

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLEMENT MUNNEY; AND CHEF EXEC  
SUPPLIERS, LLC,  
Appellants,  
vs.  
DOMINIQUE ARNOULD,  
Respondent.

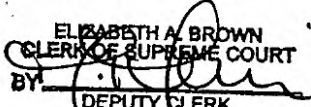
No. 83641

CLEMENT MUNNEY,  
Appellant,  
vs.  
DOMINIQUE ARNOULD,  
Respondent.

No. 83869

**FILED**

FEB 17 2023

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

These are consolidated appeals from a district court order granting summary judgment and a post-judgment award of attorney fees and costs in a business matter. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

This appeal arises from a dispute between two former business partners, appellant Clement Muney and respondent Dominique Arnould. Arnould and Muney co-owned Chef Exec Suppliers, LLC (CES), until 2019, when their professional relationship broke down. Each co-owner accused the other of misappropriating CES funds for personal use. Arnould, on behalf of CES, brought a derivative suit against Muney seeking (1) declaratory relief for the appointment of a receiver and judicial dissolution, and (2) an accounting of CES and damages for breach of fiduciary duty. Muney brought direct counterclaims for (1) breach of fiduciary duty, (2) conversion, (3) money had and received, (4) unjust enrichment, (5) constructive fraud, and (6) fraudulent concealment.

In June 2020, the district court appointed a receiver, Larry L. Bertsch, CPA (Receiver), to prepare a report about the company's viability. After finding that it was not reasonably practicable for Muney and Arnould to remain in business together, the district court later ordered dissolution of CES to take effect on September 30, 2020.

The Receiver issued his final report (Receiver's Report) in December 2020. In the Receiver's Report, the Receiver made recommendations as to the distribution of company assets and liabilities. Muney filed an objection to the Receiver's Report in which he disputed several of the Receiver's findings. The Receiver responded to Muney's objections. The district court approved and accepted the Receiver's Report, and discharged the Receiver, in February 2021.

The district court set the close of discovery for May 14, 2021. That day, Arnould designated the Receiver and Muney designated Andrew Martin and Gene Proctor as expert witnesses for trial. Arnould designated the Receiver's Report as an expert report, but Muney did not designate an expert report.

Arnould moved for summary judgment. Over Muney's opposition, the district court granted summary judgment in favor of Arnould and against Muney. In granting summary judgment, the district court found that "Mr. Muney failed to provide any exhibit, declaration, or affidavit that might put any fact in dispute. . . . [And] Mr. Muney failed to cite to any material facts that support his defenses [or] counterclaims in this matter." Following summary judgment, the court awarded Arnould attorney fees and costs in the amount of \$199,985.

Muney now appeals both the district court order granting summary judgment to Arnould, as well as the subsequent monetary judgment against him. As we explain below, the district court did not err

in granting summary judgment or awarding attorney fees and costs in favor of Arnould.

*The district court did not err in granting summary judgment to Arnould with respect to Arnould's accounting claim*

Muney argues that the district court erred in finding that Arnould prevailed on his second claim for an accounting of CES. Muney first claims that Arnould had to establish wrongdoing and unjust possession of property by Muney to satisfy the threshold for a court-ordered accounting. Second, Muney disputes the district court's finding that the Receiver's Report was a complete and full accounting of CES. Third, Muney argues that the district court failed to consider evidence that disputed the Receiver's Report.

An equitable accounting "is essentially a legal action or equitable remedy, designed to compel a defendant to account for and pay over money owed to the plaintiff but held by the defendant." 1A C.J.S. *Accounting* § 6 (2016). "[M]utual and/or complicated accounts" are one of several grounds by which equity jurisdiction for an accounting may exist. *Id.* at § 9. A mutual or complicated account exists where "the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable." *Takiguchi v. MRI Int'l, Inc.*, 47 F. Supp. 3d 1100, 1120 (D. Nev. 2014) (internal quotation marks omitted).

