IN THE SUPREME COURT OF THE STATE OF NEVADA

145 EAST HARMON II TRUST; AND ANTHONY TAN AS TRUSTEE OF THE 145 EAST HARMON II TRUST, Appellants, v. THE RESIDENCES AT MGM GRAND TOWER A OWNERS' ASSOCIATION, Respondents.	Supreme Court No. 75920

APPEAL

from the Eighth Judicial District Court, Clark County, Nevada
The Honorable Mark B. Bailus, District Judge
District Court Case No. A-16-733764-C

RESPONDENT'S ANSWERING BRIEF

BRENT LARSEN, ESQ. (SBN 1184)
SINGER & LARSEN P.C.
1291 Galleria Drive, #230
Henderson, Nevada 89014
blarsen@singerlarsen.com
(702) 454-2111
Attorney for Respondent

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record for the Respondent/Defendant hereby certifies that the following persons and entities as described in NRAP 26.1(a), are as follows:

Brent Larsen has been the only attorney who has represented the Respondent/Defendant, The Residences at MGM Grand - Tower A Owners' Association, in this case. When Mr. Larsen first represented Respondent/Defendant he was affiliated with the law firm of Deaner, Malan, Larsen & Ciulla. That firm has since dissolved. Thereafter Mr. Larsen joined the law firm of Singer & Larsen P.C.

The Respondent/Defendant is a Nevada non-profit corporation, and it is the governing homeowners' association for all of the MGM condominium units located in Tower A.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this _____ day of _____, 2019.

SINGER & LARSEN P.C.

*/s/ Brent Larsen*_____
BRENT LARSEN, ESQ.
Nevada Bar No. 1184
1291 Galleria Drive, #230
Henderson, Nevada 89014
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

STATEMENT OF JURISDICTION

The Respondent/Defendant, The Residences at MGM Grand - Tower A Owners' Association (hereinafter the "Association"), agrees with the Statement of Jurisdiction presented by the Appellants/Plaintiffs, 145 East Harmon II Trust and Anthony Tan as Trustee of 145 East Harmon II Trust (hereinafter the "Plaintiffs") in its Opening Brief.

ROUTING STATEMENT

The Association agrees with the Routing Statement contained in the Plaintiffs' Opening Brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Should the district court's judgment awarding attorneys' fees to the Association be affirmed where the Plaintiffs failed to present any evidence, or any viable legal argument in both the district court and in this appeal to demonstrate that they ever had any reasonable grounds for: (1) suing the Association as a Defendant in this action; and (2) continuing to maintain this action against the Association after the Plaintiff's breached their written promise to timely and formally dismiss the Association from this lawsuit?

I.

STATEMENT OF THE CASE

The Plaintiffs/Appellants, 145 East Harmon II Trust and Anthony Tan as Trustee of the 145 East Harmon II Trust (hereinafter collectively the "Plaintiffs") owned a condominium unit within Tower A of the MGM hotel/condominium complex. The MGM hotel/condominium complex is operated by Signature Tower I, LLC (hereinafter "Signature"), who eventually became a Defendant in this action, and who admitted to being responsible for satisfying the Plaintiffs' claims. 1 App. 19, 21-22, 44, 225-26. The Defendant/Respondent, The Residences at MGM Grand - Tower A Owners' Association (hereinafter the "Association") is a homeowners' association for the Tower A sub-association. Plaintiffs have never presented any evidence in this case to show that it had any reasonable grounds for suing the Association.

The Plaintiffs claimed that an unidentified employee of an MGM controlled entity allegedly trespassed into the Plaintiffs' unit, turned on the shower, and thereby created mold damage in the Plaintiffs' unit. 1 App. 197-206; 2 App. 324-325. The Plaintiffs filed a shotgun Complaint[1] against several MGM Defendant entities for the alleged wrongful act by this single employee. The Association was one of the Defendants who the Plaintiffs wrongfully sued in this matter.

/ / /

---

[1] *See Strategic Income Fund v. Spear*, 305 F.3d 1293 (11th Cir. 2002), where the court expressed strong disapproval of a "shotgun" complaint, because such a complaint makes no attempt to separate and identify the alleged wrongful acts of each named defendant.

The Association's attorney made repeated demands on the Plaintiffs' attorneys to dismiss the Association from this case. 2 App. 284-86, 292, 294. Because those demands were ignored, the Association filed a Motion for Summary Judgment. 2 App. 271-94. Thereafter, in order to avoid a hearing on the Association's Motion for Summary Judgment, the Plaintiffs and the Association filed a Stipulation that the Association be dismissed from this action, "with prejudice." 2 App. 295-96. That Stipulation and Order for Dismissal also expressly provided that the Association was reserving its right to file a Motion to recover its attorneys' fees. *Id.* After the Order for a Dismissal was entered, the Association proceeded with filing a Motion for Attorneys' Fees. 2 App. 297-370.

Accordingly, this appeal addresses the question of whether the Association was entitled to recover its attorneys' fees under NRS 18.010(2)(b) because (1) the Association was the "prevailing party" against the Plaintiffs in this matter, and (2) the Plaintiffs' claims against the Association had no reasonable basis in law or in fact. The district court granted the Association's Motion for Attorneys' Fees pursuant to the expressed language of NRS 18.010 (2 App. 295-96), which specifically provides for the recovery of attorneys' fees by a defendant when the plaintiff brings a lawsuit against such defendant without "reasonable grounds." 2 App. 295-96.

II.

STATEMENT OF THE COURSE OF THE PROCEEDINGS BELOW

On March 21, 2016, Plaintiffs filed a lawsuit against four different Defendants who all had the name "MGM" within their named identity. 1 App. 2-10. One of those

Defendants was the Association. 1 App. 2.

On May 9, 2016, two of the MGM Defendants, MGM Grand Resorts International, LLC and MGM Grand Condominium, LLC (hereinafter collectively "MGM Defendants") filed a Motion to Dismiss the Plaintiffs' Complaint because Plaintiffs had named innocent parties as Defendants and because Plaintiffs failed to sue Signature. 2 App. 14-23. That Motion pointed out that Signature was the only entity who should have been sued as a Defendant in this case. *Id.* That statement was also made by the same law firm who eventually filed an answer on behalf of Signature. 2 App. 225-235.

The MGM Defendants' Motion to Dismiss argued that they (MGM Defendants) were innocent parties. That Motion also pointed out that the two other Defendants in the case, Turnberry/MGM Grand Towers LLC, and the Association, could make identical arguments. In fn. 1 of the MGM Defendants' Motion to Dismiss it states as follows:

> Upon information and belief, the arguments contained herein also apply to Defendant Turnberry/MGM Grand Towers, LLC and Defendant The Residences at the MGM Grand Tower A, LLC, however we are only appearing on behalf of Defendants MGM Resorts International, LLC and MGM Grand Condominiums, LLC. 1 App. 019.

On May 16, 2016, the Defendant, Turnberry/MGM Grand Towers, LLC (hereinafter "Turnberry") filed a Joinder in the Motion to Dismiss, stating:

> Plaintiff has asserted no facts from which the Court can infer that Defendant Grand Tower A [Turnberry] had

> anything to do with the alleged damage to Plaintiff's unit. Even if every allegation in Plaintiff's Complaint was true, Plaintiff has failed to allege that Grand Tower A owed the Plaintiff any duty or that Grand Tower A engaged in any act or omission which caused Plaintiff's alleged damages. 1 App. 132.

