

**IN THE SUPREME COURT OF THE STATE
OF NEVADA**

IN THE MATTER OF: D.O.T.
LITIGATION

CLARK NATURAL MEDICINAL
SOLUTIONS LLC; NYE NATURAL
MEDICINAL SOLUTIONS LLC;
CLARK NMSD, LLC; INYO FINE
CANNABIS DISPENSARY LLC; AND
RURAL REMEDIES, LLC,
Appellants/Cross-Respondents,

v.

CLEAR RIVER LLC

Respondent,

Supreme Court Case No. 86771

Electronically Filed
Nov 10 2023 09:33 AM
District Court Case No. A787004
Elizabeth A. Brown
Clerk of Supreme Court

APPEAL FROM ORDER AWARDING COSTS

EIGHTH JUDICIAL DISTRICT COURT
STATE OF NEVADA, CLARK COUNTY
HONORABLE JOANNA S. KISHNER, DISTRICT JUDGE

APPELLANTS' OPENING BRIEF

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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 justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of Appellant's stock: None.

2. Names of all law firms whose attorneys have appeared for Appellant (including proceedings in the district court) or are expected to appear in this court:

Bailey Kennedy

Luh & Associates

3. If litigant is using a pseudonym, the litigant's true name: None

DATED: November 10, 2023

LUH & ASSOCIATES

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I

JURISDICTIONAL STATEMENT

This is an appeal from post-judgment order awarding costs. 2A.App.422. The order is appealable. NRAP 3A(b)(1) and (8).

Notice of entry of the order awarding costs was served on May 19, 2023. 2A.App.422. A notice of appeal was filed on June 12, 2023. 2A.App.444.

II

ROUTING STATEMENT

This case should be retained by the Supreme Court because the appeal originates from the business court. NRAP 17(a)(9).

III

STATEMENT OF ISSUES

1. Whether the district court erred by denying granting Motion to Retax and Settle Costs, And Awarding Costs to Clear River, LLC under NRS 18.020.

IV

STATEMENT OF CASE

Plaintiffs (Appellants) filed their complaint on January 4, 2019 (Clark County District Court Case No. A-19-787035-C). 1A.App.1. The Complaint sought judicial review of the State of Nevada, Department of Taxation (the “Department”) denial of Appellants application for a recreational marijuana

dispensary license. On January 11, 2019, Appellant's case was consolidated with seven other cases involving similar allegations related to the Department's issuance of recreational marijuana dispensary licenses (Clark County District Court Case No. A-19-787004-B). Appellants filed their First Amended Complaint on September 6, 2019. 1A.App.26. On June 23, 2023, the district court issued its Amended Trial Protocol No. 1, creating a phased approach to conducting trials of all the consolidated claims. 1A.App.132. Thereafter, the district court issued a Amended Trial Protocol No. 1 and Amended Trial Protocol No. 2. 1A.App.149; 1A.App.165.

On September 3, 2020, the trial court issued its Findings of Fact, Conclusions of Law and Permanent Injunction addressing the claims heard during Phase Two (claims for equal protection, due process, declaratory relief, intentional interference with prospective economic advantage, intentional interference with contractual relations, and permanent injunction). 1A.App.186. On September 16, 2020, the trial court issued its Findings of Fact, Conclusions of Law and Permanent Injunction addressing the claims of Phase Two (petitions for judicial review). 1A.App.216.

Shortly after issuing her decisions in this matter, the Honorable Judge Elizabeth Gonzales retired from the bench. As a result, this massive case consisting of seven different consolidated cases involving a multitude of legal

issues was transferred to the Honorable Judge Joanna Kishner. Judge Kishner was left with the unenviable task of certifying the results of Phases 1 and 2 as final and addressing all the post-trial motions.

On August 4, 2022, the trial court entered an Order Granting Motion to Certify Trial Phases 1 and 2 As Final Under NRCP 54(b). 1A.App.228. Thereafter, the district court received numerous memorandums of costs filed by numerous entities (defendants) that successfully applied for and received recreational dispensary licenses. It is worth noting that this is one of three appeals filed by Plaintiffs seeking identical relief from awards of costs. It is also worth noting that several parties who recovered costs did not pursue costs against Plaintiffs. Presumably this was done in recognition of the arguments set forth herein – costs are not recoverable in a claim for judicial review.

