IN THE SUPREME COURT OF THE STATE OF NEVADA

*****

DAVID DEZZANI; AND ROCHELLE DEZZANI,	**Supreme Court Case No. 69896** **District Court Case No. CV1500826**
Appellants,	
vs.	
KERN & ASSOCIATES, LTD.; AND GAYLE A. KERN,	
Respondents.	

_____/

RESPONDENTS' ANSWERING BRIEF
APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT'S ORDER FILED FEBRUARY 8, 2016

The Honorable Elliott A. Sattler, Presiding

Gayle A. Kern, Esq.
Bar No. 1620
Veronica A. Carter, Esq.
Bar No. 13841
Kern & Associates, Ltd.
5421 Kietzke Lane, Suite 200
Reno, NV 89511
(775) 324-5930
(775) 324-6173 (Fax)
gaylekern@kernltd.com
veronicacarter@kernltd.com
Attorneys for Respondents,
KERN & ASSOCIATES, LTD. AND GAYLE A. KERN

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

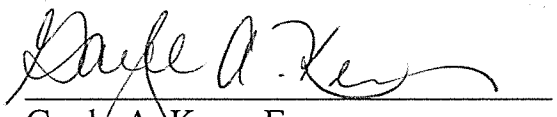
> The name of the professional corporation is Gayle A. Kern, Ltd. dba Kern & Associates, Ltd. There is no parent corporation of Gayle A. Kern, Ltd., a Nevada professional corporation, organized pursuant to the provisions of NRS Chapter 89. There is no publicly-held company that owns stock in the corporation.

The following are counsel of record who have appeared in this action on behalf of Kern & Associates, Ltd. and Gayle A. Kern:

> GAYLE A. KERN, LTD. dba KERN & ASSOCIATES, LTD.
> Gayle A. Kern, Esq.
> Veronica A. Carter, Esq.

Dated this 12th day of August, 2016.

KERN & ASSOCIATES, LTD.



Gayle A. Kern, Esq.
NEVADA BAR # 1620
Veronica A. Carter, Esq.
NEVADA BAR # 13841
5421 KIETZKE LANE, SUITE 200
RENO, NEVADA 89511
Telephone (775)324-5930
Telefax: (775) 324-6173
Attorney of Record for Respondent,
Kern & Associates, Ltd. and Gayle A. Kern

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NEVADA STATUTORY AUTHORITY

NEVADA RULES OF APPELLATE PROCEDURE

NEVADA RULES OF CIVIL PROCEDURE

JURISDICTIONAL STATEMENT

Appellants, David Dezzani and Rochelle Dezzani (collectively the "Dezzanis"), appeal from an order of the Second Judicial District Court signed by District Judge Elliott Sattler on February 8, 2016. The Order granted Respondents' Kern & Associates, Ltd. and Gayle A. Kern (collectively "Kern") Motion for Attorney's Fees and Costs and ordered Kern is entitled to fees and costs in the amount of $13,550.74. (App. 379-383). Appellants appeal a final judgment and jurisdiction is appropriate pursuant to NRAP 3(A)(b)(1).

ROUTING STATEMENT

The subject matter of this appeal is neither presumptively retained by the Supreme Court pursuant to NRAP 17(a)(1) - (14), nor presumptively assigned by the Court of Appeals pursuant to NRAP 17(b)(1)-(10). In accord with NRAP 17(c), this Court has discretion to assign this appeal to the Court of Appeals, dependent upon the workloads of each court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

B. Whether the district court properly exercised its discretion to award fees and costs pursuant to NRS 18.010(2)(b) and NRCP 11 and in accord with guiding legal principles regarding the availability of an award of fees and costs when claims are brought without reasonable grounds and/or to harass the prevailing party?

   c. Whether Kern is entitled to attorney's fees and costs because of Respondent Gayle A. Kern's actual representation of the law firm Kern and Associates, Ltd.?

   d. Whether, regardless of Kern's represented status, attorney's fees and costs in the form of sanctions under NRCP 11 and NRS 18.010(2)(b) were properly awarded because the Dezzanis brought their claims against Kern for an improper purpose, without evidentiary support, and such claims were entirely devoid of legal merit, and unsupported by existing law of a non-frivolous argument for the extension, modification or reversal of existing law?

STATEMENT OF THE CASE

Respondent, Kern & Associates, Ltd.,[1] is a professional corporation providing legal services to a variety of clients in Northern Nevada, including over 250 common-interest community homeowner associations, including the McCloud Condominium Homeowners Association ("Association"). Gayle A. Kern is an attorney employed by Kern & Associates who provided legal counsel to the Association on a variety of matters, including the matters which gave rise to the Dezzanis' Complaint. Respondents Kern and Associates, Ltd. and Gayle A. Kern are referred to collectively herein as "Kern."

The Dezzanis are members of the Association and owners of Unit #211 in the Association ("the Property"). (App. 2, Complaint ¶ 1). The Dezzanis purchased the Property with an existing rear deck extension which was approved by the Board of Directors in 2002, but which unlawfully extended into the common area of the Association. (App. 3, Complaint ¶ 8; App. 102-103, Kern Motion to Dismiss, Exhibit 2). In an effort to address the unlawful common area encroachment, the Board sent the Dezzanis, and numerous other similarly situated members of the

[1]Kern & Associates, Ltd. is a dba for a Nevada corporation, Gayle A. Kern, Ltd.

Association, a Notice of Violation articulating the facts giving rise to the violation, the applicable provisions of the governing documents and Nevada law, and offering two possible solutions to the violation. (App. 10-12, "Notice of Violation", Complaint Exhibit "1"). The solutions included the opportunity for the Dezzanis to submit an architectural application to restore the deck to its original condition OR execute a covenant stating that the deck extension would be permitted to remain during the Dezzanis' ownership and one subsequent conveyance of ownership. *Id.*

Upon receiving correspondence from the Dezzanis regarding the Notice of Violation, the Board requested Kern reply on behalf of the Association. (App. 102-103, Kern Motion to Dismiss, Exhibit 2). What followed was a sequence of unsubstantiated attacks by the Dezzanis of Kern's provision of legal services to the Association and knowledge of the facts and law. This case is simply an extension of the unwarranted attacks on Kern.

The Dezzanis filed their Complaint against Kern directly, in connection with the firm and Gayle Kern's representation of the Association, for actions taken as legal counsel on behalf of the Association. (App. 1-8, Complaint). Kern filed a Motion to Dismiss Complaint ("Motion to Dismiss") on the grounds that the

Dezzanis have no legally cognizable claim against Kern as the attorney for the Association for actions taken in connection with the representation of the Association and on behalf of the Association. At all times relevant to the allegations of the Complaint, Kern acted solely as the attorney for the governing body of the Association. (App. 39-105).

Kern filed a Motion to Dismiss, asserting that the allegations contained within the Dezzanis' Complaint were without merit and the causes of action asserted against Kern should be dismissed because (1) Kern was at all times pertinent to the subject matter of the litigation acting solely as the attorney for the Association and, therefore, the Dezzanis have no direct cause of action against Kern; (2) the Dezzanis failed to state any cognizable claim against Kern for which relief could be granted; and (3) even if the district court found a cognizable claim existed, the court lacked subject matter jurisdiction over the asserted claims for relief, as evaluating the merits of the claims for relief would have required the court to interpret and apply the governing documents of the Association, and thus the claims were subject to mandatory mediation pursuant to the provisions of NRS 38.310-360, inclusive. (App. 39, Motion to Dismiss).

