IN THE SUPREME COURT OF THE STATE OF NEVADA

ARTEMIS EXPLORATION COMPANY, A Nevada Corporation,

Appellant,

vs.

RUBY LAKE ESTATES HOMEOWNER'S ASSOCIATION,

Respondent,

/

No. 77721

APPELLANT'S REPLY BRIEF

Appeal from Fourth Judicial District Court, Division 2
Case No. CV-C-12-175

APPELLANT'S REPLY BRIEF

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NRAP 26.1
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. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. There is no such corporation.

DATED this 22nd day of July, 2019.

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I.

STANDARD OF REVIEW ON APPEAL

This appeal is from the District Court's Order Awarding Attorney's Fees and Costs that erroneously relied on NRS 116.4117. "The established rule is that a court may not award attorney's fees unless authorized by statute, rule or contract." *State, Dep't of Human Res., Welfare Div. v. Fowler*, 109 Nev. 782, 784, 858 P.2d 375, 376 (1993). "The construction of a statute is a question of law, which [this Court] review[s] de novo." *MGM Mirage v. Nevada Ins. Guar. Ass'n*, 125 Nev. 223, 226, 209 P.3d 766, 768 (2009); *see also R Ventures I, LLC v. Wells Fargo Bank, N.A.*, 393 P.3d 660 (Nev. 2017) (unpublished disposition) (Upholding a district court's denial of attorney's fees based upon the interpretation of a provision of NRS 116.).

Furthermore, an "award of attorney fees is reviewed for an abuse of discretion. An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or it disregards controlling law." *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. Adv. Op. 8, 367 P.3d 1286, 1292 (2016) (internal citations omitted); *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S. Ct. 2447, 2461, 110 L. Ed. 2d 359 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law . . .").

II.

ARGUMENT

A. The District Court is prohibited from awarding and abused its discretion by awarding Ruby Lake Estates Homeowner's Association attorney's fees based upon Ruby Lake Estates Homeowner's Association countersuit when the countersuit was previously dismissed.

RLEHOA contends in Subsection VI(B) of its Answering Brief that the District Court's decision to award Ruby Lake Estates Homeowner's Association ("RLEHOA") its attorney's fees based upon RLEHOA's countersuit should be disregarded and, instead, should be read in "context" with Artemis Exploration Company's dismissed claims. (Answering Brief 23.) RLEHOA's contention is unfounded and is further proof and acknowledgement that the District Court's decision was in error and an abuse of discretion.

On November 1, 2018, the District Court awarded RLEHOA attorney's fees pursuant to NRS 116.4117 because, as the Court determined, RLEHOA filed a "countersuit," which was necessary for the "collection of assessments authorized by governing documents . . . ." (3 AA 3-4.) However, this award was directly contrary and in direct violation of the Court's February 26, 2018 Order in which the Court ordered, and the parties stipulated, that no party is entitled to any attorney's fees and costs regarding RLEHOA's "Counterclaims and Crossclaim." (1 AA 238, 240.) Consequently, the District Court's Order Awarding Attorney's Fees and Costs

should be reversed because it violated the Court's own, previous order and the parties' stipulation.

RLEHOA understands that the District Court erred, and, for that reason, RLEHOA contends in its Answering Brief that the District Court's Order should be read in "context" by disregarding the District Court's decision that RLEHOA's counterclaims were the basis of the NRS 116.4117 award. (Answering Brief 23-26.) RLEHOA contends that that the District Court meant to rely on Artemis's dismissed claims as the basis of the NRS 116.4117 award. (*Id.*)

There is no dispute that the District Court ordered that its NRS 116.4117 award was based upon RLEHOA's "countersuit." (3 AA 4.) The District Court's Order does not reference Artemis's dismissed claims, which were dismissed early on in the case, which were not included in Artemis's First Amended Complaint or Second Amended Complaint, and which were of no issue until RLEHOA's current attempt to resurrect the dismissed claims. (1 AA 121-191.) Therefore, the District Court's Order Awarding Attorney's Fees and Costs cannot be interpreted, as RLEHOA urges, to replace RLEHOA's "countersuit" with Artemis's dismissed claims.

