IN THE SUPREME COURT OF THE STATE OF NEVADA

PARDEE HOMES OF NEVADA, INC., Appellant, vs. 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.	Case No.: 72371 Eighth Judicial District Court Case No.: A-10-622338-C **APPELLANT PARDEE HOMES OF NEVADA'S MOTION FOR PERMISSION TO FILE REPLY BRIEF EXCEEDING PAGE AND TYPE-VOLUME LIMITS**

Pursuant to NRAP 32(a)(7)(D), appellant Pardee Homes of Nevada, Inc. ("Pardee") moves for permission to file a reply brief exceeding the page and type-volume limits. Specifically, Pardee's reply brief is 35 pages and 8,807 words.

Factual Background

This breach-of-contract appeal involves Pardee and real estate brokers James Wolfram and Walter Wilkes (collectively "Wolfram and Wilkes"). Based on a written contract between the parties (the "Commission Agreement"), Wolfram and Wilkes sued Pardee in December 2010, alleging causes of action for breach of contract, breach of the implied duty of good faith and fair dealing, and for an

accounting. The case lasted nearly seven years in the district court, resulting in an 88-volume appendix covering substantial motion practice before and after trial.

On February 28, 2018, Pardee timely filed its opening brief. The brief was 35 pages long and contained 8,390 words, well below NRAP 32(a)(7)(A)(ii)'s type-volume limitation of 14,000 words. In the brief, Pardee discussed the Commission Agreement, the case's underlying facts, and the two discrete legal issues that require reversal of the district court's judgment and orders.

On March 27, 2018, Wolfram and Wilkes sought an extension of time to file their answering brief, and after the Court granted this extension, they filed their brief on May 1, 2018. The answering brief is nearly double the length of Pardee's opening brief, containing 66 pages of argument and 13,560 words. Most importantly to this Motion, Wolfram and Wilkes' brief contains several statements not supported by the record or the Commission Agreement, and legal arguments far beyond the scope of those Pardee made in its opening brief.

Although Wolfram and Wilkes' legal arguments are not novel, they do require response from Pardee to assist the Court in deciding the case correctly and with fidelity to the record below. Accordingly, Pardee seeks leave to file a reply brief exceeding the page and type-volume limitations in NRAP 32(a)(7)(A)(i)-(ii).

Argument

NRAP 32 permits an appellant to file a total of 21,000 words in its briefing. *See* NRAP 32(a)(7)(A)(i)-(ii). This includes 14,000 words for its opening brief and 7,000 words for its reply brief. *See id.* Where a party cannot comply with the limits, NRAP 32(a)(7)(D) permits it to move for permission to exceed the page and type-volume limitations "upon a showing of diligence and good cause." NRAP 32(a)(7)(D)(i). Such a motion must be supported by a declaration stating the detailed reasons for the motion and the specific number of additional pages and words. *See* NRAP 32(a)(7)(D)(ii).[1] It must also be accompanied by a copy of the brief the movant wishes to file. *See* NRAP 32(a)(7)(D)(iii).

Here, Pardee respectfully asks that the Court permit it to file a reply brief 35 pages in length and containing 8,807 words. Wolfram and Wilkes' answering brief, almost double in size to Pardee's opening brief, contains numerous factual and legal references to the 88-volume appendix. Pardee contends many of these factual references are unfaithful to the record below, and Pardee must address these inaccuracies in its reply brief. Additionally, Wolfram and Wilkes' legal arguments are beyond the scope of those in Pardee's opening brief, and Pardee needs to provide the Court with a full response to assist the Court in its ultimate decision. Good cause thus exists to extend the page and type-volume limits.

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[1] To comply with this requirement, Pardee submits the below declaration of Rory Kay in support of this Motion.

Pardee also exercised considerable diligence in the briefing on this case. After spending several hours editing through multiple drafts, Pardee's attorneys mindfully submitted an opening brief well below the type-volume limits. Pardee has exercised the same diligence on the reply brief, seeking to craft the factual and legal responses to Wolfram and Wilkes' answering brief in the most direct and streamlined way possible. However, the sheer number of new factual and legal arguments in Wolfram and Wilkes' answering brief makes complying with the page and type-volume limits impractical without negatively influencing the reply brief's quality.

Under such circumstances, and to ensure Pardee's briefing fully assists the Court in deciding this case, Pardee requests permission to file its reply brief submitted concurrently with this Motion.[2]

[2] Pardee's combined type-volume for its opening and reply briefs is 17,197 words, below the 21,000 words that NRAP 32 permits for opening and reply briefs from appellants. *See* NRAP 32(a)(7)(A)(i)-(ii).

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 31st day of May, 2018.

McDONALD CARANO LLP

By: /s/ Rory T. Kay

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DECLARATION OF RORY KAY IN SUPPORT OF APPELLANT PARDEE HOMES OF NEVADA'S MOTION FOR PERMISSION TO FILE REPLY BRIEF EXCEEDING PAGE AND TYPE-VOLUME LIMITS

1. I am an attorney with the law firm of McDonald Carano LLP ("McDonald Carano"), counsel of record for appellant Pardee Homes of Nevada, Inc. ("Pardee") in Case No. 72371.

2. I am over 18 years old and submit this declaration pursuant to NRAP 32(a)(7)(D)(ii) in support of Pardee's Motion for Permission to File Reply Brief Exceeding Page and Type-Volume Limits (the "Motion").

3. Pursuant to the same rule, I have attached a copy of Pardee's reply brief as **Exhibit A** to this Motion and concurrently filed a copy of the brief through the Court's electronic filing system.

4. Pardee's reply brief is 35 pages in length and contains 8,807 words.

5. Pat Lundvall, the supervising partner on this case, and I have worked diligently on the briefing in this matter. We spent numerous hours crafting Pardee's opening brief and reply brief, and each has gone through several drafts.

6. We have kept the legal arguments focused solely on the two discrete issues in this case and on respondents Wolfram and Wilkes' arguments raised in their answering brief.

7. Pardee's opening brief was 35 pages long and contained 8,390 words, well below the type-volume limits set by NRAP 32.

8. In response, Wolfram and Wilkes filed an answering brief that was 66 pages long and contained 13,650 words. This was nearly double in length to Pardee's opening brief.

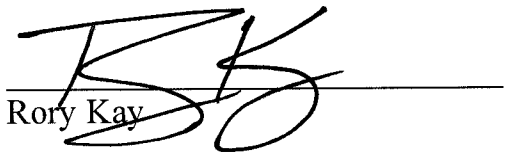
9. The answering brief contains several statements not supported by the record below and legal arguments beyond the scope of those Pardee made in its opening brief.

10. These require a thorough response from Pardee to assist the Court in deciding the case correctly and with fidelity to the record below.

11. Accordingly, Pardee seeks permission to file the attached reply brief.

I declare under penalty of perjury that the foregoing is true and correct.

Dated May 31st, 2018.



Rory Kay

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the formatting, typeface, and type-style requirements in NRAP 27 and 32 because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font, Times New Roman style. I further certify that this motion complies with the type-volume limitations of NRAP 27 and 32 because it contains 1,154 words.

