IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 69410, 69896

DAVID DEZZANI AND ROCHELLE DEZZANI

Appellants
v.

KERN & ASSOCIATES, LTD. AND GAYLE A. KERN

Respondents

APPEALS FROM THE SECOND JUDICIAL DISTRICT COURT'S ORDER OF DISMISSAL AND ORDER GRANTING FEES AND COSTS
District Court Case No. CV15-00826

RESPONDENTS' PETITION FOR REVIEW

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DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

> 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 Respondents:

> Gayle A. Kern, Ltd. dba Kern & Associates, Ltd.
> Gayle A. Kern, Esq.
> Veronica A. Carter, Esq.

The law firm of McDonald Carano Wilson represents the Respondents in this Petition for Review.

These representations are made in order that the justices of the Supreme Court may evaluate possible disqualification or recusal.

Dated this 19th day of December, 2016.

McDONALD CARANO WILSON LLP

By: */s/ Debbie Leonard*

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QUESTIONS PRESENTED FOR REVIEW

1. As a matter of first impression, when concluding that the Dezzanis' claims against Kern were subject to NRS 38.310 mediation, did the Court of Appeals incorrectly presume that Kern could be personally liable to the Dezzanis when (a) the Legislature did not intend the term "agent" in NRS 116.31183 to include an attorney and (b) Kern's duty of care was to her client, the Association, not to the Dezzanis?
2. As a matter of first impression in Nevada, did the district court correctly decide the threshold issue of whether Kern was a proper defendant under NRS 116.31183 before subjecting Kern to mandatory mediation under NRS 38.310?
3. Did the Court of Appeals incorrectly reverse the fee and cost award when (a) it affirmed dismissal of the Dezzanis' complaint and (b) the district court properly exercised its discretion to award fees and costs under NRS 18.010(2)(b) based on the Dezzanis' intent to harass Kern?

STATEMENT OF FACTS

A. The Parties

During the events giving rise to the complaint, Appellants David Dezzani and Rochelle Dezzani owned Unit #211 in the McCloud Condominium complex in Incline Village. (APP2). All unit owners are members of the McCloud Condominium Homeowners Association (the "Association"), which is governed by

a board of directors ("the Board") according to the terms of the Revised Declaration of Limitations, Covenants, Conditions and Restrictions of McCloud Condominium Homeowners' Association ("CC&Rs"). (APP54-100).

Respondent Kern & Associates, Ltd. is a professional corporation that provides legal services to, *inter alia*, over 250 common-interest community homeowner associations, including the Association. (APP42). Respondent Gayle A. Kern is a Nevada-licensed attorney and owner of Kern & Associates (collectively, "Kern"). (APP2). Kern represents the Association, and in that role, provides legal services to the Board on different issues, including the matters that gave rise to the Dezzanis' complaint. (APP3-6). The allegations in the Dezzanis' complaint arise solely from Kern's provision of legal services to the Association. (APP3-6).

B. The Association's Notice Of Violation

Prior to the Dezzanis' purchase of the unit, a previous owner extended the unit's rear deck, resulting in an encroachment on the Association's common area. (APP3, 102-03). The Board approved the architectural request for the deck extension in 2002. (APP26-27). In 2013, however, the Board grew concerned about its responsibility to preserve the common areas for the benefit of all unit owners. (APP11, 102). On or about March 14, 2013, the Board issued the

Dezzanis and other similarly situated owners notices of violation for their encroaching decks. (APP11-12).

The notice of violation to the Dezzanis ("NOV") articulated the facts that gave rise to the violation and identified the applicable sections of the governing documents that prohibited the deck extension. (APP11-12, *citing* APP90, 93). The NOV offered two possible solutions to the violation: the Dezzanis could: (1) submit an architectural application to restore the deck to its original condition or (2) execute a covenant that permitted the deck extension to remain during the Dezzanis' ownership and one subsequent conveyance. (APP11-12).

