IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Mar 09 2022 10:49 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

COMSTOCK RESIDENTS ASSOCIATION; and JOE McCARTHY,

Appellants,

v.

LYON COUNTY BOARD OF COMMISSIONERS; and COMSTOCK MINING INCORPORATED,

Respondents.
_____/

Case No. 83463

Appeal from Third Judicial Dist.
Court Case No. 14-CV-00128

RESPONDENT COMSTOCK MINING INCORPORATED'S ANSWERING BRIEF

JAMES R. CAVILIA, ESQ.
State Bar No. 3921
JUSTIN M. TOWNSEND, ESQ.
State Bar No. 12293
ALLISON MACKENZIE, LTD.
402 North Division Street
Carson City, NV 89703
(775) 687-0202

Attorneys for Respondent,
Comstock Mining Incorporated

//

//

NRAP 26.1 DISCLOSURE

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.

- Winfield Group

ALLISON MacKENZIE, LTD.

By: */s/ Justin M. Townsend*
JAMES R. CAVILIA, ESQ.
Nevada State Bar No. 3921
JUSTIN M. TOWNSEND, ESQ.
Nevada State Bar No. 12293
402 North Division Street
Carson City, NV 89703
(775) 687-0202

Counsel of Record for Respondent,
Comstock Mining Incorporated

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ROUTING STATEMENT

Respondent, COMSTOCK MINING INCORPORATED ("CMI"), objects to Appellants' request that this appeal be resolved by the Supreme Court on the basis of NRAP 17(a)(11) or (12). While CMI does not object to the Supreme Court retaining this appeal on the basis of workload of each appellate court under NRAP 17(c), this appeal is presumptively assigned to the Court of Appeals pursuant to both NRAP 17(b)(7) and (9) – "appeals from postjudgment orders in civil cases" and "administrative agency cases except those involving tax, water, or public utilities commission determinations." This action first arose from a decision of the Lyon County Board of Commissioners, an administrative agency, and does not concern tax, water, or public utilities commission determinations. It is a case concerning land use decisions of the aforementioned administrative agency. Moreover, the particular issue in this appeal is whether the District Court erred in awarding postjudgment attorney's fees.

STATEMENT OF ISSUES

The District Court did not err in awarding attorney's fees to Respondents, Lyon County Board of Commissioners (the "Board") and CMI under NRS 18.010 where Appellants, Comstock Residents Association and Joe McCarthy (collectively "CRA"), failed over more than eight years of litigation in this matter, to produce a scintilla of evidence to support any of its claims against the Board and

CMI, undisputed prevailing parties in every one of CRA's four causes of action asserted in this matter, and under NRS 278.0237, which specifically authorizes an award of fees in this case.

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

STATEMENT OF THE CASE

CRA appeals from a July 30, 2021 Order Granting Defendants' Motion for Attorneys' Fees entered in the Third Judicial District Court by the Hon. Robert Estes, Senior District Judge, in favor of CMI and the Board.

CRA filed its Complaint in this matter on January 31, 2014 and alleged four causes of action: (1) violation of Nevada's Open Meeting Law; (2) violation of constitutional due process; (3) abuse of discretion/judicial review of agency decision; and (4) violation of NRS 278.220(4). The District Court resolved each of CRA's claims in favor of the Board and CMI, in multiples orders, all of which CRA ultimately appealed unsuccessfully.

A December 3, 2014 Order dismissed CRA's Open Meeting Law and due process claims. A June 5, 2015 Order denied CRA's petition for judicial review and resolved CRA's statutory claims in favor of CMI and the Board.

CRA appealed those two orders and the Supreme Court entered an Order on December 2, 2016 Affirming in Part, Reversing in Part, and Remanding. The Supreme Court affirmed the District Court's dismissal of the Open Meeting Law claims, denial of CRA's petition for judicial review, and judgment on the statutory claims. The Supreme Court, in affirming the District Court's orders on CRA's first, third, and fourth causes of action, concluded CRA had failed to allege facts to support the Open Meeting Law claim, the Board had relied on substantial evidence

in approving CMI's land use application, and the Board had complied with NRS 278.220.