I hereby certify that I have read this motion, 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 motion complies with all applicable Nevada Rules of Appellate Procedure, and I understand that I may be subject to sanctions if this motion is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 31st day of May, 2018.

McDONALD CARANO LLP

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP, and on the 31st day of May, 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:

James J. Jimmerson
Michael Flaxman
JIMMERSON LAW FIRM, P.C.
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And by U.S. Mail to:

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/s/ Beau Nelson
An Employee of McDonald Carano LLP

Exhibit A

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 REPLY BRIEF

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I. INTRODUCTION

Wolfram and Wilkes try to convince the Court of two points in their answering brief. First, Wolfram and Wilkes contend their case is not a two-party breach-of-contract action. If accepted by this Court, Wolfram and Wilkes claim they are then eligible for recovery of attorney's fees as special damages under *Sandy Valley* and its progeny. Second, Wolfram and Wilkes contend they did not seek money damages in the form of unpaid commissions in the district court—the issue they lost in the district court.[1] If accepted by this Court, Wolfram and Wilkes suggest they may then recover their attorney's fees and costs as the "prevailing party" under a contract provision found in the Commission Agreement.

The record below, however, betrays Wolfram and Wilkes' attempt to remake this case on appeal. First, each complaint and amended complaint filed by Wolfram and Wilkes asserted three causes of action predicated upon an allegation that Pardee breached an obligation found in the Commission Agreement. (1 JA 1-12; 16 JA 2670-77). Before trial, the district court made findings that "all three causes of action [asserted by Wolfram and Wilkes] rest upon the terms of the Commission Agreement." (16 JA 2463). After trial, the district court made similar findings, once

[1] Rhetorically, Wolfram and Wilkes' position begs the question: If they did not seek money damages in the form of unpaid commission, then why did the district court's findings go to such lengths to explain that they were not entitled to any unpaid commissions and that they had already been paid all commissions due and owing under the Commission Agreement? (48 JA 7457-74).

again describing all three causes of action as "related to a Commission Agreement entered into on September 1, 2004[.]" (48 JA 7457). A review of the district court's findings reveals that the only obligation Pardee was alleged to breach arose from the Commission Agreement. (48 JA 7464-67). Those findings arose from significant briefing by both parties addressing Wolfram and Wilkes' allegations that Pardee breached a contract, the Commission Agreement. (1 JA 63-82; 2 JA 322-351; 13 JA 2081-101). To suggest, as Wolfram and Wilkes do, that their case was something other than a two-party breach-of-contract action is pure sophistry.

Second, despite Pardee paying them over $2.6 million in commissions, Wolfram and Wilkes's main theory below was that Pardee had purchased Option Property from CSI and therefore Pardee breached the Commission Agreement by failing to pay them commissions on these purchases.[2] (2 JA 334-35; 340-41). This theory was the economic engine that drove Wolfram and Wilkes to litigate. This theory began with their complaints, extended throughout discovery and dispositive motion practice, continued at trial, and in the proposed findings of fact and conclusions of law offered by Wolfram and Wilkes after closing argument in the bench trial. (1 JA 1-12; 2 JA 334-35 and 340-41; 16 JA 2670-77; 63 JA 9825-46). The only time that theory changed was when Pardee, after demonstrating that no

[2] All capitalized terms in this Reply have the same meaning as described in Pardee's Opening Brief ("AOB") and the relevant contracts at issue in the case.

commissions were awarded which was the most substantial issue in this case, sought its attorney's fees and costs during post-trial briefing pursuant to the prevailing party contract provision found in the Commission Agreement. Only then did Wolfram and Wilkes change their tune claiming they were not advancing the theory of Option Property purchases and unpaid commissions. But at the very hearing before the district court discussing their about-face, Wolfram and Wilkes admitted that if the district court had embraced their theory of the case then they would have been entitled to unpaid commissions. (70 JA 10988 (6-23)). And yet, Wolfram and Wilkes now try to convince this Court they spent nearly $620,000 simply to confirm they had been told the truth by Pardee when it advised Wolfram and Wilkes that Pardee had not purchased Option Property and that they had been properly paid all commissions owed under the Commission Agreement. Once again, their contention is pure sophistry.

Wolfram and Wilkes' actions before, during, and after the trial prove their case was about money, not simply information, and that breach of contract was the alleged wrongful conduct practiced by Pardee. Before litigation, Wolfram and Wilkes demanded a substantial financial payout from Pardee. (42 JA 6344 (1-14)). When Pardee refused this shakedown attempt, Wolfram and Wilkes filed suit seeking additional commissions as money damages. (1 JA 1-6). That suit advanced three causes of action, all of which alleged that Pardee breached the Commission

Agreement. *See id.* When Pardee moved for summary judgment because Wolfram and Wilkes failed to offer proof of damages and had not complied with their NRCP 16.1 damages disclosure obligations, Wolfram and Wilkes argued in response that the case boiled down to the definition of Option Property and that their damages were unpaid commissions from what they believed were Pardee's purchases of Option Property.[3] (2 JA 334-35; 340-41). In response to Pardee's contention about lack of NRCP 16.1 compliance, Wolfram and Wilkes disclosed $1.8 million in damages from unpaid commissions for these Option Property purchases, and they offered judgment to Pardee pursuant to NRCP 68 with a condition that required Pardee to immediately pay them commissions and to accept their theory of Option Property purchases. (76 JA 12075; 77 JA 12149). Had that condition in the NRCP 68 offer of judgment been accepted by Pardee, then Pardee would be admitting to owing over $1.8 million in additional commissions. (77 JA 12149). In ruling upon Pardee's motion for summary judgment, the district court found all three claims to be predicated upon Wolfram and Wilkes' allegation that Pardee breached the Commission Agreement. (16 JA 2463). At trial, Wolfram and Wilkes offered

[3] Specifically, in their opposition to Pardee's summary judgment motion, Wolfram and Wilkes claimed they discovered "that despite the constant claim that Pardee has not taken down any Option Property, Pardee made a significant purchase of Option Property as defined in the original Option Agreement, but hid that transaction from Plaintiffs by redefining what Option Property is." (2 JA 327 (7-11)). As before, the district court found against them on that ultimate issue. (48 JA 7464-65 at ¶ 36).

"proof" and demanded that the district court make several findings that Pardee purchased Option Property for which Pardee owed them substantial commissions in violation of the Commission Agreement. (63 JA 9825-46). Wolfram and Wilkes also confirmed during post-judgment briefing that **if the district court had accepted their theory of the case at trial, Pardee would have owed them substantial monies in unpaid commissions**. (70 JA 10988 (6-23)). Wolfram and Wilkes' actions—found plainly in the record below—leave no doubt that in this two-party breach-of-contract action Wolfram and Wilkes' primary motive was money they believed Pardee owed them for alleged purchases of Option Property. Just as clear is that the district court entirely rejected Wolfram and Wilkes' theory of Option Property purchases by Pardee. (48 JA 7464-65 at ¶ 36). The district court expressly found Pardee had paid them all commissions due and owing, and that it had not purchased any Option Property. (48 JA 7464-65 at ¶¶ 31-36). Notably, Wolfram and Wilkes have not challenged those findings.

