IN THE SUPREME COURT OF THE STATE OF NEVADA

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NORTHERN NEVADA HOMES, LLC, **Appellant,** **vs.** **GL CONSTRUCTION, INC.,** **Respondent.**	**No. 71899**

APPEAL FROM POST-TRIAL ORDER AWARDING ATTORNEY'S FEES AND COSTS
SECOND JUDICIAL DISTRICT COURT, WASHOE COUNTY, NEVADA
HONORABLE LIDIA S. STIGLICH, DISTRICT JUDGE

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APPELLANT'S REPLY BRIEF

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INTRODUCTION

This case involved multiple parties and multiple claims for relief. Both appellant and respondent prevailed in recovering money on their claims for relief against each other. Appellant recovered $362,500.00 through a settlement on the fourth day of a jury trial, after the district court had entered judgment as a matter of law in appellant's favor on the issue of liability. Respondent recovered $7,811.00 through a subsequent half-day bench trial. Appellant ultimately obtained $350,000 more in recovery than respondent. The district court however awarded respondent $10,390.73 in attorney's fees and costs on the basis that it was a prevailing party.

Pursuant to this Court's prior holdings, the district court erred by not engaging in a "net recovery" analysis to compare the recoveries by each party to determine whether respondent ultimately obtained the greater recovery and, thus, could be considered "the prevailing party" to the action as a whole. Had the district court applied a net recovery analysis, it could not have made any award of attorney's fees and costs in respondent's favor. Accordingly, appellant respectfully requests that the district court's order be reversed.

ARGUMENT

I. NEVADA HAS PREVIOUSLY ADOPTED A NET RECOVERY ANALYSIS IN SITUATIONS SIMILAR TO THIS CASE

NRS 18.010(2)(a) and 18.020(3) only allow for an award of attorney's fees and costs to "the prevailing party" in the action as a whole. This Court has previously applied a "net recovery" analysis to determine which party is "the

prevailing party" for purposes of awarding attorney's fees and costs in cases involving multiple parties and counterclaims. *Parodi v. Budetti*, 115 Nev. 236, 241, 984 P.2d 172 (1999) (case involved three consolidate separate actions, and several unrelated claims between two common parties), citing *J. Gordon Constr. Co., Inc. v. Meredith Steel Constr., Inc.*, 91 Nev. 434, 436-37, 537 P.2d 1199 (1975) (applying a net recovery analysis in case involving multiple claims and counterclaims).

In *Parodi*, the Court was faced with three consolidated separate actions, which involved both factually related and unrelated claims between two parties. *Id.*, at 238-39. The case proceeded to a jury verdict, where both parties prevailed on some of their claims. *Id.*, at 239. Each party filed competing motions for attorney's fees and costs. *Id.* The district court awarded fees and costs to the party who ultimately received the less favorable "net" verdict. *Id.*

On appeal, this Court reversed. *Id.*, at 242. The Court recognized that the application of NRS 18.010 and 18.020 to consolidated cases involving separate and distinct claims was one of first impression. *Id.*, at 241. After weighing different methods to address the issue, the Court held the litigation must be considered "as a whole" and the total net award will govern who can be considered a prevailing party for purposes of NRS 18.010 and 18.020. *Id.*, at 241 (stating, "in cases where separate and distinct suits have been consolidated into one action, the trial court must offset all awards of monetary damages to determine which side is the prevailing party…"). After comparing the competing awards, the Court reversed finding the party who

was awarded fees and costs was not "the prevailing party." *Id*., at 242. In essence, the Court reasoned that when competing parties both succeed with their claims, the most equitable way to determine "prevailing party" status is to compare the parties' respective recoveries. *Id*.

II. THE "NET RECOVERY" RULE SHOULD BE EXTENDED TO THE FACTS OF THIS CASE

This case is substantially similar to the facts of *Parodi*. Both cases involve multiple parties and multiple set of claims. (1 AA 15-23 and 51-63.) They both involve separate and unrelated sets of facts for the competing parties' claims which had been joined into one action. (1 AA 1-8, 15-23, and 51-63.) And the parties were ultimately successful in recovering money on their respective claims for relief. (1 AA 243; 1 AA 245.)