The Supreme Court reversed, however, the dismissal of CRA's due process claim and remanded the same on the basis only that CRA had pled sufficient allegations to proceed on the claim. The Supreme Court ordered the District Court to conduct further proceedings only on the due process claim. Following a period of discovery in which CRA conducted written discovery and depositions, the parties submitted final briefs to the District Court for a decision on the merits. CRA submitted a brief in which it could point to no evidence it had discovered or to any legal authority to support its due process claim. On June 11, 2019, the District Court entered final judgment on CRA's due process claim in favor of the Board. CRA appealed that decision and, in Docket 79445, on January 11, 2021, a unanimous panel of the Supreme Court filed an Order of Affirmance, concluding CRA had failed to present evidence sufficient to support its claim that the Board violated CRA's due process rights when it approved CMI's application for a master plan amendment and zone change. The Supreme Court went on to deny CRA's petitions for rehearing and for en banc reconsideration on February 25, 2021 and April 9, 2021, respectively.

The District Court then entered its July 30, 2021 Order Granting Defendants' Motion for Attorneys' Fees, awarding fees in the amount of

$50,000.00 to the Board and fees and costs in the total amount of $203,151.47 to CMI. This appeal followed.[1]

STATEMENT OF FACTS

A. CRA's Statement of Facts Unnecessarily Recites Facts Not Relevant to the Narrow Issue of Attorneys' Fees, the Only Issue Submitted for Review on Appeal.

CRA sets forth its version of the facts going back to discovery of the Comstock lode in 1859, providing essentially the same recitation of facts CRA has pushed at every turn in these proceedings for more than eight years. One interesting difference in the version of facts CRA presents here is CRA's reference to itself as 'Citizens' and references to CMI as 'Mining Company', neither of these terms having been used in these proceedings in any other pleading or paper before the Opening Brief filed herein. The Supreme Court should look past CRA's transparent and ineffective attempt to cast itself in a better light and CMI in a worse light and see CRA's Statement of Facts for what it is – a burial of the simple truth CRA has dragged this litigation on and on for years without an iota of success – unless, of course, CRA considers the very dragging on of this matter a success. CMI and the Board have been found, at literally every turn, to have complied with the law. CRA's insistence on continuing to litigate this matter, at significant and

[1] The Board and CRA have stipulated to an extension of time within which the Board may file an Answering Brief. This Answering Brief is being filed by CMI on its own.

ever mounting cost to CMI is, at the end of the day, the most important fact for consideration in this appeal. CRA's version of the facts and its repeated recitation thereof in this appeal amount to nothing more than one last improper attempt at relitigating issues already decided.

At issue in this appeal is the simple question of whether the District Court appropriately awarded attorney's fees to the Board and CMI. NRAP 28(a)(8) mandates an Opening Brief contain "a statement of facts relevant to the issues submitted for review with appropriate references to the record." CRA's recitation of the facts goes well beyond a statement of relevant facts.

B. CRA's Incessant and Vexatious Efforts Over More than Eight Years to Prevent CMI's Use of Property.

In or about August 2013, CMI submitted to the Lyon County Planning Department a Master Plan Amendment and Zone Change Application (the "Application"). JA Vol. 4 at 0901-0923. CRA actively and vociferously opposed the Application from the outset. JA Vol. 4 at 0958-0961. The Lyon County Planning Commission considered the Application on December 10, 2013 and voted to recommend denial of the Application. JA Vol. 4 at 0838-0844. The Board, having the recommendation of the Planning Commission, considered the Application at a public hearing on January 2, 2014 and voted to approve the Application. JA Vol. 4 at 0947-0956.

CRA filed suit on January 31, 2014, seeking judicial review of the Board's decision and asserting claims for open meeting law violations, violations of due process rights, and other statutory claims. JA Vol. 1 at 0001-0035. The District Court dismissed two of CRA's four causes of action on December 3, 2014 and ruled against CRA on the remaining causes of action on June 5, 2015. JA Vol. 1 at 0107-0112; JA Vol. 3 at 0617-0620. CRA appealed these orders and the Supreme Court affirmed everything but the dismissal of CRA's due process claim, remanding that claim only to allow CRA to conduct discovery to see if it could support that claim. *See* Supreme Court Docket No. 68433, Document No. 16-37327.