Because this case was a standard two-party breach-of-contract action, the district court incorrectly awarded Wolfram and Wilkes attorney's fees as special damages. It compounded that error by awarding Wolfram and Wilkes the remainder of their attorney's fees and costs as the purported prevailing party under a contract provision from the Commission Agreement. It is these two legal errors that require reversal.

II. ARGUMENT

A. Routing Issues.

Wolfram and Wilkes contend that the case should be in front of the Nevada Supreme Court "in light of the issues presented, particular the attorney's fees as damages question," but they do not cite any provision from NRAP 17 to support that contention. RAB at 1. The issue of when attorney's fees as special damages may be awarded is not an issue of first impression. *See Sandy Valley Assoc. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 35 P.3d 964 (2001). This breach-of-contract case did not originate in business court, so NRAP(a)(1)-(12) do not apply. NRAP(a)(13)-(14) are reserved for matters raising as a principal issue either "a question of first impression" or "a question of statewide public importance." Awarding attorney's fees in breach-of-contract cases is neither.

B. Standard of Review.

Although Wolfram and Wilkes concede that the appropriate standard of review for attorney's fees as special damages is de novo, they claim prevailing party review falls under an abuse-of-discretion standard. *See* RAB at 31. They cite to *Blackjack Bonding* and *Nelson v. Peckham Plaza Partnerships* for purported support. *See id.* But those cases do not apply. First, *Blackjack Bonding* did not involve a contractual attorney's fees provision but rather a statutory award of attorney's fees. *See Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d at 614

(considering attorney's fees under NRS 239.011). As discussed at length herein, the statutory analysis of prevailing party does not apply to contract provision analysis because there are two different public policies at issue. *See* Part II(D)(3), *infra*.

Second, Wolfram and Wilkes conflate (1) rulings on the amount of attorney's fees incurred and their reasonableness under *Brunzell v. Golden Gate* with (2) the legal decision interpreting the parties' intent as to who "prevailed" under the plain meaning of the contract. The former requires the district court to make factual determinations about the amounts incurred and the work performed, and thus it is properly subject to an abuse of discretion standard. *See Nelson*, 110 Nev. 23, 24, 866 P.2d 1138, 1139 (1994) (noting the appellant contended "the district court did not base its conclusions of fact on substantial evidence"). The latter, however, is a matter of contractual interpretation, which is a question of law and properly subject to a de novo standard. *See Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012).

Wolfram and Wilkes also confusingly argue that *Davis* does not apply because there "is no argument that the district court interpreted the attorney's fee provision incorrectly." RAB at 32 fn. 15. To the contrary, that is precisely Pardee's argument! Pardee contends the district court misinterpreted the prevailing party provision from the Commission Agreement, applying it in a way that did not effectuate the parties' intent or reflect what occurred during the case, which is an issue of law subject to de

novo review. *See Davis*, 128 Nev. at 321, 278 P.3d at 515.

C. Attorney's Fees as Special Damages Are Not Recoverable In Two-Party Breach-of-Contract Cases.

1. *Sandy Valley* Does Not Permit Attorney's Fees as Special Damages in Two-Party Breach-of-Contract Cases as Wolfram and Wilkes Argue.

Wolfram and Wilkes contend attorney's fees are available as special damages when they are "the natural and proximate consequence" of a defendant's conduct. RAB at 52. Because that argument is so general, it is unobjectionable. But that generality provides no guidance as to when attorney's fees are legally recoverable, if ever, as special damages in a two-party breach-of-contract case.

Such guidance, however, begins at one of *Sandy Valley*'s most important observations: "Because parties always know lawsuits are possible when disputes arise, 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." 117 Nev. at 957, 35 P.3d at 970. This is an obvious limiting principle in routine two-party breach-of-contract cases, as the non-breaching party will necessarily incur attorney's fees filing a lawsuit to remedy the breach, and such fees are the natural and proximate consequence of the

breach.[4] Stated another way, but for the breach, the non-breaching party would not have incurred attorney's fees. Accordingly, under *Sandy Valley*, there must be some exception to the American Rule **before** a party can recover its attorney's fees as special damages in a breach-of-contract case.

Sandy Valley provides that exception. *See* RAB at 43. *Sandy Valley* explains the single situation where a party may recover attorney's fees as special damages in a breach-of-contract action, and that is when "a plaintiff becomes involved in a third party dispute as a result of a breach of contract or tortious conduct by the defendant." 117 Nev. at 949, 35 P.3d at 970.

Nevertheless, Wolfram and Wilkes revert to the general language regarding "natural and proximate consequence" to claim that attorney's fees are recoverable as special damages in two-party breach-of-contract cases, and so did the district

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[4] Much of Wolfram and Wilkes' confusion seems to stem from the fact that "natural and proximate" cause is a term of art borrowed from Nevada's tort law. *See Murphy v. Southern Pac. Co.*, 31 Nev. 120, 101 P. 322 (1909) ("[D]amages which a plaintiff is entitled to recover must be due to the natural and proximate consequence of the negligence of a defendant.").

In that context, "natural and proximate" cause is a limiting principle designed to eradicated never-ending tort liability. *See Buckley v. Buckley*, 12 Nev. 423, 437, 1877 WL 4371 at *9 (1877) ("The law aims to make good the certain, natural and proximate losses of the one, but there it stops, unless, after full compensation is made, there yet remains in the hands of the other a pecuniary benefit or profit."). It is not, as Wolfram and Wilkes attempt to use it here, an expanding principle nullifying the American Rule by making attorney's fees available as special damages in **all** two-party breach-of-contract cases.

court. (48 JA 7470). Simply put, that contention is at odds with the American Rule, *Sandy Valley*, and its progeny. For example, in *Liu v. Christopher Homes, LLC*, the Court explained that attorney's fees as special damages were a **narrow** exception to the American Rule regarding attorney's fees, with the dissent expressly noting that a two-party breach-of-contract case was not one of the exceptions originally identified in *Sandy Valley*. 130 Nev. Adv. Op. 17, 321 P.3d 875, 877, 881 (2014). Wolfram and Wilkes try to argue around *Liu*'s limitations by suggesting "money is fungible and, thus, it is not 'necessary' to file suit to recover monies one may be owed." RAB at 61. This is nonsensical in the context of awards of special damages. One wonders how Wolfram and Wilkes think non-breaching parties obtain legal remedies in situations of breach other than through the necessity of filing a lawsuit or an arbitration to enforce contracts they have signed.

Wolfram and Wilkes go on to cite a litany of cases that support Pardee's position, not their own. *See* RAB at 62-63. For example, Wolfram and Wilkes cite *Works v. Kuhn* as an apparent example of a case awarding attorney's fees as special damages that falls outside the *Sandy Valley* exceptions. *See* RAB at 62. But *Works* involved statutory attorney's fees pursuant to NRCP 11 and 41(a)(2), and NRS 18.010. 103 Nev. 65, 65-69, 732 P.2d 1373, 1374-76 (1987). It therefore has no application to the special damages issue here.

