

IN THE SUPREME COURT OF THE STATE OF NEVADA

**NORTHERN NEVADA HOMES,
LLC,**

Appellant,

vs.

GL CONSTRUCTION, INC.,

Respondent.

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No. 71899

**APPEAL FROM POST-TRIAL ORDER AWARDING ATTORNEY'S
FEES AND COSTS
SECOND JUDICIAL DISTRICT COURT, WASHOE COUNTY, NEVADA
HONORABLE LIDIA S. STIGLICH, DISTRICT JUDGE**

APPELLANT'S OPENING BRIEF

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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 so that the judges of this court may evaluate possible disqualification or recusal.

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INTRODUCTION

This appeal involves an order awarding attorney's fees and costs to respondent following a bifurcated bench trial on respondent's counterclaims. The case as a whole involved multiple parties and multiple sets of claims. The trials of the appellant's claims and respondent's counterclaims were bifurcated into two trials. The first was a jury trial regarding appellant's claims, which resulted in a settlement for \$362,500.00 after the district court entered judgment as a matter of law against respondent with respect to liability. The second was a half-day bench trial regarding respondent's counterclaims. The district court ultimately found in favor of respondent and awarded it \$7,811.00. Respondent was subsequently awarded \$10,390.73 in attorney's fees and costs, pursuant to NRS 18.010(2)(a) and 18.020(3). Appellant is challenging the fees and costs award in this appeal.

Appellant submits that pursuant to the "net monetary recovery rule," respondent cannot be considered the prevailing party and, thus, was not entitled to an award of attorney's fees and costs. Under the "net monetary recovery rule," the district court should have compared the recoveries by each party to determine who ultimately obtained the greater recovery. Here, appellant obtained the greater recovery by over \$350,000. Had the district court correctly applied the net monetary recovery rule, respondent could not have been considered "the prevailing party" to the action. Accordingly, appellant respectfully requests that the district court's order be reversed.

JURISDICTIONAL STATEMENT

An order granting attorney's fees and costs is appealable as a special order after final judgment. NRAP 3A(b)(8); *Holiday Inn v. Barnett*, 103 Nev. 60, 63, 732 P.2d 1376 (1987). This appeal is timely with respect to the district court's December 1, 2016 order awarding attorney's fees and costs to respondent. (3 AA 510.) Notice of entry of the order was served on December 2, 2016. (3 AA 518.) The notice of appeal was filed on December 9, 2016. (4 AA 530.)

ROUTING STATEMENT

Pursuant to NRAP 17(b)(2), appeals from a judgment, exclusive of interest, attorney fees, and costs, of \$250,000 or less in a tort case are presumptively assigned to the Court of Appeals. This case involves the appeal of a post-judgment order totaling \$10,390.73. (3 AA 510.) Accordingly, appellant believes this matter falls within the presumption of assignment to the Court of Appeals.

STATEMENT OF ISSUES

1. Whether the "net monetary recovery rule" applies to cases involving counterclaims arising from unrelated conduct to the original claims, which were willingly joined with the original action by the defendant/counterclaimant.

2. If the "net monetary recovery rule" applies in such instances, whether respondent could be considered the prevailing party in this case pursuant to NRS 18.010(2)(a) and 18.020(3), when respondent only recovered \$7,811.00 and appellant recovered \$362,500.00.

STATEMENT OF THE CASE

On July 3, 2013, appellant filed a complaint in district court asserting trespass and property damage claims arising from respondent's illegal dumping of over 18,000 cubic yards of dirt and waste onto appellant's property. (1 AA 1.) In response, respondent asserted counterclaims against appellant regarding an allegedly unpaid invoice for excavation work totaling approximately \$7,800. (1 AA 15.) The trials of the claims and counterclaims were bifurcated into two separate phases. (1 AA 92.) The first trial involved appellant's claims and was tried to a jury. (1 AA 212.) On the fourth day of the trial, the parties settled for \$362,500.00. (1 AA 222.) The second trial was a one-half day bench trial regarding respondent's counterclaims, wherein the district court ultimately found in favor of respondent and awarded it \$7,811.00. (1 AA 240.) Respondent subsequently moved for attorney's fees and costs, which were awarded in the amount of \$10,390.73. (3 AA 510.) This appeal followed regarding the award of attorney's fees and costs to respondent. (3 AA 530.)

