

IN THE SUPREME COURT OF THE STATE OF NEVADA

WESPAC and GREG CHRISTIAN,
Appellants,

vs.

GREGORY O. GARMONG
Respondent,

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Clerk of Supreme Court
Supreme Court No. 87411
District Court No. CV12-01271

APPELLANTS REPLY BRIEF

STEPHEN S. KENT, ESQ.
Nevada Bar No. 1251
GORDON REES
SCULLY MANSUKHANI, LLP
1 E. Liberty Street, Suite 424
Reno, Nevada 89501
Telephone: (775) 467-2603
Facsimile: (775) 460-4901
E-mail: skent@grsm.com
Attorney for Appellants
Wespac and Greg Christian

IN THE SUPREME COURT OF THE STATE OF NEVADA

WESPAC and GREG CHRISTIAN,

Supreme Court No. 87411

Appellants,

District Court No. CV12-01271

vs.

GREGORY O. GARMONG,

Respondent,

_____ /

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.

Appellants, WESPAC and GREG CHRISTIAN, disclose that there are no

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persons or entities as described in NRAP 26.1(a) that must be disclosed.

Petitioners' counsel is Stephen S. Kent, Esq. of GORDON REES SCULLY
MANSUKHANI, LLP.

DATED this 26th day of April, 2024.

GORDON REES
SCULLY MANSUKHANI, LLP

BY: 
STEPHEN S. KENT, ESQ.
Nevada Bar No. 1251
1 E. Liberty Street, Suite 424
Reno, Nevada 89501
Telephone: (775) 467-2603
Facsimile: (775) 460-4901
E-mail: skent@grsm.com
Attorney for Appellants
Wespac and Greg Christian

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ARGUMENT

I.

APPELLANT WESPAC HAS NOT ACQUIESCED TO A JUDGMENT OR DECREE

Respondent Garmong argues that his payment of fees and costs pursuant to an order to compel discovery and Appellants' acceptance of that payment was an estoppel and waiver of Wespacs right to appeal.

Review of estoppel is in order. Estoppel is discussed in Am Jur
ESTOPPEL § 28:

The doctrine of equitable estoppel is based on principles of justice and good conscience and on principles of fairness. It is similarly based on an application of the golden rule to the everyday affairs of persons, requiring that one should do unto others as, in equity and good conscience, as they would have them do unto them if their positions were reversed.

Equitable estoppel will grant relief to prevent a party from suffering a gross injustice at the hands of the other party who brought about the situation or condition.

Equitable estoppel is a doctrine addressed to the discretion of the court and is intended to prevent a party from taking unconscionable advantage of one's own wrong by asserting their strict legal rights. Equitable estoppel generically precludes a party from asserting rights the party otherwise would have had against another when that party's own conduct renders the assertion of those rights contrary to equity. Where undisputed facts in the record lead to the conclusion that the elements of equitable estoppel are present, and no alternate view of the facts supports a contrary conclusion, the decision to apply the doctrine of equitable estoppel is within the court's discretion.

The purpose of equitable estoppel is to preclude a person from asserting a right when they have led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. It also has the purpose to forbid one to speak against one's own act, representations, or commitments to the injury of one to whom they were directed and who reasonably relied thereon; to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position; or to prevent a party from taking inequitable advantage of a situation they caused. Where one party has by representation or conduct induced the other party to a transaction to give that party an advantage which it would be against equity and good conscience for such party to assert, that party would not in a court of justice be permitted to avail oneself of the advantage; the equitable estoppel doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim.

The purpose of equitable estoppel is to preserve rights already acquired and not to create new ones. Equitable estoppel functions to prevent the assertion of legal rights that in equity and good conscience should not be available due to a party's conduct. It is designed to aid the law in the administration of justice where without its aid injustice might result. Conduct that works a fraud or constructive fraud on the tribunal and has a detrimental effect on the accuracy and integrity of a judgment warrants the remedy of equitable estoppel.

The doctrine always presupposes error on one side and fault or fraud upon the other and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage. It concludes the truth in order to prevent fraud and falsehood and imposes silence on a party only when in conscience and honesty the party should not be allowed to speak. Thus, the proper function of equitable estoppel is the prevention of actual or constructive fraud.

Equitable estoppel does not itself give rise to a cause of action. Equitable estoppel, rather than being an actual cause of action, is more

precisely characterized as an equitable doctrine that suggests a tort-related theory in that it attempts to allocate loss resulting from the misrepresentation of facts to the most culpable party and to ameliorate an innocent party's losses. (footnotes omitted.)

These principals have been adopted by the Nevada Supreme Court.

See, *In Re Harrison Living Trust*, 121 Nev. 217, at 223, 1061-1062, 112

P.2d 1058 (2005):

“Equitable estoppel functions to prevent the assertion of legal rights that in equity and good conscience should not be available due to a party's conduct.” This court has previously established the four elements of equitable estoppel:

(1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped. (footnotes omitted.)

Among other things, “silence can raise an estoppel quite as effectively as can words.”