The district court issued its Order granting the Motion to Dismiss and dismissing the case in its entirety. [1] (App. 142-146 "Order 1"). The court recognized that the Dezzanis have no cause of action against Kern, stating:

> The Court finds there is ***no basis in law or fact*** to support the causes of action alleged against Kern. The Court finds to permit such causes against Kern would result in a ***chilling effect on individuals' ability to hire and retain counsel.*** NRS 116.3118[3] does not permit attorneys to be personally liable for actions taken ***on behalf of an association.***

(App. 144, Order). (Emphasis added).

Kern then filed a Motion for Attorney's Fees and Costs, arguing an award of fees and costs was proper under NRS 18.010(2)(b) and NRCP 11 because the Dezzanis' ignored the law, made unsupported factual allegations, and prosecuted their claims in a manner that was a waste of the court's limited time and resources. (App 150-156). The district court granted Kern's Motion, making the specific factual finding that the Dezzanis brought their claims in an effort to harass Kern, ignored their obligation to proceed in good faith, and chose to go forward despite being informed of the clear legal deficiencies of their claims and without an

[1] The Dezzanis' appeal of the district court's granting of Kern's Motion to Dismiss is currently pending before this Court as Case No 69410.

appropriate review of the applicable law. (App 379-383, Order granting Kern's Motion to Dismiss "Order 2").

STATEMENT OF FACTS

The Dezzanis' Statement of Facts does not set forth any of the factual allegations giving rise to the Complaing and is merely a recitation of the procedural posture of the case. As such, Kern submits the following correct Statement of Facts for the Court's review:

1. Respondent Gayle A. Kern, Ltd., dba Kern & Associates, Ltd. is a professional corporation and law firm serving a variety of clients in Northern Nevada including, but not limited to, over 250 common-interest community homeowner associations. (App. 2, Complaint ¶ 2, 3). Gayle A. Kern is an attorney licenced in the State of Nevada and owner of Kern & Associates. Kern & Associates represents the Association and on numerous occasions provided legal services to the Association and its managing body on a number of different issues, including those issues involving the Dezzanis. The Dezzanis' Complaint solely alleges on wrongdoing as a result of Kern's provision of legal services to the Association. (App. 3-6, Complaint ¶¶ 13, 14, 17, 19, 22, 24, 25, 26, 35, 38).

2. As owners of property within the community, the Dezzanis are members of the Association and subject to the governing documents of the Association. (App. 2, Complaint ¶ 1).

3. The Association is governed by the Revised Declaration of Limitations, Covenants, Conditions and Restrictions of McCloud Condominium Homeowners' Association ("CC&Rs"), recorded January 28, 2008, as Document No. 3614779 with the Office of the Washoe County Recorder. (App. 54-100, CC&Rs).

4. Prior to the Dezzanis' purchase of the Property, the rear deck was extended from its original dimensions by a previous owner. (App 3, Complaint ¶ 8.) The architectural request for the deck extension was submitted to the Association's then serving Board of Directors and approved in 2002. (App. 26-27, Complaint, Exhibit 3).

5. Upon exterior inspection of the rear deck by members of the Association's Board on or about March 14, 2013, the Board of Directors issued the Dezzanis a "Notice of Violation" for the deck extension. (App. 11-12, Complaint, Exhibit 1). The Notice of Violation stated that the deck extension was unapproved

and unpermitted pursuant to the Sections 12.5 and 13.8.2 of the CC&Rs, which provide that the Board has the obligation to maintain all common areas and owners may not make any changes or modifications to the common areas. (App. 3, 11-12, Complaint ¶ 11, 12, 13, Exhibit 1).

6. As part of its enforcement of the CC&Rs, the Board provided that the Notice of Violation include two options for the Dezzanis to correct the violation. They could either submit an application for the restoration of the deck to its original condition, OR they could sign a covenant stating that the deck extension in its current condition could remain during the entire course of their ownership and one subsequent conveyance of ownership, but the deck would be required to be removed at the owner's expense thereafter, *i.e.* after a second, subsequent conveyance of ownership. (App. 11-12, Complaint Exhibit 1).

7. The Board sought the assistance of its counsel, Kern, regarding the wrongful taking of common area by extension of multiple rear decks within the community, including the Dezzanis' deck. (App 5-6, Complaint ¶ 35). The Board of Directors requested Kern reply to the Dezzanis' various communications on the Association's behalf. (App. 102-103, Kern Motion to Dismiss, Exhibit 2). Kern

communicated with the Dezzanis on behalf of the Association by letter dated April 4, 2013. *Id.* The letter clearly informed the Dezzzanis that Kern was acting as attorney for the Association. *Id.* In fact, this is mentioned in the first paragraph. *Id.* The letter states, in pertinent part:

> "Dear Mr. And Mrs. Dezzani:
>
> ***I represent the McCloud Condominium Homeowners Association. The Board requested I respond to your email*** request to review communications and/or information related to another unit and Board minutes....

Id. (Emphasis added).

8. Kern's April 4, 2013 letter sets forth the Association's position regarding the deck extension, stating:

> The Board understands your frustration and appreciates you are addressing the matter of the unapproved deck extension that wrongfully encroaches in the common area. There is no question the extension exists in the common area, as do the other extensions. The common area is owned in common by *all* owners of the community. While it is unfortunate the issue of deck extensions and the wrongful taking of common area was not addressed earlier, the Association has properly taken action to protect the integrity of the common area. There is no question common area is not permitted to be given to any one owner for his/her exclusive use and enjoyment, thereby reducing the common area for the other homeowners. It is the wrongful conversion of common area that is the problem. Simply put, there is no lawful transfer of common area to individual owners absent a vote of the membership. *See* NRS 116.3112.

Id.

9. *After* Kern sent the April 4, 2013 letter outlining and confirming the Association's conclusion regarding the deck extension on the Property, the Dezzanis emailed the Association's Board of Directors vehemently contesting the Notice of Violation and statements in Kern's letter. (App. 14-22, Complaint Exhibit "2"). The email was a lengthy attack on Kern's provision of legal services to the Association, the conclusion stated in her April 4th letter, her knowledge of the facts and law, and her ability to assist and advise her client, the Association. *Id.* In various places, the email refers to Kern's representation of the Association and the communications Kern had with the Dezzanis on behalf of the Association. The email explicitly acknowledges that Kern communicated directly with the Dezzanis as counsel for the Association with regard to the deck extensions. *Id.* at page 2, ¶ 6.

10. On May 10, 2013, Kern sent another letter to the Dezzanis regarding their request for a hearing and for various documents. Again, Kern clearly indicated she represents the Association and that the Dezzanis should direct all further communication regarding the deck extension to Kern rather than directly to the Board of Directors. Specifically, the letter stated:

> Dear Mr. And Mrs. Dezzani:
>
> The Board of Directors requested I respond to your various communications.... If you have any further communications, the Board request that you communicate with me. We appreciate your anticipated cooperation. If I have failed to address any of your communications, please advise me.

