IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 72371

PARDEE HOMES OF NEVADA, INC.

Appellant,

v.

JAMES WOLFRAM; ANGELA L. LIMBOCKER-WILKES, AS TRUSTEE OF THE WALTER D. WILKES AND ANGELA L. LIMBOCKER-WILKES LIVING TRUST, A NEVADA TRUST; AND WALTER D. WILKES AND ANGELA L. LIMBOCKER-WILKES LIVING TRUST, A NEVADA TRUST

Respondents.

Appeal Regarding Judgment and Post-Judgment Orders
Eighth Judicial District Court
District Court Case No.: A-10-632338-C

APPELLANT'S OPENING BRIEF

McDONALD CARANO LLP
Pat Lundvall (NSBN 3761)
lundvall@mcdonaldcarano.com
Rory T. Kay (NSBN 12416)
rkay@mcdonaldcarano.com
2300 W. Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
Facsimile: (702) 873-9966

Attorneys for Appellant

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.

Weyerhaeuser Company ("Weyerhaeuser") is a publicly traded company and the parent company of Weyerhaeuser NR Company ("WNR"). During trial, WNR was the parent of Weyerhaeuser Real Estate Company ("WRECO"). WRECO was the parent company of Pardee Homes, which was the parent company of appellant Pardee Homes of Nevada, Inc. ("Pardee"). Since trial, Tri Pointe Homes ("Tri Pointe") has become the parent company of Pardee. Tri Pointe is a publicly traded company. During this litigation, McDonald Carano LLP is the

///

///

///

///

only firm that has appeared on behalf of Pardee and/or its related entities as described above.

Dated this 28th day of February, 2018.

McDONALD CARANO LLP

By: /s/ Rory T. Kay

Pat Lundvall (NSBN 3761)
Rory T. Kay (NSBN 12416)
2300 W. Sahara Ave., 12th Floor
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
Facsimile: (702) 873-9966
lundvall@mcdonaldcarano.com
rkay@mcdonaldcarano.com

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment after a bench trial and postjudgment orders. (71 JA 11389-390; 86 JA 13613-621). Appellate jurisdiction exists under NRAP 3A(b)(1). The district court entered the judgment on May 11, 2016 and notice of entry was filed on May 17, 2016. (71 JA 11389-396). Pardee timely moved to amend the judgment pursuant to NRCP 52(b) and 59(e), and both parties moved for their attorney's fees, costs, and interest. (71 JA 11442-454; 72 JA11455-614; 77 JA 12115-182). On January 10, 2017, the district court entered orders on Pardee's motion to amend and the parties' motions for attorney's fees, costs and interest. (86 JA 13613-621). Notice of entry was filed on the same day. (86 JA 13622-642). Pardee filed its notice of appeal on February 8, 2017 regarding the judgment and these postjudgment orders. (86 JA 13657-659).

The district court also entered an amended judgment on October 12, 2017, and notice of entry was filed on October 13, 2017. (88 JA 14118-143). Pardee filed an amended notice of appeal on November 2, 2017. (88 JA 14152-154). This appeal is therefore timely. *See* NRAP 4(a).

ROUTING STATEMENT

This appeal is from a civil case that did not originate in business court, does not involve questions of first impression, and does involve postjudgment orders. As a result, it is presumptively assigned to the Court of Appeals. *See* NRAP 17(b).

STATEMENT OF THE ISSUES

1. The American Rule requires each party to bear its own attorney's fees and costs, absent a statute, rule, or contract stating otherwise. *Sandy Valley v. Sky Ranch Estates* and its progeny recognized three limited exceptions in which attorney's fees can be awarded as "special damages." None of those exceptions involve attorney's fees incurred in prosecuting an ordinary two-party breach of contract claim. In this case, did the district court err in awarding plaintiffs/respondents James Wolfram ("Wolfram") and Walt Wilkes ("Wilkes") as "special damages" their attorney's fees incurred in prosecuting their two-party breach of contract claim against Pardee?

2. The Commission Agreement between Wolfram, Wilkes, and Pardee contained a "prevailing party" attorney's fee provision. In this case, Wolfram and Wilkes demanded millions of dollars in additional commissions from Pardee, which was the case's most substantial issue. After the district court found Pardee owed no additional commissions to Wolfram and Wilkes, did the district court err concluding that Wolfram and Wilkes were the prevailing parties and therefore entitled to recover additional attorney's fees on top of their "special damages" attorney's fees?

STATEMENT OF THE CASE

This contract dispute is between real estate brokers Wolfram and Wilkes, and residential home builder Pardee, regarding Pardee's development agreements for the Coyote Springs development located in Southern Nevada. (1 JA 1-6). The brokers and Pardee executed a Commission Agreement in 2004 which required Pardee to pay Wolfram and Wilkes a commission based upon certain, specifically-defined amounts Pardee was to pay to Coyote Springs Investment, LLC ("CSI") for the opportunity to developed specifically-defined lands. (24 JA 3675-78; 23 JA 3545-3625).

Believing that Pardee failed to pay them millions of dollars in commissions, Wolfram and Wilkes filed suit asserting three causes of action: (1) breach of contract; (2) breach of the contractual implied duty of good faith and fair dealing; and (3) for an accounting. (1 JA 1-6). The contract allegedly breached was the Commission Agreement. (1 JA 1-6). Two and a half years into the litigation, Wolfram and Wilkes moved to file a second amended complaint explaining they were seeking "special damages" for their attorney's fees incurred in prosecuting the breach of contract action against Pardee. (15 JA 2434-61). Pardee opposed the motion, but the district court granted it. (16 JA 2659-61). Pardee also challenged these special damages before trial through a summary judgment motion and a motion in limine. (1 JA 63-82; 13 JA 2145-75). The district court denied these

motions too. (16 JA 2462-64).

The case went to a bench trial beginning in October 2013. (71 JA 11389-91). At the conclusion, the district court found Pardee did not owe Wolfram and Wilkes any additional commissions and Pardee had informed Wolfram and Wilkes of the amount and due dates of all commissions to which they were entitled. (48 JA 7464 at ¶¶ 31-32, 36). The district court also found that Pardee's representations to Wolfram and Wilkes regarding the amount and due dates of their commissions were correct. (48 JA 7465 at ¶ 38). Nevertheless, the district court ruled Pardee breached the Commission Agreement by (1) withholding from Wolfram and Wilkes certain confidential contracts executed between Pardee and CSI concerning land purchases **not** the subject of the Commission Agreement; and (2) failing to provide publicly recorded information about Pardee's purchases of lands from CSI not subject to the Commission Agreement.[1] (48 JA 7464 at ¶ 30; 7469 at ¶¶ 16-17). The district court awarded Wolfram and Wilkes $6,000.00 in compensatory damages for time and effort searching for publicly recorded information, and $135,500.00 of their attorney's fees as "special damages" incurred in prosecuting the two-party breach of contract action. (48 JA 7470 at ¶¶ 20-21).

