IN THE SUPREME COURT OF THE STATE OF NEVADA

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145 EAST HARMON II TRUST, ANTHONY TAN AS TRUSTEE OF THE 145 EAST HARMON II TRUST, Appellants, vs. THE RESIDENCES AT MGM GRAND – TOWER A OWNERS' ASSOCIATION, Respondent.	Electronically Filed Jan 30 2019 08:03 a.m. Elizabeth A. Brown Clerk of Supreme Court **No. 75920**

APPEAL FROM POST-STIPULATION OF DISMISSAL ORDER AWARDING ATTORNEY'S FEES AND COSTS;
EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA;
HONORABLE MARK B. BAILUS

****

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

DAVID J. KAPLAN, Esq., counsel for appellants in district court and on appeal.

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BRENT A. LARSEN, Esq., SINGER & LARSEN P.C., counsel for appellees in district court and on appeal.

Appellant 145 East Harmon II Trust is a trust. As such, it has no parent corporations and is not owned by a publicly held company. Appellant Anthony Tan, as Trustee of the 145 East Harmon II Trust, is an individual.

Attorney of record for Appellants.

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JURISDICTIONAL STATEMENT

This appeal, initiated by Appellants 145 East Harmon II Trust and Anthony Tan, Trustee of 145 East Harmon II Trust (collectively, "the Trust"), relates to the district court's Order Granting Motion for Attorneys' Fees, which awarded Respondent the Residences at MGM Grand – Tower A Owners' Association ("the Association") attorneys' fees and costs (hereinafter, "Order"). (2 TRUST 439–443.[1]) An order awarding attorney fees and costs is appealable as a "special order" under NRAP 3A(b)(8). *See Campos-Garcia v. Johnson*, 331 P.3d 890, 891 (2014). This appeal is timely with respect to the aforementioned Order as notice of entry of the Order was served on April 16, 2018. (2 TRUST 439–440) The Trust filed the instant notice of appeal on May 16, 2018. (2 TRUST 444.)

ROUTING STATEMENT

Pursuant to NRAP 17(b)(5), appeals from a judgment, exclusive of interest, attorney fees, and costs, of $250,000 or less in a tort case are presumptively

[1] This citation refers to pages TRUST439 to TRUST443 of volume 2 of the Trust's Appendix, filed herewith. A similar citation format is used for all citations to the Trust's Appendix.

The Trust notes that, in an effort to agree on a joint appendix with the Association pursuant to NRAP 30(a), it made the contents of its appendix available to the Association on January 21, 2019, and sought comments from the Association by January 24, 2019. Despite the response of an assistant to the Association's counsel of record that the Association would provide comments, if any, by January 24, 2019, as of the date of this filing, the Association did not provide either its approval of or any comments on the proposed appendix.

assigned to the Court of Appeals. This case involves the appeal of a post-stipulated dismissal order awarding attorneys' fees and costs totaling $9,928.81. (2 TRUST 442.) Accordingly, appellant believes this appeal may be assigned to the Court of Appeals.

STATEMENT OF ISSUES

1. Whether the district court properly found the Association to be a "prevailing" party over the Trust under NRS 18.010(2) and NRS 18.020, and therefore eligible to receive attorney fees and costs, where the Association was dismissed as the result of a stipulation and the district court did not decide any issue on the merits. This issue is subject to de novo review.

2. Whether the district court abused its discretion in awarding "reasonable" attorney fees stemming from: (i) preparing a motion to dismiss where the Trust had already agreed in writing to dismiss the Association; and (ii) preparing a subsequent motion for attorney fees.

INTRODUCTION

It is black letter law in Nevada that a party is not considered a "prevailing party," and therefore eligible to receive attorney fees and costs under NRS 18.010(2) and NRS 18.020, respectively, unless the lawsuit has "proceeded to judgment." This policy exists for a reason. It encourages parties to settle claims among themselves without expending either their own or the judicial system's resources unnecessarily. That incentive worked here, at least until the Association sought and was awarded its attorney fees and costs. The Trust agreed to dismiss the Association with prejudice instead of forcing the court to deal with the Association's motion to dismiss, or in the alternative for summary judgment ("Motion to Dismiss"). That should have been the end of the matter, with no further resources expended by either party or any court.