Wespac accepting payment of the undisputed amount Garmong owes pursuant to a fee award, pursuant to a motion to compel does not qualify as a waiver or estoppel and if this court decides that additional fees should be paid this decision would not be contradictory to the position taken by Wespac that additional fees should have been awarded.

The old authority cited by Garmong, *Culberson v. Culberson*, 91 Nev. 230, 533 P.2d 768 (1975), merely held that where a wife has accepted benefits of the original judgment of dissolution and had sought to enforce its provisions, the court would not review the original judgment at wife's behest; and that evidence that wife, contrary to provisions of dissolution judgment, had engaged in illicit conduct with unmarried male, that older children were aware that an unmarried man was sleeping with their mother, and that the school work of the older children had deteriorated while they were in the wife's custody sustained change in custody order.

Obviously this is not the circumstance here. There is no judgment or decree of dissolution that was accepted by Wespac. Wespac has a judgment against Garmong, there has been no satisfaction of that judgment from Wespac. Wespac did nothing to indicate it was waiving its right to seek the additional fees it had requested in the District Court.

Wespac did nothing to state or indicate the amount paid resolved its claims for attorneys fees related to its motion for fees related to the motion to compel.

The authority cited and concept is that a party cannot appeal where to do so contradicted a position taken and reversal would upend the

decision below. The law more accurately described is that where reversal of the judgment on the grounds appealed cannot possibly affect the appellants right to the benefits accepted then the appeal was not waived. *Thomas v. Beaumont Heritage, Soc.*, 339 S.W.3d 713 (Tex. App. 2011); *Caranas v. Jones*, 437 S.W.2d 905 (Tex. Civ. App. 1969).

A party who voluntarily accepts benefits of a judgment cannot afterward prosecute an appeal, **except where reversal cannot possibly affect his right to benefit secured**; if he accepts only that which appellee concedes or is bound to concede to be due, he is not estopped to prosecute appeal which involves only his right to further recovery. *City of Mesquite v. Rawlins*, 399 S.W.2d 162 (Tex. Civ. App. Tyler 1966).

One who voluntarily accepts benefits of judgment cannot thereafter prosecute an appeal therefrom; **except where reversal of judgment cannot possibly affect his right to benefits secured under judgment**. *Wallace v. Wallace*, S.W.2d 918 (Tex. Civ. App. San Antonio 1963).

By enforcing a judgment or decree by execution or otherwise, a party clearly waives his right to appeal, **unless the decree is such circumstances that there is no inconsistency between such enforcement and the appeal**. *Gaulding v. Gaulding*, 256 S.W.2d 684 (Tex. Civ. App. Dallas 1953). Here Wepac did nothing inconsistent with

the appeal herein where it seeks additional fees related to the motion to compel.

II.

**APPELLANTS CORRECTLY FILED A SEPARATE MOTION
FOR FEES AND COSTS AFTER AN ORDER
TO COMPEL AND AWARD OF FEES WAS GRANTED;
APPELLANTS SHOULD HAVE BEEN AWARDED THEIR
\$2,043.25 IN FEES AND COSTS FROM THE APRIL 26, 2023
MOTION FOR FEES AND COSTS UNDER NRCP 37(A)(5)(A)**

It is undisputed Rule 37(a)(5)(A) mandates an award of fees and costs as part of a successful motion to compel. NRCP 37(a)(5) implicitly requires an award of fees and costs for a successful motion to compel including all fees related to that motion because the amount of fees is not known when the motion to compel is filed and a request for fees is not appropriate for a reply. Rule 37(a)(5) implicitly includes a fee award for the required subsequent motion for fees and costs, not just the motion to compel and reply pleadings. The District Courts failure to recognize this was error. The district courts failure to award these fees of \$2,043.25 was an abuse of discretion.

It is not disputed that that the purpose of Rule 37(a)(5)(A) is to award the moving party all of the expenses they were forced to incur in being forced to seek an order to compel, because the opposing party ignored responding to discovery.

The district court abused its discretion by making a decision that was clearly erroneous. *See, Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242

(2007) ("The district court's factual findings will not be set aside if supported by substantial evidence."); *Bopp v. Lino*, 110 Nev. 1246, 1249, 885 P.2d 559, 561 (1994) ("The district court's findings of fact will not be set aside unless those findings are clearly erroneous."); *Real Estate Division v. Jones*, 98 Nev. 260, 264, 266, 65 P.2d 1371, 1373-74 (1982).

This Court generally reviews a district court's award of attorney's fees for an abuse of discretion. *See, Rivero, supra*, 125 Nev. at 440-41, 216 P.3d at 234; *Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727 (2005).

The district court's open and obvious error of law, here incorrectly applying NRCP 37(b)(5), was also an abuse of discretion. *See, Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 562-63, 598 P.2d 1147, 1149 (1979), *quoting, Goodman v. Goodman*, 68 Nev. 484, 489, 236 P.2d 205, 207 (1951) ("E)ven within the area of discretion where the court's discernment is not to be bound by hard and fast rules, its exercise of discretion in the process of discernment may be [g]uided by such applicable legal principles as may have become recognized as proper in determining the course of justice. A clear ignoring by the court of such established guides, without apparent justification, may constitute abuse of discretion.").

