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.

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' REPLY 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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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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INTRODUCTION

The threshold inquiry here is whether a party is a "prevailing" party eligible to receive attorney fees and costs under NRS 18.010(2) and NRS 18.020, respectively, where the underlying district court litigation settles before the court rules on the merits of any issue. Under Nevada Supreme Court precedent, the answer is clear. As explained in *Works v. Kuhn*, 103 Nev. 65, 732 P.2d 1373 (1987), there is no prevailing party in that instance.

In its Answering Brief, the Association avoids addressing this issue directly, making clear from the outset that this is a planned tactic. Its "Statement of Issues Presented for Review" not only does not mention the concept of a prevailing party, it is directed to a separate irrelevant issue: whether the Trust had reasonable grounds for bringing and maintaining a lawsuit against the Association. Lest one entertain the thought that the Association's own Statement of Issues is not representative of the actual discussion in its brief, the Association then proceeds to spend nearly 20 pages arguing that the Trust acted unreasonably. This is a pure attempt at a distraction. Importantly, as explained herein, the facts actually relevant to the issues in this appeal are all undisputed. But even if the Association's position is correct – which it is not – it is irrelevant. The statutes require that a party must be a prevailing party to recover attorney fees and costs.

The Association's legal discussion is little better. Tellingly, the Association never deals with the straightforward and undisputed fact pattern at hand. The Trust and the Association settled their dispute prior to any issue coming before the District Court. The Association's only success in front of the District Court was with respect to the award of attorney fees and costs. However, the Association points to no authority for awarding costs and attorney fees in this circumstance. Instead, the Association's primary argument is that the stipulated order that ended the dispute between the Trust and the Association should be treated like a judgment and that a dismissal with prejudice can sometimes render one party to be a prevailing party. The former is an assertion that the Association supports only with its own brazen misrepresentations of the cases it refers to, while the latter is a meaningless point when not in the context of the present facts. Thus, the Association does nothing to change the fact that in Nevada there is no authority for granting attorney fees and costs to a party in a case that settled before any issue came before the District Court.

Moreover, even if the Association could properly pass the threshold issue and be considered the prevailing party, the Association also failed to address the fact that, as explained by the Trust, its attorney fees were not reasonable under the appropriate test. Thus, even if it is necessary for this Court to reach the issue of the amount of attorney fees awarded, it too is a basis for reversal.

ARGUMENT

I. The Association Does Not Dispute Any Fact Pertinent to the Issues in this Appeal

While the Association spends nearly 20 pages of its brief presenting and arguing its view of the proceedings below (Assn. Br. at 2–16, 34–39),[1] it does not dispute a single fact necessary for determining the outcome of this appeal. For example, with respect to whether the Association was the prevailing party in the proceedings below, as the Trust explained:

- Prior to its motion for attorney fees, the only paper the Association filed with the District Court was its motion to dismiss (Trust Op. Br. at 7–8);
- Per a stipulation between the Trust and the Association, the Trust dismissed its claims against the Association with prejudice, and the Association withdrew its motion to dismiss (Trust Op. Br. at 8 (citing 2 TRUST 295–296));
- As a result, the Trust did not respond to the Association's motion to dismiss, and the District Court never ruled on the motion (Trust Op. Br. at 3 (citing 2 TRUST 296, 300–301)); and
- The District Judge signed a proposed order to the same effect as that stipulation (Trust Op. Br. at 8 (citing 2 TRUST 296)).

These are the only facts that are necessary to determine whether the Association was a prevailing party over the Trust, and they are all undisputed. Thus, it is undisputed that the Association did not prevail on anything in front of

[1] As used herein, "Trust Op. Br." refers to the Trust's Opening Brief, and "Assn. Br." refers to the Association's Answering Brief.

the District Court except in being awarded attorney fees and costs, leading to this appeal.