On remand of the due process claim, CRA conducted written discovery and depositions and the parties thereafter submitted briefs and evidence to the District Court for a decision on the merits. JA Vol. 3 at 0708 to JA Vol. 7 at 1640 (containing the parties' briefs and all exhibits submitted to the District Court on the due process claim). The District Court entered judgment on CRA's due process claim in favor of the Board and CMI on July 11, 2019, noting the evidence submitted by CRA failed to support a claim that CRA's due process rights had been violated. JA Vol. 7 at 1641-1644. CRA appealed this judgment and a panel of the Supreme Court unanimously affirmed the judgment. *See* Supreme Court Docket No. 79445, Document No. 21-00718. CRA petitioned for rehearing and

then for en banc reconsideration, both of which were denied. *See* Supreme Court Docket No. 79445, Document Nos. 21-05537 and 21-10276, respectively.

C. CMI was Forced to Spend Hundreds of Hours Defending Against CRA's Baseless Claims, Incurring Hundreds of Thousands of Dollars in Legal Expenses.

At every stage of these proceedings, CRA asserted generally the same set of facts, framed to cast CMI and two members of the Board in an extremely negative light. Notwithstanding CRA's countless efforts in this regard, CMI and the Board were vindicated by every decision entered in these proceedings, whether by the District Court or the Supreme Court. However, vindication came at significant cost. On August 1, 2019, before CRA appealed the due process judgment, the Board and CMI filed a Motion for Attorneys' Fees in which they presented legal grounds and presented Brunzell factors for the District Court's consideration in support of an award of fees in the amount of $50,000.00 to the Board and fees and costs in the total amount of $203,151.47. JA Vol. 7 at 1645-1661. CRA filed an Opposition and the Board and CMI filed a Reply. JA Vol. 7 at 1662-1679.[2] The District Court entered the Order Granting Defendants' Motion for Attorneys' Fees on July 30, 2021, awarding the full amounts requested. JA Vol. 7 at 1685-1686.

///

[2] It goes without saying CMI has been forced to spend substantially more time, incurring additional fees, since August 1, 2019 dealing with CRA's unsuccessful appeal of the due process judgment and this appeal. CMI has not requested an award of these additional fees and costs.

SUMMARY OF ARGUMENT

The District Court, in its sound discretion, properly awarded attorney's fees to the Board and to CMI under NRS 18.010(2) because the Board and CMI were the prevailing parties on every one of CRA's claims, they recovered less than $20,000, and CRA brought and maintained this action without reasonable grounds. Additionally, or in the alternative, the District Court properly awarded attorney's fees under NRS 278.0237, which authorizes such an award in actions, like this one, brought under NRS 278.0233.

STANDARD OF REVIEW

CRA blatantly asserts the wrong standard of review for this appeal. De novo review is, unquestionably, not the standard of review in this matter. It is well settled in Nevada "an award of attorney fees [is reviewed] for an abuse of discretion." Las Vegas Review-Journal v. City of Henderson, 500 P.3d 1271, 1276, 137 Nev. Adv. Op. 81 (2021).

ARGUMENT

A. Legal Authority Supports an Award of Fees In this Case.

As a general rule, "attorney fees cannot be recovered as a cost of litigation unless authorized by agreement, statute or rule." Sandy Valley Associates v. Sky Ranch Estates Owners Ass'n, 117 Nev. 948, 956, 35 P.3d 964, 969 (2001)

abrogated on other grounds. CMI contends that attorney's fees should be awarded in this case pursuant to NRS 278.0237 and NRS 18.010.

CRA filed claims in this action arising out of the Board's land use decision involving CMI's Application for a master plan amendment and zone change. CRA argued the decision of the Board was arbitrary and capricious, and sought judicial review of the Board's decision. See Paragraphs 123-131 of the Complaint; JA Vol. 1 at 0032-0033. The Supreme Court has recognized that NRS 278.0233 provides a basis for judicial review of an agency decision on grounds the decision was arbitrary and capricious. Redrock Valley Ranch, LLC v. Washoe County, 127 Nev. 451, 455-45, 254 P.3d 641, 644 (2011). Just because NRS 278.3195(4) also authorizes judicial review of the Board's decision does not divest the District Court or this Court from concluding CRA's action was an action brought under NRS 278.0233. See NRS 278.0235, providing the mechanism for initiating an action authorized by NRS 278.0233 and which is referenced by NRS 278.3195(4). Judicial review implicates both NRS 278.0233 and 278.3195(4). NRS 278.0237(2) specifically authorizes an award of reasonable attorney's fees, court costs and interest to the prevailing party in a judicial review action brought under NRS 278.0233. Therefore, the District Court's award was properly given.