The Association could have made the same argument if the Plaintiffs had ever bothered to serve the Association with the Complaint before the Plaintiffs filed its Amended Complaint.[2] Paragraph 3 of the original Complaint is the only allegation in the Complaint that makes any specific reference to the Association. That paragraph also erroneously identified the Association as a limited liability company. *Id.* at 1 App. 2-3. That error was also perpetuated into paragraph 8 of the Plaintiffs' First Amended Complaint. 1 App. 199. That error could have been avoided if the Plaintiffs' attorney had simply looked up information about the Association on the Nevada Secretary of State's website. 2 App. 287.

When the Plaintiffs filed their Opposition to the MGM Defendants' Motion to Dismiss, they offered the Declaration of their attorney, Eric Tran, who testified to all the efforts that he made on behalf of the Plaintiffs to ascertain which Defendants

---

[2] There is nothing in the court record, the Appendix, or in the court docket sheet (2 App. 418-21) to suggest that the Association ever received service of either the original Complaint or the First Amended Complaint. Page 1 of the Plaintiffs' Alphabetic Appendix shows that an "Affidavit of Service (Association)" is located at 2 App. 248. In reviewing such document, it shows that the Association was only served with a 3-Day Notice of Intent to Take a Default on August 1, 2016. *Id.* There is no evidence of the Association ever being served with a Complaint in this case.

should be sued. 1 App. 137-140. When the Plaintiffs opposed the Association's Motion for Attorneys' Fees, the Plaintiffs relied on Mr. Tran's Declaration. 2 App. 374. In that Declaration (1 App. 137-140), Mr. Tran expressed his confusion as to what entities he should be suing. Mr. Tran stated that he examined the Nevada Secretary of State's website to determine what entities he should sue. 1 App. 139. Plaintiffs' also referred to an exhibit that contained a 5-page list of over 100 MGM entities that were obtained from the Securities and Exchange Commission website. 1 App. 145 and 158-163. Yet, the name of the Association cannot be found anywhere on that list. Accordingly, there is literally nothing stated in Mr. Tran's Declaration, or anywhere else in the court record, to reasonably explain why the Plaintiffs chose to sue the Association.

The district court denied the MGM Defendants' Motion to Dismiss without prejudice by allowing the Plaintiffs to file an Amended Complaint. 2 App. 250-254. On June 10, 2016, the Plaintiffs filed a First Amended Complaint. 1 App. 197. That Amended Complaint added a second Plaintiff and also added two more Defendants. *Id.* Signature was one of the new Defendants that the Plaintiffs chose to sue. Turnberry was not named as a Defendant in the Amended Complaint.

Yet, for some inexplicable reason, the Plaintiffs Amended Complaint continued to name the Association as a Defendant in the action, even though the Plaintiffs had never assembled any evidence, either before the filing of the First Amended

Complaint or at any time thereafter, to show that they had any reasonable grounds for suing the Association in this action.

The only place where the Association is named in the First Amended Complaint is found at ¶ 8. 1 App. 199. There is no other allegation in the Plaintiffs' Amended Complaint that makes any reference whatsoever to the Association. Instead, all the other allegations in the Amended Complaint refer to all MGM Defendants collectively as though they are all bound together and all bound to the acts of each other.

Paragraphs 4, 5, 6 and 7 refer to the Defendants named therein as being a subsidiary of MGM Resorts International (hereinafter "MGM"). 1 App. 4-7, 198-199. There is no allegation in paragraph 8 to allege that the Association is a subsidiary of an MGM entity. That is the only occasion where the Plaintiffs attempted to distinguish the Association from the other Defendants in the case.

Based on the aforementioned admission from Signature's attorney, that Signature was the sole Defendant who should be held responsible to answer for the Plaintiffs' claims (1 App. 225-35), the Plaintiffs have inexplicably failed to explain why they still chose to proceed with pursuing a lawsuit against the Association.

On August 1, 2016, the Plaintiffs served the Association with a Three Day Notice of Intent to Take a Default. As a result, the Association hired an attorney to address the Plaintiffs' Complaint. On August 11, 2016, Mr. Larsen sent a 3-page demand letter to Mr. Tran, pursuant to NRCP 11. Such letter demanded an immediate

dismissal of the Association from the lawsuit because the Amended Complaint never presented any viable claim against the Association. 2 App. 284-86. Mr. Tran was further warned that if the letter were to be ignored, then the Association would be filing a motion to dismiss and would also seek the recovery of attorneys' fees as a sanction for filing a frivolous lawsuit against the Association. *Id.*

That August 11, 2016 letter detailed the various objections to the Plaintiffs' approach to suing the Association, by pointing out that the Association was not a limited liability company but is a non-profit homeowners' association. *Id.* That letter further objected to the "shotgun method" of the Plaintiffs' Complaint by stating:

> ... [Y]ou are seemingly naming as a Defendant every conceivable entity that ever had any association with your client's property, regardless of whether they had anything to do with the employee who you claim made an allegedly unlawful entry into your client's property. Before you named my client as a Defendant, however, I believe that your NRCP 11 obligations required you to do more due diligence in investigating any alleged involvement that Tower A [the Association] had regarding the particular unauthorized entry that is the subject of your Complaint. *Id.* at 285.

Such letter also pointed out that the Association was not a subsidiary of the MGM, and therefore, the Association was not similarly situated with the other Defendants

/ / /

/ / /

/ / /

who were named in the action.[3] In this regard, the letter stated:

> ... Your Complaint very carefully acknowledges that my client is not a subsidiary of MGM International. Yet, while you make a distinction between my client and the other MGM Defendants in terms of its ownership, you make no distinction in any other part of the Complaint as to what my client's alleged involvement is or was with any of the other Defendants' role in dealing with your client's property. Instead, you merely lumped all the Defendants together in alleged wrongdoing, without mentioning any particular act of wrongdoing by my client. *Id.* at 285.

After the August 11, 2016 demand letter was sent to the Plaintiffs' attorney, emails were exchanged between the Plaintiffs' and the Association's attorney. On September 13, 2016, the Association's attorney sent an email to Mr. Tran stating:

> "Hello Eric
> On August 26th you telephoned me to tell me that you were going to proceed with filing a voluntary dismissal of the Tower A hoa, and that the dismissal would be without prejudice. You also told me that you would have the dismissal **filed** by the end of the next week. To date I have not seen the dismissal. Please tell me what is going on. ..." (Emphasis added.) 2 App. 292 and 318.

Mr. Tran responded to that email on September 19, 2016 by stating:

> "Hi Brent,
> I have been swamped at work lately and I will be out of the country for the next two weeks. I'll have the voluntary dismissal of tower A done when I come back." *Id.*

---

[3] The subsidiary relationship seemed to be important to the Plaintiffs when they filed their Opposition to the MGM Defendants' Motion to Dismiss because the Plaintiffs argued that a relationship between a subsidiary and parent company could establish a claim for liability. 1 App. 145-47.