Nor does the Association dispute any of the facts that, along with those set forth above, are pertinent to determining whether the amount of attorney fees awarded to the Association was reasonable. These include:

- Instead of responding to the Trust's complaint, the Association wrote the Trust a letter asserting that it was not correctly named as a defendant to the lawsuit (Trust Op. Br. at 2, 7 (citing 2 TRUST 310–316));
- After the Association's letter, and before the Association took any further action, the Trust promptly agreed in writing to dismiss the Association from the lawsuit. (Trust Op. Br. at 2–3, 7 (citing 2 TRUST 299, 318));
- While the rest of the lawsuit proceeded, no demands were made as to the Association. (Trust Op. Br. at 7 (citing 2 TRUST 259–270, 432–438.)) Among other things, the Association was not part of the Joint Case Conference Report prepared by the Trust and the remaining defendants, nor was the Association asked for discovery (Trust Op. Br. at 7 (citing 2 TRUST 259–267));
- Prior to March 15, 2017, when the Association filed its motion to dismiss, the Association had not corresponded with the Trust for the previous two months. (Trust Op. Br. at 3, 8 (citing 2 TRUST 299–300, 374–376));
- The Association never alerted the Trust that it was going to prepare and then file a motion to dismiss (*id.*); and
- Of the $10,968.75 in attorney fees the Association sought to recover, $3,750 was for preparing the motion to dismiss and $2,250 was for preparing the motion for attorney fees. (Trust Op. Br. at 9 (citing 2 TRUST 304–306)).

As a result, the Association does not dispute that it was effectively required to take no substantive action in the case, and that all fees incurred as of the moment the Association decided to prepare a motion to dismiss without consulting the Trust were, at best, at the Association's election and not out of necessity.

II. The Association's Extensive Argument that the Trust Brought or Maintained a Lawsuit Against it without a Reasonable Basis Is Irrelevant and Incorrect

As set forth in the Trust's Opening Brief, the sole basis of the award of attorney fees and costs to the Association was NRS 18.010(2) and NRS 18.020, respectively. (Trust Op. Br. at 14–15.) Pursuant to these statutes, only a prevailing party is entitled to recover fees and costs. *Id.* While costs are automatically available to a prevailing party, for attorney fees, only if a party is properly considered to be a prevailing party can a district court consider whether claims were brought or maintained unreasonably, as set forth in subpart (b) of NRS 18.010(2). Thus, the Association's entire factual argument is directed to subpart (b), which is not relevant to the requisite determination of whether the Association is "a prevailing party" under NRS 18.010(2).

However, even if it were relevant, the Association's argument is incorrect. While there is no need for the Trust to distract focus from the pertinent issues at hand by refuting each of the Association's incorrect assertions on this issue – most of which are unsupported by the record and merely the Association's opinion on

the matter – it is notable that the Association does not acknowledge that (i) the Trust's unit was damaged by a building worker who gained access using a key card (Trust Op. Br. at 4–5 (citing 1 TRUST 004–006; 2 TRUST 373)); (ii) the MGM refused to pay for the damage (Trust Op. Br. at 5 (citing 1 TRUST 006)); (iii) the MGM's complex corporate structure and inconsistent representation about who was responsible made it difficult to know who were the proper defendants (Trust Op. Br. at 5 (citing 1 TRUST 145, 159–163, 176–178)); and (iv) an Association board member was believed to have managed all MGM employees on site (Trust Op. Br. at 5 (citing 2 TRUST 343, 373–374)).

Thus, it cannot be reasonably disputed that it was permissible for the Trust to name the Association as a defendant.[2] It is also clear that the Trust constructively dismissed the Association from the lawsuit promptly. While it never filed a formal notice of dismissal, the Association no longer participated in the lawsuit from that point forward. (Trust Op. Br. at 7 (citing 2 TRUST 259–270, 432–438.)) The Association presents no argument otherwise. Nor does the Association allege that it was in any danger of being found liable unless it engaged in motion practice. Thus, it is incorrect that the Trust demonstrated bad faith or caused the Association to unnecessarily expend attorney fees. Indeed, the

[2] The District Court even noted that naming the Association as a defendant was reasonable. (R.App.000026.)

Association's argument that it should have been formally dismissed does not reconcile with the Association's own repeated urging that this court now disregard form in favor of substance. (*E.g.*, Assoc. Br. at 23, 25, 26, 29.)

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

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

The Association appears to acknowledge that the issue of whether it is property considered to be the prevailing party is a matter of statutory construction subject to de novo review. (Trust. Op. Br. at 13–14; Assoc. Br. at 41.)

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

Similar to its treatment of the factual issues, the Association does not adress the legal thrust of the Trust's Opening Brief head on. As an initial matter, the Association does not dispute that (i) in Nevada, fees are only recoverable where authorized by rule, contract, or statute; and (ii) a party must be a prevailing party to recover attorney fees under NRS 18.010 (and costs under NRS 18.020). (Trust's Op. Br. at 14–15.) As the Trust also set forth, the Nevada Supreme Court explained in *Works* that a party cannot be a prevailing party unless an action has proceeded to judgment, and where a plaintiff agrees to dismiss a defendant from a case, the lawsuit has not proceeded to judgment, and it does not matter whether the dismissal is with or without prejudice. (*Id.* at 15–16.)