C. The Dezzanis' Dispute With The Association

The Dezzanis contacted the Board to object to the NOV and request information. (APP3, 102). The Board asked Kern to reply. (APP5-6, 102-103). On April 4, 2013, Kern sent a responding letter on the Association's behalf, which stated 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....
>
> 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 [of other unit owners]. 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. (APP102-103) (emphases added).

The Dezzanis emailed the Board to address the statements made in Kern's April 4, 2013 letter, in which they acknowledged that Kern's communications were made as the Association's attorney. (APP15-21). On May 10, 2013, Kern sent a responding letter on the Board's behalf, which stated, "***The Board of Directors requested I respond to your various communications....***" (APP105). The Board held a hearing and subsequently issued a Result of Hearing letter, which upheld the NOV. (APP4, 31-32).

D. The Dezzanis' Litigation Against Kern

On May 4, 2015, the Dezzanis filed suit in the district court naming Kern and Board member Karen Higgens as defendants. (APP1-38). Because the Dezzanis never served Higgens, their litigation proceeded against Kern only. (APP145). The Dezzanis did not sue the Association. (APP2).

The Dezzanis' complaint solely alleged claims arising from Kern's representation of the Association. (APP3-6). Kern filed a motion to dismiss based on alternative theories under NRCP 12(b)(5), NRCP 12(b)(1), NRCP 12(h)(3) and NRS 38.310(1). (APP39-105). After full briefing, the district court granted Kern's

motion and dismissed the Dezzanis' claims with prejudice because Kern was not a proper defendant:

> 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. (APP144).

The district court awarded fees and costs to Kern under NRS 18.010(2)(b) based on its determination that Mr. Dezzani, an attorney, brought suit to harass Kern. (APP381-382).

E. The Court Of Appeals' Decision

The Dezzanis appealed both the order of dismissal and the fee/cost order. This Court assigned both cases to the Court of Appeals, which consolidated them. On November 16, 2016, the Court of Appeals issued an order that affirmed the district court's dismissal, but on different grounds: "Because appellants' complaint fell under NRS 38.310 and was not first submitted to mediation or a dispute resolution program, the district court was required to dismiss the complaint." (COA Order 4). According to the Court of Appeals, "[b]ecause the district court should have dismissed the complaint pursuant to NRS 38.310(2), it should not have reached the issue of whether respondents were proper defendants under NRS 116.31183." (*Id.* n.3). The Court of Appeals reversed the fee/cost award on the basis that "the [district] court's reasoning for the fees and costs award does not

support affirming the award on appeal." (*Id.* at 4-5). Kern asks this Court to address the issues of first impression and statewide importance incorrectly decided by the Court of Appeals.

LEGAL STANDARD

A party aggrieved by a Court of Appeals decision may file a petition for review with the Supreme Court. NRAP 40B; *see Jacinto v. PennyMac Corp.*, 129 Nev. Adv. Op. 32, 300 P.3d 724, 726 (2013) (finding prevailing party below to be aggrieved). In exercising its discretion to grant a petition for review, the Supreme Court may consider, *inter alia*, whether: (1) "the question presented is one of first impression of general statewide significance"; (2) the Court of Appeals' decision conflicts with this Court's precedent; or (3) "the case involves fundamental issues of statewide importance." *Id.* Kern submits that all of these criteria warrant the Court's review.

ARGUMENT

A. The Court Of Appeals Should Have Affirmed The District Court's Correct Determination That NRS 116.31183 Does Not Create A Cause Of Action Against An Association's Attorney

The Dezzanis' claims against Kern were based upon the erroneous premise that NRS 116.31183 allows an attorney to be sued solely for actions she took in the course of her representation. By dismissing on the basis that the Dezzanis had to first subject Kern to mediation under NRS 38.310, the Court of Appeals incorrectly

accepted the Dezzanis' erroneous premise as true without first determining that Kern was a proper defendant. Because NRS 116.31183 does not create a cause of action against an association's attorney, the Court of Appeals should have affirmed the dismissal for the reasons stated by the district court. This issue of statutory interpretation is reviewed de novo. *Westpark Owners' Ass'n v. Eighth Jud. Dist. Ct.*, 123 Nev. 349, 357, 167 P.3d 421, 427 (2007).

