IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: D.O.T. LITIGATION

GREEN LEAF FARM HOLDINGS, LLC; GREEN THERAPEUTICS LLC, NEVCANN, LLC; RED EARTH, LLC AND THC NEVADA, LLC,
Appellants,
vs.

THE STATE OF NEVADA, ON RELATION OF ITS DEPARTMENT OF TAXATION; CANNABIS COMPLIANCE BOARD; LONE MOUNTAIN PARTNERS, LLC; DEEP ROOTS MEDICAL, LLC; NEVADA ORGANIC REMEDIES, LLC,
Respondents.

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Supreme Court Case No.: 86071

District Court Case No.: A787004

APPELLANTS GREEN LEAF FARM HOLDINGS LLC; GREEN THERAPEUTICS LLC; NEVCANN, LLC; RED EARTH, LLC AND THC NEVADA, LLC'S REPLY BRIEF

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Docket 86071 Document 2024-11573

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I. Appellants Only Maintained Two Causes of Action Against Respondents, Neither of Which Provides for the Recovery of Costs Under NRS 18.020

Respondents ask this Court to overlook the actual claims which Appellants asserted in order to try and avail themselves of the statutory protections of those specific delineated categories providing for recovery of costs under NRS 18.020. The only claims pled against Respondents were "Declaratory Judgment" and "Petition for Judicial Review, neither of which provide for the recovery of costs herein. (Vol. 6 AA1294-1389). Both of these actual claims (in line with the gravamen of Appellants' Complaint) were always targeted towards, and intended to address, the DOT's actions but eventually Appellants had to include the Respondents for procedural purposes.[1]

In granting Appellants' claims for declaratory relief, the district court specified as follows:

> **The claim for declaratory relief is granted**. The Court declares:
>
> **The DOT acted beyond its scope of authority when it arbitrarily and capriciously replaced the mandatory requirement of BQ2**, for the background check of each

[1] Respondent Lone Mountain Partners, LLC ("Lone Mountain") acknowledges the same when it states, "Appellants **challenged the 2018 RME licensing process** on numerous grounds . . .". *See* Lone Mountain's Answering Brief [at 3](emphasis added).

> prospective owner, officer and board member with the 5% or greater standard in NAC 453.255(1). This decision by the DOT was not one they were permitted to make as it resulted in the modification of BQ2 in violation of Article 19, Section 2(3) of the Nevada Constitution.

(Vol. 6 AA1444)(emphasis added).

The district court did more than order the DOT to simply follow the law as Respondents suggest[2] – it specifically stated that DOT acted *beyond its authority and violated the Nevada Constitution*. *Id*. These are serious conclusions of violations of law. While Respondents argue that the practical consequence was nevertheless hollow, that does not negate the plain reading of the FFCOL which clearly found significant errors in the process as detailed throughout its decision (as Appellants set forth in pages 19-21 of their Opening Brief). After detailing those significant errors, the district court then ruled the DOT acted "**arbitrarily and capriciously**" in a manner that it was "**not permitted to make**". (Vol. 6 AA1444)(emphasis added). There is certainly nothing pronounced in the Court's FFCOL on the declaratory relief claim *in favor of Respondents*.[3] Therefore, the

[2] "In other words, the district court issued declaratory relief directing the DOT to comply with the law and uphold obligations the DOT already was required to uphold." *See* Respondent Deep Roots Harvest, Inc. (f/k/a Deep Roots Medical, LLC)'s Answering Brief [at 6].

[3] The district court did acknowledge that the DOT provided a *post-hearing submission* that certain applicants provided the required information for each prospective owner, officer and board member, one of which included Deep Roots.

FFCOL plainly grants declaratory relief in favor of Appellants, rendering them the prevailing parties on that specific claim.

Appellants' only other claim against Respondents was that of a petition for judicial review seeking evaluation of the DOT's administrative decision to deny their applications. However, pursuant to NRS 233B.130, any petition requesting the district court to review the decision of an administrative body also requires identification of all parties of record to the administrative proceeding; thus, Respondents had to be named as well. While Appellants acknowledge that they did not prevail on that specific claim against the DOT, the district court specifically pronounced that costs for petitions for judicial review are not reimbursable under NRS 18.020 and as such, do not serve as a basis for the court's findings. (Vol. 10. AA2349)(stating: "I would agree judicial – a pure petition for judicial review comes up through the administrative process. That does not have an 18.020 concept.").

