

IN THE SUPREME COURT OF THE STATE OF NEVADA

DESERT VALLEY CONTRACTING,
INC., a Nevada corporation,

Appellant,

vs.

IN-LO PROPERTIES, a Nevada limited
liability company; EUGENE INOSE, an
individual; JEFFREY LOUIE, an
individual; DOES 1 through 10; and ROE
ENTITIES 1 through 10,

Respondents.

Case No.: 83338

District Court No. A16-734331-C
*On remand from Nevada Supreme
Court Case No. 79751*

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APPEAL

From the Eighth Judicial District Court,
The Honorable Joe Hardy Presiding

RESPONDENTS' ANSWERING 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 in order that the Justices of the Court may evaluate possible disqualification or recusal.

1. Respondent In-Lo Properties is not a publicly owned entity, and no publicly-held company holds any ownership interest thereof.
2. Attorneys from the law firm of Holley Driggs have appeared for Respondent in this appeal, and in the proceedings in the district court.

Dated this 23rd day of February 2022.

HOLLEY DRIGGS

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ROUTING STATEMENT

Respondents In-Lo Properties, LLC, Jeffrey Louie, and Eugene Inose (hereinafter referred to collectively as “Inose”) concur with Appellant Desert Valley Contracting (“Desert Valley”) that NRAP 17(b)(6) is informative, directing “[c]ases involving a contract dispute where the amount in controversy is less than \$75,000” to the Court of Appeals. NRAP 17(b)(6) (emphasis added).

Here, the parties were engaged in a contract dispute where the amount in controversy was *more* than \$75,000, and therefore this matter is impliedly routed to the Supreme Court pursuant to NRAP 17(b)(6). *See* Appellant’s Opening Brief at 21 (“For the foregoing reasons, the judgment of the District Court should be reversed and remanded . . . and [Desert Valley] should be awarded . . . (\$89,197.58) in damages . . .”).

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This Court remanded this construction contract matter in March 2021 for further proceedings on a narrow question: if a scrivener's error in the contract were reformed to provide that Appellant Desert Valley is entitled to its expected profit and overhead in the event of an early termination of the agreement by Respondent Inose, could the District Court's ruling against Desert Valley on its claims still stand?

This Court directed the District Court to consider whether mutual breaches by *both* parties precluded relief to either side, despite the reformed contract. Heeding this Court's command, the District Court amended its findings of fact and conclusions of law to fix the scrivener's error, but held that the parties' mutual breaches (and mutual failure to prove their damages by a preponderance of the evidence) precluded recovery by Desert Valley and Inose, and affirmed its prior ruling.

Did the District Court abuse its discretion in holding that Desert Valley's numerous, material breaches of the construction contract preclude its ability to seek damages from Inose?

II. STATEMENT OF THE CASE

Desert Valley has already appealed the District Court's judgment in this construction contract matter once. In the proceedings below, Desert Valley and Inose lodged claims against each other, alleging various breaches of the construction contract by which Desert Valley was hired to remodel Inose's residence after a flood. Following a seven-day bench trial, the District Court concluded that Desert Valley had failed to prove its claims because its own faulty accounting (and other inexcusable missteps) throughout the construction project precluded its ability to establish its damages by a preponderance of the evidence.

Additionally, the District Court identified a number of ways in which Desert Valley materially breached the contract.¹ Among the various, independently sufficient bases upon which the District Court denied relief to Desert Valley was a termination provision in the construction contract which provides that if "the client" terminated the agreement prior to completion of the project, then "the client" (rather than Desert Valley) would be entitled to its expected overhead and profits (the "Termination Provision"). The District Court held this was an ambiguity and construed the ambiguity against Desert Valley.

¹ The District court nevertheless ruled against Inose on his counterclaims, holding that Inose also could not establish any damages by a preponderance of the evidence.

Having ruled against both sides on their respective claims following the bench trial, the District Court granted Inose an award of attorney fees and costs pursuant to a generous offer of judgment it extended to Desert Valley in January 2018, in the amount of \$50,000.²

During its first appeal, in Nevada Supreme Court Case No. 79751, Desert Valley was obligated to raise any and all appealable issues regarding the District Court's findings of fact and conclusions of law ("FFCL") and did in fact raise many issues—all of which it improperly attempts to re-litigate, yet again, in this subsequent appeal.

Of all the purported issues raised by Desert Valley's first appeal, this Court found that *only one* constituted legal error, and therefore issued a very narrow order of reversal and remand on March 3, 2021 (the "Remand Order"). This Court's Remand Order held that the Termination Provision in the contract was not ambiguous, but rather contained a scrivener's error that should have been reformed to reflect that *Desert Valley* would be entitled to its expected profit in the event of an early termination by Inose. This Court stated its holding as follows:

Accordingly, we conclude the district court erred by construing the error against Desert Valley and concluding the error barred Desert

² Amounting to more than half of Desert Valley's total stated damages (\$89,197.58). *See* Opening Brief at 22.

Valley from seeking damages for its expected profits.