1. The Legislature Distinguished Between The Terms "Agent" And "Attorney" In NRS Chapter 116

a. NRS 116.31183 Does Not List An "Attorney" As Personally Liable To A Unit Owner

Although under the common law a lawyer is generally deemed the "agent" of the client, the plain language of NRS 116.31183(1) and other provisions of Chapter 116 confirm that the Legislature did not intend to create a cause of action against an association's attorney:

> 1. ***An executive board, a member of an executive board, a community manager or an officer, employee or agent of an association*** shall not take, or direct or encourage another person to take, any retaliatory action against a unit's owner because the unit's owner has:
>
> (a) Complained in good faith about any alleged violation of any provision of this chapter or the governing documents of the association;
> (b) Recommended the selection or replacement of an attorney, community manager or vendor; or
> (c) Requested in good faith to review the books, records or other papers of the association.

> 2. In addition to any other remedy provided by law, upon a violation of this section, a unit's owner may bring a separate action to recover:
>
> (a) Compensatory damages; and
>
> (b) Attorney's fees and costs of bringing the separate action.

NRS 116.31183 (emphasis added).

The Legislature did not include "attorney" among the enumerated individuals whom the statute lists as being potentially liable for a retaliation claim. *See* NRS 116.31183(1). Yet elsewhere, the Legislature did use the term "attorney." For example, the Legislature specified that retaliation because a unit owner "[r]ecommended the selection or replacement of an attorney" is actionable. NRS 116.31183(1)(b). Similarly, the Legislature used the term "attorney" when indicating that the unit owner may recover fees and costs if successful. *See* NRS 116.31183(2)(b). In light of this language, the Legislature distinguished between the terms "agent" and "attorney."

This point is underscored by NRS 116.31164(4), which provides that "[an association's foreclosure] sale may be conducted by the association, ***its agent or attorney***…" NRS 116.31164(4) (emphasis added). Having listed both "agent" and "attorney" in this provision, the Court should assume the Legislature intended to exclude "attorney" from NRS 116.31183(1).[1] *See Ex parte Arascada*, 44 Nev. 30, 189 P. 619, 620 (1920) (holding that when Legislature enumerates certain things,

[1] Similarly, the Legislature mandated that an association indemnify its board members who can be individually sued under NRS 116.31183(1) yet provided no analogous protection for an association's attorney. *See* NRS 116.31037.

"it names all that it contemplates"); *Virginia & T.R. Co. v. Elliott*, 5 Nev. 358, 364 (1870) (holding that "[t]he mention of one thing or person, is in law an exclusion of all other things or persons"). Had the Legislature intended to include an "attorney" within the scope of possible defendants in NRS 116.31183(1), it would have specifically said so. *See Clark County Sports Enter., Inc. v. City of Las Vegas*, 96 Nev. 167, 174, 606 P.2d 171, 176 (1980) (holding that the Legislature would have provided language of inclusion if it intended).

b. Agency Law Does Not Make An Attorney Liable To Third Parties For The Acts Of Its Client

Treating an attorney as an "agent" for the purposes of NRS 116.31183 is contrary to the purpose of agency law. Agency law makes the client responsible for the actions of its attorney: the "attorney's act is considered to be that of the client in judicial proceedings when the client has expressly or impliedly authorized the act." *Huckabay Props. v. NC Auto Parts*, 130 Nev. Adv. Op. 23, 322 P.3d 429, 434 (2014). However, the converse of this principle is not true; the attorney is not personally liable for the acts of its client or those acts taken by the attorney on behalf of the client. *See id.*; *see also* Restatement (Third) Of Agency §7.02 (2006) (stating that "[a]n agent's breach of a duty owed to the principal is not an independent basis for the agent's tort liability to a third party. An agent is subject to tort liability to a third party harmed by the agent's conduct only when the agent's conduct breaches a duty that the agent owes to the third party."). There is

nothing in NRS 116.31183 to indicate that the Legislature intended to turn basic agency principles upside down to make an association's attorney independently liable to a unit owner for actions the attorney took on behalf of its client.