[1] Importantly, the district court found that Wolfram and Wilkes were not entitled to any commissions for these purchases, which were not for single-family detached production residential homes, and therefore not the subject of the Commission Agreement. (48 JA 7464 at ¶ 36).

After trial, both parties moved for recovery of their attorney's fees and costs pursuant to the Commission Agreement's prevailing party provision. (72 JA 11590-614; 12115-82). Pardee also moved to amend the judgment regarding the award of $135,500.00 in attorney's fees as special damages for the breach of contract claim. (72 JA 11455-589). The district court denied Pardee's motions and granted Wolfram and Wilkes' motions for attorney's fees and costs, awarding them $428,462.75 in additional attorney's fees, $56,129.56 in costs, and both pre- and post-judgment interest on the "special damages" attorney's fees award. (86 JA 13613-21). Finally, the district court entered an amended judgment in 2017 that included all awards. (88 JA 14118-29). Pardee now appeals the judgment.

STATEMENT OF FACTS

A. The Coyote Springs Development: a Green Field Community.

1. Pardee, Wolfram and Wilkes Become Involved in the Coyote Springs Development.

CSI founder, Harvey Whittemore, owned 43,000 acres of land and water rights northeast of Las Vegas, Nevada that he envisioned turning into a green field community named "Coyote Springs." (40 JA 5825 (17-25); 5840 (21-23)). A green field community is a barren piece of land, well away from existing development, that gives the developer a blank canvas for creating subdivision boundaries, infrastructure, and neighborhood amenities. (40 JA 5841 (1-21); 46 JA 6965 (22) – 6968 (25)). To partner with him in this visionary project,

Whittemore compiled a five-member list of the nation's top residential home builders with operations in the Las Vegas area. (40 JA 5851 (10) – 5853 (9)).

Whittemore included Pardee on that list and met with Klif Andrews, Pardee's Nevada-based division president. (40 JA 5853 (10) – 5854 (11)). On Pardee's behalf, Andrews expressed interest in purchasing land at Coyote Springs to build single-family detached production residential homes,[2] and he wanted to set up a meeting with Whittemore and Andrews' boss, Jon Lash. (32 JA 4852 (13-14); 40 JA 5854 (12-19)). Lash was Pardee's Senior Vice President of Land Acquisition. (32 JA 4852 (13-14)). Unbeknownst to Whittemore and Andrews, Lash had separately spoken with real estate brokers Wolfram and Wilkes about the Coyote Springs project. (32 JA 4869 (17) – 4870 (2)).

Whittemore and Andrews arranged a preliminary meeting between Pardee and CSI to discuss Coyote Springs. (29 JA 4472 (24) – 4473 (17)). Wolfram and Wilkes attended the meeting but did not participate in any discussions. (29 JA 4473 (7-11); 40 JA 5856 (14-25)). At the meeting, Whittemore indicated he needed a residential home builder to help develop Coyote Springs and at the time he was only interested in selling land for development of single-family detached

[2] Single-family detached production residential homes are those built on smaller lots without fully customizable amenities. (32 JA 4923 (8-18)). They are distinguishable from multi-family homes (townhomes, apartments, and condominiums) and custom homes (which include bigger lots and greater customizable amenities). (*Id.*). The term "single-family detached production residential homes" has a critical meaning to this case.

production residential homes. (32 JA 5051 (14-19)). All other lands CSI intended to develop itself. (*See id.*).

Working exclusively through Whittemore, Lash, Andrews, and their attorneys, CSI and Pardee negotiated over the next few months until they executed the Option Agreement for the Purchase of Real Property and Joint Escrow Instructions ("Option Agreement") in May 2004. (29 JA 4479-82; 23 JA 3545-625). The Option Agreement created two categories of land for the construction of single-family detached production residential homes at Coyote Springs: Purchase Property and Option Property.[3] (23 JA 3545 at Recital B). Because of the unique nature of Coyote Springs as a green field community, CSI and Pardee specifically defined the two categories of land (Purchase Property and Option Property) in the Option Agreement and specifically described how CSI would be paid for Pardee's purchases. (*See id.*). In doing so, CSI and Pardee expressly recognized the location and legal description of the Purchase Property and Option Property was to be modified from time to time as necessary to conform to existing circumstances. (23 JA 3545 at Recital A).

Pardee originally agreed to pay CSI $66 million in exchange for the right to develop specifically defined lands, i.e. Purchase Property. (29 JA 4482 (18-20); 32

[3] Any term capitalized herein was specifically defined in the Option Agreement executed by CSI And Pardee. (23 JA 3545-625). Those capitalized terms, and others from the Option Agreement, were incorporated into Pardee and the brokers' Commission Agreement. (24 JA 3675).

JA 4864 (8-14); 23 JA 3546 at ¶ 1). The parties defined the purchase amount as the "Purchase Property Price" in the Option Agreement. (23 JA 3547 at ¶ 1(b)). Because Coyote Springs was a green field community being built from the ground up with no existing infrastructure, land entitlements or zoning, CSI and Pardee could not and did not describe the specific locations of the Purchase Property or a specific number of acres that constituted the Purchase Property at the time they executed the Option Agreement. (32 JA 4864 (4-14); 40 JA 5829 (2-17) and 5870 (9-16)). The parties knew the specific locations and acres would shift as they obtained entitlements, worked through environmental issues with the Bureau of Land Management ("BLM") and United States Fish & Wildlife Service ("FWS"), and adjusted development to correspond to the local economy's condition. (40 JA 5829 (2-17) and 5870 (9-16); 46 JA 6977 (19) - 6982 (7)).

The parties did, however, specifically define the payment schedule for the Purchase Property Price and the method for acquiring acreage and its location. (23 JA 3546-47 at ¶ 1(b)). Under the Option Agreement, as Pardee paid CSI the monthly installments on the Purchase Property Price, Pardee did not immediately receive any land. (46 JA at 6959 (24) – 6960 (19)). Instead, Pardee received the right to buy land designated for single-family detached production residential homes to be mapped in the future as the parties worked through the entitlement

process and the Coyote Springs development became more defined.[4] (32 JA 4988 (9) – 4989 (4); 46 JA 6969 (10) - 6970 (19)).