Wolfram and Wilkes also cite to four post-*Sandy Valley* cases, yet each of

them supports Pardee or does not involve attorney's fees awarded as special damages under *Sandy Valley*. *See* RAB at 63-64. *Schuette v. Beazer Homes Holdings Corp.*, for example, involved statutory attorney's fees under NRS 40.655(1) and thus did not implicate *Sandy Valley*'s exceptions. *See* 121 Nev. 837, 862, 124 P.3d 530, 547-48 (2005). Wolfram and Wilkes cite to *Reyburn Lawn & Landscape v. Plaster Dev. Co., Inc.* purportedly for the generic "natural and proximate" cause language from *Sandy Valley*, but they overlook that *Reyburn* involved the type of **third-party** breach-of-contract claim expressly allowed by *Sandy Valley* as one of the three exceptions to the American Rule. 127 Nev. 331, 346-47, 255 P.3d 268, 279 (2011). The *Reyburn* court also confirmed that "fees as special damages constitute a rather narrow exception to the [American Rule] prohibiting attorney fees awards absent express authorization." *See id.* at fn. 11.

Finally, in arguing against a "fixed limitation" on attorney's fees as special damages, much of Wolfram and Wilkes' argument focuses on the broad range of **tort cases** where a party may be able to recover attorney's fees as special damages. *See* RAB at 64-65. Specifically, Wolfram and Wilkes cite to Justice Maupin's concurrence in *Horgan* for the proposition that attorney's fees may be appropriate for "malicious prosecution, abuse of process, wrongful attachment, trademark infringement, false imprisonment or arrest." *See* RAB at 65. But Justice Maupin's language in *Horgan* only affirms that attorney's fees may be recoverable as special

damages in various **tort cases**. 123 Nev. 577, 587, 170 P.3d 982, 989 (2007).[5] It does not establish, as Wolfram and Wilkes claim, that attorney's fees are recoverable as special damages in **two-party breach-of-contract cases**.

2. This Was a Two-Party Breach-of-Contract Case.

Much of Wolfram and Wilkes' brief is dedicated to the fiction that this was not a two-party case about breach of contract, but rather a case about an accounting and the search for information. But this contention is impossible to square with the record below and even Wolfram and Wilkes' arguments to this Court. After trial, the district court characterized all three of Wolfram and Wilkes' claims as contract claims "related to a Commission Agreement entered into on September 1, 2004 between [Wolfram and Wilkes] and Pardee." (48 JA 7457 (17-21)). That finding matched a similar finding made before trial by the district court in deciding Pardee's motion for summary judgment: "The COURT FURTHER FINDS the Plaintiffs' complaint alleges three different causes of action namely, Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, and for an Accounting. **However, all three causes of action rest upon the terms of the Commission Agreement dated September 1, 2004 between the parties**." (16 JA 2463) (emphasis added). In each complaint filed by Wolfram and Wilkes, in each of the

[5] Again, Justice Maupin's focus on tort claims makes analytical sense because the "natural and proximate" cause language in *Sandy Valley* is borrowed from Nevada's historical tort law as a limiting principle on tort damages.

three causes of action asserted, they alleged a common predicate: breach by Pardee of the Commission Agreement. (1 JA 1-12; 16 JA 2670-77). It was upon those alleged two-party breach-of-contract claims that the district court awarded Wolfram and Wilkes $135,500 in attorney's fees as special damages.

Specifically, Wolfram and Wilkes' theory of the case below was that Pardee breached the Commission Agreement by failing to pay them commissions. (1 JA 2 at ¶ 8). Wolfram and Wilkes contended that Pardee purchased Option Property from CSI for which it had not paid them commissions. (*See id.*). Although they label "accounting" as one of their causes of action, they repeat the same contentions on appeal about Pardee breaching the Commission Agreement by failing to pay for alleged Option Property purchases. *See* RAB at 8 (stating the Option Agreement obligated Pardee "to purchase a certain amount of property (approximately 3600 acres in Clark County)" as Purchase Property) and 11-12 (explaining they needed information about the boundaries of Purchase Property and Option Property).[6] That

[6] The Option Agreement did not require Pardee to pay Wolfram and Wilkes based on the Purchase Property's location or acreage. (24 JA 3675). Instead, Pardee paid Wolfram and Wilkes a percentage of the Purchase Property Price as expressly required by the Commission Agreement. (*See id.*). This was because, as both Pardee and CSI witnesses testified at trial, they could not define the specific number or location of acres of Purchase Property because of the "green field" nature of Coyote Springs' development. (32 JA 4864 (4-14); 40 JA 5829 (2-17); 5870 (9-16)). It was this fundamental refusal to accept the Option Agreement and Commission Agreement's plain language that caused Wolfram and Wilkes to think they were entitled to additional commissions.

is because the information was only a means to an end, and that end was forcing Pardee to pay them additional commissions. All Wolfram and Wilkes' actions in this case indicate as much.

First, Wolfram and Wilkes' attorney (and current appellate counsel) sent Pardee a letter on April 23, 2009 stating that Wolfram "did not receive a commission at the time of close of escrow or afterwards" and that they were "skeptic[al]" that Pardee had paid all commissions due. (34 JA 5261-62). Wolfram confirmed that suspicion at trial, testifying that in 2009, before filing suit, he believed Pardee owed Wolfram and Wilkes additional commissions and that he communicated the same to Jon Lash. (41 JA 6149 (15-22)). Wilkes testified he was owed additional commissions, a point even conceded in Wolfram and Wilkes's Answering Brief. *See* RAB at 38 fn. 18. Lash testified that he spoke with Wolfram and Wilkes before the lawsuit and understood them to be asking for a substantial financial payoff to avoid the litigation. (42 JA 6344 (1-14)). Harvey Whittemore, too, testified that he understood the case to be about unpaid commissions after speaking with Wolfram and Wilkes' counsel. (29 JA 4472 (12-15)). Thus, four separate witnesses testified that the parties' pre-litigation understanding was that Wolfram and Wilkes believed Pardee owed them additional commissions for alleged purchases of Option Property.

Second, Wolfram and Wilkes' initial Complaint sought lost commissions as money damages. (1 JA 1-6). In it, Wolfram and Wilkes state they sent a letter to

Pardee requesting information about all Pardee's land purchases at Coyote Springs because they believed Pardee purchased lands that "are part of the property outlined in the Option Agreement, and therefore, property for which they are entitled to a commission." (1 JA 2 at ¶ 8). For their breach-of-contract claim, they alleged damages greater than $10,000.00. (1 JA 5 at ¶ 24). The pleading concludes by asking for compensatory money damages greater than $10,000.00.[7] (1 JA 6). In all respects, the Complaint shows that Wolfram and Wilkes were seeking additional commissions from Pardee in the form of money damages.

Third, early summary judgment practice in the case revealed Wolfram and Wilkes were seeking lost commissions as money damages. Pardee moved for summary judgment on the breach-of-contract claim because Wolfram and Wilkes failed to offer any proof of money damages (an essential element of their claim) and had not complied with their NRCP 16.1 obligation to disclose any damage calculations. (1 JA 75). Wolfram and Wilkes responded that the case boiled down to the definition of Option Property and that their damages were unpaid commissions

[7] This alone belies Wolfram and Wilkes' contention that the case was only about information, as the district court found that Wolfram and Wilkes' compensatory damages from searching for information were only $6,000.00. (48 JA 7470 at ¶¶ 20-21). Thus, at the time they filed the Complaint, they necessarily had to be seeking money for something other than just information.

from what they believed were Pardee's purchases of Option Property. (2 JA 334-35; 340-41).