Rather than addressing this precedent, which, given the undisputed facts, is dispositive to this appeal, the Association again presents irrelevant and distracting arguments. Specifically, the Association argues that the fact that the stipulated dismissal did not contain the word "judgment" should not be determinative, and that a "multitude of decisions from the Nevada Supreme Court" hold that an order dismissing a defendant with prejudice is the functional equivalent of a judgment. (Assoc. Br. at 20–21). The Association also takes the confusing position that it is not seeking a result inconsistent from *Works* (*id.* at 20), but at the same time, argues that the requirement from that case that an action must proceed to judgment is not found in the statute, and therefore the statute should not be read to include this requirement (*id.* at 25–27). Finally, the Association argues that the cases relied on by the Trust are distinguishable. (*Id.* at 29–34.) All of these arguments are inapposite and miss the mark. Indeed, the very first sentence of the Association's "Legal Argument" section previews the fundamental flaw in the Association's position. (*Id.* at 20.)[3] The issue here is not how the order dismissing the Association was styled. Rather, the important concept is that where a party is dismissed from a case by stipulation, it cannot be the prevailing party. A review of

[3] Namely, the Association asserts that "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." This thorough misstatement of the Trust's position sets up the strawman argument that the Association proceeds to dispute.

the cases cited by the Association reveals that not only are the Association's pronouncements about those cases gross mischaracterizations, but that the Association does not cite a single case that supports awarding fees in this circumstance.

i. The Nevada Supreme Court Already Considered and Rejected the Association's Position in *Works*

As an initial matter, the Association uses its strawman argument as a tool to ignore the fact that the Nevada Supreme Court already squarely addressed its position in *Works*. (Trust Op. Br. at 15–16.) There, plaintiff and counterclaim defendant Works asserted it had prevailed as it accepted a monetary settlement prior to trial for its offensive claims and also successfully secured a dismissal with prejudice of the defendant's counterclaims.[4] *See Works*, 732 P.2d at 1374–75. Thus, the facts in *Works* were even more compelling for an award of attorney fees than the instant case. In its decision, the Nevada Supreme Court addressed the issue of a dismissal with prejudice head on, and explained that it was following

[4] The Association argues that the fact that the plaintiff in *Works* was paid by the defendant is a distinction. But the Association ignores that it was the plaintiff-appellant Works that sought attorney fees after both settling its offensive claims and successfully getting defendant-respondent Kuhn's counterclaims dismissed. Having actually achieved a financial gain, Works presented a more compelling case to be considered the prevailing party than the Association as Works arguably "prevailed" both on its offensive claims and on defending against counterclaims. Thus, if there is indeed a distinction as the Association asserts, it is that the Association has a less compelling argument for attorney fees than Works did.

federal courts with respect to an "identical federal rule" in holding that a dismissal with prejudice did not entitle a party fees. *Id.* at 1376. Notably, the Supreme Court did not find this to be a close call, but found that appellant's argument was "so lacking in merit as to constitute a frivolous appeal and a misuse of the appellate processes of this court."[5] *Id.*

ii. The Cases Relied by the Association Do Not Support Its Position

Despite the fact that the Nevada Supreme Court long ago considered and rejected its argument, the Association attempts to cobble together purported authority for it anyway. The Association refers to six cases in asserting that it effectively obtained a judgment against the Trust. None actually support the Association's position, and none address a scenario where a plaintiff agreed to dismiss a defendant before a dispositive motion (or, as is the case here, any motion) came before the district court.

