
IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 87411

Electronically Filed
Mar 27 2024 09:11 PM
Elizabeth A. Brown
Clerk of Supreme Court

WESPAC; GREG CHRISTIAN,

Appellants

--against--

GREGORY GARMONG,

Respondent

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

RESPONDENT'S ANSWERING BRIEF

Carl M. Hebert, Esq.
Nevada Bar No. 250
2215 Stone View Drive
Reno, NV 89436
(775) 323-5556

Attorney for Respondent
Gregory Garmong

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.

Respondent 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 respondent in the district court or this Court.

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

Attorney for respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES-iii

STATEMENT OF THE ISSUES-iv

COMBINED STATEMENT OF THE CASE AND FACTS-1

SUMMARY OF THE ARGUMENT-5

**THE RESPONDENTS ARE ESTOPPED FROM BRINGING THIS
APPEAL BECAUSE THEY ACCEPTED THE BENEFITS OF THE
ORDER OF AUGUST 10, 2023-6**

**THIS COURT SHOULD DECLINE THE APPELLANTS' INVITATION
TO REWRITE NRCP 37(a)(5)(A) TO INCLUDE THE EXPENSE OF
BRINGING A MOTION FOR FEES AND COSTS-7**

CONCLUSION-9

ATTORNEY'S CERTIFICATE OF COMPLIANCE-10

PROOF OF SERVICE OF RESPONDENT'S ANSWERING BRIEF-12

TABLE OF AUTHORITIES

Cases

Culbertson v. Culbertson, 91 Nev. 230, 233, 533 P. 2d 768, 770 (1975)-5, 6

Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n. 38, 130 P.3d 1280, 1288 (2006)-9

Exec. Mgt., Ltd. v. Ticor Title Ins. Co., 118 Nev. 46, 54, 38 P.3d 872, 876 (2002)-8

Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 783 (9th Cir. 1983)-8

Fed. Natl. Mortg. Assn. v. Westland Liberty Village, LLC, 138 Nev. Adv. Op. 57, 515 P.3d 329, 335 (2022)-7

In re Gravel, 6 F.4th 503, 515 (2d Cir. 2021)-8

Mangarella v. State, 117 Nev. 130, 134, 17 P.3d 989, 992 (2001)-9

Wheeler Springs Plaza, LLC v. Beemon, 119 Nev. 260, 264, 71 P. 3d 1258, 1261 (2003)-6

Statutes

NRS 15.040-6

Rules

NRCP 37(a)(5)(A)-iv, 2, 5, 7, 9

STATEMENT OF THE ISSUES

1. Are the appellants estopped from pursuing an appeal after they acquiesced in the terms of the order awarding fees and costs of August 10, 2023 by enforcing it.
2. Does an award of fees and costs after a successful motion to compel discovery under NRCP 37(a)(5)(A) implicitly include the expense incurred in preparing and filing a separate motion for attorney's fees and costs.

COMBINED STATEMENT OF THE CASE AND FACTS

Nature of the case: This appeal arises from an action for negligent investment advice, breach of fiduciary duty and fraud brought by respondent Garmong (“Garmong”) against appellants Wespac and Christian, an investment advisory firm and financial advisor, respectively.

Course of the proceedings: The proceedings in this case were lengthy and complex, including an arbitration and post-judgment executions on the assets of Garmong. The facts stated here will be only those relevant to the present appeal.

The appellants (collectively “WESPAC”) prevailed in the underlying arbitration. Attorney’s fees and costs were awarded against Garmong because he did not obtain a result better than an offer of judgment made by WESPAC. A judgment for those fees and costs was entered on July 16, 2021. Appellant’s Appendix (“AA”) 14-16.

Even though WESPAC executed on the total amount of the judgment¹ and recovered it from an investment account held by Garmong, AA 37-38, it served interrogatories and requests for production in aid of execution. AA 26-33 (post-judgment discovery). Garmong understandably saw no point in responding to

1

There was a later, second execution to recover interest incurred while the Sheriff in Carson City delayed serving the first writ of execution. This, too, was satisfied.

discovery which did not serve any purpose and was obviously designed to harass.