(App. 105, Kern Motion to Dismiss, Exhibit 3).

11. The Board held a hearing on the matter, attended by the Board and by Kern as attorney for the Association. (App. 4, Complaint ¶ 18). The Board subsequently issued the Result of Hearing letter, dated September 5, 2014. (App. 4, 31-32, Complaint ¶ 18; Complaint Exhibit 5.) Kern continued to correspond with the Dezzanis as counsel for the Association regarding the deck extension. (App. 4, Complaint ¶ 20, 21, 22). At all times, Kern responded on behalf of her client, the Association, and asserted the legal positions she was retained to express by her client.

12. The Dezzanis filed their Complaint on May 4, 2015, asserting claims against the Kern and Karen Higgens, an individual member of the Board. (App. 1-

38). The claims asserted in the Complaint were never submitted to the Nevada Real Estate Division as required by NRS 38.310(1).

13. Kern filed a Motion to Dismiss, alleging that all claims against Kern must be dismissed in accord with NRCP 12(b)(5), and or NRCP 12(b)(1), NRCP 12(h)(3) and NRS 38.310(1). (App. 39-105). The district court found that the claims asserted against Kern were without merit. (App. 142-146, Order). The court acknowledged the "chilling effect" which would undoubtedly result from allowing the Dezzanis' claims against Kern for her representation of the Association. (App. 144). The court noted that there was no statutory basis for the claims asserted against Kern for actions taken upon advisement by the Board throughout her representation of the Association. *Id.*

14. Kern subsequently filed a Motion for Attorney's Fees and Costs, arguing an award of fees and costs was warranted in accord with NRS 18.010(2)(b) and NRCP 11, as the Dezzanis filed claims against Kern which were not grounded in fact or law. (App. 150-278). Noting Mr. Dezzani is a retired attorney, Kern asserted he should be well acquainted with the high professional standards

attorneys are held to and the degree of honesty, intelligence and integrity required when engaging in litigation. (App. 154).

15. The district court entered its Order granting Kern's Motion for Attorney's Fees and Costs on February 8, 2016. The court stated that it found "evidence indicating this case was maintained in an effort to harass the Defendants." (App 381). The court stressed the fact that as an attorney, Mr. Dezzani was aware of his duty to proceed in good faith, should have conducted more thorough research of the controlling law, and should know of the consequences of his actions. (App 381-382). The Dezzanis appeal the district court's Order awarding fees and costs to Kern.

SUMMARY OF ARGUMENTS

District courts have broad discretion when awarding attorney's fees and costs pursuant to NRS 18.010(2)(b) and NRCP 11. An award of attorney's fees and costs should not be reversed absent a manifest abuse of discretion or clear departure from settled principles of law. Here, the district court properly applied its discretion to award attorney's fees and costs. Pursuant to NRS 18.010(2)(b), an award of attorney's fees and costs was proper because there was evidence sufficient to demonstrate the claims were brought to harass Kern and, further, because the

Dezzanis' claims were groundless and not supported by any credible evidence. Similarly, attorney's fees and costs were appropriate under NRCP 11 as sanctions because the Dezzanis' claims were not supported by any facts, were brought for an improper purpose, and were not supported by any existing law, a fact which the Dezzanis were informed of directly after filing their groundless Complaint. The Dezzanis chose to proceed with their baseless allegations and such actions should have consequences., as contemplated by NRS 18.010(2)(b).

LEGAL ARGUMENTS

A. Standard of Review

The decision to award attorney's fees and costs lies within the sound discretion of the district court. *See Bergmann v. Boyce*, 109 Nev. 670, 674, 676, 856 P.2d 560, 563, 564 (Nev. 1993); *see also County of Clark v. Blanchard Constr. Co.*, 98 Nev. 488, 492, 653 P.2d 1217, 1220 (Nev. 1982); *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 995, 860 P.2d 720, 724 (Nev. 1993). An award of attorney's fees and costs, under either NRS 18.010(2)(b) or NRCP 11, will not be overturned on appeal absent a "manifest abuse of discretion." *Frantz v. Johnson*, 116 Nev. 455, 471, 999 P.2d 351, 361 (Nev. 2000) (citing *Nelson v. Peckham Plaza*

Partnerships, 110 Nev. 23, 26, 866 P.2d 1138, 1139-40 (1994)); *see also M.C. Multi-Family Dev., L.L.C. v. Crestdale Assocs., LTD.*, 124 Nev. 901, 916, 193 P.3d 536, 546 (Nev. 2008); *Bergmann*, 109 Nev. at 676. A district court abuses its discretion when its ruling contravenes guiding legal principles or is based upon an erroneous view of the law. *See Allianz*, 109 Nev. at 995; *see also State v. Eighth Judicial Dist. Court of Nev.*, 127 Nev. 927, 932, 267 P.3d 777, 780 (Nev. 2011) (*citing Steward v. McDonald*, 330 Ark. 837, 958 S.W.2d 297, 300 (Ark. 1997)).

In the Order being appealed, the district court also made various findings of fact. This Court has held that a district court's findings of fact "shall not be set aside unless clearly erroneous." *Leonard v. Stoebling*, 102 Nev. 543, 728 P.2d 1358, 1986 Nev. LEXIS 1611 (Nev. 1986) (quoting *Burroughs Corp. v. Century Steel, Inc.*, 99 Nev. 464, 470, 664 P.2d 354, 358 (1983)).

B. Kern is Not Precluded from Being Awarded Attorney's Fees and Costs.

The Dezzanis assert Kern proceeded in proper person and is therefore not entitled to an award of attorney's fees and costs. [2] However, the Dezzanis ignore

[2] The Dezzanis incorrectly assert that Nevada law "does not authorize attorney's fees to prevailing defendants." (Opening Brief, page 3). To the contrary, Nevada law provides for an award of attorney's fees to prevailing *parties*, and whether the party was the plaintiff or defendant is irrelevant. *See* NRS 18.010. The district

the fact that throughout the litigation, Kern represented herself and the law firm Kern & Associates, Ltd ("the Corporation"). As a result of Kern's representation of the Corporation, an award of attorney's fees and costs is available. Moreover, attorney's fees and costs remain available as sanctions for the Dezzanis' frivolous claims.

In opposition to Kern's Motion for Attorney's Fees and Costs, the Dezzanis argued the Unites States Supreme Court's decision in *Kay v. Ehrler*, 499 U.S. 432 (1991) precludes an award of attorney's fees and costs for self-represented attorneys. (App. 280, Opposition to Motion for Attorney's Fees and Costs, page 2). However, *Kay* makes an important and crucial distinction when an attorney represents a law firm. In *Kay*, the Supreme Court noted that "the word 'attorney' assumes an agency relationship" and that such a relationship was the predicate to an award of attorney's fees and costs. *Kay*, 499 U.S. at 435-36. However, the Court distinguished between individual attorney pro se litigants and organizations represented by in-house counsel. In analyzing whether attorney's fees were actually incurred by an organization to justify an award of attorney's fees and costs, the

---

court granted Kern's Motion to Dismiss, dismissing all claims asserted by the Dezzanis against Kern. Kern may properly be awarded fees and costs as the prevailing party.

