IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT CLARKE, an individual, Appellant, v. SERVICE EMPLOYEES INTERNATIONAL UNION, a nonprofit cooperative corporation; and CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION, A/K/A SEIU 1107, a non-profit cooperative corporation, Respondents.	Supreme Court No. 80520 District Case No. A764942
SERVICE EMPLOYEES INTERNATIONAL UNION, an unincorporated association; and NEVADA SERVICE EMPLOYEES UNION A/KA CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION, SEIU 1107, a non-profit cooperative corporation, Appellants, v. DANA GENTRY, AN INDIVIDUAL; and ROBERT CLARKE, an individual, Respondents.	Supreme Court No. 81166 District Case No. A764942

JOINT REPLY BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION AND CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION A/K/A SEIU LOCAL 1107

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INTRODUCTION

Service Employees International Union ("SEIU") and Clark County Public Employees Association a/k/a SEIU Local 1107 ("Local 1107") (collectively, "Unions") hereby reply in support of their appeal in case number 81166.

Robert Clarke and Dana Gentry (collectively, "Respondents") argue that the district court properly denied the Unions' motions for attorneys' fees for two primary reasons. First, they contend that although the Unions' joint offers of judgment were conditioned on the dismissal of defendant Sharon Kisling, Kisling was not included as an offeror in the offers of judgment. But this was not the basis for the district court's written order denying the Unions' motions for attorneys' fees. Even if it were, Respondents fail to identify any provision of Nevada Rule of Civil Procedure 68 ("Rule 68") which required Kisling to be included as an offeror in the Unions' joint offers of judgment.

Second, Respondents argue that the balance of factors under *Beattie v. Thomas*, 99 Nev. 579, 588–89 (1983), weigh in their favor because they pursued their claims in good faith. However, their argument ignores the nearly uniform persuasive caselaw dictating that their claims were preempted by Labor Management Reporting and Disclosure Act ("LMRDA"), as described in the Unions' opening/answering brief. Respondents' rejection of the Unions' offers of judgment, despite the preemption of their claims, was thus grossly unreasonable.

For these reasons and those discussed in the Unions' opening/answering brief, the Unions respectfully request that the Court reverse the district court's order denying their motions for attorneys' fees.

ARGUMENT

I. Rule 68 Did Not Require Defendant Sharon Kisling to Be Included as an Offeror in the Unions' Joint Offers of Judgment.

Respondents' first argument requires a brief recap of relevant facts. In Respondents' first amended complaint, Dana Gentry alleged several causes of action, including a defamation claim against Local 1107 and Sharon Kisling, a former officer of Local 1107. *See* Unions' Appendix ("Unions' Appx."), II:340–41.[1] Pursuant to Rule 68, SEIU and Local 1107 made joint offers of judgment to Respondents conditioned on Respondents' dismissal of all claims against all defendants, including Gentry's defamation claim against Local 1107 and Kisling. *See id.*, VI:1177–78. Respondents did not accept those offers (*see id.*, VI:1205, ¶ 3); the district court later granted summary judgment against them on all claims (*see id.*, VI:1147–1152); and the Unions then unsuccessfully moved for attorneys' fees under Rule 68(f)(1)(B) (*see id.*, VII:1379–1382).

Respondents contend the district court properly denied the Unions' motions

[1] Citations to the Unions' Appendix or Respondents' Appendix ("Clarke Appx.") will indicate the volume number and page number, followed by paragraph or line number where applicable.

for attorneys' fees because, although Kisling's dismissal was a condition of the Unions' joint offers of judgment, she was not included as an offeror in the offers of judgment. *See* Respondents' Answering/Reply Brief ("RB") at 64–66. This argument fails for a few reasons.

As an initial matter, the district court's written order denying the Unions' motions for attorneys' fees was not based on this ground. To be sure, at the hearing on the Unions' motions for attorneys' fees the district court acknowledged that Kisling, who was not represented by counsel for SEIU or Local 1107, was not one of the offerors. *See* Unions' Appx. VII:1351–1352. Even so, the district court's written order did not mention Kisling, let alone conclude the Unions' joint offers of judgment were invalid under Rule 68 because Kisling was not one of the offerors. *See id.*, VII:1381–1382.

