IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KENNETH BERBERICH, TRUSTEE, ON BEHALF OF 4499 WEITZMAN PLACE TRUST, A NEVADA TRUST, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Appellant,
vs.
SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION, A NEVADA NONPROFIT CORPORATION; MTC FINANCIAL, INC., A CALIFORNIA CORPORATION REGISTERED IN NEVADA; OLYMPIA MANAGEMENT SERVICES, LLC, A NEVADA LIMITED LIABILITY CORPORATION; AND FEDERAL HOME LOAN MORTGAGE CORPORATION, A FEDERALLY CHARTERED CORPORATION,
Respondents.

No. 77640-COA

JEFF BRAUER; AND BRAUER, DRISCOLL, SUN AND ASSOCIATES LLC,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE SUSAN JOHNSON, DISTRICT JUDGE,
Respondents,
and
OLYMPIA MANAGEMENT SERVICES, LLC, A NEVADA LIMITED LIABILITY CORPORATION,
Real Party in Interest.

No. 78064-COA

FILED

DEC 10 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

19-50058

KENNETH BERBERICH, TRUSTEE ON BEHALF OF 4499 WEITZMAN PLACE TRUST, A NEVADA TRUST, AND ON BEHALF OF ALL OTHERS SIMILARILY SITUATED, Appellant, vs. OLYMPIA MANAGEMENT SERVICES, LLC, A NEVADA LIMITED LIABILITY CORPORATION, Respondent.	No. 78069-COA
JEFF BRAUER; AND BRAUER, DRISCOLL, SUN AND ASSOCIATES LLC, Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE SUSAN JOHNSON, DISTRICT JUDGE, Respondents, and SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION, A NEVADA NONPROFIT CORPORATION, Real Party in Interest.	No. 78523-COA
KENNETH BERBERICH, TRUSTEE, ON BEHALF OF 4499 WEITZMAN PLACE TRUST, A NEVADA TRUST, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Appellant, vs. SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION, A NEVADA NONPROFIT CORPORATION, Respondent.	No. 78541-COA

ORDER DENYING PETITIONS FOR WRIT RELIEF (DOCKET NOS. 78064-COA AND 78523-COA), ORDER OF AFFIRMANCE (DOCKET NOS. 77640-COA, 78069-COA, AND 78541-COA)

These are consolidated original petitions for writs of mandamus or prohibition and appeals challenging post-dismissal district court orders granting and denying motions for attorney fees and costs.[1] Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Following the issuance of the remittitur from this court's order of reversal, *see Berberich v. S. Highlands Cmty. Ass'n*, Docket No. 72689-COA (Order of Reversal, April 20, 2018), appellant Kenneth Berberich—represented by petitioners Jeff Brauer, Esq., and Brauer, Driscoll, Sun and Associates LLC (collectively referred to herein as Brauer)—moved for attorney fees under NRS 18.010(2)(a) and NRCP 68.[2] The district court concluded that Berberich was not entitled to fees under those authorities and denied his motion. It then granted respondents Southern Highlands Community Association's (SHCA) and Olympia Management Services, LLC's (Olympia) pending motions for attorney fees under NRS 7.085, NRS 18.010(2)(b), and EDCR 7.60, concluding that Berberich and Brauer

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[1]We note that, although named in the first complaint below, the appellant did not name Olympia Group, LLC (a distinct entity from respondent Olympia Management Services, LLC), in his amended complaint. Accordingly, that entity is not a party to these appeals and writ petitions, and we direct the clerk of the court to amend the caption for Docket Nos. 77640-COA to conform to the caption on this order.

[2]The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018). We cite the prior versions of the applicable rules, as they were in effect at all relevant times herein.

brought and maintained the underlying action unreasonably and vexatiously. The district court awarded SHCA and Olympia their fees reasonably incurred from the date the first complaint in this action was filed to the date on which Berberich filed his second voluntary dismissal, which was the dismissal this court held to be operative under NRCP 41 in our April 20, 2018, order of reversal. *See Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 679, 263 P.3d 224, 228-29 (2011) (holding that district courts retain jurisdiction over collateral matters like sanctions for attorney misconduct after a case is dismissed under NRCP 41(a)(1)). Specifically, the district court awarded SHCA $80,297.50 and Olympia $20,345.00—a total of $100,642.50—against Berberich and Brauer, jointly and severally.