Court stated:

> Petitioner argues that because Congress intended organizations to receive an attorney's fee even when they represented themselves, an individual attorney should also be permitted to receive an attorney's fee even when he represents himself. However, an organization is not comparable to a pro se litigant because ***the organization is always represented by counsel, whether in-house or pro bono, and thus, there is always an attorney-client relationship.***

(Emphasis added). *Kay v. Ehrler*, 499 U.S. 432, 436 at n. 7 (U.S. 1991).

The Supreme Court "made crystal clear, however, that the exception for individual plaintiffs who represent themselves does not apply to organizations." *Baker & Hostetler LLP v. United States DOC*, 473 F.3d 312 (D.C. Cir. 2006). The *Kay* Court made no distinction between law firms and any other type of organization. *Id.* The reasoning behind the Court's reluctance to award attorney's fees to pro se attorney litigants is inapplicable to situations in which an organization is the client because of the agency relationship inherently present in the latter situation.

Courts in other jurisdictions have similarly held that just as an organization is entitled to an award of reasonable attorney's fees and costs based on the existence of an agency relationship, law firms are eligible for attorney's fees awards when represented by an attorney employed by the organization. *See Dipaolo v. Moran*,

277 F. Supp. 2d 528, 536 (E.D. Pa. 2003) (holding that attorney who represented himself and law firm was entitled to "incremental fees incurred as a result of defending his law firm" and that "by representing his law firm, [the attorney] created an attorney-client relationship."); *Baker & Hostetler LLP v. United States DOC*, 473 F.3d 312 (D.C. Cir. 2006) (holding that law firm that represents itself remains eligible for attorney's fees because "the exception to fees statutes for individual litigants who represent themselves does not extend to organizational litigants."); *Bond v. Blum*, 317 F.3d 385, 399 (4th Cir. 2003) (finding "[w]hen a member of an entity who is also an attorney represents the entity, he is in an attorney client relationship with the entity" and "[t]hough representation of a law firm by one of its members presents an increased risk of emotional involvement and loss of independence, the law firm still remains a business and professional entity distinct from its members, and the member representing the firm as an entity represents the firm's distinct interests in the agency relationship inherent in the attorney-client relationship."); *Gold, Weems, Bruser, Sues & Rundell v. Metal Sales Mfg. Corp.*, 236 F.3d 214, 218-19 (5th Cir. 2000) (holding "when an organization is represented by an attorney employed by the organization, the attorney has a status separate from the client."); *Treasurer v. Goding*, 692 F.3d 888, 898 (8th Cir. 2012)

(holding "where an attorney represents his or her own firm, *Kay* does not forbid the award of attorneys' fees... there is no meaningful distinction between a law firm and any other organization on the issue of whether there exists an attorney-client relationship between the organization and its attorney."); *Fontanillas-Lopez v. Morel Bauza Cartagena & Dapena LLC*, 2015 U.S. Dist. LEXIS 137066 (D.P.R. Sept. 30, 2015).

Though extra-jurisdictional, there is persuasive authority for the proposition that an attorney representing a law firm has an attorney-client relationship with the law firm as an organization and is thus entitled to an award of reasonable attorney's fees and costs. Attorney's fees and costs are actually incurred by the law firm as the client. There is a separate and distinct relationship present when a member attorney represents the law firm. In representing an organization, the agency relationship is created, as the entity is separate and distinct from the individual attorney representative.

In determining whether attorney proper person litigants are entitled to attorney's fees and costs, this Court noted that, "all proper person litigants, whether attorney or non-attorney be obligated to pay attorney fees as a prerequisite for an award of prevailing party attorney fees." *Sellers v. Fourth Judicial Dist. Court*, 119

Nev. 256, 259, 71 P.3d 495, 498 (Nev. 2003); *see also Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd.*, 124 Nev. 1206, 1220-21, 197 P.3d 1051, 1060-61 (Nev. 2008). As stated above, such obligation is created when an individual attorney represents the law firm. In addition, there exists an attorney-client relationship in the present case. Kern as the attorney has an independent status from the law firm. Gayle A. Kern signed pleadings as attorney for the Corporation. (App. 40,51,117,127, 148, 150, 156, 292).

Gayle A, Kern, Ltd. dba Kern & Associates, Ltd. is a Nevada corporation, and, as a result, the rule that attorney pro se litigants may not recover attorney's fees and costs is inapplicable. To apply the rule for individual applicants to the law firm would be to deny the actual costs incurred by the organization to have representation by counsel in this matter. Kern successfully represented the Corporation and is entitled to an award for the actual and reasonable attorney's fees and costs incurred defending the Dezzanis' unsupported claims. In addition, attorney's fees and costs are available as sanctions awarded pursuant to the district court's discretion, in accord with NRS 18.010(2)(b) and NRCP 11 based upon the court's conclusion the claims were not maintained on reasonable grounds, but rather to harass Kern.

C. An Award of Attorney's and Costs is Warranted Pursuant to NRS 18.010(2)(b).

In the Motion for Attorney's Fees and Costs, Kern argued that an award of attorney's fees and costs was authorized under NRS 18.010(2)(b), as the Dezzanis brought claims without any reasonable ground and ignored the clear application of the law to the facts at issue, in an effort to continue their harassment of Kern. (App. 153, Motion, page 4, lines 15-26). The Court agreed, clearly stating, "[t]he Court finds evidence indicating this case was maintained in an effort to harass the Defendants." (App. 381, Order, page 3, lines 15-16). [3] The Court further noted the suit was not maintained with reasonable grounds. (App. 381, Order, page 3, lines 16-17). The Court did not abuse its discretion when determining that the Dezzanis brought and maintained their legally and factually deficient lawsuit in an effort to harass Kern. The Dezzanis were informed early on of that their allegations were unsupported by the facts and had no basis in law, yet proceeded with vigorously litigating their claims and attacks on Kern. As such, an award of attorney's fees pursuant to NRS 18.010(2)(b) was proper.

---

[3] This factual finding should not be reversed unless "clearly erroneous." *See Leonard*, 102 Nev at 548. It cannot be said this finding was clearly erroneous, as the Dezzanis' own evidence highlight their combative interactions with Kern.

NRS 18.010(2) provides, in pertinent part, as follows:

> 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:
> ...
> (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.

(Emphasis added).

This Court has found that an award of attorney's fees and costs pursuant to NRS 18.010(2)(b) is warranted when a party "has alleged a groundless claim that is not supported by any credible evidence at trial." *Frantz v. Johnson*, 116 Nev. 455, 472, 999 P.2d 351, 362 (Nev. 2000) (citing *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 996, 860 P.2d 720, 724 (1993)). A groundless claim is one which is unsupported by any credible evidence. *See Freidson v. Cambridge Enters.*, 2010 Nev. LEXIS 116, 11 (Nev. 2010) (*citing Rodriguez v. Primadonna Company*, 125

Nev. 578, 587, 216 P.3d 793, 800 (2009)). The awarding court must determine whether the party had reasonable grounds for its claims, taking into consideration the actual circumstances of the case. *Bergmann*, 109 Nev. at 675. Further, even if one claim is colorable, it does not excuse the prosecution of other groundless claims. *Id.* at 675-76. This Court has directed that NRS 18.010(2)(b) shall be "liberally construed" in favor of awarding attorney's fees when the circumstances so warrant. *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 968, 194 P.3d 96, 107 (Nev. 2008).