By December 12, 2016, the Plaintiffs had not followed through with their aforementioned promise to dismiss the Association from this case. As a result, the Association's counsel emailed Mr. Tran on December 12th asking why he hadn't prepared and filed the dismissal of the Association from this case. 2 App. 320. Mr. Tran responded by stating that the Plaintiffs had hired a new attorney and that Mr. Tran would not take any further responsibility in the matter. *Id.*

As a result of Mr. Tran's disclaimer of responsibility, the Association's attorney sent an email on December 12, 2016 at 12:16 p.m. to the Plaintiffs' new attorney, Mr. Steven Lewis. That email explained the Association's displeasure that Mr. Tran had not followed through on his earlier promise to cause the Association to be formally dismissed from this case. 2 App. 322. At 12:55 that same day, Mr. Lewis responded by stating that he not yet received the file but when he reviewed it he would "sit with you to discuss your client." *Id.* Approximately two and a half hours later on that same day (at 3:33 p.m.), the Association's attorney sent a second email to Mr. Lewis which once again enclosed the same August 11th demand letter for a dismissal as discussed above. That email also protested Mr. Tran's "lack of diligence" in effectuating the formal dismissal. *Id.* Thereafter Mr. Tran emailed the Association's attorney objecting to the characterization of Mr. Tran's conduct. 2 App. 324. Approximately 20 minutes later Mr. Lewis responded by stating "please remove me from any emails which contain pointless bickering." *Id.*

Thereafter, the Association never received another communication from the Plaintiffs' attorney.[4] Since the Plaintiffs went completely silent in its dealings with the Association's attorney, the Association then determined that the only effective way to get itself dismissed from this case was to take the initiative by filing its own Motion to Dismiss or in the alternative Motion for Summary Judgment. 2 App. 271-94. The Plaintiffs never responded to the Motion for Summary Judgment. Instead, the Motion was resolved by the parties stipulating to having the Association dismissed from this case "with prejudice." 2 App. 295-96. That Stipulation further notified the Plaintiffs that once the Association was dismissed, the Association intended to proceed with filing a Motion for the recovery of its attorneys' fees. *Id.* The Plaintiffs expressly agreed to the Association's reservation of rights to recover attorneys' fees in the Order of Dismissal. *Id.*

The court Order dismissing the Association "with prejudice" was filed on April 27, 2017. 2 App. 296. On April 28, 2017 the Association filed its Memorandum in

---

[4] In the Plaintiffs' Opposition to the Association's Motion to recover attorneys' fees, Mr. Lewis alleged that in January of 2017, he made one unsuccessful attempt to telephone the Association's counsel. 2 App. 375. That statement was never backed up, however, by any declaration or affidavit. Moreover, the Association and its attorney emphatically denied that Mr. Lewis ever made any attempt to contact the Association's attorney. *See* 2 App. 388. Yet, the record is abundantly clear that Mr. Lewis acknowledged that he was very much aware of Mr. Tran's written promise to dismiss the Association from this case by January of 2017. 2 App. 375. Yet, Mr. Lewis made no effort to respond to the Association's demands that it be dismissed from this case until after the Plaintiffs were served with the Association's Motion for Summary Judgment.

order to recover its statutory costs in this case. 1 R.App. 15-17. The Plaintiffs never challenged or filed any motion to retax those costs as required by NRS 18.110(4).

On May 18, 2017, the Association filed its Motion for Attorneys' Fees. 2 App. 297-370. That Motion made specific reference the Plaintiffs' err in filing a "shotgun" pleading that irresponsibly brought the Association into this case. Attached to the Motion for Attorneys' Fees included the Association's Motion for Summary Judgment and the Declaration of Larry Hartman, which is the Declaration used in support of the Motion for Summary Judgment. 2 App. 279-282. That Declaration pointed out the many errors that were made in the Plaintiffs' Amended Complaint, which wrongfully brought the Association into this case as a Defendant. *Id.*

On June 5, 2017, the Plaintiffs filed their Opposition to the Association's Motion for Attorneys' Fees. 2 App. 371-383. As explained in more detail below that Opposition never presented a scintilla of evidence to show: (a) any wrongdoing by the Association; or (b) that there were reasonable grounds for the Plaintiffs having brought and maintained this action against the Association.

At the time that the Plaintiffs entered into the Stipulation for Dismissal with Prejudice, as well as the time when it filed its Opposition to the Association's Motion for Attorneys' Fees, the Plaintiffs' then attorney, Mr. Lewis, had been suspended from the practice of law due to his failure to comply with the Nevada Bar Association's CLE requirements. *See Nevada Lawyer*, Vol. 25, Issue 6, p. 37 (June 2017). As a

result of that situation, the parties' attorneys agreed to contact the court to have the hearing on the Motion for Attorneys' Fees continued to August 8, 2017. *See*, 1 R.App. 46, Minute Order showing dates of continuation of hearing.

During the August 8, 2017 hearing, the district court made an express finding that the Plaintiffs were given ample notice by the Association of the Association's demand to have it dismissed from this case, by stating:

> "It appears you were pretty well put on notice fairly early in the case that the defendant did not feel they had any liability. . . ." 1 R.App. 26-27.

At the conclusion of the August 8, 2017 hearing the court took the matter under advisement and continued the matter to August 15, 2017 so the court could announce its decision in open court. 1 R.App. 44.

At the August 15, 2017 hearing, the court announced its ruling that the Association was entitled to recover attorneys' fees because it was the prevailing party in this matter. 2 App. 427-31. The court further stated his reasons for granting attorneys' fees to the Association by stating that the Plaintiffs had to live with the errant actions of Plaintiffs' prior counsel, Mr. Tran. *Id.* The court also stated that the Plaintiffs' attorney was "certainly put on notice regarding Rule 11 and whether he should proceed forward." 2 App. 430. The court further stated that he "applied the *Brunzell* factors" in determining the amount of attorneys' fees to be awarded.[5] *Id.* at

[5] *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

431. As a result, competing orders were prepared by the attorneys for both parties and submitted to the court. Apparently the court was not satisfied with either such orders since the court prepared its own order for the granting of attorneys' fees, which was filed by the court an Order on April 13, 2018. 2 App. 441-42.

Thereafter, the Plaintiffs filed their Notice of Appeal on May 16, 2018. 2 App. 444-46.

III.

STATEMENT OF FACTS

1. The Plaintiffs' First Amended Complaint is the best evidence in the court record to show that the Plaintiffs' claims against the Association were brought without reasonable grounds. When the Plaintiffs chose to sue the Association, they did so in a reckless haphazard manner when it filed a "shotgun" Complaint, wherein the Plaintiffs chose to sue the Association on a theory of "guilt by association liability," even though paragraphs 4 through 8 of the Plaintiffs' Amended Complaint acknowledged that the Association, unlike the other Defendants in this case, had no subsidiary or affiliate relationship with the other Defendants in this case. 1 App. 2-4. Moreover, there is not a single allegation in any of the other paragraphs in the Plaintiffs' Amended Complaint that alleges any act of wrongdoing being committed by the Association.

/ / /

2. The Association is an innocent Defendant who was wrongfully sued in this action, which is demonstrated by the Plaintiffs' failure during the entirety of the district court proceedings and in this appeal, to present even one scintilla of evidence to demonstrate that Plaintiffs had any reasonable basis for suing the Association. Even the Plaintiffs' Opening Brief on appeal fails to show any wrongful act committed by the Association towards the Plaintiffs. The only allegedly wrongful act that the Plaintiffs attempt to identify in their Opening Brief is their claim that the Association was allegedly guilty of wrongful conduct when it filed its Motions for Summary Judgment and for attorneys' fees.

3. The Plaintiffs received numerous notices from both the MGM's counsel and the Association's counsel which clearly laid road maps that explained to the Plaintiffs that they had no basis for suing the Association in this matter. The first notice came from the MGM Defendants' Motion to Dismiss. *See* 1 App. 19 (fn.1). The second notice came to Plaintiffs when the Association's counsel sent the aforementioned August 11, 2016 letter to Mr. Tran, the Plaintiffs' original attorney. 1 App. 284-87. Approximately one month later, on September 19, 2016, Plaintiffs' original counsel stated in writing that the Association could expect to be formally dismissed from this case within the following two weeks. 2 App. 292.