Berberich now appeals from the district court's decisions denying his motions for attorney fees and granting SHCA's and Olympia's motions (Docket Nos. 77640-COA, 78069-COA, and 78541-COA). Brauer also challenges the decisions granting SCHA's and Olympia's motions by way of original writ petitions (Docket Nos. 78064-COA and 78523-COA), which we have consolidated with Berberich's appeals. *See Watson Rounds, P.C. v. Eighth Judicial Dist. Court*, 131 Nev. 783, 786-87, 358 P.3d 228, 231 (2015) (noting that "extraordinary writs are a proper avenue for attorneys to seek review of sanctions").

Attorney fees are recoverable when allowed by agreement or when authorized by a statute or rule. *Miller v. Wilfong*, 121 Nev. 619, 623, 119 P.3d 727, 730 (2005). We generally review a district court's "decisions awarding or denying attorney fees for a manifest abuse of discretion." *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006) (internal quotation marks omitted). "But when the attorney fees matter implicates questions of law, the proper review is de novo." *Id.* Accordingly,

to the extent this consolidated matter requires us to determine whether the district court properly concluded that parties were either eligible or ineligible for an award of attorney fees under a statute or rule, we review those issues de novo. *See Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011) ("Questions of statutory construction, including the meaning and scope of a statute, are questions of law, which this court reviews de novo." (internal quotation marks, alterations, and citation omitted)); *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 8-11, 106 P.3d 1198, 1199-200 (2005) (reviewing de novo the question of whether landowners in condemnation actions may be awarded attorney fees as prevailing parties under NRS 18.010(2)(a)); *see also Casey v. Wells Fargo Bank, N.A.*, 128 Nev. 713, 715, 290 P.3d 265, 267 (2012) (noting that legal conclusions regarding court rules, like those regarding statutes, are reviewed de novo); *Soro v. Eighth Judicial Dist. Court*, 133 Nev. 882, 885, 411 P.3d 358, 361 (Ct. App. 2017) (reviewing a question of law de novo in the context of a writ petition).

But to the extent we must determine whether the district court abused its discretion in granting eligible parties' requests for attorney fees, we will affirm those decisions if they are supported by evidence in the record. *See Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 687 (1995); *see also Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014) ("An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances."). And in the context of Brauer's writ petitions challenging the same rulings, we will likewise deny those petitions absent an abuse of discretion. *See Watson Rounds*, 131 Nev. at 787, 358 P.3d at 231 (reviewing "sanctions awarding attorney fees for an abuse of discretion" in the context of a writ petition).

We first consider whether the district court erred when it concluded that Berberich was not a prevailing party under NRS 18.010(2)(a). A party prevails for purposes of that statute "if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit." *Valley Elec.*, 121 Nev. at 10, 106 P.3d at 1200 (internal quotation marks omitted). Here, despite Berberich's procedural victory in his prior appeal before this court, he voluntarily dismissed his underlying district court claims without prejudice. Thus, it is axiomatic that Berberich did not succeed on any of the issues presented in his district court claims and that he achieved none of the benefit he sought in bringing suit. Accordingly, the district court properly denied his request for attorney fees under NRS 18.010(2)(a).

We next consider whether the district court erred in concluding that Berberich was not entitled to attorney fees under NRCP 68. Under that rule, if an offeree rejects an offer of judgment and fails to obtain a more favorable judgment, the district court may award the offeror reasonable attorney fees incurred from the time of the offer. NRCP 68(f)(2). Berberich contends that because the district court awarded him $479.10 in costs for the prior appeal, respondents failed to obtain a more favorable judgment than his January 7, 2017, offer to pay each of them $10.00 to settle all claims. However, as we held in the prior appeal, the underlying case was dismissed without prejudice on December 22, 2016, and Berberich fails to present any authority in support of the notion that an offer of judgment has any effect when it is made after a district court has lost jurisdiction over a case because of a voluntary dismissal. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that this court need not consider claims that are not cogently argued or

supported by relevant authority). Our own research similarly failed to reveal any authority in support of Berberich's argument, and we therefore reject it.[3]

