

IN THE SUPREME COURT OF THE STATE OF NEVADA

In the Matter of the Determination of the
Relative Rights in and to the Waters of
Mott Creek, Taylor Creek, Cary Creek (aka
Carey Creek), Monument Creek, and Bulls
Canyon, Stutler Creek (aka Stattler Creek),
Sheridan Creek, Gansberg Spring, Sharpe
Spring, Wheeler Creek No. 1, Wheeler
Creek No. 2, Miller Creek, Beers Spring,
Luther Creek and Various Unnamed
Sources in Carson Valley, Douglas County,
Nevada.

Electronically Filed
Feb 15 2013 02:11 p.m.
Tracie K. Lindeman
Clerk of Supreme Court
Supreme Court Case No. 62620

District Court Case No. 08-CV-0363-D

J.W. BENTLEY and MARYANN
BENTLEY, TRUSTEES OF THE
BENTLEY FAMILY 1995 TRUST,

Appellants,

vs.

STATE OF NEVADA, OFFICE OF THE
STATE ENGINEER; THOMAS J.
SCYPHERS; KAHTLEEN M.
SCYPHERS; FRANK SHARO;
SHERIDAN CREEK EQUESTRIAN
CENTER, LLC, a Nevada Limited Liability
Company; DONALD S. FORRESTER;
KRISTINA M. FORRESTER; HALL
RANCHES, LLC; RONALD R.
MITHCELL; and GINGER G.
MITHCELL,

Respondents.

MOTION FOR DETERMINATION OF FINAL ORDER

COME NOW Appellants, J.W. BENTLEY and MARYANN BENTLEY, Trustees
of the Bentley Family 1995 Trust ("Bentleys"), by and through their counsel of record,
Michael L. Matuska, Matuska Law Offices, Ltd., and hereby move for a determination of

1 whether the 4 January 2013 Order for attorney's fees and costs attached hereto as
2 *Exhibit 1* is a final, appealable order.

3
4 This Motion raises the same issues that were raised in this Court's
5 15 November 2012 Order to Show Cause in Case No. 60891. That Order questioned
6 whether the Findings of Fact, Conclusions of Law and Judgment in Case No. 08-CV-0363-
7 D could be considered a final, appealable judgment under NRAP 3A(b)(1), where, despite
8 the certification of that order as a final judgment, the decree involving theses same parties
9 is still pending. Appellants asserted in their 14 December 2012 response to the Order to
10 Show Cause that the certification was improper. "In the absence of a proper certification
11 of finality, an interlocutory order dismissing fewer than all the parties cannot be challenged
12 on appeal until a final judgment is entered in the action fully and finally resolving all the
13 claims against all the parties." *Fernandez v. Infusaid Corp.*, 110 Nev. 187 (1994).
14
15

16 On 4 January 2013, the Hon. David R. Gamble entered the Order awarding
17 attorney's fees and costs (*Exhibit 1*) that is the subject of this appeal. This Order was also
18 entered before the entry of the final decree. There is no rule authorizing a motion for
19 attorney's fees prior to the entry of a final judgment, let alone the entry of an order.
20 "Unless a statute provides otherwise, the motion [for attorney's fees] must be filed no later
21 than 20 days *after* entry of judgment is served." NRCP 54(d)(2)(B) [italics added].
22

23 An order awarding attorney's fees after the entry of the final judgment is a special
24 order made after final judgment that is appealable pursuant to NRAP 3A(b)(8). *Smith v.*
25 *Crown Financial Services of America*, 111 Nev. 277, fn. 2 (1995); *Gumm v. Mainor*, 118
26

27 ///

1 Nev. 912 (2002).¹ In contrast, the 4 January 2013 Order awarding attorney's fees in this
2 case was entered before the final decree and cannot be considered a final order for any
3 purpose.
4

5 Although Appellants contend that the Order awarding attorney's fees is not a final
6 order, they felt compelled to appeal out of an abundance of caution and because
7 Respondents have already recorded the Order in an attempt to create a judgment lien (*see*
8 *Exhibit 2*). Petitioners have filed this Motion for Determination at the earliest opportunity
9 in order to avoid the unnecessary expenditure of time, money, and judicial resources.
10

11 WHEREFORE, Petitioners request an Order from this Court clarifying that the
12 Order awarding attorney's fees is not a final order for purposes of appeal or enforcement.
13

14 Dated this 15th day of February 2013.

15 MATUSKA LAW OFFICES, LTD.

16 By: 

17 MICHAEL L. MATUSKA, SBN 5711
18 Attorneys for Appellants
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28 ¹ *Smith v. Crown Financial and Gumm v. Mainor* cite former NRAP 3A(b)(2).

