

IN THE SUPREME COURT OF THE STATE OF NEVADA

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IN THE MATTER OF THE ADMINISTRATION OF THE SSJ'S ISSUE TRUST,	Case No.: 81470	Electronically Filed Apr 13 2021 11:57 p.m. Elizabeth A. Brown Clerk of Supreme Court
IN THE MATTER OF THE ADMINISTRATION OF THE SAMUEL S. JAKSICK, JR. FAMILY TRUST.	PR17-00445 PR17-00446	
TODD B. JAKSICK, INDIVIDUALLY AND AS CO- TRUSTEE OF THE SAMUEL S. JAKSICK, JR. FAMILY TRUST, AND AS TRUSTEE OF THE SSJ'S ISSUE TRUST; MICHAEL S. KIMMEL, INDIVIDUALLY AND AS CO-TRUSTEE OF THE SAMUEL S. JAKSICK, JR. FAMILY TRUST; KEVIN RILEY, INDIVIDUALLY AND AS A FORMER TRUSTEE OF THE SAMUEL S. JAKSICK, JR. FAMILY TRUST, AND AS TRUSTEE OF THE WENDY A. JAKSICK 2012 BHC FAMILY TRUST; AND STANLEY JAKSICK, INDIVIDUALLY AND AS CO-TRUSTEE OF THE SAMUEL S. JAKSICK, JR. FAMILY TRUST, Appellants/Cross-Respondents, vs. WENDY JAKSICK, Respondent/Cross-Appellant.		

OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, 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 justices of this court may evaluate possible disqualification or recusal.

There are no parent corporations for Stanley Jaksick or publicly held companies owning 10% or more stock.

Stanley Jaksick has been represented throughout this action by Adam Hosmer-Henner, Esq. of McDonald Carano and Philip Kreitlein, Esq. of Kreitlein Law Group. Stanley Jaksick has also been represented by the law firm of Maupin, Cox & LeGoy in his capacity as co-Trustee of the Samuel S. Jaksick, Jr. Family Trust.

DATED: April 13, 2021.

McDONALD CARANO LLP

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TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
ROUTING STATEMENT.....	2
STATEMENT OF THE ISSUES.....	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
SUMMARY OF THE ARGUMENT	4
ARGUMENT	7
CONCLUSION	11
CERTIFICATE OF COMPLIANCE	12
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Diotallevi v. Sierra Dev. Co.</i> , 95 Nev. 164, 167, 591 P.2d 270, 272 (1979).....	8
<i>Frederic & Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC</i> , 134 Nev. 570, 580, 427 P.3d 104, 112 (2018)	4
<i>Hannam v. Brown</i> , 114 Nev. 350, 362, 956 P.2d 794, 802 (1998)	4
<i>Matter of Est. of Martini</i> , 134 Nev. 957, 422 P.3d 1231 (2018)	5
Statutes	
NRS 153.031	6-9
NRS 163.115	9-10

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment entered in the Second Judicial District Court in and for Washoe County. NRAP 3A(b)(1). Stanley Jaksick's Notice of Cross Appeal was filed on July 21, 2020, within the applicable time period after the Notice of Appeal filed by Wendy Jaksick on July 13, 2020. XXII JA TJA003670-003777.

ROUTING STATEMENT

This appeal is neither presumptively retained by the Supreme Court nor presumptively assigned to the Court of Appeals. NRAP 17. While cases "involving trust and estate matters in which the corpus has a value of less than \$5,430,000" are presumptively assigned to the Court of Appeals, the combined value of the two trusts in this appeal – the Samuel S. Jaksick, Jr. Family Trust and the SSJ's Issue Trust – exceeds this threshold. VIII JA TJA001424. Accordingly, retention by the Supreme Court is appropriate.

STATEMENT OF THE ISSUES

Whether the district court erred in awarding attorney's fees to a trust beneficiary who failed to obtain relief as a result of a petition filed to adjudicate the affairs of a trust?

STATEMENT OF THE CASE

Appellants Todd Jaksick ("Todd") and Michael Kimmel filed Petitions for Confirmation of Trustee and Admission of Trust to the Jurisdiction of the Court, and for Approval of Accountings and Other Trust Administration Matters on August 2, 2017. *See* XII JA TJA002094-2118. Wendy Jaksick ("Wendy") filed a Counterpetition seeking affirmative relief and Stanley Jaksick ("Stan") filed an Objection and then his own Counterpetition. *Id.*

The district court bifurcated the trial between legal and equitable claims. A jury trial was held between February 14, 2019 and March 4, 2019. *Id.* The jury found in favor of Todd, individually, Stan, individually and as co-Trustee of the Family Trust, and all other parties against Wendy's claims for relief. The jury found in favor of Wendy and against Todd in his capacities as Trustee of the SSJ's Issue Trust and co-Trustee of the Family Trust on Wendy's claims for breaches of

fiduciary duty. *Id.* The jury assessed damages against Todd in his trustee capacities in the amount of \$15,000. *Id.*

