

IN THE SUPREME COURT OF THE STATE OF NEVADA

SEAN EVENDEN, an individual; *
ROGER AYALA, an individual, *

Appellants, *

v. *

NANCY HAACK, an individual; and *
NRS REALTY GROUP, LLC, a *
Nevada Limited Liability Company, *
d/b/a LIFE REALTY. *

Respondents, *

Supreme Court No. 81473

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Clark County, Nevada

APPELLANTS' OPENING BRIEF ON APPEAL

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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 judges of this court may evaluate possible disqualification or recusal.

1. Appellants Sean Evenden and Roger Ayala are natural persons.
2. In all proceedings before the Eighth Judicial District Court, appellants herein were represented by Patrick J. Sheehan, Esq. of the law firm Fennemore Craig.
3. In all proceedings before this Honorable Court, appellants herein are represented by Stephen I. Vladeck, Esq., a law professor unaffiliated with any law firm, and Maurice B. VerStandig, Esq., of The VerStandig Law Firm, LLC.

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IV. Jurisdictional Statement

This Honorable Court has jurisdiction over the appeal *sub judice* pursuant to the allowances of Section 2.090 of the Nevada Revised Statutes and Nevada Rule of Appellate Procedure 3A(b)(1), as this matter concerns review of a final judgment entered in an action in the district court where the matter was commenced. Nev. R. App. P. 3A(b)(1).

This appeal is timely as the final judgment below was docketed on June 17, 2020 (Appendix vol. IV at p. 875), with written notice of the entry of said judgment being then docketed on July 9, 2020 (Appendix vol. IV at p. 902), and this appeal being properly noticed on July 10, 2020 (Appendix vol. IV at p. 932).

The judgment appealed from herein is a final judgment inasmuch as it disposes of all issues presented to the district court, concludes all business of the district court save for the entertainment of post-judgment motions for attorneys' fees, and "leaves nothing for the future consideration of the court." *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000).

V. Routing Statement

This matter is one presumptively retained by this Honorable Court as this case raises as a principal issue a question of first impression involving the Nevada Constitution. Nev. R. App. P. 17(a)(11). Specifically, this case raises the questions of whether (i) Article 3, Section 1 of the Nevada Constitution; (ii) Article 6, Section

6 of the Nevada Constitution; and (iii) Article 6, Section 1 of the Nevada Constitution prohibit a district court from delegating to a private party the right to conclusively fix and determine damages in a civil dispute.

VI. Statement of Issues Presented for Review

The following questions are submitted for review herein:

a. Did the trial court violate Article 3, Section 1 and Article 6, Section 6 of the Nevada Constitution when it delegated to a private third party the power to conclusively fix the damages awarded in this case?

b. Did the trial court violate Article 6, Section 1 of the Nevada Constitution when it delegated to a private third party the power to conclusively fix the damages awarded in this case?

c. Did the trial court err in finding for the plaintiff below on her claims for breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing in the absence of evidence establishing actual damages?

VII. **Statement of the Case**

This matter concerns a protracted dispute between and amongst the members of a realty firm, the factual nuances of which are largely immaterial to this appeal. The district court heard claims and counterclaims premised upon various civil causes of action typically attendant to the infighting-fueled demise of a limited liability company, all of which were tried to the bench. Following trial, the court below found in favor of Nancy Haack (“Plaintiff Haack” or the “Respondent”) on her claims for (i) breach of the implied covenant of good faith and fair dealing; and (ii) breach of fiduciary duty. All other claims and counterclaims were resolved in favor of the party(ies) defending such claims and counterclaims.

In its decision and order (the “judgment”), however, the district court expressly found “in conjunction with Haack’s undisputed distribution profits, Plaintiff never proved any damages.” Appendix vol. IV at p. 889, ll. 20-21. In light of the resultant inability to award any damages on this and related fronts, the court below created an unorthodox dispute resolution regime whereby it directed Plaintiff Haack to nominate three (3) “independent accountants,” of whom Sean Evenden (“Mr. Evenden”) and Roger Ayala (“Mr. Ayala”) (collectively, the “Appellants” or “Defendants”) would select one (1) to provide an accounting of the parties’ realty firm, also directing the Defendants to pay for such accounting. Appendix vol. IV at p. 900, ll. 17-23. The court below then directed the selected accountant to

“determine the value of NRS Realty Group, LLC at the time of its closing,” and ordered the Defendants to “pay Nancy Haack one-third of the profits and value, minus any distributions that Haack already received, based on that independent accounting.” Appendix vol. IV at p. 900, ll. 21-25.

