IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GREGORY O. GARMONG,
Appellant,
vs.
WESPAC; AND GREG CHRISTIAN,
Respondents.

No. 83356-COA

FILED

JUL 21 2022

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

ORDER OF AFFIRMANCE

Gregory O. Garmong appeals from a district court order awarding attorney fees. Second Judicial District Court, Washoe County; Lynne K. Simons, Chief Judge.

In December 2020, this court affirmed a district court order confirming an arbitration award.[1] After our order of affirmance, Garmong petitioned this court to rehear the case, which we denied. Once rehearing was denied, Wespac and Christian filed a second amended motion for attorney fees, asking the district court to award them fees and costs from the appeal. After Wespac and Christian filed their second amended motion for attorney fees, Garmong petitioned the Nevada Supreme Court for review of this court's order of affirmance. The parties then stipulated that Garmong would have "10 calendar days after the Nevada Supreme Court has acted on the [ ] petition for review" to file an opposition to the second amended motion for attorney fees.

On April 6, 2021, the Nevada Supreme Court denied Garmong's petition for review. Ten days passed, and Garmong failed to file an opposition. Wespac and Christian requested that the district court enter an order awarding the requested fees and costs because Garmong failed to timely oppose their motion. In response, Garmong filed two motions. First,

[1]We do not recount the facts except as necessary to our disposition.

he moved to strike the declaration of Wespac and Christian's attorney, Thomas Bradley, offered in support of the motion for attorney fees. Second, he moved the court for an extension of time to file an opposition to the motion for attorney fees. The district court denied both motions and entered an order granting Wespac and Christian's motion for attorney fees.

On appeal, Garmong argues that the (1) arbitrator, district court, and the court of appeals misapplied the law in relation to Garmong's motion for partial summary judgment; (2) arbitrator, district court, and the court of appeals improperly applied the law concerning the law of tortious breach of the implied covenant of good faith and fair dealing, breach of the Nevada Deceptive Trade Practices Act, breach of fiduciary duty of full disclosure, and breach of NRS 628A.030; (3) arbitrator, district court, and court of appeals misapplied the summary judgment standard; (4) arbitrator, district court, and court of appeals erred in refusing to apply JAMS Rule 24 in awarding attorney fees to Wespac; (5) arbitrator, district court, and court of appeals erred in revisiting the terms of the parties' agreement; (6) district court abused its discretion denying Garmong's motion to strike Bradley's declaration; and (7) district court abused its discretion denying Garmong's motion for an extension of time to file an opposition to the second amended motion for attorney fees. We disagree on all points.

We decline to address the issues already resolved by Garmong's previous appeal

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) (Order of Affirmance) (addressing the first five arguments raised by Garmong in this appeal). We also denied rehearing on those issues, *see Garmong v. Wespac*, No. 80376-COA (Nev. Ct. App. Feb. 17, 2021) (Order Denying Rehearing), and the Nevada Supreme Court declined to

review our decision, *see Garmong v. Wespac*, No. 80376 (Nev. Apr. 6, 2021) (Order Denying Petition for Review). Nevertheless, Garmong argues that this court can reconsider those issues because the doctrine of law of the case does not apply here. For that proposition, Garmong argues that this doctrine does not apply because this court misapplied the law. But Garmong's understanding of the doctrine of law of the case is flawed.

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." *Clem v. State*, 119 Nev. 615, 620, 81 P.3d 521, 526 (2003); *Graves v. State*, 84 Nev. 262, 439 P.2d 476 (1968); *State v. Loveless*, 62 Nev. 312, 150 P.2d 1015 (1944). Departing from the doctrine of law of the case requires that the appellant show that the prior decision was "so clearly erroneous that continued adherence to [it] would work a manifest injustice." *Clem*, 119 Nev. at 620, 81 P.3d at 526. Garmong argues that this court's misapplication of the law should allow us to depart from the doctrine of law of the case. But this argument is misleading and misconstrues the standard for departing from the law of the case. *See id.*

Additionally, when a party feels that a reviewing court has misapprehended the law, the correct procedure is for the party to petition the reviewing court for rehearing of its decision. *See* NRAP 40(c)(2)(A)-(B) (stating that a petition for rehearing may be granted when the court has overlooked or misapprehended a question of law in a case, or when the court has misapplied a decision that controls the disposition). Thus, we decline to reexamine the issues Garmong presents that have already been decided by this court with review being denied by the supreme court. He has neither shown a clearly erroneous misapplication of the law resulting in manifest injustice, nor how such injustice would manifest as the result of the failure to apply a change in the law, if any. *See, e.g., Hsu v. County of Clark*, 123 Nev. 625, 632, 173 P.3d 724, 729-30 (2007) (explaining that "when the

controlling law of this state is substantively changed during the pendency of a remanded matter at trial or on appeal, courts of this state may apply that change to do substantial justice"). Therefore, we need only address the merits of Garmong's arguments that the district court abused its discretion in denying his motion to strike and motion for an extension of time to file an opposition to the second amended motion for attorney fees.