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Matuska Law Offices and that on the 15th day of February 2013, I served a true and correct copy of the preceding document entitled **MOTION FOR DETERMINATION OF FINAL ORDER** as follows:

Bryan L. Stockton
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701

Thomas J. Hall, Esq.
305 South Arlington Avenue
P.O. Box 3948
Reno NV 89505-3948

Jessica Prunty, Esq.
DYER LAWRENCE, et al.
2805 Mountain Street
Carson City NV 89703

☒ **BY U.S. MAIL:** I deposited for mailing in the United States mail, with postage fully prepaid, an envelope containing the above-identified document(s) at Carson City, Nevada, in the ordinary course of business.

☐ **BY PERSONAL SERVICE:** I personally delivered the above-identified document(s) by hand delivery to the office(s) of the person(s) named above.

☐ **BY FACSIMILE:**

☐ **BY FEDERAL EXPRESS ONE-DAY DELIVERY.**

☐ **BY MESSENGER SERVICE:** I delivered the above-identified document(s) to Reno-Carson Messenger Service for delivery.


LIZ STERN, ALS

EXHIBIT 1

EXHIBIT 1

1 Case No. 08-CV-0363-D

2 Dept. No. I

FILED

2013 JAN -4 PM 2:38

RECEIVED

JAN -4 2013

TED THUAN
CLERK
P. GREGORY
BY.....DEPUTY

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6
7 IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
8 IN AND FOR THE COUNTY OF DOUGLAS

9
10 In the Matter of the Determination of the relative
11 rights in and to the Waters of Mott Creek, Taylor
12 Creek, Cary Creek (aka Carey Creek), Monument
13 Creek, and Bulls Canyon, Stutler Creek (aka Statler
14 Creek), Sheridan Creek, Gansberg Spring, Sharpe
15 Spring, Wheeler Creek No. 1, Wheeler Creek No. 2,
16 Miller Creek, Beers Spring, Luther Creek and various
17 unnamed sources in Carson Valley, Douglas County,
18 Nevada.

ORDER

19
20 THIS MATTER comes before the Court upon a Motion For Attorney's Fees and a
21 Memorandum of Costs filed by Donald S. Forrester and Kristina M. Forrester, Hall Ranches,
22 LLC, a Nevada Limited Liability Company, Thomas J. Scyphers and Kathleen M. Scyphers,
23 Frank Scharo, Sheridan Creek Equestrian Center, LLC, a Nevada Limited Liability Company,
24 and Ronald R. Mitchell and Ginger G. Mitchell (hereinafter referred to collectively as
25 "Intervenors"). J.W. Bentley and MaryAnn Bentley, Trustees of the Bentley Family Trust 1995
26 Trust (hereinafter referred to as the "Bentleys") have opposed the motion while filing their own
27 Motion To Retax Costs. The Bentleys have also filed a Motion For Leave To File Sur-Reply
28 regarding the Motion for Attorney's Fees, which is opposed by Intervenors.

Having now examined all relevant pleadings and papers on file herein, the Court enters
the following order, good cause appearing:

1 **Motion For Attorney's Fees**

2 On April 5, 2012, the Court entered written Findings of Fact, Conclusions of Law,
3 Order and Judgment following a contested trial during which the Bentleys and the Intervenor
4 were in opposition. That pleading includes the following excerpts, among others not
5 specifically recounted herein:
6

7 FINDINGS OF FACT

8
9 F. Attorney Fees:

10 44. Mr. Bentley, through intimidation and threat, attempted to bully the Intervenor,
acting in a manner to harass and financially exhaust the Intervenor.

