

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES N. BELSSNER,
Appellant,
vs.
COUNTRY CLUB SHADOWS
HOMEOWNERS ASSOCIATION,
Respondent.

No. 48210

FILED

DEC 17 2008

FRANZ K. LINDEMAN
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

ORDER GRANTING PETITION FOR EN BANC RECONSIDERATION,
REINSTATING APPEAL, REVERSING IN PART
AND AFFIRMING IN PART

This is a proper person petition for en banc reconsideration of this court's April 14, 2008, order affirming the district court's order awarding \$64,697.46 in attorney fees and costs to respondent as a sanction under EDCR 7.60(b).

Petition for en banc reconsideration

In our April 14 order, we concluded that because appellant Charles N. Belssner had failed to oppose respondent Country Club Shadows Homeowners Association's (CCS) motion for attorney fees and costs in the district court, appellate review of any assignment of error was precluded.¹ Belssner then filed a timely petition for rehearing, which was denied. Belssner now seeks en banc reconsideration of our April 14 order, arguing that he did file a written opposition in district court. On

¹See Belssner v. Country Club Shadows, Docket No. 48210 (Order of Affirmance, April 14, 2008) (citing DCR 13(3) for the proposition that failure to file and serve a written opposition may be construed as consent to grant the motion).

November 5, 2008, we directed CCS to file an answer to the petition for en banc consideration addressing whether the district court entertained Belssner's late opposition. CCS filed its answer on December 3, 2008.

In its answer, CCS indicates that the district court reviewed and considered Belssner's untimely opposition in the course of resolving the motion for attorney fees and costs. Having considered the petition and answer, we conclude that our April 14 order improperly affirmed the district court's award of attorney fees and costs as a sanction based on Belssner's failure to file an opposition, as Belssner did file an untimely opposition, which was, as admitted by CCS, considered by the district court in resolving the motion for sanctions. Accordingly, we grant Belssner's petition for en banc reconsideration, vacate our April 14 order, and reinstate this appeal.²

Belssner's appeal from the district court's award of sanctions

In October 2002, Belssner filed an alternative dispute resolution claim against CCS complaining that the floorboards in the apartment directly above his unit squeaked and constituted a nuisance. After subsequent proceedings before the arbitrator and the district court in Case No. A471090, the parties agreed to a settlement under which CCS would pay \$3,750 to repair the floorboards.

Approximately two years later, Belssner filed another claim for alternative dispute resolution against CCS, which was docketed under District Court Case Nos. A520269 and A517970.³ Subsequently, CCS filed

²NRAP 40A.

³These cases were consolidated under Case No. A517970.

a motion to dismiss and requested that sanctions in the form of attorney fees and costs be imposed on Belssner under EDCR 7.60(b).⁴ The district court granted CCS's motion to dismiss and ordered CCS to file a memorandum detailing their claimed attorney fees and costs by August 14, 2006. The district court further instructed Belssner that if he wished to oppose the request for fees and costs, an opposition must be filed by August 23, 2006. On August 14, 2006, CCS filed its memorandum and on August 24, 2006, Belssner filed an untimely opposition. Thereafter, on October 20, 2006, the district court entered an order sanctioning Belssner by awarding CCS \$64,697.46 in attorney fees and costs. Belssner appealed from the October 20, 2006, order.

This court reviews a district court's award of attorney fees and costs as a sanction for an abuse of discretion.⁵ A review of the memorandum of costs CCS filed in district court indicates that \$23,847.66 of the \$67,649.99 in attorney fees and costs requested by CCS were incurred in District Court Case No. A471090. Because those proceedings involved a completely different district court case before a different district court judge, the district court in the underlying action abused its discretion in including fees incurred in Case No. A471090 in its sanctions award.⁶ Accordingly, we reverse the portion of the October 20, 2006,


⁴See EDCR 7.60(b) (permitting the district court to impose attorney fees and costs as a sanction against a party litigating in a vexatious and unreasonable manner).


⁵See Nevada Power v. Flour Illinois, 108 Nev. 638, 646-47, 837 P.2d 1354, 1360 (1992).


⁶Id.

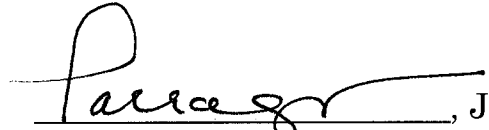
district court's sanction order to the extent that it awarded CCS \$23,847.66 in attorney fees and costs incurred in a separate proceeding related to District Court Case No. A471090. With regard to the remaining attorney fees and costs award, having considered the parties' arguments and the documents before us, we conclude that no abuse of discretion occurred with regard to that portion of the district court's award. Thus, we affirm the portion of the district court's October 20, 2006, order with regard to the remainder of the attorney fees and costs award.


It is so ORDERED.⁷

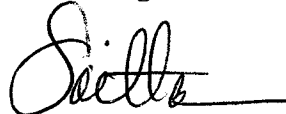

_____, C.J.
Maupin


_____, J.
Gibbons


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas


_____, J.
Saitta

cc: Hon. Jackie Glass, District Judge
Charles N. Belssner
Leach Johnson Song & Gruchow
Eighth District Court Clerk

⁷The Honorable Michael A. Cherry, Justice, voluntarily recused himself from participation in the decision of this matter.