Because we cannot say whether the district court's error was harmless here, we reverse the judgment and remand for further proceedings. In particular, the court did not determine who breached first or if the breaches were mutual, thereby precluding relief. *See Cain v. Price*, 134 Nev. 193, 196, 415 P.3d 25, 29 (2018) (“one party’s material breach of its promise discharges the non-breaching party’s duty”); *Westinghouse Elec. Corp. v. Garrett Corp.*, 601 F.2d 155, 158 (4th Cir. 1979) (observing that under general contract law, “in proper circumstances a court may refuse to allow recovery by either party to an agreement because of their mutual fault.”). Moreover, because the district court erred in determining the [Termination Provision] was ambiguous and that Desert Valley therefore could not establish damages, the district court did not address whether, in light of the evidence presented, the contract, once reformed to omit the scrivener’s error, entitled Desert Valley to its expected profit and overhead in the event of termination by Inose. These are questions of fact for the district court to determine upon remand. . .

[VII JNT 1208–09] (Remand Order).

The District Court’s task on remand was thus narrowly defined by this Court. The District Court simply needed to decide whether its prior ruling could stand in light of the reformed language of the Termination Provision—*i.e.*, the *sole* error identified by this Court during the first round of appeals. Notably, this Court cited two cases in its Remand Order, *Cain v. Price* and *Westinghouse Elec. Corp. v. Garrett Corp.*, which invited the District Court to consider whether Desert Valley’s own material breaches of the contract precluded its ability to seek damages from Inose.

In response to the District Court’s request for supplemental briefing and oral

argument on remand, Inose focused his attention on the legal error identified by this Court's Remand Order. Ultimately, Inose demonstrated to the District Court that Desert Valley committed various, material breaches of the construction contract which not only precluded its ability to seek relief under *Cain* and *Westinghouse*, but that also rendered it impossible for the District Court to ascertain Desert Valley's alleged damages by a preponderance of the evidence (such that even if Desert Valley could seek damages, it would not be able to prove the amount thereof).

The District Court agreed with Inose's argument and heeded this Court's advice to consider whether Desert Valley should be precluded from seeking damages based on its own material breaches of the construction contract. In doing so, the District Court paid special attention to this Court's directive to consider whether the newly reformed language of the Termination Provision had any effect on the District Court's prior ruling.

In its amended findings of fact and conclusions of law ("Amended FFCL"), the District Court held that the parties' mutual breaches of the contract preclude recovery by either side "despite the now-reformed scrivener's error in the Construction Agreement." [VII JNT 1215–16] (Amended FFCL). The District Court further held in the alternative that, despite the reformed Termination Provision, Desert Valley was precluded from recovering damages because it

breached the contract first, and because it failed to prove its damages by a preponderance of the evidence.

Unhappy with the result on remand, Desert Valley seeks to take another bite at the apple. However, Desert Valley is limited in this subsequent appeal to the *sole* legal issue identified by this Court: Now that the language of the Termination Provision has been reformed in favor of Desert Valley, is Desert Valley entitled to an award of damages for breach of contract? As will be discussed in detail herein, the District Court did not abuse its discretion in finding that Desert Valley's various material breaches of the contract preclude the relief Desert Valley requests.

III. STATEMENT OF THE FACTS

a. The Facts of the Underlying Dispute Between Desert Valley and Inose

The underlying facts of this case are well-established. This Court provided a fair and adequate (if not full and complete) summary of the transaction between Desert Valley and Inose that led to their dispute in its March 3, 2021, Remand Order:

Eugene Inose hired Desert Valley Contracting, Inc., to repair and restore his custom home after it suffered extensive water damage. Their contract required Desert Valley to perform the restoration work in a good and workmanlike manner and Inose to immediately forward insurance proceeds to Desert Valley and instruct the insurer to make Desert Valley a payee on all insurance drafts for the work. Desert Valley expected to receive its project costs plus ten percent overhead and ten percent profits. Desert Valley performed extensive work on the home but made mistakes and decisions that increased costs and

resulted in additional damage.

Meanwhile, Inose requested changes and upgrades that were not in the scope of the repair work, believing those costs could be offset. Throughout the restoration work, Inose turned over some, but not all, of the insurance proceeds to Desert Valley. Eventually Desert Valley stopped work on the home. Inose thereafter worked with Desert Valley's subcontractors directly.

Desert Valley received insurance funds sufficient to cover its costs and some, but not all, of its overhead and expected profits. Desert Valley filed the underlying lawsuit, asserting causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and intentional interference with a contract. Inose asserted similar counterclaims against Desert Valley. Following a seven day bench trial, the district court dismissed both parties' claims. The district court found that both parties breached the contract and concluded that neither party was entitled to damages. As to Desert Valley specifically, the district court concluded the contract was ambiguous, construed the ambiguity against Desert Valley, and found that because Desert Valley completed approximately 85 percent of the work and was paid for that work, Desert Valley failed to establish damages.

See [VII JNT 1205–06] (Remand Order).

Because the scope of the Remand Order does not permit the parties to re-litigate every factual finding and holding from the District Court's initial FFCL, the above summary of the facts is sufficient to answer the narrow question posed by Desert Valley's latest appeal (whether Desert Valley breached the contract, thereby precluding relief). However, Inose will cite other findings of fact and conclusions of law from the District Court's FFCL and Amended FFCL as necessary to demonstrate the propriety of the District Court's holdings on remand.