Finally, we consider whether the district court abused its discretion in ordering Berberich and Brauer to pay SHCA and Olympia their attorney fees under NRS 7.085, NRS 18.010(2)(b), and EDCR 7.60, which collectively allow district courts to award fees as sanctions against parties and their attorneys when they conduct litigation unreasonably and vexatiously.[4] Because our review of the record reveals that the district court did not abuse its discretion in awarding fees against Berberich and Brauer under EDCR 7.60, we consider the district court's findings in light of that rule alone. Under the rule, a court may sanction both a party and his or her attorney by ordering them to pay an opposing party's reasonable attorney fees if the party or the attorney "[s]o multiplies the proceedings in a case as to increase costs unreasonably and vexatiously." EDCR 7.60(b)(3).

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[3]To the extent Berberich also contends that he was eligible for fees under his March 31, 2016, offer of judgment to SHCA, he fails to set forth any cogent explanation on appeal as to how the dismissal of his claims without prejudice—or even the award of his appellate costs—in any way constituted a less favorable judgment for SHCA than the terms of the March offer, which would have required SHCA to quitclaim rights in various properties "to a third party entity specified by Plaintiff's counsel." Thus, we reject this argument. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

[4]Because the district court awarded attorney fees as sanctions against Berberich and Brauer, we reject their argument that SHCA and Olympia failed to timely file their motions for attorney fees. *See* NRCP 54(d)(2)(C) (stating that the requirement under NRCP 54(d)(2)(B) that a party must file a motion for attorney fees within 20 days after notice of entry of judgment "do[es] not apply to claims for fees and expenses as sanctions pursuant to a rule or statute").

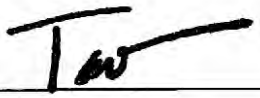
Having reviewed the protracted history of the litigation below, we cannot conclude that no reasonable judge would have reached a similar decision to that of the district court under the circumstances of this case. *See Leavitt*, 130 Nev. at 509, 330 P.3d at 5. Multiple actions taken by Berberich and Brauer during the litigation evince an unreasonable and vexatious intent to multiply the proceedings from the outset of the case. Examples of such include their refusal to accept SHCA's counsel's offer to allow them to substitute a trustee as plaintiff in place of the original plaintiff trust without filing a motion to dismiss the complaint, *see Causey v. Carpenters S. Nev. Vacation Tr.*, 95 Nev. 609, 610, 600 P.2d 244, 245 (1979) ("A party to litigation is either a natural or an artificial person. [Trusts are] neither. It is the trustee, or trustees, rather than the trust itself that is entitled to bring suit."), and their failure to appear at multiple hearings below. But perhaps the clearest example of Berberich and Brauer's multiplication of the proceedings is their repeated, stubborn attempts to enforce the first voluntary dismissal even though they had not complied with all of the requirements of NRCP 41(a)(1)(i) at the time it was filed, and even though the district court had stricken the dismissal on grounds that it contained a provision precluding all defendants from seeking their attorney fees, despite the fact that the defendants had not agreed to such a waiver and Berberich and Brauer had not filed and served any motion affirmatively seeking such relief. And most egregious of all was Berberich and Brauer's filing of a "Notice of Entry of Order Granting All Parties Relief from Attorneys Fees," in which they represented—in direct contravention of the district court's ruling just one day prior—that the district court intended to give effect to the fee-waiving provision, when in fact it struck the entire dismissal because of that very provision. In light of

these events and others, we cannot say that the district court manifestly abused its discretion in determining that Berberich and Brauer unreasonably and vexatiously extended the proceedings from the outset of the case. *See* EDCR 7.60(b)(3); *Thomas*, 122 Nev. at 90, 127 P.3d at 1063.

Based on the foregoing, we

ORDER the petitions DENIED and the judgments of the district court AFFIRMED.[5]

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. Susan Johnson, District Judge
Brauer, Driscoll, Sun and Associates LLC
Spencer M. Judd
Aldridge Pite, LLP
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP/Las Vegas
Burke, Williams & Sorensen, LLP
Kemp, Jones & Coulthard, LLP
Kolesar & Leatham, Chtd.
Eighth District Court Clerk

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[5]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.