1. The District Court Properly Recognized That the Dezzanis' Claims Were Brought Without Reasonable Grounds.

The Dezzanis asserted various claims against Kern, all based upon alleged violations of Chapter 116 of the Nevada Revised Statutes for actions taken when Kern was acting as attorney for the Association. Specifically, the Dezzanis asserted that Kern undertook and/directed retaliatory action against them in response to their complaints regarding Kern's provision of legal services to the Association in alleged violation of NRS 116.31183 (App. 4-5, Complaint ¶ 24-26); participated in meetings regarding the unlawful deck extensions in alleged violation of NRS 116.31084 (App. 4-5, Complaint ¶ 24-26); and acted and/or encouraged others to

act in alleged violation of NRS 116.3108, [4] NRS 116.31083, [5] NRS 116.31084, [6] NRS 116.31085, [7] NRS 116.31087, [8] and NRS 116.31175. [9] (App. 6, Complaint ¶ 38). Quite simply, the Dezzanis had no reasonable grounds to bring and maintain

---

[4] NRS 116.3108 governs meetings of unit owners' associations, frequency of meetings, calling special meetings, requirements concerning notice and agendas, requirements concerning minutes of meetings, and the right of unit owners to make audio recordings of meetings. It does not establish a private cause of action for a unit owner against an association or its attorney.

[5] NRS 116.31083 governs meetings of the executive board, frequency of meetings, periodic review of certain financial and legal matters at meetings, requirements concerning minutes of meetings, and the right of unit owners to make audio recordings of certain meetings. It does not establish a private cause of action for a unit owner against an association or its attorney.

[6] NRS 116.31084 governs voting by members of the executive board, disclosures, and abstention from voting on certain matters. It does not establish a private cause of action for a unit owner against an association or its attorney.

[7] NRS 116.31085 governs the right of unit owners to speak at certain meetings, limitations on the right to speak at meetings, limitations on power of executive board to meet in executive session, procedure governing hearings on alleged violations; requirements concerning minutes of certain meetings. It does not establish a private cause of action for a unit owner against an association or its attorney.

[8] NRS 116.31087 governs the right of unit owners to have certain complaints placed on the agenda of the meeting of the executive board. It does not establish a private cause of action for a unit owner against an association or its attorney.

[9] NRS 116.31175 governs the maintenance and availability of books, records and other papers of the association, general requirements, exceptions, general records concerning certain violations, enforcement by the Ombudsman, limitations on amount that may be charged to conduct review. It does not establish a private cause of action for a unit owner against an association or its attorney. Rather, it provides for a process of challenge and review through the Ombudsman and Commission for Common-Interest Communities and Condominium Hotels.

their claims against Kern, and an award of attorney's fees and costs was appropriate and should be upheld by this Court. The frivolous claims brought by the Dezzanis are exactly those NRS 18.010 was designed to deter.

The Dezzanis' contentions regarding alleged retaliatory action taken by Kern are, frankly, absurd. Kern advised her client, the Association, regarding multiple deck extensions within the community that unlawfully encroached upon common area of the Association. Upon direction from the Association, and before receiving any of the communications from the Dezzanis attached to the Complaint, Kern issued a Notice of Violation to the Dezzanis. [10] At all times relevant to the allegations of the Complaint, Kern acted and communicated consistently with the Notice of Violation. As demonstrated to the district court, there was simply no evidence of any retaliatory action. In fact, the evidence presented belies the Dezzanis' theory of retaliation and confirms Kern took a consistent course of conduct in response to the violation of the Association's governing documents.

---

[10] The Dezzani's allege Kern took retaliatory action against them in response to their complaints to the Association of Kern's provision of legal services and recommendations that Kern be replaced as the attorney for the Association. (App. 4-5, Complaint ¶¶ 24-26). However, the Dezzanis expressly acknowledge that their complaints of Kern were initiated after their receipt of the Notice of Violation. (App. 3, Complaint ¶ 14). It is completely axiomatic to assert that Kern's issuing of the Notice of Violation, on behalf of the Association, was in retaliation for complaints made by the Dezzanis *after* they received the Notice.

The evidence presented by the Dezzanis consists of the following: a Notice of Violation sent to the Dezzanis by the Association's Board of Directors, dated March 18, 2013 (App. 11-12 , Complaint Exhibit "1"); an email from David Dezzani to the Association's Board of Directors, dated May 3, 2013, attacking Kern's understanding of the facts and legal advice and conclusions (App. 14-22, Complaint Exhibit "2"); a letter from the Dezzanis to the Association's Board of Directors, dated July 18, 2013, urging the Board to cancel its scheduled hearing on the Notice of Violation (App. 24-27, Complaint Exhibit "3"); a letter from Kern to the Dezzanis in response to the Dezzanis' July 18th letter indicating the Board had previously complied with the Dezzanis' request to reschedule the hearing and would make a determination at the hearing (App. 29, Complaint Exhibit "4"); a Result of Hearing sent to the Dezzanis by the Association's Board of Directors, dated September 5, 2014, indicating the Board's determination that the enlarged deck was an unlawful encroachment of the common area and detailing the Board's deliberation process and consideration of the opinions presented by Kern and the Dezzanis' attorney who was present at the hearing (App. 31-32, Complaint Exhibit "5"); a letter from the Dezzanis to the Association's Board of Directors, dated December 29, 2014, outlining their various objections to the Result of Hearing and

requesting the Board issue a new finding authorizing the deck and requesting their complaint be put on the next Board meeting agenda (App. 34-36, Complaint Exhibit "6"); a letter from the Association's Board of Directors to the Dezzanis specifying that the Board's position with respect to the unlawful deck remained the same and inviting the Dezzanis to attend the next regularly scheduled meeting of the Board to speak during the open comment period or contact the community manager to have the item placed in the agenda of a closed executive session (App. 38, Complaint Exhibit "7").

It is outrageous to assert that these documents establish any retaliatory action by Kern personally against the Dezzanis. The Dezzanis documentary evidence consists solely of communication between the Dezzanis and the Board, with a single letter authored by Kern of behalf of the Association. The letter from Kern attached to the Complaint does not demonstrate any retaliatory action. Kern responded to the Dezzanis' letter and indicated the Board would make a decision regarding the Notice of Violation at that hearing. Kern even provided information for the Dezzanis to participate telephonically if it was difficult for them to attend the hearing. (App. 29). While David Dezzani attested to his personal belief and impression that Kern undertook and/or directed and/or encourage retaliatory action

against him and his wife (App. 283-284, Counter-Affidavit of David Dezzani) there is simply no credible evidence which suggests Kern took any retaliatory action. Furthermore, at all times relative to the allegations of the Complaint, Kern was acting as the attorney for the Association upon direction from the Board.