The district court's award of attorney fees and costs to the Association ran afoul of that binding precedent and the public policy reasons for it. Indeed, it cannot be disputed that the underlying lawsuit here, as between the Trust and Association, never proceeded to judgment. The only issue that the district court ruled on between the Trust and the Association was the Association's motion for attorney fees that led to this appeal. In these circumstances, public policy also weighs in favor of no prevailing party eligible for attorney fees and costs, lest others in the same position the Trust was in be incentivized to never abandon any

claim against any party in the future. The district court's ruling should be reversed both based on precedent and public policy.

However, even if the Association is eligible for attorney fees, those fees still must be reasonable. Here, it is undisputed that this lawsuit was entirely dormant as far as the Association was concerned, and that the Trust had already agreed to dismiss the Association in writing. Having been effectively dismissed, there was no reason for the Association to engage in substantive motion practice, particularly without conferring with the Trust first to ensure there was an actual dispute. In short, the Association's attorney fees were not reasonable from the time it decided on its own to prepare a Motion to Dismiss. The Association's unnecessary expenditures should not be encouraged by awarding it associated attorney fees.

STATEMENT OF THE CASE

The Trust initiated this lawsuit after its condominium unit in an MGM property was damaged by an MGM employee not authorized to access the unit. (1 TRUST 001–010 at 004–005.)

The Trust named the Association as a defendant in its First Amended Complaint, filed on June 10, 2016. (1 TRUST 197, 199.) The Association's counsel sent a letter to the Trust's counsel on August 11, 2016 indicating that the Association was not a proper defendant and should be dismissed from the case. (2 TRUST 310–316.) After correspondence between counsel for the Trust and the

Association, the Trust's counsel agreed to dismiss the Association in writing on September 19, 2016. (2 TRUST 299, 318.)

The Trust proceeded to prosecute the case against other defendants, but not the Association, and the lawsuit between the Trust and those defendants was thereafter settled on confidential terms. (2 TRUST 375, 432–438.) Prior to that settlement, however, on March 15, 2017, Association filed a motion to dismiss, or in the alternative, for summary judgment (hereinafter, "Motion to Dismiss"). (2 TRUST 271–294.). The Association had not corresponded with the Trust for the previous two months. (2 TRUST 300, 375.) After the Association filed its motion, the Trust and the Association agreed to a stipulation to dismiss the Association from the case with prejudice on April 17, 2017. (2 TRUST 295–296.) As a result, the Trust did not respond to the Association's motion to dismiss, and the district court did not rule on that motion. (2 TRUST 296, 300–301.)

On May 18, 2017, the Association filed a motion seeking attorney fees. (2 TRUST 297–370.) The district court ultimately issued the Order granting the motion on April 13, 2018. (2 TRUST 439–443 at 442.) Although it never ruled on any substantive issue between the Trust and the Association, the district court ruled that the Association is "the prevailing party," and awarded the Association $9,431.25 in attorneys' fees under NRS 18.010(2)(b). (2 TRUST 439–443 at 441–442.) This largely encompassed the fees that the Association's counsel claimed had

been accrued preparing the Motion to Dismiss and the subsequent motion for attorney fees. (2 TRUST 304–305, 365–370.) The district court also found that the Association was entitled to recover $497.56 in costs as the prevailing party under NRS 18.020. (2 TRUST 442.) This Appeal followed the Order. (2 TRUST 444–449.)