11 45. Bentleys brought and maintained their Exception No. 1 relating to the Diversion
12 Agreement without reasonable grounds.

13 46. The Diversion Agreement contains a clause that allows attorney fees to the
prevailing party in the event a lawsuit is brought to enforce or interpret the Agreement.

14 47. Bentleys asserted that the Agreement dated August 5, 1986, and the letter recorded
15 August 6, 1986, granted an additional right to divert the flow of Sheridan Creek through the
ponds. (Exhibit 7.) However, those documents did not grant any additional rights and are
16 invalid.

17 48. The Bentleys proceeded in this matter under an erroneous theory and under an
erroneous thought process, and therefore, their action was maintained by them without
18 reasonable grounds.

19 CONCLUSIONS OF LAW

20 19. The Intervenor are the prevailing parties and are entitled to their costs and a
21 reasonable attorney fees.

22 20. The Intervenor are adjudged to be the prevailing parties for the purposes of an
award of attorney fees to be supported by a separate motion or memorandum for the same
23 pursuant to NRCP 54(d) and NRS 18.010.

24 21. The Intervenor shall prepare and file a Memorandum of Fees and Costs, to
include evidence sufficient for the Bentleys to examine the Memorandum for content without
25 invading the attorney/client privilege. The Court will make a separate determination on the
amount of costs and attorney fees after the Bentleys have had an opportunity to respond to the
26 Memorandum.

27 ORDER AND JUDGMENT

28 It is hereby ordered the final decree in this matter shall include the following:

11. The Intervenor's are awarded their costs and a reasonable attorney fee.

Nevada Revised Statute 18.010 provides the following, among other things:

2. In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party:

(a) When the prevailing party has not recovered more than \$20,000; or

(b) Without regard to the recovery sought, 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 prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

3. In awarding attorney's fees, the court may pronounce its decision on the fees at the conclusion of the trial or special proceeding without written motion and with or without presentation of additional evidence.

4. Subsections 2 and 3 do not apply to any action arising out of a written instrument or agreement which entitles the prevailing party to an award of reasonable attorney's fees.

Having already pronounced its decision on fees at the conclusion of trial, the only remaining issue is to set the amount of the award. The Intervenor's post-hearing pleading in reply concludes by requesting attorney's fees in the amount of \$171,814.00.¹

Considering the factors provided within *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), the Court determines that the amount requested is reasonable based upon the following findings:

1. Professional Qualities: As reflected within the resumes attached to Intervenor's motion, Thomas Hall, Esq. is a Martindale-Hubbell AV-rated lawyer practicing regularly in the following areas of law for decades: real estate, water rights and litigation. Work billed by an

Intervenor's original award request was listed as \$165,049.00. That amount increased to \$171,814.00 within their reply pleading. Because that amount increased without the Bentleys having an opportunity to comment, the Bentleys' motion for leave to file a sur-reply is hereby granted, allowing the Court to receive and consider the Bentleys' position regarding the increased amount.

1 associate attorney and paralegal, both of whom are educated and experienced, has been
2 performed under Mr. Hall's supervision, constituting a savings to the client. The professional
3 qualities of Mr. Hall and his legal staff are satisfactory and reasonable.

4 2. Character Of Work To Be Done: The written judgment referenced within this Order
5 reflects the substance of the dispute between the parties. The nature and importance of
6 contested exceptions to the State Engineer's order of determination regarding the relative rights
7 in and to the water sources at issue herein speaks for itself. The legal work necessary included
8 conducting, defending and participating in contested litigation, which in turn required legal
9 research, analysis and writing in preparation for, and specific to, this matter.

10
11 3. The Work Actually Performed: Based upon a review of the billing statements
12 attached to the Motion for Attorney's Fees, and having previously ruled upon the pleadings
13 received in this sub-matter, and having further presided over the trial herein, during all of
14 which the Court observed the work of the appearing attorneys, the Court finds the work of the
15 Intervenor's legal team to have been satisfactory and reasonable.

