

IN THE SUPREME COURT OF THE STATE OF NEVADA

JONELL THOMAS,  
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK, AND THE HONORABLE  
DONALD M. MOSLEY, DISTRICT  
JUDGE,

Respondents,

and

THE STATE OF NEVADA,  
Real Party in Interest.

No. 49045

**FILED**

MAR 06 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER GRANTING PETITION

This is an original petition for a writ of mandamus challenging the district court's order granting \$5,437.50 of the \$38,750 in excess fees requested by petitioner attorney JoNell Thomas for excess fees incurred in her representation of an appellant in a post-conviction death penalty appeal. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

In this original proceeding, Thomas seeks a writ of mandamus directing respondent Judge Donald Mosley to award her the full amount of her requested excess fees. This court has original jurisdiction to issue a writ of mandamus as a remedy to compel the performance of a judicial act or to control an arbitrary or capricious exercise of discretion.<sup>1</sup>

<sup>1</sup>Schuster v. Dist. Ct., 123 Nev. \_\_\_, \_\_\_, 160 P.3d 873, 875 (2007).

In her petition, Thomas argues that Judge Mosley improperly denied her the full amount of her requested excess fees in two respects. First, Thomas contends that reducing her award to \$5,437.50 was improper because the manner in which the compensable billing entries were selected from her billing invoice was arbitrary and capricious. Second, she contends that the rationale for denying the remaining balance of her request was ad hoc. For the following reasons, we conclude that Judge Mosley's award was improper in both respects. Accordingly, we grant the petition with instructions for further proceedings consistent with our order. The parties are familiar with the facts and we do not recount them except as necessary to our disposition.

Standard of review

A district court's order concerning excess fees is reviewed for an abuse of discretion.<sup>2</sup> A district court abuses its discretion in the context of a fee request if it acts arbitrarily or capriciously or its decision exceeds the bounds of law or reason.<sup>3</sup>

Reduced \$5,437.50 award

Thomas contends that the manner in which compensable billing entries were selected from her billing invoice was arbitrary and capricious because they appear to have been selected at random. Thomas' original invoice contained 118 billing entries reflecting 310 hours of appellate work. Accompanying his order, however, Judge Mosley attached

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<sup>2</sup>Digesti v. District Court, 109 Nev. 532, 536, 853 P.2d 118, 120 (1993).

<sup>3</sup>Id.; see also Matter of Eric L., 123 Nev. \_\_\_, \_\_\_, 153 P.3d 32, 36-37 (2007).

a revised billing invoice in which he reduced the number of entries to 16 and the number of compensable hours of appellate work to 43.5.

Notably, the revised invoice wholly omits entries entered before October 4, 2006, and includes and omits separate billing entries that involved interdependent tasks. Thomas' first billing entry is dated September 10, 2006, the day that she began preparing her opening brief; her last was entered on November 22, 2006, the day that she completed her final edits. Thus, Judge Mosely's revised invoice excludes an approximately two-week span of time representing 68.75 hours of work.

Moreover, this dark period on the revised invoice coincides with the time Thomas spent drafting and editing the bulk of her argument section, a critical stage of preparing a persuasive brief. The revised invoice is therefore troubling because of the number of consecutive days it excludes as well as the type of work performed during the omitted period. Judge Mosley counters that he was not obligated to accept Thomas' billing entries at face value. Absent more specific factual findings to illuminate his reasons for the omission, however, we conclude that the revised invoice unreasonably excludes billing entries entered before October 4, 2006.

With respect to the billing entries that were included in his revised invoice, we conclude that the selection process was similarly indiscernible. In one notable instance, the revised invoice approved compensation for edits to issues concerning jury instructions but denied compensation for the underlying research. Because edits and research are

interdependent tasks, we conclude that denying compensation for the latter was arbitrary.<sup>4</sup>

Moreover, the revised invoice lacks specific findings on any of the multiple factors traditionally weighed in assessing the reasonableness of excess fees. In reviewing a request for excess fees, NRS 7.125(4) and our decision in County of Clark v. Smith<sup>5</sup> direct district courts to consider (1) the complexity of the case; (2) the severity of the offense; (3) the time necessary to provide an adequate defense; (4) other special circumstances; (5) counsel's actual performance, and knowledge, skill and judgment displayed during the representation; and (6) counsel's professional standing.<sup>6</sup>

In this case, based upon his review "of the efforts apparently expanded [sic]" on appeal, Judge Mosley determined that only "43.5 hours should be compensated . . . amounting to the sum of \$5,437.50." Absent specific findings corresponding to the appropriate factors, we are unable to review whether Thomas' excess fees were reduced based on a meaningful consideration of the factors or for other reasons. Accordingly, we conclude

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<sup>4</sup>In light of this arbitrary decision, several other features of Judge Mosley's revised invoice stand out, in particular, the omission of two week-long billing periods in October and November, and his decision to compensate Thomas for a single 15-minute phone call for the entire period of November 1, 2006, through November 12, 2006, during which time Thomas' original billing invoice reflects that she performed over 70 hours of work spread between issue-specific research and preparation of the appendix.

