

IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY R. SCHMIDT, AN INDIVIDUAL,
Appellant,

vs.

WASHOE COUNTY, NEVADA, A
POLITICAL SUBDIVISION OF THE
STATE OF NEVADA, ON RELATION
OF ITS BOARD OF COUNTY
COMMISSIONERS,
Respondent.

No. 49681

FILED

DEC. 19 2008

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

ORDER OF AFFIRMANCE

This is an appeal from a post-judgment district court order denying attorney fees. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Appellant Gary Schmidt was a member of the Washoe County Board of Equalization. At a board meeting in February 2005, Schmidt requested that Deputy District Attorney Terrence Shea answer questions concerning a new 2004 regulation pertaining to assessment of real property. Schmidt also requested that Shea be sworn in to answer questions. Another deputy district attorney present at the hearing, Peter Simeoni, objected to having Shea sworn in. After an exchange between Schmidt, Shea, and other members of the Board, it was agreed that Shea would take an oath and Schmidt would be limited to asking Shea three questions.

Thereafter, respondent, the Washoe County Board of County Commissioners (the County), initiated a proceeding against Schmidt for possible removal from his position on the Board. At the request of Board members and under NRS 241.033, the County first convened a closed

session meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of Schmidt. After conducting a hearing on the matter under NRS 241.033 and 361.340(7), the County found that Schmidt's actions were considered to be a neglect of duty and censured him. The County and the Board further stated that Schmidt needed to complete some unspecified training.

Schmidt filed an Application for Writ of Mandamus in district court challenging the County's censure and arguing that the Commissioners had no authority to censure him based on his conduct. The Second Judicial District Court held a hearing on the merits of the sanction. The district court subsequently issued the writ, concluding that the County and the Board were without legal authority and that the censure was void, but declined to consider the merits of other matters raised in Schmidt's application, including whether the County's actions against Schmidt were brought without reasonable grounds or to harass Schmidt.

Schmidt then filed a Motion for Attorney's Fees, which the County opposed. The district court denied Schmidt's motion for attorney fees because, in considering Schmidt's application, it had declined to reach the merits of whether or not the County's actions against Schmidt were brought without reasonable grounds or to harass Schmidt. Schmidt now appeals the district court's denial of his motion for attorney fees, contending that he is 1) entitled to fees under NRS 41.0349 and 2) entitled to fees under NRS 18.010(2)(b). We disagree and conclude that the district court did not abuse its discretion in denying Schmidt's motion for attorney fees.

When reviewing a district court order involving the award of attorney fees, we consider whether the district court abused its discretion.¹ A district court may not award attorney fees unless authorized by statute, rule, or contract.² Schmidt argues that the district court abused its discretion in refusing to award attorney fees based on indemnity principles or based on the County's allegedly unreasonable, harassing conduct.

Schmidt first contends that he is entitled to indemnification for his attorney fees under NRS 41.0349 because he had to defend against the Board's censure when he was a member of a board of the State.

NRS 41.0349 provides that the State or political subdivision shall indemnify a "present or former officer, employee, immune contractor, [or] member of a board or commission of the State" in any civil action brought against him "based on any act or omission relating to his public duty or employment"³ As such, the state indemnifies its agents if sued in their official capacity unless:

- 1) The person failed to submit a timely request for defense;
- 2) The person failed to cooperate in good faith in the defense of the action;

¹Trustees v. Developers Surety, 120 Nev. 56, 59, 84 P.3d 59, 61 (2004).

²Nevada Bd. Osteopathic Med. v. Graham, 98 Nev. 174, 175, 643 P.2d 1222, 1223 (1982).

³NRS 41.0349.

3) The act or omission of the person was not within the scope of his public duty or employment;
or

4) The act or omission of the person was wanton or malicious.⁴

The district court specifically found that NRS 41.0349 “clearly states that, in any civil action, a judgment must be entered against Petitioner based on an act or omission relating to this public duty or employment. Here, no judgment was entered against [Schmidt].” Moreover, the district court concluded that “NRS 41.0349 does not contain any specific language authorizing an award of attorney’s fees in an action involving a petition for judicial review of an agency action.” Consequently, the district court denied Schmidt’s motion for attorney fees.