By December 12, 2016, the Plaintiffs still had not performed on their written promise to dismiss the Association from this case. The excuse given at the time was

that the Plaintiffs had hired new counsel. Accordingly, Mr. Lewis, the Plaintiffs' successor counsel, also received a *third* notice from the Association concerning its demands to be dismissed from this case. 2 App. 294. On that occasion, the Association's counsel sent a second email to Mr. Lewis on December 12, 2016 which enclosed the aforementioned August 11, 2016 letter demanding a dismissal of the Association from this case. *Id.*

In view of the proof of such notices that were given to the district court, the court explained to Plaintiffs' counsel that:

> "It appears you were pretty well put on notice fairly early in the case that the defendant did not feel they had any liability. . . ." 1 R.App. 26-27.

4. Since the aforementioned written demands for a dismissal were ignored by the Plaintiffs' counsel, the Association proceeded to file a Motion to Dismiss or, in the alternative, Motion for Summary Judgment. That Motion ultimately forced the Plaintiffs to concede their lack of any viable claim against the Association when the parties agreed to dismiss Plaintiffs' claims against the Association "with prejudice." 2 App. 295-96.

The foregoing facts raises the question of why the Plaintiffs chose to continue to maintain its action against the Association in view of such facts. That question is answered by an incriminating admission by Plaintiffs' predecessor counsel, Mr. Lewis, where he stated on the last page of his Opposition to the Association's Motion

for Attorneys' Fees, that he had no intention of dismissing the Association from this case until he was certain he could settle the case with one particular Defendant. 2 App. 383. That is demonstrated by the following quote from Plaintiffs' attorney:

> . . . in fact, Plaintiff agreed to the dismissal solely because MGM and the Plaintiff had already agreed to the terms of their settlement and were working on the settlement agreement at that time." *Id.*

Such a statement certainly provides no justification that could explain why the Plaintiffs chose to maintain this lawsuit against the Association when it had no reasonable grounds to do so.

IV.

SUMMARY OF THE RESPONDENT'S ARGUMENTS

The district court properly granted an award of attorneys' fees to the Association under the plain language of NRS 18.010(2)(b) since the Association established that it was the prevailing party in this matter. It obtained that status by filing a dispositive Motion for Summary Judgment which presented compelling evidence that the Plaintiffs had no reasonable claims against the Association. The Plaintiffs chose to avoid opposing the Motion for Summary Judgment by agreeing to have the Association dismissed from this case "with prejudice" with the express understanding that the Association was reserving its right to file a motion for the recovery of attorneys' fees.

/ / /

A dismissal "with prejudice" is an adjudication on the merits of the case. *Home Savings Assn. v. Aetna Casualty*, 109 Nev. 558, 854 P.2d 851 (1993). Since the Association obtained an adjudication of the merits of this case in its favor, that dismissal order qualifies the Association as the prevailing party in this case.

The Plaintiffs erroneously argue that the Association is not entitled to attorneys' fees where the order for dismissal with prejudice does not include the word "judgment." There are numerous cases cited below which explain that the endorsement of such a view would wrongfully have "form triumph over substance." In the case of *Lee v. GNLV*, 116 Nev. 424, 427, 996 P.2d 416 (2000), the court specifically held that the court must look to the effect of what the court order accomplishes, rather than the labels of the order to determine the substance of such order. The court further held that labels are insignificant in determining the actual effect of an order for dismissal with prejudice. The *Lee* case, which is discussed in detail below, is dispositive for rejecting the Plaintiffs' erroneous facial "judgment" argument.

This brief will also show that the evidence presented to the district court shows that the Plaintiffs was very cavalier and reckless in fulfilling their NRCP 11 obligations when it chose to include the Association as one of the Defendants in this action. The Plaintiffs' wrongful conduct was further aggravated when it refused to enter a formal dismissal of the Association of this case prior to the Association having

to file its Motion Summary Judgment.

This Brief will also show that in the district court proceedings, the Association did everything reasonably required of it to give the Plaintiffs every notice and every opportunity available for it to simply dismiss the Association from this case so that the Association could avoid any further attorneys' fees. Based on the provisions of NRS 116.4109, the Association had a compelling need to obtain a dismissal in this matter so that it would not have to disclose the existence of this lawsuit in a seller's resale package that must be provided to prospective buyers of units in the Association whenever a seller of any unit in Tower A wished to sell their property.

This brief will also show that the Plaintiffs presented no viable challenge to the amount of attorneys' fees awarded. They simply challenged the amount of the award by saying that the services in seeking a summary judgment were unnecessary simply because the Plaintiffs were allegedly willing to dismiss the Association from this case on a timetable that would serve the Plaintiffs' convenience. The Plaintiffs' Opening Brief contends that the Association should have been willing to allow this litigation to end immediately upon the entry of the Stipulation for Dismissal with Prejudice. Such a self-righteous argument demonstrates the Plaintiffs' profound sense of unearned entitlement in this matter.

The Plaintiffs had nothing to gain by its refusal to dismiss the Association from this case at its earliest opportunity to do so. The Association offered the Plaintiffs

several earlier opportunities for the Association to walk away from this case, but a dismissal never occurred because the Plaintiffs refused to cooperate. For instance, a good time to allow the Association to walk away form this case would have been when the Plaintiffs chose to file their Amended Complaint – particularly where the Plaintiffs had no evidentiary basis or legal basis to sue the Association. The Plaintiffs could have also brought a conclusion to the Association's participation in this case in September 2016 if the Plaintiffs had simply performed on its written promise to dismiss the Association from this case. The Plaintiffs could have also dismissed he Association from this case in December of 2016 when its new attorney received the same August 11, 2016 aforementioned demand letter that was served on Plaintiffs' prior counsel. Yet, for purposes of solely serving the Plaintiffs' own convenience, they chose to ignore the Association's demands to be dismissed from the case.

Thus, this brief will explain that the Association was innocent of any alleged wrongdoing and that the Plaintiffs had no reasonable grounds to sue the Association or to maintain this suit against the Association. As such, when the Association obtained a dismissal "with prejudice," it was entitled to recover its attorneys' fees under the prevailing party provisions of NRS 18.010(2)(b). The policy considerations to support such an award of attorneys' fees are further explained in later sections of this brief.

/ / /

V.

LEGAL ARGUMENT

A. Numerous Nevada Supreme Court decisions have recognized that a court order providing for the dismissal of a defendant from a lawsuit "with prejudice," is the functional equivalent of a judgment because such an order of dismissal is an adjudication on the merits of the case in favor of the defendant.

Plaintiffs erroneously argue that the Association was not eligible to recover its attorneys' fees, as the prevailing party in this matter, simply because the Order of Dismissal "with prejudice" did not contain the word "Judgment." Such an argument ignores the reality that in substance, when the district court signed and entered the "order" of dismissal with prejudice, such an order is "in effect a final judgment although entitled 'an order.'" *See Lee v. GNLV Corp.*, 116 Nev. 424, 427, 996 P.2d 416 (2000). In the *Lee* case, the court further stated that the word "judgment," "as the term is used in the Nevada Rules of Civil Procedure, includes 'any *order* from which an appeal lies.'" (Emphasis the court's.) 116 Nev. at 426-27. Certainly an order of a "dismissal with prejudice" can be reviewed on appeal.

