IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TODD ELWARDT,
Appellant,
vs.
LISA ELWARDT,
Respondent.

No. 69638

ORDER OF AFFIRMANCE

Appellant Todd Elwardt appeals from a post-divorce decree order awarding attorney fees. Eighth Judicial District Court, Family Court Division, Clark County; Denise L. Gentile, Judge.

Following an evidentiary hearing on the parties' post-divorce contempt motions, the district court awarded respondent Lisa Elwardt attorney fees.[1] Appellant contends on appeal that the district court erred by failing to specify the basis for its award. We review the award of attorney fees in divorce proceedings for an abuse of discretion. *Sprenger v. Sprenger*, 110 Nev. 855, 861, 878 P.2d 284, 288 (1994).

Although the district court did not clarify under which rule it was awarding attorney fees,[2] it had the authority to award such fees in

[1]We do not recount the facts except as necessary to our disposition.

[2]The appellant always bears the burden of providing an appellate court with reasons to reverse a challenged district court action, and here the appellant failed to provide copies of the motion upon which the district court's award of attorney fees was based. As the dissent notes, without the original motion, this court cannot discern what legal basis the award was predicated upon given the brevity of the district court's order. Arguably, both the district court and the appellant share responsibility: the district court for not writing a more complete and thorough order, and

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this action; and because it properly considered the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), we cannot say the district court abused its discretion in making its award. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.).

Accordingly we,

ORDER the judgment of the district court AFFIRMED.

Silver, C.J.
Silver

Tao, J.
Tao

GIBBONS, J., dissenting:

I am unable to join my colleagues in affirming the district court's order as doing so requires this court to engage in speculation regarding the legal authority, if any, relied upon by the district court,

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the appellant for not transmitting a complete appellate record. But the appellant had the "last clear chance" to make the record whole, and therefore instead of remanding for the district court to do the appellant's job of filling in the missing pieces, we apply the rule of *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, and hold the missing portions of the record against the party that bore the burden of providing it. 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (appellant is responsible for making an adequate appellate record and when "appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision").

when ordering a moving party to pay the defending party's attorney fees, when the moving party was successful in prosecuting a contempt of court action, but did not adequately prove some of his contempt allegations. Further, I believe the majority's application of *Cuzze v. University & Community College System of Nevada*, 123 Nev. 598, 172 P.3d 131 (2007), undermines existing caselaw holding that a district court must identify the legal authority which permits an award of attorney fees. Accordingly, I dissent as I believe this case should be remanded to the district court to identify the legal authority relied upon or to vacate its attorney fee award to Lisa Elwardt.

Following a hearing on Todd Elwardt's motions for Lisa to show cause why she should not be held in contempt of court, the district court issued a decision that found that Todd prevailed on two of his contempt allegations, and ordered Lisa to pay a penalty of $500 per violation, but Todd had failed to prove the remaining allegations were willful violations of a court order. Both parties were ordered to submit memoranda of fees and costs.

After reviewing the memoranda, the district court issued a minute order. Although the court cited no authority that would allow it to order either party to pay attorney fees, it awarded fees to Todd for prevailing on two claims and Lisa was awarded fees for successfully defending the remaining claims. As the court concluded that Lisa prevailed on the majority of the issues, Todd was ordered to pay her $15,000 in attorney fees, while Lisa was ordered to pay Todd $6,000 in attorney fees plus the sanction award of $1,000. Todd appeals the order that he pay Lisa $8,000, which is the offset amount. Lisa did not cross-appeal.

It appears that based upon its conclusion that both parties had prevailed in part, the district court believed each party was entitled to attorney fees. At no point in the brief minute order, however, did the district court identify the authority which permitted it to award attorney fees to either party. Under the contempt statute in NRS Chapter 22, a party that has been found in contempt of court can be ordered to pay a fine of up to $500 and attorney fees. *See* NRS 22.100(2)-(3) (providing in pertinent part that "if a person is found guilty of contempt, a fine may be imposed on the person not exceeding $500 or the person may be imprisoned not exceeding 25 days, or both[,]" and "the court may require the person [found guilty of contempt] to pay the party seeking to enforce the . . . order . . . the reasonable expenses, including, without limitation, attorney's fees, incurred by the party as a result of the contempt"). This statute, however, does not provide authority to grant attorney fees for successfully defending a contempt motion. *See* NRS 22.100.