STATEMENT OF FACTS

I. The Trust's Condominium Unit at an MGM Property Was Severely Damaged by an MGM Employee

The Trust previously owned a condominium unit in The Signature at MGM Grand ("Signature Towers"), an MGM property in Las Vegas that includes both hotel rooms and condominiums. (1 TRUST 002–003; 2 TRUST 373.) The Trust did not rent its unit and no one resided in it; the Trust visited the unit only occasionally. (1 TRUST 004; 2 TRUST 373.) On December 3, 2015, the Trust had not visited its unit in several weeks. (*Id.*) That day, Appellant and trustee Anthony Tan entered and was surprised to find the condominium severely damaged. (*Id.*)

The Trust determined that the unit had been accessed by an unauthorized person who had turned on a shower and left it running for days on its hottest temperature and highest pressure settings. (1 TRUST 004–005; 2 TRUST 373.) The resulting mold damage was extensive and required demolition of most of the unit as part of the remediation process. (1 TRUST 006; 2 TRUST 373.) The Trust thereafter undertook a pre-litigation investigation, which revealed that an MGM

employee used an electronic key card to enter the unit on November 26, 2015, and that this was likely not an isolated incident of unauthorized access to condominium units by MGM employees. (1 TRUST 005–006; 2 TRUST 373.)

II. The MGM's Complex Corporate Structure and Sporadic Cooperation Made It Difficult to Ascertain the Identities of the Correct Defendants

While it was therefore clear from the outset that the MGM was responsible for the damage, the MGM refused to pay for the damage, forcing the Trust to initiate litigation. (1 TRUST 006.) However, MGM's complex corporate setup and sporadic cooperation made ownership and operation of the building difficult to ascertain without litigation discovery. (1 TRUST 137–138.) For example, MGM Resorts International has dozens of subsidiaries and in discussions with the Trust the MGM itself had inconsistently represented who owned and operated the property. (1 TRUST 145, 159–163, 176–178.) Further complicating matters, some individuals were involved with multiple MGM entities. (1 TRUST 177–178.) For example, Jill Archunde was believed to manage all MGM employees on site, but she was also active in several MGM entities including sitting on the board of the Association. (2 TRUST 343, 373–374.)

The Trust at first hoped that the MGM would take responsibility without a lawsuit, but it became clear fairly quickly that they would not do so. While MGM Resorts International provided an attorney to handle the matter on behalf of the MGM entities, that attorney refused to identify which MGM entities were

responsible, and refused to identify the MGM employee that had accessed the unit and caused the damage. (1 TRUST 137–138.) The Trust was therefore forced to do the best it could from the MGM's limited cooperation and through its own investigation.

On March 21, 2016, the Trust filed a complaint against four MGM defendants that it believed owned and operated the building where the Trust's condominium was located: Turnberry/MGM Grand Towers, LLC; The Residences at MGM Grand Tower A, LLC; MGM Resorts International; and MGM Grand Condominiums, LLC. (1 TRUST 002–010.) On May 9, 2016, two of the MGM defendants moved to dismiss the Trust's complaint. (1 TRUST 014–128.) In addition to arguing that they were not proper defendants, they also asserted that the lawsuit must be dismissed for failure to name all necessary and indispensable parties to the action, including "The Signature," who purportedly owned the building. (1 TRUST 022–023.)

As a result of that motion, discussions with the MGM's litigation counsel, its own investigation, and needing to ensure that its amended complaint addressed the assertion that not all necessary parties were named, the Trust filed its First Amended Complaint on June 10, 2016.[2] (1 TRUST 197–206.) In it, the Trust

[2] On June 21, 2016, the district court issued an order denying the MGM defendants' motion to dismiss and allowing the first amended complaint. (2 TRUST 250–254.)

named as defendants two of the MGM entities that were included in its original complaint, as well as The Signature Condominiums, LLC, Signature Tower I, LLC, and the Association.[3] (*Id.*)

III. Though the Trust Promptly Agreed in Writing to Dismiss the Association and Took No Further Action Against It, the Association Prepared and Filed a Motion to Dismiss Without Warning

Instead of responding to the amended complaint, the Association wrote to the Trust on August 11, 2016 asserting that it was not correctly named as a defendant to the lawsuit. (2 TRUST 310–316.) After further correspondence with the Association, the Trust agreed in a September 19, 2016 e-mail to dismiss the Association from the lawsuit. (2 TRUST 299, 318.) While the Trust's counsel at the time did not file a formal notice of dismissal as to the Association, no demands were made as to the Association even while the rest of the lawsuit proceeded with discovery and ultimately lengthy settlement discussions pursuant to which the lawsuit ultimately settled and was dismissed by stipulation on September 14, 2017. (2 TRUST 259–270, 432–438.) For example, the Association was not part of the Joint Case Conference Report the Trust and the remaining defendants filed on December 5, 2016, nor was the Association asked for discovery. (2 TRUST 259–267.)