Additionally, NRS 18.010(2) provides that "the court may make an allowance of attorney's fees to a prevailing party" under one of two circumstances;

first, where "the prevailing party has not recovered more than $20,000;" and second, where the "court finds that the claim…of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." NRS 18.010(2)(a) & (b). NRS 18.010(2) applies to CRA's vexatious claims for open meeting law violations, violations of due process, and violations of provisions of NRS Chapter 278.

The District Court is required to construe the provisions of NRS 18.010(2)(b) liberally and award fees in all appropriate situations in an effort to deter "frivolous or vexatious claims" because such claims "overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public." NRS 18.010(2)(b). As shown by the Statement of Facts set forth above, CRA brought and maintained claims for which it was unable to muster any supporting evidence for more than eight years, apparently only as a means of thwarting CMI's lawful use of its property. A more egregious example of vexatious litigation is hard to fathom.

B. CRA's Claims were Without Reasonable Ground and were Brought and Maintained for Purpose of Delay.

Attorney's fees should be awarded to CMI under NRS 18.010(2) because CMI prevailed on all four of CRA's claims and CRA's claims were vexatious and

caused significant and undue delay in the ability to realize the effect of the Board's decision to approve CMI's Application.

CRA filed this action in an effort to invalidate the Board's approval of CMI's Application. The Board's action on CMI's Application was taken in a public meeting in January 2014, more than eight years ago. The vehicle for such a challenge is a petition for judicial review under the provisions of NRS Chapter 278. See Redrock Valley Ranch, LLC, supra. Judicial review of land use planning decisions is meant to provide a speedy remedy. Kay v. Nunez, 122 Nev. 1100, 1104, 146 P.3d 801, 805 (2006).

In this case, CRA asserted four claims for relief rather than just a simple petition for judicial review. In addition to judicial review, CRA asserted claims its rights were violated under the open meeting law, constitutional due process mandates, and the requirements of NRS 278.220(4).

Based at least in part on the law set forth in Redrock Valley and Kay, the Board and CMI moved to dismiss all of CRA's claims except for its petition for judicial review. The District Court granted the motion to dismiss and CRA subsequently appealed. Both the District Court and the Nevada Supreme Court noted that CRA had failed to allege sufficient facts to support a claim for violation of the open meeting law and that the record confirmed there was no violation of NRS 278.220.

On judicial review of the Board's approval of the Application, the District Court found that the Board's decision was based on substantial evidence. The Supreme Court agreed, specifically noting that while the Board was only required to make any one of five permissible findings, it had actually found all five.

The Supreme Court did, however, remand CRA's due process claim for further proceedings, in order to allow CRA to attempt to prove the factual allegations it had made in support of the due process claim. On remand, the District Court entered an order, on February 13, 2018, allowing CRA to conduct discovery on the issue of whether CMI had improperly influenced two members of the Board such that CRA's due process rights were violated. To that point, four years after filing its Complaint, CRA had conducted no discovery.

Following a period of discovery in which CRA conducted written discovery and depositions, the parties submitted final briefs to the District Court for a decision on the merits of CRA's due process claim. CRA submitted a brief in which it could point to no evidence it had discovered or to any legal authority to support its due process claim. The District Court entered final judgment on CRA's due process claim and found that CMI and the Board had followed all applicable laws in relation to the approval of CMI's Application. The District Court found that CRA had "not shown by a preponderance of the evidence that [CRA] were denied due process." June 11, 2019 Order; JA Vol. 7 at 1685-1686. In other

words, CRA had discovered nothing in more than five years of litigation to support its allegations of due process violations.

All of the foregoing conclusively shows that CRA's claims were brought without reasonable ground. Further, CRA's litigation tactics and improper and unfounded claims delayed CMI's ability to use its property as approved by the Board on January 2, 2014. For these reasons, the District Court's award of attorney's fees to CMI was proper, under NRS 18.010(2).

CRA's claims to have presented credible evidence in support of its claims should be rejected. CRA did not present credible evidence or credible legal arguments in support of any of its claims.

