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

REPLY

From the Eight Judicial District Court, Department XV
The Honorable Joe Hardy, District Judge
District Court Case No. A-16-734351-C

APPELLANTS' REPLY BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

Desert Valley Contracting, Inc. has no parent company and no publicly listed company owns 10% or more of the Appellant's stock.

This representation is made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 8th day of April, 2022

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INTRODUCTION

On or about August 2008, Respondent, EUGENE INOSE and IN-LO PROPERTIES, LLC (hereafter "Respondent"), built the custom residential home located at 587 Saint Croix Street, Henderson, Nevada 89012 (APN: 178-27-114-001) (hereinafter "Subject Property") through various subcontractors. In early August, 2014, the Subject Property sustained substantial water damage due to a burst pipe. At the time, the Respondent did not reside at the Subject Property, so the leak remained undetected for an unknown amount of time. Once the leak and water damages were detected, a friend of the Respondent contacted ServPro of Henderson, to begin the clean-up of the extensive water damage. ServPro of Henderson is a completely separate corporate entity from DESERT VALLEY CONTRACTING, INC. (hereafter referred to as "Appellant") with different ownership and different employees. ServPro of Henderson conducted the initial demolition of the water damaged property.

Thereafter, ServPro of Henderson referred Respondent to Appellant. After the Appellant and Respondent made contact, Mr. Inose and Appellant's Employee Daniel Merritt met at the property and discussed the damage and the remodel of the property. Thereafter, on August 24, 2014, Appellant, and Respondent, entered into a Contract wherein Appellant would complete perform the remediation and perform the restoration at the Subject Property. The Contract stated that;

"The undersigned hereby transfers, assigns and conveys to Contractor his/her/their right...to the insurance proceeds...The undersigned agrees to immediately endorse and tender all drafts as produced to the Contractor. The undersigned further agrees to authorize Desert Valley Contracting Inc. to sign on its behalf and/or deposit all insurance checks that are issued to pay for the services performed pursuant to the contract."

The Respondent never endorsed or tendered the payment drafts he received from the insurance company, FIREMANS FUND, to the Appellant as required by the Contract. Respondent also never allowed the Appellant to sign on Respondent's behalf or deposit the insurance checks themselves. The Respondent never relinquished control of the purse strings for this project. The documents show that the Respondent doled out payments to Appellant over the course of a year, from September 2014 to September 2015.

The Contract contemplates that work may be performed outside the scope of the Insurance Claim. The Contract states twice that all uninsured work, including uninsured code-upgrade work, or any form of work not covered under Owner's Insurance Policy would be the responsibility of the Appellant as signatory of the contract. The contract also states in multiple places that if the contractor is forced to bring suit the prevailing party would be entitled to attorney's fees and the legal interest rate of Prime Plus Two (2) points. The contract also states that requests for

additional work must be in writing so that they can be added to the Scope of Work. The contract does not say that they need to be signed by the Appellant to be added to the Scope of Work.

In September of 2014, Appellant began reconstruction of the Subject Property. During the demolition and reconstruction of the house, several revised budgets were presented to Respondents insurance company, FIREMAN'S FUND. During the performance of the Contract, Respondent chose to have several upgrades in materials and work added onto the Contract's scope of work, which increased the original Contract's scope of work and cost. Basically, the Respondent took this opportunity to remodel home on the insurance company's dime. These changes also caused delays in construction. The Court has heard testimony regarding the upgraded wine room, the upgrades to the pool area, and Master Bathroom. Additionally, other uncontrollable delays bedeviled the reconstruction, in particular, marble had to be imported from Tuscany and was not available for Three (3) months while it was held up in customs due to a dock workers labor dispute.

The testimony and exhibits have shown that the Respondent was a ubiquitous presence on the Property during the reconstruction. Mr. Inose received constant emails and telephone calls from the Appellant and from Rob Ramirez. He spoke directly to subcontractors as well and was intimately aware of Change Orders and the status of the project at all times. It is of course his right as owner to be involved

in the reconstruction of his home, but he cannot then feign ignorance later when the bill comes due.

On June 19, 2015, the Respondent was sent a copy of the Final Estimate and among other documents in an email from Brian Lynch of FIREMAN'S FUND. Against the advice of the Appellant, the Respondent closed out the claim following the production of this estimate. Then, in October 2015, the Appellant could no longer abide by the Respondent's demands for the upgrades and changes that were overrunning the insurance proceeds that were designed to reconstruct, not improve the residence. Nor could the Appellant stand not getting paid the insurance proceeds as they were being paid (in violation of the Agreement).

