

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

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Elizabeth A. Brown

Eighth Judicial District Clerk of Supreme Court
Case No.: A-10-632338-C

**RESPONDENTS' RESPONSE TO
APPELLANT'S CLARIFICATION
OF THE RECORD AND NOTICE
OF SUPPLEMENTAL
AUTHORITIES**

COME NOW, 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, "Respondents" or "Wolfram and Wilkes"), by and through their counsel of record, James J. Jimmerson, Esq. and James M. Jimmerson, Esq., of The Jimmerson Law Firm, P.C., and, pursuant to NRAP 28(e)(1) and 31(e) and in compliance with NRPC 3.3(a)(1), hereby provide the following Response to Appellant Pardee Homes of Nevada's

(“Pardee”) Clarification of Record Notice of Supplemental Authorities (the “Response”).

In its Clarification of Record Notice of Supplemental Authorities (the “Notice”), Pardee states:

In response to Justice Hardesty’s inquiry asking whether Pardee sought from the district court apportionment of attorney’s fees between successful/unsuccessful claims, the undersigned responded “no.” That was error. In the district court, Pardee did seek apportionment in its motion for attorney’s fees...

Notice at 2.

During oral argument, Justice Hardesty did not ask if Pardee sought from the district court apportionment of attorney’s fees between successful/unsuccessful claims. Justice Hardesty instead asked, “Did you ask the district court to allocate the fees before and after the production of the agreements?” Oral Argument at 14:38-43.¹ Pardee responded, “We

¹ The recording of the oral argument before this Court can be found on the Court’s website at:
https://nvcourts.gov/Supreme/Arguments/Recordings/PARDEE_HOMES_OF_NEVADA_VS_WOLFRAM/

did not.” *Id.* at 14:43-45. That response was accurate. The Notice’s statements and claims of “clarify[ing] the record” are not.²

Pardee’s Notice’s statement that it asked the district court to apportion attorney’s fees between successful/unsuccessful claims is erroneous. Pardee never asked the district court to apportion Wolfram and Wilkes’ award of attorney’s based upon successful and unsuccessful claims. Pardee’s argument throughout post-trial motion practice, even at the very end, was that Wolfram and Wilkes were not the prevailing party and thus were not entitled to *any* attorney’s fees.

Pardee argued in its Opposition to Plaintiffs’ Motion for Attorney’s Fees, “Pardee and only Pardee is the prevailing party under the Commission Agreement and so Plaintiffs are not entitled to recover their attorney’s fees in this matter.” 82 JA 13036. Pardee maintained that position even after the Court issued its finding during the final hearing on attorney’s fees that “the most substantial issue in plaintiffs’ case pre-litigation through litigation was to get the information and also to get the accounting...” 86 JA 13520:19-22. The last words from Pardee’s counsel

² It strains credulity that, given how contentious this case has been, Pardee would forget its own position on a matter as significant as Wolfram and Wilkes’ award of attorney’s fees.

on this issue during the hearing were, “I don’t think you can say that the plaintiffs prevailed in this matter. And I would submit to you that the Commission Agreement is not a proper basis to award this \$441,000 in fees and costs.” 86 JA 13537:8-12. It is fallacious to declare to this Court that Pardee asked the district court to apportion Wolfram and Wilkes’ attorney’s fees award based upon the degree of success they achieved, much less that the fees were sought to be allocated before and after the documents were produced (which was the actual question posed).

As this Court can conclude, Pardee has taken a high-stakes, all or nothing approach throughout post-trial motion practice and appeal. At every turn, Pardee has foolishly gambled that it would succeed in persuading the district court, and then this Court, that Pardee was the prevailing party. Indeed, when Justice Hardesty asked, “when that issue of fees and costs on prevailing party was addressed, did you concede that some fees and costs would be appropriate at least up to the point that the future accounting and documents were produced” (Oral Argument at 13:58-14:18), Pardee’s answer was not “yes,” but instead a restatement of its claim that Pardee had prevailed on the most substantial issue, citing the *Hsu* and *Berkla* decisions. *Id.* at 14:19-14:38. Justice Hardesty’s next

question, immediately after Pardee's response, followed up on this inquiry about whether Pardee gave Wolfram and Wilkes any credit for their trial success, when he asked, "[d]id you ask the district court to allocate the fees before and after the production of the agreements?" *Id.* at 14:38-43. As this Court knows, Pardee's answer was, "We did not." *Id.* at 14:43-45.

Within the district court's record below, there is a simple explanation why Pardee did not seek apportionment of Wolfram Wilkes' award of attorney's fees on the basis of the unsuccessful request for commissions. Pardee did not do so because, as discussed during oral argument, Wolfram and Wilkes' request for a specified sum of unpaid commissions was made **during trial**, **after** it was discovered that Pardee had re-designated certain property from multi-family to single family homes. *Id.* at 33:16-33:50. Thus, apportionment, if it would even be possible, would not have yielded any meaningful reduction in the fees awarded to Wolfram and Wilkes.

It has not been disputed, on oral argument or elsewhere, that Wolfram and Wilkes learned about the re-designation of the land during trial. The district court acknowledged the same, stating:

I don't know if it just if the light went on during trial when Mr. Lash did his testimony. I don't know. I don't know how -- it obviously wasn't an issue before on if they had bought something and redesignated it, because you would have known about it. They would have listed it. I understand that.

44 JA 6552:12-18 (emphasis supplied); 86 JA 13507:1-3 ("we learned the middle of trial, you would recall, that there was a re-designation from multi-family to single family production housing..."); 70 JA 10993:7-16.

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Because Wolfram and Wilkes' request for unpaid commissions arose during trial and would therefore make apportionment of an attorney's fees award for them difficult, if not outright impossible, and considering Pardee's all or nothing approach to this litigation, the Court should reject Pardee's latest effort to misrepresent the district court record and find that Pardee did not seek apportionment of Wolfram and Wilkes's fee award before the district court.

Dated this 28th day of January, 2019.

THE JIMMERSON LAW FIRM, P.C.

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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 28th day of January, 2019, 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