Fourth, this summary judgment process prompted Wolfram and Wilkes to immediately amend their NRCP 16.1 damages disclosure to calculate their damages "to be in excess of $1,930,000.00 associated with [Pardee's alleged] breach of contract," including $1.8 million in lost commissions. (76 JA 12075). Although Wolfram and Wilkes now claim these disclosed damages were merely "hypothetical" and Pardee was not entitled to rely on it when considering how to defend the case, this cannot be squared with NRCP 16.1's language. *See* RAB at 43. NRCP 16.1 requires disclosure of "damages **claimed** by the disclosing party," not merely a hypothetical shell game by plaintiffs that never truly reveals the litigation's stakes.[8] NRCP 16.1(a)(1)(C) (emphasis added). Thus, although Wolfram and Wilkes now distance themselves from the damages they claimed during the litigation, their NRCP 16.1 disclosures were not hypothetical or speculative. (76 JA 12075). Their claim to $1.8 million in lost commissions from

[8] As this Court has explained, damages disclosures play a vital role in enabling defendants "to understand the contours of their potential exposure and make informed decisions regarding settlement and discovery." *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. Adv. Op. 37, 396 P.3d 783, 787 (2017); *see also Washoe Cty. Bd. of School Trustees v. Pirhala*, 84 Nev. 1, 5, 435 P.2d 756, 758 (1968) ("The purpose of the discovery rule is to take the surprise out of trials or cases so that all relevant facts and information pertaining to the action may be ascertained in advance of trial.").

Pardee's alleged breach was their primary theory and the case's most substantial issue.

Fifth, Wolfram and Wilkes' offer of judgment to Pardee reveals this end goal, as it required Pardee to do far more than provide information. (77 JA 12149). The offer required Pardee to accept the condition that any land Pardee purchased from CSI for "detached production residential use," including "all land for roadways, utilities, government facilities" would be "deemed Option Property" under the Option Agreement. (*See id.*). This condition was tantamount to Pardee accepting a condition that it owed Wolfram and Wilkes their claimed additional commissions, as the Commission Agreement required Pardee to pay Wolfram and Wilkes 1.5% of the multiple of the number of acres of Option Property purchased by Pardee by $40,000.00. (24 JA 3675).

Sixth, at the district court's request, Wolfram and Wilkes submitted proposed findings of fact and conclusions of law after trial that demanded findings consistent with their theory of breach that Pardee had purchased Option Property for which it owed them additional commissions. (63 JA 9825-46). Specifically, Wolfram and Wilkes focused on the boundaries of Purchase Property, a factual issue entirely irrelevant because the Commission Agreement paid them based on **Purchase Property Price**, not the boundaries of Purchase Property. (63 JA 9828 at ¶¶ 17 and 23; 9832 at ¶¶ 44-45). They urged the district court to ignore the Commission

Agreement's plain language that they were paid based on Purchase Property Price, not on Purchase Property's acreage. (63 JA 9830 at ¶ 30). Wolfram and Wilkes also claimed Pardee and CSI barred them from development meetings to avoid paying any additional commissions as Pardee and CSI developed the land. (63 JA 9829 at ¶ 24). Finally, Wolfram and Wilkes claimed Pardee purchased substantial Option Property, a claim that if true would have required Pardee to pay Wolfram and Wilkes the $1.8 million in commissions they disclosed as damages. (63 JA 9833 at ¶¶ 48-50; 9834-36 at ¶¶ 58-66). They argued the Court should find that these additional commissions owed were "significant damages" resulting from Pardee's alleged breach. (63 JA 9836 at ¶ 67). Each of these was aimed at exacting a monetary price from Pardee, not merely information as Wolfram and Wilkes contend.

Finally, Wolfram and Wilkes admitted during post-trial argument that if district court had accepted their theory of breach, they would have been entitled to $1.8 million in additional commissions. Specifically, the district court noted that if it had agreed with Wolfram and Wilkes' theory that Pardee had purchased Option Property from CSI, then commissions would be "due and owing." (70 JA 10987 at (6-13) and (16-25). This is because, under the Commission Agreement, Pardee owed Wolfram and Wilkes commissions for any purchase of Option Property from CSI, and the district court understood Wolfram and Wilkes' position to be "that [CSI] had already sold property [to Pardee] under that option agreement." (70 JA

10987 (22-25)). Wolfram and Wilkes' counsel conceded that, in arguing against summary judgment and trial, they asserted Pardee's alleged purchase of Option Property "could lead to future commissions of $1.8 million" for Wolfram and Wilkes if the district court accepted their theory of breach. (70 JA 10986 (10-12)). The district court confirmed that if it agreed Pardee had purchased Option Property, which "Wolfram and Wilkes claim [] that [Pardee] had already . . . bought from CSI," then the "future commissions" would be immediately due and owing. (40 J 10987 (6-12)). Wolfram and Wilkes confirmed their argument was that Pardee owed them additional commissions for Option Property, a position the district court rejected after trial. (70 JA 10988 (6-23)).

Each of these actions before and during the litigation reveal that Wolfram and Wilkes did not spend $620,000 in attorney's fees and costs and nearly eight years prosecuting this case merely for information based upon a contention other than breach of contract. Instead, this was a two-party breach-of-contract case based primarily upon Wolfram and Wilkes' theory that Pardee purchased Option Property and breached the Commission Agreement by failing to pay them commissions for those purchases. The information they tangentially requested was merely a means to those financial ends.

3. Wolfram and Wilkes Falsely Argue That Their Accounting Claim Was for Declaratory or Injunctive Relief.

Realizing that they are not entitled to attorney's fees as special damages for

prosecuting a two-party breach-of-contract case, Wolfram and Wilkes try to save their case by renaming it as one for declaratory or injunctive relief. *See* RAB at 53-54. But Wolfram and Wilkes' pleadings and the relevant caselaw betray them on this point.

First, there is no declaratory or injunctive relief alleged in their original Complaint, First Amended Complaint, or Second Amended Complaint. (1 JA 1-12; 16 JA 2670-77). Wolfram and Wilkes allege three causes of action for breach of contract, breach of the implied duty of good faith and fair dealing, and for an accounting. (*See id.*). Nowhere do they request injunctive or declaratory relief. (*See id.*). Without such an express claim, they cannot avail themselves of *Sandy Valley*'s exception. 117 Nev. at 957-58, 35 P.3d at 970.