STATEMENT OF FACTS

On July 3, 2013, plaintiffs Northern Nevada Homes, LLC (hereinafter "NNH" or "appellant") and Cerberus Holdings, LLC (hereinafter "Cerberus") filed a complaint naming Gordon Lemich (hereinafter "Mr. Lemich") and his excavating company GL Construction, Inc. (hereinafter "GL Construction") as defendants. (1 AA 1.) NNH's claims arose as a result of approximately 18,000 cubic yards of dirt

and other waste that defendants dumped onto NNH's property. (1 AA 7, 60-61.) Cerberus' claims arose out of faulty construction work and misrepresentations that were made by defendants to Cerberus during the purchase of a parcel of property commonly known as the "Comstock Storage" property, which had been owned and occupied by defendants. (1 AA 52-59.)

Defendants filed an answer to plaintiffs' complaint on August 8, 2013. (1 AA 9.) A month later, defendant GL Construction filed a motion for leave to amend its answer in order to assert counterclaims against NNH. (1 AA 24.) The counterclaims concerned allegedly unpaid invoices for work GL Construction had performed on a separate and largely unrelated project where NNH was the general contractor. (1 AA 19-20.) On October 23, 2013, the district court granted GL Construction's motion. (1 AA 43.) GL Construction filed its amended answer and counterclaims a few days later. (1 AA 15.)

Both defendants were initially represented by James Beasley, Esq. On May 21, 2014, however, John Boyden, Esq. associated into the case as insurance defense counsel for Mr. Lemich and GL Construction. (1 AA 84.) Mr. Boyden and his firm handled the defense of defendants from this point forward. Mr. Beasley remained as counsel of record for GL Construction's counterclaims, but had little involvement with the case after May 21, 2014. After Mr. Boyden entered the case, the sole focus of the case and all discovery centered on plaintiffs' claims against defendants. Virtually nothing was done with regard to GL Construction's counterclaims and Mr.

Beasley was for the most part absent from the case until shortly before trial.

The case ultimately proceeded to trial on August 8, 2016, and was bifurcated into two trials. (1 AA 89-93.) The first trial involved a four day jury trial regarding NNH's claims against defendants.¹ (1 AA 212.) These claims were settled for \$362,500.00 on the fourth day of trial after the district court granted judgment as a matter of law in favor of NNH on the issue of liability.² (1 AA 221-22.) Mr. Beasley did not attend the jury trial. (1 AA 212-22.) Efforts were made to reach a full and global resolution of the claims and counterclaims, but Mr. Beasley demanded approximately \$70,000 out of the settlement money for his alleged attorney's fees and costs to settle the counterclaims. Thus, no settlement could be reached regarding the counterclaims, and the parties were forced to conduct a half-day bench trial immediately following the settlement of NNH's claims. (1 AA 227.)

During the bench trial, the evidence established that there had been a prior

¹ Cerberus' claims were resolved prior to the time of the jury trial. On February 27, 2014, Cerberus had accepted a \$20,000.00 offer of judgment from Mr. Lemich in his individual capacity. (1 AA 64.) Judgment was entered in favor of Cerberus and against Mr. Lemich on April 29, 2014. (1 AA 77.) To this day, Mr. Lemich has not made a single payment towards this judgment and collection has proven difficult given Mr. Lemich's conduct in shifting around and hiding assets. These issues will likely result in future motion practice in the district court. Cerberus' remaining claims against GL Construction were dismissed pursuant to a stipulation filed by the parties prior to the jury trial on NNH's claims. (1 AA 87.)

