

ATTACHMENTS

IN THE SUPREME COURT OF THE STATE OF NEVADA

O.P.H. OF LAS VEGAS, INC.,

Appellants,

v.

OREGON MUTUAL INSURANCE COMPANY;
DAVE SANDIN; AND SANDIN & CO.,

Respondents.

Supreme Court No. 76966

Electronically Filed
District Court No. A-12-672158
Oct 11 2018 10:31 a.m.
Elizabeth A. Brown
DOCKETING of Supreme Court
STATEMENT CIVIL
APPEALS

1. Judicial District: Eighth Judicial District Court
 County: Clark
 Judge: Gloria Sturman, Department XXVI
 District Ct. Case No.: A-14-702829-B

2. **Attorneys filing this docketing statement:**
 Attorneys: Michael N. Feder and Gabriel A. Blumberg
 Telephone: (702) 550-4400
 Firm: Dickinson Wright PLLC
 Address: 8363 West Sunset Road, Suite 200, Las Vegas, NV 89113
 Clients: Appellant O.P.H. of Las Vegas, Inc.

3. **Attorney(s) representing Respondent(s):**
 Attorney: Michael K. Wall and Patricia Lee
 Telephone: (702) 385-2500
 Firm: Dickinson Wright PLLC
 Address: 10080 West Alta Drive, Suite 200, Las Vegas, NV 89145
 Clients: Respondents Dave Sandin and Sandin & Co.

4. **Nature of disposition below (check all that apply):**

<input type="checkbox"/> Judgment after bench trial	<input type="checkbox"/> Dismissal:
<input type="checkbox"/> Judgment after jury verdict	<input type="checkbox"/> Lack of jurisdiction
<input checked="" type="checkbox"/> Summary judgment	<input type="checkbox"/> Failure to state a claim
<input type="checkbox"/> Default judgment	<input type="checkbox"/> Failure to prosecute
<input type="checkbox"/> Grant/Denial of NRCP 60(b) relief	<input checked="" type="checkbox"/> Other (specify): Stipulation and Order to Dismiss
<input type="checkbox"/> Grant/Denial of injunction	<input type="checkbox"/> Divorce Decree
<input type="checkbox"/> Grant/Denial of declaratory relief	<input type="checkbox"/> Original <input type="checkbox"/> Modification
<input type="checkbox"/> Review of agency determination	

5. **Does this appeal raise issues concerning any of the following?**

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

N/A

6. **Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

This case was previously the subject of an appeal in Case No. 68543.

7. **Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.*, bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

N/A

8. **Nature of the action.** Briefly describe the nature of the action and the result below:

In 2002, Sandin became O.P.H. of Las Vegas, Inc.'s ("OPH") insurance broker and began procuring commercial insurance policies for OPH. Throughout the course of the relationship between Sandin and OPH, Sandin informed OPH on three separate occasions that OPH was late on an insurance premium payment. Indeed, Sandin made it his practice to inform clients of pre-cancellation notices because that gave his clients an opportunity to avoid having their policy terminate for non-payment. OPH relied on Sandin to be its "buffer" in the event of any problems with its insurance policies.

In 2011, Sandin and his company Sandin & Co. (together the "Sandin Defendants") recommended that OPH purchase insurance from Oregon Mutual

Insurance Company (“OMI”). As a result of the Sandin Defendants’ recommendation, OMI and OPH entered into a “Businessowners Protector Policy” that became effective on December 26, 2011 (the “Policy”). The Policy covered two restaurant locations: 4833 West Charleston Boulevard, Las Vegas, Nevada (the “Premises”) and 4170 South Fort Apache Road, Las Vegas, Nevada. The Policy provided a \$691,000 limit of insurance for the replacement cost of buildings and a \$350,000 limit of insurance for the replacement cost of business personal property for each location. The Policy also provided that OMI would reimburse OPH for loss of business income in the event of a covered loss. Furthermore, the Policy provided that OMI could not cancel the Policy absent providing OPH notice of cancellation at least ten days before the effective date of cancellation, if the cancellation was premised upon nonpayment of premium.

On July 31, 2012, OMI allegedly sent a Notice of Cancellation to OPH stating that the Policy would be cancelled effective August 16, 2012 if OPH did not make a premium payment by August 15, 2012 (the “July 31 Notice”). OPH did not receive the July 31 Notice and the Sandin Defendants failed to inform OPH of the July 31 Notice or the missed July premium.