This appeal was timely noticed following entry of the judgment (Appendix vol. IV at pp. 932-933), with the parties continuing to litigate cross-claims for attorneys’ fees and costs below as of the drafting of this brief.

VIII. Statement of the Facts

Plaintiff Haack, alongside Messrs. Evenden and Ayala, formed a real estate brokerage firm, known as NRS Realty Group, LLC (“NRS”), in May 2010. Appendix vol. IV at p. 876, ln. 16-19. Commensurate with the opening of NRS, the parties hereto executed an operating agreement (the “Agreement”). Appendix vol. IV at p. 879, ll. 8-11.

Ultimately, the business relationship between the parties – with Messrs. Evenden and Ayala on one side, and Plaintiff Haack on the other side – “rotted to its core.” Appendix vol. IV at p. 887, ln. 21. Infighting ensued with parties threatening one another, and the parties took respective actions that ultimately led to the commencement of this litigation. Appendix vol. IV at p. 876, ll. 21-26.

Plaintiff Haack initiated this case, bringing suit against Messrs. Evenden and Ayala for breach of contract, breach of the implied covenant of good faith and fair

dealing, conversion, indemnity, accounting, interference with prospective economic advantage, and usurpation of corporation opportunities. Appendix vol. I at pp. 10-16. Shortly after filing this case, Plaintiff Haack amended her pleading to add a claim for breach of fiduciary duty. Appendix vol. I at p. 35.

Messrs. Evenden and Ayala, in turn, filed a counterclaim against Plaintiff Haack, alleging breach of contract, breach of the implied covenant of good faith and fair dealing, tortious interference with contract and prospective economic advantage, and declaratory relief. Appendix vol. I at pp. 45-47.

The case was tried to the bench of the eighth judicial district court (the “trial court”), with the Honorable Stefany A. Miley presiding, from February 18, 2020 through February 21, 2020. Appendix vol. IV at p. 875, ll. 23-24. Approximately four months later, the trial court issued its judgment in this case. Appendix vol. IV at p. 901, ln. 2.

The trial court ultimately ruled against the proponent of nearly every cause of action tried below, finding for Messrs. Evenden and Ayala on six of Plaintiff Haack’s eight claims for relief, and finding for Plaintiff Haack on all four of the causes of action set forth in Messrs. Evenden and Ayala’s counterclaim. Appendix vol. IV at pp. 875-901. The trial court did, however, find for Plaintiff Haack on her claims for (i) breach of fiduciary duty; and (ii) breach of the implied covenant of good faith and fair dealing. Appendix vol. IV at 891 ll. 14-16; *id.* at 893 ll. 6-9.

In its judgment, the trial court expressly noted Plaintiff Haack's inability to prove cognizable damages on most of her claims below, finding, *inter alia*:

[I]n conjunction with Haack's undisputed distribution profits, Plaintiff never proved any damages. The Forensic Accountant was unable to specify damages due to his repeated testimony that he needed more documents and information to make a conclusion. His report only noted possible areas of misappropriation.

Id. at 889 ll. 20-25. The trial court did, however, find the existence of damages in connection with Plaintiff Haack's claim for breach of the implied covenant of good faith and fair dealing, "While Plaintiff may not have originally pled the loss of salary in her Second Amended Complaint, the salary taken by Sean Evenden and Roger Ayala is evidence of damages suffered by Nancy Haack in this matter." *Id.* at 891 ll. 18-20.

In holding Messrs. Evenden and Ayala breached their respective fiduciary duties, the Trial Court did not make any finding of damages whatsoever. *Id.* at 892 ll. 1-893 ll. 13. In fact, the trial court noted that Plaintiff Haack herself acknowledged the salaries taken by Messrs. Evenden and Ayala (the only form of damages noted anywhere in the Judgment) to be below "the industry standard." *Id.* at 893 ll. 2-4.

With the trial court being unable to find any damages aside from Plaintiff Haack not being paid an equivalent salary (the sum of which is not established in the judgment or elsewhere in the record), but nonetheless finding for her on two

counts of her amended pleading, the trial court fashioned a remedy allowing for damages to be established post-judgment by a third party of Plaintiff Haack's nomination:

Plaintiff shall submit a list of three proposed independent accountants to Defendants who will choose one of the proposed accountants to provide an independent accounting of NRS Realty Group, LLC, including but not limited to, the profitability of the company from 2016 until the closing of NRS. The accountant shall also determine the value of NRS Realty Group, LLC at the time of its closing. The expense of the independent accountants shall be paid by Defendants. Further, Sean Evenden and Roger Ayala shall pay Nancy Haack one-third of the profits and value, minus any distribution that Haack already received, based on the independent accounting.