The district court did not abuse its discretion by denying Garmong's motion to strike

This court reviews a district court's order on a motion to strike a declaration for attorney fees for an abuse of discretion. *See Thomas v. Hardwick*, 126 Nev. 142, 152-53, 231 P.3d 1111, 1118 (2010) (reviewing for an abuse of discretion a district court's denial of a motion to strike evidence).

Garmong argues that the district court did not have a basis to grant the second amended motion for attorney fees because Wespac and Christian's attorney, Thomas Bradley, did not submit a declaration supporting the motion for attorney fees that was based on "personal knowledge."[2] We disagree.

Reviewing Bradley's declaration, Garmong, Wespac and Christian, and the district court all relied on NRCP 56(c)(4), which states that an "affidavit or declaration used to support or oppose a motion must be made on personal knowledge." But the "motion" that NRCP 56(c)(4) refers to is a motion for summary judgment, not attorney fees. *See generally* NRCP 56 (the rule governing motions for summary judgment). Here, Wespac and Christian are not moving the court for summary judgment; they are asking

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[2]To the extent that Garmong attempts to frame his argument around the merits of the district court's ability to award attorney fees, that issue is not preserved on appeal, *see Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52-52, 623 P.2d 981, 983-84 (1981); and thus, we only address the denial of the motion to strike.

for the attorney fees associated with their previous appeal. Thus, NRCP 56, and its personal knowledge requirement, does not apply.

Instead, NRCP 54—which was designed for judgments and motions for attorney fees—governs. Under NRCP 54(d)(2)(B)(v), a motion for attorney fees must by supported by

> (a) counsel's affidavit swearing that the fees were actually and necessarily incurred and were reasonable;
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> (b) documentation concerning the amount of fees claimed; and
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> (c) points and authorities addressing the appropriate factors to be considered by the court in deciding the motion.

In this instance, Bradley's declaration states his CV information and hourly rate. The declaration also states that Bradley believes that his hourly rates and costs are reasonable, and that those rates and costs were necessary for the appeal. Bradley attached invoices that detail his time billed and the costs associated with the appeal. Finally, Bradley's declaration is attached to a motion wherein Bradley addresses in detail why he believes Wespac and Christian are entitled to attorney fees. Thus, reviewing the declaration and considering all the requirements set forth under NRCP 54(d)(2)(B)(v), we conclude that Wespac and Christian's motion for attorney fees is properly supported.[3]

Accordingly, we affirm the district court's decision to deny Garmong's motion to strike the declaration because it reached the right result, even if for the wrong reason, in this case by relying on the incorrect rule. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*,126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (holding that appellate courts "will affirm a

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[3]Additionally, Bradley's declaration is proper under the requirements set forth in NRS 53.045.

district court's order if the district court reached the correct result, even if for the wrong reason").

The district court did not abuse its discretion denying Garmong's motion for an extension of time to file an opposition

We review a district court's order denying a motion for an extension of time for an abuse of discretion. *See id.* at 598, 245 P.3d at 1202 (affirming the district court's denial for an extension of time to serve defendants under NRCP 4).

At the outset, we note that the parties' stipulated agreement states that Garmong had ten days to file an opposition to the second amended motion for attorney fees once the Nevada Supreme Court issued a decision on the petition for review. And, by Garmong's own admission, he failed to do so. Thus, Garmong's failure to adhere to the agreement alone is grounds for affirming the district court's decision.[4] *Cf. Taylor v. State Indus. Ins. Sys.*, 107 Nev. 595, 598, 816 P.2d 1086, 1088 (1991) ("A stipulation is an agreement made before a judicial tribunal which requires, as does a contract, the assent of the parties to its terms.").