On November 18, 2015, the parties and their attorneys met at Appellant's counsel's offices and attempted to reach a compromise to compete the project. Following the meeting, Appellant believed that an agreement was made to pay off the subcontractors change orders and complete the project. However, following the meeting the Respondent barred the Appellant from the Subject Property and negotiated with the subcontractors directly. On December 7, 2015 sent Appellant correspondence terminating their contract. The Contract specifically states that should the Client (Respondent) terminate the Contractor (Appellant) after the work has begun, the Respondent is responsible for any fees and costs plus the profit the Appellant would have made had the Respondent not repudiated the Contract. To

date, the Respondent has not paid that amount. Following the termination, the Appellant attempted to continue negotiations through their counsel to no avail and filed this action on March 31, 2016.

A Bench Trial held on April 8, 9, 10, and 11, 2019, June 19, 20 and 21, 2019, and July 24, 2019. On July 24, 2019, the Court rendered its verdict wherein the Court did not award damages to either party. INOSE had previously sent DVC an Offer of Judgment in the amount of Fifty Thousand Dollars and Zero Cents ($50,000.00). Therefore, on November 18, 2019, the Court Granted INOSE's Motion for Attorney's Fees and Costs based on the Courts award of no damages. If the award of damages is overturned, then the Offer of Judgment is no longer satisfied.

The Notice of Entry of Findings of Fact and Conclusions of Law was filed on September 4, 2019. DVC filed a timely Notice of Appeal on September 30, 2019. On March 3, 2021 this Court issued an Order of Reversal and Remand. Thereafter, the parties exchanged briefs and the District Court heard arguments. The District Court ruled that the Scrivener's Error was harmless, and that Desert Valley Contracting had breached the agreement first. A timely notice of appeal was filed on July 6, 2021. An amended judgment was entered against Desert Valley Contracting Inc. and additional attorney's fees were awarded to the Respondent.

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LEGAL ARGUMENT

A. Desert Valley Contracting, Inc. Presented a Clear Calculation of Damages to the Court.

The Trial Court was clearly in error in ruling that the Appellant failed to prove its damages by a preponderance of the evidence. The Appellant was damaged by the breach of the Respondent. The Appellant had a reasonable expectation of their profit and overhead for the project under the industry standard Ten Percent (10%) overhead and Ten Percent (10%) profit. Pursuant to the uncontradicted testimony of DVC owner Dennis Zachary, the Contract was to be performed on a "10 and 10" basis, meaning that Desert Valley was entitled to (10%) profit and (10%) overhead based on the amount Desert Valley Contract, Inc. spent on the project.

The general goal of contract damages is to provide compensation for the injured party based on the injured party's expectation interest. 3 D. Dobbs, Law of Remedies § 12.2(1), at 22 (2d ed. 1993); Restatement (Second) of Contracts § 347cmt. a (2008). Although there are other remedies available for an injured party in a breach of contract situation, the general and traditional goals of awarding damages in a breach of contract case are aligned with the expectation/compensation remedy. Dobbs, § 12.2(1), at 22.

More specifically, "[c]ontract damages . . . are intended to give [the nonbreaching party] the benefit of his bargain by awarding him a sum of money that

will, to the extent possible, put him in as good a position as he would have been in had the contract been performed," and no better. *Restatement (Second) of Contracts § 347 cmt. a; Dobbs, supra, § 12.2(1), at 23; Colorado Env't, Inc. v. Valley Grading Corp.,* 105 Nev. 464, 470, 779 P.2d 80, 84 (1989) ("It is fundamental that contract damages are prospective in nature and intended to place the nonbreaching party in as good a position as if the contract had been performed."); *Dalton Properties, Inc. v. Jones,* 100 Nev. 422, 424, 683 P.2d 30, 31 (1984) (stating that placing the nonbreaching party in as good a position as if the contract had been performed is the "object of compensatory damages").

In this matter, the Parties Contract states that if the Client terminates the contract before the work is completed, they shall be responsible for the profit the Contractor would have been made had the contract not been repudiated. The Appellant's cost for the project was One Million, Twelve Thousand, Four Hundred, Fifty One Dollars and Eight Cents ($1,012,451.08)(Appendix Volume VII Exhibit 14, JNT0001170). At a Twenty (20%) profit, the Appellant is entitled to a total of One Million, Two Hundred Fourteen Thousand, Nine Hundred Forty One Dollars and Thirty Cents ($1,214,941.30). The Appellant was paid approximately One Million, One Hundred, Twenty-Five Thousand, Seven Hundred Forty Three Dollars and Seventy-Two Cents, ($1,123,743.72). Therefore, Appellant has been damaged

in the amount of approximately Eighty-Nine Thousand, One Hundred Ninety Seven Dollars and Fifty Eight Cents ($89,197.58).