Under the Option Agreement, Option Property was defined separately from Purchase Property. (32 JA 4989 (7-9)). The Option Agreement gave Pardee a forty-year option to purchase specifically defined Option Property at $40,000 per acre with annual adjustments. (23 JA 3549 at ¶ 2). Pardee and CSI defined "Option Property" as "the remaining portion of the Entire Site which is or becomes designated for single-family detached production residential use." (23 JA 3545 at Recital B). To purchase Option Property, Pardee was contractually required to publicly record several documents with relevant government agencies. (46 JA 6992 (3) – 6993 (5)). At trial, Whittemore, Lash, and Andrews testified Pardee never purchased Option Property at Coyote Springs. (32 JA 4857 (14-18); 35 JA 5423 (6-18) and 5424 (24) – 5425 (4)). None of the required public documents were ever recorded. (42 JA 6378 (12) – 6379 (17)). Whittemore, Lash, and Andrews all testified that given the recession it made no financial sense for Pardee to purchase additional lands over and above what they had contracted to purchase

[4] As CSI and Pardee completed zoning and entitlements for portions of Coyote Springs, the parties continually reconciled the land designations with Pardee demanding CSI create a parcel map for specific areas of Coyote Springs and CSI submitting the same to the county government for approval. (46 JA 6959 (24) – 6960 (19)). Through this process, Pardee paid the Purchase Property Price and acquired just over 2,100 acres of land designated as Purchase Property. (46 JA 7011 (14) – 7012 (3)).

as Purchase Property. (29 JA 4653 (10-18); 33 JA 5154 (22) – 5155 (21); 46 JA 6990 (6) – 6991 (9)). The district court expressly found that Pardee did **not** purchase any Option Property. (48 JA 7464 at ¶ 36).

Between July 2004 and March 2005, CSI and Pardee twice amended the Option Agreement, raising the "Purchase Property Price" from $66 to $84 million, and entered into an Amended and Restated Option Agreement for the Purchase of Real Property and Joint Escrow Instructions ("AROA"). (23 JA 3632-34; 24 JA 3645 at ¶ 4; 25 JA 3684-933; 26 JA 3934-4083). Across time, Pardee paid CSI the full amount of the Purchase Property Price of $84 million in monthly installments over a four-year period. (24 JA 3645 at ¶ 4).

2. Pardee, Wolfram and Wilkes Execute a Commission Agreement.

While Pardee and CSI were negotiating the Option Agreement, Lash, Wolfram, and Wilkes negotiated an agreement to compensate Wolfram and Wilkes for introducing Pardee to CSI. (33 JA 5140 (23) – 5141 (16); 37 JA 5754 (25) – 5756 (17)). Both sides had counsel during the negotiations, and numerous drafts were exchanged. (33 JA 5141 (21) – 5143 (13); 37 JA 5757 (13) – 5758 (3)). During these negotiations, Wolfram and Wilkes were given copies of the Option Agreement and its amendments. (37 JA 5582 (14-24)). After several months negotiating, Pardee, Wolfram and Wilkes executed the Commission Agreement in September 2004. (24 JA 3675-78).

The Commission Agreement provided commissions for Wolfram and Wilkes separately and differently based on "Purchase Property Price" to be paid by Pardee and "Option Property" as defined in the Option Agreement and its amendments. (*See id.* at ¶ (i)-(iii)). Specifically, the commissions Pardee would pay were centered on the Option Agreement's key terms of "Purchase Property Price" and "Option Property":

> (i) Pardee shall pay four percent (4%) of the **Purchase Property Price** payments made by Pardee pursuant to paragraph 1 of the Option Agreement up to a maximum of Fifty Million Dollars ($50,000,000);
>
> (ii) Then, Pardee shall pay one and one-half percent (1-1/2%) of the remaining **Purchase Property Price** payments made by Pardee pursuant to paragraph 1 of the Option Agreement in the aggregate amount of Sixteen Million Dollars ($16,000,000.00);[5] and
>
> (iii) Then, with respect to any portion of the **Option Property** purchased by Pardee pursuant to paragraph 2 of the Option Agreement, Pardee shall pay one and one-half percent (1-1/2%) of the amount derived by multiplying the number of acres purchased by Pardee by Forty Thousand Dollars ($40,000.00).

(24 JA 3675) (emphasis added). Given the use of specific terms from the Option Agreement, the Commission Agreement compensated Wolfram and Wilkes only for Pardee's purchase of land at Coyote Springs designated for "single-family

[5] The Option Agreement's second amendment raised the Purchase Property Price from $66 to $84 million. (24 JA 3645 at ¶ 4). Pardee included this increase in the Commission Agreement's commission structure, increasing the aggregate amount in provision (ii) from $16 million to $34 million.

detached production residential homes." (*See id.* at ¶¶ (i)-(iii)).[6]

The Commission Agreement also required Pardee to provide Wolfram and Wilkes with certain information based on the Option Agreement's definitions. (24 JA 3676). Specifically, Pardee was to keep Wolfram and Wilkes "reasonably informed as to all matters relating to the amount and due dates of [their] commission payments." (24 JA 3676). As found by the district court, Pardee supplied Wolfram and Wilkes with the amounts and due dates for the $2,632,000.00 in commission payments made by Pardee. (48 JA 7464 at ¶¶ 31-34). Pardee was also required to provide "a copy of each written option exercise notice given pursuant to paragraph 2 of the Option Agreement, together with information as to the number of acres involved and the scheduled closing date." (24 JA 3676). Because Pardee did not purchase any Option Property, there were no such notices to provide. (48 JA 7464 at ¶ 36).

3. CSI and Pardee Jointly Develop Coyote Springs and Subsequently Execute Several Confidential Agreements.

When CSI and Pardee executed the Option Agreement and its amendments, each expected additional agreements or modifications as they jointly developed

---

[6] Lash testified Whittemore was only offering single-family detached production residential lands when Pardee and CSI negotiated and executed the Option Agreement. (32 JA 4890 (11) – 4891 (3)). Pardee, Wolfram, and Wilkes incorporated the Option Agreement's definitions into their Commission Agreement on that basis. (*See id.*).

Coyote Springs. (40 JA 5833 (23) – 5835 (11); 46 JA 6979 (14) – 6984 (5)). As Coyote Springs developed and particularly when the housing market deteriorated, CSI and Pardee subsequently executed eight amendments to the AROA between July 2006 and June 2009. (27 JA 4293-453). Lash and Whittemore testified at trial that these new agreements did not deal with single-family detached production residential lands but instead covered lands designated for other uses. (32 JA 4859 (20) – 4860 (2); 40 JA 5834 (23) – 5835 (11)).