(R.App 0043). However, the DOT was the only party in possession of all the unredacted applications and could confirm such attestations as to ownership; thus, Appellants had no way of ever being privy to the same. (R.App 0031). This lack of access to information made for a completely unlevel playing field for Appellants in the underlying litigation as they were incapable of demonstrating the inequity in treatment of applications which were "heavily redacted because of the highly competitive nature of the industry and sensitive financial and commercial information being produced". *Id*. It was ultimately this lack of information in the record which largely prohibited the district court from being able to properly assess the claims before it in Phase 1 and Phase 2. Notably, Appellant THC Nevada, LLC was the only applicant that *did* provide its unredacted application (Vol. 6 1456).

Thus, the *only* claim and basis in providing for the award of costs against Respondents was that of "Declaratory Judgment".

II. *Even Assuming* Respondents Were the Prevailing Party on the Declaratory Relief Claim, That Action Did Not Seek to Recover Personal Property Valued Over $2500

Even if this Court determines Respondents are the prevailing party on the declaratory relief claim, it is not one that falls under the purview of NRS 18.020. Appellants' cause of action challenged the manner in which the DOT applied NRS 453D.210. (Vol. 6 AA1312). More specifically, Appellants alleged that "NRS 453D.210(4)-(5)(a) permit the DOT to approve an application only if it complete, as defined in NRS 453D.210(4)-(5)(a) and NAC 453D.268." *Id.* Appellants went on to assert that "NRS 453D.210(5) sets forth additional objective factors that must be met in order for DOT to approve a given application" and those factors must result in "an impartial and numerically scored competitive bidding process." (Vol. 6 AA 1312-1313). Appellants further alleged that the factors were "not applied equally and fairly to all applicants" and, therefore, resulted in violation of NRS 453D.210(6); whereas the successful applicants, including Respondents, asserted the factors were applied equally and fairly to all applicants. *Id*. (Vol. 6 AA 1313). Thus, Appellants asserted the "foregoing issues are ripe for judicial determination because there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment". *Id.*

Accordingly, the plain reading of Appellants' allegations in the claim for declaratory judgment do not constitute a claim for "recovery of personal property, where the value of the property amounts to more than $2,500". *Id.* This is a claim asking the district court to declare that the DOT did not follow the law when it undertook the grading process for the applications. And that is what the district court declared when it said, "[**t]he claim for declaratory relief is granted**", and further specified how the DOT in fact violated the Nevada Constitution. As such, it did not seek to recover personal property valued at more than $2,500. Accordingly, the claim for declaratory relief does not fall into one of the limited provisions of NRS 18.020 and any award for costs pursuant thereto is an abuse of discretion.[4]

[4] Respondent Lone Mountain argues waiver by Appellants regarding the challenge to NRS 18.020 for claims tried in Phase 2 of the proceedings (which only pertained to the claim for declaratory judgment as to Respondents). *See* Lone Mountain's Answering Brief [at 25]. Lone Mountain asserts this argument based on the joinder that Appellants had made to TGIG Plaintiffs' Motion to Retax; however, Appellants *also joined* in "High Sierra Holistics, LLC's Motion to Retax and Settle Costs regarding Lone Mountain" which does specifically challenge Lone Mountain's assertion of costs for the declaratory relief as not being one of those set forth in NRS 18.020. (Vol. 9 AA2082)(stating "Consequently, the Second Phrase Claims did not proceed to judgment in favor of LMP, and there is no court order declaring any party as the prevailing party as to those claims. Further, pursuant to NRS 18.020, LMP does not fall within any of the identified categories to recover its costs.") *See also* (Vol. 9 AA 2154-AA2157)(emphasis added). Thus, Appellants dispute such claims of waiver.