Additionally, Artemis's dismissed claims have no affect on the case at hand. Given that no legal or factual findings were made regarding the dismissed claims, the dismissed claims cannot be a basis for an award under NRS 116.41147, as

RLEHOA urges, because the District Court only made a finding pursuant to NRS 30.010 *et. seq.*

B. There is no basis to award Ruby Lake Estates Homeowner's Association attorney's fees.

RLEHOA relied upon NRS 116.4117, 116.3115(6), 18.010(2), and the CC&Rs for its attorney's fees request. (Answering Brief 27-46.) None of the authorities support RLEHOA's requested award. *Flamingo Realty, Inc. v. Midwest Dev., Inc.*, 879 P.2d 69, 73 (Nev. 1994); NRS 18.010 (Nevada allows attorney's fees only when "authorized by rule, statute, or contract").

1. The District Court is prohibited from awarding Ruby Lake Estates Homeowner's Association attorney's fees pursuant to NRS 116.4117.

RLEHOA contends in Subsection VI(C) that the District Court is not prohibited from awarding RLEHOA attorney's fees pursuant to NRS 116.4117. However, RLEHOA's attorney's fees cannot be awarded pursuant to NRS 116.4117 because the only claim that was maintained and decided by the District Court was Artemis's Declaratory Judgment claim brought pursuant to NRS 30.010 *et. seq.*

RLEHOA argues that Artemis's declaratory relief claim was allegedly not brought pursuant to NRS 30.010 *et. seq.* and was instead brought pursuant to NRS Chapter 116. (Answering Brief 28 and 33.) Despite RLEHOA's contention, Artemis's claim for declaratory relief—the only claim that the District Court ruled

on—was brought pursuant to NRS 30.010 *et. seq.* NRS Chapter 30 governs declaratory judgments. Artemis's claim was titled "**FIRST CLAIM FOR RELIEF (Declaratory Judgment).**" (1 AA 125.) The claim reads in relevant part:

> Plaintiff seeks a declaratory judgment to establish that the Ruby Lake Estates subdivision is not a common-interest community as defined by Chapter 116 of the Nevada Revised Statutes.

(*Id.*)

The Second Amended Complaint requested the following relief:

> For a declaratory judgment establishing that Ruby Lake Estates Homeowner's Association is not authorized under the Ruby Lake Estates Declaration, Restrictions and Covenants to compel the payment of dues or assessments, or to otherwise compel property owners within the Ruby Lake Estates to participate in the activities of the so-called Ruby Lake Estates Homeowner's Association.

(1 AA 126.)

The District Court also ruled that all lot owners within Ruby Lake Estates needed to be joined into the case pursuant to NRS Chapter 30 because Artemis filed its declaratory relief claim. (1 AA 114.) The parties stipulated and the District Court ordered that there was a single claim that was maintained and determined by the District Court, which was one for "declaratory relief." (1 AA 236-244.) Therefore, Artemis's single claim was a declaratory relief claim brought pursuant to NRS 30.010 *et. seq.* and RLEHOA's attempt to interpret the claim as a different type of claim is unfounded and unsupported.

RLEHOA also contends that attorney's fees may be awarded pursuant to NRS 116.4117 even though a single claim for declaratory relief was brought pursuant to NRS 30.010 *et. seq.* because *R Ventures I, LLC v. Wells Fargo Bank, N.A.*, 393 P.3d 660 (Nev. 2017) (unpublished disposition) and *Bank of Am., N.A. v. Treasures Landscape Maint. Ass'n*, No. 216CV380JCMNJK, 2017 WL 3116233, at *3 (D. Nev. July 21, 2017) allegedly do not apply to this case. (Answering Brief 30.) RLEHOA's only argument that those cases do not apply to this case is that the facts of each case are different than the case at hand. However, this argument is of no consequence because both cases stand for the legal proposition that a declaratory relief claim cannot be the basis for an attorney's fees award pursuant to NRS 116.4117 or NRS 116.3116. *Id.* Simply, a claim for declaratory judgment pursuant to NRS 30.010 *et. seq.* is not a claim brought pursuant to NRS 116.4117. Therefore, attorney's fees cannot be awarded in this case because the single declaratory relief claim was not brought pursuant to NRS 116.4117.

2. NRS 116.3115(6) does not provide an alternate or additional basis for an award of attorney's fees to overcome the District Court's error in awarding fees pursuant to NRS 116.4117.