The AROA and eight amendments (collectively the "Confidential Agreements") each contained a confidentiality provision preventing CSI and Pardee from disclosing "any information" regarding the Confidential Agreements and the "terms and provisions thereof." (25 JA 3728 at ¶ 27). Both Lash and Whittemore testified the Confidential Agreements contained highly sensitive commercial information that CSI and Pardee did not want competitors to have because it may cause competitive harm. (33 JA 5164 (7) – 5165 (5); 40 JA 5929 (2-12)). Accordingly, CSI informed the escrow company and others not to reveal the Confidential Agreements. (40 JA 5871 (19) – 5872 (2)).

The Confidential Agreements did not increase the Purchase Property Price. (35 JA 5442 (21) – 5443 (20); 40 JA 5834 (23) – 5835 (11); 46 JA 6984 (6-15)). They did not indicate Pardee purchased any Option Property. (32 JA 4859 (20) – 4860 (8); 33 JA 5162 (18) – 5164 (6); 35 JA 5443 (21-24)). Nor did they change

the definitions of Purchase Property Price or Option Property found in the original Option Agreement and its two amendments previously provided to Wolfram and Wilkes. (33 JA 5162 (18-21); 35 JA 5443 (1-24)).

B. Pardee Pays All Wolfram and Wilkes' Commissions Through a Title Company.

1. Pardee Pays Wolfram and Wilkes All Commissions Owed Under the Commission Agreement.

From March 2005 until March 2009, as required by the Commission Agreement, Pardee paid Wolfram and Wilkes all commissions owed on the "Purchase Property Price" as each monthly installment was paid by Pardee to CSI. (23 JA 3404-544; 32 JA 4872 (1-9) and 5165 (23) – 5166 (12)). The total commissions paid were $2,632,000.00 (48 JA 7464 at ¶¶ 31-34). Until August 2007, Wolfram and Wilkes never made any inquiry about these payments. (42 JA 6362 (21-25)). In August 2007, however, Wolfram contacted Lash to let Pardee know it may have overpaid Wolfram and Wilkes. (41 JA 6103 (6-18)). Pardee confirmed it had overpaid Wolfram and Wilkes and would be offsetting this overpayment against future commission payments. (27 JA 4095-96; 42 JA 6340 (11) – 6341 (13)). Wolfram and Wilkes originally agreed to that arrangement. (37 JA 5528 (14) – 5529 (3)).

Later, however, Wolfram and Wilkes accused Pardee of purchasing Option Property and failing to pay Wolfram and Wilkes a commission for these claimed

Option Property purchases. (27 JA 4099-100; 42 JA 6342 (3-25)). Wolfram and Wilkes requested maps of Pardee's purchases from CSI. (27 JA 4099-100; 29 JA 4693 (10-19)). Pardee gave them a map and locations of all single-family detached production residential lands purchased from CSI and informed Wolfram and Wilkes it had not made any Option Property purchases. (37 JA 5546 (7-23)).

The parties then exchanged several letters in 2008 and 2009 regarding Wolfram and Wilkes' unfounded allegations that Pardee had purchased Option Property from CSI. (27 JA 4101-02, 4119-23; 34 JA 5233-35, 5261-63). In these letters, Pardee explained it had not purchased any Option Property, but Wolfram and Wilkes still claimed they were due additional commissions. (*See generally id.*).

2. Wolfram and Wilkes Hire Counsel and Demand Access to Confidential Agreements Between Pardee and CSI, Claiming They Have Not Been Paid All Commissions Owed Under the Commission Agreement.

Wolfram and Wilkes retained counsel, who demanded from the title company all documents about any of Pardee's land purchases from CSI. (27 JA 4106). Wolfram and Wilkes' counsel also demanded the Confidential Agreements between Pardee and CSI. (34 JA 5261-63). Pardee explained that it could not provide the Confidential Agreements, that they did not relate to any additional commissions owed under the Commission Agreement, and that Pardee would not instruct the title company to release the Confidential Agreements. (32 JA 4859

(20) – 4860 (8); 27 JA 4101-02).

Pardee did, however, authorize the title company to release information to Wolfram and Wilkes regarding Pardee's payment of Purchase Property Price to CSI and its purchase of all lands at Coyote Springs designated as Purchase Property, i.e. lands for single-family detached production residential homes. (42 JA 6354 (25) – 6355 (21); 27 JA 4124). Pardee supplied several deeds describing its purchases, each of which Pardee publicly recorded with the relevant government entity. (27 JA 4126-67, 4169; 37 JA 5624 (8) – 5632 (2) and 5744 (16) – 5746 (7); 33 JA 5153 (14-24)). Importantly, the Commission Agreement only provided Wolfram and Wilkes commissions for "Purchase Property Price" payments or Option Property, both of which were only for lands designated for the development of single-family detached production residential homes. (24 JA 3675-78; 23 JA 3545 at Recital B).

Unhappy with Pardee's responses, Wolfram separately began searching public records. (42 JA 6207 (9-12) and 6256 (17) – 6257 (1)). As Wolfram testified at trial, he interpreted the definition of Option Property differently than defined in the contracts between Pardee and CSI, and therefore he believed Pardee had purchased Option Property. (38 JA 5764 (9-22)). Lash and Whittemore testified at trial that Wolfram's interpretation of Option Property was incorrect. (29 JA 4634 (4-18); 33 JA 5162 (18-21); 40 JA 5886 (2) – 5889 (4)).

Wolfram believed the Confidential Agreements would reveal Pardee and CSI had altered definitions of the lands being acquired by Pardee and therefore Pardee would owe him and Wilkes additional commissions for Option Property purchases. (41 JA 6149 (15-22) and 6151 (8-15)). Wolfram further believed he was also entitled to a commission on **any** land Pardee bought from CSI, contrary to the express terms in the Commission Agreement. (41 JA 6149 (15-22).

C. Wolfram and Wilkes Sue Pardee Seeking Additional Commissions and Information to Determine the Amount of Additional Commissions Owed.

1. The Most Substantial Issue Advanced by Wolfram and Wilkes Was For Additional Commissions Allegedly Owed Under the Commission Agreement.

On December 29, 2010, Wolfram and Wilkes sued Pardee, alleging breach of the Commission Agreement and breach of the contractual duty of good faith and fair dealing implied therein. (1 JA 1-6). They also demanded an accounting of "all transfers of real property [from CSI to Pardee] governed by the Option Agreement" so they could determine the amount of additional commissions owed. (1 JA 4 at ¶ 17-18). They prayed for money damages greater than $10,000.00 and for attorney's fees and costs. (1 JA 6).[7]

Consistent with their pre-litigation letters, Wolfram and Wilkes alleged Pardee owed additional commissions as money damages. (16 JA 2670-77).