III. A Petition for Judicial Review is Not a Special Proceeding[5]

Respondent Deep Roots rely on one case, *T.L. Townsend Builders, LLC v. Nev. State Contractors Bd.,* No. 80518 (Nev. Apr. 16, 2021), for the premise that a case where a party seeks judicial review is a "special proceeding" under NRS 18.020(4). In *T.L. Townsend Builders, LLC*, the Nevada Supreme Court confirmed that the Nevada State Contractors Board, as a regulatory body, was entitled to recovery of attorneys' fees and costs pursuant to NRS 622.410. The Court also perfunctorily cited to NRS 18.020(4). Therefore, while *T.L. Townsend Builders, LLC*, confirmed the award to the regulatory agency for its fees and costs, there was no specific holding as Respondents suggest that a petition for judicial review unequivocally constitutes a special proceeding for purposes of a non-regulatory body participant.[6] *Id.* This is consistent with the district court's determination that "a pure petition for judicial review comes up through the administrative process. That does not have an 18.020 concept." (Vol. 10. AA2349).

[5] This argument is limited to Deep Roots because Lone Mountain did not seek costs in connection with Phase 1, the petition for judicial review. *See* Lone Mountain's Answering Brief [at 6: FN2].

[6] A review of the appellant's briefing in that case shows that appellant does not even raise the issue of whether or not a petition for judicial review was improperly determined to be a special proceeding.

If the Nevada legislature intended costs be awarded for petitions for judicial review, it would have expressly stated the same. *Smith v. Crown Financial Services of America*, 111 Nev. 277, 286, 890 P.2d 769, 775 (1995). Not only does the plain language of NRS 18.020 not reference petition for judicial review, but the legislature did not include more expansive phrases in the wording of the statute such as "including but not limited to" or "in other actions where the Court deems appropriate". Thus, the plain language of NRS 18.020 limits recovery of costs to only the five cases specified, and the Court must follow the plain language of the statute. *See Harris Associates v. Clark County Sch. Dist.*, Nev. 638, 641-42, 81 P.3d 532, 534 (2003). It is significant that the legislature did not specifically delineate petitions for judicial review in the types of cases for which a party may recover its costs. The legislature is presumed to have knowledge of existing statutes related to the same subject, *i.e.*, NRS Chapter 233B. *See City of Boulder v. General Sales Drivers,* 101 Nev. 117, 119, 694 P.2d 498 (1985)*; Ronnow v. City of Las Vegas,* 57 Nev. 332, 366, 65 P.2d 133 (1937).

Chapter 233B of the NRS does not classify a petition for judicial review as a special proceeding. NRS 233B.130 provides that judicial review in a district court is available to any party who is aggrieved by a final decision from an administrative proceeding in a contested case. An aggrieved party seeking review of a district court's decision on a petition for judicial review may appeal which "shall be taken

as in other civil cases." NRS 233B.150. NRS Chapter 233B lacks any indication a petition for judicial review is a special proceeding.

NRS 233B.131 is the only section of Chapter 233B which addresses costs in that it allows a court to assess additional costs against a party unreasonably refusing to limit the record to be transmitted to the reviewing court in for a petition for judicial review. NRS Chapter 233B contains no other mention of assessing costs against a party in a petition for judicial review and it does not mention or refer to NRS Chapter 18.

NRS 18.020, which was enacted in 1911, has been amended six times since then, with the most recent amendment occurring in 1995 where it added to subsection 4 the following language "except a special proceeding conducted pursuant to NRS 306.040." 1995 Stat. of Nev., at 2794. By amending NRS 18.020 multiple times and not including petitions for judicial review as one of the type of cases for which costs may be awarded, the Court may presume that the Legislature intended only to include those types of cases specified in NRS 18.020. *See Williams v. Clark County Dist. Attorne*y, 118 Nev. 473, 487-88, 50 P.3d 536, 545 (2002) (Rose, J., concurring and dissenting in part) ("[W]e have often said that the legislature is presumed to know what it is doing and purposefully uses the specific language [it chooses].").

Ultimately, both parties can agree that there is not a plethora of case law in Nevada on this issue. *See also State v. Black*, No. 61728, at *4 (Nev. July 30, 2014)(where the Nevada Supreme Court declined to address an untimely claim that a petition for judicial review is not a "special proceeding" in which costs may be awarded under NRS 18.020(4)). Thus, in the event the Court clarifies the same herein, those costs recoverable would only be limited to those for Phase 2, the petition for judicial review, which was a very limited phase of the underlying proceedings.[7]

IV. The Court Did Not Abuse its Discretion In Denying Deep Roots its Pre-Appearance Costs

Deep Roots acknowledges that there "does not appear to be any case law from Nevada expressly confirming that a prevailing defendant may recover costs incurred after the lawsuit was filed but before the date of its answer." *See* Deep Roots' Answering Brief [at ix]. Deep Roots further acknowledges an award of costs is reviewed for abuse of discretion. *LVMPD v. Blackjack Bondi*ng, 131 Nev. 80, 89, 343 P.3d 608, 614 (2015); *Village Builders 96, L.P. v. U.S. Labs., Inc*., 121 Nev.

