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

3
4 GOLDEN ROAD MOTOR INN, INC., a
5 Nevada Corporation d/b/a ATLANTIS
6 CASINO RESORT SPA,

7 Appellants/Cross-Respondent,

8 vs.

9 SUMONA ISLAM, an individual,
10 Respondent/Cross-Appellant,

11 and

12 MEI-GSR HOLDINGS, LLC, a Nevada
13 limited liability company d/b/a
14 GRAND SIERRA RESORT WHICH
15 CLAIMS TO BE THE SUCCESSOR
16 IN INTEREST TO NV-GS, LLC,
17 Respondent.

18 _____
19 SUMONA ISLAM, an individual,
20 Appellant

21 vs.

22 GOLDEN ROAD MOTOR INN, INC., a
23 Nevada Corporation d/b/a ATLANTIS
24 CASINO RESORT SPA,

25 Respondent.

26 _____
27 MEI-GSR HOLDINGS LLC, a Nevada
28 limited liability company d/b/a
29 GRAND SIERRA RESORT,

30 Appellant/Cross-Respondent,

31 vs.

32 GOLDEN ROAD MOTOR INN, INC., a
33 Nevada Corporation d/b/a ATLANTIS
34 CASINO RESORT SPA,

35 Respondent/Cross-Appellant.

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Case No. 64349

Case No. 64452

Case No. 65497

36 **RESPONDENT AND CROSS-APPELLANT ISLAM'S REPLY BRIEF**

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1 This Reply addresses the Respondent's Answering Brief of Golden Road
2 Motor Inn, Inc., dba The Atlantis Casino Resort Spa ("Atlantis") on the issue of
3 the award of attorneys fees to the Atlantis.

4 **1. Due Process Should Apply to Proceedings to Obtain Money**
5 **Judgments, Whether The Money Is Classified As "Attorneys**
6 **Fees" or "Damages" or "Costs"**

7 The Atlantis maintains in its brief that all that is required to support a
8 motion for attorneys fees under NRCP 54 is a lawyer's affidavit stating the
9 amount of money the attorneys wants. *Resp. Ans. Brief, p. 16, lines 17-22.*

10 The Atlantis further contends that the fee award in this case was further
11 justified in that in addition to the attorney's affidavit, the Atlantis made an *ex*
12 *parte* submission of its time records to the judge for his *in camera* review. *Resp.*
13 *Ans. Brief, p. 19.*

14 What was communicated to the judge in that *ex parte* submission will never
15 be known to Islam, or to this Honorable Court, because the Atlantis made a
16 "vehement" objection to having those materials become part of the court's official
17 file on appeal, *10 App. 2098*, and the court then ruled that the documents
18 submitted by the Atlantis were not to be made part of the court's file on grounds
19 that they were, in their entirety, attorney-client privileged. *10 App. 2129.*

20 Ignoring the Due Process implications of the *ex parte* communication with
21 the court, the Atlantis argues that the judge was "well positioned" to determine the
22 amount of fees to be awarded from his prior history with the litigation and from
23 whatever information the judge received in the *ex parte* communications. *Resp.*
24 *Ans. Brief, p. 19, lines 3-4.*

25 The position of the Atlantis is that Islam is not entitled to Due Process, and
26 that position is fundamentally wrong. The erroneous position of the Atlantis is
27 that that there is something different and special about an award of attorneys fees
28 compared to an award of damages. In the case of damages, a trial with proof is

1 required; in case of attorneys fee awards, the opposing side has no right to
2 meaningfully participate. Thus, the Atlantis had to spend three weeks in trial to
3 recover a judgment of \$43,874. All that time was devoted to proof because those
4 dollars were classified as “damages”. 6 App. 1309. In contrast, the court awarded
5 of \$308,711 without any proof being shown to Islam except an attorney’s
6 conclusory affidavit asking for a sum of money, because those were monies owed
7 for attorneys fees. 9 App. 2021. The implication of the Atlantis position is that
8 dollars awarded for “damages” require meaningful notice, to right to see the
9 evidence, and opportunity to confront and cross-examine, while dollars awarded
10 for “attorneys fees” require no such rights to be afforded.

11 From the viewpoint of the person ordered to pay those dollars, however,
12 there is no distinction between dollars awarded as attorneys fees and dollars
13 awarded as damages. Dollars are dollars. The Due Process required to award a
14 dollar of attorneys fees should be comparable, at least, to the process that is due to
15 before award a dollar of damages, or for that matter, a dollar of costs. Bobby
16 Berosini, Ltd., v. People for the Ethical Treatment of Animals, 114 Nev. 1348,
17 1353, 971 P.2d 383, 386 (1998) (costs award must be supported by documentation
18 and itemization).

