

No. 81689

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Elizabeth A. Brown
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

TRUDI LEE LYTLE AND JOHN ALLEN LYTLE, TRUSTEES OF THE
LYTLE TRUST,
Appellants,

vs.

SEPTEMBER TRUST, DATED MARCH 23, 1972; GERRY R. ZOBRIST AND
JOLIN G. ZOBRIST, AS TRUSTEES OF THE GERRY R. ZOBRIST AND
JOLIN G. ZOBRIST FAMILY TRUST; RAYNALDO G. SANDOVAL AND
JULIE MARIE SANDOVAL GEGEN, AS TRUSTEES OF THE RAYNALDO G.
AND EVELYN A. SANDOVAL JOINT LIVING AND DEVOLUTION TRUST
DATED MAY 27, 1992; AND DENNIS A. GEGEN AND JULIE S. GEGEN,
HUSBAND AND WIFE, AS JOINT TENANTS,
Respondents.

On Appeal from an Order of the Eighth Judicial District Court, Clark
County, Nevada; The Honorable Timothy C. Williams, District Court Judge;
District Court Case No. A-17-765372-C

APPELLANTS' MOTION FOR REMAND PURSUANT TO NRAP 12A

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APPELLANTS' MOTION FOR REMAND PURSUANT TO NRAP 12A

I. Introduction

September Trust, dated March 23, 1972 (“September Trust”), Gerry R. Zobrist and Jolin G. Zobrist, as Trustees of the Gerry R. Zobrist and Jolin G. Zobrist Family Trust (“Zobrist Trust”), Raynaldo G. Sandoval and Julie Marie Sandoval Gegen, as Trustees of the Raynaldo G. and Evelyn A. Sandoval Joint Living and Devolution Trust Dated May 27, 1992 (“Sandoval Trust”), and Dennis A. Gegen and Julie S. Gegen, Husband and Wife, as Joint Tenants (“Gegen”) (hereafter September Trust, Zobrist Trust, Sandoval Trust and Gegen may be collectively referred to as “Respondents”), by and through their attorneys, Christensen James & Martin, hereby file this Motion for Remand Pursuant to NRAP 12A (“Motion”), because District Court Judge Timothy Williams has certified his intent to grant the Respondents’ Motion to Amend the Attorney’s Fees Order upon which this Appeal is based. The Minute Order demonstrating this certification is attached hereto as Exhibit 1.¹ Therefore, this Appeal should be remanded so that the Attorney’s Fees Order can be amended consistent with Judge Williams’ recent ruling. Accordingly, the instant motion asks this Court for a remand pursuant to NRAP 12A.

¹ The Respondents respectfully request that this Court take judicial notice of Exhibit 1 pursuant to NRS 47.130 as it is a document recorded in the Official Records of Clark County, Nevada, and, therefore, a matter of public record.

II. Relevant Facts and Procedural History

On May 24, 2018, the District Court entered its Order Granting Motion for Summary Judgment or, in the Alternative, Motion for Judgment on the Pleadings and Denying Countermotion for Summary Judgment (“May 2018 Order”) in favor of the Respondents and against the Appellants. *See* Docketing Statement, Exhibit A, p. 3 ¶ 1. On September 11, 2018, the District Court signed an Order in favor of the Respondents and against the Lytle Trust for attorney’s fees, litigation costs and expenses incurred through May 22, 2018 pursuant to NRS 18.010(2) (“First Fees Order”). *Id.* ¶ 2. The Lytle Trust appealed the May 2018 Order and the First Fees Order (Case Nos. 76198 and 77007, consolidated, *Trudi Lee Lytle v. September Trust, Dated March 23, 1972*). This Court entered its Order of Affirmance of the May 2018 Order and First Fees Order on March 2, 2020 (available at *Lytle v. Sept. Tr., Dated Mar. 23, 1972*, No. 76198, 2020 WL 1033050 (Nev. Mar. 2, 2020) (Table)).

On May 26, 2020, Respondents filed a Motion for Attorney’s Fees and Costs in the District Court seeking fees and costs incurred from May 23, 2018 to April 30, 2020. In the Motion, Respondents requested an award of attorney’s fees and costs for, among other things, amounts incurred by the Respondents successfully defending this Court’s Orders on Appeal. *Id.* p. 4 ¶ 11.

