IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Oct 05 2020 04:07 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Appeal No.: 80591

ALLEN CRANE

Appellant,

vs.

VICTOR MARLOF; LAS VEGAS PIZZA, LLC dba PIZZA HUT,

Respondents.

On Appeal from the Eighth Judicial District Court, Clark County, Nevada
Department 32, The Honorable Rob Bare
District Court Case No. A-16-741854-C

RESPONDENT, LAS VEGAS PIZZA, LLC'S ANSWERING BRIEF

ANNALISA N. GRANT, ESQ.
Nevada Bar No. 11807
ALEXANDRA B. M^{C}LEOD, ESQ.
Nevada Bar No. 8185
GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 300
Las Vegas, Nevada 89113
Tel.: (702) 940-3529
Fax: (855) 429-3413
Alexandra.McLeod@aig.com
Attorneys for Las Vegas Pizza, LLC

Docket 80591 Document 2020-36530

GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

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.

LAS VEGAS PIZZA, LLC dba PIZZA HUT does not have a parent company. No publicly held corporation owns 10% or more of its stock. Furthermore, the following law firms and attorneys have appeared in proceedings in District Court:

Annalisa N. Grant, Esq. (GRANT & ASSOCIATES)

Sarah B. Hartig, Esq. (formerly of GRANT & ASSOCIATES)

Alexandra B. McLeod, Esq. (GRANT & ASSOCIATES)

Only counsel Grant and McLeod are expected to appear in this Court.

DATED this 5th day of October, 2020.

GRANT & ASSOCIATES



ALEXANDRA B. McLEOD, ESQ.
Nevada Bar No. 8185
7455 Arroyo Crossing Pkwy, Suite 300
Las Vegas, Nevada 89113
Attorneys for Las Vegas Pizza, LLC

GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

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GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

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GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

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GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the District Court abused its discretion when it used parol evidence to interpret the ambiguous term "short trial format" in the Parties' stipulation and ultimately determined all short trial rules, including the cap on attorney fees in NSTR 27, applied to this case?

GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

STATEMENT OF FACTS

Appellant Allen Crane alleges personal injuries sustained on 3-19-16 when (former) Las Vegas Pizza, LLC (LVP) delivery driver Victor Marlof, while in route to deliver a pizza and after being stopped at the security gate at a Las Vegas apartment complex, put his car in reverse and backed into him. [**APP023** at lines12-19] This case was tried on 11-18-19 in a one-day trial[1] format before Judge Rob Bare (Dept 32), resulting in a plaintiff's verdict of $21,295.86. [**APP332-337**] There is an ongoing dispute about whether the trial fell inside or outside of the Short Trial Program. Demand for Removal from the Short Trial Program was filed on 10-23-17 [**APP036-038**]; however, the parties stipulated to continue trial and "move to Short Trial Program" on 6-18-19, agreeing to borrow the "one-day, Short Trial format." [**APP264-267**]

After trial, Plaintiff filed a motion to recover $9,157.66 in costs, $4,612.99 in prejudgment interest, and $101,405.00 in attorney's fees. [**APP355**] Defendant Marlof filed an opposition [**APP583-643**], and LVP joined [**APP644-646**], based largely on the fact that attorneys' fees are capped at $3,000 in the short trial program (NSTR 27(b)(4)). Following oral argument on 1-21-20, the Court took the matter under advisement.

In Judge Bare's 12-page, 2-6-20 decision [**APP007-19**], the Court found that the short trial limits do apply. But, since there was no proof that Defendant Marlof's

[1] At trial, Plaintiff was represented by Kathleen Gallagher, Esq. and Eric Powers, Esq. Marlof was represented by Michael Smith, Esq. of Winner Sherrod. LVP was represented by undersigned counsel. Crane and Marlof both attended the trial, as did Christy Hughes on behalf of LVP.

counsel had settlement authority for both Defendants when Crane issued an unapportioned Offer of Judgment, fees ($3,000) and interest ($4,612.99) were awarded against Marlof only. [**APP018**] Crane was also awarded a reduced sum for costs, $4,576.76 against both Defendants. [**APP018**] Plaintiff Crane then filed his Notice of Appeal on 2-10-20. [**APP001-003**]

SUMMARY OF THE ARGUMENT

1. Without a valid offer properly apportioned, directed to, and served on Las Vegas Pizza, there is no basis for Crane to collect attorney fees from LVP regardless of amount or whether the Short Trial cap applies.