The long-standing rule in Nevada is that attorney fees cannot be awarded unless authorized by statute, rule, or agreement. *See First Interstate Bank of Nev. v. Green*, 101 Nev. 113, 116, 694 P.2d 496, 498 (1985). A prevailing party may be awarded fees pursuant to NRS 18.010(2)(a) if the party recovers less than $20,000. *See Smith v. Crown Fin. Servs.*, 111 Nev. 277, 286, 890 P.2d 769, 775 (1995) (establishing that a monetary judgment is a prerequisite for an attorney fee award pursuant to NRS 18.010(2)(a)). Further, a party which successfully defends an action may be awarded fees if the court finds that the claim was brought or maintained without reasonable ground or to harass the prevailing party. NRS 18.010(2)(b). The district court here did not make such findings. Therefore, I discuss NRS 18.010 only because

that court used variations of the word "prevailing" several times in its order and because Todd alleges on appeal that the district court may have relied upon NRS 18.010.

On appeal, however, Lisa does not argue that NRS 18.010 applies, or that she even requested attorney fees from the district court at the hearing or by way of motion, but instead, directs the court's attention to her countermotion to modify visitation and to hold Todd in contempt for failing to pay child support and alimony. This countermotion was filed through different counsel, several months before Todd filed a contempt motion, and was not the subject of the district court hearing or this appeal. Lisa then relies upon the arguments she advanced in this unrelated motion, despite the fact that the attorney fee award was based upon *defending against Todd's contempt motions*. But even if she had requested fees, she would not be entitled to them under NRS 18.010 as she was not awarded a monetary judgment, so she cannot be a prevailing party, and the district court did not find that Todd brought the action without reasonable ground or to harass Lisa.[3]

The majority faults Todd for not providing a complete appellate record, in that he did not include his contempt motions. My colleagues assert that under *Cuzze*, Todd's failure to include his contempt motions signifies that the district court's order should be affirmed. *See* 123 Nev. at 603, 172 P.3d at 135 (holding that necessary documentation

[3]The district court found that Lisa was in contempt of court as two of Todd's claims were meritorious, and several of his other claims were denied on the ground that Lisa provided a sufficient explanation for her conduct, therefore, no willful violation of a court order was proven. The district court found that Todd's remaining claims were contradicted.

from the district court record must be included on appeal). I believe, however, that applying *Cuzze* in this case unnecessarily creates tension with existing law.

Specifically, my colleagues conclude that *Cuzze*'s holding supports affirmance despite there being clear caselaw requiring a district court to make findings regarding the basis for attorney fees. *See, e.g.*, *Stubbs v. Strickland*, 129 Nev. 146, 152 n.1, 297 P.3d 326, 330 n.1 (2013) ("[W]e require a district court to make findings regarding the basis for awarding attorney fees and the reasonableness of an award of attorney fees[.]"); *Henry Prods. Inc. v. Tarmu*, 114 Nev. 1017, 1020, 967 P.2d 444, 446 (1998) ("The failure of a district court to state a basis for the award of attorney fees is an arbitrary and capricious action and, thus, is an abuse of discretion.").

As a district court abuses its discretion by failing to identify a legal authority for the award, I believe Todd's motions are not *necessary documentation* under *Cuzze* because the available record already demonstrates that the district court erred. *See also Bates v. Chronister*, 100 Nev. 675, 679, 691 P.2d 865, 868-69 (1984) (holding that once an appellant demonstrates a prima facie showing on the partial record submitted, the respondent bears the burden of providing the portion of the record which would support the district court's order).[4] Moreover, Todd's motions would obviously not cite any authority for the court to award Lisa

[4]Although Lisa may not have been required to file an appendix to her brief, *see* NRAP 30(a), Lisa nevertheless elected to file her own respondent's appendix, and it did not include pleadings and moving papers demonstrating that she sought attorney fees or that the district court determined a legal basis to award her fees.

attorney fees, which is the issue before this court. Therefore, inclusion of his motions would not provide this court with *necessary documentation*.

Further, Lisa does not challenge Todd's argument that a district court must identify the authority relied upon when granting attorney fees. I take Lisa's failure to respond as "a confession of error" and would also remand on this ground alone. *See* NRAP 31(d)(2); *Polk v. State*, 126 Nev. 180, 184, 233 P.3d 357, 359-60 (2010) (holding that NRAP 31(d) permits this court to consider the failure to respond to an argument as "a confession of error"); *Bates*, 100 Nev. at 682, 691 P.2d at 870 (same).