2. Kern Only Had A Duty To Her Client – The Association – Not To Third Parties Such As The Dezzanis

The Court of Appeals' decision presumes that an attorney for an association has a duty not only to her client but also to her client's adversary. That conclusion is contrary to law. *See* Restatement (Third) of the Law Governing Lawyers §51 (2000); *Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 750 P.2d 118, 122, 124 (N.M. 1988). A lawyer may only be liable to a third party to whom the lawyer has an independent legal duty.[2] *See* Restatement (Third) of the Law Governing Lawyers §51 (2000); *B.L.M. v. Sabo & Deitsch*, 64 Cal. Rptr. 2d 335, 340 (Cal. Ct. App. 1997) (rejecting an argument that a lawyer could be liable to third parties "as being unworkable and undermining the very nature of the attorney-client relationship"); *Martin v. Trevino*, 578 S.W.2d 763, 771 (Tex. Civ. App. 1978).

Here, Kern provided legal advice to and acted for and on behalf of her client, the Association. (APP4-6, 29, 102-105). She had no legal obligation independent

[2] For this reason, the *Hamm v. Arrowcreek Homeowners' Ass'n* case cited by the Court of Appeals is distinguishable. 124 Nev. 290, 183 P.3d 895 (2008). *Hamm* involved a collection agency, not an attorney. Because of the lawyer's unique duty to a client, the law protects attorneys from third-party liability absent an independent legal duty. The lawyer's attorney/client relationship with the association is not analogous to that of a collection agency.

of her attorney/client relationship with the Association. (APP4-6, 29, 102-105). The Association, not each unit owner, is her client, and the Association, not Kern, has a fiduciary and contractual duty to each unit owner. (APP54-100). There is no legal privity between Kern and an owner that makes Kern liable to the Dezzanis. *See Waggoner v. Snow, Becker, Kroll, Klaris & Krauss*, 991 F.2d 1501, 1508 (9th Cir. 1993).

The Dezzanis' complaint made allegations that attacked the competency of Kern's representation of the Association. (APP4-6). To the extent the Dezzanis contend that Kern's actions fell below the standard of care that Kern owed to her client (which Kern steadfastly disputes), the Association – not the Dezzanis – could bring a malpractice action or make a complaint to the State Bar. The Dezzanis have no standing to bring a claim against Kern to challenge the manner in which Kern represented Kern's client. *See* Restatement (Third) of the Law Governing Lawyers §51 (2000); *Noble v. Bruce*, 709 A.2d 1264, 1275 (Md. 1998). Simply placing the label "retaliation" on their claims does not allow the Dezzanis to circumvent this law because the only facts they allege relate to Kern's duty to the Association. (APP4-6).

In the McCloud Association, there are 256 members. The Court of Appeals' decision suggests that Kern must mediate with all members who have a dispute with how Kern advised her association client in relation to enforcement of the

CC&Rs. That is simply untenable.[3] Because Kern cannot be deemed to have a legal duty to the unit owners when they are not her client, she is aggrieved by the Court of Appeals' decision.

3. For NRS 38.310 To Apply, There Must Be a Legitimate "Claim" Involving The CC&Rs, Which Does Not Exist Here

The district court correctly looked first at whether the Dezzanis could state a claim against Kern because a prerequisite to NRS 38.310 mandatory mediation is a cognizable "claim":

> No civil action ***based upon a claim*** relating to:
>
> (a) The interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property or any bylaws, rules or regulations adopted by an association; ... may be commenced in any court in this State unless the action has been submitted to mediation... NRS 38.310(1) (emphasis added).

