

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,

Case No.: 68942

District Court Case No. CV-36431
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PROIMTU MMI LLC, a Nevada limited
liability company,

Appellant,

vs.

TRP INTERNATIONAL, INC., a foreign
corporation,

Respondent,

Case No.: 69336

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36431

**RESPONDENT TRP INTERNATIONAL, INC.'S
ANSWERING BRIEF IN ASE NO. 69336**

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record for respondents 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.

There are no parent corporations or publicly held companies that own 10% or more of the respondent's stock.

The following is the law firm whose partners or associates have appeared for the respondent (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

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Respectfully submitted,

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I. JURISDICTIONAL STATEMENT

This appeal is the result of attorney fees awarded after the district court granted a petition to expunge a mechanic's lien. Respondent, TRP International, Inc. ("TRP") filed a petition to expunge the mechanics' lien of Appellant, Proimtu MMI LLC ("Proimtu") on December 12, 2014, pursuant to Nev. Rev. Stat. Ann. §108.2275. JA0001-73. The petition was orally granted by the district court on June 18, 2015 (JA0301-0377), with Findings of Fact and Conclusions of Law and Order entered on October 5, 2015. JA0416-0424. The order expunged Proimtu's mechanics' lien, exonerated the surety bond and awarded TRP attorney's fees and costs, with the amount to be determined. JA04014. On July 6, 2015, TRP filed its Motion for Attorney Fees, with a hearing held on September 9, 2015. The order awarding fees was entered on November 12, 2015. JA0427-28. The Notice of Appeal was filed on December 4, 2015. JA0432. Therefore, jurisdiction is proper.

II. ROUTING STATEMENT

It is appropriate for the Court of Appeals to hear and decide this appeal. NRAP 17(b)(3) dictates that appeals in statutory lien cases falling under Nev. Rev. Stat. Chapter 108 should be heard by the Court of Appeals. This is not a case of first impression. If the order expunging the lien is reversed, the judgment for fees and costs should be reversed. If the underlying order is not

reversed, the abuse of discretion standard should be utilized by the Court of Appeals and the district court's order awarding fees should be affirmed.

III. STATEMENT OF ISSUES

1. Must the Court reverse the award of attorney fees and costs to TRP if the district court's order expunging Proimtu's lien is reversed?
2. Did TRP provide substantial evidence to the court to support the award of fees?
3. Did the district court correctly find that TRP's requested attorney fees were reasonable after determining that Proimtu's lien was invalid?

IV. STATEMENT OF THE CASE

On December 12, 2014, TRP filed a Petition to Expunge Lien, pursuant to Nev. Rev. Stat. §108.2275. JA0001-73. After full briefing, the district court heard arguments and ruled in favor of TRP. JA0416-0424. Thereafter, TRP filed a Motion for Attorney Fees, which included an itemized listing of fees incurred during litigation ("Fee Listing"). JA0378-84; JA0392-99; JA0402-08. After TRP filed an Opposition to the Motion (JA0385-0391), TRP filed a Reply to Opposition to the Motion ("Reply to Opposition") on July 21, 2016, once again including an itemized list of fees and attaching a signed affidavit pursuant to Nev. Rev. Stat. §53.045. JA0392-99.

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On September 9, 2015, Judge Elliot ruled in favor of TRP, expunged the lien, and awarded TRP attorneys' fees, with the amount to be determined at a later date. JA0414. Also on September 9, 2015, because of additional fees incurred due to Proimtu's attempt to stay the court's order expunging the lien, TRP filed a Supplement to Motion for Attorney Fees ("Supplement"). JA0404-0408. As with the Motion, the Supplement contained an itemized list of fees. *Id.*

On November 12, 2015, the order granting Motion for Attorneys' Fees ("Fee Order") was entered. JA0427-428. In its Fee Order, the district court found that TRP had satisfied the *Brunzell* factors and that the fees were reasonable. *Id.* Proimtu filed its appeal to the Fee Order on December 4, 2015. JA0432-46.