A hearing was held on the Motion and Court Minutes were entered on July 7, 2020 wherein the Court stated “The Court also denies any charges related to the appeal.” *See* the Court Minutes attached hereto as Exhibit 2, at 1.² Consistent with this express conclusion in the Minute Order, Respondents drafted the Attorney’s Fees Order with the following Conclusion of Law: “The Court also denies any charges related to the appeal...” *See* Exhibit A to Docketing Statement, p. 6, ¶ 14. The Attorney’s Fees Order, and Notice of Entry of the Order, were entered on August 11, 2020. On August 21, 2020, the Defendants filed their Case Appeal Statement and their Notice of Appeal of the Second Fees Order (“Appeal”). *See* Exhibit C to Docketing Statement.

On September 8, 2020, the Respondents filed their Motion to Amend Order Granting in Part and Denying in Part Respondents’ Motion for Attorney’s Fees and Costs Pursuant to NRCP 52(B) (“Motion to Amend”), requesting that the court amend its findings or make additional findings in its Order related to the appeal fees. *See* Exhibit B to Docketing Statement 4:11-13, 5:4-7. At the hearing held on the Motion to Amend, the Court Minutes entered on December 14, 2020, state:

After additional review and consideration, this Court awards attorney’s fees stemming from appeals under paragraph 25 of the CC&Rs. Accordingly, Plaintiff’s Motion to Amend the Court’s Order Granting in Part and Deny in Part Plaintiff’s Motion for Attorney’s Fees and Cost is GRANTED to reflect such change.

² The Respondents respectfully request that this Court take judicial notice of Exhibit 2 pursuant to NRS 47.130 as it is a document recorded in the Official Records of Clark County, Nevada, and, therefore, a matter of public record.

See Exhibit 1 at 1.

Therefore, Judge Williams has certified that he would amend the Attorney's Fees Order to include attorney's fees related to the appeals if he had jurisdiction.

III. Legal Argument

"[A] timely notice of appeal divests the district court of jurisdiction" to "revisit issues that are pending before [the Supreme Court]." *Mack-Manley v. Manley*, 122 Nev. 849, 855-56, 138 P.3d 525, 530 (2006); *see also Foster v. Dingwall*, 126 Nev. 49, 52, 228 P.3d 453, 455, 2010 WL 1407139 (2010). Once a notice of appeal has been filed, district courts are limited to entering orders "on matters that are collateral to and independent from the appealed order, i.e., matters that in no way affect the appeal's merits." *Mack-Manley*, 122 Nev. at 855, 138 P.3d at 530. However, pursuant to NRAP 12A, remand is available after a ruling in which the District Court states its intent to grant relief on a substantial issue.

NRAP 12A(a) provides that:

If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the clerk of the Supreme Court if the district court states either that it would grant the motion or that the motion raises a substantial issue.

NRCP Rule 62.1(a)(3) provides that if a timely motion is made but the court lacks authority to grant such because of an appeal, the court may grant the motion if the appellate court remands for that purpose. NRCP Rule 62.1(b) provides that, "The

movant must promptly notify the clerk of the supreme court under NRAP 12A if the district court states that it would grant the motion or that the motion raises a substantial issue.” The Advisory Committee Notes to NRCP Rule 62.1 provide that:

This new rule . . . works in conjunction with new NRAP 12A . . . [and] does not attempt to define the circumstances in which a pending appeal limits or defeats the district court’s authority to act. . . . Rather, these rules provide the procedure to follow when a party seeks relief in the district court from an order or judgment that the district court has lost jurisdiction over due to a pending appeal of the order or judgment, consistent with *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978), and its progeny.

The Advisory Committee Notes for NRAP 12A are almost identical (so are not quoted here). NRAP 12A thus codifies this Court’s established *Huneycutt* procedure.

This Court clarified the procedure when a notice of appeal is filed before a timely Rule 52(b) motion in *Foster*, 126 Nev. at 52–53, 228 P.3d at 455 (the progeny of *Huneycutt*). There, this Court held that,

In considering such motions, the district court has jurisdiction to direct briefing on the motion, hold a hearing regarding the motion, and enter an order denying the motion, but lacks jurisdiction to enter an order granting such a motion.

Id. If the Court is inclined to grant the 52(b) Motion, the Court may “certify its intent to do so.” 126 Nev. at 53, 228 P.3d at 455.

At that point, it would be appropriate for the moving party to file a motion (to which the district court’s certification of its intent to grant

relief is attached) with [the Nevada Supreme Court] seeking a remand to the district court for entry of an order granting the requested relief.

Id.; see, e.g., *Cottonwood Homeowners Ass’n, Inc. v. Holland*, 128 Nev. 890, 381 P.3d 604 (2012) (Table).