19 2. NRCP 54 Requires Documentation of the Attorneys Fees

20 The Respondent’s brief asserts that the “documentation concerning the
21 amount of fees claimed” in NRCP 54(d)(2)(B) means a total number of hours by
22 month and the resulting dollar total. Resp. Ans. Brief p. 16, lines 12-15. Such an
23 argument makes a mockery of the term “documentation” and the phrase
24 “documentation concerning the amount of fees claimed.” Even if the case of mere
25 costs, this Court has held that “documentation” means actual supporting records.
26 Bobby Berosini, Ltd., supra. A party seeking \$308,711 in attorneys fees should
27 have to produce and serve on the other party at least as much supporting evidence
28 as required to recover \$17,070.61 in costs. 9 App. 2018.

1 **3. Meaningful Review of Attorneys Fees Awards Cannot Be Had**
2 **Without A Record**

3 In cases such as *Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev.
4 821, 830, 192 P.3d 730, 737 (2008) and *Shuette v. Beazer Homes Holdings Corp.*,
5 121 Nev. 837, 863-65, 124 P.3d 530, 549-49 (2005) this Court has held that the
6 district court is obliged to set forth sufficient findings and reasoning in support of
7 its determination to award attorneys fees.

8 Here, the attorney fee award is approximately seven times larger than the
9 compensatory and punitive damage award, it is the sum of \$308,711, and one
10 would expect that sufficient findings and reasoning would be present in order to
11 have a meaningful appellate review.

12 Yet within the approximately 6,052 pages of record on this appeal, the
13 Atlantis billing records submitted *ex parte* to the district court for *in camera*
14 review are not among them. The evidence upon which the district judge based his
15 calculus that \$308,711 is owed by Islam to the Atlantis for attorneys fees is
16 completely unknown to this Court and to Islam. The result is that the district
17 judge's decision cannot meaningfully be reviewed.

18 The Respondent's brief blames Islam for the absence of a record, arguing
19 that months after Islam had appealed, Islam received a set of redacted billings
20 from the Atlantis, and Islam "elected to do nothing with the fee records and
21 therefore they were never filed with the court." *Resp. Ans. Brief.*, p. 14, line 22 to
22 p. 15 line 1. The Atlantis further argues that the fact that Islam failed to file the
23 fee records with the court must mean that the records supported the district court's
24 decision. *Resp. Ans. Brief.*, p. 15, lines 1-2.

25 The Atlantis has come full circle. On November 21, 2013, the Atlantis was
26 "vehemently" opposing the motion of Islam to make the attorneys fees billings
27 part of the court's official record for purposes of appeal. *10 App. 2099*. Now the
28 Atlantis is blaming Islam for the fact that the attorneys fees billings are not part of

1 the record on appeal. At the time, Islam objected to all the *ex parte* secrecy that
2 was going on. Islam tried to have the attorneys fees motion decided properly
3 based on required documentation, *see 9 App. 2023*, and the Atlantis adamantly
4 opposed it. Now the Atlantis would like to portray Islam as the party responsible
5 for not having a proper record on appeal.

6 The Atlantis position is less than fair to Islam. The district court already
7 had issued its order denying Islam's motion that the attorneys fees billings be
8 made part of the official record. *10 App. 2130*. The billings that the judge
9 actually reviewed, not the redacted ones provided months later to Islam, would the
10 the appropriate documents to retain in the official record.

11 While the Atlantis argues that Islam should have moved for reconsideration
12 of the attorneys fees award in March of 2014, *see Resp. Ans. Brief p. 15, line 10*,
13 the Atlantis is well aware that motions for reconsideration must be made within 10
14 days. WDCR 12(8), DCR 13(7).

15 Furthermore, and more importantly, a motion for reconsideration could not
16 be granted due to lack of subject matter jurisdiction. The Islam appeal of the
17 attorneys fees award having been filed Nov. 15, 2013, the issue of the attorneys
18 fees award was squarely before this Court in 2014, which divested the district
19 court of jurisdiction to entertain a motion for reconsideration on the attorneys fees.
20 *Mack-Manley v. Manley*, 122 Nev. 849, 855, 138 P.3d 525, 530 (2006).

21 The Atlantis rhetorically asks that if Islam believed the district court was
22 without jurisdiction, why then did Islam continue to "file pleadings related to the
23 issue of fees", *see Resp. Ans. Brief, p. 14, lines 20-21*, and the answer is that the
24 district court had jurisdiction to save the evidence in the case for purposes of
25 appeal, which is what Islam tried unsuccessfully to accomplish. The Islam
26 motions did not ask the district court to rule again on the merits of the award of
27 fees, because the district court already was divested of jurisdiction on that
28 question.