Regarding its petition for review of the Board's approval of CMI's Application, CRA falsely equates the evidence presented to the Board in opposition to CMI's application with evidence in support of its petition for judicial review. The question here is not whether CRA presented any credible evidence in opposition to CMI's application in public hearings before the Board. The question is, instead, whether CRA had any evidentiary basis to support a claim in this case that the Board's decision to approve the application was not based on substantial evidence.

As the Supreme Court has already noted in this matter, neither the Court nor the Supreme Court were "permitted to reweigh the evidence to reach a different

result." See Order Affirming in Part, Reversing in Part, and Remanding, Supreme Court Case No. 68433 (Dec. 2, 2016). That the Board's decision to approve CMI's application was based on substantial evidence was clear from the start and CRA had no legal or evidentiary means of persuading the District Court or the Supreme Court to conclude that the Board's action lacked substantial evidentiary support.

Regarding its open meeting law claims, CRA's argument is that a single Supreme Court justice dissented from the majority opinion that upheld dismissal of the claim. CRA's open meeting law claims were based on an argument that members of the Board deliberated on CMI's application outside of a public meeting, but CRA failed to produce any evidence of such deliberations or of any serial gatherings equating to a quorum of the Board. The Supreme Court specifically noted that CRA had failed to even allege the necessary factual elements of an open meeting law claim.

CRA's open meeting law claim was also based on allegations of a deficient agenda, where the ultimate decision was to approve CMI's application as to a reduced amount of acreage from what was noted on the agenda. The Supreme Court noted, again, that CRA could prove no set of facts to support the idea that a reduction in the described acreage would constitute a valid claim that the agenda was deficient. There was neither factual nor legal basis, therefore, for any portion of CRA's open meeting law claim.

Regarding CRA's claim that its rights under NRS 278.220(4) were violated, the Supreme Court concluded that the record clearly showed that the procedures required thereby had been met. CRA's arguments on this claim lacked any merit whatsoever and neither the District Court nor the Supreme Court gave them any credence.

Lastly, in arguing that it presented credible evidence in support of its due process claim, CRA attempts merely to relitigate the claim. The District Court and the Supreme Court (three times, including the denial of CRA's petitions for rehearing and en banc reconsideration) flatly rejected all of CRA's arguments and emphatically found CRA had failed to present evidence to support a due process violation. Again, in more than five years of litigation (now going on more than eight) CRA discovered nothing to support its allegations of due process violations.

C. CMI Presented Brunzell factors, which were Properly Accepted by the District Court.

The Supreme Court, in Brunzell v. Golden Gate Nat. Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), set forth four factors courts must consider when determining an amount of fees to award:

> (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer:

> the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.

CMI set forth facts supporting a finding in its favor as to each of these factors, supported by the affidavits of counsel appearing on behalf of CMI. JA Vol. 7 at 1656-1661. The District Court, in its July 30, 2021 Order Granting Defendants' Motion for Attorneys' Fees, expressly adopted the reasoning and factual assertions of CMI's counsel, under Brunzell, in awarding all fees requested.

An award of $203,151.47 to CMI, considering the length of this litigation, three full appeals, and the fact that CMI prevailed in absolutely every facet hereof is more than reasonable. Again, CMI has incurred yet more fees since filing the Motion for Attorneys' Fees on August 1, 2019.

CONCLUSION

For the reasons set forth herein, CMI respectfully request this Court affirm the District Court's award of attorney's fees.

///

///

///

///

///

///

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this 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 2010 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) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3,495 words.

3. Finally, I hereby certify that I have read this Respondent Comstock Mining Incorporated's Answering 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 9th day of March, 2022.

ALLISON MacKENZIE, LTD.
402 North Division Street
Carson City, NV 89703
(775) 687-0202

By: */s/ Justin M. Townsend*
JAMES R. CAVILIA, NSB 3921
jcavilia@allisonmackenzie.com
JUSTIN M. TOWNSEND, NSB 12293
jtownsend@allisonmackenzie.com

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law, and that on this date, I caused the foregoing document to be served on all parties to this action by:

✓ Efiling Notification System of the Nevada Supreme Court as follows:

John L. Marshall, Esq.
Debbie Leonard, Esq.
Stephen Rye, Esq.

DATED this 9th day of March, 2022.

/s/ Nancy Fontenot
NANCY FONTENOT

4856-4050-4339, v. 2