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IN THE SUPREME COURT FOR THE STATE OF NEVADA

JEFFREY D. SPENCER,
Appellant,

v.

HELMUT KLEMENTI, EGON
KLEMENTI, ELFRIEDE KLEMENTI,
MARY ELLEN KINION, ROWENA
SHAW, and PETER SHAW,

Respondents.

Case No. 77086

APPELLANT'S PETITION FOR REHEARING

I. INTRODUCTION

This Court has repeatedly established that petitions for rehearing should only be brought to raise a material fact or point of law that was apparently overlooked or misapprehended. NRAP 40; *Matter of Estate of Herrmann*, 100 Nev. 149, 151, 679 P.2d 246, 247 (1984). In its published opinion, the Court failed to address a material issue of law and appears to have overlooked certain material facts that are central to its decision affirming portions of the judgment and the attorney fees award at issue in these consolidated appeals.

Primarily, the Court overlooked a material legal issue and an issue of fact in affirming the awards of attorney fees to Mary Ellen Kinion and Helmut Klementi. The Court relied on Jeffrey Spencer's failure to oppose Helmut's motion for attorney fees as acquiescence to the motion, but the Court overlooked the district court's actions that made opposition futile. Specifically, the district court invited the motion for fees, told all the parties it would "of course" grant the motion, and said that it did not want Spencer spending time responding to fees. (6 AA 1453-54). This material fact rendered any opposition futile and the district court's prejudgment of the motion should not be used to prevent Spencer from challenging it on appeal. Therefore, the Court should grant rehearing to address the futility of filing an opposition to the motion for fees and address the merits of Helmut's motion for fees.

In affirming Kinion's first motion for attorney fees, the Court failed to address the material legal issue of whether Spencer's counterclaim for malicious prosecution

was frivolous at the time the claim was brought. The Court properly found, and Jeffrey Spencer does not challenge, that Kinion was the prevailing party on her motion for summary judgment; however, prevailing on the motion does not render the claim against her meritless at the time it was brought. The Court failed to address this material legal issue and because Spencer raised disputed facts and meritorious arguments despite his ultimate loss, the Court should grant rehearing and reverse the awards of attorney fees to Kinion. The Court should also apply this law to the consideration of the merits of Helmut's motion for attorney fees and reverse that award.

The Court also affirmed Helmut's motion for summary judgment and the Shaws' motion for summary judgment, holding that the Shaws and Helmut established the defense of truth. The Court appears to have overlooked the material fact that Helmut and Rowena Shaw repeatedly, falsely claimed that Spencer punched Helmut despite having seen the surveillance video that proved those statements false. That material fact raised in response to the motions for summary judgment and on appeal that created issues of fact precluding the entry of summary judgment against Spencer.

The Court should therefore grant rehearing to address these material legal and factual issues and reverse the grants of summary judgment and the awards of attorney fees.

II. ARGUMENT

A. The Court Overlooked Controlling Law Governing the Application of NRS 18.010(2)(b)

The Court affirmed the awards of attorney fees to Kinion, on her first summary judgment motion, and to Helmut both of which were based on NRS 18.010(2)(b). *Spencer v. Klementi*, 136 Nev. Adv. Op. 35 at * 14-16 (2020). In doing so, the Court failed to address two material issues: (1) Spencer's claims were not frivolous at the time he brought them and (2) failure to file an opposition to a motion that the district court had already granted would have been futile and did not constitute acquiescence to the ruling.

1. *Spencer's Claims for Malicious Prosecution Were Not Frivolous at the Time He Brought Them*

In addressing whether Spencer was reasonable to bring a claim for malicious prosecution against Kinion, the Court and the district court focused on the evidence after the evidentiary hearing and motions for summary judgment. *See Spencer*, 136 Nev. Adv. Op. 35 at * 16. Specifically, the Court ruled “[t]he deputy district attorney’s testimony and respondents’ testimony at the preliminary hearing support the district court’s finding [of frivolousness]. *Id.*

The material legal issue, however, is whether the losing “party ‘brought or maintained [a claim] without reasonable ground[s].’” *Patush v. Las Vegas Bistro, LLC*, 135 Nev. 353, 356, 449 P.3d 467, 470 (2019) (quoting NRS 18.010(2)(b)). “Attorney fees are not appropriate where the underlying claim rested on novel and arguable

issues, even if those issues were not resolved in the claimant's favor.” *Id.* Spencer raised this argument on appeal and in the district court. (See 3 Appellant's Appendix “AA” at 508-509; Appellant's Opening Brief “AOB” at 24-25; Appellant's Reply Brief “ARB” at 19-20).

