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THE SUPREME COURT OF THE STATE OF NEVADA

PROIMTU MMI LLC, a Nevada limited liability company,

Appellant,

vs.

TRP INTERNATIONAL, INC., a foreign corporation,

Respondent.

PROIMTU MMI LLC, a Nevada limited liability company,

Appellant,

vs.

TRP INTERNATIONAL, INC., a foreign corporation,

Respondent.

Case No. 68942
District Court Case No. CV-36431

Electronically Filed
May 18 2016 10:56 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

Case No. 69336
District Court Case No. CV-36431

**APPELLANT PROIMTU MMI, LLC'S
OPENING BRIEF IN CASE NO. 69336**

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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:

Proyectos E Implantacion de Tuberias, S.L is the holder of 100% of the membership interests of Proimtu MMI, LLC.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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1 **APPELLANT PROIMTU MMI, LLC'S OPENING BRIEF**

2 **I. JURISDICTIONAL STATEMENT**

3 This appeal arises from the district court's award of attorneys' fees and
4 costs following expungement of a mechanics' lien. Respondent, TRP
5 International, Inc. ("TRP") filed a Motion to expunge Appellant, Proimtu
6 MMI LLC's ("Proimtu") mechanics' lien. Vol. 1, JA¹0001- 73. On
7 September 9, 2015, Judge Elliott entered Findings of Fact and Conclusions of
8 Law and Order on Petition to Expunge Lien ("Order"). Vol. 2, JA0409-415.
9 The Order expunged Proimtu's mechanics' lien, exonerated the surety bond
10 and awarded TRP its attorneys' fees and costs, with the amount to be
11 determined. Vol. 2, JA0414. TRP served written notice of entry of the Order
12 by mail on October 2, 2015. Vol. 2, JA0416-424. Proimtu filed its Notice of
13 Appeal of the Order on October 5, 2015. Vol. 2, JA0417-418.

14 TRP filed its Motion for Attorneys' Fees on July 2, 2015, which was
15 after the district court's oral pronouncement on fees and costs from the bench,
16 but before formal entry of the Order expunging the lien. Vol. 2, JA0378-384.
17 The Order Granting Motion for Attorneys' Fees ("Fee Order") was entered on
18 November 12, 2015. Vol. 2, JA0427-428. Written Notice of Entry of the

19 ¹ "JA" refers to Joint Appendix.

1 Fee Order was filed the same day. Vol. 2, JA0429-431. The Notice of Entry
2 of the Fee Order did not contain a service page. Proimtu filed its timely
3 notice of appeal on December 4, 2015.² Vol. 2, JA0432-446.

4 **II. ROUTING STATEMENT**

5 This appeal should be decided by the Court of Appeals. NRAP
6 17(b)(3) provides that appeals in statutory lien matters under Chapter 108
7 should be heard by the Court of Appeals. This case does not present a
8 question of first impression. If the Order expunging the lien is reversed, then
9 the judgment for attorneys' fees and costs based upon the expungement
10 should be reversed as well. If the underlying Order is not reversed, the Court
11 of Appeals can determine whether TRP failed to provide substantial evidence
12 to support the award of fees.

13 **III. STATEMENT OF ISSUES**

14 1. Must the district court's Fee Order be reversed if this Court
15 reverses the district court's Order expunging Proimtu's lien?

16 ² NRS 108.2275(8) allows appeals from interlocutory orders releasing a
17 mechanic's lien. This Court has held that an appeal of the release of a lien,
18 however, requires the district court to direct the lien's release and award
19 attorney fees and costs. *Yonker Const., Inc. v. Hulme*, 126 Nev. 590, 592, 248
P.3d 313, 314 (2010). Here, the district court did award fees and costs as part
of the Order, but required a motion to set the amount. Vol. 2, JA0414. The
Court set the amount of fees and costs before the original appeal was filed;
however, the order setting the amount was not entered until November 12,
2015. Vol. 2, JA0427-428. A second Notice of Appeal was filed on
December 4, 2015. Vol. 2, JA0432-446.

1 2. Did TRP provide substantial evidence to support the fee award?