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b. Issues Raised by Desert Valley in its First Appeal and This Court's Remand Order

In its opening brief in the first appeal (Supreme Court Case No. 79751), Desert Valley presented the following arguments:

(1) **The Termination Provision contained a scrivener's error that should be corrected to provide that Desert Valley is entitled to its expected profit and overhead in the event of an early termination by Inose** [SUPP 18–22];

(2) The District Court erred when it held that Desert Valley had failed to establish its damages by a preponderance of the evidence [SUPP 22–25];

(3) The District Court erred when it held that Desert Valley breached the contract by failing to perform the work in a good and workmanlike manner [SUPP 26–27];

(4) Desert Valley did not breach the contract by failing to complete the scope of work (having left the job only 85 percent complete) [SUPP 27–28];

(5) Desert Valley did not breach the contract by failing to complete the work within the confines of the insurance proceeds (as required by contract) [SUPP 28–29];

(6) The District Court erred when it found that Desert Valley breached the contract by failing to pay subcontractors in full for their work [SUPP 29–30];

and

(7) The District Court erred when it found that Desert Valley breached the contract by unilaterally approving change orders [SUPP 30–31].

Inose responded to Desert Valley’s arguments before this Court in its answering brief. *See* [SUPP 36–78] (Inose’s answering brief). Remarkably, having entertained full briefing by the parties on each of these issues, this Court identified only *one (1)* point of error committed by the District Court (bolded *supra* for ease of reference). *See* [VII JNT 1205–1209] (Remand Order). This Court held that the Termination Provision contained a scrivener’s error that must be reformed to reflect that if Inose terminated the contract early, then *Desert Valley* (and not Inose) would be entitled to its expected profit and overhead for the work performed. [VII JNT 1208].

Critically, this Court did not endorse any of Desert Valley’s additional arguments and identified no other legal errors by the District Court. Instead, on March 3, 2021, this Court issued a narrow reversal of the District Court’s FFCL, and issued the following simple instruction:

Because we cannot say whether the district court’s error was harmless here, we reverse the judgment and remand for further proceedings. In particular, the court did not determine who breached first or if the breaches were mutual, thereby precluding relief. . . Moreover, because the district court erred in determining the [Termination Provision] was ambiguous and that Desert Valley therefore could not establish damages, the district court did not

address whether, in light of the evidence presented, the contract, once reformed to omit the scrivener's error, entitled Desert Valley to its expected profit and overhead in the event of termination by Inose.

[VII JNT 1209].

c. This District Court Affirmed its Prior Decision Following Briefing and Oral Argument by Counsel

Following a status check to determine the course of proceedings on remand, the parties submitted supplemental briefing and appeared for oral argument before the District Court. *See* [SUPP 101–120] (Inose's Supplemental Brief) and [SUPP 121–216] (Desert Valley's Supplemental Brief). The parties agreed at the hearing that a new trial was not necessary “*to address the issues stated in the Remand Order*, as both Plaintiff and Defendants had a full and fair opportunity to present documents and witnesses at trial.”³ [VII JNT 1216] (emphasis added).

Critically, Desert Valley's supplemental brief to the District Court reargued each and every one of the points it raised before this Court in its first appeal⁴—all

³ As it pertained to the proceedings on remand, the understanding of the parties and the District Court was that the *only* issues to be addressed were the narrow issues raised by this Court's Remand Order (as evidenced by the language of the District Court's Amended FFCL, *supra*, and the directive set forth in the Remand Order itself). It is unclear why Desert Valley believes it has carte blanche to raise issues previously rejected by this Court and the District Court.

⁴ Except, of course, the scrivener's error issue, which this Court had already identified as the sole legal error committed by the District Court during the underlying proceedings.

of which were previously rejected by this Court. *Compare* [SUPP 1–35], *with* [SUPP 121–216]. *See also* [VII JNT 1205-10]. Following oral argument, on July 1, 2021, the District Court issued its Amended FFCL. [VII JNT 1211–17].

The Amended FFCL acknowledged the error identified by this Court as a result of Desert Valley’s first appeal, and amended the erroneous portion of its initial FFCL as follows:

Consistent with the Remand Order, the Court finds that the provision of the Construction Agreement which provides that, upon termination by the client, Desert Valley would be entitled to its costs “plus the profit that the client would have made on the job had Client not repudiated the contract” contains a scrivener’s error, and is hereby reformed to entitle Desert Valley to the profit it would have made in the event the client repudiated, ***notwithstanding any other facts or circumstances which might preclude recovery by Desert Valley***. *See* Remand Order at 4–5.

[VII JNT 1214] (emphasis added).

The Amended FFCL specifically leaves intact all of the District Court’s remaining findings of fact and conclusions of law. [VII JNT 1214, ¶ 13, 1215, ¶ 1]. Additionally, the Amended FFCL set forth several new findings of fact and conclusions of law in response to the narrow issue identified by this Court’s Remand Order. Those additional findings are stated as follows:

❖ “The Court finds that both sides committed material breaches of the Construction Agreement.”

❖ “The Court further finds that the first material breach of the

Construction Agreement was committed by Desert Valley, when it stopped work on Defendants' construction project and instructed the subcontractors to also stop performing work on the project."

❖ "The Court further finds that, even with the reformation of the Construction Agreement as set forth in the Remand Order, the parties failed to present sufficient evidence setting forth their respective damages by a preponderance of the evidence."

[VII JNT 1214–15].

In addition to the new findings of fact addressed by the District Court, the Amended FFCL also states new conclusions of law, and ultimately holds:

❖ "The parties' mutual breaches of the Construction Agreement preclude recovery by either side, despite the now-reformed scrivener's error in the Construction Agreement;"

❖ "In the alternative, the Court holds that Desert Valley is precluded from recovering on its contract claims despite the now-reformed scrivener's error in the Construction Agreement, as Desert Valley was the first party to materially breach the Construction Agreement."