Id. at 900 ll. 16-25.

This appeal was timely noticed. *Id.* at 932-33.

IX. Summary of Argument

The three questions presented for review in this appeal may be best classified as falling into two categories: (i) whether the trial court contravened the Nevada Constitution by delegating to a private party the power to conclusively fix and determine damages; and (ii) whether the trial court erred in finding Messrs. Evenden and Ayala liable for tortious conduct in the absence of damages being proven at trial.

This is a case of first impression under the Nevada Constitution, but only because no trial court appears to have ever attempted the maneuver at issue here — and for good reason. By delegating the power to conclusively fix the damages in

this case to a private party, the trial court not only improperly delegated the *judicial* power vested by the Nevada Constitution to a non-judicial actor, but it also improperly endeavored to exercise *legislative* power by purporting to identify a “referee” in this case — authority committed exclusively to the Nevada legislature. Either of those violations of the Nevada Constitution are sufficient to vacate the decision below.

The district court’s second error is more ordinary in nature, sounding solely in the elemental construct of two common law causes of action. But if, as it should, this Court returns this matter to the district court in light of these constitutional infirmities, it should also reverse the trial court’s judgment insofar as it (1) ruled for Plaintiff Haack on her claim for breach of fiduciary duty despite the district court’s expressly finding that no damages had been proven; and (2) authorized damages for Plaintiff Haack on her claim for breach of the implied covenant of good faith and fair dealing even though the record is devoid of any quantification of correlative damages. Damages are elemental to both of these causes of action; since Plaintiff Haack failed to sufficiently prove damages below, she cannot — as a matter of law — have prevailed on either cause of action.

This Court need not reach the constitutional infirmities of the trial court’s judgment if it is found Plaintiff Haack failed to sufficiently prove damages, as such would result in a remand with instructions to enter judgment in favor of Messrs.

Evenden and Ayala. This argument is presented second, however, because the constitutional issues raised on this appeal serve to evidence the trial court's inability to find any legally cognizable damages; had damages been conclusively proven at trial, there would not have been a need for the trial court to contravene constitutional protections in search of cognizable damages.

X. **Argument**

a. **The Holding Below is an Unconstitutional Delegation of Judicial Powers to a Private Citizen**

By ordering an accountant to fill the role of a referee and conclusively fix and award damages, the trial court engaged in an unconstitutional delegation of the judicial power of the State of Nevada to a private citizen. The judgment serves to *de facto* establish a new judicial officer — imbued with the power to conclusively determine a putative debt and direct the payment thereof — and does so in contravention of Article 6, Section 1 and Article 3, Section 1 of the Nevada Constitution.

The first of these two clauses provides that “[t]he Judicial power of this State is vested in a court system, comprising a Supreme Court, a court of appeals, district courts and justices of the peace. The Legislature may also establish, as part of the system, Courts for municipal purposes only in incorporated cities and towns.” Nev. Const. art. 6, § 1. The second provision provides, in turn:

The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

Nev. Const. art. 3, § 1(1).

As this Court has long explained, “Nevada follows the maxim ‘*expressio unius est exclusio alterius*,’ the expression of one thing is the exclusion of another.” *State v. Javier C.*, 128 Nev. 536, 541, 289 P.3d 1194, 1197 (2012) (citing *Cramer v. State, DMV*, 126 Nev. 388, 394, 240 P.3d 8, 12 (2010)). Here, the constitutional expression of a judicial system consisting, *en toto*, of (i) a Supreme Court; (ii) a court of appeals; (iii) district courts; and (iv) justices of the peace, is to the necessary exclusion of a judicial system consisting of any other officers or departments. The Nevada Constitution does not allow for accountants to assume the judicial power of the state, nor does it allow for referees to assume any part of the judicial power of the state in the absence of legislative approval. Even in the federal system, where current doctrine recognizes fewer constraints on the delegation of powers (and where the Constitution does not include an express non-delegation provision like Article 3, Section 1 of the Nevada Constitution), only *Congress* can delegate the “judicial power of the United States” to non-Article III tribunals; the courts have no authority to do so themselves. *See Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1958 (2015) (Roberts, C.J., dissenting) (“Article III judges have no

constitutional authority to delegate the judicial power—the power to ‘render dispositive judgments’—to non-Article III judges, no matter how closely they control or supervise their work.” (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995))).

