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**

On Appeal from the Eighth Judicial District Court
Clark County, Nevada

APPELLANTS' REPLY BRIEF ON APPEAL

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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,	*	**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. **Introduction**

In her answering brief (the "Answering Brief"), respondent Nancy Haack ("Plaintiff Haack") purports to defend the constitutionality of the order appealed from (the "Final Order") by rewriting it, recasting the Trial Court's decision to appoint a third party to finally and conclusively determine the amount of damages as if it were an appointment of a special master under Nevada Rule of Civil Procedure 53. Among other things, this transparent attempt to move the goalposts puts Plaintiff Haack in the awkward position of having to concede the numerous respects in which the Trial Court *failed to comply* with Rule 53's procedural and substantive requirements—which is hardly surprising given that the Trial Court did not, in fact, appoint a special master, and instead unconstitutionally delegated authority to a private party.

In a comparable effort to square a circle, Plaintiff Haack also maintains both that the Trial Court (i) did not err in its award of damages; and (ii) was correct in finding that it needed the services of a third party to quantify damages. In so arguing, Plaintiff Haack selectively points to evidence that *could* have been used to arrive at a damages finding, but which, to the contrary, plainly was not.

To be sure, it is not Plaintiff Haack's fault that the Trial Court disposed of this case in a manner grossly violative of the Nevada Constitution. But the Answering Brief implicitly concedes what is now manifest: the Final Order cannot

withstand the scrutiny of appeal; the Trial Court's ruling was a flatly unconstitutional exercise of judicial power. For these reasons, and as extrapolated upon *infra*, it is respectfully urged that this Court vacate the Final Order. Further, because of the Trial Court's mistake of law as to the theory of liability, this Court should not only remand this matter, but should do so with instructions to enter judgment in favor of Roger Ayala and Sean Evenden.

V. Standard on Review

While neither Messrs. Ayala and Evenden's opening brief (the "Opening Brief"), nor the Answering Brief, address the appropriate standard of review in detail, it is clear that the questions of law at issue are reviewed *de novo*. *See, e.g.*, *Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 618, 173 P.3d 707, 711 (2007) (noting constitutional issues are reviewed *de novo*); *Plimpton v. State ex rel. Shirley*, 124 Nev. 1500, 238 P.3d 846 (2008) ("On appeal, appellants raise questions of constitutional interpretation. Questions of constitutional interpretation are questions of law, which we review de novo.") (citing *SIIS v. United Exposition Services Co.*, 109 Nev. 28, 30, 846 P.2d 294, 295 (1993); *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 603 (Alaska 1999); *Robson Ranch Mountains v. Pinal County*, 51 P.3d 342 (Ariz. Ct. App. 2002); *Blair v. Harris*, 45 P.3d 798 (Haw. 2002)).

This standard guides not merely the constitutional issues and legal issues *sub judice* but also the Trial Court's award of unquantified economic damages to

Plaintiff Haack. *See, e.g., Dynalectric Co. of Nevada, Inc. v. Clark & Sullivan Constructors, Inc.*, 127 Nev. 480, 483, 255 P.3d 286, 288 (2011) ("Whether a party is 'entitled to a particular measure of damages is a question of law' reviewed de novo.") (quoting *Toscano v. Greene Music*, 124 Cal. App. 4th 685, 21 Cal. Rptr. 3d 732, 736 (2004)).

VI. Argument

a. The Answering Brief Confirms the Perils of the Final Order

Plaintiff Haack argues extensively as to what *could* have been an appropriate disposition by the Trial Court. The central problem is that the disposition the brief defends bears little resemblance to the one that Messrs. Ayala and Evenden are appealing. This is not a case in which the Trial Court made concrete findings as to some facts, carefully identified other matters to be of such complexity as to require the imposition of a special master, and then lawfully appointed such a special master. To the contrary, this is a case in which Plaintiff Haack could not actually prove damages at trial — despite having the burden to do so — and the Trial Court, through the mechanism of its rather unorthodox Final Order, elected to nonetheless permit Plaintiff Haack to recover damages through a post-judgment extrajudicial delegation of power to a private, third party.

In point of fact, the Trial Court did *not* appoint a special master. As the Answering Brief itself acknowledges, such an appointment would have required

conformity with Nevada Rule of Civil Procedure 53. As stressed in the Opening Brief — and conceded by Plaintiff Haack in the Answering Brief — the Trial Court did not remotely follow the rule. More than a mere technicality, the extent to which the Final Order does *not* comply with Rule 53 drives home that no one understood the Trial Court to have been pursuing that procedure.