RLEHOA contends in Subsection VI(D) that if the District Court abused its discretion in awarding attorney's fees pursuant to NRS 116.4117, then NRS 116.3115(6) provides an alternate theory for an attorney's fees award to be made. However, RLEHOA is not entitled to an award of attorney's fees and costs pursuant

to NRS 116.3115(6) because the single, declaratory relief cause of action was brought pursuant to NRS 30.010 *et. seq.* and did not rely on NRS 116.3115(6). (1 AA 114); *R Ventures I, LLC*, 393 P.3d 660 (unpublished disposition); *Bank of Am., N.A.*, 2017 WL 3116233, at *3.

NRS 116.3115(6) does not allow for an award of attorney's fees. The statute provides in pertinent part:

> If damage to a unit or other part of the common-interest community, or if any other common expense is caused by the willful misconduct or gross negligence of any unit's owner, tenant or invitee of a unit's owner or tenant, the association may assess that expense exclusively against his or her unit, even if the association maintains insurance with respect to that damage or common expense, unless the damage or other common expense is caused by a vehicle and is committed by a person who is delivering goods to, or performing services for, the unit's owner, tenant or invitee of the unit's owner or tenant.

NRS 116.3115(6).

RLEHOA's counsel misquotes the statute, employing quotations, as follows: "If any common expense is caused by the misconduct of any unit owner, [RLEHOA] may assess that expense exclusively against his unit." (Answering Brief 34.) The misquotation is so inaccurate and misleading that, unless it is a mistake, it appears intentional. RLEHOA is attempting to misconstrue the language of the statute to broaden its application to the instant case; however, NRS 116.3115(6) is inapplicable.

NRS 116.3115(6) is narrow in its application. The statute specifically refers to "damage to a unit" or "other common expense" caused by the "willful misconduct or gross negligence" of any unit's owner. Therefore, RLEHOA could only recover "damage to a unit" or "other common expense" under the statute. The statute does not provide an avenue for RLEHOA to recover attorney's fees, which must be specifically "authorized by rule, statute, or contract." NRS 18.010.

Even if RLEHOA could collect fees under NRS 116.3115(6), RLEHOA would be required to prove "damage to a unit" or "willful misconduct or gross negligence." RLEHOA does not assert that any of Artemis's actions caused "damage to a unit" or that Artemis was "gross[ly] negligen[t]." However, RLEHOA, through strained logic, argues that Mr. Essington's alleged actions constituted "willful misconduct" and were imputed to Artemis and caused RLEHOA to incur "other common expenses," which include attorney's fees and costs from Artemis's declaratory judgment claim. (Answering Brief 31-42.) Such logic is unsupported.

RLEHOA voluntarily dismissed its claims against Artemis regarding Mr. Essington, which were all contained in RLEHOA's counterclaims. (1 AA 236-244.) By voluntarily dismissing the claims and not pursuing any fees and costs associated with such claims, RLEHOA abandoned its pursuit of fees and costs related to its allegations regarding Mr. Essington contained in RLEHOA's counterclaims and

determined to only seek fees and costs related to Artemis's declaratory judgment claim.

Furthermore, this Court never entered any order or judgment finding any damage or "willful misconduct."[1] Consequently, NRS 116.3115(6) does not support an award of attorney's fees and costs.

3. NRS 18.010(2)(b) does not provide an alternate or additional basis for an award of attorney's fees to overcome the District Court's error in awarding fees pursuant to NRS 116.4117.

RLEHOA contends in Subsection VI(E) that if the District Court abused its discretion in awarding attorney's fees pursuant to NRS 116.4417, then NRS 18.010(2)(b) provides an alternate theory for an attorney's fees award to be made. However, RLEHOA is not entitled to an award of attorney's fees and costs pursuant to NRS 18.010(2)(b). Artemis's case is based on reasonable grounds and was not brought "without reasonable grounds or to harass the prevailing party."

The Court's decision is one of first impression in the state of Nevada and is based upon an interpretation of statute that has been in controversy among the

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[1] RLEHOA contends that Artemis "did not dispute" that acts of Mel Essington were imputed to Artemis "below or on appeal." (Answering Brief 41 ft. 7.) This contention is without merit. Artemis disputed and provided evidence to disprove RLEHOA's contentions regarding Mel Essington throughout the case below; however, such evidence was ultimately unnecessary because RLEHOA voluntarily dismissed its own claims regarding Mr. Essington because the claims were baseless and RLEHOA failed to prosecute the claims. (1 AA 236-244.)

Legislative Council Bureau, Attorney General's office, the legislature, lot owners, and associations. NV S. Jour., 75th Sess. No. 120 (June 1, 2009); (1 AA 98).