16
17 4. The Result Obtained: As reflected within the written judgment entered on April 5,
18 2012, the result of trial was determined to be in favor of the Intervenor's.

19
20 However, although the amount of attorney's fees requested is reasonable and justified
21 as reflected above, considering the purpose of the award as stated within NRS 18.010(2)(b), the
22 Court hereby determines that an award of \$90,000.00 is appropriate to accomplish the statutory
23 purpose as stated therein.

24 THEREFORE, Intervenor's are hereby awarded \$90,000.00 in attorney's fees, to be paid
25 by the Bentleys.

26
27 **Motion To Retax Costs**

28 Intervenor's Memorandum of Costs presents costs expended in this sub-matter of

1 \$13,072.85. The Bentleys' Motion to Retax Costs seeks to reduce that amount by \$9,350.91 to
2 a retaxed amount of \$3,721.94. In opposition to the Motion to Retax Costs, Intervenor's cite
3 NRS 18.110(4), arguing that the Bentleys did not timely file their motion within the statutory
4 time allotted. No reply to the opposition has been received.

5 A review of the record indicates that the Motion to Retax Costs should have been filed
6 certainly no later than May 1, 2012. On May 2nd, a stipulation was filed extending the time in
7 which the Bentleys could file an opposition to the Motion for Attorney's Fees. That stipulation
8 did not specifically include an extension to the statutory time limit regarding a Motion to Retax
9 Costs. The Court adopted the stipulation within its Order dated May 10, 2012. That Order
10 likewise did not extend the time to seek the retax of costs.


11 Regardless, NRS 18.005, which defines costs that may be recovered by the prevailing
12 party, consistently references reasonable costs. Therefore, reviewing the Intervenor's
13 Memorandum of Costs, the Court hereby reduces the amounts requested by the following:

Item	Reduction
23,272 of black and white copies at a cost of \$0.10 in lieu of \$0.25:	(\$3,445.80)
Postage:	(\$500.00)
Legal research:	(\$2,000.00)
Total Reduction:	(\$5,945.80)

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21 THEREFORE, the Court finds that Intervenor's are hereby entitled to recover, as the
22 party prevailing in a special proceeding pursuant to the judgment entered on April 5, 2012, and
23 NRS 18.020(4), total costs of \$7,127.05 from the Bentleys.

24 IT IS SO ORDERED.

25 Dated this 4 day of January, 2013.

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DAVID R. GAMBLE
District Judge

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Copies served by mail this 4th day of January, 2013, to:

Bryan L. Stockton, Esq.
Deputy Attorney General
State of Nevada
100 North Carson Street
Carson City, NV 89701

Thomas J. Hall, Esq.
P. O. Box 3948
Reno, NV 89505

Michael L. Matuska, Esq.
937 Mica Drive, #16A
Carson City, NV 89705

John Shafer

EXHIBIT 2

Doc Number: **0816057**

01/11/2013 01:41 PM

OFFICIAL RECORDS

Requested By:
THOMAS J HALLDOUGLAS COUNTY RECORDERS
Karen Ellison - RecorderPage: 1 of 7 Fee: \$ 20.00
Bk: 0113 Pg: 2773

Deputy: sg

Assessor's Parcel Number: 1219-14-001-013

Recording Requested By:

Name: Thomas J. Hall, Esq.Address: Post Office Box 3948City/State/Zip: Reno, NV 89505

Mail Tax Statements to:

Name: _____

Address: _____

City/State/Zip: _____

Please complete Affirmation Statement below:

☒ I the undersigned hereby affirm that this document submitted for recording does not contain the social security number of any person or persons. (Per NRS 239B.030)

-OR-

☐ I the undersigned hereby affirm that this document submitted for recording contains the social security number of a person or persons as required by law: _____ (state specific law)

Thomas J. Hall
Signature (Print name under signature)

Attorney-at-Law

Title

ORDER (for Attorney's Fees and Costs)

(Title of Document)

If legal description is a metes & bounds description furnish the following information:

Legal description obtained from: Deed (Document Title), Book: 506 Page: 3946
Document # 674437 recorded May 8, 2006 (Date) in the Douglas County Records Office.

