

IN THE SUPREME COURT OF THE STATE OF NEVADA

PAT SONGER,

Appellant,

v.

RAYMOND DELUCCHI and
TOMMY HOLLIS

Respondents

Supreme Court Case No.: 67414

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APPELLANT'S OPENING BRIEF

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Nev. R. App. P. 26.1 Disclosure

In accordance with Nevada Rule of Appellate Procedure 26.1, the undersigned counsel of record for Respondent Pat Songer certifies the following persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made so the judges of this Court may evaluate possible disqualification or recusal.

Regarding all parent corporations of Respondent and any public-held company which owns 10% or more of the party's stock, there are no such corporations.

In addition, the following is a list of the names of all law firms whose partners or associates have appeared for the party in the case, including proceedings in district court:

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Routing Statement

The Nevada Supreme Court presumptively retains this matter because the appeal raises a principal issue of statewide public importance regarding the application of the prevailing market rate rule in awarding attorney's fees. Nev. R. App. P. 17(a)(14).

Statement of the Issue

Nevada has implicitly recognized district courts should award attorney's fees at the prevailing market rate, not on the attorney's hourly billing rate or any agreement between the attorney and the client. The district court awarded Mr. Songer attorney's fees at the billing rate based on the co-defendant's billing rate and on Lipson Neilson's pre-litigation agreement with the insurance carrier. Has the district abused its discretion in refusing to apply the prevailing market rate?

Statement of the Case

This case arises from the district court's denial of reasonable attorney's fees and costs at the prevailing market rate arising from a successful anti-SLAPP motion to dismiss. Notice of Entry of Order Awarding Fees and Costs; JA0987-JA0992.

On August 4 and 27 of 2015, the parties appeared for oral argument on Appellant Pat Songer's Special Motion to Dismiss Pursuant to NRS § 41.660 (2013). Defendant Pat Songer's Special Motion to Dismiss Pursuant to NRS §41.660; JA00010-JA0040. The district court properly granted Mr. Songer's motion, and as a result, was statutorily required to award Mr. Songer his attorney's fees and costs pursuant to NRS § 41.670 (2013). Order Granting Defendant Pat Songer's Special Motion to Dismiss Pursuant to NRS §41.660; JA0919-JA0922.

On December 2, 2015, the district court held oral arguments on Mr. Songer's Motion for Attorney's Fees and Costs. Transcript of Tape-Recorded Hearing ("Transcript"); JA0923-JA0980. The district court only awarded Mr. Songer \$21,767.50 in attorney's fees and \$702 in costs, thus denying Mr. Songer's request for fees set at the prevailing market rate, which would total \$32,885.50. Defendant Pat Songer's Motion for Attorney's Fees; JA0853-JA0895 and Notice of Entry of Order Awarding Fees and Costs; JA0987-JA0992. This timely appeal arises from the court's final judgment awarding attorney's fees and costs. *Id.*

Statement of the Facts

Mr. Songer was successful in prevailing on an anti-SLAPP motion to dismiss. Notice of Entry of Order Granting Defendant Pat Songer's Special Motion to Dismiss Pursuant to NRS §41.660; JA0981-JA0986. Based on the district court granting Mr. Songer's anti-SLAPP motion to dismiss, the district court was required to award Mr. Songer reasonable costs and attorney's fees. NRS § 41.670 (2013). In turn, Mr. Songer argued the court set his attorney's fees compensation rate at the prevailing market rate, rather than the rates billed. Defendant Pat Songer's Motion for Attorney's Fees and Costs; JA0853-JA0895. Lipson Neilson pre-negotiated rates below the prevailing market rate with Mr. Songer's insurance company before the insurance company assigned Mr. Songer's case to Lipson Neilson. *Id.*, 9:22-10:3.

Specifically, Mr. Songer requested the district court set the attorney's fees at the prevailing market rate, rather than at the amounts billed to his insurance company because such an award would provide a windfall to Mr. Delucchi and Mr. Hollis. *Id.*, 10:14-16. Mr. Songer's proposed prevailing market rates per hour were as follows: 1) \$475 prevailing market rate v. \$235 billed rate for Mr. Garin; 2) \$275 prevailing market rate v. \$180 for Ms. Gutierrez; and 3) \$115 prevailing market rate v. \$90 for Ms. Sineneng-Tejada. *Id.*, Chart 2 and 3.

The district court held a hearing on the award of attorney's fees and costs on December 2, 2014. Although the district court did award Mr. Songer attorney's fees, the district court erred in refusing to award the fees at the requested prevailing market rate. The district court based the award rate on the fact co-defendant's counsel's rates were similar and the firm itself having agreed to take insurance cases at the lower, pre-negotiated rate. Transcript, 17:3:11; JA0939 and 20:14-21:4; JA0942-JA0943.

