IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: SEVEN HILLS GOLF COURSE LITIGATION.

No. 38045

WILL F. ARELLANO, L. ARELLANO, KYLE ARETT, MARIA E. BEGUE, EVE L. BAILEY, ROBERT BILLINGTON, MARY BILLINGTON, MARK A. BIRTHA, DEAN BOLEN, PATRICIA BOLEN, RICHARD BROWN, ESTHER BROWN, WILLIAM BUSCHUR, CAROLYN BUSCHUR, ANTHONY CAMPAGNA, KAREN CAMPAGNA, AUSTIN CLARK, BARBARA CLARK, FERNANDO CRUZ, YVONNE CRUZ, TIMOTHY J. CUA, DENNIS DAVIS, MARIA DAVIS, ANTHONY DELGADO, JOAN DELGADO, CATHY DELLA VEDOVA, TERRY DEMARCANTINO, JAMES DENEEN, BRIT DENEEN, IDA DOMAN, ROBB DOMNITZ, SUSAN DOUGHERTY, JANE MCKELUIO, MARC DURAND, JOYCE DURAND, JOHN FRISBY, DIANE FRISBY, RICHARD GIANCHETTI, MICHAEL GLASS, CAROLE GLASS, WOLFGANG GLOSSNER, VICTORIA GLOSSNER, BRUNO GOTZMER, MARSHA GOTZMER, WAYNE GUTIERREZ, ELIZABETH GUTIERREZ, ERIC K. HAGENBURGER, THOMAS HALL, SUSAN HALL, ANGELA HANDLOS, ANDREW HOSKINS, ELIZABETH HOSKINS, WILLIAM M. HUMPHREY, DERON HUNSBERGER, ANGELA HUNSBERGER, GLENN R. JOHNSON, NIRA JOHNSON, DONALD JONKER, PAT JONKER, ARDEL JORGENSEN, HARRY KASSAP, ADREIENNE KASSAP, ROBERT M. KELLY, LINDA

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04-20636

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ZARAGOZA, YOLANDA ZARAGOZA, DENNIS ZALEWSKI, SANDRA ZALEWSKI, STEVEN ZELLERS, AND KATHLEEN ZELLERS,
Appellants/Cross-Respondents,
vs.
RIO DEVELOPMENT, INC.,
Respondent/Cross-Appellant.

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellants/cross-respondents' motion for attorney fees and a cross-appeal from a district court order granting declaratory relief. Eighth Judicial District Court, Clark County; Michael L. Douglas, Judge, and Mark W. Gibbons, Judge.

This appeal and cross-appeal arise out of a multi-party action involving the sale of a golf course to respondent/cross-appellant Rio Development, Inc. Silver Canyon Partnership was the owner of 1300 acres of real property in Henderson, Nevada, which it divided into a residential development, called Seven Hills Master Planned Community, and a proposed golf course. The Seven Hills Master Declaration of Covenants, Conditions and Restrictions and Reservations of Easement ("CC&Rs") governed both properties. In August 1997, Rio agreed to purchase the golf course property. Shortly after acquiring the property, Rio announced its intention to reserve use of the golf course exclusively for its hotel guests. Appellants/cross-respondents, a class of homeowners in the Seven Hills community, filed a class action suit against Silver Canyon, Rio and various builders and sellers of real property. Appellants alleged that, when they purchased homes and/or lots at Seven Hills, various persons and entities promised them use of the golf course. During the pendency of

the proceedings, Rio temporarily allowed appellants to use the golf course, charging $300 per round.

The district court divided the bench trial into phases. In Phase I, the district court determined that, based on the CC&Rs, appellants had a conditional right to use the golf course, subject only to their compliance with golf course rules and fees. In Phase II, the district court determined that Rio did not act in bad faith when it charged appellants $300 per round, and that Rio's fee decision was neither arbitrary nor capricious. Following trial, each party moved for attorney fees as the prevailing party. The district court denied both motions.

Appellants appeal, arguing that the district court abused its discretion when it denied appellants' motion for attorney fees. Rio cross-appeals, arguing that the district court erred when it concluded that appellants had a conditional right to use Rio's golf course.

Attorney fees

Appellants argue that the district court abused its discretion when it denied their motion for attorney fees. Appellants argue that they are entitled to attorney fees because they prevailed on significant issues at trial, including the district court's ruling that they were entitled to use the golf course and that Rio was not entitled to charge any fee that it wished.

A district court may not award attorney fees unless authorized by statute, rule or contract.[1] Absent an abuse of discretion, this court will not disturb a district court's decision concerning an award of attorney fees.[2] "An abuse of discretion is '[a] clear ignoring by the court of

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[1]U.S. Design & Constr. v. I.B.E.W. Local 357, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002).

[2]Id.

[applicable legal principles], without apparent justification."[3] NRS 18.010(1) provides that the law does not restrain attorney fees governed by express or implied agreement.[4] In the present case, Section 13.5(g) of the CC&Rs expressly provides that a judgment arising from the contract should include an award of attorney fees to the prevailing party.

