IN THE SUPREME COURT OF THE STATE OF NEVADA

NEWELL ROOFING, INC., A NEVADA CORPORATION,
Petitioner,
vs.
THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE, AND THE HONORABLE JANET J. BERRY, DISTRICT JUDGE,
Respondents,
and
BRUNSONBUILT CONSTRUCTION AND DEVELOPMENT CO., LLC; BRUNSONBUILT CONSTRUCTION AND DEVELOPMENT, A NEVADA GENERAL PARTNERSHIP; EDWARD B. MCCAFFREY, III, AN INDIVIDUAL AND GENERAL PARTNER; AND DOUGLAS C. BRUNSON, AN INDIVIDUAL AND GENERAL PARTNER,
Real Parties in Interest.

No. 51861

FILED

OCT 10 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order denying petitioner's motion to enforce a judgment and granting real parties in interest's motion to enforce a settlement agreement.

In the underlying district court action, among other things, homeowners sued real parties in interest, Brunsonbuilt Construction and Development Co., LLC, and related persons (collectively, Brunsonbuilt), under contract and tort law theories, for constructional defects to their residence. In defense of the homeowners' claims, Brunsonbuilt asserted that the homeowners were comparatively negligent, and it also filed a

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third-party complaint for contribution and indemnity against petitioner, subcontractor Newell Roofing, Inc., based on the homeowners' claims of constructional defects concerning their roof.

After trial, the jury returned a general verdict form regarding the homeowners' claims, determining that (1) Brunsonbuilt was 45 percent liable and the homeowners were 55 percent liable for the proven constructional defects, and (2) a portion of the total constructional defects was attributable to roof defects, for which Brunsonbuilt was 71 percent liable and Newell Roofing was 29 percent liable. Accordingly, the district court entered judgments for Brunsonbuilt on the homeowners' claims and for Newell Roofing on Brunsonbuilt's third-party complaint for indemnity and contribution. Newell Roofing was also awarded attorney fees and costs under the offer-of-judgment provisions.

The homeowners appealed. Brunsonbuilt did not appeal. Instead, Brunsonbuilt and Newell Roofing entered into a settlement agreement whereby Brunsonbuilt paid an amount to satisfy Newell Roofing's attorney fees and costs award and agreed to forego any appeal from the court's judgment. Under the agreement, "in the event Homeowners prevail[ed] on their appeal of the [judgment on the jury verdict] in any respect relating to the findings concerning the Roof Verdict . . ., then the parties will be returned to the status quo and Brunsonbuilt's claims for indemnity and contribution as against Newell Roofing will be reinstated and Brunsonbuilt can pursue such claims via its third-party complaint."[1]

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[1]The pertinent portion of the agreement, Provision 1.3, includes the following language:

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The homeowners' appeal was resolved in the 2006 opinion Skender v. Brunsonbuilt Construction & Development Co.,[2] in which we determined that the district court improperly instructed the jury on the issue of the homeowners' comparative negligence and erred by allowing the jury to use a general verdict form, rather than a special verdict form, due to the multiple theories of liability presented. Accordingly, we reversed the district court's judgment and remanded for a new trial on the homeowners' claims.[3] In so doing, we pointed out that certain issues regarding Brunsonbuilt's alleged breach of contract and Newell Roofing's attorney fees, based on the trial outcome, must be resolved on remand.[4]

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> "[I]n the event that Homeowners prevail[ed] on their appeal of the [judgment on the jury verdict] in any respect relating to the findings concerning the Roof Verdict . . ., and in the event this Action is remanded . . . for new trial, Settling Parties agree that Newell Roofing's Satisfaction of Judgment is withdrawn, and the parties will return to the status quo regarding the ability to assert any previous claims or defenses properly raised in the Original Action without prejudice to any claim for fees or costs as if the Satisfaction of Judgment was never entered."

[2]122 Nev. 1430, 148 P.3d 710 (2006).

[3]Id. at 1439, 148 P.3d at 717.

[4]Id. ("Further, if Brunsonbuilt did breach the contract, then Skender is not obligated to pay the outstanding debts on the contract. Lastly, the district court awarded Newell Roofing attorney fees, and found that Skender must indemnify Brunsonbuilt for these attorney fees, based on the outcome of the trial. All of these issues must be addressed under this court's current holdings.")