There are only three differences between this case and *Parodi*. First, this case did not involve consolidated separate actions, but rather involved counterclaims which were willingly and affirmatively joined into the action by respondent. (1 AA 24-42.) *Parodi* on the other hand involved three consolidated separate actions. Second, while both parties ultimately succeeded in recovering money on their respective claims in this case, appellant recovered by way of a settlement on the fourth day of a jury trial and after the district court granted judgment as a matter of law in its favor on the issue of liability, as opposed to through a jury verdict or judgment. (1 AA 243.) In *Parodi*, both parties were awarded damages through a jury verdict. And third, this case does not involve competing motions for attorney's

fees because appellant is not seeking an award of attorney's fees as costs, only respondent is. (2 AA 262.) Thus, unlike *Parodi*, the issue here is only whether respondent is entitled to an award of attorney's fees and costs as "the prevailing party" to the action as a whole, and not whether appellant should be awarded fees and costs.

In respondent's answering brief, it contends Nevada has only extended the "net recovery" rule to situations where both parties' claims resulted in judgments. (RAB, at p. 9-12.) Respondent thus argues Nevada has only adopted a "net judgment" rule, which does not apply in this case. (*Id*., at p. 12.) While it is true this Court has not previously extended *Parodi's* "net recovery" rule to situations where one party obtained recovery through settlement and the other obtained recovery through a judgment, this Court has not spoken on the issue one way or the other.

Appellant respectfully submits that a logical and reasoned extension of the "net recovery" rule should apply to the facts of this case. Here, appellant spent three years litigating its claims, was forced to try its claims in a jury trial, and reached a $362,500.00 settlement on the fourth day of the trial and after the district court granted judgment as a matter of law against respondent. (1 AA 1 and 221-22.) Under no circumstance can it be said appellant was unsuccessful on its claims and/or did not receive a more a favorable recovery than respondent, merely because of the

fact appellant reached its recovery through a settlement as opposed to a judgment.[1] The only reason respondent's counterclaims were not included in the settlement is because respondent and its counsel were unreasonable in their settlement demands.

To award respondent attorney's fees and costs on the basis that it was the only party to obtain a judgment and, thus, was "the prevailing party" in the case as a whole, would produce an unequitable result and would reward respondent for being unreasonable. Adoption of a "net recovery" analysis in situations like this case would not only encourage settlements, conserve judicial resources, and produce fair and equitable results, but it would also discourage unreasonableness by the parties.

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[1] Other courts have held that parties who recover money through a settlement, as opposed to a formal judgment, can still be considered to have successfully prevailed on their claims for relief. *See*, *DeSaulles*, *v. Comm. Hospital of Monterey*, 370 P.3d 996, 998 (Cal. 2016) (holding the term "recovery" encompasses situations in which a defendant settles with a plaintiff for some or all of the money that the plaintiff sought through the litigation); *Daisy Manufacturing Co., Inc.*, 999 P.2d at 917 (holding recovery may be the product of a court judgment or of a settlement reached by the parties); *Maher v. Gagne*, 448 U.S. 122, 129 (1980) (holding a plaintiff can prevail through a settlement).

In preparing this reply brief, appellant has noticed an error in its opening brief where it cited the above cases for the position that "other courts have held that a net recovery analysis includes money obtained through a settlement, even though a formal judgment was not entered." (AOB, at p. 13.) This was a mistake. As the answering brief correctly discusses, none of these cases involved instances where a net recovery analysis was employed which included money obtained through a settlement by one party. Appellant's counsel meant to cite these cases for the position that the term "recovery" has been held to encompass situations in which a defendant settles with a plaintiff for some or all of the money that the plaintiff sought through the litigation. Appellant's counsel apologizes to the Court for this incorrect statement and citation.

III. WHETHER APPELLANT CAN BE CONSIDERED THE PREVAILING PARTY IS NOT AT ISSUE

Respondent's answering brief contends that "NNH is in effect maintaining that it must be considered the 'prevailing party' in this action…," but this argument must be soundly rejected because Nevada law is clear that only parties who have "proceeded to judgment" can be considered prevailing parties for purposes of NRS 18.010. (RAB, at p. 11.) In essence, respondent is contending that the only way respondent cannot be considered the prevailing party, is if appellant is found to be "the prevailing party" for purposes of awarding NRS 18.010 attorney's fees and costs. Respondent's argument is misplaced.

