

IN THE SUPREME COURT OF THE STATE OF NEVADA

PARDEE HOMES OF NEVADA,

Appellant,

vs.

JAMES WOLFRAM; ANGELA L. LIMBOCKER-WILKES as trustee of the WALTER D. WILKES AND ANGELA L. LIMBOCKER-WILKES LIVING TRUST; and the WALTER D. WILKES AND ANGELA L. LIMBOCKER-WILKES LIVING TRUST,

Respondents.

Case No.: 72371

Eighth Judicial District Court

Case No.: A-10-632538-C

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**RESPONDENTS' RESPONSE
TO APPELLANT PARDEE
HOMES OF NEVADA, INC.'S
MOTION FOR PERMISSION
TO FILE REPLY BRIEF
EXCEEDING PAGE AND
TYPE-VOLUME LIMITS**

Respondents, JAMES WOLFRAM, ANGELA L. LIMBOCKER-WILKES as trustee of the WALTER D. WILKES AND ANGELA L. LIMBOCKER-WILKES LIVING TRUST, and the WALTER D. WILKES AND ANGELA L. LIMBOCKER-WILKES LIVING TRUST (collectively, "Wolfram and Wilkes"), by and through their counsel of record, hereby respond (the "Response") to Appellant Pardee Homes of Nevada, Inc.'s ("Pardee") Motion for Permission to File Reply Brief Exceeding Page and Type Volume Limits (the "Motion").¹

¹ The Motion is cited to herein as "Mot. at ____."

INTRODUCTION AND FACTUAL BACKGROUND

The litigation between Appellant Pardee and Respondents Wolfram and Wilkes arose from Pardee's failure to keep Wolfram and Wilkes appropriately informed concerning the development of Coyote Springs—a duty that arose not only from a Commission Agreement executed by the parties, but also from the special relationship of trust between Wolfram and Wilkes on the one hand, and Pardee on the other.² (48 JA 7469 at ¶ 15; 7473 at ¶ 6.) Pardee filed its appeal after Wolfram and Wilkes not only successfully prosecuted all three of their claims—(1) accounting, (2) breach of contract, and (3) breach of the implied covenant of good faith and fair dealing—but also defeated Pardee's counterclaim for breach of the implied covenant of good faith and fair dealing before the district court.³

The opening and answering briefs were timely submitted to the Court after the Court granted each side a 30-day extension to submit their

² In this appeal, Pardee does not dispute the district court's finding of the existence of the special relationship of trust that entitled Wolfram and Wilkes to the disclosure of the sought after information. (48 JA 7473 at ¶ 6.)

³ Pardee fails to disclose in its Motion that it unsuccessfully asserted a counterclaim before the district court. Pardee also failed to disclose in its opening brief as well in its proposed reply brief that it ever asserted a counterclaim or that the Court ruled in favor of Wolfram and Wilkes and against Pardee on this counterclaim.

respective briefs.⁴ Pardee's opening brief was 8,390 words in length. (Pardee Br. at 37.)⁵ For various reasons, including but not limited to, the need to correct the various inaccuracies, omissions, and factual and legal misstatements in Pardee's opening brief (*see, e.g.*, WW Br. at 1, 4 n. 5, 15-23, 34 n. 16, 43, 45 n. 24, 48, 50, 59 n. 34),⁶ and to best protect their victory in the district court, Wolfram and Wilkes's answering brief was 13,560 words in length. Now Pardee is seeking to file a reply brief that not only exceeds NRAP 32(a)(7)'s word limit on reply but even exceeds the length of its opening brief (the proposed reply brief is 8,807 words in length).

Pardee's Motion seeking permission to file a reply brief in excess of the page and word limits, including counsel's declaration in support thereof, fails to provide adequate detail or particularity explaining why good cause

⁴ While Pardee states in its Motion that Wolfram and Wilkes sought an extension of time to file their answering brief (Mot. at 2.), it conspicuously omits the fact that Pardee similarly required an extension to submit its opening brief, to which the parties entered into a stipulation. *Id.* The Motion further omits disclosing that Wolfram and Wilkes were required to seek an extension from the Court by motion (as opposed to submitting a stipulation) as Pardee refused to enter into a stipulation that was identical to the one that Wolfram and Wilkes entered into when Pardee needed additional time to submit its opening brief. *See* Respondents' Motion for Extension of Time to File Answering Brief (3/27/2018) at Exhibit B; *cf.* Stipulation to Extend Time to File Opening Brief (First Request) (1/22/2018).

⁵ Pardee's opening brief is cited to herein as "Pardee Br. at ____."