2 **IV STATEMENT OF THE CASE**

3 On December 12, 2014, TRP filed a Petition to Expunge Lien
4 (“Motion”). Vol. 1, JA0001-73. Judge Elliott granted the Motion on
5 September 9, 2015. Vol. 2, JA0409-415. Judge Elliot expunged the lien,
6 exonerated the surety bond posted to release the property from the lien and
7 awarded TRP its fees and costs. Vol. 2, JA0414. TRP served written notice
8 of entry of the Order by mail on October 2, 2015. Vol. 2, JA0416-424.
9 Proimtu filed its original Notice of Appeal on the Order on October 5, 2015.
10 Vol. 2, JA0417-418.

11 TRP filed its Motion for Attorneys’ Fees to determine the amount on
12 July 2, 2015, which was after the oral pronouncement on fees from the bench,
13 but before formal entry of the Order expunging the lien. Vol. 2, JA0378-384.
14 There was no hearing on the Motion for Attorneys’ Fees. The Order Granting
15 Motion for Attorneys’ Fees (“Fee Order”) was entered on November 12,
16 2015. Vol. 2, JA0427-428. Written Notice of Entry of the Fee Order was
17 filed the same day. Vol. 2, JA0429-431. The Notice of Entry of the Fee
18 Order did not contain a service page. Proimtu filed its notice of appeal on
19 December 4, 2015, less than 30 days after entry of the Fee Order. Vol. 2,

1 JA0432-446.

2 **V. STATEMENT OF THE FACTS**

3 The district court expunged the lien, exonerated the surety bond and
4 awarded attorneys' fees and costs pursuant to NRS 108.2275(6). Vol. 2,
5 JA0416-424. TRP then filed a motion to determine the amount of fees ("Fee
6 Motion"). Vol. 2 JA0378-384. The Fee Motion discusses the *Brunzell*
7 factors, but contains no declaration of counsel to establish the underlying
8 facts or the reasonableness of the fees. *Id.* In addition, the Fee Motion that
9 TRP served on Proimtu did not attach any evidence of the time spent on the
10 case. Vol. 2, JA0386³. TRP requested \$12,180 for its fees. Vol. 2, JA0382.
11 TRP attempted to correct the deficiencies in the Fee Motion by attaching an
12 affidavit of counsel and copies of invoices detailing the tasks and time spent
13 for each to its reply brief. Vol. 2, JA0396-398. Later, TRP supplemented its
14 claim for fees to increase the amount to \$16,240. Vol. 2 JA0404-408. These
15 additional fees resulted from TRP's opposition to Proimtu's attempt to obtain
16 a stay of the Order expunging the lien. *Id.* The supplemental request for fees
17 was supported by an affidavit and billing records, but contained no analysis
18 of the *Brunzell* factors. *Id.*

19 ³ The filed copy of the Fee Motion did attach a summary of the tasks and
time spent; but it was not included in Proimtu's copy. Vol. 2, JA.0383.

1 **VI. ARGUMENT AND AUTHORITIES**

2 **1. SUMMARY OF LEGAL ARGUMENT**

3 If this Court reverses the Order expunging Proimtu’s lien, then the
4 award of fees must also be reversed. In addition, TRP failed to support its
5 Fee Motion with any supporting declaration or the necessary evidence
6 regarding the work performed. The district court had no evidence upon
7 which to evaluate the *Brunzell* factors. The new evidence in TRP’s reply
8 brief and supplement is not sufficient to cure the evidentiary deficiencies
9 because Proimtu did not have the opportunity to contest that evidence.
10 Without the necessary supporting evidence to establish reasonableness, the
11 district court’s award of fees was an abuse of discretion.

12 **2. LAW AND ARGUMENT**

13 **A. The award of fees in this case involves questions of fact and**
14 **law.**

15 This Court reviews decisions awarding or denying attorneys’ fees for
16 “a manifest abuse of discretion. *Thomas v. City of N. Las Vegas*, 122 Nev.
17 82, 90, 127 P.3d 1057, 1063 (2006) Questions of law regarding an award of
18 fees are reviewed de novo. *Id.*

19 A district court's factual determinations will be set aside if they are

1 clearly erroneous and not supported by substantial evidence. *Dewey v.*
2 *Redevelopment Agency of City of Reno*, 119 Nev. 87, 93, 64 P.3d 1070, 1075
3 (2003). Substantial evidence is that which a reasonable mind might accept as
4 adequate to support a conclusion.” *United Exposition Serv. Co. v. State*
5 *Indus. Ins. Sys.*, 109 Nev. 421, 424, 851 P.2d 423, 424-25 (1993).