The *only* interactions between Kern and the Dezzanis were communications regarding the Association's ultimate decision that the deck was unlawful. In all such communications, Kern advised that she was acting as the attorney for the Association and upon direction from the Board of Directors. Further, the message remained the same, despite the Dezzanis' defamatory comments about Kern's ability to provide legal counsel to her client. It bears emphasizing that the Dezzanis' complaint regarding Kern's ability as legal counsel of the Association was sent *after* the Association issued the Notice of Violation. The Dezzanis do not allege they sent any communication prior to the Notice of Violation which addressed the taking of common area. At no point after the Dezzanis made any communication with the Association, the members of the Board, or Kern directly, did Kern stray from the Board's initial position that the deck extension was unlawful and action was required to correct the violation of the governing documents and Nevada law. Kern's actions and communications remained consistent with the decision of the

Board, made before the Dezzanis complained. In light of these factors, the district court properly found there was no factual basis for the Dezzanis' contentions regarding alleged retaliatory action by Kern individually, that the Dezzanis' claims were groundless, and that an award of attorney's fees and costs was appropriate under the circumstances.

Moreover, there is absolutely no evidentiary support for the alleged violations of Chapter 116 by Kern, notwithstanding the fact that the cited statutory provisions do not provide unit owners a cause of action against attorneys for associations acting upon direction from the board of directors. The cited provisions of Chapter 116 govern voting by members of the executive board, abstention of voting on certain matters, requirements concerning notice of meetings of the members and agendas, meetings of the executive board, the right of unit owners to speak at certain meetings and have certain complaints placed on the agenda of executive board meetings, and the maintenance and availability of books and records of the association. Kern is not, and never has been, a member of the Association's Board of Directors. As a matter of law, there is no cause of action against Kern directly. Further, there is simply no evidence that Kern encouraged the members of the Board to act in a manner inconsistent with the requirements of

Chapter 116. The only letter from Kern the Dezzanis offered as evidence indicated that in accord with Nevada law, a hearing on the alleged violation was scheduled and the matter would be discussed at that hearing. (App. 29, Complaint Exhibit "4"). There is simply no credible evidence supporting the Dezzanis' claims against Kern. The district court properly applied its discretionary authority to award attorney's fees and costs to Kern for prevailing against the Dezzanis' groundless claims. (App. 381, Order 2, page 3, lines 15-17). The court was unpersuaded the Dezzanis brought their claims on reasonable grounds and the decision to award attorney's fees and costs as a result was in accord with Nevada law. As such, this Court should not find that the district court abused its discretion. Furthermore, the district court made a specific finding that the Dezzanis brought their claims to harass Kern. This should not be disturbed, as it is based on the evidence submitted and not clearly erroneous.

2. There is Clear Support for the District Court's Conclusion that the Dezzanis Brought their Claims in an Effort to Continue their Unlawful Harassment of Kern.

NRS 18.010(2)(b) provides for an award of attorney's fees and costs when claims are brought without reasonable grounds or to harass the prevailing party.

The statute was designed to prevent vexatious claims which unnecessarily burden the judiciary and increase the costs of doing business and providing professional services. *See* NRS 18.010(2)(b). The district court found there was evidence indicating the Dezzanis' claims were maintained in an effort to harass Kern. (App. 381, Order 2, page 3, lines 15-16).

It is clear, from the Dezzanis' own evidence, that they took issue with Kern, her role as attorney for the Association, her involvement with advising the Association on the deck encroachment issue, and her interactions with the members of the Board. The serious accusations against Kern and her professional capabilities are plentiful. The Dezzanis accused Kern of possessing "faulty knowledge of the facts and the law, a propensity to presume matters without evidence and a willingness to espouse legal opinions which ignore, overlook, misconstrue and/or fail to consider applicable Nevada laws." (App. 4, Complaint ¶ 24). The letters from the Dezzani assert Kern advised "upon a faulty understanding," had an "ignorance of the factual basis underlying her legal advice," "rendered legal advice to the Board based upon probably untrue assumptions," gave "deficient" analysis, inadequately applied the law, and generated increased costs for the members. (App. 15-18, Complaint Exhibit "2"). Then, notably, the Dezzanis chose to bring suit

against Kern directly. The district court found sufficient evidence that the Dezzanis' complaint was brought and maintained in an effort to continue their harassment of Kern. In light of the spurious allegations against Kern in the Complaint and supporting documents, the court's conclusion was well-founded and reasonable, and should not be reversed for an abuse of discretion. This Court should uphold the district court's award of attorney's fees and costs pursuant to NRS 18.010(2)(b), because, as demonstrated above, the Dezzanis' claims were groundless and sufficient evidence existed to suggest they were maintained in an effort to harass Kern.

D. An Award of Attorney's and Costs is Warranted Pursuant to NRS NRCP 11.

Rule 11 of the Nevada Rules of Civil Procedure establishes a pleading threshold, by which all parties submitting any document to the court are held to a high standard of honesty, propriety, and legitimacy. NRCP 11 authorizes the imposition of sanctions, which may include reasonable attorney's fees, for abuse of process and the imposition if frivolous lawsuits. It provides, in pertinent part:

> (b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge,

information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for ***any improper purpose, such as to harass*** or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are ***warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law*** or the establishment of new law;

(3) the allegations and other factual contentions have ***evidentiary support*** or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

This Court has found that NRCP 11 sanctions should be imposed for the filing of frivolous actions. *Bergmann*, 109 Nev. at 676. Frivolous claims are those that are "both baseless and made without a reasonable and competent inquiry." *Id.* (*citing Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990)). Thus, the imposing court must determine whether: (1) the claim is well

grounded in fact and supported by existing law, or the "nonfrivolous argument for the extension, modification, or reversal of existing law", and (2) the claimant made a "reasonable and competent inquiry." NRCP 11; *Bergmann*, 109 Nev. at 676. The rationale behind imposing sanctions for NRCP 11 is to deter abuse of the judicial process and ensure compliance with the rules of the judiciary. *See Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 698, 263 P.3d 224, 228 (Nev. 2011) (quoting *Red Carpet Studios Div. of Source Advan. v. Sater*, 465 F.3d 642, 645 (6th Cir. 2006)). NRS 18.010(2)(b) directs that attorney's fees and costs should be awarded as sanctions pursuant to NRCP 11 in order "to punish for and deter frivolous or vexatious claims and defenses."

1. The Dezzanis' Claims Are Not Supported by Fact and Were Brought For an Improper Purpose.

NRCP 11 prohibits bringing and maintaining claims for any improper purpose, including to harass the opposing party, and requires that all claims have evidentiary support. NRCP 11(b)(1) & (3). Sanctions, including an award of attorney's fees and costs, are authorized for violations of these pleading standards. NRCP 11(c); NRS 18.010(2)(b). The discussion herein above regarding the lack of evidentiary and factual support for the Dezzanis' claims and the claims brought

to harass Kern is equally applicable in support of an award of attorney's fees and costs pursuant to NRCP 11. Noting sanctions under NRCP 11 "should be imposed for frivolous actions," the district court found that the Dezzanis chose to go forward on an erroneous legal theory and ignored the clear consequences of their action. (App. 381-382, Order 2, page 3-4). The award of attorney's fees and costs under NRCP 11 was appropriate given the complete lack of factual support and evidence that the Dezzanis brought their claims to harass Kern.