It is not just that the words "special master" nowhere appear in the Final Order. Among other things, Messrs. Ayala and Evenden were given no notice or hearing prior to the appointment of the putative special master, let alone an opportunity to object as expressly required. *See* Nev. R. Civ. P. 53(a)(2), (d). The putative appointment order provides none of the specific details and constraints required by Rule 53(b). There were no subsequent meetings as required by Rule 53(d)(1). There was no final report as required by Rule 53(e). And Messrs. Ayala and Evenden had no opportunity to object to the final report — because the Trial Court impermissibly delegated the authority to issue a final damages award to the third party.

All of this goes to why the Trial Court did not, in fact, appoint a special master — and why the constitutional objections detailed in the Opening Brief are therefore meritorious. But even if it was possible to transmogrify the Trial Court's Final Order into the appointment of a special master, it would still have been erroneous. "[R]eferral to a special master is only warranted when it is necessary, not merely

when it is desirable." *Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 118 Nev. 124, 128, 41 P.3d 327, 329 (2002). And there does not appear to be any case law establishing that the failure of a party to prove damages at trial creates such a necessity.

Indeed, what Plaintiff Haack proposes is a regime whereby the failure of a party to make a satisfactory showing of damages at trial — even after being permitted the use of expert witnesses and given a full evidentiary opportunity to make a case — is one resolved not by the entry of an adverse judgment but, rather, by mere delegation to an extrajudicial actor for purposes of additional fact-finding. This is a notion firmly rejected by longstanding case law establishing the simple proposition that a failure to prove damages at trial equates to a failure to prevail at trial. *See, e.g.*, *Rouseau v. Dieleman*, 90 Nev. 112, 519 P.2d 1135 (1974) ("We find no reversible error in the trial court's order, which dismissed plaintiff's action pursuant to NRCP 41(b), after presentation of her evidence. On review of the record, we believe the trial judge could properly determine, not only that plaintiff failed to prove any actual damage by reason of the defendants' alleged trespass upon her land, but also that she failed to prove either of them was indeed responsible for the alleged trespass."); *Clearwater Mech., Inc. v. Recreation Dev. Co., LLC*, 131 Nev. 1336 (2015) (unpublished disposition) ("Clearwater also failed to prove any damages or an amount of damages. And Clearwater failed to prove that Paonessa's

salary and RDC's payment of Clearwater's debts was inadequate compensation. Consequently, we conclude the district court did not err in determining that RDC was not unjustly enriched.").

There does not appear to be any precedent in this state for the post-trial appointment of a special master to make factual findings (let alone to unilaterally enter judgment), nor does there appear to be any precedent for the appointment of a special master to aid a party in proving damages its own expert(s) cannot sufficiently articulate to the court. That the Trial Court did not so much as reference a "special master" in its Final Order, or invoke Nevada Rule of Civil Procedure 53, therefore is hardly the technical oversight that Plaintiff Haack postulates; rather, it is proof positive that the Trial Court did something altogether different — and, thus, unconstitutional.

b. **The Respondents' Answering Brief Reveals the Finality of the Judgment**

The core argument advanced by Plaintiff Haack appears to be that since the Trial Court failed to actually fix and determine damages (because it was unable to actually fix or determine damages based on the evidence presented at trial), the Final Order is not, in fact, a final order. But that argument once again relies on the fiction that the Trial Court appointed a special master, and that there was still work to be done before its judgment could be finalized. As the Opening Brief explained

in detail, it is clear beyond peradventure that the Trial Court considered its work done — such that the Final Order was thereby an appealable final judgment.

At bottom, if Messrs. Evenden and Ayala did not appeal from the Final Order, there would have been no subsequent order from which they could have appealed. As this Honorable Court has observed, "a final judgment has been described as one 'that disposes of the issues presented in the case, determines the costs, and leaves nothing for the future consideration of the court.'" *Lee v. GNLV Corp*., 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) (quoting *Alper v. Posin*, 77 Nev. 328, 330, 363 P.2d 502, 503 (1961); citing *Magee et al. v. Whitacre et al*., 60 Nev. 202, 96 P.2d 201 (1939); *Perkins v. Sierra Nevada S.M. Co*., 10 Nev. 405 (1876)).

Here, the Final Order disposes of all the issues presented in the case. The Final Order expressly provides "judgment *shall* be awarded in favor of Plaintiff Nancy Haack on her claims of (1) breach of the implied covenant of good faith and fair dealing and (2) breach of fiduciary duty . . . . " Appendix vol. IV at 930 ll. 6-10 (emphasis added). The Final Order equally directs that Appellants "are *required* to pay Nancy Haack an equivalent amount of money in salary that they were paid after amending the Operating Agreement of [NRS Realty Group LLC]." Appendix vol. IV at 930 ll. 10-12 (emphasis added).