6 **B. If this Court reverses the Order expunging Proimtu’s lien,**
7 **then TRP’s fee award must be reversed because it is**
8 **predicated on the expungement of Proimtu’s lien.**

9 The law is well settled that if a district’s court’s order is based upon a
10 ruling that is subsequently reversed by this Court, the second order likewise
11 must be reversed. See, *Szilagyi v. Testa*, 99 Nev. 834, 839, 673 P. 2d 495,
12 497 (1983)(Denial of motion to amend counterclaim based upon prior order
13 granting motion to dismiss was reversed when dismissal order reversed.) The
14 same rule applies to an award of fees. If the underlying basis for a fee award
15 is reversed, the award of fees becomes a nullity and must be reversed.
16 *Coombs v. Curnow*, 219 P.3d 453, 471 (Ida. 2009).

17 The only legal basis for TRP’s fee award is the Order expunging
18 Proimtu’s lien. NRS 108.2275(6)(a) provides that if the district court
19 determines that “the notice of lien is frivolous and was made without
reasonable cause”, it shall award costs and reasonable attorneys’ fees for

1 bringing the motion to expunge. Had the lien been upheld, Priomtu would be
2 entitled to its fees and costs. NRS 108.2275(6)(c). Thus, the outcome of
3 Proimtu's appeal of the Order expunging Proimtu's lien will determine which
4 party is entitled to fees and costs.

5 **C. TRP failed to support its Fee Motion with substantial**
6 **evidence necessary to establish reasonableness. Thus, the**
7 **district court's award of fees was an abuse of discretion.**

8 As the party seeking fees, TRP bears the burden of documenting the
9 hours expended in the litigation and must submit evidence supporting those
10 hours and the rates claimed. See *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103
11 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Where a requesting party fails to meet its
12 burden, a court may reduce or deny the requested fees. *Id.* (holding that
13 applicant should "maintain billing time records in a manner that will enable a
14 reviewing court to identify distinct claims"); *Fischer v. SJB-P.D. Inc.*, 214
15 F.3d 1115, 1121 (9th Cir. 2000) (holding that a district court may reduce
16 hours to offset "poorly documented" billing).

17 Any attorney's fees awarded must be reasonable. See *National Union*
18 *Fire Ins. Co. of Pittsburgh, PA. v. Pratt and Whitney Canada, Inc.*, 107 Nev.
19 535, 544, 815 P.2d 601, 608 (1991). The party seeking fees must provide
evidence to demonstrate reasonableness under the factors established in

1 *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349–50, 455 P.2d 31,
2 33 (1969).

3 Here, TRP failed to support its Fee Motion with any declaration of
4 counsel to provide evidence for an analysis of the *Brunzell* factors. The Fee
5 Motion served also did not contain any itemized breakdown of the fees.
6 Counsel’s declaration and fee breakdown with hours was not provided to
7 Proimtu until TRP filed its reply brief and supplemental request for fees.
8 New arguments or evidence cannot be provided in a reply brief. See
9 *Pacquiao v. Mayweather*, No. 2:09-CV-2448-LRH-RJJ, 2010 U.S. Dist.
10 LEXIS 92343, at *3 (D. Nev. 2010) (holding that it is improper to raise new
11 legal arguments or set forth new evidence in a reply brief). See also *Gold v.*
12 *Wolpert*, 876 F.2d 1327, 1331 n.6 (7th Cir. 1989)(“It is well-settled that new
13 arguments cannot be made for the first time in reply. This goes for new facts
14 too.” (internal citations omitted)). Because TRP did not timely support its
15 Fee Motion with the required evidence, TRP impaired Proimtu’s right to
16 challenge the amount or reasonableness of the fees and the district court’s
17 ability to determine reasonableness. Thus, TRP failed to satisfy its burden to
18 prove its fees were reasonable and the fee award should, therefore, be
19 reversed.