"'A plaintiff may be considered the prevailing party for attorney's fee purposes if it succeeds on any significant issue in litigation which achieves some of the benefit [it] sought in bringing the suit.'"[5] While we have followed this definition of prevailing party status in several instances,[6] application of this definition is discretionary and often fact intensive. We conclude that the cases that appellants rely on are factually distinguishable from the instant case and that the district court did not abuse its discretion when it denied appellants' motion for attorney fees.

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[3]Collins v. Murphy, 113 Nev. 1380, 1383, 951 P.2d 598, 600 (1997) (alterations in original) (quoting Hotel Last Frontier v. Frontier Prop., 79 Nev. 150, 154, 380 P.2d 293, 294 (1963)).

[4]NRS 18.010(2) permits a district court to award attorney fees to the prevailing party in limited circumstances. This section, however, does not apply to "action[s] arising out of a written instrument or agreement which entitles the prevailing party to an award of reasonable attorney's fees." NRS 18.010(4). Instead, the contract provisions govern.

[5]See Hornwood v. Smith's Food King, 105 Nev. 188, 192, 772 P.2d 1284, 1287 (1989) (quoting Women's Federal S & L Ass'n v. Nevada Nat. Bank, 623 F. Supp. 469, 470 (D. Nev. 1985) (citing Hensley v. Eckerhart, 461 U.S. 424, 433 (1983))).

[6]Sack v. Tomlin, 110 Nev. 204, 214, 871 P.2d 298, 305 (1994); Chowdhry v. NLVH, Inc., 109 Nev. 478, 485-86, 851 P.2d 459, 464 (1993); Hornwood, 105 Nev. at 192, 772 P.2d at 1287.

While appellants rely on Hornwood v. Smith's Food King,[7] the facts in Glenbrook Homeowners v. Glenbrook Co.,[8] decided six years after Hornwood, provide greater factual similarity. In Hornwood, the district court determined that, while Smith's breached its contract with the Hornwoods, the Hornwoods were not entitled to compensatory or consequential damages. The district court also found in favor of Smith's on the Hornwoods' tort claims and awarded attorney fees and costs to Smith's as the prevailing party. On appeal, the Hornwoods argued that they were entitled to consequential damages based on the diminution of property value caused by Smith's breach of contract. We agreed and reversed.[9] Incidental to our reversal of the damages award, we also reversed the district court's award of attorney fees to Smith's.[10] Although the Hornwoods did not succeed on their tort claims, we concluded that, because the Hornwoods significantly benefited from bringing their suit, they were the prevailing party entitled to an award of attorney fees and costs.[11]

While Hornwood presents one instance in which a party may be considered a prevailing party, Glenbrook has greater factual identity with the instant case. In Glenbrook, the Glenbrook Homeowners' Association sued Glenbrook Company, seeking an order conveying certain real property to the Association. The district court ordered Glenbrook to

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[7]105 Nev. 188, 772 P.2d 1284.

[8]111 Nev. 909, 901 P.2d 132 (1995).

[9]Hornwood, 105 Nev. at 190-91, 772 P.2d at 1286.

[10]Id. at 192, 772 P.2d at 1287.

[11]Id.

convey three pieces of property to the Association, but denied the Association's request as to other property. The district court further concluded that, based on the complicated factual setting, the multiplicity of issues and the complexity of settlement negotiations, neither party prevailed for purposes of the CC&Rs' attorney fee provision; the court therefore ordered each party to bear its own attorney fees. On appeal, this court affirmed the denial of the Association's request for conveyance, reversed the order requiring Glenbrook to convey two pieces of property to the Association and remanded as to the third piece of property.[12] As to the award of attorney fees, this court concluded that "[e]ach party won on some issues and lost on others," and held that the district court did not abuse its discretion when it denied both parties an award of attorney fees.[13]

Likewise, the district court in the instant case was considering an award of attorney fees pursuant to the CC&Rs. As in Glenbrook, the factual setting here was complicated, with a multiplicity of issues as well as complex settlement negotiations. And, the parties in this case, like those in Glenbrook, received declaratory relief rather than monetary relief. Accordingly, as in Glenbrook, even though the plaintiffs achieved some success in litigation, the district court properly found no prevailing party for purposes of awarding attorney fees.

Appellants also argue that Parodi v. Budetti[14] offers support for an award of attorney fees in their favor. We disagree. Parodi involved

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[12]Glenbrook, 111 Nev. at 922, 901 P.2d at 141.

[13]Id.

[14]115 Nev. 236, 984 P.2d 172 (1999).

a determination of prevailing party status in a consolidated action concerning three separate and distinct breach of contract claims. In Parodi, we followed a net value approach in reviewing a determination as to which party was the prevailing party.[15] Because a net value approach is not conducive to determining prevailing party status in the instant case, we find Parodi unhelpful in our analysis.