Muney incorrectly claims that a party moving for an accounting must make a showing of wrongdoing. "A claim of wrongdoing is *sufficient* under *some authority* to establish equitable jurisdiction for an accounting," but "[a] court *may consider other grounds* of equitable jurisdiction to support an accounting action." 1A C.J.S. *Accounting* § 9 (emphases added). There

is no authority indicating that Nevada is a jurisdiction that requires a showing of wrongdoing.<sup>1</sup>

Muney further insists that, in the absence of a fiduciary relationship, an accounting is permitted only if the other party is in possession of property for which the claimant has title. However, the authority that Muney relies upon is equivocal on this point. *See In re Nat'l Audit Def. Network*, 332 B.R. 896, 919 (Bankr. D. Nev. 2005) (“On this point, the authorities are somewhat less precise, but appear to assume that the defendant’s possession of property belonging to the complaining party is essential if the parties are not in a fiduciary relationship.” (emphases added)). Moreover, even if Arnould’s claim required such a showing, we are persuaded that Arnould has met this burden. After all, the Receiver’s accounting adjusted the CES financials to reflect property unjustly possessed by both partners.

Accordingly, a showing of mutual or complicated accounts sufficed to satisfy Arnould’s claim for an accounting. The record persuades us that CES’s accounts were indeed so complicated that an ordinary legal action demanding a fixed sum was impracticable. Thus, the district court did not err in finding Arnould entitled to an accounting.

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<sup>1</sup>Muney argues that *Foster v. Arata*, 74 Nev. 143, 325 P.2d 759 (1958), *abrogated on other grounds by Guzman v. Johnson*, 137 Nev. 126, 483 P.3d 531 (2021), imposes a requirement that the party moving for an accounting make a showing of waste of assets, mismanagement, fraud, or official misconduct on behalf of the other party. However, that decision, supported by New York caselaw, indicates that the requirement is limited to instances in which a stockholder sues a director for an accounting. *Id.* at 154, 325 P.2d at 764-65. Moreover, no subsequent Nevada case has signaled that such a showing applies universally to all accountings at equity. *See, e.g., Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 94-95 787 P.2d 777, 781 (1990); *see also Miller v. Walser*, 42 Nev. 497, 513, 181 P. 437, 442 (1919).

Muney's second argument pertaining to the accounting claim is that the district court improperly declared the Receiver's Report a complete and full accounting of CES in a retroactive manner. However, we have held that Nevada has "no statutory provision as to the method of procedure when it has been made to appear that an accounting should be ordered, but it seems that a court of equity has a wide discretion in this matter." *Foster v. Bank of Am. Nat'l Tr. & Sav. Ass'n*, 77 Nev. 365, 369, 365 P.2d 313, 316 (1961) (internal quotation marks omitted). Furthermore, once appointed, receivers are essentially required to perform an accounting of an LLC under NRS Chapter 86. See NRS 86.5419 ("The receiver . . . shall lay before the district court *a full and complete inventory* of all the estate, property and effects of the limited-liability company, . . . and *an account of all debts due* from and to [the LLC] . . . ." (emphases added)).

Accordingly, Nevada law did not require the district court to order a new accounting in addition to the Receiver's Report, and doing so would likely be redundant. The Receiver's Report was a complete inventory of CES's assets and liabilities, accounted for amounts that Muney and Arnould owed to the company and to each other, and determined the distribution of company assets upon dissolution. Thus, the district court properly found that the Receiver's Report could serve as an accounting in accordance with Nevada law.

Muney's third claim is that the district court erroneously determined that none of Muney's evidence disputing the Receiver's Report was admissible. NRCP 56(c)(1) states that a party opposing summary judgment must support an assertion that a fact is disputed by either citing to materials in the record or showing that materials in the record do not establish the absence or presence of a genuine dispute, or that the moving party cannot produce evidence to support the fact. The nonmoving party

“must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue.” *Wood v. Safeway*, 121 Nev. 724, 731, 121 P.3d 1026, 1030-31 (2005) (internal quotation marks omitted). Any such affidavit or declaration must “set out facts that would be admissible in evidence.” NRCPC 56(c)(4).

