

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID DEZZANI AND ROCHELLE DEZZANI,  
Appellants,  
vs.  
KERN & ASSOCIATES, LTD.; AND GAYLE A.  
KERN,  
Respondents

Case Nos. 698410/69896  
District Court Case No. CV1500826

**FILED**

MAR 16 2017

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

Appellants'  
Answer to Respondents' Petition for Review  
and  
Response to Amicus Curiae Brief

**BACKGROUND**

On May 4, 2015, Appellants filed their forty-paragraph Complaint, citing seven provisions of the NRS and attaching seven Exhibits, in the Second Judicial District Court of the State of Nevada, Case No. CV15 00826,.

On November 19, 2015, *without permitting discovery*, the District Court entered an **ORDER** dismissing the Complaint, holding that:

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

On February 2, 2016, the District Court entered a second **ORDER** in CV15 000826, awarding more than \$13,000 attorneys fees in favor of Respondents, and against Appellants, notwithstanding that the Respondents had stated throughout the proceedings that they were "in *pro per*".

Appellants appealed from the two Orders, which were treated as two separate appeals

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and assigned Case Nos. 69410 and 69896, both transferred to the Court of Appeals on September 8, 2016, where they were consolidated, on September 22, 2016.

On November 16, 2016, the Court of Appeals entered its ruling, titled *ORDER AFFIRMING IN PART AND REVERSING PART*, describing the two cases as “consolidated appeals from district court orders dismissing a complaint in a torts action and awarding attorney fees and costs.”

On December 12, 2016, the Court of Appeals transferred the consolidated cases back to the Supreme Court and, on December 19th, now represented by an attorney, Respondents filed a PETITION FOR REVIEW (“Petition” or “Kern’s Petition”)

On January 13, 2017, after obtaining leave to do so, the State Bar of Nevada filed an AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR RELIEF (“amicus” or “amicus brief”)

On February 24, 2017, this Court entered an **ORDER** directing Appellants to answer Kern's Petition and respond to the amicus.

### **APPELLANTS’ ANSWER AND RESPONSE**

The Petition asks this Court to review the Court of Appeals Order on grounds that:

“The Court of Appeals decision is inconsistent with the statutory language and contrary to Nevada public policy. Kern respectfully asks the Court to address these matters of first impression and statewide importance to affirm the district court’s order dismissing Kern and awarding fees and costs. (id., p. 20)

The State Bar of Nevada’s amicus supports Kern’s Petition by arguing that the Court of Appeals decision:

“creates a problematic result that (1) interferes with an attorney’s duty to zealously advocate for his client; (2) impacts an attorney’s duty of loyalty; (3) may reveal attorney work product and privileged or confidential materials; and (4) results in unprecedented potential for personal liability against an attorney for actions taken on behalf of his clients, and may make malpractice insurance difficult or impossible to obtain.” (id., p. 10)

Although Appellants agree that this Court should review the Court of Appeals decision, they disagree with the arguments set forth in the Petition and the amicus, urging that such review should result in affirmation of the District Court’s summary dismissal order.

In Appellants’ view, the Court of Appeals’ ruling should be reviewed by this Court because it creates unnecessary and unwarranted procedural barriers to application of

Nevada statutes, especially NRS116.31183, which were enacted by the Nevada legislature for the purpose of protecting Nevada common interest property owners, like Appellants, from retaliation for having communicated complaints to their HOAs and having sought replacement of their homeowners' association's attorney.

Furthermore, because the result urged in the Petition and amicus brief would establish precedent for depriving Nevada common interest property owners of protection from retaliation, for simply for submitting complaints and recommendations to their HOAs, the arguments stated therein should not be accepted.

Although Appellants agree that the Court of Appeals decision should be reviewed, their reasons for doing so are very different from those urged by Kern's Petition and the amicus brief, which focus entirely on purported rights, protections and relationships of attorneys, rather than upon the legislative purpose of the statutes cited in the Complaint.

For example, the legislative intent and purpose of NRS116.31183 clearly is to protect, and provide remedies to, owners of Nevada common interest ownership property who submit complaints to their homeowners' association ("HOA") and/or recommend replacement of their HOA's attorney.

However, the arguments urged in Kern's Petition and the State Bar's amicus would turn the legislative intent on its head and, instead, insulate and protect Nevada attorneys from liability for intentionally taking or directing actions **for the purpose of retaliating** against HOA members who have complained about them and/or requested their replacement.

The arguments asserted in the Petition and the amicus apparently were accepted and followed by the District Court, when it ruled that the attorney for Appellant's HOA, Kern, was immune from potential liability for retaliating against Appellants, simply because her moving papers asserted that all of her actions were "on behalf of the client", after which the District Court summarily dismissed the Complaint, ruling no discovery would be allowed nor inquiry permitted nor factual issue considered regarding the truth of that assertion and/or motivation to retaliate.

Contrary to the seemingly clearly worded NRS116.81183, that an "agent of an association shall not take, direct or encourage ... any retaliatory actions against a unit's owner ...", Kern's Petition and the State Bar's amicus brief urge that the legislature actually intended the statute to contain a loophole for lawyers, removing them from the normal definition of the word "agent", and actually providing them with immunity to abuse their responsibilities, as attorneys for an HOA, and retaliate freely against HOA members who complain and/or recommend their replacement.