² On September 16, 2016, a stipulation and order to dismiss was entered regarding NNH's claims against Mr. Lemich and GL Construction. (1 AA 238.) Pursuant to the stipulation, each party agreed to "bear its own attorneys' fees and costs" regarding the prosecution and defense of NNH's claims. (*Id.*)

agreement between Cerberus, NNH, Mr. Lemich, and GL Construction that the unpaid invoice which formed the basis for the counterclaims was to be offset by unpaid rent and other charges that were due to Cerberus. (1 AA 109-33, 145-46, 151-57, 176-80, and 189-211.) This agreement was evidenced by emails exchanged between the parties and the testimony at the bench trial. (*Id.*)

In the district court's order following the bench trial, the court nonetheless found in favor of GL Construction on its counterclaims and awarded \$7,811.00 in damages. (1 AA 240.) The district court's ruling was based upon the fact that Cerberus had amended its complaint following the filing of GL Construction's counterclaims and included claims for the unpaid rent that were part of the original compromise between the parties. (1 AA 242-43.) The district court noted that Cerberus had accepted an offer of judgment in the amount of \$20,000 (which still remains unpaid today) that necessarily included the claim for the unpaid rent and other charges. (*Id.*) Thus, the district court found that these facts precluded a finding that the parties had previously settled GL Construction's counterclaims. (*Id.*)

Following the entry of the district court's order, GL Construction moved for attorney's fees in the amount of \$67,595.00 and costs in the amount of \$2,497.33. (2 AA 252 and 262.) Almost all of the attorney's fees and costs claimed by GL Construction related solely to the defense of Cerberus and NNH's claims, and had no relation to the counterclaims. (2 AA 252-61 and 314-21.) Some examples of the attorney's fees GL Construction was claiming involved \$5,527.00 related to a

debtor's examination and discovery requests that solely concerned Cerberus' collection efforts on the \$20,000.00 judgment it obtained; \$7,397.50 related to the preparation of a motion for summary judgment that solely pertained to the defense of NNH's claims; \$6,545.00 related to a motion for reconsideration regarding the Court's denial of GL Construction's motion for summary judgment that was never even filed in the case; \$8,387.00 related to the depositions of Mr. Fitzgerald and Mr. Wolf, where not a single question was asked that remotely pertained to the counterclaims; and \$12,870.00 to simply review documents that had been served or filed in the case and which had nothing to do with the counterclaims, but rather solely related to NNH's claims. (2 AA 314-21.) While this is not an exhaustive list of the unrelated billing entries in Mr. Beasley's invoices, it is demonstrative of the unreasonableness of the attorney's fees and costs being claimed.

GL Construction made no effort in the motion or its subsequent reply to identify and separate any fees or costs that it contended were incurred in relation to the counterclaims. (2 AA 262; 3 AA 479.) In NNH's opposition to the motion, it identified these issues as well as contended that pursuant to the "net monetary recovery rule," GL Construction could not be considered the prevailing party and, thus, was not entitled to any award of attorney's fees or costs. (2 AA 330-42.)

On December 1, 2016, the district court granted GL Construction's motion and awarded attorney's fees in the amount of \$10,000.00 and costs in the amount of \$390.73. (3 AA 510.) The district court determined that GL Construction was the

prevailing party with respect to its counterclaims, and essentially determined that the “net monetary recovery rule” did not apply because “the facts underlying the counterclaim were largely unrelated to the claims asserted by Cerberus and Northern Nevada Homes.” (3 AA 514-15) The district court noted that GL Construction would have been free to bring its claims in an unrelated action, and had it chosen to do so, it would have clearly been a prevailing party. (3 AA 515.) The district court however, overlooked the fact that GL Construction had willingly requested to join its claims in the lawsuit, thereby choosing to subject any award of attorney’s fees and costs to the “net monetary recovery rule.” (1 AA 15-45.)

Nevertheless, the district court determined that the requested attorney’s fees and costs were unreasonable. (3 AA 515-16.) Having reviewed the record, the district court determined that “very little, if any, substantive motion practice occurred with respect to the counterclaim.” (*Id.*) Thus, the court awarded only \$10,000 in attorney’s fees and \$390.73 in costs. (*Id.*) The court however did not articulate any basis for its calculation of \$10,000 in attorney’s fees, but rather, it appears the court arbitrarily determined \$10,000 was a reasonable amount. (*Id.*) This appeal followed regarding the award of attorney’s fees and costs. (3 AA 530.)