V

STATEMENT OF FACTS

A. Plaintiffs' Claims

Plaintiffs consist of four separate entities that submitted applications for recreational marijuana establishment licenses to the Department. 1A.App.11. Plaintiffs, along with numerous other entities applied for the recreational marijuana establishment licenses in September of 2018. 1A.App.11. On December 5, 2018, the Department provided written notice to all applicants of the

granting or denial of their application. 1A.App.12. Plaintiffs did not receive a recreational marijuana establishment license and the licenses were issued to other applicants. 1A.App.12.

After receiving the denials, Plaintiffs discovered various discrepancies with the licensing and scoring process. Plaintiffs filed their Complaint on January 4, 2019. 1A.App.1. Plaintiffs filed their Amended Complaint on August 23, 2019. 1A.App.26. The Amended Complaint alleged the following claims for relief: 1) Petition for Judicial Review; 2) Petition for Writ of Certiorari; 3) Petition for Writ of Mandamus; and 4) Petition for Writ of Prohibition. 1A.App.26.

Plaintiffs' claims were consolidated with seven other lawsuits from other unsuccessful applicants. It is worth pointing out that the parties to the other seven consolidated lawsuits asserted numerous claims that were not asserted by Plaintiffs.

On June 23, 2020, the district court issued its Amended Trial Protocol No. 1. 1A.App.132. Within the Order, the district court established three phases of trial. 1A.App.145. Each phase addressed various claims asserted by the parties to the consolidated action. Specifically, the district court established the following phases:

First Phase – Petitions for Judicial Review; 1A.App.145.

Second Phase – Legality of 2018 recreational marijuana application process (claims for Equal Protection, Due Process, Declaratory Relief, Intentional Interference with Prospective Advantage, Intentional Interference with Contractual Relations, and Permanent Injunction); 1A.App.146.

Third Phase – Writ of Mandamus. 1A.App.146.

The Trial Protocol established by the district court had the trial of Phase 2 occurring first. The Phase 2 trial began on July 17, 2020, and concluded on August 18, 2020. 1A.App.186. Thereafter, Phase 1 trial/hearing (Judicial Review) occurred on September 8, 2020. 1A.App.216.

In September of 2020, the district court issued written decisions for Phase 1 and Phase 2 proceedings. 1A.App.186; 1A.App.165. With respect to Phase 1, the district court denied the claims for Judicial Review. 1A.App.227. With respect to the claims heard in Phase 2, the district court found in favor of the claimants on the declaratory relief claim and declared that the Department acted beyond its scope and authority when it arbitrarily and capriciously replaced mandatory requirements of Ballot Question No. 2. 1A.App.214. The district court also found that the claims for equal protection were partly granted and partly denied. 1A.App.214. The district court denied all other Phase 2 claims. 1A.App.214.

On August 4, 2022, the district court entered an order certifying Trial Phases 1 and 2 as Final Under NRCP 54(b). 1A.App.228.

B. Award of Costs to Clear River LLC

On August 8, 2022, Clear River filed its Memorandum of Costs seeking an award of the costs incurred. 1A.App.246. Thereafter, numerous parties filed motions to retax objecting to the costs sought by Clear River on numerous grounds. Specifically, the following motions to retax and settle costs were filed:

- 1) TGIG Plaintiffs filed their Motion to Retax and Settle Costs re Clear River on August 11, 2022; 2.A.App.312.
- 2) High Sierra Holistics filed a Motion to Retax and Settle Costs on August 11, 2022; and 2.A.App.301.
- 3) Natural Medicine filed its Motion to Retax and Settle Costs Regarding Clear River on August 11, 2023. 2.A.App.364.

Plaintiffs filed a Joinder to the various Motions to Retax and specifically joined the arguments set forth in the aforementioned Motions to Retax.

2.A.App.418. Additionally, Plaintiffs Joinder reminded the trial court that Plaintiffs only asserted judicial review claims that were heard during the one-day hearing during Phase 2 and did not participate during the five-week trial of Phase 1. 2.A.App.419.

The district court conducted three hearings to address all the Motions to Retax and Settle Costs filed in response to the numerous parties seeking to recover costs. The first hearing on costs was conducted on September 16, 2022.

3.A.App.446. The second hearing on costs was conducted on October 21, 2022.

4.A.App.615. The third and final hearing on costs was conducted on December 19, 2022. 5.A.App.803; 6A.App.1053.