❖ "Also in the alternative, the Court holds that Desert Valley has failed to prove its damages by a preponderance of the evidence despite the now-reformed scrivener's error in the Construction Agreement, such that even if Desert Valley

had not materially breached the Construction Agreement, it still would not be entitled to damages on any of its claims.”

[VII JNT 1215–16].

Desert Valley now appeals the District Court’s Amended FFCL, raising—for the *fourth* time—the very same arguments that this Court rejected during the first appeal, and that the District Court rejected during the initial proceedings and on remand. Desert Valley’s failed arguments must be rejected yet again.

IV. SUMMARY OF THE ARGUMENT

The scope of the issues on remand from this Court as a result of Desert Valley’s first appeal were exceedingly narrow. Desert Valley exceeds this narrow scope in its instant appeal, seeking to rehash well-established factual findings, which are reviewed for abuse of discretion. Notably, Desert Valley makes this attempt by cutting and pasting the very same arguments it set forth in its first opening brief before this Court in Case No. 7951. Desert Valley’s pre-canned brief violates the rules of procedure and wastes this Court’s and Inose’s time and resources. Nevertheless, Inose addresses each and every one of Desert Valley’s stale arguments to avoid any waiver of the same herein.

First, Desert Valley has not shown that the District Court abused its discretion in finding that Desert Valley breached the contract first (thereby

precluding relief to Desert Valley). Desert Valley argues that *Inose* breached first, but provides no dates for when the parties' respective breaches occurred. Moreover, the District Court found that Desert Valley committed various breaches throughout the project, such that it is impossible to tell which party breached first.

However, even if the District Court did err in finding that Desert Valley committed the *first* breach, this error is harmless because the District Court entered alternative conclusions of law, which concluded that neither party was entitled to damages based on their *mutual* breaches of the contract, regardless of the sequence and timing of such breaches. The District Court's holding is consistent with the points of law set forth in this Court's March 2021 Remand Order, and must be affirmed.

Next, Desert Valley seeks to retread old ground by rearguing—verbatim—arguments already presented to this Court in its first appeal (and already presented twice to the District Court). Desert Valley reiterates that the District Court erred in finding that: (1) Desert Valley failed to prove its damages by a preponderance of the evidence, and (2) Desert Valley breached the contract at any point throughout the construction project. While this Court's March 2021 Remand Order did not reopen these issues for debate, *Inose* addresses them briefly to avoid any waiver.

In response to these repetitive arguments, *Inose* points out that the District Court committed no abuse of discretion in finding that Desert Valley failed to

establish its damages. Testimony and evidence presented at the bench trial reveals the numerous ways in which Desert Valley's substandard accounting and misrepresentations throughout the project rendered *both* parties unable to prove their respective damages, if any. Desert Valley has shown no abuse of discretion as to these findings.

Moreover, the District Court did not err in holding that Desert Valley breached the contract repeatedly throughout the project. Desert Valley's argument is belied by the voluminous factual findings with respect to Desert Valley's breaches from virtually day-one of the construction project. Desert Valley has failed to show that the District Court abused its discretion as to these findings.

Desert Valley's latest appeal must be denied, having identified no abuse of discretion or other legal error on the part of the District Court during its proceedings on remand. As such, the District Court's Amended FFCL must be affirmed.

V. STANDARD OF REVIEW

a. Findings of Fact

The Nevada Supreme Court "reviews the district court's findings of fact for an abuse of discretion, and this court will not set aside those findings 'unless they are clearly erroneous or not supported by substantial evidence.'" *NOLM, LLC v. Cty. of Clark*, 120 Nev. 736, 739, 100 P.3d 658, 660–61 (2004).

b. Conclusions of Law

“A district court’s conclusions of law are reviewed de novo.” *White v. Cont’l Ins. Co.*, 119 Nev. 114, 116, 65 P.3d 1090, 1091 (2003). Similarly, the Nevada Supreme Court reviews a district court’s application of law to facts on a de novo basis. *See D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004), *overruled on other grounds by U.S. Home Corp. v. Michael Ballesteros Tr.*, 134 Nev. 180, 415 P.3d 32 (2018).

c. Damages Calculations

The “district court is given wide discretion in calculating an award of damages, and this award will not be disturbed on appeal absent an abuse of discretion.” *Diamond Enterprises, Inc. v. Lau*, 113 Nev. 1376, 1379, 951 P.2d 73, 74 (1997) (citing *Flamingo Realty v. Midwest Development*, 110 Nev. 984, 987, 879 P.2d 69, 71 (1994), *cert. denied*, 514 U.S. 1127, 115 S.Ct. 1999, 131 L.Ed.2d 1001 (1995)).

VI. ARGUMENT

Desert Valley attempts to use its second appeal as an opportunity to re-hash established facts and issues that are not subject to further review. In fact, of Desert Valley’s approximately 22-page Opening Brief, only about *five (5)* pages are not cut and pasted—*verbatim*—into its Opening Brief in this appellate matter. Unsurprisingly, courts have condemned such behavior by appellants. *See*

Cadlerock III, LLC v. Harry Brown & Co., LLC, 754 Fed. Appx. 780, 782 (11th Cir. 2018) (finding the appellant’s opening brief was “copied, cut, and pasted from several briefs it filed in the district court” and holding that the brief was “woefully deficient and in clear violation of” the analogous Federal Rule of Appellate Procedure 28(a) as a result thereof).