WESPAC moved to compel discovery responses in a motion filed on January 24, 2023. AA 17-36. On April 10, 2023 the district court granted the motion and awarded fees and expenses under NRCP 37(a)(5). AA 77-87. Subsequently, on April 25, 2023, WESPAC filed a motion for fees and costs for bringing the motion to compel. The total amount of fees and costs sought were \$4,878.25. AA 90. Garmong opposed the motion for fees and costs as unnecessary: WESPAC had sufficient information in hand to fully execute on its judgment before serving the discovery and, in fact, did fully execute on two separate writs of execution without ever receiving discovery responses. AA 99 (opposition to WESPAC motion for fees and costs).

In an order entered on August 10, 2023 the district court awarded fees in the amount of \$2,835.00. AA 180-193. The district court denied all fees and costs incurred by WESPAC after April 10, 2023, the date of the order granting the motion to compel. The district court reasoned that a motion for fees and costs did not fall within the mandate of NRCP 37(a)(5), which confined the award to only fees and costs expended in bringing the motion to compel and not any follow-on fees for filing a separate motion for expenses. AA 191: 15-28.

Counsel for WESPAC sent demands for payment of the \$2,835.00 by letter of

September 13, 2023, threatening further execution, Respondent's Appendix ("RA") 8, and by e-mail dated September 18, 2023. RA 10. On September 21, 2023, Garmong paid the fee award of \$2,835.00 ordered by the district court on August 10, 2023. RA 23-24. In an e-mail to counsel for Garmong dated September 18, 2023, counsel for WESPAC confirmed that this amount was the total then due under the judgment and any collateral orders for fees and costs. RA 20-21.

WESPAC filed this appeal from the order of August 10, 2023 on October 4, 2023. AA 213-215.

After the notice of appeal was filed, on October 9, 2023 WESPAC brought a motion for sanctions for the failure of GARMONG to again respond to the discovery in aid of execution, even though it served no useful purpose since Garmong had paid everything he owed up to that point. RA 1. Garmong opposed the motion for sanctions. RA 11. The district court referred the motion for sanctions to the Discovery Commissioner of the Second Judicial District Court for his recommendation. In the same order, the district court referred Garmong's motion for relief from the order compelling discovery on the basis that it had been superseded by events and was therefore moot. RA 25.

On January 26, 2024 Garmong paid the sum of \$3,281.00 in response to an order of the district court awarding fees and costs for the second execution to pick up

additional interest on the judgment. RA 55 (“Response to Recommendation for Order by Discovery Commissioner and Notice of Satisfaction of Order of January 10, 2024”); RA 28 (Order of January 10, 2024).

On February 15, 2024 the Discovery Commissioner entered his recommendation for order on the two motions referred to him. He recommended that if Garmong satisfied the order of the district court of January 10, 2024, he would not be required to serve any responses to the discovery in aid of execution. This had already occurred. See immediately above. WESPAC did not object to the recommendation and, on March 11, 2024, the district court entered its order confirming the recommendation. RA 61.

Garmong has paid the judgment, interest on the judgment and any orders to pay fees and costs. Specific to this appeal, he paid the fee award of \$2,835.00 ordered by the district court on August 10, 2023. RA 23-24. At this moment, there is nothing else to pay; he has completely satisfied the judgment.

SUMMARY OF THE ARGUMENT

1. WESPAC enforced the order of August 10, 2023 awarding \$2,835.00 in fees. As a result, it is estopped from appealing that order. Culbertson v. Culbertson, 91 Nev. 230, 233, 533 P. 2d 768, 770 (1975).

2. The provisions of NRCp 37(a)(5) provide for an award of fees and costs only for a motion to compel discovery and not for the expense of bringing a later motion for fees and costs.

ARGUMENT

1.

THE RESPONDENTS ARE ESTOPPED FROM BRINGING THIS APPEAL BECAUSE THEY ACCEPTED THE BENEFITS OF THE ORDER OF AUGUST 10, 2023.

Standard of review. Whether an appellant has acquiesced in a judgment, rendering an appeal moot, is an issue of law for the appellate court. Wheeler Springs Plaza, LLC v. Beemon, 119 Nev. 260, 264, 71 P. 3d 1258, 1261 (2003).