In this case the Association is not asking this court to retreat from prior Nevada Supreme Court decisions which state that in order to obtain attorneys' fees as the prevailing party, the prevailing party must succeed in obtaining a judgment. Such an argument is unnecessary because the Association obtained a judgment against the Plaintiffs when it succeeded in obtaining an Order of Dismiss "with prejudice." The

Association's argument is illustrated by a multitude of decisions from the Nevada Supreme Court which hold that when a court order dismisses a defendant from a lawsuit "with prejudice," such an order is the functional equivalent of a judgment. That is because an order of dismissal with prejudice is a full adjudication of plaintiff's claims and those claims are resolved on the merits adversely against the plaintiff. *See Home Savings, supra*. In the *Home Savings* case, the court explained the difference between a dismissal of a case with prejudice, as distinguished from a dismissal without prejudice. In that case, the court stated that a dismissal with prejudice means that the case cannot be re-litigated, whereas a dismissal without prejudice would allow the Plaintiffs to file a second lawsuit against the same Defendant on identical grounds. In the circumstance of a dismissal without prejudice, neither a plaintiff nor a defendant could claim the status of a prevailing party.

There are legions of Nevada cases holding that when a dismissal is with prejudice, the defendant is the prevailing party because the plaintiff's claims have been adversely adjudicated on the merits. *See, Cummings v. Charter Hospital*, 111 Nev. 639, 896 P.2d 1137 (1995); *Lighthouse v. Great W. Land & Cattle*, 88 Nev. 55, 493 P.2d 296 (1972). During the hearing on the Association's Motion to recover its attorneys' fees, the district court was very articulate in explaining this principle to the Plaintiffs' attorney. 1 R.App. 27.

/ / /

Based on the cases cited above and below, the right to claim the status of a "prevailing party" for purposes of recovering attorneys' fees under NRS 18.010 should naturally occur whenever a defendant brings evidence before the court when asserting a dispositive motion,[6] and as a direct result of bringing such a motion, the defendant succeeds in obtaining a court order for a "dismissal with prejudice." That simple concept is endorsed by the following case law which demonstrates that the test for determining whether a defendant can claim the status of a prevailing party under NRS 18.010 must be determined by the substance of what the order of dismissal accomplished, rather than the label of the words that are used in such an order.

For instance, in the case of *Lee v. GNLV, supra*, the court ruled that an order of dismissal with prejudice is in substance a final judgment, by stating:

> More recently, in *Valley Bank of Nevada v. Ginsberg*, 110 Nev. 440, 874 P.2d 729 (1994), we reiterated that "[t]his court determines the finality of an order or judgment by looking at what the order or judgment actually *does* [emphasis the court], not what it is called." We thus found labels to be inconclusive when determining finality; instead, we recognized that this court has consistently determined the finality of an order or judgment by what it substantively accomplished. *Id.* at 427. (Citations omitted.) ("'This court has consistently looked past labels in interpreting NRAP 3A(b)(1), and has instead taken a functional view of finality, which seeks to further the rule's main objective: promoting judicial economy by avoiding the specter of piecemeal appellate review.'")

---

[6] The Association's Motion for Summary Judgment that was filed in this case was a dispositive motion. 2 App. 271-294.

(Citations omitted.)

> Thus, whether the district court's decision is entitled a "judgment" or an "order" is not dispositive in determining whether it may be appealed; what is dispositive is whether the decision is final. . . . 116 Nev. at 427.

Plaintiffs argue that the case of *Works v. Kuhn*, 103 Nev. 65, 732 P.2d 1373 (1987), supports their claim that they should not have been charged for attorneys' fees simply because the Order of Dismissal "with prejudice" obtained by the Association does not contain the word "judgment." The endorsement of such a view would result in erroneously allowing form to be exalted over substance, which, as explained below, the Nevada Supreme Court has clearly stated is not the appropriate method for construing a statute.

The Plaintiffs' erroneous argument also fails to recognize the doctrine set forth in the *Lee, supra*, case which holds that whenever a court order uses the title or label of an "order of dismissal with prejudice," such a label or title is synonymous with a court order that uses the label of "judgment." The Plaintiffs' entire argument is flawed because it attempts to have the word "judgment" be elevated in form over the substance of the meaning of the words "dismissal with prejudice." Such an argument is completely contradicted by the *Lee* case.

The *Lee* case presented a situation where a defendant was dismissed from the case on a motion for summary judgment. The court held that in determining whether the order of dismissal could be treated as a final judgment, for purposes of obtaining

relief on appeal, the test for making such a determination is not to be decided by the "labels" that are used, but rather, the court made the following declarations of law as to how the term "judgment" should be defined and characterized when dealing with an order of dismissal:

> [T]his court has customarily adopted the view that the finality of a district court's order depends not so much on its label as an "order" or a "judgment," but on what the "order" or "judgment" substantively accomplishes. 116 Nev. at 412.

The *Lee* court went on to state that:

> This point is illustrated in *Taylor v. Barringer*, 75 Nev. 409, 344 P.2d 676 (1959). In *Taylor*, . . . [t]his court [stated] as follows:
>
> > "True it is that Rule 72(b)(1) permits an appeal from a final judgment and says nothing about an order of dismissal; nevertheless, the formal order dismissing the action as to defendants . . . was signed by the judge and filed in the action and is in effect a final judgment although entitled 'an order.'" (Citations omitted.)
>
> . . . We additionally recognized that "'had the court here, after entering an order, gone on to enter a judgment, the latter would have been superfluous.'" (Citations omitted.) *Id.* at 427.

The Supreme Court further stated that it,

> . . . has customarily adopted the view that the finality of the district court's order depends not so much on its label as an "order" or a "judgment," but on what the order or judgment substantively accomplishes." *Id.*

That an Order of Dismissal "with prejudice" is the functional equivalent of a final judgment is amplified by the court's language in the *Lee* case where the court stated that an order of dismissal was "in effect a final judgment although entitled 'an order.'" *Id.* at 427.

Accordingly, the same test of "finality" and "substance" that was applied in the *Lee* decision should also prevail in this court's construction of NRS 18.010, so that the use of "labels" will not interfere with the reality of recognizing what the Association actually accomplished in this case by obtaining an order of "dismissal with prejudice." Thus, the Plaintiffs' argument that the Association's recovery of attorneys' fees under NRS 18.010 should be disallowed simply because of the labels that were used in the Order of Dismissal "with prejudice," is truly a misguided attempt to have "form triumph over substance."

The Supreme Court has consistently held that statutory construction should not result in having "form be exalted over substance." For instance, in the case of *Carrillo v. Valley Bank of Nevada*, 103 Nev. 157, 734 P.2d 724 (1987), the court specifically directed that whenever a court is in the process of construing a statute, the court should never construe a statute in a manner that "would truly exalt form over substance in disregard of reality." 103 Nev. at 158.

When looking at the reality of the instant case, there can be no dispute that the Association became the "prevailing party" when it forced a summary judgment

reckoning on the Plaintiffs, and thereafter the Association succeeded in achieving a dismissal "with prejudice" regarding all of the Plaintiffs' claims against the Association. This court can easily ascertain the substance of the Order of "Dismissal With Prejudice" by concluding that this case was adjudicated on the merits in favor of the Association, thereby substantively making the Association the prevailing party as against the Plaintiffs for purposes of recovering attorneys' fees under NRS 18.010(2)(b).

In the process of this court's construction of NRS 18.010(2)(b) it is important to recognize that the plain language of that statute merely states that to be eligible for attorneys' fees, the party seeking such a recovery must be the "prevailing party." There is nothing in that statute stating that the court order of a dismissal must also use the word or label of "judgment" if a defendant is to be considered the prevailing party in the case. Indeed, the word "judgment" cannot be found anywhere within NRS 18.010.