Interestingly, in urging their arguments for immunity from NRS116.31183, neither Kern's Petition nor the amicus brief discuss paragraph 1(b) of that statute, which specifically extends protection from retaliation to homeowners who recommend "replacement of an attorney".

Because logic suggests that the only person potentially motivated to retaliate against a homeowner, for recommending replacement of an HOA attorney, would be the attorney whose replacement is recommended, the wording of paragraph 1(b) logically shows that the legislature did not intend there to be a loophole for lawyers, when enacting NRS116.31183.

The cases cited and the arguments urged, by Kern and the State Bar, relying upon traditional concepts of attorney and client relationships ignore the realities of common interest property ownership law and the special responsibilities of attorneys who chose to represent HOAs, where statutorily-mandated monthly fees assessed against HOA members are used to pay for that attorney's legal services.

In fact, rather than implying a loophole excluding attorneys from the meaning of the word "agent", as urged, it makes much more sense to view NRS 116.31183 as legislation enacted for the *purpose of preventing* attorneys and others from abusing, through *retaliatory action*, the homeowners who actually pay for the attorney/agent's services.

Although Appellants have little knowledge of Nevada common interest property ownership law, because Nevada law required them to pay monthly fees, totaling many thousands of dollars, over a period of twelve years, and because myriad other common interest property owners have also been required, and remain obligated, to pay such monthly fees, and because substantial portions of those fees were and are paid to Kern and other State Bar attorneys, who have chosen to enter into, and receive the financial benefits of, HOA agency relationships, Nevada law should not, and probably does not, allow those attorneys to escape personal liability if they purposefully retaliate against individual members of the HOA, merely by asserting that their actions were done "on behalf of the client association".

Appellants note that none of <sup>the</sup> cases or authority cited in the Petition, or the amicus, discuss attorneys' obligations and liabilities in situations analogous to those present here, where an attorney for an HOA is alleged who have personally retaliated against individual members of the HOA who complained about and sought replacement of that attorney.

In that regard, Appellants point out that the Court of Appeals, at page 3 of its decision, incorrectly summarized the claims asserted by Appellants in their complaint as alleging "that [Kern] advised the HOA to take certain actions in retaliation for appellants' suggestion that the HOA replace its counsel", whereas Appellants actually assert that Kern *personally* undertook retaliatory actions against them *beyond, and different in character from*, simply misadvising the HOA.

Due to its misunderstanding of the nature and extent of Appellants' claims for relief, as set forth in their complaint, the Court of Appeals incorrectly concluded that "the court would have to interpret the CC&Rs to determine whether respondents' advice was supported by or made in contravention of the CC&Rs.", thereby deciding that NRS

38.310(1) mediation or dispute resolution was prerequisite to Appellant's filing of a civil complaint.

However, the civil complaint filed by Appellants actually sets forth multiple claims for relief, based upon several cited provisions of the NRS ***not implicating or requiring reference to the CC&Rs***, but instead presenting questions whether an attorney representing an HOA intentionally failed to disclose and/or misadvised regarding *the existence and/or significance of tangible evidence*, for the purpose of retaliating against HOA members because they complained about and sought that attorney's replacement.

Because the claims for relief actually asserted in the Complaint do not depend upon and would not require, interpreting, applying or enforcing the CC&Rs or any HOA documents, the Court of Appeals ruling that NRS 38.310(1) proceedings were a prerequisite to filing of the Complaint is incorrect.

Also, because the Court of Appeals decision' would be precedence for future claims by homeowners who have been retaliated against, it should be reviewed and corrected by this Court, in a manner where the outcome would allow Nevada common interest property owners to be protected, and able to obtain remedy, without being required to first go through the unnecessary and inapplicable procedural steps of NRS 38.310(1).

In conclusion, regarding the portion of pages 19 and 20 of Kern's Petition addressing Case No. 69896, by asserting that "**The Court of Appeals Improperly Reversed the Fee Award**", Appellants answer ~~asserting~~ by stating that **reversal of the fee award was absolutely correct**, even if the Court of Appeals' understanding of Appellants' claims for relief and its reasoning regarding NRS 38.310(1), were incorrect, as discussed above.

Appellant's' briefing submitted in Case No. 69896, discusses at length how the District Court's award of fees was totally unjustified, because there was absolutely no basis for that court's finding that the filing of Appellants' civil complaint, seemingly expressly authorized by the wording of the several statutes cited therein, including NRS 116.31183, would or could justify such an award.

Subsequent events and filings, during the ensuing appellate proceedings, have made clear that, although NRS 116.31183 may or may not be subject to conflicting interpretations, Appellants' reliance upon its seemingly clear wording, when filing their complaint, was certainly not frivolous and, therefore, the District Court's award of fees against them was totally unjustified.

Dated: March 13, 2017

Signed: David Dezzani

David Dezzani, Appellant

Rochelle Dezzani  
Rochelle Dezzani, Appellant