

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

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Case No.: A-10-63238-C
Elizabeth A. Brown
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**APPELLANT PARDEE HOMES
OF NEVADA, INC.'S RESPONSE
TO RESPONDENTS' MOTION
FOR SANCTIONS**

I. INTRODUCTION

In this appeal, Pardee asks the court to apply clearly established law under *Sandy Valley v. Sky Ranch Estates* to correct the district court's error in awarding Wolfram and Wilkes certain of their attorney's fees as special damages for their breach of contract claim. In doing so, Pardee supplied an 88-volume appendix to the court and cited it heavily through its briefing so the court could review all relevant filings in the district court below.

Despite the ordinary issues involved and Pardee's counsel McDonald Carano LLP's ("McDonald Carano") effort in putting together a substantial record for the court, Wolfram and Wilkes now move for sanctions against McDonald Carano.

Wolfram and Wilkes claim the court can sanction McDonald Carano under NRAP 38 because, in making the unremarkable argument that the court can enforce a plain reading of *Sandy Valley*, McDonald Carano purportedly breached ethical duties to other clients not involved in this appeal. Wolfram and Wilkes also claim that, despite substantial citations to the record in each of Pardee's briefs, McDonald Carano misrepresented the record on appeal regarding Wolfram and Wilkes' offer of judgment and their post-judgment statements regarding the damages they sought during trial. But as discussed below neither position has merit, and McDonald Carano accordingly requests that the court deny Wolfram and Wilkes' motion.

II. ARGUMENT

A. Legal Standard for Sanctions.

Under NRAP 38(b), the court may order a party to pay the other party's attorney's fees when an appeal is frivolous, solely for the purposes of delay, or occasioned through the misuse of the appellate process. In considering such sanctions, appellate courts have been cautious given their chilling effect on appeals. *See Lockary v. Kayfetz*, 974 F.2d 1166, 1172 (9th Cir. 1992). An argument on appeal must be "so lacking in merit" that it is frivolous before the court can impose sanctions. *Works v. Kuhn*, 103 Nev. 65, 69, 732 P.2d 1373, 1376 (1987) (disapproved of on other grounds by *Sandy Valley Assoc. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 35 P.3d 964). Sanctions should therefore be reserved "for the rare and exceptional case." *Lockary*, 974 F.2d at 1172.

Here, McDonald Carano is not advancing a novel position, otherwise making marginally relevant arguments, or failing to provide foundation for its arguments. Instead, as discussed thoroughly in Pardee's opening brief, McDonald Carano is asking the court to enforce *Sandy Valley*'s plain language to correct the district court's error in awarding Wolfram and Wilkes certain of their attorney's fees as special damages for their two-party breach of contract claim. *See* Pardee's Opening Brief at 25-29. This is not sanctionable behavior under NRAP 38.

B. McDonald Carano Has Not Created Positional Conflict Between Its Current Clients.

Wolfram and Wilkes suggest McDonald Carano has violated Rule 1.7 of the Nevada Rules of Professional Conduct. Rule 1.7 prohibits representation where a concurrent conflict of interest exists, and it defines such a conflict as where there exists a significant risk that representation of one or more clients will be materially limited by the lawyer's responsibilities to another client. *See* NRPC 1.7(a)(1)-(2). Wolfram and Wilkes argue McDonald Carano has taken inconsistent positions on behalf of separate clients by arguing in this appeal that an accounting claim is not mandatory injunctive relief while purportedly pleading attorney's fees as special damages for accounting claims in two other cases. *See* Motion at 6-7. For support, Wolfram and Wilkes cite ABA Formal Opinion 93-377. *See id.* at 7, fn. 9.

But there is no ethics opinion from the Nevada State Bar on positional conflicts and whether Rule 1.7 prevents the same. And although ABA Formal

Opinion 93-377 may provide some guidance, it is not controlling, nor does it apply here because there is no “significant risk” that McDonald Carano’s arguments in this appeal will materially limit its representation of any client. There is no positional conflict between McDonald Carano’s arguments in this case and its pleadings in other cases.