Rather, and as discussed in greater detail *infra* in connection with an analysis of the limited constitutional allowance of referees, the Nevada Constitution permits only the four delineated courts to exercise the state’s judicial powers. Even where masters and referees are permitted, they are to serve limited functions crafted to aid the correlative trial court in its exercise of the judicial power — not to take that judicial power from the trial court.

Yet, here, the trial court delegated a core feature of its judicial power — the power to “render [a] dispositive judgment[],” *Plaut*, 514 U.S. at 219 — to an accountant, to act as a referee, to be nominated by Plaintiff Haack. The accountant is imbued with the absolute, unchecked, and unfettered authority to “determine the value of NRS Realty Group, LLC at the time of its closing” and, in so doing, to conclusively fix the “profits and value” of the entity, with Messrs. Evenden and Ayala being mandated to pay one third of that sum to Plaintiff Haack. Appendix vol. IV at 900 ll. 16-25.

This is not the first time an actor of the state government has encroached the limited constitutional provision of a four-prong state judiciary. Almost 100 years

ago, the state’s legislature enacted a water law inclusive of provisions permitting a state engineer to hear “contests” concerning water rights. In striking down those various legislative enactments, this Court observed, *inter alia*:

Counsel for appellants insist that the time has now come for an authoritative decision of the special question whether sections 29, 30, 31, and 32 of the present water law relative to “contests” are unconstitutional, because they attempt to confer judicial powers upon the state engineer to hear and determine questions properly and only determinable by a regularly organized court. . . .

We are of the opinion that the sections specified are unconstitutional, because they attempt to give judicial powers to the state engineer to hear and determine contests involving not relative but vested rights, which the statute itself expressly inhibits.

Pitt v. Scrugham, 44 Nev. 418, 195 P. 1101, 1103 (1921) (emphasis added).

The *Pitt* holding is striking because it shows that even where the Nevada legislature endeavors to expand the judicial powers of the state, and even where the expanded power is vested in a state employee, it is still an unconstitutional delegation of the judicial power of the State of Nevada. If a presumptively disinterested civil servant charged by the elected representatives of the State with exercise of discretion over exceedingly niche legal disputes could not withstand constitutional scrutiny, it is impossible to see how a private accountant – nominated by Plaintiff Haack herself and with no statutory authorization – could possibly survive the same constitutional scrutiny.

Analogously, during the pendency of this appeal, the United States Court of Appeals for the Third Circuit remanded a case where:

[T]he District Judge's law clerk conducted a telephonic status conference, “advise[ing counsel] that the court was intending to grant the government's motions to exclude defendant's expert testimony.” The law clerk explained that the basis for the exclusion was Rules 403 and 704(b) and that a written opinion would be forthcoming. No opinion or order was ever docketed. Notably, the District Judge did not participate in the telephone status conference. The call went unrecorded and has not been transcribed.

United States v. Heinrich, 971 F.3d 160, 162 (3d Cir. 2020) (internal citations omitted).

In *Heinrich*, the appellate court reasoned, *inter alia*, the delegation of power to a judge’s law clerk was impermissible in nature:

District judges have broad powers, some of which they may properly delegate to a law clerk, who serves as a “judicial adjunct.” But a law clerk's “duties and responsibilities are to assist [a] judge in his work, not to be the judge.” **Problems arise when a law clerk engages—** whether through his own initiative or at the behest of his or her judge— **in judicial tasks that are nondelegable.**

Id. at 164 (quoting *Connolly v. Nat’l Sch. Bus Serv., Inc.*, 177 F.3d 593, 599 (7th Cir. 1999); citing *Sanders v. Union Pac. R.R. Co.*, 193 F.3d 1080 (9th Cir. 1999); *Riley v. Deeds*, 56 F.3d 1117 (9th Cir. 1995); and *United States v. Long*, 301 F.3d 1095 (9th Cir. 2002)) (emphasis added)

Pitt and *Heinrich* both illustrate the longstanding common sense rule that, while a judicial officer may be assisted by an actor not imbued with judicial power,

a judicial officer may *not* delegate her or his judicial power to a third party — even when that third party is a fellow civil servant. *Pitt* evidences such a delegation to be a direct violation of the Nevada Constitution; *Heinrich* shows the myriad record-centric problems (which necessarily invite due process concerns) that result from such an unlawful delegation.