In its order after equitable trial, the district court ruled in favor of Stan on each and every equitable claim asserted by Wendy. *Id.* These claims were: 1) Failure to Disclose and Adequately Account to Compel Accounting (Family Trust); 2) Contest of Purported ACPAs (Family Trust); 3) Contest of Purported Indemnity Agreement (Family Trust); 4) Declaratory Judgment – No Contest Provision (Family Trust); 5) Unjust Enrichment and Constructive Trust (Family Trust); 6) Removal of Trustees and Appointment of Independent Trustee(s) (Family Trust); 7) Disgorgement of Trustee Fees (Family Trust); 8) Enjoin Trustees from Using Trust Assets to Defend in this Matter (Family Trust); and 9) Award of Attorneys’ Fees and Costs. *Id.*

STATEMENT OF THE FACTS

Stan partially joins in the Statement of the Facts filed by the other co-Trustees of the Family Trust insofar as it is relevant to the arguments below. The primary factual issue that is specifically relevant to the limited cross appeal by Stan is that the district court awarded Wendy’s counsel \$300,000 in attorney’s fees. XII JA TJA002115.

STANDARD OF REVIEW

“A district court's order regarding distribution or administration of trust funds will generally not be disturbed unless it clearly demonstrates an abuse of discretion.” *Hannam v. Brown*, 114 Nev. 350, 362, 956 P.2d 794, 802 (1998); *see also Frederic & Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC*, 134 Nev. 570, 580, 427 P.3d 104, 112 (2018) (reviewing a “district court's attorney fees decision for an abuse of discretion”).

SUMMARY OF ARGUMENT

After a lengthy jury trial, the jury completely exonerated Stanley Jaksick (“Stan”) from any liability as co-Trustee of the Samuel S. Jaksick, Jr. Family Trust (“Family Trust”) and from each and every legal claim asserted by a beneficiary of the Family Trust, Wendy Jaksick (“Wendy”). IV JA TJA000954-957. Thereafter, in the bench trial of the remaining equitable claims, the district court entered judgment against Wendy on each and every one of her equitable claims against Stan. XII JA TJA002094-2118. Accordingly, this cross appeal filed by Stan is necessarily succinct as there is only one issue on which Stan did not prevail and for which he has standing to appeal. *See Matter of Est.*

of Martini, 134 Nev. 957, 422 P.3d 1231 (2018) (unpublished) (“trustees have standing to appeal when the order affects their personal rights, the existence or corpus of the trust as a whole, or the rights of undetermined beneficiaries”). In its Order After Equitable Trial, the district court ordered the Family Trust and the SSJ’s Issue Trust to “pay a combined attorneys’ fee of \$300,000 to Wendy’s attorneys for prevailing in the claim against Todd for breach of fiduciary duties. This payment shall be made directly to Wendy’s attorneys without Wendy’s signatory participation as a client or trust beneficiary.” XII JA TJA002115.

The district court’s award of attorney’s fees to Wendy’s counsel appears to be an attempt at rough justice. There was not a pending motion for attorney’s fees by Wendy at the time of the Order After Equitable Trial nor was there a calculation performed by the district court to arrive at the \$300,000 figure. The \$300,000 fee award may seem generally reasonable when compared to the \$1,364,024 in attorney’s fees purportedly incurred by Wendy’s counsel as of June 30, 2019, VIII JA TJA001465, or the total attorney’s fees in the case that approached, and likely now have exceeded \$4,000,000. XXII

TJA003646. The award, however, is decidedly unreasonable when compared to the \$15,000 monetary award that Wendy received solely as a result of prevailing on claims for breach of fiduciary duty against Todd, as trustee of the SSJ's Issue Trust and as co-Trustee of the Family Trust. IV JA TJA000954-957.

After Wendy's "scorched-earth litigation" has already depleted the resources of the Family Trust significantly, it compounds the unfairness to all of the beneficiaries of the Family Trust to deplete it a further \$300,000 for the benefit of her attorneys. XII JA TJA002099. In order to warrant an award of attorney's fees in a trust action under NRS 153.031(3), the petitioner must have received relief in the process of "adjudicat[ing] the affairs of the trust" and the district court must have determined that "additional relief is appropriate to redress or avoid an injustice." The breach of fiduciary duty by one of the co-Trustees of the Family Trust, which only resulted in \$15,000 in damages to Wendy and no other benefit to the other beneficiaries or to the Family Trust, does not warrant an additional \$300,000 drain on the Family Trust assets.

While there is not a basis to award attorney's fees to Wendy's counsel, a far worse result would transpire if the parties were required

to redo the trial at the district court for any reason. As the district court noted, “the combined attorneys’ fees now exceed \$3 million and may be approaching \$4 million. The parties are strongly encouraged to bring this dispute to an end or commence their appellate litigation.” XXII JA TJA003639-3646. While the parties all opted to continue pursuing their cases at this appellate level, the Family Trust, which is already bereft of liquid assets, would be devastated – far more than the award of attorney’s fees to Wendy’s counsel – if a new trial was ordered for any reason.

