

# The WRIT

OFFICIAL PUBLICATION OF THE WASHOE COUNTY BAR ASSOCIATION

Wednesday, October 10, 2018, 12 Noon, Harrah's Convention Center, 3rd Floor

## Judicial Candidates' Forum

WCBA is pleased to present the upcoming candidate forum. Justice A. William Maupin will be our moderator.

Judge Elissa F. Cadish is running for Nevada Supreme Court - Seat C. Judge Cadish graduated magna cum laude from the University of Pennsylvania in 1986, receiving her Bachelor of Arts degree with honors in Political Science. She received her law degree from the University of Virginia School of Law in 1989. After graduation, she moved to Las Vegas and clerked for two years for Honorable Philip M. Pro in the United State District Court for the District of Nevada. In July 2007, she was appointed to fill the District Judge vacancy in Department 6 of the Eighth Judicial District Court where she presently serves.



Justice Lidia S. Stiglich was appointed to the Supreme Court of Nevada by Governor Brian Sandoval in November 2016. Prior to her appointment to the Supreme Court, Justice Stiglich was appointed district court judge of the Second Judicial District Court by Governor Brian Sandoval in November 2012, and was subsequently retained by voters in 2014. As the presiding judge in Department 8 of the district court, Justice Stiglich heard civil and criminal trials. In addition to her duties in Dept. 8, she served as the Probate Judge for the district and was also the cofounder and presiding judge of the Youth Offender Drug Court. This specialty court was designed for the young adult population (ages 18 to 24) who are opiate/heroin users, as an alternate sentencing/rehabilitation program.



Judge Dixie Grossman was appointed by Governor Brian Sandoval to the Second Judicial District Court, Department 2 in March 2018. Judge Grossman has devoted her professional career to the practice and improvement of family law. Judge Grossman received one of the highest performance scores on the recent judicial survey conducted by WCBA.



All candidates were invited to participate.

**RSVP** by Monday, October 8. \$25 per person for members, \$35 non-members. \$200 for table of eight with signage. Register online at [www.wcbar.org](http://www.wcbar.org) or call 786-4494.

# APPELLATE BRIEFS

By Debbie Leonard, McDonald Carano

## WHO IS THE “PREVAILING PARTY” WHEN THERE IS A PARTIAL SETTLEMENT OF COMPETING CLAIMS?

Nevada law allows the “prevailing party” to recover costs and, in some cases, fees. But it is not always clear who qualifies as the prevailing party. The Supreme Court recently addressed this question in the context of a partial settlement of competing claims, concluding that NRS 18.010(2) (a) and NRS 18.020(3) do not authorize a district court to compare a monetary settlement of one party’s claim against a judgment for damages on another party’s counterclaim in determining the “prevailing party.” See *Northern Nevada Homes, LLC v. GL Constr., Inc.*, 134 Nev. Adv. Op. 60 (August 2, 2018).

Northern Nevada Homes, LLC (“Owner”) sued GL Construction, Inc. (“Contractor”) alleging trespass for dumping dirt and other waste on Owner’s property. Contractor counterclaimed for breach of contract regarding unpaid invoices for excavation work it performed for Owner. The district court bifurcated the case into a jury trial for the trespass-related claims and a bench trial for the counterclaim. During the jury trial, Contractor settled Owner’s trespass-related claims for \$362,500. The bench trial on the counterclaim then ensued, with the district court awarding \$7,811 in damages to Contractor.

Contractor then moved for \$67,595 in attorneys’ fees and \$2,497.33 in costs. In opposing that motion, Owner argued that Contractor was not the prevailing party within the meaning of NRS 18.010 and 18.020 because Owner obtained a net recovery in the settlement of its primary claims. The district court rejected this argument and awarded Contractor \$10,000 in fees and \$390 in costs. In reaching this result, the district court found that the settlement amount – even though it exceeded the counterclaim judgment by more than \$350,000 – was not relevant

in determining who qualifies as the prevailing party, as that term is used in Nevada’s statutory scheme.

The Supreme Court agreed with the district court’s statutory analysis that one could not be a “prevailing party” unless the action resulted in an actual judgment. In reaching that conclusion, the Court rejected Owner’s reliance on *Parodi v. Budetti*, 115 Nev. 236, 241, 984 P.2d 172, 175 (1999). There, the Court held that where a jury awards both parties damages, the trial court must offset the damage awards to determine whether the net award meets the statutory requirements. Because *Parodi* only requires a district court to consider competing judgments for monetary damages, the Supreme Court concluded it did not require that a judgment be compared to a greater settlement sum.

Although the Court acknowledged that some jurisdictions do recognize a settlement recovery in determining who is the prevailing party, it found no basis in Nevada law to do so. For example, the Court distinguished the statutory purpose underlying California’s comparable statute to that of NRS 18.010(a). While California’s statute has the “basic purpose of imposing costs on the losing party,” the intention of NRS 18.010(2)(a) is “to afford litigants in small civil claims the opportunity to be made whole.” The Court noted that “[a]llowing judgments for damages on distinct counterclaims to be aggregated with distinct settlements would not provide the opportunity for defendants with comparatively small counterclaims to be made whole.” This, the Court believed, undermined the legislative intent of NRS 18.010(2)(a).

As a result, the Court affirmed the fee and cost award in favor of the counterclaimant who successfully recovered an albeit nominal judgment in

comparison to the settlement sum paid to the plaintiff.

What is the takeaway from the *Northern Nevada Homes* decision? Primarily, it appears to be a lesson in how to negotiate a partial settlement. In reaching a settlement on some but not all claims, it would be worthwhile to contemplate how fees and costs on the remaining claims will be addressed. The settling parties can decide whether a net settlement recovery will contractually bar a fee and cost award on the remaining claims, even if the counterclaimant would statutorily be deemed “the prevailing party.” A waiver of a statutory rights to fees and costs on unsettled claims could be part of the consideration for a partial settlement. Or the parties could agree to a cap on any such fee and cost award. Conversely, the settlement sum could take into account the possibility that an adverse fee and cost award might result once the remaining claims are adjudicated. The bottom line is that, when negotiating a partial settlement, there may be more terms to contemplate than just the value of the claims that are being settled.

*Debbie Leonard is a partner at McDonald Carano LLP, where her practice focuses on appeals before Nevada’s appellate courts, the Ninth Circuit Court of Appeals and administrative agencies. She served as the 2013-2014 Chair of the State Bar’s Appellate Litigation Section and is Lead Editor of the Nevada Appellate Practice Manual, 2016 and 2018 editions. She is also a mediator and Nevada Supreme Court settlement judge.*