Although the Legislature did not define "claim" in Chapter 116, other statutory language relates a "claim" to an action by or against an association and its board members arising from an enforcement action.

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[3] Kern represents approximately 250 associations, all of which are non-profit corporations. (APP42). They have between 4 and 6,000 members. According to the Court of Appeals' decision, Kern would have to engage in mediation with every member who takes issue with the manner in which Kern provided legal services to her association clients regarding the interpretation, application or enforcement of the CC&Rs. This could be thousands of people. Just as a shareholder has no independent cause of action against a corporation's counsel for actions taken in the course and scope of representing the corporation, so too the Dezzanis have no claim against Kern. *See Bovee v. Gravel*, 811 A.2d 137, 140 (Vt. 2002); *Lee v. Mitchell*, 953 P.2d 414, 426 (Or. Ct. App. 1998); *Skarbrevik v. Cohen, England & Whitfield*, 282 Cal. Rptr. 627, 634 (Ct. App. 1991).

> The executive board may determine whether to take enforcement action by exercising the association's power to impose sanctions or commence an action for a violation of the declaration, bylaws or rules, including whether to compromise any claim for unpaid assessments ***or other claim made by or against it***." NRS 116.3102(3) (emphasis added).

The Legislature did not contemplate that the association's attorney could be subject to a "claim" because the association, not its attorney, is a party to an enforcement action. *See id.*

This makes sense because the association, not its attorney, is a party to the CC&Rs. (APP54-100). The Association is a non-profit corporation that acts through and by its Board. NRS 116.3101. The CC&Rs constitute a contractual agreement between a unit owner and the association and among all unit owners. (APP54-100). As the Association's attorney, Kern is not a unit owner and is not a party to the CC&Rs. (APP54-100). And the question of whether or not Kern can be personally liable for the Dezzanis' claims does not require interpretation of the CC&Rs. (APP4-6). The district court correctly made the preliminary determination that the Dezzanis could not state a claim against Kern, and absent a "claim," NRS 38.310's mandatory mediation provision does not apply.

4. The Purpose Of NRS 116.31183 Is Satisfied Without Making An Association's Attorney Independently Liable To A Unit Owner

Interpreting NRS 116.31183 to preclude an independent cause of action against an association's attorney still ensures that the Dezzanis have a remedy for their alleged harm. They can sue and recover their alleged damages from the

Association and its individual board members, who will be indemnified by the Association. *See* NRS 116.31183(1); NRS 116.31037. However, the Dezzanis chose not to name the Association or pursue claims against its board members. (APP4-6). All statutory remedies are available to them from the Association, not from Kern. *See* NRS 116.31183(1).

B. The District Court Correctly Exercised Its Discretion To Choose Which Threshold Issue To Decide First

1. The Legislature Indicated That Mediation Is A Condition Precedent To Suit, Not A Jurisdictional Prerequisite

Although it did not use the words "subject matter jurisdiction," by stating the district court "should not have reached the issue" of whether Kern could be sued under NRS 116.31183, the Court of Appeals erroneously treated NRS 38.310 as a jurisdictional bar that prevented the district court from dismissing on other grounds. NRS 38.310(2) provides that "[a] court shall dismiss any civil action which is commenced in violation of … [NRS 38.310(1)]." This language does not describe the pre-litigation mediation requirement as jurisdictional or prohibit dismissal for other reasons.