[3] As used herein, "the Signature defendants" refers collectively to The Signature Condominiums, LLC and Signature Tower I, LLC.

While the Trust was busy litigating the case with the MGM and the Signature defendants, the Association made one follow up request as to a formal dismissal in December 2016. (2 TRUST 299–300, 374–376.) However, the Association did not contact the Trust in the following months, and had no role in the lawsuit until it elected to file its Motion to Dismiss on March 15, 2017. (*Id.*) It is undisputed that after the Trust's agreement to dismiss the Association from the lawsuit the Association made no mention to the Trust of the prospect of it preparing and filing such a motion. (*Id.*)

IV. The Trust and the Association Agreed to a Stipulation of Dismissal and the Association Thereafter Successfully Moved for Attorney Fees and Costs

The Trust and the Association thereafter engaged in discussions that concluded with a stipulation of dismissal of the Association from the lawsuit. (2 TRUST 300–301, 375–376.) Specifically, on April 17, 2017, the Trust and the Association stipulated that: (1) all claims asserted in the Trust's first amended complaint against the Association were dismissed with prejudice; (2) the Association's motion to dismiss was withdrawn; and (3) the Association "reserves its right to file a Motion to recover the attorneys' fees it incurred in this matter, as may be provided by law." (2 TRUST 295–296.) The stipulation was filed with a proposed order to the same effect, which the District Judge signed on April 21, 2017. (2 TRUST 296.)

On May 18, 2017, the Association filed a motion for attorneys' fees. (2 TRUST 297–370.) Among other things, the Association asserted that it was entitled to an award of attorneys' fees under NRS 18.010(2)(b). (2 TRUST 303–304.) However, the Association presented no analysis in its motion as to whether it should properly be considered the prevailing party under that statute. (2 TRUST 299–307.) The motion sought to recover for a total of 29.25 hours of attorney time at $375 per hour, or $10,968.75 total. (2 TRUST 304–306.) This total included 10 hours of attorney time ($3,750) for preparing the motion to dismiss and an additional 6 hours ($2,250) for preparing the motion for attorney fees itself. (*Id.*) In its opposition, the Trust pointed out, among other things, that it voluntarily dismissed its claims against the Association and that the Association therefore could not be a prevailing party under a previous Nevada Supreme Court ruling as there was no "merit-based finding by this Court" and the Association did not "succeed on any issue." (2 TRUST 377–378.) The Trust also argued that the fees requested were not reasonable and unnecessary as the Association had no valid reason for preparing the motion to dismiss and the later motion for attorney fees that followed, particularly as it failed to confer with the Trust's counsel concerning the motion to dismiss prior to preparing it. (2 TRUST 382–383.)

In addressing the prevailing party issue in its reply, the Association did not cite a single Nevada case, let alone any decision discussing a proper determination

of the prevailing party under NRS 18.010(2). (2 TRUST 386–402.) Instead, the Association focused on the fact that the dismissal was with prejudice, and cited cases from Illinois, Colorado, and Kansas discussing the implications of a dismissal with prejudice on a res judicata analysis. (2 TRUST 392–396.) The Association also argued that its tasks, including preparing the motion to dismiss, were reasonable and necessary as the Association sought to avoid having to disclose the lawsuit in a resale package. (2 TRUST 400.) However, the Association offered no explanation as to why it did not contact the Trust prior to preparing that motion in order to avoid unnecessary motion practice or expense.