While the verbiage and substance of the judgment from which this appeal springs may be appreciably odd, the fundamental principles contravened by that verbiage are far more familiar. As eloquently stated by this Court as far back as 1886:

The constitution deals with subjects which are intended to govern the people in their rights and privileges. In treating of the judicial department, it declares in what courts “the judicial power of this state shall be vested.” It defines the jurisdiction and authority of these courts, and specifies the powers possessed by the judges.

State v. County Com’rs, 19 Nev. 332, 10 P. 901, 907 (1886).

What Messrs. Evenden and Ayala ask herein is that the *Pitt* Court’s holding, the sound judicial philosophy set forth in *Heinrich*, the plain text of Article 6, Section 1 of the Nevada Constitution, and the equally plain text of Article 3, Section 1 of the Nevada Constitution, be honored. The constitutional scheme of this state does not allow for judges to unilaterally delegate their judicial power to anyone, much less to private citizens to conclusively fix and award damages in a civil action pursuant to such a delegation. Yet that is exactly what the trial court did here. And

it is thus respectfully submitted that the trial court's final judgment ought to be reversed on the basis that it is facially unconstitutional in nature.¹

b. The Trial Court Unconstitutionally Encroached Exclusively Legislative Powers in Appointing a Referee

The trial court's delegation of its judicial powers to an accountant, acting in the role of a referee, also reflects a second — and equally problematic — constitutional infirmity. The Nevada Constitution is clear that only the state's *legislature* may direct the utilization of referees in the district courts, and this Court recently reinforced the plain meaning of that provision.

Under Article 6, Section 6 of the Nevada Constitution, “The legislature may provide by law for: (a) Referees in district courts. . . .” Nev. Const. art. 6, § 6(2).

Under the same ‘*expressio unius est exclusio alterius*’ doctrine set forth above, this

¹ To the extent Plaintiff Haack challenges the finality of the judgment below, Messrs. Evenden and Ayala anticipate responding to such challenge in their reply brief *sub judice*. However, in addition to the notation of finality in the jurisdictional statement (*supra*, § iv), Messrs. Evenden and Ayala respectfully note the judgment expressly provides “judgment *shall* be awarded” (Appendix vol. IV at 900 ll. 6-7) (emphasis added) and Messrs. Evenden and Ayala “are *required* to pay Nancy Haack an equivalent amount of money in salary that they were paid after amending the Operating Agreement of [NRS].” *Id.* at ll. 10-11 (emphasis added). This language – as well as the whole of the judgment – renders clear that there is no further work for the trial court and that its business in this matter is concluded. *Lee*, 116 Nev. at 426, 996 P.2d at 417. Moreover, the judgment does not contain any reservation of jurisdiction, nor any direction the parties may take exceptions from the referee's order (let alone a method or manner for so doing). There is, at core, not only no further work for the trial court but, too, no mechanism for the parties to return to the trial court.

language is to the necessary preclusion of a judicial officer having the right or power to appoint a referee. *Javier C.*, 128 Nev. at 541, 289 P.3d at 1197 (citing *Cramer*, 126 Nev. at 394, 240 P.3d at 12).

Just two years ago, this Court reversed and remanded a district court ruling concerning a termination of parental rights, reasoning that the district court violated this constitutional provision when it utilized a “hearing master” who presented a recommendation to the district court which, in turn, was subject to objection and judicial review (something not even available in this case):

The Nevada Constitution allows the Legislature to “provide by law for ... [r]eferees in district courts.” Accordingly, in certain Chapters of the Nevada Revised Statutes, the Legislature has provided that the district courts may appoint a master or referee to hear and determine particular matters subject to the district court’s supervision and review. The Legislature, however, has not enacted a law allowing the district courts to allocate the duty to hear a termination of parental rights petition to a master. The termination of parental rights is governed by NRS Chapter 128 and there is no statute within that chapter providing for the appointment of a referee or master. Further, there is no other statute outside of NRS Chapter 128 authorizing the use of masters in actions to terminate parental rights.

Matter of K.J.B., Docket Number 71515, 409 P.3d 52 (Nev. Jan. 18, 2018) (unpublished disposition) (quoting Nev. Const. art. 6, § 6(2)(a); citing NRS 3.405; NRS 125.005; NRS 432B.470; NRS 128.090(1)).

