

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IN THE MATTER OF THE
GUARDIANSHIP OF THE ESTATE OF
EDWARD FEIN, A PROTECTED
PERSON.

No. 82630-COA

FILED

JUL 21 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ALAN S. LEVIN, M.D., J.D.,

Appellant,

vs.

EDWARD FEIN; PEARL FEIN;
RANDAL S. KUCKENMEISTER; AND
JP MORGAN CHASE BANK, N.A.,
Respondents.

ORDER OF AFFIRMANCE

Alan S. Levin, M.D., J.D., appeals from a district court order awarding attorney fees. Second Judicial District Court, Washoe County; Lynne K. Simons, Chief Judge.

In 2018, the district court appointed Levin as permanent guardian over respondent Edward Fein's¹ estate—not over his person or his trust.² Months later, Edward married respondent Pearl Landrith, his longtime romantic partner with whom he had been cohabitating, and she took his last name. Shortly thereafter, Pearl petitioned the court to remove Levin as permanent guardian of Edward's estate, claiming, among other things, that he exceeded his authority as guardian. During the litigation, the court appointed respondent Randal Kuckenmeister, a CPA, as guardian

¹Edward petitioned the court for a guardian after being diagnosed with a mild cognitive impairment. He requested the court appoint Levin, a medical doctor, attorney, and longtime acquaintance.

²We recount the facts only as necessary for our disposition.

ad litem for Edward's estate for the limited purpose of participating in settlement discussions and entering into a settlement agreement.

After a two-day settlement conference, the parties executed a settlement agreement that contained multiple provisions pertinent to this appeal. First, the parties agreed that Levin would resign as permanent guardian of Edward's estate; the court would appoint a successor guardian; and the successor guardian would "endeavor, by subpoena or otherwise" to obtain a Wells Fargo dossier, "if such exist[ed]," without objection (the Resignation provision). This alleged dossier purportedly contained information Wells Fargo compiled regarding Pearl's alleged misuse of Edward's funds. Second, they agreed to keep the settlement agreement and its terms "in the strictest confidence." This prohibited any party from "disclos[ing] any such information . . . except as may be required . . . to a court . . . in the event of any proceeding regarding the interpretation, construction, or enforcement of the terms and conditions of the [a]greement, or any dispute that may arise hereunder" (the Confidentiality provision). Third, the parties agreed that neither Levin nor his wife would contact either Pearl or Edward, "directly, indirectly, or by any other means" (the No Contact provision). Finally, they agreed that if either party sued to enforce the settlement agreement, or for a breach of it, the prevailing party would be entitled to an award of attorney fees and costs (the Attorney Fee provision).

The parties then filed a joint petition to approve the settlement agreement, which the district court granted. In its order approving the agreement, the court stated that "[t]he parties shall perform in accordance with the binding terms of the Settlement Agreement." The court also stated that "Levin's involvement in this guardianship case and the related trust case . . . in any capacity or interest whatsoever is terminated, and he is

relieved from any fiduciary duties related to [Edward].” Finally, the court appointed Kuckenmeister as permanent guardian.

Three months later, Levin filed a pro se motion requesting the district court order the state guardianship compliance office to obtain the Wells Fargo dossier so as, he claimed, to complete the terms of the settlement agreement (the Levin Motion). In his motion, Levin argued that the settlement agreement required Kuckenmeister to obtain the Wells Fargo dossier. However, Levin claimed, “the docket in this matter indicates no action by [Kuckenmeister] to follow the Court’s instructions to obtain the Wells Fargo dossier.” Levin claimed that this showed Kuckenmeister was “reluctant to proceed” and the court therefore had a “responsibility” to “appoint a neutral investigative entity . . . to obtain information from Wells Fargo and make its report and recommendations, if any, to the Court for decision.”

Edward opposed the motion. He also filed a motion for sanctions, which Pearl joined (the Sanctions Motion). In the Sanctions Motion, Edward claimed that Levin violated the settlement agreement’s Resignation,³ Confidentiality,⁴ and No Contact⁵ provisions; the order that approved the settlement agreement; and NRCP 11 (by filing a frivolous and

³Edward claimed Levin violated this provision by monitoring the case filings in the guardianship case and filing the Levin Motion.

⁴Edward claimed Levin violated this provision when he filed the Levin Motion (which quoted from the settlement agreement and described the dossier) and filed his opposition to the motion for sanctions (which had the settlement agreement attached as an exhibit). Levin did not file the motion nor the opposition under seal.

⁵Edward claimed Levin violated this provision because Levin’s filing of the Levin Motion indirectly contacted them “by any other means” when Levin had the motion served on them.

harassing motion). Because he was forced to file a motion to enforce the terms of the settlement agreement, Edward argued that he was entitled to attorney fees under the Attorney Fee provision.

Levin opposed the Sanctions Motion—though he did so without citing any authority. In his opposition, he cursorily claimed that the settlement agreement was “wholly contingent” upon the successor guardian’s review of the dossier. If that provision was “unilaterally excised,” he claimed, the agreement could be “voided in its entirety.” He further claimed that Kuckenmeister had failed to subpoena the dossier, and that he should not be allowed to either ignore this part of the agreement or to selectively share what he has done in a “secretive, clandestine environment.”

