

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 72371

Electronically Filed
~~Jul 18 2019~~ 11:35 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

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 PETITION FOR REHEARING

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Pursuant to NRAP 40, appellant Pardee Homes of Nevada, Inc. (“Pardee”) petitions for rehearing of a portion of the court’s opinion issued on July 3, 2019.

I. GENERAL GROUNDS FOR REHEARING

Pursuant to NRAP 40(c)(2) the grounds for rehearing are: (1) the court overlooked or misapprehended a material fact or material question of law; or (2) the court overlooked, misapplied or failed to consider a statute, rule or decision. In its decision issued July 3, 2019, the court misapprehended a material fact, and then based upon that misapprehension, failed to consider prior decisions from this court requiring apportionment in mixed result cases.

Pardee contends that the court misapprehended a material fact: a claimed finding by the district court. At page 10 of the July 3 decision, the court stated: “Pardee’s assertion the respondents filed the underlying suit because they claimed they were owed unpaid compensation - - a claim the district court found was without merit - - is not compelling.” Based upon that material fact, on pages 10-11 of the July 3 decision, the court went on to award to respondents all of its attorneys fees as the prevailing party, rather than apportioning those fees between the successful theory and the unsuccessful theory advanced by respondents.

This case was undisputedly a mixed result case. Throughout respondents advanced two theories of breach of contract by Pardee and breach of contract was the common denominator in each of respondents’ three claims for relief: one

theory alleged Pardee owed respondents “more information” and the second theory alleged Pardee owed respondents “more money” in commissions. The district court expressly acknowledged respondents were advancing both theories throughout. The district court further found respondents prevailed on one theory (more information), but lost on the second theory (more money). The district court did not find or reject Pardee’s assertion that this case was a mixed results case, but instead expressly acknowledged respondents’ success on the more information theory and Pardee’s success on the more money theory, **and expressly found that the reason or purpose respondents sought more information was to get more money.**

This court’s misapprehension of the district court’s finding then lead the court to misapply or fail to direct the district court upon remand to apportion the attorneys fees under the prevailing party provision between those attorneys fees incurred in successfully advancing one theory of recovery, but disallowing to respondents those attorneys fees they incurred in advancing their second theory of recovery upon which they were not successful.

II. REHEARING SOUGHT ON ATTORNEY FEES PURSUANT TO PREVAILING PARTY PROVISION

In Pardee’s briefing to the court, it demonstrated that this case was a mixed result case, with respondents winning on one theory of breach of contract (more information) but losing on their second theory of breach of contract (more money).

AOB 4, 19-21, 31-33; ARB 2-5, 12-19. Pardee also demonstrated that during the post-trial briefing on entitlement to attorneys fees, respondents admitted that if the district court had accepted their second theory of breach of contract (more money) they would have been entitled to more money in commissions, but the district court found in favor of Pardee on that theory. ARB 18-19 (citing to 70 JA 10987 at 6-13 and 16-25, 70 JA 10987 (22-25), 70 JA 10986 (10-12), 40 JA 10987 (6-12), and 70 JA 10988 (6-23)). And Pardee demonstrated that the district court expressly noted that if it had agreed with respondents' second theory of breach of contract (more money), then more money in commissions would be due and owing, but the district court did not agree with that second theory of recovery (more money). *Id.* Tellingly, in explaining its decision finding that respondents were the prevailing parties, **the district court explained that the reason or purpose respondents advanced their more information theory was to get more money in commissions, and expressly acknowledging respondents were not successful in advancing their more money theory.** 86 JA 13520-13521 ("I find that the plaintiffs - - the most substantial issue in plaintiffs' case pre-litigation and through litigation was to get the information and also get the accounting so that they could determine, number one, whether they were due more fees and commissions[.] . . . They [plaintiffs] looked at it [more information] and came up with they felt reviewing it. . . they felt they might have a theory, which I disagreed with, to get

commissions.”).

Allowing a party to recover attorney’s fees for a losing on a theory of recovery in mixed result cases runs contrary to this court’s prior decisions requiring apportionment between successful and unsuccessful issues or claims. *Franchise Tax Board v. Hyatt*, ___ Nev. ___, 401 P.3d 1110, 1140 (2017); *Glenbrook Homeowners Ass’n v. Glenbrook Co.*, 111 Nev. 922, 901 P.2d 132, 141 (1995); *Bergmann v. Boyce*, 109 Nev. 670, 675-76, 856 P.2d 560, 563 (1993). Therefore, rehearing should be granted on this issue, so the court can properly instruct the district court on remand which attorneys fees under the prevailing party provision are recoverable and which are not.

III. CONCLUSION

For the foregoing reasons the court overlooked or misapprehended a material fact and the applicable law based upon that material fact. As such the court should grant rehearing on the limited issue discussed above.

Dated this 18th day of July, 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font, Times New Roman style. I further certify that this brief complies with the 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 does not exceed 10 pages.

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

Dated this 18th day of July, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP, and on the 18th day of July, 2019, a true and correct copy of the foregoing Appellant's Petition for Rehearing was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system:

/s/ Beau Nelson

An employee of McDonald Carano LLP