After receiving briefing and an oral argument, the district court rendered its decision at a hearing on August 15, 2017. (2 TRUST 428–431.) Regarding the issue of whether the Association was the prevailing party, the Court stated:

> I am going to rule that [the Association] is the prevailing party. I looked at the stipulation and order and it is in the form of an order that the matter is to be dismissed with prejudice. And, further, that [the Association's counsel] has the opportunity to seek attorneys' fees as a result of the dismissal.
>
> So I am going to find his client to be the prevailing party under NRS 18.010, I believe it is, okay.

(2 TRUST 429.)

With respect to the amount of attorney fees to be awarded, the Court stated that, in applying the *Brunzell* factors, "I did take out a couple of entries, things

such as conferences with your partner or telephone conferences or meetings with co-counsel, Lisa Wild, things of that nature," and determined that reasonable attorneys fees would be $9,431.25. (2 TRUST 430.)

The district court subsequently issued the Order, which was entered on April 16, 2018. (2 TRUST 439–443.) However, the Order offered no additional explanation as to why the Association was determined to be the prevailing party, or concerning the amount of the attorney fee award. (2 TRUST 441–442.) It also provided that the Association "is entitled to recover [] costs as the prevailing party in this matter" and awarded costs of $497.56. (2 TRUST 442.)

This appeal followed. (2 TRUST 444–449.)

SUMMARY OF ARGUMENT

The issue of whether the definition of "prevailing party" as used in NRS 18.010(2) and NRS 18.020 can include a defendant dismissed with prejudice by stipulation is one of statutory construction and subject to de novo review. If the Association is not properly a prevailing party under those statutes, then it is not eligible for the fees and costs that were awarded by the district court.

It is settled Nevada Supreme Court law that under NRS 18.010(2) a party is not a prevailing party unless a matter has "proceeded to judgment," and that a stipulated order of dismissal, even with prejudice, does not qualify. *Works v. Kuhn*,

103 Nev. 65, 68, 732 P.2d 1373, 1376 (1987). The district court's award of attorney fees and costs to the Association should be reversed on this basis alone.

However, even if the Association is eligible for attorney fees, which it is not, the district court erred in applying the *Brunzell* factors, whose analysis is required in order to determine reasonable attorney fees. The Association's Motion to Dismiss and subsequent motion for attorney fees were objectively unnecessary since the Association was effectively, but not formally, dismissed from the lawsuit, and did not confer with the Trust. The *Brunzell* factors provide that a party cannot recover attorney fees incurred unnecessarily and unreasonably.

ARGUMENT

The district court's order awarding the Association attorney fees and costs should be reversed because the Association cannot properly be considered to be the prevailing party under NRS 18.010(2) and NRS 18.020. If the Court finds that the Association is not the prevailing party under the aforementioned statutes, as the Trust asserts, it need not reach the second issue presented herein. However, even if this Court finds that the Association is the prevailing party, it should set aside the award of attorney fees as unreasonable.

Each of these points is discussed in turn below.

I. The Association Cannot Properly Be Considered a Prevailing Party Under NRS 18.010(2) and NRS 18.020

Because the Association is not a prevailing party under NRS 18.010(2) and NRS 18.020, it was improper for the district court to award it any attorney fees or costs.

A. The District Court's Determination that the Association Is the Prevailing Party Is Subject to De Novo Review

In Nevada, issues of statutory interpretation are reviewed under a de novo standard on appeal. *See Arguello v. Sunset Station, Inc.*, 252 P.3d 206, 208 (2011) ("Questions of statutory construction, including the meaning and scope of a statute, are questions of law, which this court reviews de novo.") (quoting *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003)) (internal quotations omitted); *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1028 (2006) ("Statutory interpretation presents a question of law, subject to de novo review.") (internal citation omitted). The issue here is one of statutory interpretation. It concerns how the broadly the term "prevailing party," as used in NRS 18.010(2) and NRS 18.020, should be defined. Specifically, the question is whether a prevailing party includes a defendant that was dismissed from an action with prejudice by stipulation.

That the present topic includes attorney fees over which district courts have some discretion does not change the standard of review. Indeed, the Nevada

Supreme Court previously confirmed that it generally reviews decisions concerning attorney fees for abuse of discretion, "but when the attorney fees matter implicates questions of law, the proper review is de novo." *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006); *see also Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 8–11, 106 P.3d 1198, 1199–200, (2005) (reviewing de novo the question of whether landowners in condemnation actions may be awarded attorney fees as prevailing parties under NRS 18.010(2)(a)).