Lisa, perhaps recognizing the district court abused its discretion, elects to provide several authorities which she believes authorize the attorney fee award and urges this court to essentially pick one. The majority falls into this trap. Instead of remanding on the narrow grounds argued by Todd, my colleagues choose—in the first instance—to state there is authority they believe would authorize an award. I believe such an approach is improper. *Cf. Musso v. Binick*, 104 Nev. 613, 615, 764 P.2d 477, 478 (1988) (holding that findings should be made by the district court in the first instance). Even assuming that this court can identify an authority in the first instance, I am not convinced that the authorities advanced by Lisa authorize an award of attorney fees in this particular case.

Lisa argues that she is entitled to attorney fees pursuant to either NRS 125.150, or *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972), which analyzed and approved the fees awarded pretrial and at the conclusion of the divorce trial. Lisa, however, never alleges that these authorities were presented to the district court during the contempt proceedings, but instead cites to the unrelated motion she filed in 2014

several months before any contempt proceedings were initiated. The parties were divorced in 2011 and a different district judge was presiding in that department through 2014. Therefore, it is logical to conclude that these arguments were not presented to the district court for the contempt motion that is the subject of this appeal, and again, it is only by speculation that one could say that the district court was considering these possible authorities when it issued its order.

Moreover, there does not appear to be a single case in Nevada that holds that NRS 125.150 authorizes an award of fees to a party who partially prevails in defending against an order to show cause in a post-divorce contempt action under NRS Chapter 22. Unfortunately, the majority appears to extend NRS 125.150 to the present case notwithstanding the fact that this is a question of first impression that is wholly unnecessary to resolve in this appeal. Further, Lisa provides no authority which demonstrates that NRS 125.150(4) permits an award of attorney fees under the circumstances presented here. Instead, Lisa relies upon cases which address post-decree family law issues involving custody or child support that are distinguishable from the present case.

The majority also justifies its result by averring that the district court properly considered the *Brunzell*[5] factors. Lisa, however, failed to include a *Brunzell* affidavit with her memorandum of fees and costs while Todd did include such an affidavit. The district court could not engage in a proper *Brunzell* analysis when Lisa did not provide an affidavit. One could infer from this omission by Lisa that she did not ask

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[5]*Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

for an award of attorney fees, which further supports the conclusion that the district court's award was an abuse of discretion.

Even if the district court properly engaged in the required *Brunzell* analysis to determine the reasonable amount of attorney fees, such a fact is not relevant to the question of whether the court had the legal authority to award attorney fees in the first place. As our court held in *Frazier v. Drake*, it is a clear abuse of discretion to award attorney fees, even when reasonable, if the underlying basis to award the fees is not first met. 131 Nev. ___, ___, 357 P.3d 365, 373 (Nev. Ct. App. 2015) (holding that a finding of reasonableness alone cannot support an award of attorney fees as other factors must be satisfied). Although *Frazier* concerned fees that could be awarded following an offer of judgment so long as the *Beattie*[6] factors are met, the same rationale applies here—*i.e.*, the underlying legal authority must exist before the *Brunzell* factors are even considered.

In summary, our court has been asked to determine whether a district court abuses its discretion by failing to identify any legal authority when ordering a moving party to pay the defending party's attorney fees, when the moving party was successful in prosecuting a contempt of court action, but did not adequately prove all of his contempt allegations. We should resolve the case on that narrow issue. In addressing the merits of the argument, we should conclude that a district court abuses its discretion by failing to identify any legal authority for the award.[7]

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[6]*Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983).

[7]Moreover, our court has previously stated that failing to identify the legal authority supporting the award deprives this court of the ability to engage in meaningful review. *See, e.g., Martella v. Martella*, Docket

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Accordingly, I would remand this case as the failure to identify any legal authority prevents our court from engaging in a fully meaningful review of a troublesome legal question.

_____, J.
Gibbons

cc: Hon. Denise L. Gentile, District Judge, Family Court Division
James J. Jimmerson, Settlement Judge
Law Offices of F. Peter James, Esq.
Tony Terry
Eighth District Court Clerk

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No. 65597, 2016 WL 6652780, at *2-3 (Order Affirming in Part, Reversing in Part, and Remanding, Nev. Ct. App., Nov. 1, 2016) (concluding that this court could not conduct a meaningful review of an award and remanding for clarification because the district court did not explain whether it was an attorney fee award made pursuant to *Sargeant*, or was instead a distribution of community property); *cf. Doty v. Dubin*, Docket No. 69665, 2017 WL 448663, at *1 (Order of Reversal and Remand, Nev. Ct. App., Jan. 25, 2017) (reversing an attorney fee award in part because the district court made insufficient findings explaining its decision).