The centerpiece of the Association's support is *Lee v. GNLV Corp.*, 116 Nev. 424, 996 P.2d 416 (2000), which the Association refers to repeatedly. (Assoc. Br. at 20, 22–26, 28–29, 43.) However, in *Lee*, the issue was not whether one party

[5] Having requested four extensions so that it could apparently prepare a 43-page brief that not only avoids the issues and includes unprofessional name-calling such as "self-righteous" and "profound sense of unearned entitlement," (*e.g.*, Assoc. Br. at 18), but is so far out of proportion to the amount and issues in controversy, the Court here should act similarly as in *Works* and rebuke such tactics.

was the prevailing party, but rather, whether an order granting summary judgment was a final judgment or appealable order under NRAP 3A. *See Lee*, 996 P.2d at 417. Thus, while the Court did discuss the meaning of the word "judgment," it was in the context of whether an order granting summary judgment could be considered a judgment for the purpose of NRAP 3A, and therefore appealable. *Id.* at 417–418. The Court had no reason to, and did not consider the issue of a prevailing party. Moreover, in *Lee*, the Supreme Court explains that the defendant moved for summary judgment and the district court subsequently considered and granted that motion. *Id.* at 417. Thus, even if the legal principle of *Lee* were applicable here, which it is not, the key factual circumstance in this appeal differs. That is, the District Court here never considered any motion by the Association. Instead, it merely signed a stipulated order of dismissal. The Association's entire reliance on *Lee* should therefore be disregarded.

The other case that the Association relies on as foundational support for its position is *Home Sav. Ass'n v. Aetna Cas. and Sur. Co.*, 109 Nev. 558, 854 P.2d 851 (1993). (Assn. Br. at 17, 21.) The Association cites this decision in support of its assertion that a dismissal with prejudice is an adjudication on the merits of the case. (*Id.*) While the Association is correct that the case does discuss the difference between a dismissal of a case with prejudice and without prejudice (Assn. Br. at 21; *Home Sav. Ass'n*, 854 P.2d at 854), the decision says nothing about a dismissal

with prejudice being an adjudication on the merits, let alone anything about whether one party in such an instance would be the prevailing party. Instead, the issue in *Home Sav. Ass'n* was whether a statute of limitations was applicable and would have barred trial of the action, thereby making a dismissal with prejudice appropriate. *Id.* at 854–855. The Nevada Supreme Court determined that the statute of limitations was not applicable and the case should not have been dismissed at all. *Id.* at 856. A statute of limitations issue has nothing to do with the merits of the case. Instead, the Nevada Supreme Court was actually determining a procedural issue that affected whether the merits of the case could even be considered. Thus, like *Lee*, discussed above, *Home Sav. Ass'n* provides no support for the Association's argument that it should be considered to be the prevailing party here.

The Association next asserts that "[t]here 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." (Assoc. Br. at 21.) However, the Association fails to marshall any support for this position. The two cases it does cite do not support this sweeping assertion.[6] In fact, neither *Cummings v. Charter Hosp. of Las Vegas, Inc.*, 111 Nev. 639, 896 P.2d 1137 (1995) nor *Lighthouse v. Great Western Land & Cattle Corp.*, 88 Nev. 55, 93

[6] Here and elsewhere in the Association's Answering Brief, the Association's failure to include pinpoint citations makes it difficult to tell where in these cases the Association was referring to.

P.2d 296 (1972) even mentions the concept of a prevailing party. At most, they reference the difference between a dismissal with prejudice and one without prejudice, but that is not at issue here. Moreover, in each instance, the Court was dealing with a contested, fully briefed motion. In short, these cases have nothing to do with the issue at hand, and it is baffling why the Association refers to them. The Association's broad assertion is unsupported and should be ignored.

The Association later cites two more cases, which it asserts "amplifies" the support for its position. (Assn. Br. at 27–28.) This is also incorrect. In *MB America Inc. v. Alaska Pacific Leasing Co.*, 367 P.3d 1286 (2016), after the plaintiff filed suit, the defendant filed a motion for summary judgment. *MB America*, 367 P.3d at 1287. That motion was then heard by the district court, who granted it, and then found the defendant to be the prevailing party as the victor on its summary judgment motion. *Id.* at 1288, 1292. The issue in front of the Nevada Supreme Court on the appeal that followed was whether a defendant who had achieved dismissal after a contested summary judgment motion that was decided by the district court in its favor was a prevailing party under NRS 18.010. *Id.* That set of facts is far different then here. It is undisputed that the Association never had any motion heard by the District Court other than its motion for attorney fees. While it filed a motion for summary judgment, it later withdrew it. Thus, unlike the

defendant in *MB America*, the Association never succeeded on any motion, let alone a contested summary judgment motion in front of the District Court.