Second, seeking an accounting is not declaratory or injunctive relief. As this Court has explained, an accounting is a statement of receipts and disbursements for a given business relationship. *See Polikoff v. Levy*, *132* Ill. App. 2d 492, 500, 270 N.E. 2d 540, 547 (Ill. App. Ct. 1971) (*quoted by Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 94-95, 787 P.2d 777, 781 (1990)). It is a derivative claim that does not exist unless the party alleging it succeeds on the primary or underlying claim. *See Janis v. California State Lottery Com.*, 68 Cal. App. 4th 824, 833, 80 Cal. Rptr. 549, 554 (Cal. App. Ct. 1998) ("A right to an accounting is derivative; it must be based on other claims."); *see also Sahara Gaming Corp. v. Culinary Workers Union Local*

226, 115 Nev. 212, 214, 984 P.2d 164, 165 (1999) (recognizing the principle of a derivative claim with no independent existence). Yet with no Nevada authority cited, Wolfram and Wilkes baldly claim that because the district court awarded them an accounting, it was issuing a mandatory injunction. *See* RAB at 54. This is not only legally unsupportable, but it would turn every case stating a cause of action for accounting into one where the plaintiff could recover attorney's fees as special damages. *See* 117 Nev. at 957, 35 P.3d at 970 (explaining declaratory or injunctive relief may warrant attorney's fees as special damages). This again would completely invalidate the American Rule.

Third, Wolfram and Wilkes cite to cases from Ohio and Illinois for help, but even a cursory review shows that the plaintiff in those cases expressly stated causes of action for declaratory or injunctive relief. *See, e.g.*, *State ex rel. Delhi Tp. v. Wilke*, 27 Ohio App. 3d 349, 350, 501 N.E. 2d 97, 98 (Ohio Ct. App. 1986) ("The complaint asks for a declaratory judgment under R.C. Chapter 2721 . . . ."); *see also Lichtenstein v. Anvan Co.*, 62 Ill. App. 3d 91, 91, 378 N.E. 2d 1171, 1172 (Ill. App. Ct. 1978) ("Plaintiffs, former partners in defendant Anvan Company, a partnership, brought this action seeking a mandatory injunction requiring an accounting and the distribution of plaintiffs' pro rata shares in said partnership."). The cases accordingly provide no help to Wolfram and Wilkes because, contrary to the *Wilke* and *Lichtenstein* plaintiffs, Wolfram and Wilkes did not bring an action for

declaratory or injunctive relief. Instead, Wolfram and Wilkes brought a derivative claim for an accounting that was predicated on their two-party breach-of-contract claims.

Finally, the district court did not award Wolfram and Wilkes attorney's fees for special damages under their accounting cause of action. (48 JA 7457-74). Rather, in its final judgment, the district court expressly awarded Wolfram and Wilkes special damages for their breach-of-contract and breach-of-the-implied-duty claims, which in no way could be considered declaratory or injunctive relief. (88 JA 14126). The district court's next paragraph deals with the accounting claim and does not award any special damages for that claim. (88 JA 14126-27). As such, even Wolfram and Wilkes' attempt to convert an accounting claim into one for declaratory or injunctive relief fails because the district court awarded special damages for the claims regarding breach, not the accounting claim. (*See id.*).

D. The Most Substantial Issue In This Case Was Wolfram and Wilkes' Breach-of-Contract Claim Demanding Additional Commissions.

1. Given the Mixed Results Before the District Court, the Contract Provision At Issue Requires a Determination By This Court of the Case's Most Substantial Issue.

Interpreting a contract like the Commission Agreement at issue in this case is a question of law for the Court to decide. *See Davis*, 128 Nev. at 321, 278 P.3d at 515. That necessarily requires determining which party prevailed on the case's most

substantial issue. *See Hsu v. Abbara*, 9 Cal. 4th 863, 877, 891 P. 2d 804, 813 (1995).

Because both Pardee and Wolfram and Wilkes prevailed on portions of the relief sought, it was incumbent upon the district court to pragmatically look at the entire litigation to identify the most substantial issue in the case and then determine which party prevailed on that issue. But, at Wolfram and Wilkes' urging, the district court myopically focused only on certain contentions made during trial while ignoring the rest of the litigation in determining the case's most substantial issue.

During post-trial hearings on the parties' competing attorney's fees, the district court was persuaded by Wolfram and Wilkes' erroneous contention that contractual "prevailing party" analysis focuses only on what occurred at trial. (70 JA 11030 (1-11); 11036 (19-21); 11037 (8-23); 11038 (7-12). The district court stated it could not consider Wolfram and Wilkes' NRCP 16.1 damages disclosure of $1.8 million in lost commissions because that occurred in discovery, not trial. (*See id.*). It ignored pre-trial and post-trial briefing, and instead believed that only what occurred "at trial [was] what [Pardee was] defending" against in the litigation. (70 JA 11038 (7-12)).

This is too narrow a view of the case's most substantial issue, especially when the bulk of attorney's fees are typically incurred pre-trial, not at trial. A pragmatic analysis focused on the entirety of the case from before litigation until its conclusion is required. *See Hsu*, 9 Cal. 4th at 877, 891 P.2d at 813. The district court's error

not only requires reversal, but because it is a legal determination, it permits this Court to determine the case's most substantial issue. From this, the Court can then find that Pardee prevailed and is entitled to its attorney's fees and costs, remanding to the district court for determination of the reasonableness of Pardee's attorney's fees and costs.

2. Pardee Prevailed on Wolfram and Wilkes' Claim to Millions of Dollars in Commissions, Which Was the Case's Most Substantial Issue.

Attempting to distance themselves from their claims to millions of dollars in commissions for Pardee's alleged breach of the Commission Agreement, which was the case's most substantial issue, Wolfram and Wilkes suggest they never raised the $1.8 million figure during trial and so it was never at issue in the litigation. *See* RAB at 44-45. Thus, they claim their failure to recover $1.8 million or any amount of money as damages expressly sought at trial from Pardee cannot be utilized to determine who prevailing in this case. *See id.* Their argument is akin to saying if Pardee prevailed on a motion for summary judgment, it cannot be the prevailing party because the claims were never tried. The ridiculousness of their argument is manifest.

Considering who prevailed in the litigation under the Commission Agreement is a much broader inquiry than focusing merely on trial alone. *See Hsu*, 9 Cal. 4th at 877, 891 P. 2d at 813 ("We agreed that in determining litigation success, courts

should respect substance rather than form, and to this extent should be guided by equitable considerations."). Under Wolfram and Wilkes' suggestion, a party could assert ten different claims, conduct extensive discovery on each of them, forego nine as meritless before trial or lose those claims on summary judgment, and yet assert it prevailed in the litigation if it succeeded at trial on a minor, remaining claim. The inquiry required by the caselaw on prevailing party analysis under contract provisions, however, is not so narrow.

That distinction is critical as shown in this case because, by the time trial began, Wolfram and Wilkes had all the Confidential Documents that verified they were not entitled to a single nickel, let alone millions of dollars in additional commissions, yet they moved toward trial anyway. *See* RAB at 46 (conceding they had received the Confidential Documents before trial). It begs the question why they did so, if the case was only about existing information needed to verify past commissions. *See id.* Indeed, the district court expressly stated during closing arguments that "this trial changed" from what the parties had sought during prior points in the litigation. (47 JA 7206 (9)).