On May 19, 2023, the district court entered an Order Denying in Part and Granting in Part the TGIG Plaintiffs' Motion to Retax and Settle Costs, and Awarding Costs to Clear River. 2.A.App.425. The Notice of Entry was filed on the very same day. 2.A.App.422. As a result, the district court denied TGIG's Motion to Retax including the joinders thereto and the district court determined that Clear River was entitled to recover its costs of \$26,069.09 against all the non-prevailing litigants involved in the In Re DOT matter. 2.A.App.425. The district court's order applied to all non-prevailing litigants inclusive of Plaintiffs.

VI

SUMMARY OF ARGUMENT

The district court erred when it awarded costs to Clear River as the prevailing party against Plaintiffs. Plaintiffs only asserted claims for judicial review. Judicial Review claims are not one of the enumerated claims where costs are allowed to the prevailing party.

Second, the district court erred by awarding costs against Plaintiffs because none of the costs sought by Clear River were incurred as part of the judicial review claims. A judicial review claim is limited to a review of the record from the administrative agency. In a judicial review claim, there is no discovery. As discussed below, the costs awarded to Clear River related to Clear River's defense of the claims that were heard during Phase 2 (the trial). None of the costs incurred by Clear River were incurred as part of Phase 1.

Additionally, the district court erred by lumping Plaintiffs in with all other parties who asserted claims that were heard during Phase 2 (the trial). During the hearing on the various motions to retax, the district court ruled that because all the cases were consolidated, all the parties that participated in the consolidated action were responsible for costs incurred by the prevailing party irrespective of what claims for relief were asserted by a particular party. Put another way, the district court awarded costs for Phase 2 against Plaintiffs despite the fact that Plaintiffs did not assert any claim that was heard during Phase 2 and therefore did not participate during Phase 2.

VII

ARGUMENT

A. Standards of Review

Award of costs are generally reviewed for abuse of discretion. *Logan v.*

Abe, 131 Nev. Adv. Op. 31, 350 P.3d 1139, 1144 (2015). However, decisions that implicate questions of law are reviewed *de novo*. *Thomas v. City of N. Las Vegas*, 122 Nev, 82, 90, 127 P.3d 1057, 1063 (2006). Statutory construction is also reviewed *de novo*. *Leven v. Frey*, 123 Nev. 399, 402, 168 P.3d, 765, 775 (2010).

B. The District Court Erred by Awarding Costs Against Plaintiffs.

1. Costs Are Not Recoverable In a Claim for Judicial Review.

In Nevada, costs of suit are only recoverable if they are authorized by statute or court rule. *Sun Realty v. Eighth Judicial Dist. Court In and For Clark County*, 91 Nev. 774, 776, 542 P.2d 1072, 1074 (1975). NRS 18.020 allows the prevailing party to receive its costs in the following five actions: (1) an action for the recovery of real property or a possessory right thereto; (2) an action to recover the possession of personal property valued more than \$2,500; (3) an action to recover money or damages of more than \$2,500; (4) a special proceeding; and (5) an action involving title or boundaries of real estate, the legality of any tax, assessment, toll, or municipal fine.

The plain and express language of NRS 18.020 does not allow for the recovery of costs in a judicial review claim. If the Legislature intended to allow costs for petitions for judicial review, the Legislature would have so expressly stated. *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 district court was required to follow the plain language of the statute. *See, Harris Associates v. Clark County Sch. Dist.*, 119 Nev. 638, 641-42, 81 P.3d 532, 534 (2003).

It is significant that the Legislature did not include 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. The express language of NRS Chapter 233B lacks any indication that a petition for judicial review is a

special proceeding. Rather, it expressly indicates that a claim for judicial review is a “civil case.”

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 doesn’t mention or make reference 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. Attorney*, 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].”).

Here, the district court's order regarding Clear River's costs acknowledges that one of the arguments advanced was that costs are not recoverable in a claim for judicial review. 2.A.App.428-429. Specifically, the order indicates that one of the challenges to Clear River's Memorandum of Costs was that "costs cannot be awarded in suites (*sic*) involving petitions for judicial review." 2.A.App.429. The order confusingly follows that "TGIG argued Clear River's Memorandum of Costs does not seek costs solely related to judicial review proceedings." Unfortunately, the district court's order fails to specifically address whether the district court found that costs are recoverable in a petition for judicial review. However, because the district court also acknowledged that the costs awarded were not exclusive to the claims for judicial review, the district court implicitly acknowledges that it awarded costs against Plaintiff even though Plaintiffs did not assert any of the claims where Clear River incurred costs.