In any event, even if Respondents' interpretation of the district court's decision is correct, they fail to point to a provision of Rule 68 that required Kisling to be an offeror in the Unions' joint offers of judgment. To the contrary, Rule 68 makes clear that offerors can specify the "terms and conditions" of their offers. *See* NRCP 68(a) (providing that "any party may serve an offer in writing to allow judgment to be taken *in accordance with its terms and conditions*" (emphasis added)). Respondents do not identify any reason—based either on the text of Rule 68 or in caselaw—that the Unions could not condition their offers on the dismissal

of all claims against all defendants, including Kisling.[2]

Instead, Respondents contend this case is like *Parodi v. Budetti*, 115 Nev. 236 (1999), where two defendants made a joint offer of judgment that "did not indicate how much of [the offer] was to be paid by the respective defendants and was therefore unapportioned." *Id*. at 239. The Court rejected the defendants' argument that they acted jointly "as one entity," and ruled instead that "[a] joint, unapportioned offer of judgment is invalid" under Nevada Rule of Civil Procedure 68. *Id*. at 240.

Parodi is inapplicable here. It has been superseded by Rule 68, which now permits joint unapportioned offers of judgment. "Prior to 1998, joint unapportioned offers of judgment were invalid for an award of attorneys' fees under . . . NRCP 68 . . . ." *RTTC Comms., LLC v. Saratoga Flier, Inc.*, 121 Nev. 34, 41 (2005). "However, NRCP 68 was amended in 1998 . . . to permit an award of fees when there has been an unapportioned offer of judgment, under certain circumstances." *Id*. at 42. Indeed, subsection (c) of Rule 68 is titled "Joint Unapportioned Offers," and describes the circumstances in which such offers are permissible. Subsection (c)(1), titled "Multiple Offerors," provides that "[a] joint

[2] If anything, Respondents' focus on Kisling overlooks the fact that the other individual defendants, Mary Kay Henry, Luisa Blue, and Martin Manteca, were likewise not included as offerors in the Unions' joint offers of judgment. Respondents do not explain why Kisling was required to be an offeror, but the other individual defendants were not.

offer may be made by multiple offerors." NRCP 68(c)(1).[3] Rule 68 therefore authorized SEIU and Local 1107, multiple offerors, to make joint offers of judgment to Gentry and Clarke, and to specify that a condition of those offers was dismissal of all claims against all defendants, including the defamation claim against Kisling.

Moreover, the present case is unlike *Parodi*, where the claims against one defendant, Musico, were unrelated to the claims against the other defendants, the Budettis. *See id*. at 241 ("The Budettis were not included in these claims [related to Musico's alleged slander against the plaintiff], nor was Muisco included in the contractual and lien claims against the Budettis."). By contrast, Gentry sued Kisling and Local 1107 in a single defamation cause of action, alleging both defendants were liable for statements Kisling allegedly made while acting in her official capacity as Local 1107's Vice President. *See* Unions' Appx. II:340–41. In fact, the district court recognized the close connection between Kisling and Local 1107 for purposes of Gentry's defamation claim when it denied Respondents' motion for default judgment against Kisling: The district court denied the motion because Kisling and Local 1107, which had not defaulted, had common defenses to

[3] The Unions' joint offers of judgment were apportioned between Clarke and Gentry, *i.e.*, each plaintiff would receive $30,000 in settlement of all claims against all defendants. *See* Unions' Appx. VI:1177–78. Because the Unions' joint offers were apportioned between the plaintiffs, Rule 68(c)(3), concerning a joint unapportioned offer to multiple plaintiffs, did not apply here.

Gentry's defamation claim. *See* Unions' Reply Appendix at 1–2 (Order Denying Plaintiffs' Motion for Default Judgment (citing *Paul v. Pool*, 96 Nev. 130, 132 (1980) ("The answer of a co-defendant inures to the benefit of a defaulting defendant where there exists, as here, a common defense as to both of them.")).

In short, the Unions' offers of judgment were not invalid under Rule 68 simply because defendant Kisling was not one of the offerors.

II. Respondents Were Grossly Unreasonable in Continuing to Pursue Preempted Claims.

The district court's evaluation of the Unions' motions for attorneys' fees required it to consider the factors described in *Beattie v. Thomas*, 99 Nev. 579 (1983). Respondents do not dispute that some *Beattie* factors favored the Unions. For example, they do not challenge the district court's conclusion that the Unions' offers of judgment were reasonable in timing and amount, or argue that the Unions sought an unreasonable or unjustified amount of attorneys' fees. *See* RB at 68–69. Rather, Respondents contend the district court correctly denied the Unions' motions for attorneys' fees because Respondents brought their claims in good faith, and were not grossly unreasonable in rejecting the Unions' offers. *See id*.