Rather, the ADR requirement in NRS 38.310 is one of administrative exhaustion. *See* NRS 38.320 et seq. Exhaustion is "not a jurisdictional

prerequisite."[4] *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982), *quoted with approval in Copeland v. Desert Inn Hotel*, 99 Nev. 823, 826, 673 P.2d 490, 492 (1983); *see also City of Henderson v. Kilgore*, 122 Nev. 331, 336 n.10, 131 P.3d 11, 15 n.10 (2006) (holding that failure to exhaust all available administrative remedies only renders the matter unripe for district court review and is not a jurisdictional bar). Based on these authorities, the district court had discretion to dismiss on the grounds that Kern was not a proper defendant, and the Court of Appeals erroneously concluded otherwise. *See Henderson*, 122 Nev. at 336 n.10, 131 P.3d at 15 n.10.

2. A Court Can Dismiss An Improper Defendant Prior To Establishing Subject Matter Jurisdiction

Even if NRS 38.310 could be deemed jurisdictional, although a matter of first impression in Nevada, under federal law a district court need not first determine the existence of subject matter jurisdiction before dismissing on other grounds. "[T]here is no mandatory 'sequencing of jurisdictional issues.'" *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (*quoting Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999)); *accord New*

[4] Kern acknowledges that she presented an alternative NRCP 12(b)(1) argument below that should the district court determine the Dezzanis' claims could be brought against Kern, the Dezzanis first needed to submit to mediation before the district court would have subject matter jurisdiction. (APP50). However, to the extent the Court of Appeals concluded the district court could not first determine whether Kern could be sued under NRS 116.31183, Kern submits that NRS 38.310(2) sets out an exhaustion – not jurisdictional – requirement.

Jersey Television Corp. v. F.C.C., 393 F.3d 219, 221 (D.C. Cir. 2004) ("The priority for jurisdictional issues … doesn't control the sequence in which we resolve non-merits issues that prevent us from reaching the merits."). A "court has leeway 'to choose among threshold grounds for denying audience to a case on the merits.'" *Id.*, *quoting Ruhrgas*, 526 U.S. at 585. Subject matter "jurisdiction is vital only if the court proposes to issue a judgment on the merits." *Id.* (quotation omitted).

Based on these principles, the Supreme Court affirmed a "threshold" dismissal that occurred prior to establishment of subject matter jurisdiction where, like here, public policy prohibited a suit against the named defendant. *See Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005) and cases cited therein; *see also Sinochem*, 549 U.S. at 431 (dismissing based on *forum non conveniens* prior to determining subject matter jurisdiction); *Ruhrgas*, 526 U.S. at 585 (holding that personal jurisdiction inquiry could precede subject matter jurisdiction inquiry); *Galvan v. Fed. Prison Indus., Inc.*, 199 F.3d 461, 463 (D.C. Cir. 1999) (deciding sovereign immunity issue "even where subject matter jurisdiction is uncertain").

Under these authorities, the district court had discretion to dismiss the Dezzanis' claims on the threshold basis that Kern was not a proper defendant even if NRS 38.310(2) (to the extent it applies) also required dismissal. *See Tenet*, 544 U.S. at 6 n.4. As the district court correctly concluded, "NRS 116.3118[3] does

not permit attorneys to be personally liable for actions taken on behalf of an association." (APP144). Because no interpretation of the CC&Rs or analysis of the Dezzanis' retaliation allegation was necessary to determine whether Kern could be personally liable under NRS 116.31183, the Court of Appeals erroneously concluded that dismissal on NRS 38.310 grounds (as opposed to NRS 116.31183 grounds) was required. *See id.*

C. The Court Of Appeals' Decision Has Widespread Negative Policy Implications For The Practice Of Law In Nevada

1. The Court Of Appeals' Decision Discourages An Attorney From Zealously Representing Her Client

As the district court correctly recognized, but the Court of Appeals ignored, an association's attorney will be chilled from zealously advocating on behalf of an association if she must fear being sued or forced into a statutory ADR process solely for actions taken in the course and scope of her representation. (APP144). "[A] properly zealous advocate must do all he can to [represent] his client." *Brown v. State*, 110 Nev. 846, 849, 877 P.2d 1071, 1073 (1994); *see also Greenberg Traurig v. Frias Holding Co.*, 130 Nev. Adv. Op. 67, 331 P.3d 901, 904 (2014) (noting that "[a]ttorneys must zealously pursue the interests of all of their clients"). The Court of Appeals should have interpreted NRS 116.31183 so that an attorney can fulfill her duty of zealous advocacy without fear of reprisal.