In sum, the district court erred when it awarded costs against Plaintiffs. As set forth above, costs are not recoverable in an action for judicial review. Because Plaintiffs only asserted claims for judicial review, the district court erred when it lumped Plaintiffs in with all the other parties who asserted claims that were heard during the Phase 2 trial.

2. The Costs Awarded Were Incurred As Part of Phase 2.

The district court also erred by awarding costs against Plaintiffs because all the costs incurred by Clear River were related to defending the claims heard during Phase 2. Put simply, the costs incurred by Clear River were incurred defending claims that were not asserted by Plaintiffs. Thus, it was improper for the district court to award costs against Plaintiffs. At a bare minimum, the district court should have separated out those costs that were incurred as part of the judicial review claims versus the other claims that were heard during Phase 2.

On August 8, 2022, Clear River filed their Memorandum of Costs.

2A.App.246. In the Memorandum, Clear River sought to recover a total of \$37,194.47 in costs. 2A.App.261. That sum was comprised of: 1) Photocopies \$10,588.80; 2) Court Filing Fees \$3,074.18; 3) Westlaw Research Fees \$6,291.37; 4) Parking Costs \$1,555.00; 5) Runner Services and Document Delivery \$485.00; 6) Transcripts \$7,344.03; 7) Postage \$36.03; 8) Jury Verdict Trial Services \$3,212.50; and 9) Advance Resolution Management \$4,612.56. 2A.App.247-261. Ultimately, the district court reduced this sum by \$11,125.38 thereby eliminating any costs that were incurred prior to February 12, 2020.

It is critically important to keep in mind that a claim for judicial review is limited to a review of the administrative agency's record. In that regard, there is no discovery, no trial, or anything other than a hearing. In this matter, the trial

court conducted a hearing on the judicial review claims on September 8, 2020.

1A.App.216. Thereafter, the district court rendered its Findings of Fact and Conclusions of Law. 1A.App.216. The district court's decision clearly indicates that the record consisted of the Record on Review and the Supplement to Record on Review and that the record was provided by the State of Nevada Department of Taxation. 1A.App.220. This demonstrates that there was no need for Clear River to incur the costs sought within Clear River's Memorandum of Costs. As a result of the district court's ruling, Clear River recovered the following costs: 1) photocopying; 2) filing fees; 3) legal research; 4) parking; 5) runner; 6) transcripts; 7) postage; 8) trial services; and 9) mediation costs. 2A.App.430.

Even assuming for arguments sake that costs are recoverable in an action for judicial review, the district court erred by not undertaking any analysis to determine what costs, if any, were related to the judicial review claims (Phase 1) as opposed to the costs incurred in the Phase 2 trial. Because Plaintiffs did not assert any of the claims that were heard during Phase 2, it was necessary for the district court to determine what costs Clear River incurred during Phase 1 and Phase 2. Here, the district court's order awarding costs to Clear River results in Clear River recovering costs against Plaintiffs for claims that Plaintiffs did not assert.

During the hearing on this matter, counsel for Plaintiffs specifically requested that the district court make a determination as to which costs Clear River

incurred during Phase 1 versus Phase 2 and explained why such a finding was necessary. 5A.App.862. Ultimately, the district court declined to engage in such an analysis and instead found that because this action was consolidated, all the non-prevailing parties were in the same position. 5A.App.866.

VIII

CONCLUSION

Accordingly, the award of costs to Clear River against Plaintiffs in this case should be vacated. Alternatively, the issue should be remanded to the district court for a determination of what costs were incurred by Clear River as part of the judicial review claims (Phase 1) versus what costs were incurred as part of the Phase 2 trial.

DATED: November 10, 2023

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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 MS Word in 14 point Times New Roman type style.

2. This brief complies with the type-volume limitation in NRAP 32(a)(7)(A)(ii) [14,000 words].

3. 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 appropriate references to 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: November 10, 2023

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CERTIFICATE OF SERVICE

I certify that I am an employee of Luh & Associates, and that on this date, I served a true copy of the foregoing document to be served via the Court's electronic filing and service system ("E-Flex") to all parties on the current service list:

Mark Dzarnoski
Rusty Graf
Dominic Gentile
Brigid Higgins

Dated this 10th day of November, 2023.

/s/ Victoria Grant
Victoria Grant