In this case, the district court held that the claim against Kinion for malicious prosecution was frivolous because there was probable cause to bring criminal charges for battery against Spencer for his alleged attack on Helmut. (3 AA 547). The district court did not address the absence of probable cause for the alleged battery of Egon by throwing snow on him. (See *id.*; see also AOB at 25). When Spencer brought the claim for malicious prosecution against Kinion, he had evidence that (1) Kinion had urged his prosecution for throwing snow onto Egon with a snowplow, (2) the investigating officer had found no evidence of that crime, and (3) the criminal complaint had been amended to include a battery of Egon based upon the snowplow incident. (1 AA 108-111 (criminal complaint and amended information); 1 AA 135-137 (no evidence of a crime); 1 AA 248-249, 6 AA 1246, 1318 (Kinion tried to have Spencer prosecuted)).

Indeed, this Court addressed the claim for malicious prosecution in four pages of opinion, clarifying among other things that the disjunctive nature of the elements requires only proof of one basis of malicious prosecution. See *Spencer*, 136 Nev. Adv.

Op. 35 at * 7 n.3.¹ The Court’s analysis of these elements and the arguments surrounding them clearly illustrates that Spencer’s claim was not frivolous when the claim was brought. *See id.* If “the underlying claim” had not “rested on novel and arguable issues,” even though those issues were ultimately decided against Spencer, then the Court need not have analyzed the evidence and argument in support of the claim against Kinion, resolving the novel issues that were argued. *See Patush*, 135 Nev. at 356, 449 P.3d at 470. The Court should grant rehearing to apply the holding in *Patush* to the claims for attorney fees under NRS 18.010(2)(b) and hold that the district court abused its discretion by awarding fees because the claims were not frivolous at the time they were brought.

2. Opposition to Helmut’s Motion for Fees Was Futile

In deciding to affirm the award of attorney fees to Helmut, the Court relied on the district court’s finding that Spencer’s failure to oppose the motion was acquiescence to the merits of the motion. *Spencer*, 136 Nev. Adv. Op. 35 at *16. The Court overlooked and failed to address Spencer’s argument that any such opposition would have been futile because the district court had announced that it would grant the motions before they were filed. (*See* AOB at 25; ARB at 19; 6 AA 1453-54 (“I am

¹ In the referenced footnote, the Court stated: “Because the three bases for malicious-prosecution liability are joined by the disjunctive or, a party need prove only one of them to succeed on a **defamation claim**.” *Spencer*, 136 Nev. Adv. Op. 35 at * 7 n.3 (emphasis added). The Court appears to have unintentionally combined the claims for malicious prosecution and defamation and may wish to correct or clarify this footnote upon a grant of rehearing.

inviting attorney's fees, of course. . . . I don't want you to have to spend time on your own, by the way, . . . to respond to the attorney's fees. . . . Of course I will grant them.")). This Court has previously held that when raising an issue would be futile, there should be no waiver of that issue on appeal. *See Bronneke v. Rutherford*, 120 Nev. 230, 236, 89 P.3d 40, 44 (2004). Spencer raised this futility in his Opening and Reply Briefs (AOB at 25; ARB at 19), but the Court failed to address the futility of filing an opposition.

Because the district court granted the motion for fees before the motion was made and told the party not to spend time responding, the Court should not allow the absence of an opposition to be considered acquiescence to the already granted motion. (*See* 6 AA 1453-54). While in other factual circumstances a failure to oppose a motion may be considered consent to granting it, requiring an opposition to a motion that had already been granted neither serves judicial economy nor frames the issues to be considered on appeal. In the case upon which the Court based its affirmance, *Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 278, 182 P.3d 764, 768 (2008), the Court reviewed the record and concluded "nothing in the record suggests that the district court abused its discretion in treating [appellant's] failure to file a timely opposition as an admission." In this case, the district court's statements make clear that it was an abuse of discretion to treat the non-opposition as an admission. (*See* 6 AA 1453-54).

The Court should grant rehearing to address this unique circumstance and not allow the district court to grant a motion before it was made and tell Spencer it did not want him to spend time responding, but then use the failure to oppose the motion as a basis for granting it. In granting rehearing, the Court should address the merits of Helmut's motion for attorney fees (if it does not grant rehearing of the motion for summary judgment as addressed below) and reverse the award of attorney fees to Helmut because the claims Spencer brought against him, including defamation, were not frivolous at the time they were brought. *See Patush*, 135 Nev. at 356, 449 P.3d at 470.