Moreover, the Final Order leaves no further work for the Trial Court. While the Final Order does provide the at-issue remedy of having Plaintiff Haack

designate three accountants, one of whom will fix and award damages, the ruling does not (i) reserve jurisdiction to hear exceptions to that determination; (ii) provide any mechanism to appeal from that determination; or (iii) even contain a general reservation of jurisdiction for any additional issues that might have arisen from, or even during, that determination. Saving and excepting for post-judgment fees motions, the Final Order is the Trial Court's final word on this case; the Final Order clearly contemplates all future work being done by an accountant, with the damages fixed by that accountant automatically becoming part of the judgment against Appellants.

Even the Trial Court clearly understood the fixation of damages to be but a ministerial step toward the already-awarded remedy. The Final Order directs that "The expense of the independent accountants *shall* be paid by Defendants." Appendix vol. IV at 930 ll. 22-23 (emphasis added). This is not the Trial Court holding evidence open, permitting Plaintiff Haack to go hire a new expert witness, and then allowing introduction of that expert's report; this is the Trial Court fashioning an equitable award that includes Plaintiff Haack picking an individual to fix and determine damages with Messrs. Evenden and Ayala both paying for that individual's services and then paying whatever damages that individual may fix and determine.

The finality of the judgment is well observed by James M. Jimmerson, the Settlement Judge in this case, whose report to this Court notes, *inter alia*:

> [T]he trial court does **not** retain subject matter jurisdiction over the subject matter or personal jurisdiction over the parties, so as to allow the district court to enter a subsequent order approving the calculations/damages determined by the independent accountant. Nor is there a mechanism upon which the trial court would be able to incorporate this damage figure as part of the Decision and Order since it did not retain jurisdiction.

Reply Appendix at p. 145 (emphasis in original).

Moreover, Plaintiff Haack herself has proceeded with post-judgment motions practice on the basis of the Final Order being, in fact, a final order. Specifically, she has filed a motion for a post-judgment award of attorneys' fees (the "Fees Motion"). Reply Appendix at p. 1. In essence, she is attempting to have her cake and eat it, too. After all, the Fees Motion proclaims, in the past tense, *inter alia*, "Plaintiffs *were* the prevailing party in this action." Reply Appendix at p. 5, ln. 21 (emphasis added). The same filing turns on an argument Plaintiff Haack is permitted fees based upon the "successful" nature of her derivative claims. Reply Appendix at p. 18, ln. 4. The Fees Motion additionally turns, in part, on a contractual provision allowing "the prevailing party" to recover "in addition to any other damages assessed, its reasonable attorneys' fees and all other costs and expenses . . . . " Reply Appendix at p. 3, ll. 8-10.

If Plaintiff Haack did not construe the Final Order as a final judgment, her Fees Motion would be necessarily premature as she would not yet be "the prevailing party." Moreover, on a purely practical front, the Fees Motion would be irresponsible, as it would seek fees for only *part* of the case below — not waiting for resolution of the accountant's finding of damages (which will, no doubt, require her counsel to expend additional hours) or any exceptions taken thereto (which, again, would require the expenditure of additional attorneys' fees).

Instead, the obvious explanation is that Plaintiff Haack likewise understands that the accountant's work *follows* the Trial Court's final judgment, and there are no exceptions to be taken since the Trial Court did not reserve jurisdiction. Indeed, the decree has all the markings of a final order, and accordingly all the markings of being properly appealable. Perhaps most importantly, there is no indication that the Trial Court would *ever* have entered any further order in this case — such that there would be no *other* order from which Messrs. Evenden and Ayala could challenge the Trial Court's unconstitutional delegation of judicial power (and exercise of legislative power). Tellingly, the Answering Brief does not identify a subsequent ruling from the Trial Court that is more properly understood as a final judgment, nor does it concede that a well-taken appeal from the accountant's determination of damages would be timely if it were outside the time for appealing the Trial Court's ruling.

Moreover, even if the Final Order were not immediately appealable under Nevada Rule of Appellate Procedure 3A, Messrs. Evenden and Ayala would be entitled in any event to a writ of mandamus, given that (as Plaintiff Haack herself concedes in the Answering Brief) "the district court judge has committed 'clear and indisputable' legal error," *Archon Corp. v. Eighth Judicial Dist. Ct. in and for County of Clark*, 133 Nev. 816, 819–20, 407 P.3d 702, 706 (Nev. 2017) (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953)), and that there may *never* be an adequate opportunity to remedy that error on an appeal after a judgment that, in Plaintiff Haack's view, actually *is* "final."

c. **Plaintiff Haack's Analysis of What Damages May be Inferred from the Record Does not Alter the Trial Court's Election to Make no Such Findings**

A core tension permeates the Answering Brief: on one hand Plaintiff Haack suggests the Trial Court was presented with an evidentiary record so complex as to necessitate the *sua sponte* appointment of a special master to decipher questions of damages, while, on the other hand, Plaintiff Haack defends the Trial Court's entry of judgment on claims for breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing as being sufficiently pegged to damages proven at trial. These are irreconcilable postures; either Plaintiff Haack left a record so haywire that damages could not be deciphered without affording her a second bite at the proverbial apple, or the record supports the imposition of damages on

these two counts (being the only counts upon which she prevailed), in which case no outside assistance (whether by a "special master" or not) should have been needed. And although Haack cannot have it both ways, it is also clear that the former contention is the correct one.