V. STATEMENT OF THE FACTS

TRP is a company based in Spain that constructs components for solar projects. JA0001-02. TRP and Proimtu, both licensed contractors in the state of Nevada, entered into a contract for heliostat assembly and field erection in Tonopah, Nevada. JA0001-02. Eventually, a dispute arose between TRP and Proimtu over payment, with Proimtu making demands for additional payment beyond the contractual amount. JA0059-60. TRP refused to pay the additional sums demanded by Proimtu. Due to the dispute for payment, Proimtu subsequently recorded a mechanics lien in the amount of \$2,357,977 against the

real property more commonly known as APN Nos. 012-141-01, 012-151-01, 612-141-01, 012-031-04, 012-131-03 and 012-131-04, in Nye County (the “Real Property”). JA0063-68. The lien was recorded on November 12, 2014. *Id.*

TRP disputed the validity of the lien, and presented its case at the hearing held before Judge Elliott on June 18, 2015. JA0378-84. On September 9, 2015, the trial court expunged the lien, exonerated the surety bond, and awarded attorney fees and costs to TRP pursuant to Nev. Rev. Stat. §108.2275(6)(a). JA0418-423. On November 12, 2015, the district court entered its Fee Order and awarded TRP \$16,240.00 in fees. JA0429-31.

VI. ARGUMENT AND AUTHORITIES

1. SUMMARY OF LEGAL ARGUMENTS

Attorney fees were awarded to TRP based on Nev. Rev. Stat. §108.2275(6)(a), which states that if “[t]he 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.” Here, if the Court of Appeals finds that the district court properly expunged the lien, the Fee Order should be upheld pursuant to Nev. Rev. Stat. §108.2275(6)(a). However, if the Court of Appeals reverses the order expunging Proimtu’s lien, then the award of attorney fees should be reversed because the conditions of §108.2275(6)(a) will not have been met.

TRP submitted ample evidence supporting the reasonableness of fees. TRP timely and properly included an itemized fee listing in its Motion for Attorney Fees, providing evidence for the district court to consider when determining attorney fees. JA0380; JA0383. TRP also addressed in its motion the four-part test articulated in *Brunzell*, which requires the court to consider (1) the advocate's professional qualities, (2) the nature of the litigation, (3) the work performed, and (4) the result.¹ JA0381.

Proimtu argued that TRP failed to provide an affidavit supporting the reasonableness of the attorney fees, pursuant to NRCP 54(d)(2)(b). NRCP 54(d)(2)(b) was not the basis for which TRP applied for its fees, but rather the attorney fees was pursuant to Nev. Rev. Stat. §108.2275 (6)(a). Therefore, a declaration of counsel, pursuant to NRCP 54(d)(2)(b), was not required. Nevertheless, TRP submitted a declaration made pursuant to Nev. Rev. Stat. §53.045 to the district court and therefore satisfied any affidavit requirement that may have existed. JA0396.

The district court did not abuse its discretion when it awarded fees to TRP. The award of fees was based on the statutory authority of Nev. Rev. Stat. §108.2275(6)(a), and the reasonableness of the amount was determined by the

¹ *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

court when it applied the *Brunzell* factors. While the district court is required to consider the *Brunzell* factors in determining the reasonableness of fees, it is not required to articulate exactly how the factors are satisfied in its decision. Here, the district court stated in its Fee Order that TRP satisfied the *Brunzell* factors, which is an explicit statement of consideration showing that the district court applied the test. JA0427. Therefore, the court did not abuse its discretion in awarding fees to TRP.

The district court's award of attorney fees was proper because TRP provided evidence that the fees were valid and reasonable and the district court properly applied and considered the *Brunzell* factors before awarding fees.

2. LAW AND ARGUMENT

A. The award of fees is valid if the Order expunging Proimtu's lien is upheld.

“[A]ttorney fees are not recoverable unless allowed by express or implied agreement or when authorized by statute or rule.”² In the context of the current litigation, Nev. Rev. Stat. §108.2275(6)(a) authorizes an award of costs and reasonable attorney's fees if the court finds, after a hearing, that the notice of lien is frivolous and was made without reasonable cause.