This Court should therefore review the district court's determination that the Association is the prevailing party under NRS 18.010(2) and NRS 18.020 de novo.

B. The District Court's Award of Attorney Fees and Costs Is Only Proper if the Association Is the Prevailing Party Under NRS 18.010(2) and NRS 18.020

A Nevada district court may only award attorney fees "if authorized by a rule, contract, or statute." *Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 825, 192 P.3d 730, 733 (2008) (citing *Albios*, 122 Nev. at 417, 132 P.3d at 1028); *Young v. Nevada Title Co.*, 103 Nev. 436, 442, 744 P.2d 902, 905 (1987); *Liberty Mutual Fire Ins. Co. v. Wynn Las Vegas, LLC*, 2:13-cv-852-LDG-PAL, 2015 WL 5731904, at *1–2 (D. Nev. Sept. 30, 2015).

Here, the district court awarded attorney fees under NRS 18.010(2). (2 TRUST 429, 442.) It is notable that the statute expressly provides that only a prevailing party is entitled to recover attorney fees. NRS 18.010(2); *Liberty Mutual*

Fire Ins., 2015 WL 5731904, at *1–2. Thus, the district court's award of attorney fees is only proper if the Association is correctly the prevailing party under NRS 18.010(2). Because, as set forth below, the Association is not the prevailing party here, the district court's order must be overturned.

Similarly, costs are available to prevailing parties under NRS 18.020. The district court found that the Association was entitled to recover costs as the prevailing party. This too must be reversed where, as here, the party awarded costs is not the prevailing party.

C. The District Court's Finding that the Association Is the Prevailing Party Conflicts with Nevada Supreme Court Precedent

The Nevada Supreme Court confirmed long ago that "a party to an action cannot be considered a prevailing party within the contemplation of NRS 18.010, where the action has not 'proceeded to judgment.'" *Works*, 103 Nev. at 68, 732 P.2d at 1376 (quoting *Sun Realty v. District Court*, 91 Nev. 774, 775 n.2, 542 P.2d 1072, 1073 n.2 (1973)), disapproved of on other grounds by *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 955 n. 7, 35 P.3d 964, 969 n.7 (2001); *County of Clark v. Blanchard Constr. Co.*, 98 Nev. 488, 492, 653 P.2d 1217, 1220 (1982).

The Court has been equally clear that an agreement to dismiss a case, even if with prejudice, does not constitute an action that has "proceeded to judgment." Indeed, that was precisely the situation in *Works*. In its decision, the Court noted

that "[i]n the instant case . . . respondents voluntarily dismissed their counterclaim with prejudice prior to trial based upon appellant's acceptance of the offer to settle the action. Under these circumstances, we conclude that appellant cannot be considered as having prevailed in this action. Therefore, appellant was not entitled to attorney's fees under the provisions of NRS 18.010 . . ." *Works*, 103 Nev. at 68, 732 P.2d at 1376.

That is precisely the situation here. The Trust and the Association agreed to a stipulation of dismissal with prejudice of the Trust's claims against the Association. No matters concerning the Trust's claims against the Association "proceeded to judgment." Like in *Works*, the Association therefore cannot be considered as having prevailed in this action. Indeed, as the Supreme Court ruled in *Works*, the Association's focus on the fact that the dismissal was "with prejudice" is of no moment.[4]

Nor does the fact that the Court in this instance issued an order of dismissal to the same effect as the stipulation mean that the Association can be considered to be the prevailing party. The Nevada Supreme Court also considered that assertion in *Works*, and dismissed it. *Works*, 103 Nev. at 68–69, 732 P.2d at 1376.

[4] It is telling that in advancing its argument that the fact that the dismissal being "with prejudice" is determinative, the Association did not cite a single Nevada case in support. (2 TRUST 392–396.)

