IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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

No. 69410

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

No. 69896

Appellants'
in *pro per*
Reply Brief in Docket 69896

David and Rochelle Dezzani reply to RESPONDENT'S ANSWERING BRIEF, in Docket No. 6989, as follows*:

In their Opening Brief, Appellants addressed the District Court's error and abuse of discretion by awarding fees and costs to Respondents, after dismissing Appellants' civil complaint without permitting discovery, as discussed in Docket 69410.

In response to Appellants' 6-page Opening Brief, Respondents presented an Answering Brief consisting of 50+ pages (hereafter cited as "AB"), accompanied by an APPENDIX with 383 pages (hereafter cited as "APP.").

Notwithstanding the length of their Answering Brief, Respondents did not address the major points raised in Appellants' Opening Brief:

(1) The Answering Brief does not mention the fact that **every paper** Respondents presented to the District Court ***before*** *obtaining dismissal* stated that they were proceeding "in *pro per* "and *only* ***after*** *the District Court dismissed Appellants' complaint,* did they file a document claiming representation by counsel.

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Respondent's Answering Brief ignores this metamorphosis, wherein "Kern" in *pro per* requesting dismissal of the complaint suddenly became "Kern", proceeding "by and through their counsel", asking for attorney's fees and costs.

Instead, Respondents' briefs spend several pages, (AB 14-19), setting forth convoluted arguments regarding self-identification and self-representation, under a heading, on page AB 14, claiming **"Kern is *Not Precluded from Being* Awarded Attorney's Fees and Costs"** (italics added to emphasize that "Not Precluded From Being" is not the same as "entitled to be")

Those five pages, AB 14 to19, ignore the distinction between "precluded from" and "being entitled to" fees and, confusingly, culminate in a series of seemingly out-of-the-blue statements that "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", followed by a string of irrelevant citations to the Appendix, at AB at 19, totally muddying the water with self-inflicted ambiguity arising from Respondents' initial collective self-identification as ("Kern") in *pro per* in each of their submissions to the District Court and at odds with rguments Respondents made to the District Court , e.g. "an individual attorney proceeding *pro se is* not entitled to an award of attorney's fees and costs ... " (APP. 287)

Furthermore, despite all of Respondents' gyrations regarding their stated self-representation and their current attempts to muddy the water by referring to "relationships" and "obligations", as set forth at AB 14-19, the Nevada Supreme Court, made clear in *Settlemeyer v. Smith, 124 Nev. 1206,* that it was an abuse of discretion for the District Court to award attorneys fees to Respondents herein:

"... attorneys who represent themselves in litigation generally may not recover attorney fees for doing so. Consequently, the district court abused its discretion when it awarded fees ... . Accordingly, we reverse the post-judgment order awarding attorney fees ... .". (id.)

Therefore, in spite of and notwithstanding Respondents efforts to ignore and/or change their self-described representation from "in *pro per*" to "by and through their counsel" in , that Courtthe District Court erred and abused its discretion when it awarded attorney's fees and costs.

(2) The first 13 pages of the Answering Brief purport to describe events and evidence supporting the District Court's award of attorney's fees and costs, while completely ignoring the principle of law that contested facts were required to have been construed in favor of Appellants by the District Court, rather than as urged by Respondents in those 13 pages.

Furthermore, Respondents' recitation of the purported evidence and events overlooks that wording of the ORDER of the District Court does not identify or cite a single fact or describe any evidence, much less *uncontested* facts or evidence, in support of its bald statement that "The Court finds evidence indicating that this case was maintained in an effort to harass the Defendants". (APP. at 381)

Because the District Court did not cite any facts or evidence *in the record* supporting its bald statement that it found "evidence", that deficiency in and of itself is reversible error, since sanctioning a parties without actual evidence was not only an abuse of discretion but also a denial of justice and due process.

(3) Although the District Court's ORDER makes it impossible to know what "the Court was alluding to with its unsupported use of the word "evidence", there is no question that the Court improperly considered and relied upon a belatedly-produced **new exhibit,** which was held back by Respondents until presented to the Court via a reply memorandum ***after*** Appellants' answering memorandum deadline had passed. (see EXHIBIT "3", copy of a letter dated September 9, 2015, APP. 302-307, attached to REPLY TO MEMORANDUM OF ANSWERING POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR ATTORNEY'S FEES & COSTS, filed December 21, 2015, APP. 286-378.