There can be no doubt that, as discussed above, Wolfram and Wilkes' claim to additional commissions was the case's most substantial issue and that Pardee prevailed upon it. Wolfram and Wilkes disclosed nearly $2 million in damages, of which $1.8 million was from lost commissions. (76 JA 12075). They made pre-suit

demands for additional commissions, which Pardee understood to be asking for a substantial financial payoff to avoid litigation. (34 JA 5261-62; 42 JA 6344 (1014)). Their proposed findings of fact and conclusions of law were littered with requests that the district court find Pardee purchased Option Property and therefore owed additional commissions. *See* Part II(B)(1), *supra*. The demand for millions of dollars in additional commissions drove Wolfram and Wilkes to spend over $620,000 litigating the case for nearly eight years.

Yet after trial, the district court entirely rejected Wolfram and Wilkes' theory, embracing Pardee's position that it never purchased Option Property and had paid all commissions due and owing to Wolfram and Wilkes. (48 JA 7462 at ¶¶ 21 and 23; 7464 at ¶¶ 31, 34, and 36). With that, Pardee was the prevailing party in the litigation's most substantial issue—additional commissions—and it was entitled to recover its attorney's fees and costs pursuant to the Commission Agreement. The district court's contrary ruling, which was based on a fundamental misunderstanding of "prevailing party" analysis, is incorrect.

3. Wolfram and Wilkes' Cited Cases Do Not Apply Because They Interpreted Statutory Attorney's Fees Awards.

Wolfram and Wilkes argue that the Court must determine "prevailing party" under the Commission Agreement pursuant to Nevada law. *See* RAB at 35. On this point, the parties agree, which is why Pardee cited the Nevada cases of *Davis v. Beling* and *Dimick v. Dimick* in its Opening Brief. *See* AOB at 30. Both these cases

expressly deal with **prevailing party analysis under private contracts** and suggest a pragmatic approach that focuses on the litigation's most substantial issue. *See id.*

Wolfram and Wilkes, however, urge the Court to adopt the far more lenient **statutory standard** for defining a prevailing party. Specifically, Wolfram and Wilkes suggest the Court can interpret the Commission Agreement's prevailing party provision to mean "the one who prevails on **any** significant issue that achieves some benefit sought by bringing the action." RAB at 35-36 (emphasis added). For support, Wolfram and Wilkes cite *Blackjack Bonding*, *Bentley v. State*, and *Terry v. Cruea* for this lenient definition of "prevailing party." They also cite *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 761 (2d Cir. 1998).

But none of these cases apply to this **contractual** dispute because they all involve **statutory** awards of attorney's fees or costs. *See Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d at 615 (construing "prevailing party" under NRS 239.011); *see also Bentley*, 2016 WL 3856572 at *12 (Nev. July 14, 2016) (construing "prevailing party" under NRS 18.010 and awarding fees under NRS 18.010(2)(b) because the claims were brought "for the purpose of harassment"); *Terry*, 2017 WL 4618615 at *2 (Nev. Oct. 13, 2017) (construing "prevailing party" under NRS 18.110 in considering costs); *LeBlanc*, 143 F.3d at 761 (awarding attorney's fees under 42 U.S.C. §§ 1983, 1985, and the Fair Housing Act).

Statutory awards of attorney's fees have different policy rationales than

contractual attorney's fees provisions, as made clear by the caselaw. First, *LeBlanc*, *Blackjack Bonding*, *Bentley*, and *Terry* all involve statutes where the relevant legislative body allowed a plaintiff to seek its attorney's fees and costs to make the plaintiff whole. *See id.* These statutes only run in favor of plaintiffs, not defendants, and by legislatively ensuring plaintiffs can seek attorney's fees, they reward individuals for vindicating important rights that inure to the public benefit.[9] *See id.* That is an altogether different scenario than contractual attorney's fees—like that at issue here—which arise from the bargaining process and run in favor of both plaintiffs and defendants. *See Davis*, 128 Nev. at 321, 278 P.3d at 515. Statutory attorney's fees and the associated prevailing party standard are a policy choice of the legislative body, and they have no application to contract matters where the contracting parties themselves decide the issue of defining prevailing party.

Second, while the primary purpose of contractual attorney's fees provisions is to "provide an incentive to settle and reduce litigation," *Dimick*, 112 Nev. 402, 405, 915 P.2d 254, 256 (1996), the statutory fee-shifting award's purpose is often to

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[9] This is quite like awarding fees in class actions to the lead plaintiff because, as this Court has stated, "class actions promote efficiency and justice in the legal system by reducing the possibilities that courts will be asked to adjudicate many separate suits arising from a single wrong." *D.R. Horton, Inc. v. Eighth Jud. Dist. Ct.*, 125 Nev. 449, 458, 215 P.3d 697, 704 (2009). *LeBlanc, Blackjack Bonding, Bentley*, and *Terry* all involve statutes promoting efficiency and justice by enforcing the public good through one lawsuit rather than many. A lenient standard for attorney's fees thus makes sense.

encourage litigation that vindicates the public's right to information, corrects government abuses of constitutional rights, or otherwise uses pro bono attorneys for the civic good. *See Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d at 615 (noting the plaintiff was bringing the lawsuit to require a government entity to turn over records regarding "the provision of a public service"); *see also McDaniel v. Cty. of Schenectady*, 595 F.3d 411, 414 (2d Cir. 2010) (awarding fees under 42 U.S.C. § 1983 for bringing a case to remedy unconstitutional strip searches at New York jails); *Miller v. Wilfong*, 121 Nev. 619, 623, 119 P.3d 727, 730 (2005) (confirming pro bono counsel may recover attorney's fees under NRS 126.171 for various policy reasons, including their "important role in the legal system's attempt to address the unmet needs of indigent and low-income litigants").

Because contractual attorney's fees provisions only involve enforcement of litigants' private rights, the more lenient statutory standard for defining "prevailing party" is inapplicable. *See Dimick*, 112 Nev. at 405, 915 P.2d at 256.[10] Contractual

[10] Even Wolfram and Wilkes' citation to *Hornwood*, which does involve a contractual attorney's fees provision, is distinguishable. *See* 105 Nev. 188, 772 P.2d 1284 (1989). In *Hornwood*, the plaintiff sued for breach of contract and sought $1.425 million in compensatory damages for the breach. *See* 105 Nev. at 191, 772 P.2d at 1286. Contrary to the district court's denial in this case of almost all Wolfram and Wilkes' claimed compensatory damages, the district court in *Hornwood* found that the plaintiff had proven breach and suffered damages over one million dollars, a number the Nevada Supreme Court stated was supported by "substantial evidence." 105 Nev. at 190-91, 772 P.2d at 1286. Thus, under any possible conception of prevailing party, the *Hornwood* plaintiff prevailed because it achieved nearly the entirety of their requested relief. *See id.*

attorney's fees provisions focus on eliminating or reducing litigation through incentivizing settlement, an incentive that would be eliminated by the more lenient statutory standard that encourages litigation. Accordingly, the statutory standard does not apply and instead the pragmatic standard focused on the case's most substantial issue governs "prevailing party" analysis under contractual provisions.

4. The Accounting Claim Was Derivative of the Breach-of-Contract Claim as Found by the District Court, a Finding Not Challenged by Wolfram and Wilkes.