<sup>5</sup>96 Nev. 854, 856, 619 P.2d 1217, 1218 (1980).

<sup>6</sup>See Lueck v. State, 99 Nev. 717, 720, 669 P.2d 719, 721 (1983) (citing Smith, 96 Nev. at 856, 619 P.2d at 1218).

that reducing Thomas' excess fees to \$5,437.50 was improper without the appropriate findings..

Denial of Thomas' remaining excess fees

Thomas contends that the decision to deny the balance of her excess fee request was ad hoc because the reasoning in the order departed from his original rationale for denying her request.

Judge Mosley denied Thomas' request twice in separate letters to Thomas because she did not obtain his approval to incur excess fees on appeal. Later, following our March 21, 2007, order directing the entry of a formal written decision in this matter, Judge Mosley entered an order granting Thomas \$5,437.50 in excess fees. However, the order denied the remaining balance of Thomas' request based on a determination that her opening brief was a reconstructed version of her original habeas writ petition and thus her net work product on appeal was less than her billing invoice suggested.

In our March 21, 2007, order, we directed that this order include specific findings of fact and conclusions of law to support the "reasoning that underlies the conclusion stated in [Judge Mosley's] letters."<sup>7</sup> In other words, we directed that the order explain the "prior approval" requirement in anticipation of disposing of this petition on those grounds.<sup>8</sup> Notably, however, the order did not contain the requested

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<sup>7</sup>Thomas v. Dist. Ct., Docket No. 49045 (Order Directing District Court to Enter Written Decision, March 21, 2007).

<sup>8</sup>Although Judge Mosley contends that his initial two letters were devoid of any reference to "prior approval" as a basis for denying Thomas' request, the letters did not need to explicitly mention a "prior approval"

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findings regarding this requirement. Instead, the order denied Thomas the full amount of her excess fees for the apparent reason that a portion of her fees were unreasonable.

Even if it was based on the proper statutory grounds for denying the balance of Thomas' requested excess fees, the order does not reference NRS 7.125(1), which permits district courts to award less than a requested amount if the underlying fees are unreasonable. Because the order fails to reference the controlling statute, the legal basis for denying the balance of Thomas' excess fee request is unclear. Given that the order does not contain the requested findings or reference NRS 7.125(1), we conclude that denying the balance of Thomas' requested excess fees was improper.

#### Conclusion


We are persuaded that Thomas has demonstrated that writ relief is warranted in this case. Because the reasons for reducing Thomas' award and denying the balance of her excess fees are not apparent from the order resolving Thomas' request, we conclude that Judge Mosley abused his discretion under the circumstances. Accordingly, we


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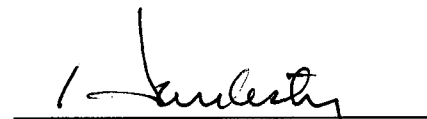
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requirement by name to convey that meaning to Thomas. Following the first denial letter, Thomas re-captioned her claim for excess fees as a "motion" on the belief that this was the reason for initially denying her request. Notably, however, Thomas' request was again denied in a second letter on the same "prior approval" rationale despite the new caption. Because her request was not apparently denied due to deficiencies with its form, Thomas reasonably believed that it was denied because of its timing—i.e., because she requested compensation before obtaining approval to incur excess fees on appeal.

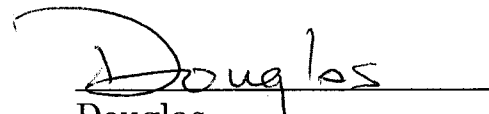
ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate its order resolving Thomas' excess fee request and to reassign this matter to a different district court judge for resolution consistent with this order.

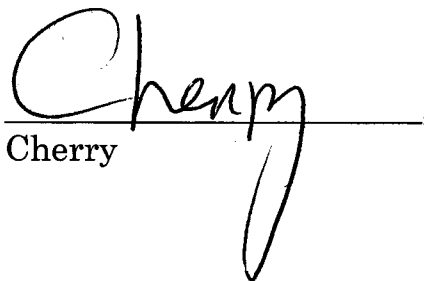
  
Gibbons, C.J.

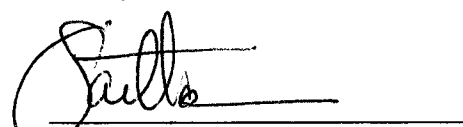
  
Maupin, J.

  
Hardesty, J.

  
Parraguirre, J.

  
Douglas, J.

  
Cherry, J.

  
Saitta, J.

cc: Hon. Donald M. Mosley, District Judge  
Hon. Kathy A. Hardcastle, Chief Judge, District Court  
JoNell Thomas  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Linda Marie Bell  
Eighth District Court Clerk