To be sure, Nevada’s statutory scheme does contain certain provisions for the use of referees. *See, e.g., Henry v. Nev. Comm’n on Judicial Discipline*, 135 Nev. 34, 36, 435 P.3d 659, 661 (2019) (“Although hearing masters are not specifically

enumerated in the Nevada Constitution, the Nevada Constitution still gives the Legislature authority to enact laws regarding referees in district courts. Since NRS 1.428 concerns referees in district courts, we conclude its enactment was constitutional.”). Yet none of those provisions speak to (i) the utilization of referees in cases where the district court is itself unable to discern damages following trial in which a party fails to actually prove damages; or (ii) the utilization of referees in a manner that does not include a provision for the taking of exceptions to the district court.

In fact, the rules governing civil procedure in Nevada’s trial courts create a very specific – and equally strict – procedural mechanism for the appointment of a master where permissible, with such an appointment only being proper upon (i) stipulation of all parties; (ii) motion (to which an opposition may be noted and heard in the ordinary course); or (iii) the court’s own order to show cause why a master ought not be appointed. *See Nev. R. Civ. P. 53(b)*. And when such a master is appointed:

The appointing order **must state**: (A) the master’s duties, including any investigation or enforcement duties, and any limits on the master’s authority under Rule 53(d); (B) the circumstances, if any, in which the master may communicate *ex parte* with the court or a party; (C) the nature of the materials to be preserved and filed as the record of the master’s activities; (D) the time limits, method of filing the record, other procedures, and any criteria for the master’s findings and recommendations; and (E) the basis, terms, and procedure for fixing the master’s compensation under Rule 53(g).

Nev. R. Civ. P. 53(c) (emphasis added).

Here, the trial court's judgment most certainly does not state (i) "the circumstances, if any, in which the master may communicate ex parte with the court or a party;" (ii) "the nature of the materials to be preserved and filed as the record of the master's activities;" or (iii) "the time limits, method of filing the record, other procedures, and any criteria for the master's findings and recommendations." Nor does it cite to any statutory authority that would allow it to appoint a referee to fix damages, let alone that would allow it to shirk the requirements of Rule 53(c) in the process. Thus, even if the appointment of a referee was permitted by the legislature on these facts (which it is not), such appointment would still have been invalid.

More problematically, however, since there is no legislative provision for the appointment of a referee in this case, there is, equally, no provision for the taking of exceptions to the referee's ultimate findings. Even when referees are permitted, they are not imbued with judicial power; they are merely given the ability to collect evidence and make a report and recommendation to a bona fide judicial officer of the State of Nevada:

Special masters may only exercise limited authority. This court has explained that "[m]asters are appointed 'to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause,' and not to place the trial judge into a position of a reviewing court."

Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court of State ex rel. County of Clark, 118 Nev. 124, 129, 41 P.3d 327, 330 (2002) (quoting *Russell v. Thompson*, 96 Nev. 830, 834, 619 P.2d 537, 539 (1980) (quoting *Ex parte Peterson*, 253 U.S. 300, 312 (1920)); citing *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957)).

In this case, the trial court has appointed a referee to oversee a type of inquiry for which the legislature has not authorized the appointment of referees, the trial court has done so without adhering to the rules governing the appointment of referees, the trial court has done so without an order setting forth the required parameters of the referee's work, the trial court has done so in a manner that openly violates the rule of *Venetian Casino Resort, LLC*, and the trial court has done so in blatant disregard for Article 6, Section 6 of the Nevada Constitution. The trial court therefore acted in violation of the Nevada Constitution when it delegated the power to conclusively fix damages to a third party.

c. Plaintiff Haack's Failure to Prove Damages at Trial Precludes her From Recovering Monies Herein

i. Plaintiff Haack Cannot Prevail on Her Claim for Breach of Fiduciary Duty Since No Damages Were Found

The trial court also committed reversible error by finding Plaintiff Haack to have failed to prove damages while also finding Plaintiff Haack to have prevailed upon a common law cause of action for which proof of damages is elemental. As a

matter of law, Messrs. Evenden and Ayala cannot be liable for breach of fiduciary duty if there is no evidence of their conduct having resulted in damages.

Under Nevada law, “a claim for breach of fiduciary duty has three elements: (1) existence of a fiduciary duty; (2) breach of the duty; and (3) the breach proximately caused the damages.” *Klein v. Freedom Strategic Partners, LLC*, 595 F. Supp. 2d 1152, 1162 (D. Nev. 2009) (citing *Brown v. Kinross Gold U.S.A., Inc.*, 531 F. Supp. 2d 1234, 1245 (D. Nev. 2008)). In the words of this Court, “a breach of fiduciary duty claim seeks damages for injuries that result from the tortious conduct of one who owes a duty to another by virtue of the fiduciary relationship.” *Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009) (citing *Restatement (Second) of Torts* § 874 cmt. a (1979)).