The district court found that Proimtu's notice of lien was made without

² *Miller v. Wilfong*, 121 Nev. 619, 623, 119 P.3d 727, 730 (2005).

reasonable cause and should be expunged. JA0409-15. The award of fees should stand if the Court of Appeals upholds the district court's order expunging Proimtu's lien. However, if this Court finds that Proimtu's lien was valid and the district court's order expunging Proimtu's lien should be overturned, the award of attorney fees should also be reversed because the conditions of Nev. Rev. Stat. §108.2275(6)(a) have not been met.

B. TRP's Motion for Attorney Fees provided substantial evidence satisfying the *Brunzell* factors and supporting the award of fees.

The court will affirm an award of attorney fees if it supported by substantial evidence.³ The reasonableness of TRP's request for an award of attorney fees is measured and determined by the holding in *Brunzell*, where the court focused on four (4) general factors which include: (1) the qualities of the advocate: his or her ability, training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; and (4) the result: whether the attorney was

³ *Logan v. Abe*, 131 Nev. Adv. Op. No. 31, 350 P.3d 1139 (2015).

successful and what benefits were derived.⁴

Here, TRP provided substantial evidence and addressed the four *Brunzell* factors in its Motion for Attorney Fees. JA0378-84. TRP included in its motion a summary of its attorney's qualities as an advocate and her professional qualifications, and provided a detailed accounting of the hours and type of work performed. JA0381; JA0383. The character of the work performed and the work actually performed were also evidenced by the record, including pleadings filed and by oral arguments provided at the hearing, which resulted in the district court ruling in TRP's favor.

i. TRP timely and properly included an itemized Fee Listing in its Motion for Attorney Fees, providing evidence for the district court to consider when determining attorney fees.

The substantial evidence submitted by TRP includes an itemized Fee Listing. Proimtu claims that TRP did not provide the Fee Listing, including a breakdown of hours, until the Reply to Opposition, which was filed twenty-one days after motion. However, this is not correct; the Fee Listing is included in the motion that was filed with the court on July 6, 2015. JA0378-84. The same copy that was filed with the district court was served to Proimtu. JA0384. This Fee Listing included dates, the type of work performed, the name of the

⁴ *Id.*

attorney performing the work, hours spent on the work, and the hourly rate.

JA0383. Further, the Fee Listing submitted with the Motion for Attorney Fees contained the same information (date, work performed, attorney name, hours, and rate) that was resubmitted with TRP's Reply to Opposition to Motion for Attorney's Fees. *Compare* JA0383 *with* JA0397-98.

TRP timely supported its motion with required evidence. A copy of the Motion for Attorney Fees filed with the district court shows that TRP attached an itemized list of fees incurred during litigation. JA0378-84. Because the Fee listing was timely submitted, Proimtu's right to challenge the amount or reasonableness of the fees was not impaired, nor was the district court's ability to determine reasonableness.

ii. Proimtu's argument that TRP's Motion for Attorney Fees fails because a Declaration of Counsel was not provided is without merit.

An affidavit stating that the fees awarded were actually and necessarily incurred is required pursuant to NRCP 54(d)(2)(b). However, NRCP 54(d)(2)(b) is not applicable to the fees requested in this case. NRCP 54(d)(2)(b) applies to fees being sought after final judgment. The fees awarded were pursuant to Nev. Rev. Stat. §108.2275(6)(a), which does not require an affidavit and which mandates that the court shall award attorney fees upon a finding that a lien was frivolous or made without cause. Nevertheless, TRP

submitted a declaration of counsel, made pursuant to Nev. Rev. Stat. §53.045, in its Reply to Opposition filed on July 21, 2015. JA0396. TRP also submitted a declaration of counsel, again pursuant to Nev. Rev. Stat. §53.045, with its supplement filed on September 9, 2015. JA0405. TRP sought fees pursuant to Nev. Rev. Stat. §108.2275(6)(a), and the motion for fees therefore does not require an affidavit made pursuant to NRCP 54(d)(2)(b).

Further, Proimtu's assertion that the lack of a declaration by counsel in the motion for fees filed on July 6, 2015 indicates that there was no evidence to analyze when examining the *Brunzell* factors – when there is ample evidence to examine in the record and when TRP timely submitted an itemized accounting of hours – is absurd. As detailed above, TRP twice submitted an itemized accounting of hours and provided evidence addressing the *Brunzell* factors in its motion. JA0383; JA0397-98

TRP sought fees pursuant to Nev. Rev. Stat. §108.2275(6)(a), and the motion for fees therefore does not require an affidavit made pursuant to NRCP 54(d)(2)(b). Therefore, regardless of whether an affidavit was required or not, one was provided to the district court prior to its ruling and is not a valid basis to overturn the award of fees.