2. The Trial Court considered all it was obligated to under applicable precedent and guidance given by the Nevada Supreme Court. The Court lawfully used its discretion to interpret the ambiguous term "short trial format" in the Parties' stipulation and ultimately found all of the Nevada Short Trial Rules to apply in this case, including the cap on attorney fees in NSTR 27.

3. If the Nevada Short Trial Rules and the caps on damages and expert fees apply here, the reduced costs awarded by the Trial Court were proper.

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GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

ARGUMENT

I. REGARDLESS OF NSTR 27, ATTORNEY FEES MAY NOT BE AWARDED AGAINST LAS VEGAS PIZZA BECAUSE THERE WAS NO PROOF THAT DEFENDANT MARLOF'S COUNSEL HAD AUTHORITY TO ACCEPT AN NRCP 68 UNAPPORTIONED OFFER OF JUDGMENT FOR BOTH DEFENDANTS

"Nevada follows the American rule that attorney fees may not be awarded absent a statute, rule, or contract authorizing such award."[2] If fees are awarded, the Nevada appellate courts review a district court's award of attorney fees for an abuse of discretion.[3] Specifically, a district court has discretion to award attorney fees to a prevailing party "when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the pre-vailing party." NRS 18.010(2)(b). Further, NRCP 68(f) provides that fees may be awarded to a party whose prior offer of judgment was rejected, if the judgment ultimately obtained by the offeree is less favorable than the original offer. In evaluating the reasonableness of a request for attorney fees, a district court is required to consider the factors set forth in *Brunzell.*[4]

Here, Crane recovered an award which exceeds $20,000.[5] The Court specifically found that Crane is not entitled to attorneys' fees under NRS 18.010(2)(b). Instead, Crane's argument and the Trial Court's order granting fees is premised on having bested an NRCP 68 Offer of Judgment, which was either (1)

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[2] *Thomas v. City of North Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006).
[3] *Id*.
[4] *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349-350, 455 P.2d 31, 33 (1969).
[5] *See* NRS 18.010.

GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

unapportioned to both Defendants or (2) directed to counsel for Marlof only. In reviewing that issue, the Court considered both the *Brunzell* and *Beattie*[6] factors [**APP015:9-24**] but found that the failure of service on LVP as well as the lack of proof that Defendant Marlof's counsel had settlement authority for both Defendants resulted in the offer being binding only against Defendant Marlof. [**APP016:9-13**]

Indeed, Crane's argument fails regardless of service because his joint, unapportioned Offer to both Defendants was invalid. NRCP 68 provides in pertinent part:

> (c) Joint Unapportioned Offers.
> (2) Offers to Multiple Defendants. An offer made to multiple defendants will invoke the penalties of this rule only if (A) there is a single common theory of liability against all the offeree defendants, such as where the liability of some is entirely derivative of the others or where the liability of all is derivative of common acts by another, ***and* (B) the same entity, person or group is authorized to decide whether to settle the claims against the offerees***. (Emphasis added.)

Crane's Offer was addressed to "All Defendants," though it was only specifically directed at counsel for Marlof. Even assuming Crane's failure to include the undersigned counsel on the Offer was an oversight and it was intended to be directed to both Defendants, the same is clearly invalid. A joint, unapportioned offer must only be made to multiple defendants where "the same entity, person or group is authorized to decide whether to settle the claims against the offerees."[7] Here, Defendants Marlof and LVP are separate parties, being defended by separate attorneys who were retained by separate insurance carriers on their separate

[6] *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983)
[7] NRCP 68.

behalves. Thus, the same entity, person, or group was never authorized to settle the claims as against both Defendants.