Nonetheless, NRCP 6(b)(1)(B)(ii) affords the district court the discretion to grant an enlargement of time "on [a] motion made after the time has expired if the party failed to act because of excusable neglect." *See also Mosley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 662, 188 P.3d 1136, 1142 (2008) (determining that "the district court may exercise its discretion to grant an enlargement of time to take an action that is otherwise required

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[4]In addition, DCR 13(3) states that "[f]ailure of the opposing party to serve and file his written opposition may be construed as an admission that the motion is meritorious and a consent to granting the same." Thus, the plain language of DCR 13(3) is also grounds for affirming the district court's decision, considering that the district court can use its discretion to grant an unopposed motion, as it did here. *Id.*; *see also Saavedra-Sandoval*, 126 Nev. at 598, 245 P.3d at 1202.

to be done within a specified time when excusable neglect is shown"). Garmong, however, never argued to the district court that excusable neglect should afford him an extension. Instead, Garmong's arguments that are preserved on appeal rely on an allegation that opposing counsel violated NRPC 3.5A and that the public policy favors hearing cases on their merits. We note that this case was in fact heard on the merits and a decision made not in Garmong's favor. Nevertheless, we address Garmong's arguments below.

Turning to Garmong's first argument, NRPC 3.5A is an ethical rule designed for attorneys' relationships with opposing counsel before an entry of default is filed. The rule states,

> [w]hen 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.

NRPC 3.5A. Thus, a plain reading of the rule infers that counsel needs to notify an opposing counsel only before a default or dismissal is entered. *Id.* The Nevada Supreme Court has also interpreted this rule as such, stating that the rule requires an attorney "to inquire into the opposing party's intent to proceed before requesting a default." *Landreth v. Malik*, 127 Nev. 175, 189, 251 P.3d 163, 172 (2011); *Rowland v. Lepire*, 95 Nev. 639, 640, 600 P.2d 237, 237 (1979). Here however, Wespac and Christian's motion for attorney fees stems from a contested arbitration award under NRS 38.243(3) and NRCP 68, not an entry of default or dismissal. Thus, even a broad

interpretation of *Rowland* and *Landreth* would not lead to the logical conclusion that NRPC 3.5A applies to these facts.[5]

When considering Garmong's second argument, while we agree that this state's public policy favors hearing cases on their merits, the Nevada Supreme Court has explained that this policy "is not absolute and must be balanced against [other] countervailing policy considerations." *Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 198, 322 P.3d 429, 430 (2014). The *Huckabay* court went on to explain that some policy considerations include "the public's interest in expeditious appellate resolution, which coincides with the parties' interests in bringing litigation to a final and stable judgment; prejudice to the opposing party; and judicial administration concerns, such as the court's need to manage its large and growing docket." *Id.* at 203, 322 P.3d at 433. And we note that the *Huckabay* court never suggests that the district court must consider an enumerated list of policy considerations with detailed findings. *See generally id.* at 203, 322 P.3d at 433-34. Instead, the district court enjoys discretion to determine which policy considerations favor its findings. *See generally id.*

Here, the district court relied on one of the *Huckabay* policy considerations, the public interest in resolving cases expeditiously, in denying Garmong's motion. The district court's findings explain in detail that this case has been ongoing for over nine years, that Garmong has already received an adverse judgment against him that has been affirmed by appellate review, and that allowing the extension would require this case to be ongoing, which would again mean incurring more costs and attorney

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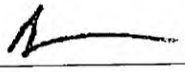
[5]Indeed, the district court specifically stated in its order that, "Mr. Garmong's reliance on NRPC 3.5A is misplaced because Rule 3.5A applies when counsel seeks entry of a default or complete dismissal of an action and does not relate to a litigant's responsibility to timely file a pleading." (internal citations omitted).

fees. Thus, because the district court's findings appropriately consider the "countervailing policy considerations" appropriate to the case at bar, and because the district court gave detailed findings regarding those policy considerations, we cannot agree that there was an abuse of discretion based on hearing a case on its merits, or more precisely under the facts and circumstances presented here, hearing a motion on the merits.

Therefore, because Garmong has not demonstrated the district court abused its discretion, we affirm the district court's decision to deny his motion for an extension of time to file an opposition.

Accordingly, we ORDER the judgment of the district court AFFIRMED.[6]

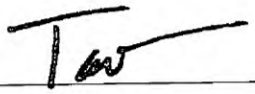
_____, C.J.
Gibbons



_____, J.
Bulla

TAO, J., concurring:

I concur in the judgment.



_____, J.
Tao

[6]Insofar 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
Carl M. Hebert
Law Offices of Thomas C. Bradley
Washoe District Court Clerk