Even if Respondents initiated their claims in good faith, it was grossly unreasonable of them to reject the Unions' offers of judgment after being presented with persuasive caselaw holding their claims were preempted. As described in the Unions' opening/answering brief, nearly all the courts that have considered

LMRDA preemption in this context have found preemption. *See* Unions' Opening/Answering Br. at 32–34 (citing state court cases from California, Montana, Michigan, New Jersey, and Colorado, and federal district court cases applying California and Oregon law). The Unions presented this caselaw to Respondents early in the litigation (*see, e.g.*, Unions' Appx. I:43–46; *id.*, II:226–27), leaving Respondents ample opportunity to evaluate it through discovery and analysis prior to the Unions' offers of judgment. Despite that persuasive caselaw, Respondents rejected the Unions' offers of judgment and continued pursuing their claims. That intransigence makes Respondents' insistence that they reasonably rejected the Unions' offers of judgment ring hollow.

Faced with the litany of cases holding claims like theirs are preempted, Respondents argue such cases were wrongly decided. Respondents are free to make that argument; but doing so hardly makes their rejection of the Unions' offers of judgment reasonable.[4] That they appear to have found only two cases—both unpublished—disagreeing with the holding of *Screen Extras Guild, Inc. v. Superior Court*, 51 Cal. 3d 1017 (1990), underscores the point. *See* RB at 21 (citing *Shuck v. Int'l Ass'n of Machinist and Aero. Workers, Dist. 837*, No. 4:16-

[4] Rule 68 is designed to promote settlement. *See Dillard Dept. Stores, Inc. v. Beckwith*, 115 Nev. 372, 382 (1999). That design is merely aspirational and the rule of no effect if its penalties are so easily avoided by a "cases were wrongly decided" argument.

CV 309 RLW, 2017 WL 908188 (E.D. Mo. March 7, 2017); *id*. at 28 (citing *Ardingo v. Local 951, United Food and Commercial Workers,* 333 Fed. Appx. 929 (6th Cir. May 29, 2009)). Notably, neither *Shuck* nor *Ardingo* appears to have been cited favorably by other courts addressing LMRDA preemption.

Reliance on those cases is even more precarious given that *Shuck* concerned whether *Screen Extras Guild* supported removal of state claims to federal court, *see Shuck*, 2017 WL 908188, *2, which is not at issue here.[5] That leaves Respondents clinging to a single unpublished case, *Ardingo*, which at least one court has criticized. *See Packowski v. United Food & Comm. Workers Local 951*, 796 N.W. 2d 94, 103 (Mich. Ct. App. 2010) ("We disagree with *Ardingo's* reasoning and decline to follow it"). Indeed, as the *Packowski* court correctly observed, "the cases finding preemption under similar circumstances are more numerous, more factually analogous, and more persuasive" than those declining to find it. *Packowski*, 796 N.W. 2d at 104. Given the established and growing body of caselaw supporting the conclusion that Respondents' claims were preempted,

[5] Moreover, the *Shuck* court appeared to premise its holding, at least in part, on a recognized exception to LMRDA preemption concerning claims involving an employee's unwillingness to aid in the concealment of criminal activity. *See Shuck*, 2017 WL 908188, at *2 (citing, *inter alia*, *Montoya v. Local Union III of the Int'l Bhd. of Elec. Workers*, 755 P.2d 1221, 1224 (Colo. Ct. App. 1988) (adopting exception to LMRDA preemption "to the extent a claim is based on an employee's unwillingness to aid his superior in the violation or concealment of a violation of a criminal statute")). That exception is not at issue here, making *Shuck* even less apt.

something more was required for Respondents justifiably to reject the Unions' offers of judgment. That conclusion is amplified by the fact that Respondents rejected the offers of judgment knowing that they were high-level policy making and/or confidential managers of Local 1107 who opposed Local 1107's leadership—these are precisely the circumstances in which preemption applies. *See Screen Extras Guild, Inc.*, 51 Cal. 3d at 1031.

In sum, Respondents were grossly unreasonable in rejecting the Unions' offers of judgment in the face of on-point persuasive precedent holding such claims were preempted.

CONCLUSION

For the foregoing reasons and those discussed in the Unions' opening/answering brief, the Unions respectfully request that the district court's order denying them attorneys' fees be reversed.

DATED: December 1, 2020

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CERTIFICATE OF COMPLIANCE

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 14 pt. Times New Roman type style.

This brief is approximately 2,099 words, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), and therefore in compliance with the type-volume limitation of NRAP 32(a)(7)(A)(ii).

I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, 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: December 1, 2020

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CERTIFICATE OF SERVICE

Clarke v. Service Employees International Union, et al.
Supreme Court No. 80520 and 81166
District Court Case No. A-17-764942-C

I hereby certify that on this date 1st day of December, 2020, I submitted the foregoing **JOINT REPLY BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION AND CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION A/K/A SEIU LOCAL 1107** for filing and service through the Court's eFlex electronic filing service. According to the system, electronic notification will automatically be sent to the following:

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