ARGUMENT

I. There is Not a Statutory Basis for an Award of Attorney’s Fees to Wendy’s Counsel.

The district court did not identify a specific legal basis for the award of attorney’s fees to Wendy’s counsel. Presumably, the award was issued under NRS 153.031(3)(b), which provides that

“If the court grants any relief to the petitioner, the court may, in its discretion, order any or all of the following additional relief if the court determines that such additional relief is appropriate to redress or avoid an injustice . . . Order the trustee to pay to the petitioner or any other party all reasonable costs incurred by the party to adjudicate the affairs of the trust pursuant to this section, including, without limitation, reasonable attorney’s fees. The trustee may not be held personally liable for the payment of such

costs unless the court determines that the trustee was negligent in the performance of or breached his or her fiduciary duties.”

The attorney’s fee award is not supportable under this statute for multiple reasons. First, NRS 153.031(3) relates to equitable relief provided by a court, not a legal claim presented to the jury. *Diotallevi v. Sierra Dev. Co.*, 95 Nev. 164, 167, 591 P.2d 270, 272 (1979) (“Having subject matter jurisdiction, the court could bring to bear its full equitable powers” under NRS Chapter 153). Wendy failed to obtain any equitable relief whatsoever from the district court. XIII JA TJA002220-2254. The distinction between legal and equitable claims is critical here, especially where the trial was bifurcated. The harm to Wendy from Todd’s breaches of fiduciary duty was remedied entirely by the jury’s award of damages to Wendy. Her entitlement to attorney’s fees and interest is governed by Nevada procedure and the standard American rule of attorney’s fees as if she had brought any other generic tort claim. In contrast, the Court’s equitable powers include the ability under NRS 153.031(3)(b) to specifically supplement equitable relief with an award of attorney’s fees or costs. This power, however, requires the predicate

that the court actually provide equitable relief, which it has not done here.

Second, there is no basis to conclude that the additional relief of the attorney's fee award "is appropriate to redress or avoid an injustice." NRS 153.031(3). In such circumstances, courts may consider "whether the successful party benefitted or enhanced the trust estate in deciding whether his attorneys' fees should be awarded from the trust estate." Bogert's *The Law of Trusts and Trustees, Procedure—Parties—Costs and fees*, § 871 (discussing the substantial benefit rule). The "redress" provided by this award of attorney's fees is a direct benefit to Wendy's counsel, and not to Wendy, the other beneficiaries, or to the Family Trust. And the "injustice" to presumably be redressed is the breach of fiduciary duty by Todd, which resulted in a \$15,000 damage award to Wendy. There has been no benefit to the Family Trust from Wendy's scorched-earth litigation and the opposite is true as the Family Trust has been severely depleted by the litigation.

Third, other relevant statutes should displace NRS 153.031(3). For instance, NRS 163.115 provides that if a "proceeding instituted [to remove a trustee]. . . by a . . . beneficiary of the trust against a trustee

was not instituted in good faith and based on probable cause, the court may order that the . . . beneficiary who is maintaining the proceeding against a trustee pay . . . reasonable attorney's fees." NRS 163.115(4). The district court found that there was no basis to even consider the "removal of any trustee except Todd." XII JA TJA002115. Despite this finding, the district court awarded attorney's fees to Wendy's counsel, which creates a direct and negative impact upon Stan by depleting the assets of both trusts. The district court should have relied upon NRS 163.115(4) to award fees to Stan from Wendy and not the other way around.

II. Wendy is Not a Prevailing Party Who Should Receive Attorney's Fees.

The district court's orders cannot be reconciled with respect to Wendy's entitlement to attorney's fees. On one hand, the district court awarded \$300,000 directly to Wendy's counsel, in an amount that is not based on any memorandum of fees submitted by Wendy. On the other hand, the district court rejected Wendy's request for an award of costs on the basis that she was not the prevailing party. XVII JA TJA002846-2847. The district court specifically concluded that Wendy was not "the prevailing party" and that while Wendy "did achieve some litigation

success . . . a qualitative and quantitative analysis weighs against awarding costs to Wendy as the prevailing party.” *Id.* at TJA002846-2847.

It is difficult to reconcile how Wendy’s attorneys can receive \$300,000 as additional relief to redress or avoid an injustice due to her purportedly successful challenge to the trusts, but then be denied an award of costs because she was not the prevailing party.

CONCLUSION

For all of the above reasons, Stanley Jaksick asks the Court to reverse the award of attorney’s fees to counsel for Wendy Jaksick, or at a minimum, remand and require Wendy Jaksick to establish that she was a prevailing party and to establish the reasonableness of her attorney’s fees.

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: April 13, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 27(d), I hereby certify that this Opening 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 motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font, Century Schoolbook type. I further certify that this motion complies with the page limits of NRAP 28.1 as it does not exceed 30 pages, calculated in accordance with the exclusions of NRAP 32(a)(7)(C).

Pursuant to NRAP 28.2, I hereby certify that I have read this motion, 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 motion complies with all applicable Nevada Rules of Appellate Procedure.

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I understand that I may be subject to sanctions in the event that this motion is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: April 13, 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRCp 5(b), I hereby certify that I am an employee of McDONALD CARANO LLP and that on April 13, 2021, I served the foregoing document on the parties in said case by electronically filing via the Court's e-filing system, as follows:

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