In a footnote, on page AB 42, Respondents concede that this was a new exhibit, presented via a reply memorandum and acknowledge that "arguments presented for the first time in a reply" are to be "disregarded", however, Respondents go on to offer a convoluted, unsupported explanation why they withheld the exhibit until *after* Appellants were procedurally precluded from addressing it, then claiming that "The September 9th letter was not a new argument."

Although Respondents' footnote attempts to minimize the Importance to the withheld exhibit, and its ultimate effect in leading the District Court to abuse its discretion by awarding of Attorney's fees and costs, that attempt totally ignores the reality that *the District Court specifically relied upon and cited that new exhibit, as its basis for awarding sanctions,* saying the exhibit "clearly gave notice ... [to Appellants'] ... of the Complaints deficiencies" (APP. 380).

It was error and abuse of discretion for the District Court to consider and rely upon a **new exhibit**, presented to it for the first time as an attachment to a reply memorandum, when ruling on the motion requesting sanctions.

(4) The District Court further erred and abused its discretion by improperly considering and relying upon a r*uling by* ***another District Court judge*** *in an* ***unrelated proceeding****, involving* ***different facts, different circumstances and different legal theories****, belatedly presented and/or described in a letter attached to the reply memorandum submitted by Respondents* ***after*** *Appellants had filed their answering memorandum, thereby depriving Appellants of opportunity* to respond to or address either the other District Court judge's ruling or Respondents' descriptions and arguments regarding it.

Amongst the documents presented by Respondents, in their 383-page Appendix, filed with their 50+ page Answering Brief, is a copy of a 6-page letter, dated September 9, 2015 (APP. 302-307), which Respondents first presented to the District Court as a new exhibit, by attaching it to their reply memorandum, during the proceedings leading up to the award of attorney's fees and costs, as discussed above.

The wording of the ORDER establishes beyond doubt that the District Court based its decision to award fees and costs upon the letter attached to Respondents' Reply memorandum, labelling it "The September Letter" and referring to it several times, stating that "The September Letter gave a thorough and detailed analysis of the deficiencies of Plaintiffs' claims ... ." (APP. at 380)

The ORDER goes on to state, in that same paragraph, that "The September Letter went so far as to direct the Plaintiffs to a local case" which "raised identical issues" that another local judge had "found ... untenable", going on to describe that local case "certainly persuasive" (Id.)

Although page 2 of the belatedly-produced September letter (APP. 303), purportedly quotes from the other District Court judge's decision, and states "*See* Judge Berry's May 13, 2015 Order, p.4 ii, 16-22, a copy of which is enclosed", it is not possible to know whether the District Court herein ever actually saw or read that May 13, 2015 Order, from District Court Judge Berry, before awarding the sanctions herein,, because Respondents' 383-page Appendix does not contain a copy of that Order or any written document from that "local case" which the District Court herein described as "certainly persuasive".

Therefore, whether the District Court herein ever actually saw the purportedly "certainly persuasive" ruling by another District Court in a "local case", as referred to, or whether the District Court herein simply accepted and relied upon the September letter's purported quotation from it, before deciding to award sanctions against Appellants is unknown.

Appellants believe that any fair reading of Judge Berry's May 13, 2015 Order reveals that the District Court probably did not even read that Order before finding it "certainly persuasive" with "identical issues" but, in any event, the District Court herein erred in relying upon and basing its decision to sanction upon, a ruling by another District Court, especially when the case from which the ruling emanated *bore absolutely no similarity to any of the facts, circumstances or law at issue in the present case,* except for Respondents presence as defendants in both cases.

Because Appellants can find no copy of the referred-to Judge Berry's May 13, 2015 Order in Respondents' Appendix or anywhere elsewhere in the record, Appellant will attempt to file an affidavit with a copy of that Order and the letter sent to them from Respondents' office on September 10, 2015, via an affidavit, after they file this Answering Brief, in order to allow this honorable Court of Appeals to readily access and read it,

IN any event, Appellants submit that any fair reading of Judge Berry's Order shows clearly that the case before Judge Berry did not raise any "identical issues", that its only similarity to this case was the presence of Respondents as defendants in both and that similarity should not, and does not, render the other local case "certainly persuasive".

Therefore, based upon the foregoing, Appellants submit that the District Court herein erred and abused its discretion when it awarded sanctions against them and in favor of Respondents and they respectfully request that the ORDER awarding attorney's fees and costs be reversed.

DATED: October 24, 2016, in San Clemente, California

[signature]

Rochelle L Dezzani