The same distinction is found in *Northern Nevada Homes, LLC v. GL Construction Inc.*, 422 P.3d 1234 (2018), the other case the Association asserts "amplifies" its position. (Assn. Br. at 28.) This case is even further afield from the present facts. There, both parties asserted claims against each other, and bifurcated trials took place. After those trials were respectively completed, the parties reached a settlement with respect to Northern Nevada Homes' claim, and GL Construction won its bench trial for a lesser amount than Northern Nevada Homes had secured in its settlement. *Northern Nevada Homes*, 422 P.3d at 1236. The issue in front of the Nevada Supreme Court was not whether the party that secured a settlement was properly the prevailing party, but rather whether GL Construction, who had successfully obtained a judgment following a trial, could be considered a prevailing party for that portion of the case even though it had paid a larger amount to Northern Nevada Homes in a settlement for the other claims in the case. Thus, the disputed prevailing party had won a fully completed trial. In that instance, the Nevada Supreme Court decided that the district court did not err in failing to aggregate and offset the amounts secured by each party for their respective offensive claims. *Id.* at 1238. Once again, this determination has nothing to do with the facts at hand. GL Construction actually won a bench trial against Northern

Nevada Homes. In contrast, the Association and the Trust settled before any motion even came before the District Court. These two situations are in fact polar opposites of each other, and *Northern Nevada Homes* provides no support for the Association's position here.

iii. The Association's Invitation to Overturn Established Precedent Should be Declined

Likely recognizing that it finds no applicable support in case law, the Association also advances the confusingly contradictory argument that it 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" (Assoc. Br. at 20), while at the same time asserting that there is nothing in NRS 18.010(2) that requires a judgment (*id.* at 26). As an initial matter, the Association's argument that a party need not "obtain a judgment" is precisely a request for the court to overturn its prior precedent. While the statute includes the word "prevailing," as the Nevada Supreme Court has recognized, it is not always clear in a case whether a party is in fact the prevailing party. Thus, the Court explained that the word "prevailing" means that an action must be one that has "proceeded to judgment." *See Works*, 732 P.2d 1373 at 1376 (quoting *Sun Realty v. District Court*, 542 P.2d 1072, 1073 (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., 653 P.2d 1217, 1220 (1982)). Thus, it is not the Trust that presents a "misguided" request "to insert into NRS 18.010 the word 'judgment' in place of 'prevailing party,'" as the Association asserts (Assoc. Br. at 27), but the well-established precedential interpretation of the statute. The Association cites to no authority or compelling reason that supports overturning decades of precedent.[7] As noted by the Trust, the consequences for doing so will include fewer settlements and a greater strain on limited judicial resources, both of which are accepted goals for numerous statutes, rules, and decisions.

iv. The Case Law Relied on by the Trust Is Applicable

Finally, the Association argues that the cases cited by the Trust should be ignored as distinguishable. With respect to *Works*, the Association argues that it is inapplicable because the Association filed a motion that the Trust would have had to respond to presenting "incontestable evidence of its innocense [*sic*] and the unreasonable actions" of the Trust by suing it in the first place. (Assoc. Br. at 28.) The Association then argues that a distinction here is that it "reserved" its right to file a motion for attorney fees, and that policy considerations here favor granting fees. (*Id.* at 28–29.) None of these are accurate.

[7] It is also notable that although NRS 18.010 has been amended in the intervening decades, the word "prevailing" has remained. Thus, the legislature has not seen fit to change the Nevada Supreme Court's interpretation.

As the *Works* decision notes, Works, the counterclaim defendant that sought attorney fees, filed a motion to dismiss. *Works*, 732 P.2d at 1374. While the Association believes it filed "incontestable evidence" in support of its position, surely Works believed the same, particularly since in that case, the opposing party actually paid it as part of a settlement agreement. Indeed, the fact that a party believes its own position and then achieves what it views as a favorable settlement is not unique. Nor is it the case that a party opposing a motion to dismiss need accept an adversarial party's view of events just on that party's say so, particularly before discovery has been conducted. Indeed, here, the Trust could have opposed the merits of the Association's motion for summary judgment on the sole basis that no discovery of the Association had taken place.

With respect to the Association's reservation of rights, this too is not unique. All it means is that the Association did not waive any right to seek fees it already had. Any party that seeks attorney fees has presumably not waived its right to do so, and has thus reserved its right to seek them. For example, Works also reserved its right to do so, whether explicitly or not, as there is no mention anywhere in the *Works* decision of a waiver of a right to seek attorney fees. Similarly, here, the stipulation by which the Trust's claims against the Association were dismissed provided that the Association could file a motion to seek fees, not that it would be granted fees. There is no suggestion that the Association's reservation of rights

expanded its right to seek fees that would otherwise not be available to it under the law. This was not a waiver of the Trust's rights.