1 **VII. CONCLUSION**

2 If this Court overturns the Order expunging Proimtu's mechanics' lien,
3 then it should also overturn the Fee Order. The matter should then be
4 remanded to the district court with instructions to award Proimtu its fees and
5 costs pursuant to NRS 108. 2275(6)(c). Otherwise, this Court should vacate
6 the Fee Order because there was no substantial evidence to support it.

7 Dated this 17 day of May, 2016.

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14 *Proimtu MMI, LLC*

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VIII. 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:

This Brief has been prepared in a proportionally spaced typeface using Microsoft Word version 2010 in Times New Roman with a font size of 14; 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

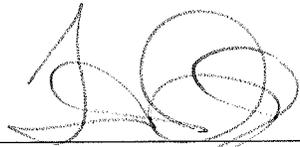
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CERTIFICATE OF SERVICE

Pursuant to Nevada Rule of Appellate Procedure 25(c)(1), I hereby certify that I am an employee of Fennemore Craig, P.C. and that on this 18th day of May, 2016, I caused the foregoing **APPELLANT PROIMTU MMI, LLC'S OPENING BRIEF IN CASE NO. 69336** to be served by submission to the electronic filing service for the Nevada Supreme Court upon the following to the email address on file and by depositing same for mailing in the Unites States Mail, in a sealed envelope addressed to:

Becky A. Pintar, Esq.
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An employee of Fennemore Craig, P.C.

APPENDIX

| | |
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| 2. | NRS 108.2275 |

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West's Nevada Revised Statutes Annotated
Nevada Rules of Appellate Procedure (Refs & Annos)
II Appeals from Judgments and Orders of District Courts

Nevada Rules of Appellate Procedure, Rule 17

RULE 17. DIVISION OF CASES BETWEEN THE SUPREME COURT AND THE COURT OF APPEALS

Currentness

(a) Cases Retained by the Supreme Court. The Supreme Court shall hear and decide the following;

- (1) Except as provided in (b) of this rule, proceedings invoking the original jurisdiction of the Supreme Court;
- (2) All direct appeals, post-conviction appeals, and writ petitions in death penalty cases;
- (3) Cases involving ballot or election questions;
- (4) Cases involving judicial discipline;
- (5) Cases involving attorney admission, suspension, discipline, disability, reinstatement, and resignation;
- (6) Cases involving the approval of prepaid legal service plans;
- (7) Questions of law certified by a federal court;
- (8) Disputes between branches of government or local governments;
- (9) Administrative agency appeals involving tax, water, or public utilities commission determinations;
- (10) Cases originating in business court;
- (11) Appeals from orders denying motions to compel arbitration;
- (12) Cases involving the termination of parental rights or NRS Chapter 432B;
- (13) Matters raising as a principal issue a question of first impression involving the United States or Nevada constitution or common law; and

(14) Matters raising as a principal issue a question of statewide public importance, or an issue upon which there is an inconsistency in the published decisions of the Court of Appeals or of the Supreme Court or a conflict between published decisions of the two courts.

(b) Cases Assigned to Court of Appeals. The Court of Appeals shall hear and decide only those matters assigned to it by the Supreme Court. The following case categories are presumptively assigned to the Court of Appeals;

(1) All post-conviction appeals except those in death penalty cases and cases that involve a conviction for any offenses that are a category A felony; any direct appeal from a judgment of conviction based on a plea of guilty, guilty but mentally ill, or nolo contendere (*Alford*); direct appeals from a judgment of conviction that challenges only the sentence imposed or the sufficiency of the evidence; and any direct appeal from a judgment of conviction based on a jury verdict that does not involve a conviction for any offenses that are category A or category B felonies;

(2) Appeals from a judgment, exclusive of interest, attorney fees, and costs, of \$250,000 or less in a tort case;

(3) Appeals in statutory lien matters under Chapter 108 of the Nevada Revised Statutes;

(4) Administrative agency appeals except those involving tax, water, or public utilities commission determinations;

(5) Cases involving family law matters other than termination of parental rights or NRS Chapter 432B proceedings;

(6) Appeals challenging venue;

(7) Appeals challenging the grant or denial of injunctive relief;

(8) Pretrial writ proceedings challenging discovery orders, or orders resolving motions in limine;

(9) Appeals in trust and estate matters in which the corpus has a value of less than \$5,430,000;

(10) Appeals arising from the foreclosure mediation program.