The requirement of damages is neither unique nor idiosyncratic to claims for breach of fiduciary duty; under this Court’s precedent, “Causation of damages is a required element for successful tort and contract claims.” *Nevada Capital Ins. Co. v. Farmers Ins. Exch.*, Docket Number 70572, 426 P.3d 32 (Nev. Sept. 21, 2018) (unpublished disposition) (citing *Clark County Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 396, 168 P.3d 87, 96 (2007)). Indeed, “While the *extent* of damages need not be certain for a party to recover, a party’s failure to establish ‘the existence or cause of damage’ will bar recovery.” *Nevada Capital Ins. Co.*, 426 P.3d at 32 (quoting *Knier v. Azores Const. Co.*, 78 Nev. 20, 24, 368 P.2d 673, 675 (1962));

citing *Franchise Tax Bd. of Cal. v. Hyatt*, 133 Nev. Adv. Op. 102, 407 P.3d 717, 749-50 (2017)).

Here, the trial court expressly found “in conjunction with Haack's undisputed distribution profits, Plaintiff never proved any damages. The Forensic Accountant was unable to specify damages due to his repeated testimony that he needed more documents and information to make a conclusion.” Appendix vol. IV at 889 ll. 20-24. This singular finding is, unto itself, the necessary end of Plaintiff Haack’s affirmative claim for breach of fiduciary duty; as made clear by this Court in *Nevada Capital Ins. Co.*, one cannot recover under any claim sounding in contract or tort without first proving damages. Plaintiff Haack’s failure to prove damages at trial below, correlative to this cause of action, is thusly a complete bar to her recovery.

Plaintiff Haack’s claim for breach of fiduciary duty did not accompany any request for non-economic relief (*i.e.*, an injunction, issuance of a writ, etc.). Breach of fiduciary duty is a classic tort claim by any estimation, and thusly the variety of claim for which the existence, *vel non*, of damages consumes the underlying inquiry; without economic damages, there is no relief to be afforded.

For all the complexities of the district court’s judgment and the constitutional morass resulting therefrom, this issue is both simple and dispositive. In the absence of damages, the Respondent necessarily cannot prevail on her claim for breach of

fiduciary duty. She was afforded the opportunity to prove damages at trial and failed to do so; per the plain language of the judgment itself, “the Respondent never proved any damages.” Appendix vol. IV at 889, ln. 21. It is accordingly appropriate to remand this case to the district court with instructions to vacate the judgment on this count and enter judgment in favor of Messrs. Evenden and Ayala.

ii. Damages on Plaintiff Haack’s Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing Were Not Proven at Trial and Accordingly Cannot be Awarded

The trial court erred in constructing the accountant/referee scheme discussed *supra* as a means of permitting Plaintiff Haack to prove actual damages in connection with her claim for breach of the implied covenant of good faith and fair dealing. The record herein makes clear the only damages demonstrated at trial, on this front (or any front), are those correlative to Messrs. Evenden and Ayala taking *de minimis* salaries for two years; yet the record is devoid of any actual quantification of these monies because Plaintiff Haack never established an actual sum certain. Stated otherwise, Plaintiff Haack never actually proved what salaries were paid over to Messrs. Evenden and Ayala and, as such, never actually proved any concrete damages.

As this Court has observed, “[t]he duty not to act in bad faith or deal unfairly thus becomes a part of the contract, and, as with any other element of the contract, the remedy for its breach generally is on the contract itself.” *Hilton Hotels Corp. v.*

Butch Lewis Productions, Inc., 109 Nev. 1043, 1046–47, 862 P.2d 1207, 1209 (1993) (quoting *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 383, 710 P.2d 1025, 1038 (1985)). As noted in another case discussing a claim for breach of the implied covenant of good faith and fair dealing, “It is well established that in contracts cases, compensatory damages ‘are awarded to make the aggrieved party whole and ... should place the plaintiff in the position he would have been in had the contract not been breached.’” *Rd. & Highway Builders v. N. Nev. Rebar*, 128 Nev. 384, 392, 284 P.3d 377, 382 (2012) (quoting *Hornwood v. Smith's Food King No. 1*, 107 Nev. 80, 84, 807 P.2d 208, 211 (1991)).