[7] Two weeks later, Wolfram and Wilkes filed an amended complaint identical to their original complaint. (1 JA 7-12).

During discovery, Wolfram testified in deposition that the amount of additional commissions he believed Pardee owed would be determined by finding the proper definition of Option Property. (3 JA 444 (16) –(20)). Wolfram and Wilkes' NRCP 16.1 disclosures disclosed nearly $2,000,000.00 in damages "associated with [Pardee's] breach of contract." (76 JA 12075). This included over $1.8 million in additional commissions.[8] (76 JA 12075-76).

2. Wolfram and Wilkes Amend Their Complaint to Seek Attorney's Fees as Special Damages.

Nearly two and a half years into the lawsuit, Wolfram and Wilkes filed a second amended complaint now alleging they were entitled to special damages for attorney's fees incurred in prosecuting Pardee's alleged breach of the Commission Agreement. (16 JA 2670-77 at ¶¶ 25 and 31). Pardee opposed this and separately moved two other times to prevent the district court from considering Wolfram and Wilkes' claim for their attorney's fees as special damages. (1 JA 63-82; 13 JA 2081-101; 2145-75; 17 JA 2471-500). Nevertheless, the district court allowed Wolfram and Wilkes' assertion of special damages to survive and be tried. (16 JA 2462-64; 2659-61).

[8] Both Wolfram and Wilkes confirmed this disclosure at trial when they testified Pardee owed them additional commissions. (37 JA 5646 (24) – 5647 (18) and 5761 (21) – 5762 (12)).

D. After a Bench Trial, the District Court Finds That Pardee Prevails On the Most Substantial Issue Tried, Specifically Finding That Pardee Did Not Owe Any Additional Commissions, But Awards Wolfram and Wilkes Over $500,000 in Attorney's Fees.

1. The Court Awards Wolfram and Wilkes $135,000 in Attorney's Fees as Special Damages.

The district court held a nine-day bench trial in October and December 2013, with testimony from Wolfram, Wilkes, Whittemore, Lash, Andrews and James J. Jimmerson.[9] After trial, the district court entered findings of fact and conclusions of law in June 2014. (48 JA 7457-74). The district court found that the Commission Agreement was an arm's length transaction and each party's obligations were within its four corners. (48 JA 7460 at ¶ 13). The district court found the Commission Agreement required Pardee to keep Wolfram and Wilkes "reasonably informed as to all matters regarding the amount and due dates" of their commission payments. (48 JA 7463 at ¶ 24). The district court found that Pardee provided Wolfram and Wilkes with "[a]ll information" regarding Pardee's purchase of land from CSI designated for single-family detached production residential homes and that Pardee had informed them of the amount and due dates of the commission owed. (48 JA 7465-66 at ¶¶ 38 and 40).

Regarding Wolfram and Wilkes' claim to $1.8 million in commissions, the

[9] Beyond serving as trial counsel, Jimmerson also negotiated and helped draft the Commission Agreement for Wolfram and Wilkes, and he sent several pre-litigation letters to Pardee demanding additional commissions and information under the Commission Agreement. (34 JA 5261-63; 37 JA 5756 (13-19)).

district court ruled in Pardee's favor. It found that Pardee paid all commissions owed to Wolfram and Wilkes under the Commission Agreement. (48 JA 7464 at ¶¶ 31-32). The district court rejected Wolfram and Wilkes' theory regarding purchases of Option Property, finding that Pardee owed no additional commissions because it did not purchase any Option Property. (48 JA 7464-65 at ¶ 36). The district court found in favor of Pardee that it owed no compensatory damages to Wolfram and Wilkes for any additional commissions. (48 JA 7468-69 at ¶¶ 9 and 14).

Nevertheless, the district court found Pardee breached the Commission Agreement because it did not provide Wolfram and Wilkes with information about Pardee's purchases of land **other than that designated for single-family detached production residential homes**. (48 JA 7466 at ¶¶ 42-43). The district court rationalized that Pardee did not provide Wolfram and Wilkes with the Confidential Agreements and believed Pardee had an obligation to provide those agreements to Wolfram and Wilkes. (48 JA 7461-66 at ¶¶ 18, 29 and 39). Although the district court found much of the information about Pardee's land purchases was available in the public record, it claimed other information was only within the Confidential Documents. (48 JA 7464 at ¶ 30).

Consequently, the district court awarded $141,500 in damages for Wolfram and Wilkes' breach of contract cause of action. Specifically, the district court

awarded Wolfram and Wilkes $6,000.00 in compensatory damages for Wolfram's time and effort searching public records for information about Pardee's purchases of land from CSI. (48 JA 7470 at ¶ 20). Relying on *Sandy Valley v. Sky Ranch* and *Liu v. Christopher Homes*, the district court also awarded Wolfram and Wilkes special damages equal to $135,500.00 for their attorney's fees incurred in prosecuting the two-party breach of contract claim. (48 JA 7470 at ¶ 21).

2. The Court Awards $428,462.75 in Additional Attorney's Fees and $56,129.56 in Costs to Wolfram and Wilkes Claiming They Were the Prevailing Parties At Trial.

The Commission Agreement provides for an award of "reasonable attorneys' fees and costs" to the "prevailing party" in any "action to enforce its rights under this [Commission] Agreement." (24 JA 3676). Both parties separately moved for their attorney's fees and costs under the Commission Agreement's prevailing party provision at the trial's conclusion. (71 JA 11397-441, 11442-54; 72 JA 11590-614; 77 JA 12115-182).[10] In opposing Pardee's motion for attorney's fees, Wolfram and Wilkes argued a defendant who defeated a claim could not be a prevailing party. (80 JA 12630 (8) – (19)).

Despite Wolfram and Wilkes' loss on the issue of additional commissions, which was the single biggest issue in the litigation, the district court ruled against

[10] Pardee also moved to amend on the issue of special damages. (72 JA 11455-589).

Pardee and instead for Wolfram and Wilkes, finding they "prevailed" in the litigation. (86 JA 13616-18, 13619-21). The district court stated it was adopting Wolfram and Wilkes' position. (86 JA 13462-64). The district court accordingly awarded them $428,462.75 in additional attorney's fees and $56,129.56 in costs under the Commission Agreement's prevailing party provision. (86 JA 13616-18, 13649-51). The Court also denied Pardee's motion to amend regarding special damages. (86 JA 13613-15).

Pardee timely appealed the district court's judgment and post-judgment orders. (86 JA 13657-59). The district court then entered an amended judgment,[11] and Pardee filed an amended notice of appeal. (88 JA 14118-129; 14152-54).