SUMMARY OF ARGUMENT

The district court erred in entering its December 1, 2016 order awarding respondent attorney’s fees and costs pursuant to NRS 18.010(2)(a) and 18.020(3), which only allow such awards to “the prevailing party” in an action. In actions

involving multiple parties and counterclaims, “prevailing party” status is determined based on the net monetary recovery obtained by the competing parties. Here, respondent willingly chose to join its counterclaims into the action. Appellant ultimately obtained over \$350,000 more in recovery on its claims than respondent obtained on its counterclaims. Appellant therefore obtained the greater net recovery, and the district court committed reversible error in its determination that respondent was “the prevailing party” in the action.

ARGUMENT

I. THE DISTRICT COURT ERRED IN AWARDING ATTORNEY’S FEES AND COSTS

A. Standard of review

Generally, post-judgment motions for attorney’s fees, costs, and interest are reviewed for abuse of discretion. *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 417, 132 P.3d 1022 (2006). Although such post-trial motions are generally governed by the abuse of discretion standard, a purely legal issue is governed by the *de novo* standard. *Matter of Halverson*, 123 Nev. 493, 509, 169 P.3d 1161 (2007).

B. The “net monetary recovery” rule

NRS 18.010(2)(a) and 18.020(3) only allow for an award of attorney’s fees and costs to “the prevailing party” in the action as a whole. In actions involving multiple parties and counterclaims, “the prevailing party” is determined based on the net monetary recovery obtained by the competing parties, commonly referred to as the “net monetary recovery rule.” *See*, 20 Am. Jur. 2d Costs § 22 (“In the

absence of any express statutory declarations upon questions of costs in cases where a counterclaim or cross complaint is pleaded, where opposing parties both succeed with their claims the party with a positive net recovery will be the prevailing party.”).

Under the “net monetary recovery rule,” the court must look at the lawsuit as a whole to determine which party ultimately obtained the greater recovery. *Thanks But No Tank v. Dept. of Environ. Protection*, 86 A.3d 1, 5 (Me. 2013). The net monetary recovery analysis includes judgments entered in a party’s favor, as well as any recovery obtained by a party through settlement. *DeSaulles v. Comm. Hospital of Monterey*, 370 P.3d 996, 998 (Cal. 2016) (applying net recovery rule and holding the term “recovery” encompasses situations in which a defendant settles with a plaintiff for some or all of the money that the plaintiff sought through the litigation); *Daisy Manufacturing Co., Inc. v. Paintball Sports, Inc.*, 999 P.2d 914, 917 (Idaho App. 2000) (applying net recovery rule and holding recovery may be the product of a court judgment or a settlement reached by the parties).

This Court adopted the “net monetary recovery rule” in *Parodi v. Budetti*, 115 Nev. 236, 241, 984 P.2d 172 (1999). In *Parodi*, the Court was faced with three consolidated separate actions, which involved both factually related and unrelated claims between two parties. *Id.*, at 238-39. The case proceeded to a jury verdict, where both parties prevailed on some of their claims. *Id.*, at 239. Each party filed competing motions for attorney’s fees and costs. *Id.* The district court awarded

fees and costs to the party who ultimately received the less favorable “net” verdict. *Id.*

On appeal, this Court reversed. *Id.*, at 242. The Court held the litigation must be considered as a whole and the total net award will govern who is a prevailing party for purposes of NRS 18.010 and 18.020. *Id.*, at 241 (stating, “in cases where separate and distinct suits have been consolidated into one action, the trial court must offset all awards of monetary damages to determine which side is the prevailing party...”). In comparing the competing awards, the Court reversed finding the party who was awarded fees and costs was not “the prevailing party.” *Id.*, at 242.

Here, this case involved multiple parties and claims and the competing parties all prevailed on their claims. (1 AA 15-23 and 51-63.) Respondent’s motion for attorney’s fees and costs, therefore, should have been evaluated using the “net monetary recovery rule” to determine whether it is “the prevailing party” in the action for purposes of NRS 18.010(2)(a) and 18.020(3).