1 It is unfortunate that the Atlantis would try to blame Islam for the state of
2 the record in this case, given what actually transpired in the district court.

3 **4. Other Cases Do Not Support the Atlantis Position**

4 The Atlantis states that this Court does not require invoices to be submitted
5 for an attorneys fees award because the Court said so in *James Hardie Gypsum*
6 *Inc. v. Inquipco*, 112 Nev. 1397, 929 P.2d 903 (1996). In the first place, the
7 language of NRCP 54(d)(2)(B) was adopted May 1, 2009, after the *Inquipco* case
8 was decided. Secondly, *Inquipco* approved a fee award supported by an affidavit.
9 What information was contained in the affidavit is not stated in the *Inquipco*
10 opinion. The case does not state that invoices are not required.

11 The Atlantis further cites *Brunzell v. Golden Gate National Bank*, 85 Nev.
12 345, 455 P.2d 31 (1969), for the proposition that invoices are not required. In
13 *Brunzell*, an attorney testified under cross-examination as to the attorneys'
14 billings. The hearing in *Brunzell* was specifically to address attorneys fees, which
15 certainly would have allowed the opposing side to meaningfully participate.
16 Again, however, *Brunzell* was decided 30 years before NRCP 54(d)(2) was
17 adopted.

18 The Atlantis attempts to equate the procedure followed in *Brunzell* with the
19 procedure in the present case, arguing that evidence as to legal fees was presented
20 in the Atlantis case-in-chief. *Resp. Ans. Brief*, p. 17, lines 3-5. In her direct
21 examination, general counsel for the Atlantis testified that the Atlantis had
22 incurred about \$330,000 in attorneys fees and costs, not including her time. This
23 testimony was given in three lines. *See 19 App. 3974*, lines 7-9. From the trial
24 record, there is not a single bit of information concerning attorneys fees except the
25 three lines stating the total amount allegedly incurred, including costs.

26 **5. A Cursory Affidavit Does Not Comport with NRCP 43**

27 Evidence in motions is allowed to be heard by affidavit under NRCP 43(c),
28 but this rule does not mean an attorney simply can submit an affidavit stating he

1 or she is telling the truth about the fees and then provide insufficient or no other
2 evidence to support the fees. DCR 13(5) states, in pertinent part: "Affidavits shall
3 contain only factual, evidentiary matter, shall conform with the requirements of
4 NRCP 56(e), and shall avoid mere general conclusions or argument. Affidavits
5 substantially defective in these respects may be stricken, wholly or in part." An
6 affidavit that is merely conclusions and a signature does not meet the basic
7 standards of NRCP 43, NRCP 56(e) and DCR 13(5). Here, an affidavit by lead
8 counsel that swears to the truth of a summary of the hours worked and amount
9 owed is not a sufficient basis to award attorney's fees.


10 **6. Conclusion**

11 It is fair, reasonable and consistent with Due Process to require a party that
12 seeks an award of fees to support a motion for fees with documentation and to
13 provide that documentation not only to the Court but also to the opposing party.
14 This standard is incorporated in NRCP 54(d)(2)(B). It is also necessary to have
15 the district court make appropriate findings from the record and to have the
16 evidence on which a fee award is based preserved by the trial court for appeal.

17 Respectfully, the district court erred in awarding attorneys fees to the
18 Atlantis without complying with the controlling rule of civil procedure and
19 decisions of this Court. It is therefore respectfully urged that the award of fees to
20 the Atlantis in Case No. 64452 be reversed.

21 DATED: April 1, 2015

LAW OFFICES OF MARK WRAY

22
23
24 By 
25 MARK WRAY
26 Attorneys for Respondent and Cross-
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[x] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 Point Times New Roman.

Finally, I hereby certify that I have read this *Respondent and Cross Appellant's Reply Brief* and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I further certify that this *Respondent and Cross Appellant's Reply 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.

///

1 I understand that I may be subject to sanctions in the event that the
2 accompanying brief is not in conformity with the requirements of the Nevada
3 Rules of Appellate Procedure.

4 DATED this 1st day of April 2015

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CERTIFICATE OF SERVICE

The undersigned employee of the Law Offices of Mark Wray certifies that a true copy of the foregoing document was sealed in an envelope with first class postage prepaid thereon and deposited in the U.S. Mail at Reno, Nevada on April 1, 2015 addressed as follows:

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