

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHAD SMITTKAMP AND JEAN
MERKELBACH, HUSBAND AND
WIFE; AND CHAD SMITTKAMP AND
JEAN MERKELBACH, TRUSTEES OF
THE ROCKWELL - 1997 TRUST,

Appellants,

vs.

WILLIAM A. HARVEY AND MAURENE
A. HARVEY, TRUSTEES OF THE
CONSULTANTS IN CRITICAL CARE,
INC., RETIREMENT TRUST DATED 1
JANUARY 1991; AND CONSULTANTS
IN CRITICAL CARE, INC., A
RETIREMENT TRUST, AND WILLIAM
A. HARVEY AND MAURENE A.
HARVEY, INDIVIDUALS,

Respondents.

No. 45774

FILED

JAN 31 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY  CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

The action underlying this appeal concerns the interpretation and enforcement of a settlement agreement. Following entry of the district court's decision, appellants moved for attorney fees as prevailing parties. In opposing the motion, respondents requested that they be declared the prevailing parties. When addressing the motion, the district court stated, "not only are the parties at odds over who the prevailing party is, but there is also disagreement about what the significant issue of the litigation is." Noting that "both parties can be said to have achieved *some* benefits sought by the litigation; as demonstrated by the moving papers," the district court concluded "that neither party be declared the 'prevailing party' for purposes of awarding attorney's fees in this action."

Accordingly, the district court denied appellant's motion for attorney fees. This appeal followed.

Following conclusion of this court's settlement conference process, this court reinstated briefing in this appeal. Prior to the commencement of briefing, however, appellants moved to dismiss this appeal with prejudice. In their motion to dismiss this appeal, appellants explain that, while they "continu[e] to believe in the merits" of this appeal, they made an "economic decision" to dismiss it. Appellants further request that each party be required to bear its own attorney fees and costs on appeal, and that the cost bond deposited with the district court be released.

Respondents do not oppose dismissal of this appeal with prejudice, but oppose the remainder of appellants' requests. Specifically, respondents seek to preserve their ability to seek, in the district court, attorney fees and costs incurred in defending this appeal. In support of their request, respondents note that the parties' underlying settlement agreement at issue in this case provides for an award of attorney fees and costs to the prevailing party in any action to enforce the terms of the agreement. Further, respondents note that in Musso v. Binick, 104 Nev. 613, 764 P.2d 477 (1988), this court held that it is appropriate for a motion for attorney fees on appeal to be filed in the district court.

We note that attorney fees are not recoverable absent a statute, rule or contractual provision to the contrary. See Rowland v. Lepire, 99 Nev. 308, 315, 662 P.2d 1332, 1336 (1983). It appears that in the instant case a contractual provision provides for the possibility of a party recovering attorney fees. In its order regarding attorney fees, the district court quoted the relevant clause in the parties' settlement

agreement as providing that “[i]n any action or proceeding to enforce the terms of [the] Agreement . . . the prevailing party shall be entitled to recover as damages its attorneys’ fees and costs incurred.” Under the same clause of the settlement agreement, “prevailing party” is defined as “the party who has been successful with regard to the main issue, even if that party did not prevail on all the issues.”

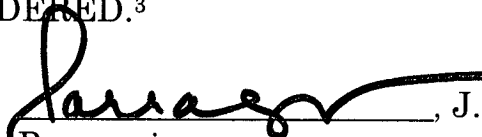
Respondents are correct that it is appropriate for a prevailing party to file a motion for attorney fees on appeal in the district court. Musso v. Binick, 104 Nev. 613, 764 P.2d 477 (1988). However, to prevail on such a motion in the district court, a party would have to establish that it was the prevailing party on appeal. As noted previously, the prevailing party according to the parties’ underlying settlement agreement is “the party who has been successful with regard to the main issue.” Here, neither appellants nor respondents have prevailed on a “main” issue or, indeed, any issue at all. This appeal was not briefed; therefore, this court did not consider or resolve any issue on its merits.¹ Instead, appellants voluntarily dismissed their appeal. Accordingly, although respondents are not precluded from filing in the district court a motion for attorney fees on appeal, we conclude there is no prevailing party in this appeal.²

¹In their docketing statement, appellants identified the issues on appeal as (1) whether the district court erred by failing to find that appellants were prevailing parties, and (2) whether the district court erred by failing to award attorney fees to appellant.


²We further note that it does not appear that this appeal was taken or processed in a frivolous manner, that it was taken for purposes of delay, or that our appellate processes have otherwise been misused. Accordingly, attorney fees similarly are not available under NRAP 38.

Cause appearing, appellants' unopposed motion for a voluntary dismissal of this appeal is granted. This appeal is dismissed. NRAP 42(b). For the reasons set forth in this order, each party shall bear its own costs and attorney fees on appeal. Finally, we note that any request for relief regarding the bond for costs on appeal must be sought in the district court. See NRAP 7. Accordingly, we deny the portion of appellants' motion requesting that the cost bond deposited with the district court be released by this court.

It is so ORDERED.³


_____, J.
Parraguirre


_____, J.
Hardesty


_____, J.
Saitta

cc: Hon. David R. Gamble, District Judge
Terry A. Simmons, Settlement Judge
Robison Belaustegui Sharp & Low
Feldman Shaw LLP
Douglas County Clerk
Joan Wilder, Court Reporter

³On May 12, 2006, appellants filed a transcript request form requesting court reporter Joan Wilder to produce a transcript of proceedings held on June 22, 2004. To date, Ms. Wilder has not filed the requested transcript. However, as this appeal is being dismissed, Ms. Wilder is no longer obligated to file the transcript in this court.