As this Court noted in its Order Granting Defendant's Motion for Summary Judgment, the Court "spent hour upon hour" reviewing the case to come to its conclusion. (1 AA 97.) The Court's conclusion rested on an interpretation that Ruby Lake Estate's CC&Rs are considered "real property," that the CC&Rs required lot owners to pay for common expenses "at least by implication," and that NRS 116.3101 should not apply to pre-1992 subdivisions. (*Id.*) The issues are of first impression, have been in controversy among leading agencies within the state, and required an interpretation of statute and contract, and therefore Artemis's declaratory relief claim was supported and not groundless. Failing to prevail on a claim does not mean that a claim is groundless. "[A] claim is groundless if 'the allegations in the complaint ... are not supported by any credible evidence at trial.'" *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998) (quoting *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo.1984)).

Artemis's case was not brought to harass RLEHOA. As stated, many top legal agencies in the state, including the Legislative Council Bureau, Attorney General's office, and legislature, have differing interpretations of the interpretations included in this case. The differing legal interpretations have caused uncertainty regarding

common-interest communities in Nevada. Thus, this case of first impression is needed to resolve the legal interpretations set forth by the state's leading agencies. Artemis's declaratory relief claim and the District Court's Final Judgment have brought the issues to judgment. Bringing such a case is not "harassment." RLEHOA again relies on its attenuated logic regarding Mr. Essington in an attempt to prove "harassment"; however, as explained above, RLEHOA abandoned those claims and attorney's fees and costs, and RLEHOA specifically stipulated not to pursue attorney's fees and costs related to such claims.

Consequently, RLEHOA is not entitled to attorney's fees and costs based upon NRS 18.010(2)(b).

4. Ruby Lake Estates' CC&Rs do not provide an alternate or additional basis for an award of attorney's fees to overcome the District Court's error in awarding fees pursuant to NRS 116.4117.

RLEHOA contends in Subsection VI(F) that if the District Court abused its discretion in awarding attorney's fees pursuant to NRS 116.4117, then Ruby Lake Estates' CC&Rs provides an alternate theory for an attorney's fees award to be made. However, RLEHOA is not entitled to an award of attorney's fees and costs pursuant to the CC&Rs because the CC&Rs do not include any provision that allows a homeowners' association to collect attorney's fees and costs as a prevailing party. The CC&Rs only provide that an "owner of any lot, DECLARANT, or any

representative of the Architectural Review Committee" is entitled to attorney's fees and costs. (3 AA 183.) Given that RLEHOA is an association, the CC&Rs do not provide that an association is entitled to an award of attorney's fees and costs. Therefore, RLEHOA cannot collect attorney's fees and costs pursuant to the contract. The language of the CC&Rs "is clear and unambiguous," and therefore must be "enforced as written." *Am. First Fed. Credit Union v. Soro*, 131 Nev. Adv. Op. 73, 359 P.3d 105, 106 (2015) (quotations and citations removed).

C. The District Court is prohibited from awarding and abused its discretion by awarding Ruby Lake Estates Homeowner's Association specific attorney's fees.

In addition to the reasons set forth above that RLEHOA should not be awarded any attorney's fees, RLEHOA should also not be awarded specific attorney's fees, as follows.

1. The District Court is prohibited from awarding attorney's fees that RLEHOA incurred in a separate action, District Court Case No. CV-C-11-147.

RLEHOA contends in Subsection VI(G) that the District Court did not abuse its discretion in awarding attorney's regarding the 2011 dismissed District Court Case No. CV-C-11-147. However, RLEHOA fails to explain how RLEHOA and the District Court complied with NRCP 54(d)(2)(B)(i) when the District Court awarded attorney's fees associated with the 2011 dismissed case.

NRCP 54(d)(2)(B)(i) requires that a Motion for Attorney's Fees must "be filed no later than 21 days after written notice of entry of judgment is served . . . ." NRCP 54(d)(2)(C) states that the "court may not extend the time for filing the motion after the time has expired."