Accordingly, the Association's argument runs parallel to the reasoning that the Supreme Court followed in the *Lee* case since the court reasoned there that even though the word or label of "order" was not contained within the applicable rule of appellate procedure, the absence of such a word did not preclude the court from concluding that an order should be treated simultaneously with a judgment for purposes of determining whether the case was ripe for an appeal.

The foregoing authorities direct that this court should not fall prey to Plaintiffs' misguided attempts at asking this court to insert into NRS 18.010 the word "judgment" in the place of "prevailing party." The Supreme Court has repeatedly held that when construing a statute, the court cannot insert words into a statute that the legislature chose to leave out. *Williams v. United Parcel Service*, 129 Nev. 386, 302 P.3d 1144 (2013). *See also Blackburn v. State*, 129 Nev. 92, 294 P.3d 422 (2013), where the court held that the specific words used in a statute should be given their plain meaning rather than trying to use phrases not contained in the statute that would otherwise render words in the statute "superfluous or make a provision nugatory." 129 Nev. at 97. Thus, the words "prevailing party," as expressed in NRS 18.010, should be construed in a manner that a court order of dismissal that uses the words "with prejudice" will be given the same treatment and substantive "effect" of the word "judgment." Therefore, for purposes of this case, this court should rule that the word "judgment" is synonymous with or inclusive of the label of a court order "dismissing a case without prejudice."

The Association's foregoing argument is also amplified by the case of *MB America Inc. v. Alaska Pacific Leasing*, 132 Nev.Ad.Op. 8, 367 P.3d 1286 (2016), where the court defined what it meant to be a prevailing party that is eligible for attorneys' fees. In that case the court cited the *Works* case by stating that "to be a prevailing party within the contemplation of NRS 18.010, the action would need to

proceed to a judgment." (Citations omitted.) Most significantly, the next sentence of that opinion expressly stated the recognition that "an order dismissing a complaint is sufficient to find a prevailing party." 367 P.3d at 1292.

The case of *Northern Nevada Homes LLC v. GL Construction Inc.*, 134 Nev.Ad.Op. 60, 422 P.3d 1234 (2018) further amplifies the Association's argument that it is entitled to recover attorneys' fees that it wrongfully had to incur in defending itself in this matter. In that case, the court affirmed a judgment for attorneys' fees that was obtained by the prevailing party. In so ruling the court stated that "NRS 18.010(2)(a) was intended to afford litigants in small civil claims the opportunity to be made whole." 422 P.3d at 1238. The intent and purpose of NRS 18.010(2)(b) would clearly be thwarted in this case if the Association is denied the opportunity to be made whole for the recovery of attorneys' fees that it has wrongfully incurred in this matter.

Based on the foregoing, this court should readily recognize that the Plaintiffs' reliance on *Works* should be disregarded in view of the Supreme Court's decision in *Lee v. GNLV, supra* and *Alaska Pacific Leasing, supra.* Both of those cases were decided long after the *Works* decision and after the 2003 amendments to NRS 18.010, which is discussed later in this section of the brief. Instead, this court should look to the *Lee* case for guidance on how NRS 18.010(2)(b) defines a "prevailing party" since the *Lee* case properly articulates the Nevada Supreme Court's repeated emphasis on

having reality and substance of an order triumph over the use of "form" or words that are only "labels."

B. The *Works* and *Dimick* cases have no application to this case because the facts of those cases are easily distinguishable from the facts of this case.

Even if the Plaintiffs' convenience could be served by ignoring the foregoing authorities, the facts remain that there are further substantial reasons for rejecting the Plaintiffs' reliance on the *Works* case based upon the substantial factual differences between the *Works* case and the instant case. *First*, the stipulation for a voluntary dismissal in *Works* did not result from forcing the counterclaimant to respond to a motion for summary judgment, such as the Plaintiffs had to face in this case. In this case, the Association presented incontestable evidence of its innocense and the unreasonable actions that the Plaintiffs took against the Association by suing it in the first instance. *Second*, the order of dismissal in *Works* did not contain any language providing for a reservation of rights to recover attorneys' fees by the party being dismissed. That distinction is in sharp contrast to the instant case, where the Plaintiffs expressly agreed in writing that the Association reserved its right to pursue a motion for attorneys' fees in the dismissal order.

The *third* distinction is that the policy considerations at play in the *Works* case are entirely distinguishable from the policy considerations that predominate in the Association's right to recover attorneys' fees in this case. A significant part of those

policy considerations are embraced with the significant amendments that were made to NRS 18.010(2)(b) after the *Works* case was decided. Those amendments were enacted in 2003. *See 2003 Laws of Nev.,* Ch. 508, p. 3478. The effect that those amendments and the policies expressed therein should have a profound effect on the outcome of this case. For instance, the Plaintiffs' reliance on the *Works* case fails to recognize that the plaintiff/counter-defendant in *Works*, who attempted to recover attorneys' fees was not acting in good faith because he was guilty of attempting to profit from the defendant/counterclaimant's good faith efforts to settle the case.

In *Works* the defendant actually paid the plaintiff money in a good faith settlement. In the spirit of that settlement, the defendant also agreed to voluntarily dismiss his counterclaim with prejudice. Thereafter, the plaintiff wrongfully attempted to recover attorneys' fees in violation of the spirit and substance of that settlement. The court held that the dismissal of the counterclaim did not give rise to an award of attorneys' fees in that peculiar set of bad faith circumstances, since the defendant who paid money to the plaintiff had bought his peace and in doing so he should have been able to walk away from the litigation in peace. Those facts are in stark contrast to the instant case, since the Plaintiffs have not paid the Association any consideration that should have caused the Plaintiffs to reasonably believe that they had bought their peace with the Association.

It was completely unreasonable for the Plaintiffs to wrongfully haul the

Association into court with no viable allegations, evidence or law that could suggest any wrongdoing by the Association. The policy considerations as set forth in NRS 18.010(2)(a) have specific language which provides that whenever a plaintiff wrongfully hauls a defendant into court, without any reasonable grounds, such a litigant cannot expect to escape from the natural consequence of such unreasonable conduct.

The policy considerations that work in the Association's favor are manifested by the 2003 amendments to NRS 18.010, which amendments expressly incorporate and reference NRCP 11. NRCP 11 provides for an award of sanctions for failing to exercise due diligence before filing a lawsuit or filing any other pleading. NRCP 11 requires that before the complaint is filed, the attorney filing the complaint must constitute a representation to the court that,

> (b) . . . By presenting to the court a pleading, . . . an attorney . . . certifies that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances:
>
> * * *
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery;...

Neither the Association nor its counsel are aware of any case which states that the award of sanctions, that results from a violation of NRCP 11 is conditioned on obtaining an order that uses the word judgment. NRS 18.010(2)(b) also specifically expresses a policy that,

> . . . It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Civil Procedure in all appropriate situations . . .

That statute further states that,

> . . . The court shall liberally construe the provisions of this paragraph *in favor of awarding attorney's fees* in all appropriate situations. (Emphasis added.)

NRS 18.010 specifically provides that an appropriate situation for awarding attorneys' fees occurs when a claim has been ". . . brought or maintained without reasonable ground . . ." Thus the policy considerations in favor of awarding the Association's rightful recovery of attorneys' fees in this matter is in stark contrast to the policy considerations that were in play in the *Works* and the *Dimick* cases as described below.

Given the foregoing policy considerations to be applied to this case, the message becomes very clear that litigants are required by rule and by statute to exercise caution before they haphazardly sue innocent parties through a shotgun method of pleading. In the case, the Plaintiffs were informed on repeated occasions, by both the Association's counsel and Signature's counsel that the Plaintiffs had no

business suing the Association. Yet, the Plaintiffs still chose to sue the Association without any evidence of wrongdoing by the Association and without alleging anything in the Plaintiffs' First Amended Complaint to support a contention that the Association was guilty of any wrongdoing.

