6 at JA 1/015:12-13 expressly permitted "motions for summary judgment," and listed Washoe District Court Rule 12 expressly permitted motions for "reconsideration " of decisions. There were no objections from either the arbitrator or Wespac when Garmong filed his PMPSJ or motion for reconsideration. Unlike Wespac, Garmong obeyed the agreed-upon rules precisely. First Order at 10 also argued that Garmong should have objected or moved after the offer of judgment was made by Wespac. But it was Wespac that sought to change the *status quo* and act contrary to the plain language of the Scheduling Order, and it was obliged to so move. The court seeks to shift to Garmong all burdens properly allocated to Wespac.

Neither the parties nor the courts have identified any location in the record where either the Parties' Agreement or the arbitrator's Scheduling Order were ever changed. Nor have they identified any JAMS rule or other law allowing unilateral retroactive changing, without notice or hearing, of the Scheduling Order. To do so was an open violation of Garmong's Due Process rights.

The arbitrator and this Court ignored the fact that fee shifting pursuant to NRCP 68 was never mentioned, agreed to, or ordered, and therefore could not be a provision of the arbitration. Nor was there any other applicable law.

Wespac thereafter sought an award of attorney's fees based upon NRCP Rule 68. But pursuant to JAMS Rule 24, the Scheduling Order, and the Agreement of the parties expressed in the Scheduling Order (JA 1/0014:17-20), NRCP Rule 68 was not included in the set of rules governing the arbitration, at that time or any time. The arbitrator and this Court simply brushed past this governing contractual provision in the arbitration.

Regarding the provision "unless the arbitrator rules otherwise," JAMS Rule 24 prohibits the arbitrator from unilaterally ruling "otherwise." The parties must first agree before the arbitrator may change the rules governing the arbitration, otherwise orders and agreements would be meaningless. The phrase "unless the arbitrator rules otherwise" simply means that the parties cannot conclusively stipulate to changing

the rules, but must bring a joint motion to the arbitrator to change the rules. Addendum, JAMS Rule 24.

Garmong adhered to the agreement and Scheduling Order throughout 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 (JA 1/0017-0018) in the arbitration on September 12, 2017, almost exactly one month after it contractually agreed that NRCP 68 would not be included within the scope of rules governing the arbitration, and the arbitrator had so ordered. This insincere approach was consistent with Wespac's prior view of its fiduciary dealings. Wespac did not, then or later, seek to modify its agreement with Garmong, or move the arbitrator to change the terms of the Scheduling Order to include NRCP 68 in the rules governing the arbitration. Garmong did not consider Wespac's Offer of Judgment under NRCP 68, simply because 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, Wespac filed a Motion for Attorney Fees and Costs pursuant to Rule 68 (JA 4/0666-0694). This Motion was based solely on the purported Offer of Judgment of September 12, 2017. Garmong filed an Opposition (JA 5/0695-0726) based upon several grounds, primarily that the rules of the arbitration did not permit Rule 68 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 legally alter the terms of the parties' contractual agreement.

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

The First Order at JA 8/1326, in deciding against Dr. Garmong, misinterprets 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, unilateral authority to change the rules without agreement of both parties, and naively believed that the rules would be obeyed by the arbitrator. Also, he knew he had a contractual agreement with Wespac that Rule 68 had not been included in the governing rules.

First Order and Second Order superficially mentioned JAMS Rule 24, but did not consider it in sufficient detail to apply it to reach a ruling. The Second Order overlooked the fact that the Fourth Issue had not been decided according to the law.

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

"Scheduling Order", JA 1/0014:17-20 (quoted above), stated not only an order by the arbitrator, but a contractual agreement between the parties.

The arbitrator, the District Court, and the two Orders were not free to rewrite this contractual agreement between the parties, absent consent of both parties to the change. Old Aztec Mine, Inc. v. Brown, 97 Nev. at 52, 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." 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."

There is no evidence of record that the parties mutually revised their contractual agreement (which would have required consent of both parties) set forth in the Scheduling Order. By arbitrarily, unilaterally, and retroactively ignoring the provision of the Scheduling Order that Rule 68 was not included in the rules governing the arbitration, the arbitrator impermissibly violated, and implicitly changed, 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 under Issue 4). Accordingly, it was and is improper to award attorneys fees under NRCP Rule 68. The Second Order overlooked the fact that the Fifth Issue had not been decided according to the law.

CONCLUSION

It can hardly be denied the principal duty, perhaps the only duty, of courts is to decide disputes between parties. It is a source of great frustration to appellant Garmong that in this case the courts will not directly adjudicate the issues stated above. Garmong respectfully requests that this Court grant rehearing of the First and Second Orders of Affirmance, reverse and enter judgment in his favor on the issues

presented.

DATED this 7th day of September, 2022.

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

Counsel for appellant/petitioner

ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this petition has been prepared in a proportionally spaced typeface using WordPerfect 12 in 14 point Times New Roman.

2. I further certify that this petition complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the petition exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains **3,753** words.

3. Finally, I hereby certify that I have read this petition, 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 petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the petition 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 petition is not in conformity with the requirements of the

Nevada Rules of Appellate Procedure.

DATED this 7th day of September, 2022.

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

Counsel for Petitioner Garmong

ADDENDUM

JAMS Rule 24 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. 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).

PROOF OF SERVICE OF APPELLANT'S PETITION FOR REHEARING

I, Carl M. Hebert, certify that, on September 7, 2022, I served the Appellant's Petition for Rehearing 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 September, 2022.

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

Counsel for petitioner Garmong