The order of August 10, 2023 from which this appeal was taken awarded fees to WESPAC, but not all the fees sought. WESPAC then aggressively threatened to enforce the order in its communications with Garmong. RA 8, 10. Garmong paid the amount ordered. RA 23-24. “A party who has taken advantage of the favorable provisions of a judgment or has acquiesced in its terms by enforcing it will not be permitted a review.” Culbertson v. Culbertson, 91 Nev. 230, 233, 533 P.2d 768, 770 (1975). This applies equally to an order for the payment of money, which may be enforced in the same manner as a judgment. NRS 15.040.

This appeal is moot and should not be heard by this Court.

2.

THIS COURT SHOULD DECLINE THE APPELLANTS' INVITATION TO REWRITE NRCP 37(a)(5)(A) TO INCLUDE THE EXPENSE OF BRINGING A MOTION FOR FEES AND COSTS.

Standard of review. “Statutory interpretation is a question of law that we review de novo.” Fed. Natl. Mortg. Assn. v. Westland Liberty Village, LLC, 138 Nev. Adv. Op. 57, 515 P.3d 329, 335 (2022).

The district court entered an order, dated April 10, 2023, compelling responses to the appellants’ post-judgment discovery in aid of execution. AA 77-88. Under 37(a)(5), it further ordered that Garmon pay the reasonable expenses of WESPAC in bringing the motion to compel. AA 87. WESPAC filed a motion for fees and costs. AA 89-96. The district court granted the motion; however, it refused to award anything for the cost of preparing and filing the motion for fees itself, finding that the scope of NRCP 37(a)(5) was limited by its very words to the motion to compel only.

WESPAC now wants this Court to rule that NRCP 37(a)(5)(A) includes an implied grant of fees for bringing a motion for fees subsequent to the order to compel.

NRCP 37(a)(5)(A) states:

If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing). If the motion is granted--or if the disclosure or requested discovery is provided after the motion was filed--the court must, after giving an opportunity to be heard, require the party or deponent whose

conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(Emphasis added). Commenting on the nature of this provision, the court in In re Gravel, 6 F.4th 503, 515 (2d Cir. 2021) observed:

Discovery sanctions under Federal Rule 37 are deterrents (specific and general) meant to punish a recalcitrant or evasive party. Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976); see Update Art, Inc. v. Modiin Publ'g, Ltd., 843 F.2d 67, 71 (2d Cir. 1988). A party might otherwise abuse or delay discovery, 'embroil[ing] trial judges in day-to-day supervision.' Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1066 (2d Cir. 1979).

(Emphasis added). See Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 783 (9th Cir. 1983) (FRCP 37 sanctions may serve punitive and deterrent purposes).²

Statutory (and rule) interpretation of punitive provisions does not permit the

2

Federal cases interpreting the Federal Rules of Civil Procedure “are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.” Exec. Mgt., Ltd. v. Ticor Title Ins. Co., 118 Nev. 46, 54, 38 P.3d 872, 876 (2002).

implicit. See Mangarella v. State, 117 Nev. 130, 134, 17 P.3d 989, 992 (2001): “Generally speaking, we narrowly construe ambiguous provisions of penal statutes. Moreover, the rules of statutory interpretation that apply to penal statutes require that provisions which negatively impact a defendant must be strictly construed, while provisions which positively impact a defendant are to be given a more liberal construction.” A strict construction of NRCP 37(a)(5) does not allow a silent provision having the effect of expanding a punitive sanction beyond what is expressly stated. WESPAC cannot recover fees and costs incurred for bringing a motion for fees.

Aside from the lack of support in the Rule, this Court should not entertain the argument of WESPAC because it has not cited any statutory authority in support of its argument. Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n. 38, 130 P.3d 1280, 1288 (2006).

CONCLUSION

Respondent Garmong respectfully requests that this Court affirm the decision of the district court in its order of August 10, 2023.

DATED this 27th day of March, 2024.

/S/ Carl M. Hebert
CARL M. HEBERT, ESQ.
Counsel for plaintiff/respondent 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 **1,885** 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 27th day of March, 2024.

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

Counsel for Respondent Garmong

PROOF OF SERVICE OF RESPONDENT'S ANSWERING BRIEF

I, Carl M. Hebert, certify that, on March 27, 2024, I served the Respondent's Answering Brief on Stephen S. Kent, Esq., counsel for appellants Wespac and Greg Christian, through the Court's electronic filing system to his e-mail address, skent@grsm.com, consistent with Nevada Electronic Filing and Conversion Rule 9©. DATED this 27th day of March, 2024.

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

Counsel for respondent Garmong