The district court's failure to exercise discretion when required to do so is also an abuse of discretion. *See, Massey v. Sunrise Hospital*, 102 Nev. 367, 371,

724 P.2d 208, 210 (1986) ("A court's failure to exercise discretion (when available) is error.").

Rule 37(a)(5) implicitly requires an award of attorneys fees for not only the motion to compel but for a separate motion for fees and costs after the Court grants the motion to compel. The detailed requirements for a motion for fees and costs cannot be included in the motion to compel because the amount of fees, hours expended, etc, are unknown. Nor can the detailed requirement of a fee and cost request be included in a reply. Court Rules require a separate motion for fees. In *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

The District Court erred and abused its discretion in not awarding the \$2,043.25 in fees requested by Appellants for preparing the motion for fees and costs, and reply after the successful motion to compel.

This Court has imposed specific requirements for a request for an award of attorneys fees and costs including the above-referenced Brunzell analysis.

Fortunet, Inc. v. Rosten, 2024 WL 390133 (Nev. 2024); *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 455 P.2d 31 (1969); *Logan v. Abe*, 131 Nev. 260, 350 P.2d 1139 (2015); *Haley v. Eighth Judicial Dist. Ct.*, 128 Nev. 171, 273 P.3d 855 (2012); *Skender v. Brunsonbuild Constr. & Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006); *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1353-54, 971 P.2d 383, 386 (1998).

A party making a motion to compel cannot include or meet all of these requirements in the motion to compel as it is unknown what the specific tasks and time will be needed to consider the opposition, prepare a reply, submit the motion to the Court or participate in any oral arguments.

It would be inappropriate to include in the reply the necessary specifics for a request for fees and costs since a reply is limited to responding to the opposition. 16AA Federal Practice and Procedure, Jurisdiction § 3974.3 (5th Ed). Including the specifics of a request for fees in the reply would not give the opposing party any chance to oppose the specifics of the request for fees.

Efficiency and judicial economy is best served by a subsequent motion for fees after the motion to compel is granted as Appellants did here.

The governing rules provide a presumption that reasonable expenses – which include attorneys’ fees from a motion detailing the fees incurred – will be awarded to the party that prevails on a motion to compel discovery. Fed. R. Civ. P. 37(a)(5)(A); see also *Big City Dynasty v. FP Holdings, L.P.*, 336 F.R.D. 507, 513 (D. Nev. 2020); *Underwood v. O’Reilly Auto Enterprises, LLC*, 2022 WL 4359096, not reported in Fed. Supp. (Nev. 2022).

The fact that a separate motion is required by Court decisions should not preclude Appellants from recovering the \$2,043.25 fees incurred in such a motion.

It was error and an abuse of discretion to deny Appellants the recovery of the \$2,043.25 in fees incurred in meeting the fee motion requirements imposed by Courts.

CONCLUSION

Appellant's did nothing that would fit within waiver or estoppel that prevent this appeal.

Appellants appropriately sought recovery of fees and costs in a separate motion after a successful motion to compel. Pursuant to Rule 37(a)(5)(A) fees and costs in this motion should have been awarded. The District Court erred in limiting Rule 37(a)(5)(A) to the fees for the motion to compel only. The District court abused its discretion in not awarding the \$2,043.25 in fees from the subsequent motion for fees.

AFFIRMATION

The undersigned hereby declares that the within document does not contain the Social Security Number of any person.

DATED this 26th day of April, 2024.

GORDON REES
SCULLY MANSUKHANI, LLP

By: 

Stephen S. Kent, Esq.

Nevada Bar No. 1251

1 E. Liberty Street, Suite 424

Reno, NV 89501

Attorney for Appellants

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 Word in Times New Roman Font.

2. I further certify that this brief does not comply with the page- or type-volume limitations of NRAP 32(a)(7), because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced and contains 2,442 words.

3. Finally, I hereby certify that I have read this reply 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


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that I may be subject to sanctions in the event that the accompanying brief is not
in conformity

DATED this 26th day of April, 2024.

GORDON REES
SCULLY MANSUKHANI, LLP

By: 
Stephen S. Kent, Esq.
Nevada Bar No. 1251
1 E. Liberty Street, Suite 424
Reno, NV 89501
Attorney for Appellants

CERTIFICATE OF SERVICE

Pursuant to Rule 25(b) of the Nevada Rules of Appellate Procedure, I hereby certify that I am an employee of Gordon Rees Scully Mansukhani and that on this date, I served a true and correct copy of the attached document as follows:

_____ By placing the document(s) in a sealed envelope with first-class US. Postage prepaid, and depositing for mailing at Reno, Nevada, addressed to the person at the last known address as set forth below.

XX Electronic Filing states that the attached document will be electronically mailed; otherwise, an alternative method will be use.

_____ By personally delivering the document(s) listed above, addressed to the person at the last known address as set forth below.

Carl Hebert, Esq.
2215 Stone View Drive
Sparks, NV 89436
Attorneys for Respondent

DATED this 26 day of April, 2024.

Sam Baker