Desert Valley’s regurgitating issues without its lending any additional argumentation or support for the same is a waste of this Court’s (and Inose’s) time and resources. *In re O'Brien*, 312 F.3d 1135, 1137 (9th Cir. 2002) (“An enormous amount of time is wasted when attorneys fail to provide proper briefs[.]”). This improper shortcut mirrors Desert Valley’s conduct throughout the construction project and this litigation, which has all led to this predictable result. Moreover, Desert Valley has continuously shirked any opportunity to work in good faith with Inose to resolve this dispute without need of successive appeals.⁵ Nevertheless, to avoid waiving any arguments, Inose will respond to each of the arguments set forth by Desert Valley and show that the District Court has not committed any abuse of

⁵ Desert Valley rejected a \$50,000 offer of judgment from Inose in January 2018, which could have saved all the parties years of time and money spent in litigation. Additionally, Desert Valley has yet to participate in a meaningful settlement conference in conjunction with its appeals. On both occasions, Desert Valley’s demands were so unreasonable that the settlement conferences were essentially dead on arrival.

its discretion.

a. The District Court Did Not Abuse its Discretion When it Held Desert Valley Breached First, But Even if the District Court Did Err, the Error Was Harmless

Turning first to Desert Valley's *only* argument that was not directly cut and pasted from its prior opening brief, Desert Valley argues that Inose breached the contract first when he failed to turn over certain insurance proceeds as soon as they were received. *See* Opening Brief at 9–12. Importantly, Desert Valley already addressed this argument in its opening brief related to its first appeal. *See* [SUPP 29–30]. However, because (1) Desert Valley provides slightly more detail regarding this argument in its Opening Brief herein, and (2) the issue of who breached first was directly raised by this Court's Remand Order and ruled upon in the District Court's Amended FFCL, Inose will address this argument in full.

First, Desert Valley has failed to demonstrate that Inose committed the first breach by failing to turn over insurance proceeds immediately upon receipt. Second, even if this Court finds that the District Court erred in determining that Desert Valley breached *first*, such error is harmless because the District Court also found that both parties were precluded from recovery based on their *mutual* breaches of the construction agreement (regardless of the timing of such breaches). [VII JTN 1215] (bullet 4(a)).

///

1. Desert Valley Has Not Shown That Inose Breached First

Desert Valley states that “Inose clearly breached the agreement first by failing to turn over insurance proceeds.” Opening Brief at 9. Desert Valley proceeds to discuss the contract provisions which require Inose to turn over insurance proceeds, and quotes testimony that was given during the bench trial before the District Court to show that Inose did commit this breach. *Id.* at 10–11. Desert Valley concludes that the District Court erred in holding that Desert Valley breached first. *Id.* at 12.

The glaring problem with Desert Valley’s argument is that it does not state—and the record does not show—*when* this breach by Inose occurred.⁶ Inose does not dispute that the Court’s FFCL held that Inose breached for failing to immediately turn over insurance proceeds. However, Desert Valley has not shown that this breach by Inose occurred before *all* of Desert Valley’s material breaches, and thus has not shown that the District Court erred in holding Desert Valley breached the contract first.

Rather, the District Court’s FFCL shows that Desert Valley began breaching

⁶ Desert Valley also fails to acknowledge that “Inose paid Desert Valley \$1,123,734.87 to complete approximately 85% of the Project”, and that “*Desert Valley was paid for the entirety of its costs incurred as well as a portion of its profit and overhead.*” [VII JNT 1170] (§§ 72, 74) (emphasis added). In addition, Inose was forced to pay “\$256,481.46 to subcontractors directly to finish the project, for sum total paid by Inose of \$1,380,216.33.” *Id.* (§ 74).

the contract almost immediately after entering into it, and throughout the course of the project:

23. Desert Valley breached its obligations under the Contract by failing to complete the work in a good and workmanlike manner including, but not limited to, by causing damage to the Property unrelated to the restoration and incorporating the cost of repairs for this damage into the cost it sought to collect from Inose.

24. Desert Valley breached its obligations under the Contract by failing to complete the scope of work and provide Inose with a fully restored property.

25. Desert Valley breached its obligations under the Contract by failing to complete the scope of work set forth in the Contract within the confines of the Insurance Proceeds as required under the Contract.

26. Desert Valley breached the Contract by failing to pay the subcontractors in full for work to be completed by the subcontractors.

27. Desert Valley breached its obligations under the Contract by unilaterally approving change orders received from subcontractors and failing to obtain approval of the same from Inose.

[VII JNT 1174] (FFCL).

Desert Valley also began breaching the implied covenant of good faith and fair dealing almost immediately after entering into the contract:

40. Desert Valley breached its covenant of good faith and fair dealing arising from the Contract by representing to Inose that certain costs could be covered elsewhere or buried without submitting written change orders to Inose.

41. Desert Valley breached its covenant of good faith and fair dealing by failing to timely present to Inose the written change orders that it received from subcontractors throughout the course of the project.

42. Desert Valley breached its covenant of good faith and

fair dealing arising from the Contract by directing Inose to close out the Insurance Proceeds and representing to both Fireman's Fund and Inose that it could complete the work for the total amount of Insurance Proceeds and that it had no change orders as of July 2015.

[VII JNT 1175–76] (FFCL).

The above-referenced breaches by Desert Valley show that it is nearly impossible to tell which party materially breached the contract first. As a practical consideration consistent with this Court and the District Court's holdings, however, it is irrelevant which party breached the construction agreement first, because the District Court found that *both* parties' *mutual* breaches of the agreement precluded relief by either side. [VII JTN 1215] (bullet 4(a)).