As noted in the Opening Brief, damages are elemental to claims of both breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing. *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)); *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, three forms of damages are at issue: (i) distribution profits, (ii) salaries taken by Messrs. Evenden and Ayala; and (iii) legal fees advanced to Messrs. Evenden and Ayala. The record is simple on the first point: Plaintiff Haack, even with the aid of her own expert witness, did not prove damages. Appendix vol. IV at 889 ll. 20-24 ("[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."). The Answering Brief debates whether or not

this is really a holding of the Trial Court; in so doing, however, Plaintiff Haack perhaps misses the bigger point: of course this is the Trial Court's holding, or there would have been no necessity for the constitutionally deficient post-judgment delegation of judicial power discussed *passim*.

The next question is that of salary-centric damages. The Final Order does *not* contain any quantification of these damages, and enters no judgment as to a sum certain. Rather, the Final Order is silent as to how much is actually owed as and for these damages. And while Plaintiff Haack argues, artfully, in her Answering Brief that the record contains bits and pieces of evidence from which a figure may be deduced, she equally concedes that "the trial court's order awarding Respondents damages was not set as a sum certain…" Answering Brief, p. 24.

Yes, if every single inference in the record were viewed in the light most favorable to Plaintiff Haack, salary damages of $125,000.00 may be artfully deduced. But this appeal is taken from neither a motion to dismiss nor one for summary judgment; the question is not what could have been divined from the evidence in the light most beneficial to the non-appealing party, but, rather, what the Trial Court actually determined. Here, it is clear the Trial Court did not make any findings as to salary damages in a sum certain.

Plaintiff Haack was given an opportunity to prove these damages to the satisfaction of the Trial Court. A multi-day trial was conducted with expert

testimony. Yet she failed to do so; she did not furnish a specific sum to the satisfaction of the Trial Court and, instead, left the Trial Court with only a concept of what *might* give rise to damages. She therefore failed to carry her burden. *See, e.g.*, *Paullin v. Sutton*, 102 Nev. 421, 423, 724 P.2d 749, 750 (1986) ("It is the burden of the plaintiff to prove damages.") (citing *Kelly Broadcasting Co. v. Sovereign Broadcast*, 96 Nev. 188, 606 P.2d 1089 (1980)).[1]

Finally, this leaves the question of damages in the form of legal fees advanced by the parties' entity to Messrs. Evenden and Ayala. In her Answering Brief, Plaintiff Haack contends the record establishes these damages to be in the sum of $138,475.78 (of which she would be presumably entitled to one third — or $46,158.59— since it is undisputed that she owned only one third of the entity advancing the fees).

Yet, once again, this defense of the Trial Order is little more than the construction of a Potemkin village. The Trial Court did not actually award damages in a sum certain; much less this sum. And while the record may be cherry picked to arrive at this number, the question on appeal is not what might have been surmised from the record had the Trial Court done as Plaintiff Haack wished; it is, to the contrary, what the Trial Court found Plaintiff Haack to have actually proven.

[1] Notably, Plaintiff Haack has not filed a cross-appeal. To the extent that she believes that the Trial Court erred in not finding that she produced evidence satisfactory to merit judgment in a sum certain, she has waived the right to argue such on appeal.

Here, the Final Order shows the Trial Court did not find Plaintiff Haack to have actually proven much of anything vis-a-vis quantifiable damages. And, thus, under the *Paullin* standard, she has not met the burden to merit entry of judgment on her claims.

VII. Conclusion

At core, this appeal really presents two issues: First, that the Trial Court engaged in an unconstitutional extrajudicial delegation of power when it could not surmise actual damages from the record before it; and, second, that Plaintiff Haack's failure to prove those actual damages ought not be rewarded with a second bite at the apple. The Trial Court judge who heard this case has now left the bench. So any remand of this case — and the Answering Brief concedes that at least *some* remand is necessary — will be presented to a new judge.

The question is the terms of that remand. Given Plaintiff Haack's failure to prove damages at trial, and her concomitant failure to cross-appeal, a remand that provides her a second bite at the apple would be unjust. Thus, Messrs. Evenden and Ayala respectfully ask that this matter not only be remanded but that it be remanded with instructions to enter judgment in their favor in light of Plaintiff Haack's failure to prove damages as a matter of law.

VIII. 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:

[x] 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

[x] Does not exceed 15 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 15th day of February, 2021

Respectfully Submitted,

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Certificate of Service

I hereby certify that on this 15th day of February, 2021, 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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