On August 17, 2012, a fire completely destroyed the Premises resulting in hundreds of thousands of dollars of damages (the “Loss”). OPH, via Sandin, reported the Loss and OMI generated a claim number for the Loss on August 17, 2012. Three days later, however, OMI denied coverage, stating that the policy had been canceled effective August 16, 2012 for failure to pay the premium pursuant to the July 31 Notice.

On November 19, 2012, OPH filed a complaint against the Sandin Defendants asserting claims for fraud in the inducement, fraud, breach of fiduciary duty, and negligence.¹

On December 26, 2012, the Sandin Defendants filed a motion to dismiss seeking to dismiss all of the claims against them for failure to state a claim pursuant to NRCP 12(b)(5). The district court orally denied the Sandin Defendants' motion to dismiss on February 13, 2013.

The very next day, on February 14, 2013, the Sandin Defendants served an offer of judgment on OPH offering to settle all claims for the sum of Two Thousand Dollars and No Cents (\$2,000.00) pursuant to NRCP 68 and/or NRS 17.115. OPH, who: (1) had just prevailed on the Sandin Defendants' motion to dismiss; (2) had already expended more than \$2,000 in attorneys' fees in the case; and (3) was seeking hundreds of thousands of dollars in damages, reasonably rejected the offer of judgment.

A little more than two years later, on March 17, 2015, the Sandin Defendants filed their motion for summary judgment, seeking judgment in their favor on all of OPH's claims against them. The district court granted the Sandin Defendants' motion for summary judgment at a hearing on May 14, 2015. The written summary judgment order was entered on July 1, 2015 and, on August 13, 2015, judgment was entered in favor of the Sandin Defendants and against OPH on all of OPH's claims against the Sandin Defendants.

¹ OPH also named OMI as an additional defendant in the district court action and asserted various claims against OMI. OMI remained a party to the action until it was dismissed pursuant to a stipulation and order on September 11, 2018.

On September 2, 2015, the Sandin Defendants brought a Motion for Attorneys' Fees and Costs seeking to recover attorneys' fees as the prevailing party on their token \$2,000 offer of judgment. The matter came before the district court for oral argument on November 17, 2015, at which time the district court granted the Sandin Defendants' Motion for Costs and took their Motion for Attorneys' Fees under advisement.

In the meantime and following the notice of entry of judgment in favor of the Sandin Defendants, OPH appealed the district court's order granting the Sandin Defendants' motion for summary judgment.² On September 14, 2017, the Nevada Supreme Court affirmed the ruling of the district court as to the summary disposition of OPH's claims against the Sandin Defendants and a remittur was issued on October 9, 2017.³

Following the remand back to the district court, the district court held another hearing on the Sandin Defendants' Motion for Attorneys' Fees on February 6, 2018. At the hearing, the district court granted the Sandin Defendants' motion for attorneys' fees. OPH filed a motion for reconsideration, but the district court denied the motion. On September 11, 2018, a stipulation of dismissal was filed as to the claims against OMI and, thus, OPH now files the instant appeal challenging the district court's decision to award attorneys' fees to the Sandin Defendants based on a patently unreasonable offer of judgment.

² OPH also appealed the district court's order granting OMI's motion for summary judgment.

³ In the same opinion, the Nevada Supreme Court reversed the district court's order granting summary judgment in favor of OMI and remanded the matter back to the district court for further disposition.

9. **Issues on appeal.**

(a) Whether the district court erred and misapplied Nevada's governing law relating to awarding attorneys' fees pursuant to an offer of judgment.

(b) Whether the district court erred by awarding attorneys' fees pursuant to an offer of judgment that was made for a nominal amount the day after the offeror lost on its motion to dismiss and where the offeree's decision to reject the offer of judgment was not grossly unreasonable and the offeree had brought its claims in good faith.

(c) Whether the district court erred by awarding an unreasonable amount of attorneys' fees.

10. **Pending proceedings in this court raising the same or similar issues.**

N/A

11. **Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. **Other issues.** Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☐ An issue of public policy

- ☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions
 - ☐ A ballot question
- If so, explain:

N/A

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This matter is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(8). Appellant believes this matter should be retained by the Supreme Court despite its presumptive assignment to the Court of Appeals because it involves an important matter of public policy. If the district court's opinion is affirmed, it will vitiate the policy behind offers of judgment and will unfairly force plaintiffs to forego legitimate claims due to fear of an unreasonable award of attorneys' fees to defendants based on an unreasonable offer of judgment if a plaintiff does not prevail on its claims. *Beattie v. Thomas*, 99 Nev. 579, 588, 668 P.2d 268, 274 (1983)

14. Trial. If this action proceeded to trial, how many days did the trial last?

N/A

Was it a bench or jury trial?