In this case, McDonald Carano has argued that the district court erred under *Sandy Valley* in awarding certain of Wolfram and Wilkes’ attorney’s fees as special damages for their two-party breach of contract claim. *See* Pardee’s Reply Brief at 8-21. It is Wolfram and Wilkes, not McDonald Carano, who argued for the first time in their answering brief that their accounting cause of action was for mandatory injunctive relief and falsely claimed that, despite the judgment’s express language, the district court awarded them special damages for their accounting cause of action rather than their breach of contract cause of action. *See* Respondent’s Answering Brief at 53-59. McDonald Carano did not raise the issue of whether an accounting is injunctive relief under *Sandy Valley* but rather responded to it only after Wolfram and Wilkes asserted it. In doing so, McDonald Carano pointed out that Wolfram and Wilkes’ argument had no merit, as the district court awarded them special damages for their breach of contract claim rather than their accounting claim and Wolfram and Wilkes’ specific accounting claim during trial was not for mandatory injunctive relief. *See* Pardee’s Reply Brief at 20-21.

Wolfram and Wilkes’ argument that an accounting is injunctive relief under *Sandy Valley* is not implicated in the cases Wolfram and Wilkes cite involving other McDonald Carano clients. *See* Motion at 5-6. Those cases involve McDonald Carano pleading accounting claims on their clients’ behalf, and there is nothing in those pleadings suggesting that McDonald Carano is asserting those accounting claims as mandatory injunctions. For the reasons stated in this appeal, such an argument is nonsensical. *See* Pardee’s Reply Brief at 20-21.

Simply put, there is no positional conflict for McDonald Carano under Rule 1.7, much less a “significant risk” that it cannot vigorously represent Pardee and its other clients. Wolfram and Wilkes have created this issue out of whole cloth while attempting to impermissibly weaponize the Nevada Rules of Professional Conduct against McDonald Carano without any standing to do so. *See* NRPC 1.0A(d) (explaining the purpose of the Nevada Rules of Professional Conduct “can be subverted when they are invoked by opposing parties as procedural weapons” and that the rules do “not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.”). Because this type of improper behavior is expressly proscribed, the court should sanction Wolfram and Wilkes’ counsel, not McDonald Carano, under NRAP 38 for the misuse of the appellate process and the court’s judicial resources in presenting their frivolous motion.

C. NRAP 38 Is Not a Tool to Enforce the Nevada Rules of Professional Conduct against McDonald Carano.

Wolfram and Wilkes' argument that McDonald Carano purportedly breached Rule 1.7 is also procedurally improper. Wolfram and Wilkes cite no authority by which the court can use NRAP 38 to enforce the Nevada Rules of Professional Conduct. The plain terms of NRAP 38 speak to frivolity, delay, and misuse of the court, but nowhere do they mention enforcing ethical rules that protect non-parties. *See* NRAP 38(a)-(b). Where a request for sanctions under NRAP 38 lacks relevant legal authority, the court should deny the motion. *See Contrail Leasing Partners, Ltd. V. Executive Service Corp.*, 100 Nev. 545, 551, 688 P.2d 765, 768 (1984) ("Respondents' requests for attorney's fees, pursuant to NRAP 38, lack relevant authority and need not be considered.").

Here, McDonald Carano's arguments are not frivolous, imposed for delay, or effectuating a misuse of the court. Instead, the firm has made arguments based on clearly established law in *Sandy Valley*. Because Wolfram and Wilkes' motion contains no authority turning NRAP 38 into a tool to enforce Rule 1.7, their argument is procedurally improper.

D. Wolfram and Wilkes Do Not Have Standing to Assert Duties Running to McDonald Carano's Non-Party Clients.

Wolfram and Wilkes identify two other McDonald Carano clients they claim will be impacted this appeal and McDonald Carano's arguments in favor of a plain reading of *Sandy Valley*. But Wolfram and Wilkes have no standing to assert

breaches of duties belonging to McDonald Carano's clients. *See Beazer Homes Holding Corp. v. Dist. Ct.*, 128 Nev. 723, 731, 291 P.3d 128, 133 (2012) (A "party generally has standing to assert only its own rights and cannot raise the claims of a third party not before the court."). Only McDonald Carano's clients can raise these claims, and the appropriate forum for them is the State Bar of Nevada's complaint procedure. Wolfram and Wilkes cannot undermine the Nevada Rules of Professional Conduct by using them in this case as a litigation sword against McDonald Carano. *See* NRPC 1.0A(d).

Wolfram and Wilkes do not have standing to claim breaches of the Nevada Rules of Professional Conduct against McDonald Carano in this case. Wolfram and Wilkes are not McDonald Carano's clients, and so the firm has no duties to them under Rule 1.7 regarding concurrent conflicts.