Standard of Review

Although the standard of review for a district court's award of fees is usually a manifest abuse of discretion, this appeal implicates questions of law and first impression and thus, the appropriate standard of review is de novo. *Trustees of Plumbers and Pipefitters Union Local 525 Health and Welfare Plan v. Developers Surety and Indemnity Co.*, 120 Nev. 56, (2004). This Court gives deference to the district court's factual findings, and questions of law based on the district court's factual findings are subject to de novo review. *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004).

Summary of Argument

The district court erred in awarding Mr. Songer's attorney's fees at the billing rate, rather than the setting the rate at the prevailing market rate for southern Nevada. Instead, the district court ignored the *Brunzell* factors and improperly

relied on co-defendant's billing rate and on the pre-litigation negotiated rate with the insurance company. *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33. (1969). Neither of these options was appropriate under *Brunzell*. As a result, this Court should reverse the district court's decision to award fees based on the firm's billing rate and affirmatively adopt the prevailing market rate as the appropriate standard in awarding attorney's fees.

Argument

I. The district court erred in determining the mandatory award of reasonable attorney's fees in NRS § 41.670 should be limited to the actual fees billed versus fees set at the prevailing market rate.

A. This Court should explicitly adopt the prevailing market rate as sound public policy for determining a reasonable rate in awarding attorney's fees in pro bono, government, and insurance defense cases.

This Court has repeatedly held and emphasized the district court's must evaluate various factors to determine the value of the attorney's services. *Brunzell v. Golden Gate National Bank*, 455 P.2d 31, 35 (Nev. 1969), *Prostack v. Songailo*, 623 P.2d 979 (Nev. 1981). This Court encourages the district courts to use the lodestar method, but the courts may "begin with any method rationally designed to calculate a reasonable amount, including those based on a lodestar amount or a contingency fee." *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864, 124 P.3d 530, 549 (2005)(internal quotes omitted).

The key to effectively using the lodestar method is to set the attorney rate at the prevailing market rate. *Blum v. Stenson*, 465 U.S. 886, 895 (1984). The prevailing market rate is the rate that prevails in the relevant legal community for similar services. *Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292 (11th Cir. 1988).

This Court has already recognized the significance of the prevailing market rate in awarding attorney's fees. In *Miller v. Wilfong*, this Court recognized that a failure to award attorney's fees at the prevailing market rate would create an unfair advantage to the losing party at the detriment of the attorneys who prevailed. 121 Nev. 619, 623 (2005). Likewise, in *Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, this Court affirmed the district court's award of reasonable attorney's fees at a rate of \$250 to the Office of the Attorney General. 123 Nev. 598, 606, 172 P.3d 131, 137 (2007). The appellant argued the Attorney General's rate should have been limited to \$91 per hour based on what the attorney general charged the state entity it was representing. *Id.* f. 29. This Court emphasized the type of attorney a lawyer maybe, i.e. government, had no bearing on the rate of fees awarded. *Id.*

While *Miller* and *Cuzze* dealt with pro bono and government attorneys, our sister-state California has applied the same reasoning to insurance defense attorneys and attorneys who charge below-market rates. In *Chacon v. Litke*, the

California Court of Appeals stated:

The reasonable market value of the attorney's services is the measure of a reasonable hourly rate. This standard applies regardless of whether the attorneys claiming fees charge nothing for their services, charge at below-market or discounted rates, represent the client on a straight contingent fee basis, or are in-house counsel. *Citing Pearl, Cal. Attorney Fee Awards* (Cont.Ed.Bar 2d ed. Sept. 2008 update) § 12.26, pp. 358–359.

181 Cal. App. 4th 1234, 1260, 105 Cal. Rptr. 3d 214, 233 (2010).

Here, the district court erred in awarding the pre-negotiated below-market rate in Mr. Songer's case. The public policy of encouraging attorneys to provide legal services for all people, businesses, and entities must be balanced with reasonable attorney's fee awards being set at the prevailing market rate. As explained below, the district court based its decision to award reasonable fees solely on the billing rate for two main reasons: 1) by comparing Lipson Neilson's billed rates to those of the co-defendant's firm; and 2) limiting the rate to the pre-litigation contract rate with the insurance company because Lipson Neilson had agreed to perform work for the insurance company below-market rate. Both of these reasons highlight the need for this Court to explicitly adopt the prevailing market rate as the standard in setting the rate for awarding attorney's fees, and reverse the district court's decision to award fees based on billing and pre-negotiated contract rates.

