

IN THE SUPREME COURT OF THE STATE OF NEVADA

MUTANA JONES, ADMINISTRATRIX
OF THE ESTATE OF RYDELL SMITH
AND MERLINE JOHNSON,
INDIVIDUALLY,

Appellants,

vs.

SUNRISE HOSPITAL AND MEDICAL
CENTER, D/B/A SUNRISE HOSPITAL
AND MEDICAL CENTER, LLC, AND
AJAY NELLUTLA, M.D.,
INDIVIDUALLY,

Respondents,

No. 47828

FILED

FEB 16 2007

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

ORDER DISMISSING APPEAL

This is an appeal from the district court's "Order of Dismissal Without Prejudice," entered on June 29, 2006. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

The settlement judge has filed a report indicating that the parties have agreed to a settlement of this matter. In his report, the settlement judge reports that "appellants have agreed to dismiss the appeal in its entirety. Respondent Nellutla has further agreed to waive his attorneys' fees and costs. Respondent Sunrise Hospital has not agreed to waive its costs or fees." (Emphasis in original)

Appellants have filed a motion to voluntarily dismiss this appeal. See NRAP 42(b). The motion requests this court to dismiss the appeal and "declar[e] that all Parties will bear their own fees and costs with respect to the appeal."

Respondent Sunrise Hospital and Medical Center ("Sunrise") has filed a response to appellants' motion. Sunrise states that it does not

oppose dismissal of the appeal, but does oppose appellants' request for this court to declare that each party shall bear its own attorney fees and costs on appeal. Sunrise notes that it specifically did not agree to waive any right to attorney fees or costs during the settlement proceedings and cites to the settlement judge's comment regarding attorney fees and costs on his report. Sunrise "requests that this . . . Court allow it the right to seek fees and costs within fourteen days of dismissal of this Appeal."¹

Sunrise cites to the provisions of NRAP 38 and NRAP 39(a) which concern the awarding of attorney fees and costs on appeal. Under NRAP 38, this court may award costs and or attorney fees if this court determines that an appeal is frivolous. We note, however, that this court is reluctant to make such a determination when the appeal has not been briefed and this court has not considered the appeal on the merits. Further, it is not clear how this court could render such a decision, as this case is assigned to the court's settlement conference program and under NRAP 16(h), "[m]atters discussed at the settlement conference and papers or documents prepared under this rule shall not be admissible in evidence in any judicial proceeding and shall not be subject to discovery." Further, we note that under NRAP 16(g), a settlement judge may recommend that sanctions be imposed against a party or counsel for failing to participate in the settlement conference program in good faith. The settlement judge has not made such a recommendation in this case, and it appears that all parties and counsel did participate in good faith in the settlement program

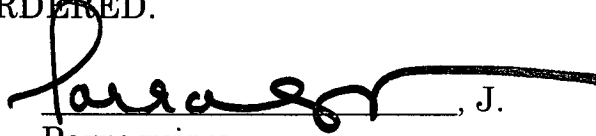
¹ The reference to "within fourteen days of dismissal" appears to be based on NRAP 39(c), which requires a party seeking costs under that rule to file an itemized bill of costs within 14 days after entry of judgment.

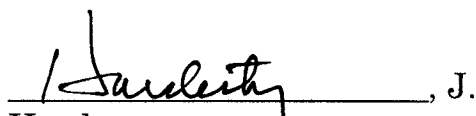
as defined in NRAP 16(g). Thus, it does not seem appropriate to consider awarding attorney fees or costs, or any other sort of sanctions, under the provisions of NRAP 38.

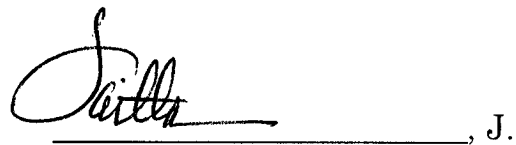
Under NRAP 39(a) costs on appeal, in an amount up to \$250, may be awarded by this court. Specifically if an appeal is dismissed, costs may be taxed against an appellant. The kinds of costs allowable are set forth in NRAP 39(c). These costs include only the costs of producing and copying briefs and appendices and the costs of roundtrip travel to attend oral arguments. This rule does not contemplate the awarding of costs on appeal by this court for costs incurred pre-briefing, while an appeal is assigned to the settlement conference program. Thus, it also does not seem appropriate for this court to consider the awarding of costs for this appeal under NRAP 39.

In light of the above, we grant appellants' motion to voluntarily dismiss this appeal pursuant to the parties' settlement agreement. Accordingly, we dismiss this appeal. We make no determination as to the awarding of attorney fees or costs on appeal. Further, this dismissal is without prejudice to Sunrise's right to seek attorney fees or costs of the appeal in the district court under any applicable provision of law or as an enforceable part of the parties' settlement agreement.

It is so ORDERED.


_____, J.
Parraguirre


_____, J.
Hardesty


_____, J.
Saitta

cc: Hon. Mark R. Denton, District Judge
Ara H. Shirinian, Settlement Judge
Kirk-Hughes & Associates
Hall, Prangle & Schoonveld, LLC/Las Vegas
Lewis Brisbois Bisgaard & Smith, LLP
Eighth District Court Clerk