In proving and quantifying such damages, the burden rests squarely on the plaintiff bringing the claim. *See, e.g., Bergstrom v. Estate of DeVoe*, 109 Nev. 575, 578, 854 P.2d 860, 862 (1993) (“The plaintiff bears the burden of proving he was damaged and of proving the extent of those damages.”) (citing *Chicago Title Agency v. Schwartz*, 109 Nev. 415, 851 P.2d 419 (1993)).

Here, the only damages identified by the trial court — and the ones observed in connection with the trial court’s finding for Plaintiff Haack on her claim for breach of the implied covenant of good faith and fair dealing — are correlative to salaries taken by Messrs. Evenden and Ayala: “While Plaintiff may not have originally pled the loss of salary in her Second Amended Complaint, the salary

taken by Sean Evenden and Roger Ayala is evidence of damages suffered by Nancy Haack in this matter.” Appendix vol. IV at 891 ll. 18-20.

There is no dispute that Plaintiff Haack owns one third (1/3) of NRS. *Id.* at 876 ln. 20. Her damages on this front are accordingly one third (1/3) of the salaries paid to Messrs. Evenden and Ayala from April 2017 until they stopped taking such salaries.

Problematically, however, nowhere in the record is there any indication of just how much Messrs. Evenden and Ayala were paid in salaries. The record does show the at-issue salary was in the sum of \$50,000 per annum and was paid to both Messrs. Evenden and Ayala commencing in April 2017. *Id.* at 878 ll. 2-5. The record is equally clear NRS ceased operating on October 31, 2019. Appendix vol. I at 127 ll. 20-21. So the salaries could not have been paid for more than two and one half years (which would result in salaries of \$125,000 to each of Messrs. Evenden and Ayala, for a total of \$250,000, of which Plaintiff Haack’s interest would be \$83,333.33). Yet the record does not show the actual payment of salaries in any given month, what happened when NRS lacked monies to pay salaries, or how much was actually paid over.²

² This point is not raised for solely academic purposes or in an effort to elevate form over substance. Messrs. Evenden and Ayala maintain NRS often lacked the monies to pay their respective salaries, and they thus frequently went without the subject salaries. The failure to show what monies were genuinely paid over is accordingly immensely material.

In this regard, Plaintiff Haack failed to prove her damages with the precision requisite to give rise to an actual award of monies under *Chicago Title Agency* and its progeny. It is not coincidence the trial court simply ordered the payment to Plaintiff Haack of her portion of the salaries, and did not award a sum certain; the record does not contain evidence sufficient to give rise to an award of a sum certain.

Fundamentally, “It is the burden of the plaintiff to prove damages.” *Paullin v. Sutton*, 102 Nev. 421, 423, 724 P.2d 749, 750 (1986) (citing *Kelly Broadcasting Co. v. Sovereign Broadcast*, 96 Nev. 188, 606 P.2d 1089 (1980)). Here, by not showing how much was actually paid over in salaries — and accordingly depriving the trial court of the ability to make any finding in a sum certain — Plaintiff Haack failed to meet that crucial burden.

Thus while the judgment may highlight salaries as a grounds of damage supporting Plaintiff Haack’s claim for breach of the implied covenant of good faith and fair dealing, this claim is no different than her claim for breach of fiduciary duty: by failing to establish actual damages, Plaintiff Haack failed to create a record upon which she may be deemed a prevailing party entitled to entry of a judgment. And it is thus appropriate to also vacate the judgment as to this count and remand the case with instructions to have judgment entered into favor of Messrs. Evenden and Ayala.

XI. Conclusion

WHEREFORE, the Appellants respectfully pray this Honorable Court (i) vacate the judgment of the trial court; (ii) remand this case to the trial court with instructions to enter judgment in favor of the Appellants on the Respondents' claims for breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing; and (iii) afford such other and further relief as may be just and proper.

XII. Certificate Pursuant to Nevada Rule of Appellate Procedure 28.2

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 Version 2009 in size 14 Times New Roman font; or

This brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

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

Proportionately spaced, has a typeface of 14 points or more and contains ___ words; or

Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text; or

Does not exceed 24 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 20th day of November, 2020

Respectfully Submitted,

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Certificate of Service

I hereby certify that on this 20th day of November, 2020, pursuant to Nevada Rule of Appellate Procedure 25(c)(1)(E), I did serve by electronic filing a true and correct copy of the foregoing on the following persons:

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