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C. The district court properly applied the *Brunzell* factors to determine that the attorney fees requested were reasonable.

While a consideration of the *Brunzell* factors by the district court is mandatory, the court has stated that the attorney fees order does not have to explicitly lay out the district court's reasoning in order to be valid.⁵ Express findings on each factor are not necessary for a district court to properly exercise its discretion so long as the district court demonstrates that it considered the *Brunzell* factors.⁶ In determining the award of fees, the district court may use any method that is "rationally designed to calculate a reasonable amount, so long as the requested amount is reviewed in light of the" *Brunzell* factors.⁷

In *Logan*, the Court found a statement that the district court had analyzed the fees pursuant to *Brunzell* to be a sufficient demonstration that the court considered the factors.⁸ Here, the district court stated in its November 12, 2015 Fee Order granting Motion for Attorney Fees, that the *Brunzell* factors were satisfied. JA0427-28. This is an explicit statement of consideration by the district court showing that the district court properly reviewed the *Brunzell* factors before issuing its Fee Order. Therefore, the district court's Fee Order

⁵ *Logan*, 350 P.3d at 1143 (2015).

⁶ *Id.*

⁷ *Id.*, quoting *Haley v. Eighth Judicial District Court*, 128 Nev. Adv. Op. 16, 273 P.3d 855, 860 (2012).

⁸ *Logan*, 350 P.3d at 1143 (2015).

granting attorney fees to TRP was proper.

D. Under the abuse of discretion standard, the Order should be affirmed because the evidence supports the reasonableness of the awarded attorney fees.

Unless there is a manifest abuse of discretion, a district court's award of attorney fees will not be overturned on appeal.⁹ Applying the abuse of discretion standard, the trial court's ruling stands unless a showing is made that the trial court has acted in an arbitrary manner unsupported by law, and that is clearly against reason and evidence.¹⁰

Here, the district court's ruling was not contrary to law. Once the district court found that Proimtu's lien should be expunged, the Fee Order was mandated by Nev. Rev. Stat. §108.2275(6)(a). Further, once the court determined that fees should be awarded, the court appropriately considered the *Brunzell* factors before determining the amount of fees. JA0430. The award of fees was also factually sound because it was supported by reason and evidence. The reasonableness of the fees requested by TRP was established by the record and in TRP's Motion for fees and its Supplement, where TRP addressed the *Brunzell* factors and included documentation explaining and supporting the

⁹ *Nelson v. Peckham Plaza Partnerships*, 110 Nev. 23, 26, 866 P.2d 1138, 1139-40 (1994).

¹⁰ *Abuse of Discretion*, *Black's Law Dictionary*, 6th Ed. At 10-11. (1990); *Abuse of Discretion, Judicial and Statutory Definitions of Words and Phrases, Volume 1*. (1914).

hours and rates claimed. JA0383; JA0407.

VII. CONCLUSION

The district court correctly awarded attorney fees to TRP when it considered the *Brunzell* factors and found that the fees submitted by TRP were valid and reasonable. Nevada law states that any fees awarded must be reasonable, and that the party seeking fees must provide evidence to demonstrate reasonableness. The record contradicts Proimtu's assertion that TRP did not submit documentation supporting its Motion for Attorney Fees because a Fee Listing was included in the Motion. Additionally, the district court explicitly stated that it analyzed the *Brunzell* factors in determining reasonableness.

Therefore, the Court of Appeals should affirm the district court's Order Granting Motion for Attorney Fees.

Dated this 14th day of June, 2016.

PINTAR ALBISTON LLP

By: /s/ Becky A. Pintar
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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 2013 in Time 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 2,646 words.

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

DATED: June 14, 2016

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 14, 2016, she served a copy of the foregoing **Answering Brief** to be served by submission to the electronic filing service for the Nevada Supreme Court upon the following to the email address on file:

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