Following a hearing, the district court summarily denied the Levin Motion but granted the Sanctions Motion in part. The court found that when Levin filed the Levin Motion, he violated the settlement agreement’s Resignation, Confidentiality, and No Contact provisions. The court declined to hold Levin in contempt. However, the court found that Edward and Pearl had filed the Sanctions Motion to enforce the settlement agreement and they were prevailing parties, entitling them to attorney fees under the Attorney Fee provision. The court then stated that it had reviewed the affidavit Edward and Pearl had filed with the Sanctions Motion and consequently awarded Edward’s counsel \$23,103 and Pearl’s counsel \$4,725 as attorney fees. The court also cautioned Levin that he had no standing, that he must follow the settlement agreement, and that he faced possible contempt penalties if he injected himself into the guardianship proceedings in the future. Levin now brings this pro se appeal.

Levin does not appear to challenge the denial of the Levin Motion. Rather, he claims that the district court erred in imposing the attorney fee award. For the first time, he claims that Kuckenmeister’s

failure to subpoena the dossier or otherwise investigate the claims against Pearl constituted a material breach of the settlement agreement that excused his own performance under the agreement. In response, Edward argues that the court properly awarded attorney fees because it correctly found that Levin violated the Resignation, Confidentiality, and No Contact provisions, which entitled them to attorney fees under the Attorney Fee provision. Kuckenmeister argues in his brief that he did not materially breach the settlement agreement because it did not require him to subpoena the dossier or file a report with the court. Finally, Pearl argues in her brief that Levin waived his arguments by not presenting them below, did not cogently argue what he did present, and that, even if Kuckenmeister breached the agreement, that would not excuse Levin from completing performance with respect to her.⁶

On appeal, we review a district court's decision to award attorney fees, enforce a settlement agreement, or impose sanctions for an abuse of discretion. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 80, 319 P.3d 606, 615 (2014); *Grisham v. Grisham*, 128 Nev. 679, 686, 289 P.3d 230, 235 (2012); *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 249, 235 P.3d 592, 596 (2010). However, we decline to review Levin's argument because he waived it by not raising it below, conceded that it was waived and should not be considered, and did not cogently argue his point. We address each independent ground below.

First, Levin raised his argument that Kuckenmeister's material breach excused his own performance for the first time on appeal.⁷ *See Old*

⁶Pearl suggests, in passing, that this court may lack jurisdiction over this appeal. We disagree. *See* NRAP 3A(b)(1), (8).

⁷Levin did not cogently argue his points below, either, making it difficult to assess what he did argue and thus preserve. But he never

Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (“A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal.”); *see also Dermody v. City of Reno*, 113 Nev. 207, 210, 931 P.2d 1354, 1357 (1997) (“Parties may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below.” (internal quotation marks omitted)).

Second, Pearl asserted in her answering brief that Levin waived his argument by failing to raise it below. Yet, in his reply brief, Levin failed to cogently address Pearl’s assertion. We deem Levin’s failure to be a concession that Pearl’s assertion is meritorious. *See Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (holding that when respondents support their argument with authority, and appellant fails to challenge that argument, the court may refuse to “conduct an independent search” and instead view respondents’ argument as meritorious).

Third, and finally, Levin has not cogently argued his point on appeal. *See Edwards v. Emperor’s Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant’s argument that is not cogently argued or lacks the support of relevant authority). He has not explained how Kuckenmeister’s alleged failure to investigate or subpoena the Wells Fargo dossier constitutes any breach, let alone a material one.⁸ The plain language of the settlement

claimed below that Kuckenmeister’s breach was so material that it excused his own performance.

⁸Levin also claims that the “District Court erred in construing the language of a settlement agreement concerning the required actions of the Successor Guardian.” But he cites no authority showing how the district court erred. Instead, he has only complained that Kuckenmeister “misinterpreted the Settlement Agreement to satisfy his own lack of compliance with the settlement agreement.” He indicates no prayer of relief

agreement does not *require* Kuckenmeister to subpoena the dossier, nor does it impose a time requirement to obtain the records. Levin has not otherwise pointed to any evidence in the record showing that Kuckenmeister either failed to subpoena the dossier or failed to investigate the allegations against Pearl. Finally, Levin does not explain how the district court abused its discretion in awarding attorney fees under the Attorney Fee provision.⁹ Therefore, we

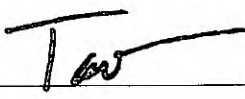
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla

TAO, J., concurring:

I concur in the judgment.


_____, J.
Tao

in that section. We therefore decline to consider this argument. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

⁹Insofar as the parties have raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

cc: Hon. Lynne K. Simons, Chief Judge
Lansford Levitt, Settlement Judge
Alan S. Levin
McDonald Carano LLP/Reno
Sheppard, Mullin, Richter, & Hampton LLP/Los Angeles
Fennemore Craig P.C./Reno
Maupin, Cox & LeGoy
Allison MacKenzie, Ltd.
Washoe District Court Clerk