2. Even if Inose Did Breach First, the District Court Did Not Err in its Ultimate Ruling Because it Also Held the Parties' Mutual Breaches Precluded Recovery By Either Side

While Desert Valley attacks the District Court's holding that Desert Valley breached the construction agreement first, Desert Valley fails to note that this was merely the District Court's *alternative* holding. *See generally* Opening Brief. Following this Court's remand, the District Court's Amended FFCL concluded:

4. Thus, the Court finds that the single error upon which the Nevada Supreme Court reversed this Court's Judgment was harmless, and does not alter the Court's final determination that neither side is entitled to an award of damages for the following reasons:
 - a. **The parties' *mutual* breaches of the Construction Agreement preclude recovery by either side, despite the now-reformed scrivener's error in the Construction Agreement;**

- b. **In the alternative**, the Court holds that Desert Valley is precluded from recovering on its contract claims despite the now-reformed scrivener's error in the Construction Agreement, as Desert Valley was the first party to materially breach the Construction Agreement.
- c. **Also in the alternative**, the Court holds that Desert Valley has failed to prove its damages by a preponderance of the evidence despite the now-reformed scrivener's error in the Construction Agreement, such that even if Desert Valley had not materially breached the Construction Agreement, it still would not be entitled to damages on any of its claims.

[VII JTN 1215–16] (emphasis added).

This determination by the District Court is consistent with this Court's Remand Order, which asked the District Court to

determine who breached first *or if the breaches were mutual, thereby precluding relief*. See *Cain v. Price*, 134 Nev. 193, 196, 415 P.3d 25, 29 (2018) (“one party’s material breach of its promise discharges the non-breaching party’s duty”); *Westinghouse Elec. Corp. v. Garrett Corp.*, 601 F.2d 155, 158 (4th Cir. 1979) (observing that under general contract law, “in proper circumstances a court may refuse to allow recovery by either party to an agreement because of their mutual fault.”).

[VII JTN 1209] (emphasis added).

It is clear based on the above-referenced portions of the District Court's FFCL (and this Court's own summary of the facts, which is now the law of the case) that Desert Valley materially breached the agreement in various ways throughout the course of the project. Therefore, even if the District Court misidentified which party breached the contract first (which it did not), such error

was harmless in light of the parties' *mutual* breaches, and the District Court's judgment should be affirmed. *Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

In light of the foregoing, the *only* new argument presented by Desert Valley in this appeal is of no avail to Desert Valley, and its appeal of the District Court's Amended FFCL must fail.

b. Desert Valley Attempts to Re-Litigate Meritless Issues—Verbatim—That Have Already Been Rejected by This Court and the District Court

The remaining arguments submitted by Desert Valley in this appeal are one hundred percent copied and pasted, word for word, from its prior opening brief in Nevada Supreme Court Case No. 79751. *Compare* [SUPP 1–35], *with* Opening Brief. As Inose pointed out *supra*, these arguments should be disregarded as a waste of this Court's resources. Indeed, this Court has already rejected each and every one of Desert Valley's remaining arguments by implication, having declined to identify the same as legal error in its March 2021 Remand Order.

Desert Valley argues that this "Court neither affirmed nor denied any of the other issues raised by Desert Valley Contracting in their initial appeal." Opening Brief at 2. However, it is unlikely that this Court identified other potentially case-dispositive legal errors committed by the Court during Desert Valley's first appeal,

but simply neglected to mention them in its Remand Order. To do so would result in successive appeals followed by successive rounds of district court proceedings on remand. As such, this Court should decline the opportunity to reconsider Desert Valley's arguments herein.

Regardless, Desert Valley's cut and pasted arguments are as meritless now as they were then. These arguments are: (1) the District Court erred when it found that Desert Valley did not prove its damages by a preponderance of the evidence, and (2) the District Court erred when it found that Desert Valley breached the contract. Opening Brief at 12–21. Inose will address these arguments in turn.

1. The District Court Did Not Err When it Found That Desert Valley Failed to Prove its Damages by a Preponderance of the Evidence

Desert Valley argues, for the third time, that the District Court erred when it held that Desert Valley failed to prove its damages by a preponderance of the evidence. Opening Brief at 12–15. According to Desert Valley, because the contract was to be performed on a “10 and 10” basis (meaning that it would earn 10 percent of its total costs as profit and an additional 10 percent of its costs to cover overhead), Desert Valley was entitled to its costs (here, \$1,012,451.08) plus an additional 20 percent of those costs (which equals \$202,490.21). *Id.* at 14–15.

The difference between this total and what Inose ultimately paid Desert Valley is Desert Valley's purported damages.⁷ *Id.*

Desert Valley oversimplifies the issue. As Inose pointed out in his supplemental brief on remand, and as stated in the District Court's initial FFCL, Desert Valley's faulty accounting and underhanded business tactics rendered it impossible for the District Court to ascertain Desert Valley's damages, even if it were not precluded from seeking the same (which it is). *See* [SUPP 112–118]. The FFCL identifies the following voluminous facts which rendered it impossible for Desert Valley to establish its damages by a preponderance of the evidence:

❖ “Inose, Merritt [Desert Valley's lead project estimator], and Zachary all testified that Desert Valley had consistently represented to Inose that Desert Valley could offset the costs of certain changes in scope by removing other items that were part of the original scope of work and that doing so would not affect the total cost of the project. This included, but was not limited to, the removal of the sauna which had previously been on the Property offset by an expansion and

⁷ Again, Desert Valley fails to acknowledge that “Inose paid Desert Valley \$1,123,734.87 to complete approximately 85% of the Project”, and “\$256,481.46 to subcontractors directly to finish the project, for sum total paid by Inose of **\$1,380,216.33.**” [VII JNT 1170] (¶ 74). Yet, Desert Valley's highest quote to complete the project was **\$1,321,331.27**—*less* than what Inose ultimately paid. [VII JNT 1168] (¶ 55).

various upgrades to the wine room.” [VII JNT 1165] (§ 24).