According to Newell Roofing, after the remand, the homeowners and Brunsonbuilt settled their claims. Newell Roofing moved to enforce the judgment it had obtained, pre-remand, against Brunsonsbuilt, and Brunsonbuilt moved to enforce the parties' settlement agreement, claiming that its third-party claims for contribution and indemnity were revived thereunder by this court's remand. The district court determined that (1) this court's decision on appeal had reversed "all judgments" arising from the improper jury verdict forms, even though Newell was not a party to the appeal, and (2) the parties' settlement agreement called for the reinstatement of Brunsonbuilt's claims for indemnity and contribution. Consequently, the court found the judgment in favor of Newell Roofing "reversed and void," denied Newell Roofing's motion, and granted Brunsonbuilt's motion to reinstate its contribution and indemnity claims against Newell Roofing. Newell Roofing then filed the instant petition for a writ of mandamus, seeking dismissal from the district court action, and Brunsonbuilt has timely filed an answer, as directed.

A writ of mandamus is available to compel the performance of an act that the law requires, or to control a manifest abuse of discretion.[5] Mandamus is an extraordinary remedy, however, and whether a petition will be considered is within our sole discretion.[6] The petitioner bears the

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[5]See NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

[6]See Smith v. District Court, 107 Nev. 674, 818 P.2d 849 (1991).

burden to demonstrate that our intervention by way of extraordinary relief is warranted.[7]

In this case, we conclude that our extraordinary intervention is not warranted. Specifically, Newell Roofing contends that the judgment in its favor is final because it was neither appealed nor reopened and that, therefore, (1) the district court lacks jurisdiction to reopen it absent a proper NRCP 60(b) motion, and (2) Brunsonbuilt is collaterally estopped from relitigating issues related to the roof verdict.

But Newell Roofing's arguments are based on a faulty premise. Under the parties' settlement agreement, Newell Roofing agreed to allow Brunsonbuilt to reinstate its claims for indemnity and contribution if the homeowners prevailed on their appeal "in any respect" related to the roof verdict findings.[8] The homeowners prevailed on appeal with respect to the roof verdict because the matter was remanded for a new trial covering all aspects of the homeowners' verdict, including the damages assigned to roof defects. That is, in Skender, we determined that the jury instruction on comparative negligence, which instructed the jury to evaluate the combined negligence, if any, of the homeowners, Brunsonbuilt, and Newell Roofing, was incomplete,[9] and that the general

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[7]Pan v. Dist. Ct., 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

[8]As Newell Roofing points out, under the agreement, "roofing verdict" was described as the portion of the homeowner verdict in which "[d]amages were assigned to roof defects for $49,000.00 with comparative fault on the part of Brunsonbuilt of 71% and Newell Roofing of 29%."

[9]Even though Newell Roofing asserts that the stipulated jury instructions pertaining to the claims between it and Brunsonbuilt were left intact by this court's opinion, the roof verdict was clearly implicated in the incorrect jury instruction, number 26, noted in the opinion. Skender v.

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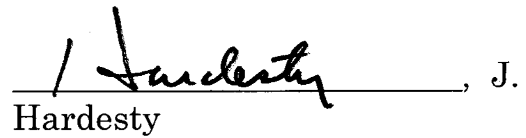
verdict form, which included the roofing verdict, was wholly improper.[10] Accordingly, the district court correctly concluded that the homeowners prevailed with respect to the roof verdict such that the settlement agreement's reinstatement terms were invoked by this court's decision in the appeal.

As Newell Roofing expressly agreed to allow Brunsonbuilt to reinstate the claims for indemnity and contribution, it may not now contend that Brunsonbuilt is estopped under res judicata principles from so doing. Accordingly, we conclude that the district court properly allowed Brunsonbuilt to pursue those claims in the remanded proceedings, and therefore, we

ORDER the petition DENIED.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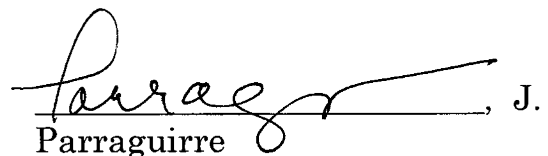
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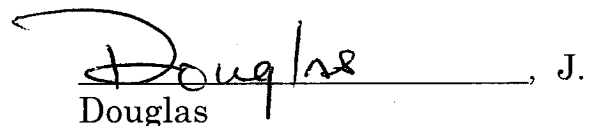
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Douglas

cc: Hon. Janet J. Berry, District Judge
Lincoln, Gustafson & Cercos
Guenther and Castronova LLP/Reno
Washoe District Court Clerk

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Brunsonbuilt Constr. & Dev. Co., 122 Nev. at 1436 n.16, 148 P.3d at 715 n.16.

[10]Id. at 1439, 148 P.3d at 717.