Finally, appellants argue that Lummi Indian Tribe v. Oltman[16] supports reversing the denial of attorney fees. In Lummi, the tribe sought to enjoin the defendants from interfering with the tribe's fishing rights. Defendants filed a counterclaim. After the parties reached a settlement, each side sought attorney fees as the prevailing party. The district court denied both motions, reasoning "that each party had received benefits and made concessions, and that the main benefit the plaintiffs received was narrowly circumscribed and burdened with assurances to the defendants."[17] The Ninth Circuit reversed and remanded on the ground that the district court had applied an incorrect legal standard.[18] The Ninth Circuit held that the district court should have determined the prevailing party according to Hensley v. Eckerhart, a United States Supreme Court case, which stated that "'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the

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[15]Id. at 241-42, 984 P.2d at 175.

[16]720 F.2d 1124 (9th Cir. 1983).

[17]Id. at 1125.

[18]Id.

parties sought in bringing suit.'"[19] Lummi further held that "[t]he extent of the plaintiff's success is considered only in determining the amount of the award."[20]

In the instant case, however, both appellants and Rio succeeded on a significant issue during trial and both parties achieved some benefit that they sought in pursuing their claims. The district court here was confronted with a different situation than in Lummi, in which it was not apparent that the defendant succeeded on any issue or achieved any benefit. Moreover, in the instant case, looking at the extent of each party's success, the district court reasonably determined that the parties' individual successes were evenly balanced. Therefore, we cannot conclude that the district court abused its discretion when it denied each party's request for attorney fees.

Appellants make several other arguments in support of their contention that they are entitled to an award of attorney fees, including that we previously have upheld an award of attorney fees in a bifurcated trial and that public policy considerations support an award of attorney fees to prevailing class action plaintiffs. Because a district court's award of attorney fees is discretionary and factually intensive and, given our holding in Glenwood and its applicability to the instant case, we conclude that appellants' final arguments are without merit.

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[19]461 U.S. at 433 (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)), cited in Lummi, 720 F.2d at 1125.

[20]Lummi, 720 F.2d at 1125.

Interpretation of contract

Rio cross-appeals, arguing that the district court erred when it determined that Section 13.14 of the CC&Rs unambiguously provided appellants with a conditional right to use the golf course.

Restrictive covenants are governed by the same rules applicable to any contract.[21] When facts are not in dispute, the interpretation of a contract is a question of law and is reviewed de novo.[22] Where a document is clear on its face, it "will be construed from the written language and enforced as written."[23] If unambiguous, words must be given their usual and ordinary meaning.[24] We must also read contracts as a whole.[25]

A review of the entire CC&Rs reveals the inclusion of several clauses, including the preamble and Section 1.29, which indicate that appellants do not have an absolute right to use the golf course property. Section 13.14, entitled "No Right To Use Golf Course," also indicates that appellants do not have an absolute right to use the golf course. Section 13.14, however, further provides: "IN ORDER TO USE THE FACILITIES, EACH OWNER WILL BE REQUIRED TO PAY SUCH FEES AND TO SATISFY SUCH OTHER CONDITIONS AS MAY BE IN EFFECT FROM TIME TO TIME WITH RESPECT TO THE USE OF THE FACILITIES."

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[21]Diaz v. Ferne, 120 Nev. 70, __, 84 P.3d 664, 665-66 (2004).

[22]Id. at __, 84 P.3d at 666.

[23]Ellison v. C.S.A.A., 106 Nev. 601, 603, 797 P.2d 975, 977 (1990).

[24]Dickenson v. State, Dep't of Wildlife, 110 Nev. 934, 937, 877 P.2d 1059, 1061 (1994).

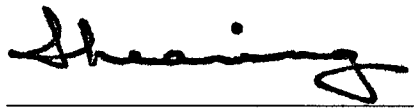
[25]Restatement (Second) of Contracts § 202(2) (1981).

This language plainly provides that appellants must comply with conditions and fees imposed by the golf course. Subjecting appellants to conditions imposed by the golf course presupposes a right to use the golf course. Construing the entirety of Section 13.14 as meaning that appellants have no right to use the golf course would be inconsistent with the inclusion of the second sentence and would create an absurd result.

Therefore, while the contract does not provide appellants with an absolute right to use the golf course, we conclude the district court did not err in determining that Section 13.14 unambiguously grants appellants a conditional right to use the golf course subject to certain conditions set by the golf course property owner.

Accordingly, we affirm the district court's orders.

It is so ORDERED.



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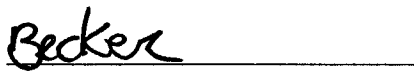

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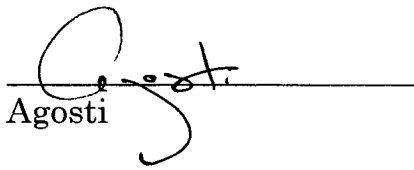

_____, J.
Agosti

cc: Eighth Judicial District Court Dept. 11, District Judge
Eighth Judicial District Court Dept. 7, District Judge
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