❖ “Merritt testified that there were many cost overruns on the project which included, but were not limited to, an over-order of approximately eight (8) pallets of tile which Merritt testified were ordered based on measurements provided by Summit Tile and Stone, one of the subcontractors working for Desert Valley.” *Id.* (§ 25).

❖ “Merritt testified that an additional cost overrun was attributable to the necessity for repainting the interior of the home since the home had originally been repainted prior to the installation of tile and that the cutting of tile caused dust to adhere to the painted walls which could not thereafter be sufficiently cleaned.” *Id.* (§ 27).

❖ “Merritt and Inose testified that additional cost overruns were attributable to items going missing from the Project including a television and several Lutron switches.” *Id.* (§ 28).

❖ “No change orders that were signed or approved by Inose were presented as evidence at trial.” [VII JNT 1166] (§ 38).

❖ “Merritt testified that, although he had been receiving and approving change orders throughout the course of the Project, and notwithstanding that Desert Valley had indicated to Inose in writing in July 2015 that there were no change orders and again in September 2015 that the cost to complete the house was

\$1,321,331.27, Merritt always intended to prepare and submit one large master change order to Inose toward the end of the Project.” [VII JNT 1169] (§ 60).

❖ “No evidence was presented at trial or any written communications to Inose indicating Desert Valley’s intent to compile and submit a large master change order at the end of the project.” *Id.* (§ 61).

❖ Merritt confirmed through testimony that at the time Desert Valley ceased working on the Property, the Project was approximately eighty-five (85%) done. *Id.* (§ 64).

❖ “Inose paid directly to subcontractors the total amount of two-hundred fifty-six thousand four-hundred eighty-one dollars and forty-six cents (\$256,481.46) to complete work for which *Desert Valley had already been paid*. See Checks and Credit Card Statements, Exhibits 586 through 595.” [VII JNT 1170] (§ 73) (emphasis added).

❖ “Desert Valley breached its obligations under the Contract by failing to complete the work in a good and workmanlike manner including, but not limited to, by causing damage to the Property unrelated to the restoration and incorporating the cost of repairs for this damage into the cost it sought to collect from Inose.” [VII JNT 1174] (§ 23).

It is clear from the above that Desert Valley’s own material breaches and missteps throughout the construction project rendered it unable to prove its own

damages. From improperly charging Inose for cost overruns, to unilaterally authorizing change orders, to failing to complete the entire scope of work (forcing Inose to pay the subcontractors over \$250,000 of his own money to complete the work), Desert Valley precluded its own ability to prove its damages by a preponderance of the evidence, and it should not be rewarded for its substandard accounting.

Moreover, having heard the testimony and evidence first-hand during the bench trial (and the parties having waived the opportunity to present additional evidence on remand), the District Court's determination of the above issues deserves significant deference, and should be overturned only if the District Court is found to have abused its discretion. *See, e.g., Crittenden v. Chappell*, 804 F.3d 998, 1020 (9th Cir. 2015) ("In light of the evidence presented in state court, and the heavy deference we owe to the trial judge's firsthand observations, we should not disturb the trial court's fact-bound determination that Crittenden did not make out a prima facie case of discrimination under Batson."). Desert Valley has failed to demonstrate such an abuse of discretion by the District Court.

2. The District Court Did Not Err When it Found That Desert Valley Breached the Contract

Desert Valley argues that the District Court erred in holding that Desert Valley breached the contract. Opening Brief at 16–21. Each of Desert Valley's

points lacks merit. Moreover, each of these arguments has already been addressed multiple times by the District Court and once by this Court in Desert Valley’s prior appeal. Nevertheless, to avoid any waiver of arguments, Inose will address them again—briefly—herein.

First, Desert Valley argues that the District Court erred in finding Desert Valley failed to perform its work in a good and workmanlike manner. *Id.* at 16–17. Desert Valley argues that a different company, ServPro, caused some damage during its initial cleanup of the flood damage, and that the District Court erred in assigning the fault to Desert Valley. *Id.* However, Desert Valley ignores the other ways in which it failed to perform in a good and workmanlike manner during the construction, including having dirtied the walls during tile installation to the point of needing to repaint (resulting in a cost overrun), and losing expensive equipment for which Desert Valley later attempted to charge Inose. [VII JNT 1165] (¶¶ 27–28).

Next, Desert Valley argues that it did not breach the contract by failing to complete the scope of work, nor by failing to do so within the confines of the insurance proceeds. Opening Brief at 18–19. First, it is undisputable based on Desert Valley’s own testimony, that “at the time Desert Valley ceased working on the Property, the Project was approximately eighty-five (85%) done.” [VII JNT 1169] (¶ 64). Desert Valley also neglects to mention that, as of the date Inose

terminated the contract (December 8, 2015), Desert Valley had *already* instructed the subcontractors to leave the job and cease working on the property on November 16, 2015, which the District Court found was a material breach of the contract. *See* [VII JNT 1168] (§ 56) and [VII JNT 1169] (§62).