SUMMARY OF THE ARGUMENT

The district court erred in awarding Wolfram and Wilkes attorney's fees. Wolfram and Wilkes were not entitled under *Sandy Valley v. Sky Ranch* and its progeny to recover special damages for their attorney's fees incurred in prosecuting this standard two-party breach-of-contract action. *Sandy Valley* noted the American Rule that each party bears its own fees and costs absent a specific contract, statute, or rule. *Sandy Valley* identified three narrow exceptions to the American Rule that permit attorney's fees as special damages. A routine two-party

[11] The amended judgment included prejudgment interest on both the $6,000 in compensatory damages and attorney's fees as special damages awarded to Wolfram and Wilkes. (88 JA 14118-29).

breach of contract case like that brought by Wolfram and Wilkes is **not** such an exception. Indeed, the district court's error in awarding Wolfram and Wilkes attorney's fees as special damages for breach of contract swallows the American Rule and departs from the guidance of *Sandy Valley*. Were the district court's conclusion correct, any plaintiff bringing a breach of contract claim could recover as special damages its attorney's fees incurred in prosecuting the action. The American Rule would therefore cease to exist in contract cases.

Compounding this error, the district court also awarded Wolfram and Wilkes nearly $500,000 in additional attorney's fees and costs under the prevailing party provision found in the parties' Commission Agreement. The Commission Agreement states that "[i]n the event either party brings an action to enforce its rights under this Agreement, the prevailing party shall be awarded its reasonable attorney's fees and costs." (24 JA 3676). Before and during the case, Wolfram and Wilkes claimed Pardee owed them millions of dollars in additional commissions. It was the primary reason why Wolfram and Wilkes litigated the case. It was the primary reason Pardee zealously defended this action. The district court found in Pardee's favor on the most significant issue of the case, specifically finding that Pardee owed Wolfram and Wilkes no additional commissions and had kept them informed about which commissions were owed. Thus, contrary to the district court's second decision, which contradicted its first decision, Pardee was

the prevailing party under the Commission Agreement. And so Pardee, not Wolfram and Wilkes, should have recovered its attorney's fees and costs sought.

Because of these errors, Pardee asks the court to reverse the district court on the issue of attorney's fees as special damages, find that Pardee was the prevailing party under the Commission Agreement, and remand for further proceedings to determine the reasonableness of Pardee's attorney's fees and costs.

ARGUMENT

A. Standard of Review.

Where an award of attorney's fees includes questions of law, the "proper review is de novo." *Thomas v. City of North Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006); *see also Liu v. Christopher Homes, LLC*, 130 Nev. Adv. Op. 17, 321 P.3d 875, 877 (2014). This is especially true where those fees are sought as a measure of damages. *See Davis v. Beling*, 128 Nev. 301, 316, 278 P.3d 501, 512 (2012). Because this appeal implicates the legal question of whether Wolfram and Wilkes were entitled to recover any attorney's fees as special damages, the de novo standard applies.

Regarding attorney's fees awarded pursuant to contract, this requires the court's "plenary review" under a de novo standard because interpretation of a contract is a question of law. *Davis*, 128 Nev. at 321, 278 P.3d at 515. The appellate court is guided by the same objective as the trial court: to interpret the

contract by "discern[ing] the intent of the contracting parties." *Id.*

B. The District Court Erred Awarding Wolfram and Wilkes Any of Their Attorney's Fees or Costs.

Nevada has long followed the American Rule that attorney's fees are not recoverable absent a statute, rule or contract permitting such an award. *See Consumers League of Nevada v. Southwest Gas Corp.*, 94 Nev. 153, 156, 576 P.2d 737, 739 (1978); *see also Bobby Berosini Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1356, 971 P.2d 383, 388 (1998). Thus, the rule generally requires litigants to bear their own attorney's fees and costs, and only rarely do courts award such fees as damages. *Sandy Valley Assoc. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 957, 35 P.3d 964, 969 (2001).

Here, however, the district court departed from the American Rule in two respects. First, the district court awarded Wolfram and Wilkes special damages for their attorney's fees incurred in prosecuting Pardee's alleged breach of contract. Second, it misconstrued the parties' Commission Agreement to determine that Wolfram and Wilkes prevailed below and consequently awarded them the remainder of their attorney's fees and all their litigation costs. Both errors require this court's correction.

1. The District Court Erred Awarding Wolfram and Wilkes Certain Attorney's Fees as Special Damages.

Vindicating the American Rule, *Sandy Valley* explained that "the mere fact

that a party was forced to file or defend a lawsuit is insufficient to support an award of attorney's fees as damages." *Id.* at 957, 35 P.3d at 969. Instead, the *Sandy Valley* court described that attorney's fees as special damages are "rare" and must be specifically pleaded under NRCP 9(g). *Id.* *Sandy Valley* identified three exceptions to the American Rule where attorney's fees may be recovered as special damages:

(1) Where a contracting party becomes involved in a third-party lawsuit because of the defendant's breach of contract or tortious behavior;

(2) Where a plaintiff incurred fees to recover property acquired through the defendant's wrongful conduct or in clarifying or removing a cloud upon title; and

(3) Lawsuits for declaratory or injunctive relief when the defendant's bad faith conduct required such actions.

Id. at 957, 35 P.3d at 970; *see also Liu*, 130 Nev. Adv. Op. 17, 321 P.3d at 877 (noting attorney's fees as special damages are an "exception" to the America rule). Nowhere did the *Sandy Valley* court embrace recovery of attorney's fees as special damages in routine, two-party breach of contract cases. *See generally id.*

Because of confusion regarding recovering attorney's fees as special damages, the Nevada Supreme Court revisited the issue twice over the next fifteen years in *Horgan v. Felton* and *Liu v. Christopher Homes, LLC*. *See* 123 Nev. 577, 170 P.3d 982 (2007); *see also* 130 Nev. Adv. Op. 17, 321 P.3d 875 (2014). In *Horgan*, the Nevada Supreme Court refined the second exception that applies

when clarifying or removing a cloud upon title. *See* 123 Nev. at 586, 170 P.3d at 988. In doing so, the *Horgan* court wrote that "attorney fees are only available as special damages in slander of title actions and not simply when a litigant seeks to remove a cloud upon title." *Id.* *Liu* further explained the three exceptions and affirmed that attorney's fees are available as special damages where a contracting party becomes involved in a **third-party lawsuit** because of the defendant's breach of contract. *See* 130 Nev. Adv. Op. 17, 321 P.3d at 880. Neither *Horgan* nor *Liu* created an exception allowing special damages in an ordinary two-party breach of contract case that did not involve the non-breaching party defending against third-party claims.[12] *See generally* 123 Nev. 577, 170 P.3d 982 *see also* 130 Nev. Adv. Op. 17, 321 P.3d 875.