N/A

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

N/A

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from:

Order: March 8, 2018

17. Date written notice of entry of judgment or order was served:

Notice of Entry of Order: March 16, 2018

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

Appellant filed a motion to reconsider and/or amend judgment on March 30, 2018. Moreover, a stipulation of dismissal as to the claims against OMI was entered on September 11, 2018.

(b) Date of entry of written order resolving tolling motion.

Order: June 11, 2018

(c) Date written notice of entry of order resolving tolling motion was served.

Notice of Entry of Order: June 12, 2018. *See also* responses to questions 22-26, *infra*.

19. Date notice of appeal filed.

September 11, 2018.

20. **Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other.**

NRAP 4, NRCP 54(b); *Fernandez v. Infusaid Corp.*, 110 Nev. 187, 192, 871 P.2d 292, 295 (1994) (“In the absence of a proper certification of finality, an interlocutory order dismissing fewer than all the parties cannot be challenged on appeal until a final judgment is entered in the action fully and finally resolving all the claims against all the parties.”).

SUBSTANTIVE APPEALABILITY

21. **Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

(a)

- | | |
|--|---------------------------------------|
| <input type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input checked="" type="checkbox"/> Other (specify): NRAP 3A(b)(8) | |

(b) **Explain how each authority provides a basis for appeal from the judgment or order:**

A post judgment order awarding attorneys’ fees and costs is appealable pursuant to NRAP 3A(b)(8). *See Campos-Garcia v. Johnson*, 130 Nev. Adv. Op. 64, 331 P.3d 890, 891 (2014) (citing *Lee v. GNLV Corp.*, 116 Nev. 424, 426-27, 996 P.2d 416, 417-18 (2000)).

22. **List all parties involved in the action or consolidated actions in the district court:**

(a) Parties:

Appellants/Plaintiffs in the district court:

(1) O.P.H. of Las Vegas Inc.

Respondents/Defendants in the district court:

(1) Dave Sandin

(2) Sandin & Co.

(3) Oregon Mutual Insurance Company (“OMI”)

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

The claims against OMI were dismissed pursuant to a stipulation of dismissal between OPH and OMI entered on September 11, 2018. The attorneys' fees award that is the subject of this appeal awarded attorneys' fees to the Sandin Defendants based solely on their \$2,000 offer of judgment. As such, OMI is not a party to this appeal.

23. **Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.**

Appellants' claims:

- (1) Fraud in the inducement
- (2) Fraud
- (3) Breach of fiduciary duty
- (4) Violation of NRS 686A.310
- (5) Negligence

Appellant's claims against the Sandin Defendants were all disposed of via summary judgment in the district court's June 30, 2015 order, which was affirmed by the Nevada Supreme Court on September 14, 2017. Appellant's claims against OMI were not disposed of until September 11, 2018, upon entry of a stipulation and order dismissing those claims.

24. **Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?**

☐ Yes
☒ No

25. **If you answered "No" to question 23, complete the following:**

(a) Specify the claims remaining pending below:

The attorneys' fees order being appealed did not resolve Appellant's claims against OMI. Appellant's claims against OMI for: (1) Breach of Contract; (2) Breach of the Implied Covenant of Good Faith and Fair Dealing; (3) Fraud in the inducement; (4) Violation of NRS 686A.310; and (5) Negligence remained active following entry of the district court's order awarding the Sandin Defendants their attorneys' fees and until these claims were dismissed pursuant to the stipulation and order entered on September 11, 2018.

(b) Specify the parties remaining below:

OMI remained a party to the action until it was dismissed pursuant to a stipulation and order entered on September 11, 2018.

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☒ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☒ No

26. **If you answered "No" to any part of question 25, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):**

All claims against all parties were not disposed of until September 11, 2018. Appellant timely filed its notice of appeal that same day.

27. **Attach file-stamped copies of the following documents:**

- The latest-filed complaint and counterclaims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Appellant O.P.H. of Las Vegas, Inc.

DATED this 11th day of October 2018

DICKINSON WRIGHT PLLC



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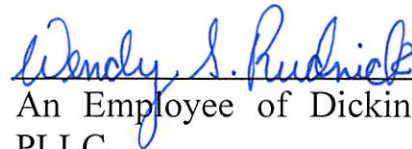
Counsel of Record for Appellants

Signed in Clark County, Nevada

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of October 2018, I submitted the foregoing Docketing Statement Civil Appeals for filing via the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

Michael K. Wall and Patricia Lee
10080 W. Alta Drive, Suite 200
Las Vegas, NV 89145
Email: mwall@hutchlegal.com


An Employee of Dickinson Wright
PLLC

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