Notably, Desert Valley instructed the subcontractors to leave the job in response to Inose’s refusal to sign the surprise “master change order” that Desert Valley presented toward the end of the project. [VII JNT] (§§ 60–61). Inose refused to sign this massive “master change order”, as he had consistently relied on Desert Valley’s representations that any changes to the scope of work could be offset for no additional money, and that as of July 2015, no change orders were necessary. [VII JNT 1165] (§ 24); [VII JNT 1169] (§ 60). Therefore, Desert Valley stopped work on the project for reasons caused by its own faulty accounting and misrepresentations to Inose throughout the project.

With respect to the insurance proceeds, even though Inose closed the insurance claim without final authorization, he did so in response to Desert Valley’s “representing to both Fireman’s Fund [the insurance company] and Inose that it could complete the work for the total amount of Insurance Proceeds [to date] and that it had no change orders as of July 2015”, which the District Court held to be a breach of Desert Valley’s implied covenant of good faith and fair dealing. [VII JNT 1176] (§ 42). Therefore, Desert Valley’s failure to complete the work

within the confines of the insurance proceeds was, at least in part, Desert Valley's own fault.

Next, Desert Valley argues that it did not breach the contract by failing to pay subcontractors in full for work to be completed. Opening Brief at 20–21. In support of this argument, Desert Valley repeats its failed argument with respect to the insurance proceeds. *Id.* However, Desert Valley misses the point of this holding. The District Court found that Desert Valley failed to pay subcontractors in full based on the District Court's factual finding that "Inose paid directly to subcontractors the total amount of two-hundred fifty-six thousand four-hundred eighty-one dollars and forty-six cents (\$256,481.46) to complete work *for which Desert Valley had already been paid.* See Checks and Credit Card Statements, Exhibits 586 through 595." [VII JNT 1170] (§ 73) (emphasis added).

This finding (which cites trial exhibits from the bench trial before the District Court) makes clear that of the insurance proceeds that Inose *did* turn over to Desert Valley, at least a portion of those funds were meant to be paid to subcontractors and Desert Valley failed to do so. As a result, Inose was forced to come out of pocket by more than \$250,000 in order to pay the subcontractors to finish the work, some of which funds had already been remitted to Desert Valley. Thus, the District Court did not abuse its discretion in finding that Desert Valley failed to pay the subcontractors *in full* for the work they were hired to perform.

Finally, Desert Valley argues that it did not breach the contract by unilaterally approving change orders. Opening Brief at 21. Desert Valley argues that because Inose knew about the change orders but refused to sign them, that means Desert Valley did not unilaterally approve them. *Id.* Again, Inose refused to sign Desert Valley's change orders because he had relied on Desert Valley's representations that any changes to the scope of work could be offset for no additional money, and that as of July 2015, no change orders were necessary. [VII JNT 1165] (§ 24); [VII JNT 1169] (§ 60).

Moreover, the District Court made numerous findings of fact on this issue, and ultimately held that "Desert Valley breached its obligations under the Contract by unilaterally approving change orders received from subcontractors and failing to obtain approval of the same from Inose." [VII JNT 1174] (§ 27). The relevant findings are as follows:

❖ "Zachary and Merritt further testified that Desert Valley did not obtain Inose's approval or signature on any change orders throughout the course of the Project."

❖ "The majority of the subcontractor change orders dated before July 3, 2015 are approved by and/or signed by Merritt. *See, e.g.*, Exhibit 576 at IN-LO00255; Exhibit 82 at DVC000104; Exhibit 83 at DVC000105; Exhibit 90 at DVC000120."

❖ “Each of the Subcontractors confirmed through testimony that they had change orders on the Project which had been provided to and approved by Desert Valley prior to July 3, 2015.”

❖ “No change orders that were signed or approved by Inose were presented as evidence at trial.”

❖ “No written communications from Desert Valley to Inose prior to October 2015 indicating the existence of change orders were presented as evidence at trial.”

[VII JNT 1166] (¶¶ 35–39).

Based on the above, the complicated course of dealing between Inose and Desert Valley resulted in breaches of the construction agreement by both sides, and rendered both sides unable to establish any over- or under-payment by Inose, which thereby precluded relief to either. The District Court’s findings are entitled to deference and may be overturned only if this Court finds that the District Court abused its discretion. *See Crittenden*, 804 F.3d at 1020; *NOLM, LLC*, 120 Nev. at 739, 100 P.3d at 660–61. Desert Valley has not met its heavy burden to show an abuse of discretion in its latest appeal, which exceeds the scope of the narrow Remand Order issued by this Court in March 2021.

VII. CONCLUSION

In light of the foregoing, Inose respectfully requests that this Court affirm

the amended findings of fact and conclusions of law of the district court in full, without the need for further proceedings on remand.

Dated this 23rd day of February 2022.

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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 a proportionally spaced typeface using Microsoft Word 2010 in 14-point font Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 28.1(e)(1)–(2) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ Proportionately spaced, has a typeface of 14 points or more, and contains 7,724 words; or

☐ Does not exceed 40 pages.

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 23rd day of February 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the law firm of Holley Driggs, and that on this 23rd day of February 2022, the above and foregoing **RESPONDENTS' ANSWERING BRIEF** was e-filed and e-served on all registered parties to the Supreme Court E-Flex system and with the Clerk of Court.

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