NRS 41.0349 is a narrow statute providing for indemnification only when an agent is acting in his official capacity and is the recipient of a civil judgment against him for acting in his official capacity. We thus conclude that the district court did not abuse its discretion in denying Schmidt’s motion for attorney fees under NRS 41.0349 because Schmidt failed to make a timely request for defense. Furthermore, no civil judgment was ever entered against Schmidt, precluding the application of NRS 41.0349.

Alternatively, Schmidt argues that the district court committed reversible error when it failed to address all the bases for attorney fees sought by Schmidt. The district court is limited in awarding attorney fees, as there must be a statute, rule, or contract allowing the

⁴Id.

award of attorney fees for the district court to award attorney fees.⁵ Here, the district court did not abuse its discretion because no statute, rule, or contract authorized an attorney fee award to Schmidt in the instant case. As discussed above, under NRS 41.0349, indemnification of attorney fees is only appropriate when a public employee is a recipient of a civil judgment against him for acting in his official capacity.⁶

Further, Schmidt argues that NRS 18.010(2)(b) also supports an award of attorney fees to him.⁷ NRS 18.010(2)(b) allows the court to make an award of attorney fees when:

⁵State, Dep't of Human Resources v. Fowler, 109 Nev. 782, 784, 858 P.2d 375, 376 (1993).

⁶Schmidt also argues that he is entitled to attorney fees under the general law of indemnity. Schmidt thus argues for a sea change in Nevada law. We conclude that this argument is without merit. Generally, the purpose of indemnifying public officials is to prevent a public official from incurring personal expense when they receive a civil judgment against them in their official capacity. See Kimberly J. Winbush, Annotation, Payment of Attorneys' Services in Defending Action Brought Against Officials Individually as Within Power or Obligation of Public Body, 47 A.L.R. 5th 553 § 2[a] (2006). Consequently, there must be a judgment entered which the municipality can indemnify. Here, no judgment was rendered against Schmidt such that the State or County should indemnify him.

⁷The County contends that Schmidt did not preserve his right to appeal the district court's denial of his motion for attorney fees under NRS 18.010(2)(b) because Schmidt raised the statute for the first time in his reply to the County's opposition to his motion for attorney fees. We will review the merits of an appellant's contentions where the appellant has raised the issues in opposition to the moving party's motion for summary judgment. Oliver v. Barrick Goldstrike Mines, 111 Nev. 1338, 1344-45, 905 P.2d 168, 172 (1995). We have noted that the purpose for this rule is to ensure that the moving party has the opportunity to respond to the

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[T]he court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations.⁸

That is, the district court may award attorney fees when it finds the opposing party maintained its action "without reasonable ground or to harass."⁹ We conclude that the district court did not abuse its discretion by denying an award of attorney fees to Schmidt under NRS 18.010(2)(b) because the premise of the statute is discretionary and dependent on the district court making certain findings about the underlying claims, which the district court explicitly did not make here. NRS 18.010(2)(b) allows the district court discretion to award attorney fees after the court makes a specific determination that the underlying action by the losing party was brought without reasonable ground or to harass. Although the statute is to be construed liberally, nothing in the statute provides for mandatory attorney fees.

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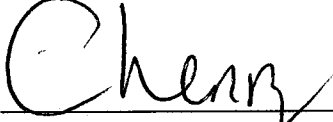
appellant's contentions, and the district court has the opportunity to consider the issues. Id. Here, Schmidt raised this issue in his answer to the opposition and the district court was on sufficient notice to specifically make its order citing the statute because it did consider the statute in making its conclusion. We thus conclude that Schmidt preserved this issue for appellate review.


⁸NRS 18.010(2)(b).

⁹Id.

We conclude that the district court did not abuse its discretion in denying Schmidt's motion for attorney fees. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry


_____, J.
Saitta

cc: Hon. Brent T. Adams, District Judge
Glade L. Hall
Washoe County District Attorney Richard A. Gammick /Civil
Division
Washoe District Court Clerk

MAUPIN, C.J., concurring:

I concur in the result reached by the majority. There was no statutory basis for an award of attorney fees.


_____, C.J.
Maupin