2. The Dezzanis' Claims Are Unsupported by Law.

NRCP 11 further requires that claims be supported by existing law or the "nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." NRCP 11(b)(2). Sanctions are appropriate for bringing claims with no basis in law. *Bergmann*, 109 Nev. at 676. The district court reviewed and carefully considered the claims presented by the Dezzanis and concluded there was no basis in law or fact to support the Dezzanis' attempts to hold Kern, as the attorney for the Association, personally liable for actions taken on behalf of the Association. (App. 144, Order 1, page 3, lines 7-10). The Court therefore granted Kern's Motion to Dismiss, dismissing each claim brought against Kern by the Dezzanis and the case in its entirety. (App. 145, Order 1, page 4, lines

4-5). While the standard for granting a motion to dismiss under NRCP 12(b)(5) differs from the standard for awarding attorney's fees and costs under NRS 18.010(2)(b) or NRCP 11, the district court's analysis as to the merits of the Dezzanis' claims is certainly illustrative of the complete lack of supporting legal authority for the Dezzanis' claims. Even considering all factual allegations set forth by the Dezzanis as true for purposes of NRCP 12(b)(5), [11] the district court found there were no grounds for the requested relief. [12]

a. There is no Theory of Liability to Hold Kern Directly Liable for Actions Taken During the Scope of Kern's Representation of the Association.

---

[11] *See Kahn v. Dodds (In re AMERCO Derivative Litig.)*, 127 Nev. 196, 211, 252 P.3d 681, 692 (Nev. 2011) (setting forth the standard for evaluating a motion to dismiss).

[12] The Dezzanis separately appealed the district court's granting of Kern's Motion to Dismiss, which is currently pending before this Court in Case No. 69410. Kern filed an Answering Brief detailing the support for the district court's granting of the Motion to Dismiss. Much of the discussion therein regarding the merit of the Dezzanis' claims, or lack thereof, is applicable to the present appeal. In this appeal, Kern continues the assertion, with which the district court agreed, that the Dezzanis' claims are groundless, unsupported, devoid of legal support, and were prosecuted without good faith and in an effort to harass Kern. In addition to supporting the district court's granting of Kern's Motion to Dismiss, this also supports the court's award of attorney's fees and costs under both NRS 18.010(2)(b) and NRCP 11.

The only relevant actions allegedly taken by Kern are those taken on behalf of the Association. The Dezzanis do not allege facts which suggest Kern acted independently from her representation of the Association. In fact, in all communications with the Dezzanis, Kern indicated she was counsel for the Association and was responding on behalf of the Association. (App. 29, Complaint Exhibit "4"; App 102, 105; Motion to Dismiss Exhibits "2" & "3"). Despite this fact, the Dezzanis seek to hold Kern independently and directly responsible for the acts of the Association. Nevada law does not recognize a theory of liability under which Kern, as attorney for the Association, may be independently liable to the Dezzanis for actions taken during the course of her and the firm's representation of the Association and upon direction from the Board of Directors.

As a matter of law, there is no cause of action against Kern for actions taken on behalf of the Association to enforce the CC&Rs and correct a wrongful transfer of common area property to individual unit owners. Rather than assert claims challenging the legality of the Association's position, the Dezzanis sued Kern directly because of her representation of and advice given to her client.

This suit is without merit. Except for limited and narrow exceptions, only a client may maintain an action against an attorney for breach of contract, negligence, breach of fiduciary duty, or failure to adhere to a recognized standard of care. There are limited exceptions in which this Court has addressed attorney liability to third-parties. In *Ricks v. Dabney*, this Court reiterated that no civil cause of action exists against an attorney based upon a violation of the Rules of Professional Conduct. *Ricks v. Dabney (In re Jane Tiffiany Living Trust)*, 124 Nev. 74, 81, 177 P.3d 1060, 1064 (Nev. 2008); *see also Mainor v. Nault,* 120 Nev. 750, 768-69; 101 P.3d 308, 320-21 (Nev. 2004).

In *Edward J. Achrem, Chtd. v. Expressway Plaza Ltd. Pshp.*, 112 Nev. 737, 917 P.2d 447 (Nev. 1996), this Court held an attorney may be liable to a third party for the attorney's failure to pay the third party settlement funds that the client lawfully assigned to the third party. The attorney was held liable as a direct result of the attorney's breach of an express and enforceable contract, the assignment agreement. *Id.* at 741-42.

Edwards is inapplicable to the present case and does not support liability against Kern directly, as there has never existed any contract between the Dezzanis

and Kern. Kern is not personally bound by the CC&Rs. The Dezzanis are not a third party beneficiary to any contract between Kern and the Association. Kern represents the Association, a non-profit corporation, not the individual homeowners. There is no basis to sustain any claim against Kern directly based upon any breach of contract, as no contract between Kern and the Dezzanis existed.

California courts have consistently held attorneys are not liable to third parties for actions taken in connection with the representation of a client, especially third parties whose interests are adverse to those of the client. *See B.L.M. v. Sabo & Deitsch*, 55 Cal. App. 4th 823, 838, 64 Cal. Rptr. 2d 335, 344-45 (1997) (holding that attorney could not be liable to third party for negligent misrepresentation based upon the attorney's legal opinion provided to the client when the third party held an adverse position to the client); *Norton v. Hines,* 49 Cal. App. 3d 917, 923-24, 123 Cal. Rptr. 237, 241-42 (1975) (finding that while an attorney may be liable in tort for damages sustained by a person intended to be benefitted by the attorney's services, an adverse party is clearly not an intended beneficiary of an attorney's services); *Weaver v. Superior Court,* 95 Cal. App. 3d 166, 182, 156 Cal. Rptr. 745, 753 (1979) (finding that to impose a duty of care to persons whom the attorney's

client deals at arm's length would "seriously jeopardize the attorney-client relationship"); *Parnell v. Smart,* 66 Cal. App. 3d 833, 837-38, 136 Cal. Rptr. 246 (1977); *Omega Video Inc. v. Superior Court,* 146 Cal. App. 3d 470, 480, 194 Cal. Rptr. 574 (1983); *St. Paul Title Co. v. Meier,* 181 Cal. App. 3d 948, 952, 226 Cal. Rptr. 538 (1986). Controlling and persuasive authority directs that the Dezzanis' claims against Kern directly have no merit.

b. NRS 116.31183 Does Not Establish a Cause of Action Against Attorneys for Associations When Taking Action on Behalf of the Association.

In addition to being unsupported by any evidence or facts, the Dezzanis' claims regarding retaliatory action are not grounded in law. To hold that NRS 116.31183 permits civil actions directly against attorneys for associations for actions taken at the request of the association would have devastating impacts on associations' ability to function and carry out their obligations. Associations retain counsel to take various lawful actions, many of which are directed against homeowners in the community (enforcing fines that have been imposed by the Association for violations of the governing documents pursuant to NRS 116.31031,

enforcing assessments made by the Association for common expenses which exclusively benefit an owner or caused by the willful misconduct or gross negligence of an owner pursuant to NRS 116.3115(4) & (6), and enforcing the association's lien for assessments through foreclosure pursuant to NRS 116.3116 *et seq*). The effective management of the community requires that attorneys for associations be authorized to take appropriate action against owners for violations of the governing documents and Nevada law upon direction by the Board. In the case at bar, Kern assisted the Association pursue a violation of the governing documents and Nevada law. Doing so put the interests of the Association and the Dezzanis temporarily at odds. This is often the case when attorneys represent their clients regarding action as permitted by Chapter 116 by the Association against homeowners. To permit a cause of action against the attorney for representing his or her client in an action against a homeowner upon direction from the board would stifle association management and efforts to obtain compliance with the governing documents. The attorney for an association must be able to represent his or her client as appropriate and upon direction from the Board in order to protect the interests of the client, which is only the association.