It is also incorrect that public policy is a distinction between the present case and *Works*. Public policy favors conserving judicial resources. As the Trust pointed out, the Nevada Supreme Court explicitly explained this policy in *Dimick v. Dimick,* 102 Nev. 402, 915 P.2d 254 (1996). (Trust Op. Br. at 17 (citing *Dimick,* 915 P.2d at 256.)[8] The Association's view that it is exceptional because it is a righteous litigant makes it no different than most parties that enter litigation, and does not change the public policy calculus. In *Works*, the appellant agreed to settle prior to trial and therefore could not be "considered as having prevailed." *Works,* 732 P.2d at 1376. That is exactly the case here. Public policy is a reason to continue following the Court's precedent, not a reason to deviate from it.

C. NRCP 11 Is Not an Alternative Basis for Affirming the District Court's Award of Costs and Fees; Instead, it Is a Basis for Reversal

The Association also presents NRCP 11 as an alternative ground for

[8] The Association ignores that this is the principle for which the Trust cited *Dimick* and instead points to purported distinctions as to why the case is inapplicable. (Assoc. Br. at 33.) However, it is notable that *Dimick* is yet another example where the Supreme Court followed and ruled consistently with *Works*. *See Dimick,* 915 P.2d at 255–56 (referring to and following *Works*). Contrary to the Association's assertion, *Dimick* is based on the same factual premise present here – the issue in question never came before the Court, so no party could be deemed to have prevailed on it. *See id*. The Court here should reach the same result.

affirmation of the attorney fee award. (Assoc. Br. at 38–39.) The Association argues that NRCP 11 supports granting it attorney fees because the rule "does not require the entry of a formal judgment." (*Id.* at 39.) This not only misses the point – once again mischaracterizing the Trust's position as related to a "formal judgment" – but both the spirit and the letter of NRCP 11 are consistent with denying a party attorney fees where a party agrees to dismiss its claims prior to a court ruling on the merits.

While NRCP 11 provides for an award of attorney fees in certain instances, it explicitly requires that a motion for sanctions under NRCP 11 must be separate from any other motion, and must be served on the opposing party 21 days before filing it. NRCP 11(c)(2). It thus creates a safe-harbor period, during which the other party can withdraw the offending conduct without penalty. If the other party does so, then the motion "must not be filed or be presented to the court." *Id.* As a result, even where a party has violated NRCP 11, the rule still offers a penalty-free withdrawal before a sanctions motion can be filed. In other words, it encourages parties to resolve their dispute without court intervention.

This is entirely consistent with the concept of only allowing attorney fees and costs to a party that succeeds on at least some issue that is actually decided by a district court on its merits. That is, a party asserting a claim or defense is encouraged to withdraw it so as to not be responsible for attorney fees. If the

opposing party consents to the relief requested – for example, by dismissing the other party from the lawsuit – then there is no prevailing party and attorney fees and costs cannot be awarded. Here, even if the Association is correct and the Trust's conduct bringing or maintaining a lawsuit against it violated NRCP 11, then the events that occurred happened exactly as NRCP 11 envisions: the Trust corrected the alleged offending conduct by dismissing the Association from the lawsuit. Thus, under NRCP 11, the Association could not have presented, let alone prevailed on, a motion for sanctions.

In addition to obfuscating the spirit of NRCP 11, the Association also completely ignores the letter of the rule, including the procedure that must be followed prior to filing a motion for sanctions. The Association never made any separate motion under NRCP 11(c)(2), nor did it ever serve such a motion on the Trust to even start the 21-day safe harbor period.

Thus, NRCP 11 does not serve as an alternative basis for affirming the District Court's award of attorney fees and costs to the Association. Rather, it illustrates that the rules are intended to encourage the resolution of issues without court intervention, and sanctions, attorney fees, and costs are intended to serve as a threat for when a party does not correct its conduct. Imposing such penalties anyway would defeat the purpose of the rules. The Association's argument that NRCP 11 supports affirming the award of attorney fees and costs is nothing more

than another example of the Association attempting to distract from the relevant law to obtain the result it seeks.