(c) In assigning cases to the Court of Appeals, due regard will be given to the workload of each court.

(d) A party who believes that a matter presumptively assigned to the Court of Appeals should be retained by the Supreme Court may state the reasons as enumerated in (a) of this rule in the routing statement of the briefs as provided in Rules 3C, 3E, and 28. A party may not file a motion or other pleading seeking reassignment of a case that the Supreme Court has assigned to the Court of Appeals.

(e) Transfer and Notice. Upon the transfer of a case to the Court of Appeals, the clerk shall issue a notice to the parties. With the exception of a petition for Supreme Court review under Rule 40B, any pleadings in a case after it has been transferred to the Court of Appeals shall be entitled “In the Court of Appeals of the State of Nevada.”

Credits

Added, eff. Jan. 20, 2015.

Editors' Notes

COMMENT

Nothing in Rule 17(b)(8) should be interpreted to deviate from current jurisprudence regarding challenges to discovery orders and orders resolving motions in limine.

Rules App. Proc., Rule 17, NV ST RAP Rule 17
Current with amendments received through 4/1/16

End of Document

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NRS 108.2275 Frivolous or excessive notice of lien: Motion; hearing; consequences of failure to appear; effect on action to foreclose; order; appeal; recording of certified copy of order releasing or reducing notice of lien.

1. The debtor of the lien claimant or a party in interest in the property subject to the notice of lien who believes the notice of lien is frivolous and was made without reasonable cause, or that the amount of the notice of lien is excessive, may apply by motion to the district court for the county where the property or some part thereof is located for an order directing the lien claimant to appear before the court to show cause why the relief requested should not be granted.

2. The motion must:

(a) Set forth in detail the legal and factual grounds upon which relief is requested; and

(b) Be supported by:

(1) A notarized affidavit signed by the applicant setting forth a concise statement of the facts upon which the motion is based; and

(2) Documentary evidence in support of the affidavit, if any.

3. If the court issues an order for a hearing, the applicant shall serve notice of the application and order of the court on the lien claimant within 3 days after the court issues the order. The court shall conduct the hearing within not less than 15 days or more than 30 days after the court issues the order for a hearing.

4. The order for a hearing must include a statement that if the lien claimant fails to appear at the time and place noted, the notice of lien will be released with prejudice and the lien claimant will be ordered to pay the reasonable costs the applicant incurs in bringing the motion, including reasonable attorney's fees.

5. If, at the time the application is filed, an action to foreclose the notice of lien has not been filed, the clerk of the court shall assign a number to the application and obtain from the applicant a filing fee of \$85. If an action has been filed to foreclose the notice of lien before the application was filed pursuant to this section, the application must be made a part of the action to foreclose the notice of lien.

6. If, after a hearing on the matter, the court determines that:

(a) The notice of lien is frivolous and was made without reasonable cause, the court shall make an order releasing the lien and awarding costs and reasonable attorney's fees to the applicant for bringing the motion.

(b) The amount of the notice of lien is excessive, the court may make an order reducing the notice of lien to an amount deemed appropriate by the court and awarding costs and reasonable attorney's fees to the applicant for bringing the motion.

(c) The notice of lien is not frivolous and was made with reasonable cause or that the amount of the notice of lien is not excessive, the court shall make an order awarding costs and reasonable attorney's fees to the lien claimant for defending the motion.

7. Proceedings conducted pursuant to this section do not affect any other rights and remedies otherwise available to the parties.

8. An appeal may be taken from an order made pursuant to subsection 6. A stay may not be granted if the district court does not release the lien pursuant to subsection 6.

9. If an order releasing or reducing a notice of lien is entered by the court, and the order is not stayed, the applicant may, within 5 days after the order is entered, record a certified copy of the order in the office of the county recorder of the county where the property or some part thereof is located. The recording of a certified copy of the order releasing or reducing a notice of lien is notice to any interested party that the notice of lien has been released or reduced.

(Added to NRS by 1995, 1505; A 1997, 2693; 2003, 2600; 2005, 1900)