IN THE SUPREME COURT OF THE STATE OF NEVADA

PEGGY CAIN, an Individual; JEFFREY CAIN, an Individual; and HELI OPS INTERNATIONAL, LLC, an Oregon limited liability company,

Appellants,

v.

RICHARD PRICE, an Individual; and MICKEY SHACKELFORD, an Individual,

Respondents.

/

NO. 69333

PEGGY CAIN, an Individual; JEFFREY CAIN, an Individual; and HELI OPS INTERNATIONAL, LLC, an Oregon limited liability company,

Appellants,

v.

RICHARD PRICE, an Individual; and MICKEY SHACKELFORD, an Individual,

Respondents.

/

NO. 69889

PEGGY CAIN, an Individual; JEFFREY CAIN, an Individual; and HELI OPS INTERNATIONAL, LLC, an Oregon limited liability company,

Appellants,

vs.

RICHARD PRICE, an Individual; and MICKEY SHACKELFORD, an Individual,

Respondents.

/

NO. 70864

REPLY TO RESPONDENTS' RESPONSE TO SUPPLEMENTAL AUTHORITIES

17-36524

Appellants hereby reply to respondents' response to appellants' notice of supplemental authorities.

Initially, the court should note that the response goes far beyond the mandatory limitations in NRAP 31(e). This is thoroughly discussed in appellants' motion to strike the response.

Respondents state that the Cains only sought recovery based upon the settlement agreement, and not based upon the Joint Venture Agreement (JVA) or the promissory note. (Response, page 2.) Respondents' contention is false. The third amended complaint, which was the operative complaint for purposes of this appeal, contained nine claims for relief. The "background" portion of the complaint contained allegations regarding the initial loan, the JVA and the promissory note. 4 A.App. 759-60. Although the first claim for relief was based upon the subsequent settlement agreement, the other claims were based upon **all** of the transactions.

For example, the second claim was for fraud, contending that the defendants made false statements "in order [to] obtain funds from Plaintiffs." 4 A.App. 761:26-27. This fraud clearly related to the original loan transaction. 4 A.App. 761-62. The Cains also alleged that the defendants participated in a conspiracy, and that the defendants converted the Cains' funds. 4 A.App. 762-65. These claims related to

all of the defendants' conduct, including conduct relating to the original JVA and promissory note.

The response also states that default judgments against other defendants "relied exclusively on the Settlement Agreement." (Response, page 5.) Again, this is a flagrant misrepresentation of the record. In fact, respondents made the same misrepresentation in their answering brief, and the Cains' reply brief set the record straight on this point. ARB 20-22. Yet respondents now ignore the evidence cited in the reply brief, which unequivocally and undeniably shows that the default judgments were based upon **all** of the claims, including those relating to the original loan and the JVA.

For example, the default judgment against C4, Rawson and Kavanagh specifically states that the judgment was rendered under the first claim for relief (breach of the settlement agreement) **and** under the second, third, fourth, fifth and sixth claims for relief, all of which included allegations relating to the original loan transaction, not just the settlement agreement. 2 A.App. 295:16-24. Another default judgment (against defendant Edwards) also was based upon all of the claims, including those relating to the original loan and the JVA. R.App. 112:24-27.

Respondents argue that the language of the release is broad enough to include respondents (as third-party beneficiaries). (Response, pp. 3-4.) This issue was already fully argued in the briefs and discussed at oral argument. Respondents' contention is irrelevant to the Restatement comment, which really should be the only relevant focus of respondents' response to the Cains' supplemental authorities. In any event, the language of the release was extremely limited, as established at AOB 30-33 and ARB 14-16.

Respondents argue that the Cains' post-settlement conduct proves that the settlement agreement was valid and binding. (Response, pp. 4-5.) Again, the argument is irrelevant to the Restatement comment. Further, the alleged post-settlement conduct, on which respondents rely, relates to the default judgments that the Cains obtained against other defendants. As noted above, and as noted in the Cains' earlier briefing in this appeal, the default judgments were not limited to the settlement agreement, as respondents contend. And the default judgments are irrelevant to the liability of respondents Price and Shackelford.

Respondents seem to contend that the Cains failed to select an appropriate remedy. (Response, pp. 5-6, 8.) Yet the district court correctly ruled that "the doctrine of election of remedies is not applicable" regarding the Cains' claims. 5 A.App. 1159:13-15.

Respondents provide extensive argument on whether there was sufficient consideration for the release provision in the settlement agreement. (Response, pp. 3, 7.) Respondents fail to demonstrate how their argument is relevant to the Restatement comment in question here. The issue of consideration was already thoroughly briefed by both sides in this appeal, and respondents' response provides nothing new.

Respondents rely on *Clark v. Clark*, a Washington case to which respondents provide no citation. (Response, p. 86) The citation is 1999 WL106898 (Wash. App. 1999). *Clark* was an unpublished opinion in which the appellate court declined to consider whether the contract created immediate rights in the third-party beneficiary, or whether the rights were conditional. *Id.* at *7. The appellate court declined to consider this issue because the trial court had not made any findings on the issue. *Id.* at *8. *Clark* is completely irrelevant and inapplicable here.

In the present case, the settlement agreement cannot possibly be read as expressing the Cains' intent to release all of C4's officers and directors, unconditionally, even if C4 and Rawson never performed the settlement agreement and never paid even a single dollar to the Cains. The officers and directors were the very people who committed the fraud against the Cains in the first place, and who received distributions from the $1 million that the Cains loaned to C4. The language

of the settlement agreement does not support such an absurd interpretation, and no evidence supported the idea that the Cains intended to allow C4's officers and directors to walk away, without any obligations, even if the Cains received no money from C4 and Rawson, and even if C4 and Rawson completely failed to perform.

In conclusion, nothing in respondents' response to the Cains' supplemental authorities changes the fact that the Cains are entitled to a reversal in this appeal.

DATED: 10/17/17

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