The claim for damages is based on the amount that Appellant paid. There is nothing inflated about the Job and Billing Detail (Appendix Volume VII, Exhibit 13, JNT0001139). At no point in the trial did opposing counsel argue that these amounts were not paid. These amounts reflect what DVC actually paid out for labor, vendors, subcontractors, and other costs. The fact that they received a portion of their profit and overhead does not mean they were not damaged. They paid out One Million, Twelve Thousand, Four Hundred, Fifty-One Dollars and Eight Cents ($1,012,451.08). They received approximately One Million, One Hundred, Twenty-Five Thousand, Seven Hundred Forty-Three Dollars and Seventy-Two Cents, ($1,123,743.72) in payments. The Respondent provided no counter testimony regarding the billing records that Desert Valley Contracting provided of the testimony of Desert Valley Contracting Inc.'s owner Dennis Zachary. Desert Valley Contracting Inc. is still owed Eighty-Nine Thousand, One Hundred Ninety-Seven Dollars and Fifty-Eight Cents ($89,197.58), by the Respondent.

B. The Supreme Court Did Not Adopt the District Court's Findings of Fact and Conclusions of Law in their March 3, 2021, Remand.

At no point in the March 3, 2021, Order of Reversal and Remand did the Supreme Court make a finding of fact regarding the damages or the underlying claim

or state that they were adopting the District Courts Findings of Fact and Conclusions of Law. Therefore, restatement of the underlying argument is appropriate.

The Respondent is mistaken that the Remand Order affirmed the District Court's Finding of Fact and Conclusions of Law. The Remand Order instructed the District Court to correct their error regarding the Scrivener's error and to make a determination regarding who breached the party's agreement first before they proceed further regarding the arguments of the Appellant. The Remand Order was not a rubber stamp of the District Court's Findings of Fact and Conclusions of Law.

The Supreme Court did remand for further argument Two (2) issues. First, the concluded that the contract provisions regarding termination by the Client contained a Scrivener's error and that the District Court erred by construing the language against the drafter *Galardi v. Naples Polaris,* LLC, 129 Nev. 306, 309, 301 P. 3d 364, 366 (2013). The Supreme Court also remanded the case to the District Court to make a ruling as to who breached first or if the breaches were mutual. The Remand Order did not affirm or overturn any other of the District Court's Finding of Fact and Conclusion of Law. Those were left alone pending the District Courts further analysis.

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C. Desert Valley Contracting, Inc. did not commit Material Breach the Contract Agreement.

The District Court abused its discretion when it ruled that Desert Valley Contracting Inc. breached the Contract Agreement first. On Page 4 of the Amended Findings of Fact and Conclusion of Law the District Court states that the first Material Breach of the Construction Agreement was committed by Desert Valley Contracting when it stopped work and informed the Subcontractor's that they were to also stop performing work at the project. (Appendix JNT001224-5). According to the District Court this was the first Material Breach. However, Desert Valley Contracting, Inc.

However, the Contract Agreement clearly states that in the event that insurance proceeds are not issued, the contractor has the right to stop work until such time the proceeds are released (JNT001138). The Appellant provided undisputed testimony that 1) the Respondent had the insurance checks issued to himself (a material violation of the Agreement) and 2) that the Respondent had withheld insurance proceeds as they were distributed. The Appellant was clearly within their contractual rights to halt work on the project until they were paid for their work. Whether they had been paid Eight-Five percent (85%) of the contract price does not alter the fact that funds were being withheld from the Appellants and that the Respondent had clearly committed a material breach of the Contract Agreement first.

The District Court abused its discretion when it ruled that Desert Valley Contracting Inc. breached the Contract Agreement first.

When parties exchange promises to perform, one party's material breach of a promise discharges the non-breaching party's duty to perform. *Cain v. Price*, 134 Ne. 193, 196, 415 p 3d 25, 29 (2018). In this case, the Respondent clearly materially breached the Contract Agreement before the Appellants decided to quit work. Any other interpretation is non-sensical. The Appellant ceased working in direct response to the Breach of Contract committed by the Respondent. Had the Respondent continued to pay the Appellant, the Appellant would have continued to work on the project.

D. The Other Alleged Breached are Not Mutual

The Appellant's opening brief addresses the other alleged Material Breaches by Desert Valley Contracting, Inc. however it must be reiterated, that DVC had nothing to do with the remediation of the water damage of the Subject Property, the Appellant and now the District Court have mistaken ServePro of Henderson for an entity related to Desert Valley Contracting, Inc. See Respondent's Answering Brief Appendix Exhibit 8. The Findings of Fact and Conclusions of Law issued by the Court on September 4, 2019, are internally inconsistent as stated in the Opening Brief.