-OR-

If Surveyor, please provide name and address:

This page added to provide additional information required by NRS 111.312 Sections 1-4.

(Additional recording fees apply)

FILED

Case No. 08-CV-0363-D

Dept. No. 1

2013 JAN -4 PM 2:38

TED THUAN
CLERK

BY *[Signature]* DEPUTY

RECEIVED

JAN - 4 2013

DOUGLAS COUNTY
DISTRICT COURT CLERK

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

In the Matter of the Determination of the relative rights in and to the Waters of Mott Creek, Taylor Creek, Cary Creek (aka Carey Creek), Monument Creek, and Bulls Canyon, Stutler Creek (aka Statler Creek), Sheridan Creek, Gansberg Spring, Sharpe Spring, Wheeler Creek No. 1, Wheeler Creek No. 2, Miller Creek, Beers Spring, Luther Creek and various unnamed sources in Carson Valley, Douglas County, Nevada.

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THIS MATTER comes before the Court upon a Motion For Attorney's Fees and a Memorandum of Costs filed by Donald S. Forrester and Kristina M. Forrester, Hall Ranches, LLC, a Nevada Limited Liability Company, Thomas J. Scyphers and Kathleen M. Scyphers, Frank Scharo, Sheridan Creek Equestrian Center, LLC, a Nevada Limited Liability Company, and Ronald R. Mitchell and Ginger G. Mitchell (hereinafter referred to collectively as "Intervenors"). J.W. Bentley and MaryAnn Bentley, Trustees of the Bentley Family Trust 1995 Trust (hereinafter referred to as the "Bentleys") have opposed the motion while filing their own Motion To Retax Costs. The Bentleys have also filed a Motion For Leave To File Sur-Reply regarding the Motion for Attorney's Fees, which is opposed by Intervenors.

Having now examined all relevant pleadings and papers on file herein, the Court enters the following order, good cause appearing:

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48. The Bentleys proceeded in this matter under an erroneous theory and under an erroneous thought process, and therefore, their action was maintained by them without reasonable grounds.

CONCLUSIONS OF LAW

19. The Intervenor is the prevailing party and is entitled to their costs and a reasonable attorney fee.

20. The Intervenor is adjudged to be the prevailing party for the purposes of an award of attorney fees to be supported by a separate motion or memorandum for the same pursuant to NRCP 54(d) and NRS 18.010.

21. The Intervenor shall prepare and file a Memorandum of Fees and Costs, to include evidence sufficient for the Bentleys to examine the Memorandum for content without invading the attorney/client privilege. The Court will make a separate determination on the amount of costs and attorney fees after the Bentleys have had an opportunity to respond to the Memorandum.

ORDER AND JUDGMENT

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Nevada Revised Statute 18.010 provides the following, among other things:

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Having already pronounced its decision on fees at the conclusion of trial, the only remaining issue is to set the amount of the award. The Intervenor's post-hearing pleading in reply concludes by requesting attorney's fees in the amount of \$171,814.00.¹

Considering the factors provided within *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), the Court determines that the amount requested is reasonable based upon the following findings:

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24 IT IS SO ORDERED.

25 Dated this 4th day of January, 2013.

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27 
28 DAVID R. GAMBLE
District Judge

1 Copies served by mail this 4th day of January, 2013, to:

2 Bryan L. Stockton, Esq.
3 Deputy Attorney General
4 State of Nevada
5 100 North Carson Street
6 Carson City, NV 89701

7 Thomas J. Hall, Esq.
8 P. O. Box 3948
9 Reno, NV 89505

10 Michael L. Matuska, Esq.
11 937 Mica Drive, #16A
12 Carson City, NV 89705

John Shair

23
24
25 **CERTIFIED COPY**

26 The document to which this certificate is attached is a
27 full, true and correct copy of the original in file and of
28 record in my office.

DATE 1/11/13

TED THIRAN Clerk of the 6th Judicial District Court
of the State of Nevada, and for the County of Douglas.

By [Signature] Deputy
6