[7] For example, Deep Roots submitted $13,355.25 in travel and lodging fees. (Vol. 6 AA1466)(Vol 7. AA1674-1715). However, argument regarding the petition for judicial review was conducted virtually; therefore, no travel and lodging was required. (Vol. 6 AA1449, FN 3). Moreover, the claim was limited to arguments surrounding the review of the administrative record submitted by the DOT and Deep Roots has not properly evidenced which of its purported costs were tied directly to such administrative review challenge.

261, 276, 112 P.3d 1082, 1092 (2005). A trial court only abuses its discretion when it exercises such discretion "in clear disregard of the guiding legal principles. . . ." *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993). Accordingly, the district has the discretion to exclude those pre-appearance costs as it is not in clear disregard of the guiding legal principles on this issue.

Awarding *pre-appearance* costs also has the potential to unfairly penalize the taxed party as it is then responsible and subject to fee shifting penalties before ever being aware that a party is even accruing them. Thus, practically speaking it only makes sense to award and limit the return of costs for those that are accrued once a party has formally appeared in case. Appellants' Initial Complaint was filed on January 4, 2019. (Vol. 1 AA0001-0316). That Initial Complaint only named the DOT. *Id.* On February 8, 2019, Appellants filed their First Amended Complaint. (Vol. 2-3 AA0316-0635). That first Amended Complaint asserted no new causes of action, nor named any new defendants. *Id.* An Errata to the First Amended Complaint was filed by Appellants on February 21, 2019 in order to address an attorney added in error to the caption. (Vol. 3-4 AA0636-0958). On May 21, 209, a Second Amended Complaint was filed on May 21, 2019 to add an additional party as a plaintiff. (Vol. 4-5. AA0959-1278). It was not until January 29, 2020 that the Third Amended Complaint was filed adding Respondents for the first time. (Vol. 6 AA1294-1389). Deep Roots then answered on February 12, 2020.

It is from this point on the district court determined, using its discretion, that costs were properly reimbursable. *U.S. Design & Const. Corp. v. I.B.E.W. Local 357*, 118 Nev. 458, 463 50 P.3d 170, 173 (2002)(Even when an award of costs is mandated, "the district court still retains discretion when determining the reasonableness of the individual costs to be awarded.") In its discretion, it was reasonable for the district court to disallow fees incurred before appearing in the litigation. This decision has not been shown by Deep Roots to be made in clear disregard of the guiding legal principles on this issue. Thus, Deep Roots has not met its high burden of demonstrating that the district court abused its discretion in limiting such costs to Deep Roots.

CONCLUSION

A review of Appellants' claims, as set forth in their Third Amended Complaint, makes it clear there were no claims against the third-party intervenors for which they (a) prevailed and/or (b) fall under NRS 18.020 entitling them to the special statutory right to the return of costs. As such, respectfully, the Appellants submit that the district court abused its discretion and asks this Court to reverse the findings that any Respondents (as third-party intervenors), are entitled to costs. In the event that this Court confirms that Respondents are entitled to costs, Appellants ask this Court to confirm the district court's discretion in limiting such costs to Respondents after they appeared in the case and those solely limited to Phase 2.

CERTIFICATE OF COMPLIANCE

a. 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 Word for Mac Version 16.80 in 14-point Times New Roman font.

b. 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 does not exceed 14,000 words.

c. Finally, I hereby certify that I have read this appellate 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.

April 1, 2024

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CERTIFICATE OF SERVICE

The undersigned, an employee of SUGDEN LAW, hereby certified that on the 1st day of April, 2024, she served a true and correct copy of the foregoing, **APPELLANTS GREEN LEAF FARM HOLDINGS LLC; GREEN THERAPEUTICS LLC; NEVCANN, LLC; RED EARTH, LLC AND THC NEVADA, LLC'S REPLY BRIEF**, to be served to all registered parties, via the Court's Electronic Filing System.

Dated: April 1, 2024

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