In accordance with NRAP 12A, the Appellants have attached the Minute Order entered by the District Court showing its intent to grant the relief requested and amend the Attorney’s Fees Order to include appeals’ fees. Here, a remand will allow the District Court to amend the Attorney’s Fees Order to include the language that attorney’s fees and costs were granted for the appeals. Remand would save judicial resources because the District Court has clarified its Attorney’s Fees Order. There is no reason to burden this Court with additional briefing on this issue.

The Appellants are now appropriately seeking a remand to the District Court for proceedings consistent with the Minute Order and NRAP 12A(b), which provides that, “If the district court states that it would grant the motion...the Supreme Court...may remand for further proceedings but the appellate court retains jurisdiction unless it expressly dismisses the appeal.” This Motion also provides notice to the Supreme Court Clerk of the District Court’s ruling that the Attorney’s Fees Order should be amended.

CONCLUSION

Appellants request that this matter be remanded to the District Court for proceedings consistent with its Minute Order.

DATED this 23rd day of December 2020.

CHRISTENSEN JAMES & MARTIN

By: /s/ Wesley J. Smith, Esq.

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Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this date, the 23rd day of December 2020, I submitted the foregoing Appellants' Motion for Remand Pursuant to NRAP 12A for filing and service through the Court's eFlex electronic filing service. According to the system, electronic notification will automatically be sent to the following:

JOEL D. HENRIOD
DANIEL F. POLSENBERG
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/s/ Wesley J. Smith
Wesley J. Smith, Esq.

EXHIBIT 1

A-16-747800-C

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Title to Property

COURT MINUTES

December 14, 2020

A-16-747800-C Marjorie B. Boulden Trust, Plaintiff(s)
vs.
Trudi Lytle, Defendant(s)

December 14, 2020 8:00 AM Minute Order

HEARD BY: Williams, Timothy C. **COURTROOM:** Chambers

COURT CLERK: Christopher Darling

JOURNAL ENTRIES

- After review and consideration of the points and authorities on file herein and oral argument of counsel, the Court determined as follows:

After additional review and consideration, this Court awards attorney's fees stemming from appeals under paragraph 25 of the CC&Rs. Accordingly, Plaintiff's Motion to Amend the Court's Order Granting in Part and Deny in Part Plaintiff's Motion for Attorney's Fees and Cost is GRANTED to reflect such change.

Counsel for Plaintiff, Marjorie Boulden Trust, shall prepare a detailed Order, Findings of Facts, and Conclusions of Law, based not only on the foregoing Minute Order but also on the record on file herein. This is to be submitted to adverse counsel for review and approval and/or submission of a competing Order or objections prior to submitting to the Court for review and

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signature.

CLERK'S ORDER: A copy of this Minute Order has been electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

EXHIBIT 2

A-16-747800-C

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Title to Property

COURT MINUTES

July 07, 2020

A-16-747800-C Marjorie B. Boulden Trust, Plaintiff(s)
vs.
Trudi Lytle, Defendant(s)

**July 07, 2020 8:00 AM Minute Order re: Plaintiffs' Motion for Attorney's Fees
and Costs**

HEARD BY: Williams, Timothy C. **COURTROOM:** Chambers

COURT CLERK: Christopher Darling

JOURNAL ENTRIES

- After a review and consideration of the record, the points and authorities on file herein, and oral argument of counsel, the Court determined as follows:

As noted at the July 7, 2020 hearing, the Court finds the CC&Rs provide a basis for attorney fee recovery. Further, Plaintiff has satisfied the Brunzell factors. Additionally, Court restates that fees sought regarding those matters before Judge Kishner are denied—\$36,259.00. The Court also denies any charges related to the appeal. Moreover, under this case's circumstances, the Court will not award fees for clerical work—\$23,374.00.

The Court has reviewed the Plaintiff's submitted billing statements, which the fees charged total \$149,403.20. In light of the findings above, the \$149,403.20 is reduced by \$36,259.00 and \$23,374.00, which leaves a difference of \$89,770.20. Further, as suggested by the Defendant, the Court will apply a 15% discount to the \$89,770.20. The difference after the discount is \$76,304.67.

Consequently, THE COURT **GRANTS** PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND COSTS BUT **WITH MODIFICATIONS**. Also, the Court grants costs in the sum of \$4,145.08.

Plaintiff shall prepare a detailed Order, Findings of Facts, and Conclusions of Law, based not only on the foregoing Minute Order, but also on the record on file herein. This is to be submitted to adverse counsel for review

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and approval and/or submission of a competing Order or objections, prior to submitting to the Court for review and signature.

CLERK'S NOTE: This Minute Order has been served to counsel electronically through Odyssey eFile.