But here, the district court departed from *Sandy Valley*, *Horgan*, and *Liu* by creating another exception to the American Rule where parties may recover special damages for attorney's fees incurred in prosecuting ordinary two-party breach of contract cases. The district court's findings and conclusions and judgment award Wolfram and Wilkes $135,500 in attorney's fees and special damages solely for Pardee's alleged breach of the Commission Agreement. (48 JA 7470 at ¶ 21; 88 JA 14126). There was no evidence that Pardee's alleged breach forced Wolfram

[12] Importantly, the dissent in *Liu* clarified "[b]reach of contract is not one of the exceptions specified in *Horgan*" that would allow special damages for attorney's fees. 130 Nev. Adv. Op. 17, 321 P.3d at 881 (Gibbons, J. dissenting).

and Wilkes to defend against third-party claims, and the lower court never made such a finding. (48 JA 7457-74). Instead, the district court misapplied the Nevada Supreme Court's instructions in *Sandy Valley*, *Horgan*, and *Liu* by awarding Wolfram and Wilkes special damages for certain attorney's fees they incurred prosecuting their breach of contract action against Pardee.[13] (48 JA 7470 at ¶ 21; 48 JA 7385-410).

In doing so, the district court's judicially created exception for Wolfram and Wilkes swallows the American Rule. The district court did not rely on a statute, contract or rule in awarding Wolfram and Wilkes special damages for certain of their attorney's fees. (48 JA 7470 at ¶ 21). Rather it awarded Wolfram and Wilkes these fees merely because they prosecuted an ordinary breach of contract claim against Pardee. (*See id.*). Such a departure from the American Rule drastically expands the scope of cases where non-breaching parties can seek their attorney's fees as special damages. Indeed, this expansion of special damages is limitless and would apply to any breach of contract case, a consequence against which the *Horgan* court explicitly warned. *See* 123 Nev. at 586, 170 P.3d at 988 (noting the court "inadvertently expanded" the scope of cases in which attorney's fees are available as special damages). Contrary to the "rare" award of attorney's fees as

[13] The district court relied upon exhibit 31A in awarding special damages. (48 JA 7470-71 at ¶ 21). During trial, Wolfram and Wilkes' counsel testified exhibit 31A contained billing entries for work he performed between November 2010 and June 2013 prosecuting the case against Pardee. (46 JA 7054 (20) – 7055 (2)).

special damages, the district court's exception makes special damages for attorney's fees the default award in ordinary breach of contract cases, no matter what the scope or nature of the breach.

In *Sandy Valley, Horgan,* and *Liu*, the Nevada Supreme Court never contemplated this severe departure from the American Rule. Accordingly, the district court erred in awarding Wolfram and Wilkes special damages for their attorney's fees while relying on those cases.

2. The District Court Erred Awarding Wolfram and Wilkes the Remainder of their Attorney's Fees and Costs Under the Commission Agreement's Prevailing Party Provision.

The district court's error awarding Wolfram and Wilkes special damages also infected its holding that Wolfram and Wilkes prevailed in the case and thus were entitled to recover the remainder of their attorney's fees and all their costs pursuant to the Commission Agreement. (86 JA 13520 (18) – 13522 (10)). It also appears the district court was persuaded by Wolfram and Wilkes' advocacy suggesting that a defendant cannot be a "prevailing party" even though they defeated a significant claim. (86 JA 13462-64). It is axiomatic, however, that a defendant can be a "prevailing party" in the context of an attorney's fee provision found in a contract in a case upon which the defendant prevailed. *See MB America, Inc. v. Alaska Pac. Leasing*, 132 Nev. Adv. Op. 8, 367 P.3 1286, 1292 (2016).

Consistent with the American Rule, contracting parties "are free to provide for attorney fees by express contractual provision." *Davis*, 128 Nev. at 321, 278 P.3d at 515. Such provisions "provide an incentive to settle and reduce litigation" rather than pressing forward with inflated claims or damages. *Dimick v. Dimick*, 112 Nev. 402, 405, 915 P.2d 254, 256 (1996). In interpreting them, the court's goal is "to discern the intent of the contracting parties." *Davis*, 128 Nev. at 321, 278 P.3d at 515. Standard principles of contract interpretation guide the courts in discerning that intent. *See Am. First Fed. Credit Union v. Soro*, 131 Nev. Adv. Op. 73, 359 P.3d 105, 106 (2015). The specific language from the Commission Agreement addressing entitlement to attorney's fees and costs states: "In the event either party brings an action to enforce its rights under this Agreement, the prevailing party shall be awarded reasonable attorneys' fees and costs." (24 JA 3676).

Discerning the parties' intent in these circumstances requires a pragmatic analysis including plaintiffs and defendants, and it focuses on which party succeeded on the **case's most substantial issue**. *See id.*; *see also Moritz v. Hoyt Enterprises, Inc.*, 604 So. 2d 807, 810 (Fla. 1992). The California Supreme Court explained the rationale behind this commonsense approach:

> We agree that in determining litigation success, courts should respect substance rather than form, and to this extent should be guided by equitable considerations. For example, a party who is denied direct relief on a claim may nonetheless be found to be a prevailing party if

> it is clear that the party has otherwise achieved its main litigation objective.

Hsu v. Abbara, 9 Cal. 4th 863, 877, 891 P.2d 804, 813 (1995); *see also Berkla v. Corel Corp.*, 302 F.3d 909, 920 (9th Cir. 2002). In *Berkla*, for example, although the appellate court affirmed the defendant's technical breach of contract, it determined the defendant was nevertheless the prevailing party because the plaintiff recovered less than 3% of what he sought in damages for that breach. *See* 302 F.3d at 919-920; *see also Friedman v. Friedman*, 2012 WL 6681933 (Nev. Dec. 20, 2012). The *Berkla* court further explained that because the plaintiff's pre-litigation "demands and objectives clearly involved a substantial financial payoff," which the defendant successfully defeated at trial, the "equitable considerations" in the case prevented the plaintiff from being the prevailing party. 302 F.3d at 920.

Ignoring this pragmatic approach, the district court erred finding Wolfram and Wilkes prevailed despite awarding them no commissions. The evidence established that Wolfram and Wilkes' primary litigation objective was a substantial payment of additional commissions from Pardee. Before litigation began, Wolfram and Wilkes contended Pardee owed them additional commissions for an alleged purchase of Option Property at Coyote Springs. (34 JA 5233-35; 5261-63). Lash testified that Pardee understood Wolfram and Wilkes were asking for a substantial financial payoff to avoid litigation. (42 JA 6344 (1-14)).