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E. The Appellant was Contractually Entitled to Cease Work on the Project.

Here, the Court has before it a clear and unambiguous contract provision that allows the Appellant to cease work if payment is withheld. The District Court seeks to re-write this bargained for right of the Appellant and transform this contractual right into a "material breach". [T]he words of the contract must be taken in their usual and ordinary signification. *Parsons Drilling, Inc. v. Polar Resources*, 98 Nev. 374, 376, 649 P.2d 1360, 1362 (1982). The parties agreed that non-payment gave the Appellant the right to cease work on the project. The Respondent is a sophisticated businessman. He had ample opportunity to review and reject any contract provisions he found objectionable. Desert Valley Contracting, Inc. ceased working to get the cost overruns under control and get an exit plan together to finish the project.

It was the Respondent who decided to terminate Desert Valley Contracting, Inc. from the project after the parties were working toward a resolution.

Q Okay. But you guys were trying to work things out with him. You didn't -- you stopped work because the change orders weren't being paid, and you needed to get all the numbers correct, right?
A Yes.
Q Okay. So you didn't terminate the contract, he actually terminated the contract?
A Yes, he sent us the letter. Yes, he did.

Testimony of Daniel Merritt Appendix Volume 4 JNT000897

The Appellant had the contractual right to stop work until payment was made, but it was the Respondent who ultimately terminated DVC from the Project. How

could the Appellant be in breach of the contract if they are ready and willing to continue work?

The Respondent is a sophisticated businessman. He had ample opportunity to review and reject any contract provisions he found objectionable. Nevada Revised Statute 624.626 gives subcontractors the right to cease work if they are not paid by the Prime Contractor. Without funds from the Appellant, Desert Valley Contracting Inc. was facing liens and litigation from the Subcontractors. Even absent an explicit contractual contract clause, it is fundamentally inequitable to require the Appellant to remain on the project without compensation. The District Court's position that the Appellant should have remained on the project without further payment from the Respondent is clearly erroneous. The District Court has abused its discretion by determining that by enforcing this contract provision that the Appellant committed a Material Breach.

F. The Court's Error is Not Harmless.

The Breach by the Respondent excuses and allows the Appellant to cease work on the project. The Appellant bears the burden of showing that the error committed by the District Court is not harmless. That standard is met when the complaining party provides sufficient evidence showing that, but for the error, a different result might have been reached. *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 194 P.3d 1214 (2008). Here, the District Court appears to have

determined that everyone breached the agreement, and that it's a wash and the parties should walk away. Nothing could be further for the truth. Desert Valley Contracting attempted to work with the Respondent throughout the process and only exercised their contractual right to cease work on the project when they could go no further. Had the court found that the Respondent breached the agreement first then the Appellant would have prevailed in the lawsuit and prevailed on the attorney's fees provision contained therein. The error by the Court was the linchpin of the District Court's decision and was clearly not harmless.

CONCLUSION

Throughout the project that is the basis of the underlying litigation, the Respondent attempted to circumvent the written agreement between the parties. The Respondent sought every upgrade every, every advantage he could get out of Desert Valley Contracting, Inc. The District Court failed to hold Respondent to his written agreement. The District Court has abused its discretion in determining that Desert Valley Contracting, Inc. breached their agreement.

The Respondent terminated the Appellant from the Project, which was his contractual right to do. However, the is still liable for the contractual portion of the Profit and Overhead that is due to Desert Valley Contracting, Inc. For the foregoing reasons, the judgment of the District Court should be reversed and remanded to the District Court, and DVC should be awarded Eighty-Nine Thousand, One Hundred

Ninety-Seven Dollars and Fifty-Eight cents ($89,197.58) in damages against INOSE.

Date: April 8, 2022.

HURTIK LAW & ASSOCIATES

By: /s/: JONATHON R. PATTERSON

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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 opening brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this opening brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains 4276 words.

FINALLY, I CERTIFY that I have read this Appellant's Reply 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 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 answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8th day of April.

HURTIK LAW & ASSOCIATES

By:

_____

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CERTIFICATE OF SERVICE

I JONATHON R. PATTERSON, HEREBY CERTIFY that I am an employee of HURTIK LAW AND ASSOCIATES, and that on the 20th day of August 2020, I caused to be served a true and correct copy of the foregoing APPELLANT'S REPLY by United States Mail by depositing a copy of the above-referenced document for mailing in the United States Mail, first class postage prepaid, at Las Vegas, Nevada, to the parties listed below at their last known mailing addresses, on the date above written:

Date: April 8, 2022

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