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1. The district court erred in comparing Mr. Songer's billed attorney's fees with those of co-defendant's to determine the reasonable hourly rate for Mr. Songer's award of fees.

The first *Brunzell* factor asks the district court to consider the “*the qualities of the advocate*: his ability, his training, education, experience, professional standing and skill[.]” *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349-350 (1969).

Here, the district court based its decision to award Mr. Songer attorney's fees only the amounts billed, rather than the request for fees at the prevailing market rate. One of the district court's basis for only awarding the amounts billed were, by comparison to co-defendant's fees, similar. The district court stated:

So, I'm not sure that the –that the attorney's fees that were billed – what I found was interesting is they were basically the same. I mean, very close to the same without consulting one another about the attorney's fees. So it seemed like – I mean, if we had one set of attorney's fees that were, you know, three times another today's attorney fees, maybe I would—I would say, oh yes, we've got something excessive here.

Transcript, 17:3:11; JA0939.

Nothing in *Brunzell* authorizes the district court to compare the billing rates of co-defendant's counsel to determine the reasonable billing rate. In fact, such a comparison goes directly against *Brunzell* because it is not an evaluation of Mr. Songer's counsel's abilities, training, education, experience, professional standing,

and skill. *Id.* at 349. The record does not support that the district court considered Mr. Garin's vast experience in litigation or abilities in considering the award. Mr. Garin's strategy and case management were the keys to Mr. Songer's ultimate success in prevailing on the anti-SLAPP motion. Co-defendant's rates and billing practices should have no bearing on the rate set in Mr. Songer's case.

This error demonstrates the need to explicitly adopt the prevailing market rate. The prevailing market rate would remind the district courts of the importance of evaluating each request for attorney's fees based on the individual attorney's work in the matter. Setting the rate at the prevailing market rate is a fair determination of the work provided.

2. The district court erred in limiting Mr. Songer's attorney's fee award based on Lipson Neilson's pre-negotiated contract with his insurance company.

The district court relied on the fact Mr. Songer's counsel had agreed to conduct the defense based on its pre-negotiated contract rate with Mr. Songer's insurance company. The district court stated:

I think that ...the reasonable attorney's fees are those fees that you actually charged. And so, I'm not going to adjust the rates up...I think a reasonable fee is what was charged. And, you're right, that's how you got the work is you agree that that's what you're willing to charge for these types of cases, and it doesn't diminish you as an attorney. It's just that you realize that that's the agreement that you've made....[s]o I think that what was actually billed would be the appropriate amount of attorney's fees in each case.

Transcript. 20:14-21:4; JA0942.

The court's willingness to limit the award based on the pre-litigation contract with the insurance carrier is directly against *Brunzell*. The fact Lipson Neilson provided a service at a pre-negotiated fee and Mr. Songer had enough foresight to purchase insurance for his expert work, should not relieve Mr. Delucchi and Mr. Hollis of paying reasonable attorney's fees at the prevailing market rate. There is no reason to distinguish between Lipson Neilson's role in this case as insurance defense counsel and its role in other civil litigation matters. The district courts should award the fees based on the *Brunzell* factors and set the hourly rate at the prevailing market rate, not the amounts billed. The prevailing market rate is consistent with *Brunzell* and Nevada's policy of awarding fees based on the value of the work provided, which may not be reflected in the billing rates.

Conclusion

The district court erred in awarding Mr. Songer's mandatory award for reasonable attorney's fees under NRS § 41.670 based on co-defendant's fees and on Lipson Neilson's pre-litigation negotiated contract with the insurance company. These bases contradict the *Brunzell* factors and this Court should affirmatively state

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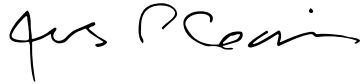
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the appropriate fee for an award of attorney's fee is one set at the prevailing market rate, not the contracted rates or amounts billed.

Dated this 2nd day of November.

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CERTIFICATION PURSUANT TO RULE 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 this brief has been prepared in a proportionally spaced typeface using Word in Times New Roman 14-point font.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7), excluding the parts of the brief exempted by NRAP 32(a)(7)(C).

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(3)(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 relief on is to be found.

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4. 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 2nd day of November, 2015.

LIPSON, NEILSON, COLE,
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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C. and that on the 2nd day of November, 2015, a true and correct copy of the foregoing Appellants' Opening Brief in Case No. 67414 was filed and served electronically with the Clerk of the Nevada Supreme in accordance with the master service list as follows:

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