As the Trial Court found, "There is no proof that Defendant Marlof's counsel has settlement authority for both Defendants." [**APP016:10-11**] Without a valid offer properly apportioned, directed to, and served on LVP, there are no grounds for Crane to collect attorney fees regardless of amount or whether the short trial cap applies.

II. BECAUSE THE TERM "SHORT TRIAL FORMAT" IS AMBIGUOUS ON ITS FACE, THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN INTERPRETING THE STIPULATION AND DETERMINING THAT ALL THE NEVADA SHORT TRIAL RULES INCLUDING THE CAP ON ATTORNEY FEES APPLIED HERE

When parties to pending litigation enter into a stipulation, they enter into a contract.[8] Such a contract is subject to general principles of contract law.[9] The law is well-settled that the interpretation of a contract is a question of law, not a question of fact.[10] As such, Trial Judge Bare acted within his authority in interpreting the stipulation between the Parties.

GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

[8] "Stipulation," Restatement (Second) of Contracts § 94 (1981); *see also Grisham v. Grisham*, *128 Nev. 679, 685, 289 P.3d 230 (2012); Mack v. Estate of Mack*, 125 Nev. 80, 95, 206 P.3d 98, 108 (2009); *Taylor v. State Indus. Ins. System*, 107 Nev. 595, 598, 816 P.2d 1086, 1088 (1991) (*citing Palmer v. City of Long Beach*, 33 Cal.2d 134, 199 P.2d 952, 957 (1948)).

[9] *Mack*, 125 Nev. at 95, 206 P.3d at 108.

[10] *Redrock Valley Ranch, LLC v. Washoe County*, 127 Nev. 451, 460, 254 P.3d 641, 647 (2011); *see also Galardi v. Naples Polaris LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013).

If the words of an agreement are unambiguous, then we look no farther than the four corners of the written document for its meaning.[11] "This rule, which is known as the parol evidence rule, is one of substantive law and not merely one of evidence; and it obtains in equity as well as at law."[12] Only if the words are ambiguous does the court venture outside of the document itself to examine such extrinsic things as parol evidence and settled rules of construction in order to determine the intent of the parties.[13] Parol evidence is only admissible when some contractual term is facially ambiguous.[14] Evidence extraneous to the stipulation is inadmissible in the case at bar unless it falls within an exception to the parol evidence rule.

One such exception is when a term of the contract is "ambiguous on its face."[15] The Nevada Supreme Court's explanation in *Galardi v. Naples Polaris, LLC* is instructive:

> Whether a contract is ambiguous likewise presents a question of law. A contract is ambiguous if its terms may reasonably be interpreted in more than one way, but ***ambiguity does not arise simply because the parties disagree on how to interpret their contract***. Rather, "an ambiguous contract is 'an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning.' "[16]

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[11] *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015).
[12] *State ex rel. List v. Courtesy Motors*, 95 Nev. 103, 590 P.2d 163 (1979) (internal citations omitted).
[13] *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913-14, 193 P.3d 536, 544-45 (2008).
[14] *Ringle v. Bruton*, 120 Nev. 82, 91, 86 P.3d 1032, 1037 (2004).
[15] Where "a written contract is clear and unambiguous on its face, extraneous evidence cannot be introduced to explain its meaning." *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 281, 21 P.3d 16, 21 (2001) (internal citation omitted).
[16] *Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366, 129 Nev. Adv. Op. 33 (2013) (emphasis added) (internal citations omitted)

GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

Here, one term of the Parties' written stipulation is facially ambiguous: "short trial format." The confusion created by that ambiguity was apparent in counsel's comments during pre-trial motions, while preparing for and during trial, arguments of post-trial motions, the Court's queries, and even the instant Appeal. The stipulation did not define "short trial format." It likewise failed to enumerate which Nevada Short Trial Rules would be applicable and which would not.