D. If the Court Finds that the Association is Not the Prevailing Party, the Association is Not Entitled to its District Court Costs

The Association asserts that the costs awarded to it cannot be reversed because the Trust waived its right to appeal costs by declining to file an objection. (Assoc. Br. at 40.) The Association argues that a motion under NRS 18.110(4) objecting to costs is a prerequisite to appealing a cost award. This is incorrect.

There is a recognized difference between challenging the amount of costs awarded and a determination that a party is a prevailing party. For the former, the Association is correct. Because the Trust did not file a motion under NRS 18.110(4), it cannot appeal the amount of costs awarded. However, the issue of whether the Association was the prevailing party is the central issue in this appeal, and the Association does not and cannot assert that it was waived. Indeed, as the Trust already pointed out, the Trust argued to the District Court that the Association was not the prevailing party. (Trust Op. Br. at 9 (citing 2 TRUST 377–378).)

When a party is awarded costs as a prevailing party, and is later determined not to be the prevailing party, then the costs award **must** be vacated. *See Doud v. Las Vegas Hilton Corp.*, 109 Nev. 1096, 1106, 864 P.2d 796, 802 (1993) ("In light of our disposition of this appeal, it is evident that the [Defendant] can no longer be

deemed the prevailing party under NRS 18.020(3). Therefore, the award of costs to the [Defendant] **must** also be vacated." (emphasis added)).

Here, if the Trust is correct, and the Association is not the prevailing party for the purposes of attorney fees and costs, then the Association is not entitled to either. The Association's position, where it is ruled not to be the prevailing party but is still somehow entitled to costs, would produce a nonsensical result and should be afforded no weight.

IV. The Association's Argument as to the Reasonableness of its Own Fees Is Entirely Conclusory

As set forth in the Trust's Opening Brief, even if the District Court correctly determined that the Association is the prevailing party and entitled to attorney fees under NRS 18.020, the District Court abused its discretion in awarding the Association an unreasonable amount of attorney fees. (Trust Op. Br. at 19–22.) The Trust detailed that none of the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969) support awarding the Association attorney fees for the objectively unnecessary tasks of preparing a motion to dismiss and the subsequent motion for attorney fees. (*Id.*) In contrast, the second and fourth *Brunzell* factors weigh heavily against awarding attorney fees for these tasks, the performance of which was also inconsistent with the Nevada Rules of Professional Conduct, the Nevada Rules of Civil Procedure, and the Rules of the Eighth Judicial District. (*Id.*)

In response, the Association makes only the conclusory argument that the attorney fee award should be affirmed because the District Court "explained that it did follow all of the elements and requirements set forth in" *Brunzell*. (Assoc. Br. at 41.) This is neither true nor dispositive. In rendering its ruling, the District Court stated only that it found certain activities of the Association's counsel to be excessive. (Trust Br. at 10–11 (citing 2 TRUST 430).) However, the District Court provided no opinion or analysis as to whether the broader tasks themselves of preparing the briefs in question were justified. Even assuming the District Court explained that it "did follow all the elements and requirements" of *Brunzell*, that would not end the matter. When determining if a district court abused its discretion in awarding attorney fees, a Nevada appellate court "examines whether the decision was supported by substantial evidence and guided by applicable legal principles." *See Kwist v. Chang*, 373 P.3d 933 (2011). That is, just because a district court provides some explanation, that does not end the matter. The analysis still must be supported by substantial evidence and guided by applicable legal principles.

Here, the District Court's decision cannot be affirmed under this standard because it is undisputed that the Association was constructively dismissed from the case from the outset, that it was not required to perform any legal work, and that it never alerted the Trust that it was going to prepare a motion to dismiss. The Trust

has shown that at least the second and fourth *Brunzell* factors were not properly considered, and neither the District Court's ruling or the Association's brief offers any explanation to the contrary. Considering this, there can be no question that the appropriate legal principle at issue here – application of *Brunzell* factors – cannot be reconciled with the District Court's decision. Thus, if it reaches the amount of attorney fees, this Court should reverse the District Court's finding as an abuse of discretion.

CONCLUSION

For the foregoing reasons, the Trust respectfully requests that this Court grant the Trust relief requested in the Conclusion of Trust's Opening Brief. (Trust Op. Br. at 23.)

DATED: June 27, 2019

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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 of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 6,145 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 27th day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this date **APPELLANTS' REPLY 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: June 27, 2019

/s/ David J. Kaplan