Wolfram and Wilkes' financial demands continued into the litigation. In their NRCP 16.1 damages disclosures, including the final disclosure during trial, Wolfram and Wilkes disclosed over $1.9 million in damages, including $1.8 million in commissions owed. (76 JA 12075). Wolfram and Wilkes each testified that Pardee owed them additional commissions. (37 JA 5576 (13) and 5674 (1-8); 41 JA 6111 (4-24) and 6151 (12) – 6153 (10)). Non-party Whittemore testified he believed the case was about additional commissions based on Wolfram and Wilkes' counsel's questioning. (29 JA 4472 (12-15)). During trial, Wolfram and Wilkes' counsel referred several times to the case being about additional commissions Pardee allegedly owed his clients. (29 JA 4466 (1-21); 32 JA 4994 (2-12) and 5151 (24) – 5152 (2); 43 JA 6482 (19-21); 44 JA 6582 (22) – 6583 (1)). In closing argument, Wolfram and Wilkes' counsel requested additional commissions. (47 JA 7128 (1) – 7129 (10); 7163 (18) – 7189 (2); 7184 (5-8); 7189 (22-24)).

It was Pardee that prevailed on the issue of commissions as the district court found Pardee owed no additional commissions and had paid Wolfram and Wilkes in full all amounts owed under the Commission Agreement. (48 JA 7464 at ¶¶ 31 and 36). Simply put, although Wolfram and Wilkes claimed Pardee owed them $1.8 million in commissions, the district court awarded them no commissions. (48 JA 7470 at ¶¶ 20-21; 76 JA 12075). Moreover, as to Wolfram and Wilkes' total

damages claim of $1.9 million, the district court awarded them only $141,500, of which $135,500.00 was the attorney's fees as special damages. (48 JA 7470 at ¶¶ 20-21). This is less than 8% of their disclosed damages. (76 JA 12075-76). When the erroneous attorney's fees as special damages are stricken, what remains is Wolfram and Wilkes recovering only $6,000.00 in compensatory damages despite seeking $1.9 million in damages during the case. (48 JA 7470 at ¶¶ 21; 76 JA 12075-76). That is less than 1% of their claimed damages. (76 JA 12075-76).

Despite Pardee's victory on the case's most substantial issue, the district court incorrectly found that Wolfram and Wilkes prevailed in the case under the Commission Agreement's prevailing party provision. (86 JA 13616-18; 13619-21). This is contrary to the court's guidance in *Davis* and *Dimick*. *See generally* 128 Nev. 301, 278 P.3d 501; *see also* 112 Nev. 402, 915 P.2d 254. Indeed, it is fundamentally at odds with the *Dimick* court's statement that contractual prevailing party provisions create an "incentive to settle and reduce litigation" rather than pressing forward with inflated claims or damages. *Dimick*, 112 Nev. at 405, 915 P.2d at 256. The district court awarded Wolfram and Wilkes nearly $500,000 in attorney's fees and costs when they recovered less than 10% of the damages they sought. (48 JA 7470 at ¶¶ 20 and 21; 76 JA 12075-76). This drops to less than 1% if the court reverses the district court's award of attorney's fees as special damages. (48 JA 7470 at ¶¶ 20 and 21; 76 JA 12075-76). Such a ruling does not

encourage settlement or reduce litigation, but instead incentivizes a plaintiff and most particularly a plaintiff's attorney alleging breach of contract to seek inflated damages amounts knowing they can recover their attorney's fees and costs even if they fall well short of recovering those damages amounts.

Only during post-trial briefing did Wolfram and Wilkes argue that the case was not about commissions but instead about Wolfram and Wilkes seeking information from Pardee to verify their commissions paid were accurate. (86 JA 13520 (18) – 13522 (10)). If that contention were true, however, there was no need for a trial because Pardee provided Wolfram and Wilkes with all information (including the Confidential Agreements) during discovery, well before trial began. (48 JA 7461 at ¶ 18). Instead, the bench trial was nearly exclusively about Wolfram and Wilkes claiming additional commissions for Pardee's alleged purchase of Option Property. *See* Part C, *supra*. The district court found Pardee had not purchased Option Property and therefore owed no additional commissions. (48 JA 7464 at ¶¶ 31 and 36). Consequently, the district court erred finding that the case was about information rather than commissions.

In sum, under the pragmatic approach suggested by *Davis*, *Dimick*, and related cases, the district court erred finding Wolfram and Wilkes prevailed under the Commission Agreement. The parties did not contemplate that the Commission Agreement's prevailing party provision would allow Wolfram and Wilkes to

recover attorney's fees and costs despite losing on the case's most substantial issue. Instead, Pardee was the prevailing party under the Commission Agreement. The court should reverse the district court, find that Pardee was the prevailing party, and remand for further proceedings to determine the reasonableness of Pardee's attorney's fees and costs sought.

CONCLUSION

The district court erred awarding Wolfram and Wilkes special damages for attorney's fees incurred in prosecuting this ordinary two-party breach of contract action. It compounded that error when it misconstrued the parties' Commission Agreement and awarded Wolfram and Wilkes further attorney's fees and all costs as the prevailing party in the lawsuit. Accordingly, Pardee asks the court to reverse the district court on the issue of attorney's fees as special damages, hold that Pardee was the prevailing party under the Commission Agreement, and remand for further proceedings to determine the reasonableness of Pardee's attorney's fees and costs.

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 28th day of February, 2018.

McDONALD CARANO LLP

By: /s/ Rory T. Kay

Pat Lundvall (NSBN 3761)
Rory T. Kay (NSBN 12416)
2300 W. Sahara Ave., 12th Floor
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
Facsimile: (702) 873-9966
lundvall@mcdonaldcarano.com
rkay@mcdonaldcarano.com

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

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 Microsoft Word in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 8390 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this 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), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I

///

///

///

///

///

///

understand that I may be subject to sanctions if this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 28th day of February, 2018.

McDONALD CARANO LLP

By: /s/ Rory T. Kay

Pat Lundvall (NSBN 3761)
Rory T. Kay (NSBN 12416)
2300 W. Sahara Ave., 12th Floor
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
Facsimile: (702) 873-9966
lundvall@mcdonaldcarano.com
rkay@mcdonaldcarano.com

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP, and on the 28th day of February, 2018, a true and correct copy of the foregoing document was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system:

/s/ Beau Nelson
An Employee of McDonald Carano LLP