Further, Appellant does not advocate a bright line, objective test based on trial procedure versus substantive evidence, akin to the *Erie* doctrine[17] or a similar guideline. Rather, the interpretation Appellant urges is the introduction of the subjective opinions and intentions of his own counsel. Appellant seeks a cafeteria, take-only-what-you-want style format which would allow him to benefit from a publicly rather than privately paid judge (outside of the Short Trial Program), to present the case to a petite, four-person jury (NSTR 22), to admit reports instead of expert testimony (NSTR 19), to time-limit the Defendants in the presentation of their evidence and argument (NSTR 21), but, apparently, to do away with the caps on damages, expert, or attorney fees (outside).

However, Mr. Galliher's (an "original party" to the stipulation) subjective understanding of the term is irrelevant to the interpretation of this term of the stipulation for at least two reasons: (1) "[T]he making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs, not on the parties' having meant the same thing but on their having

[17] *See generally Erie R.R. Co. v. Tompkins***,** 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

said the same thing";[18] and (2) the law is clear that a written contract, such as the stipulation at issue here, supersedes and obliterates all prior negotiations.[19] To do otherwise would be to eviscerate the parol evidence rule. So, parol evidence may only be used to clarify a term that is ambiguous, and an ambiguity does not arise merely because the parties disagree on what they think the contract means. When, as here, the only dispute is over what the words of the contract and parol evidence mean, then all that remains is a pure question of law for the court.[20] It is wholly within the court's purview and discretion to determine what legal effect the words of the contract and parol evidence have.

Rightfully, after identifying uncertainty about the stipulation [**APP008:12-15**], the Trial Judge did not rely on any prior discussions or individual's subjective intentions. Instead, the Judge used the context of the case overall including pre-trial motions and meetings with counsel as well as the evidentiary rulings and trial proceedings themselves to determine what "short trial format" meant in this framework. The Judge's deliberation was made manifest by the resulting 12-page decision. The Court examined transcripts and recordings of the trial to thoughtfully

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[18] *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 401, 632 P.2d 1155, 1157 (1981).

[19] "[T]he final agreement made by the parties supersedes tentative terms discussed in earlier negotiations. Consequently, in determining the content of the contract, earlier tentative agreements and negotiations are inoperative." John D. Calamari & Joseph M. Perillo, CONTRACTS § 3-2, "The Parol Evidence Rule", 135-36 (3d ed. 1987) (text cited as authority in *Matter of Kern*, 107 Nev. 988. 991, 823 P.2d 275, 277 (1991); *see also Schieve v. Warren*, 87 Nev. 42, 482 P.2d 303 (1971); *Tallman v. First National Bank*, 66 Nev. 248, 208 P.2d 302 (1949).

[20] *Redrock Valley Ranch, LLC v. Washoe County*, 127 Nev. 451, 460, 254 P.3d 641, 647 (2011) (*citing Lehrer McGovern Bovis v. Bullock Insulation*, 124 Nev. 1102, 1118, 197 P.3d 1032, 1042 (2008)).

GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

and meaningfully determine the meaning of the ambiguous term "short trial format." Ultimately, the Court found that the matter had proceeded under "ALL" the Nevada Short Trial Rules [**APP008:20** capitalization in original**; APP014:19-20**] and, accordingly, that the cap on attorney fees in NSTR 27 applied [**APP016:16-17**].

In sum, the Trial Court acted within its discretion in determining that the Nevada Short Trial Rules and specifically NSTR 27 applied here, because:

(1) A stipulation is a contract;

(2) Interpretations of a contract is a question of law;

(3) Evidence extrinsic to a stipulation or contract is inadmissible unless it falls within a recognized exception to the parol evidence rule;

(4) Ambiguity of a contract terms is one exception to the parol evidence rule;

(5) The Court is authorized to resolve the ambiguity of a term of the stipulation by considering evidence outside the contract such as usage of a term of art, overall history and context of the legal case, and operative understanding of the Court and Parties;

(6) Following the above steps, the Trial Court found that all the Nevada Short Trial Rules applied in this case;

(7) After resolving the ambiguous term of the stipulation, the Court went on to consider all that was required of it, namely the briefs, arguments of counsel, as well as precedent and statutory law including the *Brunzell* and *Beattie* factors.