Muney’s objections to the Receiver’s Report do not establish the presence of a genuine dispute regarding the Receiver’s findings. Muney’s objections cite no specific, admissible facts, and instead rely largely upon his own opinions regarding the Receiver’s methodology. Moreover, noting that the Receiver is an expert in accounting, objections to his findings cannot rest upon the opinion of a layperson and require the support of expert testimony under NRS 50.275.<sup>2</sup> While Muney did designate two expert witnesses at the close of discovery, the district court properly found that Muney’s failure to produce an expert report prohibited him from proffering the experts’ testimony under NRCPC 16.1(a)(2).<sup>3</sup> Thus, the district

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<sup>2</sup>NRS 50.275 requires expert testimony “[if] scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” Whether evidence is classified as expert or lay testimony depends upon whether it concerns “information within the common knowledge of or capable of perception by the average layperson or . . . require[s] some specialized knowledge or skill beyond the realm of everyday experience.” *Brown v. State*, 138 Nev., Adv. Op. 44, 512 P.3d 269, 275-76 (2022) (internal quotation marks omitted). Here, we are persuaded that the information at issue in the Receiver’s Report requires specialized knowledge or skill in accounting and other related fields “beyond the realm of everyday experience.” *Id.*

<sup>3</sup>NRCPC 16.1(a)(2) “requires each party to provide a written disclosure of their experts *and* the contents of those experts’ testimonies, including the information each expert considered in forming an opinion, well in advance of trial.” *Sanders v. Sears-Page*, 131 Nev. 500, 517, 354 P.3d 201, 212 (Ct. App. 2015).

court did not err in finding that Muney failed to properly dispute the Receiver's Report.

In sum, the district court correctly found in favor of Arnould on his second claim for an accounting. Arnould satisfied the threshold for a court-ordered accounting and the Receiver's Report was a complete and full accounting of CES. Muney's objections to the Receiver's Report were not admissible. Thus, the district court did not err in granting summary judgment to Arnould with respect to his accounting claim.

*The district court did not err in granting summary judgment to Arnould with respect to Muney's first, fifth, and sixth counterclaims*

The district court dismissed Muney's counterclaims for breach of fiduciary duty, constructive fraud, and fraudulent concealment. Each of these claims required a fiduciary duty, and the district court found that Arnould owed no fiduciary duty to Muney and CES because the LLC had no operating agreement. On appeal, Muney argues that the district court erred by failing to consider the "many non-formal bases for fiduciary and special relationships" discussed by the United States District Court for the District of Nevada. *See Yerington Ford, Inc. v. Gen. Motors Acceptance Corp.*, 359 F. Supp. 2d. 1075, 1088 (D. Nev. 2004), *overruled by Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865 (9th Cir. 2007).

NRS 86.298 provides that the "only" two duties owed by an LLC member to the LLC or any LLC member are "[t]he implied contractual covenant of good faith and fair dealing" and "[s]uch other duties . . . , if any, as are expressly prescribed by the articles of organization or the operating agreement." In *Israyelyan v. Chavez*, we interpreted NRS Chapter 86 to mean "that while members of an LLC can contract to fiduciary duties, such duties do not necessarily exist otherwise." No. 78415, 2020 WL 3603743, at \*4 (Nev. July 1, 2020) (Order of Affirmance) (unpublished disposition). In

so holding, we specifically noted that NRS 86.298 “further suggests the Legislature did not intend for NRS Chapter 86 to impose implied fiduciary duties upon LLCs.” *Id.* at \*4 n.5. Today, in agreement with the *Israyelyan* court, we too find that the plain language of NRS 86.298 does not impose fiduciary duties upon LLCs other than the duties of good faith and fair dealing, unless LLC members contract to additional duties.