Moreover, the thrust of the Association's position also conflicts with public policy favoring settlement without being subject to ordered attorney fees. Indeed, the Nevada Supreme Court previously explained that "provisions for the payment of attorney's fees by the losing party provide an incentive to settle and reduce litigation. This incentive would be lost if this court holds that a party cannot abandon a claim without being subject to paying attorney's fees." *Dimick v. Dimick*, 102 Nev. 402, 405, 915 P.2d 254, 256 (1996). The public policy incentive that the Court recognized in *Dimick* would be greatly disrupted if the district court's determination is permitted to stand here. Not only would parties in a similar position as the Trust lose an incentive to dismiss its claims against the Association, but the remainder of the case may not have reached settlement either. It is conceivable that a large percentage of cases that now settle would not if a party is subject to its adversary's attorney fees each time it drops a claim by stipulation.

The Trust respectfully submits that the Court should not deviate from its precedent by affirming the district court's ruling as this would greatly expand the meaning of prevailing party and negate a public policy incentive to settle cases. Instead, the Trust respectfully submits that this Court should reverse the district court's finding that the Association was the prevailing party and eligible for an award of attorney fees under NRS 18.010(2). Under the same analysis, the Court should also reverse the district court's award of costs to the Association.

II. It Is Unreasonable to Award the Association Attorney Fees for Preparing Its Motion to Dismiss and Its Motion for Attorney Fees

If the Court agrees with the Trust that the Association is not the prevailing party then it need not reach this issue. However, even if eligible to recover attorney fees, only "reasonable" fees could be properly awarded. Because the district court's award included fees for the Association's Motion to Dismiss and the subsequent motion for attorney fees, it was not reasonable.

A. Reasonableness of an Award of Attorney Fees Is Reviewed for an Abuse of Discretion

When an award of attorney fees is appropriate "the amount thereof lies within the discretion of the trial court, and such an award will not be disturbed unless there is an abuse of discretion." *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Pratt and Whitney Canada, Inc.*, 107 Nev. 535, 542, 815 P.2d 601, 605 (1991). Thus, if the Association is entitled to recover attorney fees, the district court's determination of the reasonable amount of attorney fees due to the Association should be reviewed for an abuse of discretion.

B. An Award of Attorney Fees Must Be Supported by Findings Showing It Is Reasonable

In Nevada, a trial court must evaluate the factors set forth in *Brunzell v. Golden Gate National Bank* in determining the appropriate amount for an award of reasonable attorney fees. *See Shuette v. Beazer Homes Holdings Corp.*, 121 Nev.

837, 864–65, 124 P.3d 530, 548–49 (2005). As set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), those factors include:

> (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.

Id. As the Court explained, those factors were considered to be "the well known [*sic*] basic elements to be considered in determining the reasonable value of attorney's services," and were based on "a study of the authorities." *Id.*

A district court is required not only to consider the reasonableness of fees using the *Brunzell* factors, but to render specific findings regarding the same. *See Barney*, 192 P.3d at 735–36; *Shuette* 124 P.3d at 548–49*; Argentena Consol. Min. Co. v. Julley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 540 n.2, 216 P.3d 779, 788 n.2 (2009), abrogated on other grounds by *Fredianelli v. Fine Carman Price*, 402 P.3d 1254, 1256 (2017).

C. The District Court's Inclusion of Fees for the Motion to Dismiss and the Motion for Attorney Fees in Its Award Was Objectively Unreasonable

The Association has never claimed that any demands were made of it in the litigation after August 2016. It does not allege that it participated in discovery

conferences or that it received any discovery requests. Nor does it assert that, despite having been served with a complaint months prior, it received a threat of a default or a demand for its response. That is because the Association was effectively dismissed from the lawsuit shortly after it first corresponded with the Trust in August 2016. The Trust agreed in writing almost immediately that the Association would be dismissed and no party involved the Association in the case thereafter. In short, there were no demands on the Association that required it to expend time on the substantive matters of the case, much less to engage in motion practice.