Appellant is not claiming it is the prevailing party entitled to an award of attorney's fees and costs and this is not an issue in the case. Rather, the only issue is whether respondent can be considered "the prevailing party" to the case as a whole. There is no dispute that appellant cannot be considered the prevailing party for purposes of awarding fees and costs pursuant to NRS 18.010(2)(a) because it did not obtain a judgment, nor was its recovery less than $20,000. It does not follow, however, that under no circumstances could appellant ever be considered the prevailing party in this case. NRCP 68 could have allowed for an award of fees and costs to appellant had the settlement agreement reached not provided that each party

is to bear its own fees and costs.[2] Thus, merely because appellant cannot be considered a prevailing party pursuant to NRS 18.010, does not mean that respondent must be considered the prevailing party.

This case is one circumstance where neither party can be considered "the prevailing party" for purposes of awarding fees and costs. Appellant cannot because the settlement agreement and stipulated dismissal with prejudice precluded any such award. (1 AA 238-239.) Had the settlement agreement been silent on this issue, appellant could have been allowed an award of fees and costs pursuant to NRCP 68. Respondent on the other hand cannot because it did not receive the more favorable recovery and, thus, cannot be considered "the prevailing party" to the case as a whole. Other courts have recognized there may be circumstances where neither party should be considered "the prevailing party" for purposes of awarding fees and costs. *See e.g., Jorgensen v. Coppedge*, 224 P.3d 1125, 1129 (Idaho 2010).

IV. RESPONDENT'S ARGUMENT REGARDING LACK OF APPORTIONMENT OF NNH'S SETTLEMENT WITH GORDON LEMICH AND GL CONSTRUCTION IS WITHOUT MERIT

Respondent's answering brief also contends that even if a "net recovery" analysis were to apply in this case, respondent would still be "the prevailing party" because appellant cannot show what, if any, portion of the settlement was paid by respondent. (RAB at pp. 24-28.) This argument is without merit.

[2] Appellant had served an offer of judgment to respondent for $199,000 a year before the trial. Appellant recovered $362,500 and, thus, ultimately recovered more than its offer of judgment.

The settlement agreement that was reached between appellant and respondent obligated both respondent (GL Construction) and Gordon Lemich, jointly and severally, to pay the settlement amount.[3] If neither respondent nor Gordon Lemich paid the $362,500, appellant could seek to collect from either the full amount of the settlement on the basis of joint and several liability. Indeed, the settlement amount was paid in full by respondent's insurance company. It is simply disingenuous and without merit for respondent to contend that it was not legally obligated to pay the full amount of the $362,500 settlement and that because the settlement was not expressly apportioned between defendants, it is impossible to determine whether appellant received the greater recovery against respondent.

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[3] The Settlement Agreement that was reached between appellant and respondent is not a part of the record in the district court. Respondent's arguments regarding apportionment were made for the first time in respondent's reply in support of its motion for attorney's fees and costs. (3 AA 479.) Thus, appellant did not have an opportunity to present the Settlement Agreement as an exhibit for the district court's consideration during the original motion briefing. Appellant's counsel has not included this document with its supplemental appendix out of fear such inclusion would violate NRAP 30(g)(1) and could subject appellant's counsel to sanctions. If the Court wishes to review the Settlement Agreement, appellant respectfully requests permission to supplement the appendix with the document.

CONCLUSION

For the foregoing reasons, Northern Nevada Homes, LLC respectfully requests that this Court reverse the district court's award of attorney's fees and costs.

DATED: July 19, 2017.

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CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 3(a)(4), the typeface requirements of NRAP 32(a)(5) and type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman type style.

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 brief exempted by NRAP 32(a)(7)(C), it is a proportionately spaced, has a typeface of 14 points, and contains 2,489 words.

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

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Dated: July 19, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of RUSBY LAW, PLLC and on this date **APPELLANT'S REPLY BRIEF** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

James Beasley

DATED: July 19, 2017.

/s/ Christopher Rusby