For all of these reasons, the Trial Court's determination that NSTR 27's cap on attorney fees applies should be affirmed.

GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

III. HAVING FOUND THAT THE NEVADA SHORT TRIAL RULES AND THE CAPS TO APPLY, THE COURT'S COST AWARD WAS PROPER AND SHOULD BE AFFIRMED

With regard to costs, Plaintiff sought recovery beyond the scope permitted by NRS 18.005, including: excess expert fees beyond the $500 limit of NSTR 27(b)(5); fees paid to Arbitrator in violation of NAR 24(c); costs for "legal writing service" which should be more properly classified as overhead or, alternatively, attorneys' fees; business or litigation loan financing obtained at Crane's/counsel's option. [**APP040**] While the trial court has authority to award part or all the prevailing party's costs, that authority is constrained by NRS 18.050 as well as by the scope of NRS 18.005. The items enumerated above were beyond discretion of court to allow, and Judge Bare rightfully disallowed those costs and entered a reduced award of costs for the Plaintiff of $4,576.76 against both Defendants. [**APP016:22-APP017:24**] Again, the Trial Court acted within its authorized discretion in applying the limits of the Nevada Short Trial Rules and tailoring the cost award accordingly. The Trial Court's cost award should be affirmed.

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GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

CONCLUSION

Overall, the 1-21-20 hearing and the Court's 2-6-20, 12-page findings of fact and Order manifest the Court's deliberation and meticulousness on these post-trial issues. The Court considered all it was obligated to under the guidance given by the Nevada Supreme Court and cannot be shown to have abused its discretion in these matters. As such, Judge Bare's Order should be affirmed by the appellate court and the Nevada Short Trial Rules' cap on attorney fees applied here.

RESPECTFULLY SUBMITTED this 5th day of October, 2020.

GRANT & ASSOCIATES



ALEXANDRA B. MCLEOD, ESQ.
Nevada Bar No. 8185
7455 Arroyo Crossing Pkwy, Suite 300
Las Vegas, Nevada 89113
Attorney for Las Vegas Pizza, LLC

GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

CERTIFICATE OF COMPLIANCE

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 in Times New Roman 14-point font.

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:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains less than 3,000 words; and/or

[X] Does not exceed 30 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 . . .

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GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 5th day of October, 2020.

GRANT & ASSOCIATES



ALEXANDRA B. MCLEOD, ESQ.
Nevada Bar No. 8185
7455 Arroyo Crossing Pkwy, Suite 300
Las Vegas, Nevada 89113
Attorney for Las Vegas Pizza, LLC

GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 220
Las Vegas, Nevada 89113
Telephone No. (702) 940-3529
Facsimile No. (855) 429-3413

CERTIFICATE OF SERVICE

I certify that I am an employee of **GRANT & ASSOCIATES** and that on this 5th day of October, 2020, I caused a true and correct copy of the foregoing **RESPONDENT, LAS VEGAS PIZZA, LLC'S ANSWERING BRIEF** to be served as follows:

X By placing the same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

___ Pursuant to NEFCR 9, to be sent via facsimile; and/or

X Pursuant to NEFCR 9, by transmitting via the Court's electronic filing services by the document(s) listed above to the Counsel set forth on the service list.

Keith E. Galliher, Jr., Esq.
Kathleen H. Gallagher, Esq.
THE GALLIHER LAW FIRM
1850 E. Sahara Avenue, Suite 107
Las Vegas, NV 89104
Attorneys for Appellant Allen Crane

Michael R. Smith, Esq.
ATKIN WINNER & SHERROD
1117 South Rancho Drive
Las Vegas, NV 89102
Attorney for Defendant Victor Marlof

/s/ Denisse A. Girard-Rubio

An Employee of **GRANT & ASSOCIATES**