⁶ Wolfram and Wilkes's answering brief is cited to herein as "WW Br. at ____."

exists for filing the proposed overlength reply brief. Pardee provides no more detail other than stating: (1) the length of the answering brief; (2) “many of the[] factual references [in the answering brief] are unfaithful to the record below;” and (3) “Wolfram and Wilkes’ legal arguments are beyond the scope of those in Pardee’s opening brief.” (Mot. at 3.) Curiously, more detail is provided explaining Pardee’s counsel’s diligence than the substantive necessity for exceeding the type-volume limits. (*Id.* at 4.) The Court should give careful consideration as to whether Pardee’s Motion should be granted in light of its facial insufficiency.⁷

ARGUMENT

A. Legal Standard

The Court is familiar with the standard governing motions seeking permission to exceed page-limit or type-volume limitations. “The [C]ourt looks with disfavor on motions to exceed the applicable page limit or type-volume limitation.” NRAP 32(a)(7)(D)(i). Indeed, “permission to exceed the page limit or type-volume limitation will not be routinely granted.” *Id.*; *see also, Hernandez v. State*, 117 Nev. 463, 467, 24 P.3d 767, 770 (2001).

⁷ Wolfram and Wilkes do not outright oppose Pardee’s Motion as they maintain that both sides should be appropriately heard on this appeal. However, as expressed herein, the Court should render its decision on the Motion after being given the proper context, which is why Wolfram and Wilkes have submitted this Response to the Motion.

Such a motion will only be granted “upon a showing of diligence and good cause.” *Id.* Additionally, the motion must “be accompanied by a declaration stating in detail the reasons for the motion.” NRAP 32(a)(7)(D)(ii). Finally, as with any motion, permission to exceed the page limit or type-volume limitation “must state with particularity the grounds for the motion.” NRAP 27(a)(2); *see also* Nevada Appellate Practice Manual, 2016 Edition Ch. 7, 7-14 (“[a]ny motion to exceed the page or word limit for a brief or other documents should state, with particularity, why the relief sought is necessary.”).

B. Legal Argument

1. Pardee’s Motion Fails to Demonstrate, With Particularity, Good Cause to Exceed the Word Limit

Pardee’s Motion fails to satisfy its duty to demonstrate, with particularity, why good cause exists to permit filing of the lengthy reply brief. As referenced above, Pardee provides no explanation for why the brief is necessary aside from: (1) stating (falsely) that Wolfram and Wilkes’s answering brief “was nearly double the length” of the opening brief;⁸ and (2)

⁸ Pardee is again taking liberties with the facts in claiming that the answering brief was “nearly double the length” of the opening brief. (Mot. at 2, and repeated again in the Declaration of Rory Kay at ¶ 8.) Double the length of Pardee’s opening brief would be 16,780 words (8,390 x 2). Wolfram and Wilkes’s answering brief was 13,650 words, or 3,130 words fewer than “double the length” of Pardee’s opening brief.

claiming (wrongly) that the answering brief “contains several statements not supported by the record...and legal arguments far beyond the scope of those Pardee made in its opening brief.” (Mot. at 2.)⁹ Pardee not only fails to identify **any** particular statement(s) in the answering brief that are either unsupported by the record or outside the scope of arguments made in the opening brief, but it also fails to include any explanation why such unspecified arguments necessitate an overlength reply brief. Certainly without more, such conclusory statements do not constitute the “detail” or “particularity” required under NRAP 27(a)(2) or NRAP 32(a)(7)(D) to justify permission to exceed the word limit. *See, e.g., Electronic Frontier Foundation v. C.I.A.*, No. C-09-03351 SBA, 2012 WL 1123529, at *1 (N.D. Cal. April 3, 2012) (denying request to exceed page limits where motion failed to provide sufficient explanation to establish the existence of good cause to file an overlength brief).

Furthermore, the proposed reply brief demonstrates the falsity in Pardee’s claim that additional space on reply is necessary to respond to statement(s) in the answering brief that were allegedly unsupported by the record or outside the scope of arguments made in the opening brief. Indeed,

⁹ Pardee repeats these statements in the Declaration of Rory Kay at ¶¶ 8-10. The declaration does not explain or otherwise expand upon these conclusory statements, and therefore is inadequate under NRAP 32(a)(7)(D)(ii).

the proposed reply brief contains 27 citations to Wolfram and Wilkes’s answering brief. However, as the below chart shows, in the proposed reply brief, **Pardee never once directly asserts that the cited statement is factually incorrect (or otherwise unsupported by the record), and never once claims that the cited statement or argument is outside the scope of Pardee’s opening brief.**

Citation Number	Page from Proposed Reply Brief	Citation to Answering Brief	Description of Pardee’s Use of the Citation
No. 1	Page 6	WW Br. at 1 ¹⁰	Responding to routing statement dispute
No. 2	Page 6	WW Br. at 31	Citing to Wolfram and Wilkes’s case law to respond to dispute over legal standard
No. 3	Page 6	WW Br. at 31	(same)
No. 4	Page 7	WW Br. at 32 n. 15	(same)
No. 5	Page 8	WW Br. at 52	Restating attorney’s fees as damages standard
No. 6	Page 9	WW Br. at 43	Citing to <i>Sandy Valley</i>
No. 7	Page 10	WW Br. at 61	Responding to attorney’s fees as damages argument
No. 8	Page 10	WW Br. at 62-63	Citing to Wolfram and Wilkes’s case law to respond to dispute over attorney fee damages
No. 9	Page 10	WW Br. at 62	(same)

¹⁰ In its proposed reply brief, Pardee cites Wolfram and Wilkes answering brief as “RAB at ____.” To be consistent with the citations herein, those citations have been renamed to “WW Br. at ____.”