The Plaintiffs' reliance on the case of *Dimick v. Dimick*, 112 Nev. 402, 915 P.2d 254 (1996) is also without merit. In *Dimick* the district court rejected a request for an award of attorneys' fees in a divorce action, that necessitated litigation over the terms of a nuptial agreement. Prior to the trial, and before the presentation of evidence, the wife agreed to give up or waive a portion of her pre-trial claims. As a result of that waiver the husband attempted to recover attorneys' fees under the attorney fees provision of the nuptial agreement. The court rejected that claim because the husband was litigating in bad faith. The court pointed that it would be highly inequitable for the husband to enforce the attorney fee provisions in the parties' contract when the husband had breached other provisions in the contract.

The court also emphasized in *Dimick* that the wife abandoned her claims prior to any event where evidence was presented to the district court. That is in stark contrast with the instant case where the Plaintiffs never abandoned their claims against the Association until after the Association had already presented adverse evidence to the Plaintiffs' position when the Association filed its motion for summary judgment.

/ / /

The Plaintiffs' Opening Brief essentially argues that a litigant should be able to file false allegations against its adversary and thereafter be allowed to withdraw from those allegations with impunity at any time before an actual order is issued that uses the word "judgment." Such an argument is clearly contrary to the policy considerations set forth in NRS 18.010(2)(a), and NRCP 11, which basically sends the message to litigants that they cannot be reckless in filing lawsuits against innocent defendants, and when such defendants are wrongfully sued, those defendants are entitled to the protections of such rule and statute so that they can be made whole.

C. The Plaintiffs presented a very irrational argument when it argued that the Association's Motion for Attorneys' Fees failed to explain how the Plaintiffs' action against the Association was brought and maintained without reasonable grounds, since it was the Plaintiffs who failed throughout the entirety of these proceedings to explain why they had any reasonable or legitimate grounds for suing the Association.

It is utterly incredible that the Plaintiffs could attempt to make an argument in this appeal that the Association allegedly failed to provide the district court with any analysis of NRS 18.010 to show that the Association was eligible to recover attorneys' fees. Such an argument shows a blatant ignorance of the fact that the Association filed an uncontested Motion for Summary Judgment, which was backed up by admissible evidence in the form of documents and declarations which detailed the complete lack of merit in the Plaintiffs' case against the Association.

/ / /

Rather than repeat at this stage of the brief all of the incidences of the Plaintiffs' unreasonable conduct, the Association will merely refer this court to all of the events that are set forth and identified in the Association's Statement of Facts that are delineated above.

Given all of the facts that incontestable facts that were brought to the district court's attention in support of the Association's Motion for Attorneys' Fees, it then became the Plaintiffs' burden to show the court that the actions they took against the Association were reasonable. While the Plaintiffs made a feeble attempt to justify their actions, the fact remains Plaintiffs came up empty handed in providing the court with any evidence to show any wrongdoing by the Association.

The Plaintiffs' efforts to justify its actions against the Association was nothing more than a diversionary tactic of trying to convince the court that the Plaintiffs' attorney had done a magnanimous job in allegedly settling a "massive" case with the Signature/MGM Defendants. There was nothing in the court record, however, to suggest that the Plaintiffs' settlement with the Signature Defendants was so "massive" and difficult to settle. That is because the Plaintiffs' Opposition to the Association's Motion for Attorneys' Fees offered no affidavits or declarations from anyone to back up those claims. The only document in the Appendix filed by the Plaintiffs that could address whether the Plaintiffs settled an allegedly "massive" case against the Signature Defendants, is found in those Signature Defendants' $20,000 Offer of

Judgment.[7] 2 App. 268-70.

The Plaintiffs' Opposition to the Association's Motion for Attorneys' Fees presented the only occasion where the Plaintiffs took the opportunity to explain why it chose to sue the Association in this action. That Opposition, however, failed to include a single Affidavit, Declaration or any testimony or any documentation of any kind that could have even remotely given the Plaintiffs legitimate comfort in believing they had filed a bona fide case against the Association.

It is also worth noting that Plaintiffs' feeble attempt at trying to identify a reasonable justification for the Plaintiffs' conduct in suing the Association basically amounted to nothing more than trying to rely on allegations of "rumors." 2 App. 381. For instance, the Plaintiffs' Opposition to the Motion for Attorneys' attempted to claim that: (a) the general manager of Signature, Jill Archunde, is also the director of the Tower A HOA (2 App. 373); (b) the HOA and MGM were aware that employees of MGM illegally entered units from time to time (*Id.*); (c) the HOA and MGM were aware that Signature buildings had a history of mold issues (*Id.*); and (d) "rumors existed that the HOA had knowledge of such illegal actions taking place in the past." 2 App. 381.

---

[7] It is also a curiosity as to why the Plaintiffs placed the Offer of Judgment in the Appendix when the Offer of Judgment was never filed with the district court, and therefore, never became a part of the district court record. The inclusion of that Offer of Judgment in the Plaintiffs/Appellants' Appendix was a clear violation of NRAP 30(g)(1).

Those statements were not backed up by a single piece of evidence. To argue that all these claims of "rumors," without any declaration from any living person to verify whether such alleged rumors actually existed, would naturally cause reasonable minds to wonder if the claims of such "rumors" were made up. The filing of a lawsuit on the basis of unverified "rumors" should create a per se entitlement to recover attorneys' fees under NRS 18.010 because the filing a lawsuit on the basis of mere "rumors" certainly cannot be considered as being in compliance with NRCP 11 or that the filing and maintaining of such a lawsuit was brought on reasonable grounds. The same would also be true of the claims that the HOA was allegedly aware of mold issues or unlawful entries." 2 App. 373. Once again, the Plaintiffs presented no evidence in the form of affidavit or otherwise to show what the HOA did or did not know about "rumors" of mold or unlawful entries. The Plaintiffs simply came into the district court empty handed in their attempts to justify their filing of a lawsuit against the Association.

The Plaintiffs' claim that Jill Archunde sits on the board of the Association while also acting as a manager of the Signature condominium complex does not prove anything to show that the Association was guilty of any wrongful conduct that was directed towards the Plaintiffs.

The Plaintiffs' Opposition to the Motion for Attorneys' Fees also claimed that it had reasonable grounds to sue the HOA based upon certain provisions of the

CC&Rs that govern the Association. 2 App. 381. Yet, the Plaintiffs never offered any evidence to show that the Association ever breached any duty that was owed to its members pursuant to the terms of the CC&Rs. Thus, a mere citation to CC&Rs, without providing a lick of evidence about any alleged violation of the CC&Rs certainly does not justify the Plaintiffs suing the Association with a reckless abandon of its responsibilities. Moreover, the Plaintiffs should not have to be reminded that those CC&Rs also provided provisions that supported the Association's claim to recover attorneys' fees. *See* 2 App. 352-354, § 20.2.

It is also noteworthy that the only portion of the Plaintiffs' Opposition to the Motion for Summary Judgment where it argued that it could have defeated the Association's Motion for Summary Judgment, was by simply asserting a "strong Rule 56(f) opposition." 2 App. 379. Obviously, Plaintiffs are referring to NRCP 56(f) where a party can delay a ruling on a motion for summary judgment by asking for additional time to conduct discovery. If the Plaintiffs had asserted such a strategy, then they would have obviously done so merely for the purposes of delay, which in and of itself would have been a violation of NRCP 11. Moreover, the discovery of any of the basic facts that Plaintiffs needed to justify its suit against the Association should have been accomplished before the Plaintiffs made the decision to sue the Association.