Unfortunately, the Association elected to engage in motion practice anyway. Though the Association itself asserts that from December 12, 2016 to March 15, 2017 – the day it filed its Motion to Dismiss – it had no contact with the Trust (2 TRUST 299–300.), it nevertheless expended substantial resources on its Motion to Dismiss. Given that there had been no demands on it, it was objectively unreasonable for the Association to do so, particularly as it would have taken almost no time for it to write to the Trust and advise that it would be forced to file such a motion if the Trust did not formally dismiss it from the lawsuit. The Association undoubtedly elected the least cost effective approach possible.

That the Association acted unreasonably is supported not only by common sense, but also by the Nevada Rules of Civil Procedure, the Nevada Rules of

Professional Conduct, and the Eighth Judicial District Court Rules, all of which encourage, if not require, conferring with opposing counsel prior to engaging in motion practice. For example, Nevada Rule of Professional Conduct (NRPC) 3.5A, entitled "Relations With Opposing Counsel," specifies that a lawyer must not take advantage of another lawyer "by causing any default or dismissal to be entered without first inquiring about the opposing lawyer's intention to proceed." Consistent with this requirement, NRCP 37(a) requires a party to confer with an opposing party prior to seeking court intervention on discovery matters, including seeking sanctions or attorney fees, and the Rules of the Eighth Judicial District require a meet and confer between counsel for discovery motions and motions in limine. *See* EDCR 2.34(d); EDCR 2.47(b). The theme of all of these rules is the same. Anytime there is a chance for counsel to resolve a matter without motion practice, an attorney that desires judicial intervention is obliged to attempt to do so. That is exactly what should have occurred here, but did not. Had it occurred, the Association would never have had to prepare its Motion to Dismiss or the subsequent motion for attorney fees – indeed, as it was the formal dismissal was promptly agreed to after the Association filed its Motion to Dismiss.

The *Brunzell* factors, including at least the second and fourth factors, specify that "reasonable" attorney fees only encompass matters that are necessary for a given matter. Specifically, the second factor requires consideration of a task's

"**importance, time and skill required, [and] the responsibility imposed**," and the fourth factor similarly requires consideration of "**what benefits were derived**" *Brunzell*, 85 Nev. at 349, 455 P.2d at 33 (1969) (emphasis added). An examination of each of these characteristics can only lead to the conclusion that the Association should not have been awarded attorney fees for its Motion to Dismiss and motion for attorney fees. Indeed, how could there be any importance or benefit gained by electing the least reasonable path to accomplish the same result? Taking into account that the Association could have received the same result through simple correspondence, these matters were unnecessary, of no importance, required no time or skill, came with no responsibility, and achieved no additional benefits beyond generating fees for an attorney. The second and fourth *Brunzell* factors both weigh heavily against an award of attorney fees that includes time spent on such activities.

To the contrary, no *Brunzell* factor supports awarding the Association its attorney fees for these tasks. As a result, the district court abused its discretion in ignoring the *Brunzell* factors for the 10 hours of attorney time ($3,750) for preparing the motion to dismiss and an additional 6 hours ($2,250) for preparing the motion for attorney fees. (2 TRUST 304–306.) The district court's award should therefore be reversed as to these fees.

CONCLUSION

For the foregoing reasons, the Trust respectfully requests that this Court reverse the district court's finding that the Association is a "prevailing party" over the Trust for the purposes of attorney fees and costs under NRS 18.010(2) and NRS 18.020 and reverse the district court's award of attorney fees and costs to the Association.

In the alternative, the Trust respectfully requests that this Court find that the Association's claimed attorney fees related to its motion to dismiss and motion for attorney fees were not reasonable, and reduce the amount of attorney fees awarded by the district court by $6,000.

DATED: January 29, 2019

/s/ David J. Kaplan

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CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

1. 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 2016 in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts f the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 5,901 words.

3. Finally, I hereby certify that I have read this appellate 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 29th day of January, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this date **APPELLANTS' OPENING BRIEF** was filed electronically with the clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list on:

Luis A Ayon, counsel for Appellants

Brent A Larsen, counsel for Respondent

DATED: January 29, 2019

/s/ David J. Kaplan