District Court Case No. CV-C-11-147 was dismissed on April 1, 2011, and no motion for attorney's fees was ever filed regarding the attorney's fees in the case. Therefore, it was error and an abuse of discretion for the District Court to award RLEHOA $2,796.00 in attorney's fees from February 25, 2011, to March 30, 2011, in direct violation of NRCP 54(d)(2)(B)(i). (3 AA 49-50.)[2]

2. The District Court is prohibited from awarding attorney's fees that RLEHOA incurred in a non-binding arbitration.

RLEHOA contends in Subsection VI(G) that the District Court did not abuse its discretion in awarding attorney's regarding the non-binding arbitration. However, the District Court has no authority to award attorney's fees for the non-binding arbitration because NRS 38.300-38.360 does not allow for such an award.

RLEHOA contends that NRS Chapter 38 does not prohibit the award of attorney's fees for the non-binding arbitration award. (Answering Brief 52.)

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[2] RLEHOA's attorney's fees that were awarded in error for the 2011 dismissed District Court Case No. CV-C-11-147 were inadvertently cited as 1 AA 49-50 in Artemis's Opening Brief. The fees can be found at 3 AA 49-50.

However, RLEHOA has the duty to prove that the District Court had authority to award attorney's fees, not that provisions of law prohibit such an award.

NRS 38.300-38.360 govern non-binding arbitrations. NRS 38.325(2) prohibits an arbitrator from awarding attorney's fees and costs, and, as this Court previously ruled, the District court is prohibited from confirming such an award. (1 AA 114.) Consequently, there is no basis for an award of $19,296 in attorney's fees that were incurred prior to the civil action from May 17, 2011, to December 20, 2011, for the non-binding arbitration. (3 AA 50-52.)

3. It was error and an abuse of discretion for the District Court to award attorney's fees that RLEHOA incurred in the prosecution of Ruby Lake Estates Homeowner's Association's counterclaims.

RLEHOA contends in Subsection VI(B) that the District Court did not award attorney's fees regarding its counterclaims. However, RLEHOA cites to and quotes from attorney's fees slips that unequivocally relate to RLEHOA's counterclaims and that were awarded to RLEHOA in error. (Answering Brief 22.)

RLEHOA does not dispute and affirmatively agrees that it is not entitled to any attorney's fees related to its counterclaims because it stipulated to not receive any such fees and the District Court entered an Order to that effect. (*Id.* 23.) However, RLEHOA was awarded attorney's fees directly related to its work regarding the counterclaims in the amount of $5,112. (3 AA 18: slips dated

3/23/2012-4/27/2012; 3 AA 72-74: slips dated 1/4/2018-2/5/2018, 2/12/2018-2/23/2018.)

Therefore, the District Court violated the Parties' Stipulation and the District Court's own Order by awarding RLEHOA $5,112 in attorney's fees related to RLEHOA's counterclaims. This is an abuse of discretion and the award must be reversed.

4. It was error and an abuse of discretion for the District Court to award attorney's fees and costs incurred for Ruby Lake Estates Homeowner's Association's staff and duplicative time and redacted timeslips.

RLEHOA contends in Subsection VI(H) that the District Court did not abuse its discretion in awarding RLEHOA attorney's fees for duplicative time and redacted slips. However, the District Court abused its discretion because it is impossible for the District Court to complete its analysis pursuant to *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) if it cannot read the redacted time slips. Given that no analysis regarding such time slips exists, all fees awarded with redacted time slips should not be awarded because such award was an abuse of discretion.

III.

CONCLUSION

For the foregoing reasons, Artemis respectfully requests that this Honorable Court reverse the District Court's Order Awarding Attorney's Fees and Costs and

Judgement for Attorney's Fees and Costs in Favor of Ruby Lake Estates Homeowner's Association, and specifically deny RLEHOA's attorney's fees and costs award, and for such other relief as the Court deems just and proper.

DATED this 22nd day of July, 2019.

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CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

1. I hereby certify that this Reply Brief 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 360 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), excluding the parts of the brief exempted by NRAP 32(a)(7)(C), because it is proportionately spaced, has a typeface of 14 points or more, and contains 3,504 words.

3. Finally, I hereby certify that I have read this appellate reply 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 applicable 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.

DATED this 22nd day of July, 2019.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(c), I hereby certify that I am an employee of GERBER LAW OFFICES, LLP, and that on this date, I caused the foregoing document to be served on all parties to the action by:

X E-filing pursuant to Section IV of District of Nevada Electronic Filing Procedures

X Placing a true copy thereof in a sealed postage prepaid envelope in the United States Mail in Elko, Nevada.

fully addressed as follows:

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DATED this 22nd day of July, 2019.

EMPLOYEE OF GERBER LAW OFFICES, LLP