/ / /

Thus, it is abundantly clear that the Plaintiffs' Opening Brief has misrepresented the district court record when they claim that the Association did not present compelling evidence or a proper analysis of why the Association had the right to recover its attorneys' fees as the prevailing party pursuant to the provisions of NRS 18.010(2)(b). It is also ironic that the Plaintiffs would make such an argument when they came before both the district court and this court with an empty hand in their feeble attempt to justify their patently wrongful decision to sue the Association.

D. Even assuming arguendo that the recovery of attorneys' fees under NRS 18.010 requires the entry of an order that contains the word "judgment," NRCP 11 provides alternative basis to affirm the order of attorneys' fees to the Association.

The Association's August 11, 2016 demand letter was expressly written to state that the Association would be seeking a recovery of attorneys' fees under Rule 11 if the Plaintiffs chose to continue maintaining their lawsuit against the Association. An award of sanctions under NRCP 11 does not require the entry of a formal judgment. Indeed there is no statement whatsoever in Rule 11 that requires the entry of a judgment.

In the case of *Sengel v. IGT*, 116 Nev. 565, 2 P.3d 258 (2000), the court addressed a situation where an appellate court can resort to alternative reasons to affirm a district court's decision when the district court's expressed reasons for its decision may be off point or inadequate. The court in *Sengel* stated:

> Because the district court arrived at the correct decision, even though based on the wrong standard, we affirm that decision. 116 Nev. at 570.

This court should also take note that NRCP 11, which does not require the entry of a judgment to support an award of attorneys' fees under that rule, is specifically incorporated by reference into NRS 18.010(2)(b). Thus, if the court finds a basis to award sanctions against the Plaintiffs for their failed compliance with NRCP 11, then there would also be a basis for attorneys' fees under NRS 18.010 since the Legislature specifically incorporated NRCP 11 into the provisions of NRS 18.010.

E. The Plaintiffs waived any objection to the Association's recovery of its statutory costs when it failed to file any objection to the Association's Memorandum of Costs filed with the district court.

The Order of Dismissal with prejudice was filed on April 27, 2017. One day later, on April 28, 2017, the Association timely filed its Memorandum of Costs and Disbursements pursuant to NRS 18.110. If the Plaintiffs had any intention of opposing the Association's recovery of its costs, then the Plaintiffs were required to file a motion under subsection (4) of NRS 18.110, to object to such costs and ask that the costs be retaxed and settled. Plaintiffs never filed any such objection to the Association's Cost Memorandum. Therefore, Plaintiffs objecting to such costs for the first time on appeal should not be entertained. *See Old Aztec Mine Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981 (1981).

/ / /

F. The amount of attorneys' fees that were awarded to the Association in this case was justified by the court's exercise of its discretion in that all of the attorneys' fees were itemized in billing records presented to the district court.

The district court standard of review in determining entitlement of fees pursuant to the statutory construction of NRS 18.010 would be considered a matter of de novo review. However, once it is established that a litigant is entitled to attorneys' fees, the amount of fees to be awarded is subject to the trial court's discretion, and that award will not be disturbed on appeal unless it can be shown that the court has abused its discretion. This is amplified by the case of *Nelson v. Pegman Plaza Partnership*, 110 Nev. 23, 866 P.2d 1138 (1994), where the court affirmed an award of attorneys' fees because there was no showing of an abuse of discretion by the district court. In the instant case the district court did not abuse its discretion because it explained that it did follow all of the elements and requirements set forth in the case of *Brunzell v. Golden Gate, supra*, in making its determination on the award of attorneys' fees. 2 App. 442.

VI.

CONCLUSION

The Association was wrongfully sued in this case. Plaintiffs never offered even a scintilla of evidence to show that the Association was ever guilty of any wrongdoing. Moreover, once the Plaintiffs were notified, in writing, on three separate occasions that the Plaintiffs' claims were subject to Rule 11 sanctions (2 App. 284-87,

294), and the Plaintiffs thereafter ignored those notices fully justifies the district court's award of attorneys' fees to the Association. Plaintiffs' counsel even agreed in writing to file a formal dismissal of the Association from this case (2 App. 292) but that promise fizzled out as well. Indeed, the Plaintiffs' successor attorney specifically admitted that the Plaintiffs had no intention of dismissing the Association from this case until the Plaintiffs knew it could get full satisfaction of its claims through the Signature Defendant. 2 App. 383.

Plaintiffs were never willing to dismiss this case until a Motion for Summary Judgment was staring down at them. At that point, Plaintiffs finally agreed to a formal dismissal. By that time, however, the Association insisted that if the parties were to stipulate for a dismissal, the terms of the dismissal had to be "with prejudice" and that the Association reserved its right to recover attorneys' fees. 2 App. 295-96.

Thus, the Association is an innocent party in this case and it never should have been sued. Plaintiffs' protestation of innocence crossed the line into self-righteous indignation. The whole problem with the Plaintiffs' position is that the Plaintiffs refuse to accept any accountability or responsibility for all of their erroneous decisions, maneuvers and choices that they made throughout this case.

Given that the Association achieved a dismissal of the case against it "with prejudice," and that resulted in their achieving the status of a "prevailing party" pursuant to NRS 18.010. The Plaintiffs' argument that the Order of Dismissal with

prejudice is not a "judgment" because the Order does not use the word "judgment" is also entirely without merit since a dismissal "with prejudice" is effectively a judgment because it is an adjudication on the merits of the case, with the adjudication being adverse to the Plaintiffs. As such, the Order of Dismissal with prejudice is effectively a judgment and according to Nevada Supreme Court cases of *Alaska Pacific Leasing, supra* and *Lee v. GNLV, supra*. The *Lee* case holds that an Order of Dismissal does not have to use the label "judgment" in order to have the Order of Dismissal recognized and treated as a judgment. *Id.*

Thus, this court should affirm the district court's award of attorneys' fees to the Association since it was wrongfully compelled to defend itself in this case simply because the Plaintiffs' refusal to recognize that the Association was an innocent party regarding all the claims that the Plaintiffs' alleged against them. As such an award of attorneys' fees should be affirmed in order to make the Association whole. *See Northern Nevada Homes, supra*.

DATED this 14th day of May, 2019.

Respectfully submitted,

SINGER & LARSEN P.C.

/s/ Brent Larsen
BRENT LARSEN, ESQ.
1291 Galleria Drive, #230
Henderson, Nevada 89014
Attorney for Respondents

CERTIFICATE OF COMPLIANCE

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 proportionally spaced typeface using WordPerfect X4 with 14 point, double-spaced Times New Roman font.

2. 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 is proportionately spaced, as a typeface of 14 points or more and contains 10,926 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 14th day of May, 2019.

SINGER & LARSEN P.C.

*/s/ Brent Larsen*_____
BRENT LARSEN, ESQ.
Nevada Bar No. 1184
1291 Galleria Drive, #230
Henderson, Nevada 89014

CERTIFICATE OF SERVICE

I hereby certify that service of RESPONDENTS' ANSWERING BRIEF was made this 14TH day of May, 2019, by electronic service through the Nevada Supreme Court's electronic filing system, to each of the following:

David J. Kaplan, Esq.
(djkaplan5@gmail.com)
Attorney for Appellant

Luis A. Ayon, Esq.
(laayon@ayonlaw.com)
Attorney for Appellant

*/s/ Suzanne Saavedra-Zaranti*_____
An employee of Singer & Larsen P.C.