Here, CES had no operating agreement. This means that, pursuant to NRS 86.298, the district court correctly found that Arnould and Muney owed no implied duties to each other beyond the duty of good faith and fair dealing. In the absence of a fiduciary duty, Muney’s first, fifth, and sixth counterclaims fail. We are not persuaded by Muney’s argument that alternative bases for a fiduciary duty apply. Furthermore, Muney failed to support his first, fifth, and sixth counterclaims in his opposition to summary judgment; he made arguments based solely on judicial estoppel. Accordingly, we conclude that the district court did not err in granting summary judgment to Arnould on these three counterclaims.

*The district court did not err in granting summary judgment to Arnould on Muney’s second, third, and fourth counterclaims*

The district court dismissed Muney’s counterclaims for conversion, money had and received, and unjust enrichment on the grounds that Muney lacked standing to bring them in either an individual or derivative capacity. On appeal, Muney argues that derivative standing is not necessary because he can show individual standing to bring these counterclaims.

The district court found that Muney lacked individual standing because the allegedly stolen, embezzled, or wrongfully taken funds which Muney requested that Arnould repay to CES already belonged to CES and, thus, Muney could not show that his requested relief would remedy his



injury. Muney argues that 50% of CES's assets became his when the company dissolved, thereby giving him standing to seek return of any funds wrongfully taken from CES. However, Muney has not shown what exactly these funds are and that they rightfully belong to him and not Arnould. Nor has Muney explained why, in the wake of CES's dissolution and forensic accounting, the court should conclude that these funds were rightfully his. Muney's failure to properly dispute the Receiver's Report compounds this problem. We agree with the district court that Muney failed to establish individual standing to bring his second, third, and fourth counterclaims. Therefore, we find that the district court did not err in granting summary judgment to Arnould on these counterclaims.

*The district court did not err in awarding attorney fees and costs to Arnould*

The district court found that Arnould was entitled to attorney fees pursuant to NRS 18.010(2)(a)-(b) and NRS 86.489, and awarded Arnould fees and costs in the amount of \$199,985. Muney appeals the district court's award.

This court "review[s] [a] district court's decision regarding attorney fees for an abuse of discretion." *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1027-28 (2006). NRS 18.010(2)(b) permits awards of attorney fees when the court finds that a claim or counterclaim "was brought or maintained without reasonable ground or to harass the prevailing party." A claim is frivolous or groundless for purposes of NRS 18.010(2)(b) "if there is no credible evidence to support it." *Capanna v. Orth*, 134 Nev. 888, 895, 432 P.3d 726, 734 (2018) (internal quotation marks omitted). NRS 18.010(2)(b) further instructs a court to "liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations."

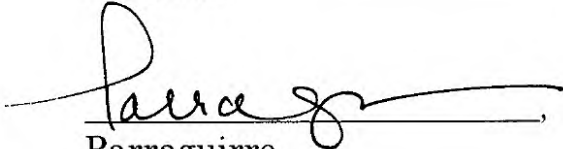
We agree with the district court that Muney did not provide any credible evidence in support of his counterclaims and defenses. As discussed above, summary judgment to Arnould was proper primarily due to Muney's failure to proffer admissible evidence by way of exhibit, affidavit, or otherwise. Accordingly, the district court did not abuse its discretion in finding Muney's defenses and counterclaims to be groundless and in awarding Arnould attorney fees under NRS 18.010(2)(b). Because attorney fees were proper under NRS 18.010(2)(b), we need not discuss whether attorney fees were proper under NRS 18.010(2)(a) or NRS 86.489. We also conclude that the district court did not abuse its discretion in awarding Arnould \$199,985. The record supports the conclusion that the award was reasonable under *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

In sum, the district court did not err in granting summary judgment to Arnould. Nor did the district court abuse its discretion in awarding Arnould attorney fees and costs. We therefore

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Stiglich

  
\_\_\_\_\_, J.  
Herndon

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Nancy L. Alf, District Judge  
Kern Law, Ltd.  
Marquis Aurbach Chtd.  
Eighth District Court Clerk