C. Appellant received the greater “net recovery” in this case

In this case, appellant obtained the greater net recovery and, therefore, the district court erred in determining that respondent was the prevailing party and entitled to an award of attorney’s fees and costs. Appellant obtained \$362,500.00 in recovery through a settlement reached after the district court entered judgment as a matter of law against respondent on the issue of liability. (1 AA 221-22.)

Respondent only obtained recovery in the amount of \$7,811.00. (1 AA 243.) Thus, under the net monetary recovery rule, respondent cannot be considered “the prevailing party” for purposes of NRS 18.010(2)(a) and 18.020(3).

According to the district court’s order, its sole basis for not applying the net monetary recovery rule was because “the facts underlying the counterclaim were largely unrelated to the claims asserted by Cerberus and Northern Nevada Homes.” (3 AA 515.) The district court noted that respondent would have been free to bring its claims in an unrelated action, and had it chosen to do so, it would have clearly been a prevailing party. (*Id.*) The district court erred as a matter of law in this determination.

Here, not only did respondent willingly request and was granted leave to join its counterclaims in the lawsuit, thereby voluntarily subjecting itself to the “net monetary recovery rule,” but this Court determined in *Parodi* that a net recovery analysis applies to all cases involving multiple parties and claims, whether related or not, and whether originally filed together or consolidated by motion of one party. *Parodi*, 115 Nev. at 241 (case involved three consolidate separate actions, and several unrelated claims between two common parties) *see also J. Gordon Constr. Co., Inc. v. Meredith Steel Constr., Inc.*, 91 Nev. 434, 436-37, 537 P.2d 1199 (1975) (applying the net recovery rule in case involving multiple claims and counterclaims).

While the district court’s order only relied upon its determination that respondent’s counterclaim was “largely unrelated” to the claims asserted by

appellant, it is anticipated respondent will contend in its answering brief that because appellant did not obtain a “judgment” in its favor, the settlement recovery it obtained cannot be considered in a net recovery analysis. Although this Court has not directly addressed this issue, several other courts have held that a net recovery analysis includes money obtained through a settlement, even though a formal judgment was not entered. *See, DeSaulles*, 370 P.3d at 998 (holding the term “recovery” encompasses situations in which a defendant settles with a plaintiff for some or all of the money that the plaintiff sought through the litigation); *Daisy Manufacturing Co., Inc.*, 999 P.2d at 917 (holding recovery may be the product of a court judgment or of a settlement reached by the parties); *Maher v. Gagne*, 448 U.S. 122, 129 (1980) (holding a plaintiff can prevail through a settlement).

Here, appellant spent three years litigating its claims, was forced to try its claims in a jury trial, and reached a \$362,500.00 settlement on the fourth day of the trial and after the district court granted judgment as a matter of law against respondent. (1 AA 1 and 221-22.) Appellant submits that under no circumstance can it be said it was unsuccessful on its claims and/or did not receive a more a favorable recovery than respondent, merely because of the fact appellant reached its recovery through a settlement as opposed to a judgment. The only reason respondent’s counterclaims were not included in the settlement is because respondent and its counsel were unreasonable in their settlement demands. To award respondent attorney’s fees and costs on the basis that it was the only party to obtain a judgment

and, thus, was the sole prevailing party in the case, would produce an absurd result and would reward respondent for being unreasonable. Accordingly, appellant submits that the district court's order should be reversed.

CONCLUSION

For the foregoing reasons, Northern Nevada Homes, LLC respectfully requests that this Court reverse the district court's award of attorney's fees and costs.

DATED: May 8, 2017.

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CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 3(a)(4), the typeface requirements of NRAP 32(a)(5) and type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is a proportionately spaced, has a typeface of 14 points, and contains 3,734 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 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.

///

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Dated: May 8, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of RUSBY LAW, PLLC and on this date **APPELLANT'S OPENING BRIEF** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

James Beasley

DATED: May 8, 2017.

/s/ Christopher Rusby