Wolfram and Wilkes suggest that the most important cause of action was their accounting claim because it provided them with the information they purportedly sought from the beginning of the case and were contractually entitled to under the Commission Agreement. *See* RAB at 38. But this admission comes with several defects, any of which shows that Wolfram and Wilkes' claim to millions of dollars in commissions was the case's most substantial issue contrary to their assertions on appeal.

First, it belies reason that Wolfram and Wilkes would spend over $620,000.00 and nearly eight years of their lives seeking information merely to confirm Pardee paid them correctly. The record shows that Wolfram and Wilkes did not want information to simply possess it, but rather because they believed the information would show Pardee owed them additional commissions. (34 JA 5233-35; 5261-63).

As Wolfram and Wilkes suggested in their proposed findings of fact and conclusions of law, the information was a means to an end, namely additional commissions for Option Property they falsely claimed Pardee had purchased. *See* Part II(B)(1), *supra*. Wolfram and Wilkes' offer of judgment similarly required Pardee to accept that it had purchased Option Property, thereby triggering a commission under the Commission Agreement. *See id.* Thus, contrary to their disingenuous claim that the case was only about information, Wolfram and Wilkes' most substantial goal was additional commissions.

Second, Wolfram and Wilkes' litigation filings show the case was truly about commissions. Wolfram and Wilkes' proposed findings of fact and conclusions of law asked for findings that Pardee incorrectly calculated their commissions and "purchased additional land for which [Wolfram and Wilkes were] entitled to a commission." (63 JA 9835 at ¶ 60). The first act of breach that Wolfram and Wilkes claimed was that Pardee purchased Option Property and failed "to appropriately calculate and pay to [Wolfram and Wilkes] the commission owed under the Option Property formula." (63 JA 9839 at ¶ 90(a)). And as discussed above, Wolfram and Wilkes' NRCP 16.1 damages disclosure revealed $1.8 million that they claimed Pardee owed them in unpaid commissions. *See* Part II(B)(1), *supra*.

Third, as discussed above, an accounting claim is derivative by nature, and it cannot be the central or most substantial claim in litigation. *See Janis*, 68 Cal. App.

4th at 833, 80 Cal. Rptr. at 554; *see also Sahara Gaming Corp*, 115 Nev. at 214, 984 P.2d at 165. Wolfram and Wilkes' accounting claim was dependent upon their breach-of-contract claim succeeding, as the entire basis for any accounting came from the Commission Agreement itself. *See Johnny Ribeiro*, 106 Nev. at 94-95, 787 P.2d at 781 (explaining an accounting must come from a business relationship). And it was through that breach-of-contract claim that Wolfram and Wilkes primarily focused on what they believed were "significant damages" for lost commissions regarding Option Property. *See* Part II(B)(1), *supra*. Those commissions drove the economics of the litigation.

Finally, the accounting that the district court ordered was inconsequential because Wolfram and Wilkes had already obtained the Confidential Documents during discovery, which were the documents they sought under the accounting and that they thought would prove additional commissions. (1 JA 4 at ¶ 17) (alleging Wolfram and Wilkes needed an accounting of documents already in existence when they filed the complaint). In other words, by the time of trial, there was nothing for Pardee "to account" for to Wolfram and Wilkes. *See Johnny Ribeiro*, 106 Nev. at 94-95, 787 P.2d at 781 (stating an accounting is a statement of receipts and disbursements).

Wolfram and Wilkes make much of the district court's order on accounting and the "substantial relief" it provided them. RAB at 5 fn. 5. But that order provided

nothing they had requested in their complaints. (49 JA 7708-11).[11] Wolfram and Wilkes' only theory of breach regarding information was retrospective and focused on Pardee's alleged failure to give them existing documents about Pardee's purchases at Coyote Springs. (1 JA 4 at ¶ 21). The accounting order, however, was prospective and focused on future documents. (49 JA 7708-11). It required Pardee to provide an affidavit confirming post-trial representations by Pardee's counsel about who had contract rights to purchase any property at Coyote Springs, future amendments to the Confidential Documents if they occurred (and they did not), and any future documents regarding Pardee's purchase of Option Property as was already required in the Commission Agreement. (*See id.*; 48 JA 7464 at ¶ 36). The order further required Pardee to pay commissions if it ever purchased Option Property in the future, again a legal duplicity because the Commission Agreement already obligated Pardee to pay such commissions. (49 JA 7716). Finally, the order required Pardee to notify Wolfram and Wilkes within 14 days if it terminated the Option Agreement, another legal duplicity because the Commission Agreement already covered termination of the Option Agreement. (48 JA 3676). Wolfram and Wilkes admit as much in their brief, conceding that the accounting order required Pardee to give them <u>future</u> information. *See* RAB at 25.

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[11] In fact, the district court admitted in post-judgment briefing that it did not have sufficient information after trial to order an accounting because it was unsure what Wolfram and Wilkes were requesting. (70 JA 10967 (22-25); 10968 (2-9)).

In sum, Wolfram and Wilkes' accounting claim was not the case's most substantial issue and it did not provide Wolfram and Wilkes with any of the relief they requested in their pleadings. Instead, it was a derivative claim that depended upon their breach-of-contract claim and their theory that Pardee owed them millions of dollars in commissions for purchases of Option Property.

III. CONCLUSION

Despite their attempts to remake this case as one for "information" rather than a two-party breach-of-contract case for which they sought lost commissions as money damages, the record is clear that Wolfram and Wilkes' claim that Pardee breached the Commission Agreement was central to this litigation. Wolfram and Wilkes argued Pardee breached the Commission Agreements, and they were entitled to additional commissions from this breach. Without the breach-of-contract claim, the derivative accounting claim does not exist. Because *Sandy Valley* expressly states that there is no exception to the American Rule for two-party breach-of-contract claims, the district court erred in awarding Wolfram and Wilkes certain of their attorney's fees as special damages.

The award of special damages also infected the district court's ruling regarding the prevailing party under the Commission Agreement. Before and during the litigation, Wolfram and Wilkes argued Pardee owed them millions of dollars in commissions. They spent nearly $620,000 litigating this theory, yet they lost on it

entirely at trial. After the district court's incorrect award of special damages is excluded, Wolfram and Wilkes only recovered $6,000.00 in compensatory damages. Against these facts, clearly Pardee prevailed. It was faced with litigation exposure into the millions and yet successfully defended against more than 99% of Wolfram and Wilkes' claimed damages. Under the pragmatic approach required by contractual analysis of looking at the case's most substantial issue, the district court erred when it myopically focused only on what was expressly mentioned at trial to find that Wolfram and Wilkes were the prevailing party and thus awarded what remained of their attorney's fees and costs.

Consequently, Pardee asks the Court to reverse the district court on special damages, hold that Pardee prevailed under the Commission Agreement, and remand the case for further proceedings to determine the reasonableness of Pardee's attorney's fees and costs as the prevailing party.

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 31st day of May, 2018.

McDONALD CARANO LLP

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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.

This brief does not comply 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 exceeds 15 pages (*see* contemporaneously filed Motion to File Appellant's Reply Brief in excess of Fifteen Pages) and is 8,807 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

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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 31st day of May, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP, and on the 31st day of May, 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:

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