Here, Kern acted solely on behalf of the Association throughout her interactions with the Dezzanis. To have abandoned the interests of her client because an owner in an adversarial position recommended replacement of Kern as attorney for the Association would have been a dereliction of her duty to her client. Rather, despite the harassing communications from the Dezzanis, and at the request of the Board, Kern carried on the enforcement of the governing documents as authorized by law. There was simply no legal basis to hold her liable for these actions and the Dezzanis calculated decision to proceed against her directly is sanctionable. Again, in addition to being groundless in law, these allegations have zero factual support, and as such, an award of fees and costs is warranted.

c. The Cited Provisions of Chapter 116 Did Not Support a Cause of Action Against Kern Directly.

The Dezzanis' contentions regarding alleged violations of various provisions of Chapter 116 were not warranted by existing law, as the statutory provisions do not provide for a cause of action against an attorney for the association. The cited provisions regulate the meetings of unit owners, meetings of the executive board, voting by members of the executive board, the right of unit owners to speak at certain meetings, the right of unit owners to have certain complaints placed on the

agenda of meetings and the maintenance and availability of Association books and records. These statutes provide no basis for a claim by the Dezzanis against Kern, as the attorney of the Association. The statutory provisions govern the conduct of the members of the executive Board, which Kern was not. More importantly, the Dezzanis alleged no facts which demonstrated Kern took any action which would constitute a violation of any of the cited provisions of Chapter 116.

The Dezzanis were informed at a very early stage in this litigation of the substantive deficiencies of their Complaint. The authority cited herein was provided in a detailed and thorough analysis to the Dezzanis from Kern by letter dated September 9, 2015. [13] (App. 302-307, Reply to Opposition to Motion for

[13] The Dezzanis assert the district court improperly relied on the September 9th letter as a "new exhibit" attached to Kern's Reply to Dezzanis' Opposition to Motion for Attorney's Fees and Costs. (Opening Brief, page 3). This Court has found that arguments asserted for the first time in a reply brief will be disregarded. *See Elko v. Zillich*, 100 Nev. 366, 371, 683 P.2d 5, 8 (Nev. 1984) (citing *Nevada Industrial Comm'n v. Bibb*, 78 Nev. 377, 383, 374 P.2d 531, 535 (1962)). The September 9th letter was not a new argument. In the Motion for Attorney's Fees and Costs, the argument was raised that Kern advised the Dezzanis on multiple occasions that there was no legal authority for their claims against her as the attorney for the Association. (App. 154, Motion for Attorney's Fees and Costs, page 5, lines 19-20). In response to Dezzanis' allegation in Opposition that they were unaware of any authority providing for immunity of an attorney for an association, Kern replied that the Dezzanis were, in fact, notified of the existence of such authority. The September 9th letter was attached in response to the Dezzanis' contentions they were ignorant of the law. The fact that

Attorney's Fees and Costs Exhibit "3"). The Dezzanis chose to ignore this authority and proceed with their claims against Kern. The district court found that, as an attorney, Mr. Dezzani "should have known the consequences of his actions" and should have conducted a more thorough analysis of applicable law. (App. 382 Order 2, page 4, lines 1-4). Exercising its discretion, the court found that the Dezzanis' pursuit of meritless claims against Kern warranted an award of attorney's fees and costs in favor of Kern. As stated in detail above, there is ample authority for holding a party liable for attorney's fees and costs when that party proceeded on untenable legal theories with no factual support in an effort to harass the other party. It cannot be said that the district court acted upon an erroneous view of the law when it granted Kern's Motion for Attorney's Fees and Costs. *See Allianz*, 109 Nev. at 995. Therefore, this Court should not find the district court abused its discretion in awarding fees and costs.

Furthermore, the district court did not err in considering the fact that the Dezzanis were provided a local case where claims made against Kern for her

---

Kern provided this analysis to the Dezzanis was initially argued in the Motion and was not new. Therefore, the district court did not err in considering the September 9th letter. Further, the Dezzanis made no attempts to seek leave of court to file a response to Kern's reply.

representation of the Association were dismissed because she was acting as counsel for the association. Kern directed the Dezzanis to the legal deficiencies in the claims and the Dezzanis decision to proceed is evidence of their bad faith prosecution and abuse of the judicial system. Taking all the relevant factors into consideration, including, most importantly, the fact that the Dezzanis' factual allegations are unsupported and there is no basis in law for their claims, the district court properly exercised its discretion in awarding attorney's fees and costs to Kern.

CONCLUSION

Again refusing to accept the clear legal and factual deficiencies of their claims, the Dezzanis' appealed the district court's order awarding attorney's fees and costs to Kern in accord with NRS 18.010(2)(b) and NRCP 11. Under NRS 18.010(2)(b) and NRCP 11, district courts have broad discretion to award attorney's fees and costs. Courts are encouraged to consider the manner in which claims are brought. For groundless and factually unsupported claims, there should be sanctions imposed to deter frivolous litigation and avoid situations in which the court and defending parties time and limited resources are wasted. The prohibition on frivolous and vexations litigation is directly implicated in the present case, in which a retired attorney has used the court as a mechanism to assert false claims against Kern, and has refused to acknowledge the clear factual and legal deficiencies, choosing instead to continue this groundless litigation. The district court applied its discretion to award Kern attorney's fees and costs. Not only that, but the district court issued a finding of fact that the Dezzanis' claims were brought to harass Kern and an award of fees and costs was necessarily appropriate. This Court should not reverse the district court's Order granting attorney's fees and costs based upon the arguments presented herein, because the district court properly exercised its discretion and the findings of fact were not erroneous.

CERTIFICATION OF COUNSEL

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 2016 in Times New Roman 14 point.

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 proportionately spaced, has a typeface of 14 points or more, and contains 9,927 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 this 12th day of August, 2016.

KERN & ASSOCIATES, LTD.

By 

GAYLE A. KERN, ESQ.
NEVADA BAR #1620
VERONICA CARTER
NEVADA BAR #13841
5421 KIETZKE LANE, SUITE 200
RENO, NEVADA 89511
Telephone (775) 324-5930
Telefax (775) 324-6173
Attorneys for Respondents Kern & Associates, Ltd. and Gayle A. Kern

CERTIFICATE OF SERVICE

Pursuant to NRAP Rule 5(b), I certify that I am an employee of KERN & ASSOCIATES, LTD., and that on this day I served the foregoing document(s) on the party(s) set forth below by:

RESPONDENTS' ANSWERING BRIEF

__X__ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage prepaid, following ordinary business practices.

_____ Personal delivery.

_____ Facsimile (FAX).

_____ Federal Express or other overnight delivery.

_____ Reno/Carson Messenger Service.

or

_____ Electronically

addressed as follows:

David and Rochelle Dezzani
17 Camino Lienzo
San Clemente, CA 92673

DATED this 12th day of August, 2016.

Teresa A. Gearhart
TERESA A. GEARHART