2. The Court Of Appeals' Decision Creates Unworkable Conflicts Of Interest Between A Lawyer And Client

If, as the Court of Appeals ordered, an association's attorney is subject to mediation initiated by a unit owner, the attorney's duty of loyalty to her client will be compromised. The prospect that an association's lawyer can be sued by third parties to whom she owes no duty will likely affect the advice the lawyer gives to the client. To protect her own self interest and avoid being sued, the lawyer may advise the association client not to enforce the CC&Rs against violators, even though associations are obligated to do so under the law. NRS 116.3102(3). Conversely, the lawyer could then be exposed to potential liability from the non-violating unit owners if the association fails to enforce their rights in the governing documents. The Court of Appeals' decision forces the association's attorney to make a Hobson's choice, and in so doing, pits an association's attorney against her client.

3. The Court Of Appeals' Decision Will Cause Association Attorneys To Lose Malpractice Insurance

Because the Court of Appeals' decision concluded that Kern can be subjected to mediation with the Dezzanis, it presumes that an association's attorney can be independently liable to every owner in the association. Given the thousands of potential claimants, attorneys who represent associations will lose their malpractice insurance and become uninsurable. Underwriters will be

unwilling to provide coverage because the number of potential claims will be too great to insure against. This result is against public policy.

4. The Court Of Appeals' Decision Will Make It Difficult For Nevada's Associations To Obtain And Retain Counsel

Interpreting NRS 116.31183 to subject an association's lawyer to independent liability will discourage lawyers from representing associations. Because associations are corporations, they must be represented by counsel in legal actions. Yet the exposure to hundreds, if not thousands, of individual claims and the prospect of being unable to secure malpractice insurance will scare away most attorneys. The Legislature could not have intended to deprive associations of effective legal representation.

D. The Court Of Appeals Improperly Reversed The Fee Award

A court may sanction a party even in the absence of subject matter jurisdiction. *Willy v. Coastal Corp.*, 503 U.S. 131, 136-37 (1992); *Emerson v. Eighth Jud. Dist. Ct.*, 127 Nev. 672, 678, 263 P.3d 224, 228 (2011). The district court awarded fees and costs under NRS 18.010(2)(b) on the basis that the Dezzanis knew Kern was not a proper defendant. (APP381-382). The Court of Appeals affirmed the dismissal but reversed the fee/cost award on its belief that "the district court should have dismissed appellants' complaint under NRS 38.310 without reaching the issue of whether respondents were proper defendants." (COA Order 4). Because the district court had authority to impose fees on the Dezzanis

under NRS 18.010(2)(b) whether or not it had subject matter jurisdiction, and Kern incurred those fees to obtain a dismissal that the Court of Appeals ultimately affirmed, the fee award should have been affirmed as well. *See Emerson*, 127 Nev. at 678, 263 P.3d at 228.

CONCLUSION

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.

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 19th day of December, 2016.

McDONALD CARANO WILSON LLP

By: */s/ Debbie Leonard*

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition for review 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font, Times New Roman style. I further certify that this petition for review complies with the type-volume limitation of NRAP 40B(d) because it contains 4,667 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this petition for review, 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 petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page 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 this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 19th day of December, 2016.

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Attorney for Respondents

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of McDonald Carano Wilson LLP and on the 19th day of December, 2016, I certify that I served the foregoing document on the party(s) set forth below by placing a true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage prepaid, addressed as follows:

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

/s/ Pamela Miller
An employee of McDonald Carano Wilson, LLP