B. The Court Overlooked Material Facts Raised in Response to the Second Round of Motions for Summary Judgment

The Court affirmed the grant of summary judgment to the Shaws and Helmut, holding that they had established the defense of truth of their defamatory statements. *Spencer*, 136 Nev. Adv. Op. 35 at *16. The Court overlooked a material fact that requires reversal of the order granting the motions. In particular, both Rowena Shaw and Helmut repeatedly claimed that Spencer had **punched** Helmut even after they had seen surveillance video demonstrating the falsehood of that claim. (*See* AOB 21, 25; ARB 12 n.3 & 16 n.5). The video exhibit was submitted to the district court in support of Spencer's responses to the motions for summary judgment and to this Court. (*See* Order Granting Motion to Transmit Exhibit, Jul. 29, 2019).

Spencer specifically raised this issue in response to the motions for summary judgment, submitting evidence that Helmut and Rowena Shaw published and republished the false statement that Spencer punched Helmut (6 AA 1260, 1274 (Helmut); 4 AA 798, 800 (Rowena Shaw)). They made these statements in December 2012, January 2013, and March 2013, after they had viewed video surveillance showing that no punching occurred. (*See id.*; 2 AA 433)

Instead of addressing the defamatory claims that Spencer punched Helmut, the Court held that “[t]he only potentially defamatory statements the Shaws made involved snow removal,” *Spencer*, 136 Nev. Adv. Op. 35 at *9, and that the only potentially defamatory statement Helmut had made was that “he was ‘confronted by Mr. Spencer.’” *Id.* at *10. This appears to be a misunderstanding of the record. The Court stated that Spencer did not specify any defamatory statements in his complaint. *Spencer*, 136 Nev. Adv. Op. 35 at *4 n.1. In the operative pleading, Spencer’s Answer to Amended Complaint & Amended Counterclaim and Third Party Complaint, Spencer detailed the several false and defamatory statements made by the Klementis, the Shaws, and Kinion. (*See* 2 AA 429-37). Spencer then incorporated those paragraphs into his first claim for relief and summarized them in the categories quoted by the Court. (*See* 2 AA 437).

Spencer repeatedly emphasized Helmut’s false claim that Spencer had punched him, others’ republication of that claim, and the video evidence that established its falsehood. (2 AA 433 (the Shaw’s review of video surveillance); 4 AA 798, 800; 6 AA

1260, 1274). Helmut's own affidavit concedes that on January 8, 2013, he told the Kingsbury General Improvement District ("KGID") that Spencer **punched** him, not simply confronted him. (4 AA 850). Rowena Shaw not only republished the false statement that Spencer punched Helmut in January 2013, she wrote to KGID in March 2013 to "correct" the minutes of the January meeting to ensure that they reflected Helmut's false claim that Spencer punched him. (4 AA 798, 800).

The Court appears to have overlooked this material factual allegation and the inability of Helmut or Rowena Shaw to establish the truth of the claim that Spencer punched Helmut. Therefore, the Court should grant rehearing and reverse the district court orders granting summary judgment to Helmut and Rowena Shaw.

III. CONCLUSION

The Court addressed several of the novel issues raised in this case, but in the complexity, the Court appears to have overlooked the controlling law on the grant of attorney fees under NRS 18.010(2)(b), the district court's grant of Helmut's motion for fees before the motion was made, and the falsehood of Helmut's and Rowena Shaw's claim that Spencer punched Helmut. Because the legal and factual issues are material to the Court's decision and were not addressed in the opinion, Spencer asks the Court to grant rehearing and reverse the awards of attorney fees and the grants of summary judgment.

ATTORNEY CERTIFICATE

Pursuant to NRAP 28.2 and NRAP 40(b)(4), undersigned counsel certifies that:

1. This Petition for Rehearing 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 in Garamond in size 14 point font.

2. I further certify that this Petition for Rehearing complies with the page- or type-volume limitations of NRAP 40(b)(3) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is less than 2,714 words (less than the 4,667 word count available for a Petition for Rehearing).

3. Finally, I certify that I have read this Petition for Rehearing 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 for Rehearing complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion regarding matters in the record to be

supported by a reference to the page of the record on appeal where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event that the accompanying Petition for Rehearing is not in compliance.

DATED this 27th day of July, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Doyle Law Office, PLLC and that on the 27th day of July, 2020, a true and correct copy of the above APPELLANT'S PETITION FOR REHEARING was e-filed and e-served on all registered parties to the Nevada Supreme Court's electronic filing system as listed below:

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