No. 10	Page 11	WW Br. at 63-64	(same)
No. 11	Page 11	WW Br. at 64-65	(same)
No. 12	Page 11	WW Br. at 65	(same)
No. 13	Page 13	WW Br. at 8	Citing to Wolfram and Wilkes's use of Commission Agreement as support
No. 14	Page 13	WW Br. at 11-12	(same)
No. 15	Page 14	WW Br. at 38 n. 18	Purported concession by Wolfram and Wilkes
No. 16	Page 16	WW Br. at 43	Responding to dispute over purpose and effect of NRC 16.1 disclosures
No. 17	Page 20	WW Br. at 53-54	Responding to attorney's fees as damages argument
No. 18	Page 21	WW Br. at 54	Citing to Wolfram and Wilkes's case law to respond to dispute over attorney fee damages
No. 19	Page 24	WW Br. at 44-45	Citing to Wolfram and Wilkes's (accurate) statement that \$1.8 million was never raised at trial
No. 20	Page 24	WW Br. at 44-45	(same)
No. 21	Page 25	WW Br. at 46	Purported concession by Wolfram and Wilkes
No. 22	Page 25	WW Br. at 46	(same)
No. 23	Page 26	WW Br. at 35	Acknowledging agreement between parties on choice of law provision
No. 24	Page 27	WW Br. at 35-36	Citing to Wolfram and Wilkes's case law to respond to dispute over prevailing party definition
No. 25	Page 30	WW Br. at 38	Citing to Wolfram and Wilkes's position on claim for accounting

No. 26	Page 32	WW Br. at 5 n. 5	(same)
No. 27	Page 33	WW Br. at 25	Purported concession by Wolfram and Wilkes

As the above chart demonstrates, in Pardee's proposed reply brief, Pardee never once cites to Wolfram and Wilkes's answering brief to directly argue that the cited statement in the answering brief is factually wrong.¹¹ Indeed, while Wolfram and Wilkes spent an entire section of their brief demonstrating the falsity of just a few of Pardee's factual misstatements (pp. 15-23 of the answering brief), none of the 27 citations to the answering brief in Pardee's proposed reply brief are from this section (and only three are from the answering brief's statement of facts (pp. 7-29)). Similarly, none of the citations accompany any statement that the argument referenced therein falls outside the scope of the opening brief. Pardee's stated reasons for requiring an overlength reply brief are simply unfounded.¹²

Finally, the Court should take note that Pardee's Motion mirrors its approach to briefing this appeal. Just as Pardee's Motion is thin and fails to

¹¹ By comparison, Wolfram and Wilkes' answering brief cited Pardee's opening brief 37 times and every single one of those citations were used to take direct issue with Pardee's statements of fact and/or law (21 citations were factual disputes, 16 were legal disputes).

¹² Pardee's suggestion that because the combined number of words between their opening brief and proposed reply is less than 21,000 that the Motion should be granted is without legal support and should be disregarded. (Mot. at 4 n. 2.) *See Otak Nevada, L.L.C. v. Eight Jud. Dist. Ct.*, 129 Nev. 799, 807 n. 6, 312 P.3d 491, 497 n. 6 (2013).

provide any substantial support for its assertions, Pardee's opening brief was similarly thin and made assertions wholly unsupported by the district court record. Not only did Wolfram Wilkes dedicate an entire section of its answering brief documenting and refuting just a few of the factual misstatements Pardee made in its opening brief, including one footnote with hundreds of citations to the record (WW Br. at 15-23, n. 9), Wolfram and Wilkes explained how Pardee's opening brief failed to address Wolfram and Wilkes's arguments concerning attorney's fees as damages made at the district court level and restated in their answering brief (*id.* at 59-60 n. 34), fearing (correctly) that Pardee would first address them on reply (which Pardee seeks to do in its proposed reply brief at pp. 19-22). Pardee's Motion seeking permission to file a reply brief in excess of the page-limit and type-volume limitations confirms the validity of Wolfram and Wilkes's concerns.

CONCLUSION

If Pardee truly needed the additional length for its reply brief, the Motion should have: (1) specifically identified the arguments and/or statements from the answering brief that are either unsupported by the record or outside the scope of the opening brief; and (2) explained why additional space is required to reply. The Court should carefully consider whether these failures appropriately justify granting Pardee's Motion.

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 5th day of June, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this response complies with the formatting, typeface, and type-style requirements of NRAP 27 and 32 because this response was prepared in a proportionally-spaced typeface using Microsoft Word in 14-point font, Georgia style. I further certify that this brief complies with the page-limitations of NRAP 27 and 32 as it contains 10 pages.

Pursuant to NRAP 28.2, I hereby certify that I have read this response, 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 response complies with all applicable Nevada Rules of Appellate Procedure, and I understand that I may be subject to sanctions if it is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of June, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of The Jimmerson Law Firm, P.C., and on the 5th day of June, 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/ Shahana Polselli

An employee of The Jimmerson Law Firm