E. McDonald Carano Has Not Misrepresented the Record in This Appeal.

Finally, Wolfram and Wilkes accuse McDonald Carano of misrepresenting the record regarding Wolfram and Wilkes' offer of judgment and Wolfram and Wilkes' post-judgment statements regarding the monetary relief they sought during trial. *See* Motion at 8-10. But McDonald Carano did no such thing. Consistent with its duties under NRAP 28(a)(10)(A), McDonald Carano described its contentions and its reasoning in making them, and it supplied citations to the record on which it relied so that the court could independently evaluate McDonald Carano's arguments. *See generally* Pardee's Opening Brief and Reply Brief.

Wolfram and Wilkes' contrary claim is remarkable given that McDonald Carano exclusively prepared the appendix of record, which included 88 volumes of material filed below in the district court. McDonald Carano has not hid the ball in the slightest. Regarding Wolfram and Wilkes' offer of judgment, McDonald Carano provided citations to the appendix and specifically showed why Wolfram and Wilkes' offer required Pardee to accept the condition that any land it purchased from CSI for single-family detached production residential homes would be deemed Option Property. *See* Pardee's Reply Brief at 17. Wolfram and Wilkes' offer plainly states as much. *See* Exh. 5 to Motion for Sanctions at 2:5-3:19. Pardee was required to accept the condition that "all purchases of real property designated for detached production residential use, which includes, without limitation, all single-family detached production residential lots . . . shall be deemed Option Property under the terms of the Option Agreement." *Id.* at 2:7-24. There can be no dispute that, as McDonald Carano explained and cited in its briefing, Wolfram and Wilkes' offer of judgment required Pardee to accept a condition that would have triggered additional commissions under the Commission Agreement. *See* Pardee's Reply Brief at 17. There was no misrepresentation on this point, and McDonald Carano appropriately cited to the appendix so that the court could conduct its independent analysis of McDonald Carano's argument.

Regarding Wolfram and Wilkes' post-judgment statements about the case involving money damages, Wolfram and Wilkes admit that McDonald Carano cited

to portions of the relevant hearings but claim that the firm omitted other citations purportedly proving Wolfram and Wilkes' argument. *See* Motion at 10. This is illogical. Wolfram and Wilkes argue they never sought money damages in this case. If true, however, there was absolutely no reason to disclose money damages in their NRCP 16.1 damages disclosures, nor any reason to discuss the same with the district court as they admit they did in the hearing to which McDonald Carano cites. *See id.*; *see also* Pardee's Reply Brief at 16. This flaw is apparent, as Wolfram and Wilkes have never explained why they were ever discussing or disclosing "theoretical" or "hypothetical" money damages during this litigation as they now claim. *See* Motion at 10 (claiming the \$1.8 million figure was a theoretical or hypothetical amount of future commissions). Nothing in NRCP 16.1 requires a party to disclose theoretical or hypothetical damages, nor can a party recover the same because damages must not be speculative. *See, e.g., Clark County School Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 397, 168 P.3d 87, 97 (2007). Instead, the record shows that Wolfram and Wilkes were seeking money damages in this case, which is precisely why they quantified those damages in their NRCP 16.1 disclosures and discussed the matter repeatedly with the district court. McDonald Carano did not misrepresent this point in its briefing.

III. CONCLUSION

This has been a hotly contested case from the moment Wolfram and Wilkes filed their Complaint. But vigorous advocacy should never morph into accusations

of ethical breaches against opposing counsel wielded solely as procedural weapons to gain a litigation advantage. *See* NRPC 1.0A(d). Yet that is what has now occurred in this case.

Nevertheless, NRAP 38 does not permit Wolfram and Wilkes to weaponize this court as a tool to enforce the Nevada Rules of Professional Conduct, nor do they have standing to enforce duties belonging to McDonald Carano's clients. Moreover, McDonald Carano has not created a positional conflict with its arguments in this appeal based on clearly established law in *Sandy Valley*. Finally, although Wolfram and Wilkes accuse McDonald Carano of misrepresenting the record, this is incorrect. McDonald Carano has complied with its obligations under NRAP 28 by providing a substantial appendix, citing to material supporting its arguments, and spiritedly defending Pardee in this case. That is not sanctionable behavior under NRAP 38.

Accordingly, McDonald Carano respectfully requests that the court deny Wolfram and Wilkes' motion and return the focus of this case to the parties' legal arguments rather than the personalities of the attorneys making them.

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 17th day of July, 2018.

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CERTIFICATE OF COMPLIANCE

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

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 this response is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 17th of July, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP, and on the 17th day of July, 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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