IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOAN VAN BLARCOM, AN INDIVIDUAL, Appellant, vs. ROCCO LUIERE, JR., AN INDIVIDUAL, Respondent.	No. 85602-COA
JOAN VAN BLARCOM, AN INDIVIDUAL, Appellant, vs. ROCCO LUIERE, JR., AN INDIVIDUAL, Respondent.	No. 85924-COA

ORDER AFFIRMING IN PART, VACATING IN PART, AND REMANDING

Joan Van Blarcom appeals from a final judgment on a jury verdict, an order denying a motion for a new trial, and a postjudgment order awarding attorney fees and costs in a tort action. These appeals have been consolidated. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Van Blarcom and respondent Rocco Luiere, Jr., were both members of the Sun City MacDonald Ranch Community Association (HOA).[1] Luiere was president of the HOA board. In June 2018, Van Blarcom sent an email to another HOA board member that stated, "[L]et us hope we can expose Rocky Rotten and his band of thieves," and, "I want to keep the pressure on and expose this Board of incompetent thieves."

[1]We recount the facts only as necessary for our disposition.

In January 2019, Luiere filed a civil complaint for defamation against Van Blarcom, seeking $100,000 in damages because her email referred to Luiere as a "thief." Van Blarcom filed a counterclaim against Luiere for retaliation under NRS 116.31183, alleging that Luiere's lawsuit was retaliatory for Van Blarcom's "criticism" of the HOA board. Luiere moved for summary judgment on his defamation claim, and the district court granted summary judgment as to liability, finding Van Blarcom's statements to be defamatory.[2] A jury trial was set on Van Blarcom's counterclaim and the limited issue of damages for Luiere's defamation claim.

Prior to trial, in March 2022, Van Blarcom served Luiere an offer of judgment for $5,000. Luiere did not accept this offer, and the matter proceeded to a six-day jury trial. After both parties had rested but before the jury began deliberations, Luiere made an oral motion for a directed verdict pursuant to NRCP 50(a)(2) to dismiss Van Blarcom's counterclaim. He argued that filing the lawsuit was not retaliatory because the court found that Van Blarcom was liable for defamation. In response, Van Blarcom abandoned her earlier theory that the lawsuit itself was retaliatory, and instead argued that Luiere retaliated against her by distributing emails and HOA campaign materials maligning Van Blarcom.

The district court granted Luiere's motion for a directed verdict. The court concluded that "no reasonable jury could determine that the emails, anger at the board, the lawsuit, or any of that" could be considered

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[2]Van Blarcom does not challenge this decision on appeal and so we do not address it. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that arguments not raised on appeal are deemed waived).

retaliatory, and further, a lawsuit is not retaliation for purposes of NRS 116.31183.

Once Van Blarcom's counterclaim was dismissed, the jury was only tasked with determining the amount of damages on Luiere's defamation claim. The jury deliberated for 12 minutes and returned with a verdict awarding Luiere one penny for past general damages, one penny for future general damages, and one penny for assumed damages, for a total award of three cents.

Following the entry of judgment on the jury verdict, Van Blarcom moved for attorney fees and costs under NRCP 68, contending that Luiere failed to obtain a more favorable judgment than her $5,000 offer. The district court analyzed the *Beattie*[3] factors and denied Van Blarcom's motion for fees, finding that her offer was not calculated to facilitate settlement because it was made after liability was determined and was low compared to Luiere's claimed damages. Van Blarcom subsequently moved for reconsideration of that order.[4]

Shortly thereafter, Luiere filed a memorandum of costs and a motion for attorney fees. He requested a total of $8,163.67 in costs as the prevailing party under NRS 18.020, but Luiere's memorandum of costs did not include any attachments or documentation. In his motion for attorney fees, Luiere sought $136,882.50 in fees under NRS 18.010(2)(b). Van Blarcom filed both a motion to retax costs and an opposition to Luiere's motion for attorney fees.

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

[4]Van Blarcom represents that she "abandoned" the motion for reconsideration, but the record on appeal does not include a final adjudication or formal withdrawal of that motion.

In December 2022, the district court entered a short order granting Luiere's motion for attorney fees and costs in full. The court found that Luiere "has met all four factors as mentioned in *Brunzell*" and that Luiere was entitled to costs under NRS 18.020 as the prevailing party. Finally, the court ordered that Luiere's "Motion for Fees is GRANTED as to Plaintiff's attorney's fees in the amount of $136,882.50 plus an additional $1,500 for having to prepare the instant Motion." The order did not contain any factual findings related to the attorney fees award.

Van Blarcom timely appealed. On appeal, she contends that the district court erred in granting Luiere's motion for a directed verdict on her counterclaim and that the district court abused its discretion in granting Luiere $146,546.17 in total attorney fees and costs.[5]

The district court properly granted a directed verdict on Van Blarcom's counterclaim for retaliation under NRS 116.31183

Van Blarcom first argues that the directed verdict dismissing her counterclaim for retaliation was erroneous because Luiere retaliated against her both by sending emails or campaign materials about her and by filing the

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[5]Van Blarcom's notice of appeal in Case No. 85602 stated that she was also appealing the district court's order denying her motion for attorney fees under NRCP 68. However, the Nevada Supreme Court dismissed this portion of her appeal because, as a result of a pending tolling motion for reconsideration, that order was not yet final. In her appellate briefs, Van Blarcom requests that this court "reconsider" the supreme court's order partially dismissing her appeal under EDCR 2.24(b). However, even assuming that her motion for reconsideration was finally adjudicated, this court lacks the authority to reconsider or reverse an order by the supreme court. *See Eivazi v. Eivazi*, 139 Nev., Adv. Op. 44, 537 P.3d 476, 487 n.7 (Ct. App. 2023). Further, EDCR 2.24(b) is not applicable because that rule is limited in scope to the Eighth Judicial District Court. *See* EDCR 1.10 (scope of rules). Therefore, this court lacks jurisdiction to consider Van Blarcom's claims on appeal that were previously dismissed.

defamation lawsuit. In response, Luiere argues that the protections in NRS 116.31183 do not apply because the district court found that Van Blarcom's statements were defamatory.

Pursuant to NRCP 50(a), judgment as a matter of law[6] may be granted on a claim or defense "[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue" and the claim cannot otherwise survive without a favorable finding on that issue. A motion under this rule "may be made at any time before the case is submitted to the jury." NRCP 50(a)(2). This court reviews a judgment under NRCP 50(a) de novo. *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 425 (2007). "In reviewing a ruling for or against a directed verdict, this court applies the same standard as the trial court, viewing the evidence in the light most favorable to the party against whom the motion is made." *Land Baron Inv., Inc. v. Bonnie Springs Fam. LP*, 131 Nev. 686, 693, 356 P.3d 511, 517 (2015) (internal quotation marks omitted).

Under NRS 116.31183(1), an HOA member or officer "shall not take, or direct or encourage another person to take, any retaliatory action against a unit's owner because the unit's owner" has:

> (a) Complained in good faith about any alleged violation of any provision of this chapter or the governing documents of the association;
>
> (b) Recommended the selection or replacement of an attorney, community manager or vendor; or

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[6]Judgment as a matter of law is synonymous with a directed verdict for purposes of NRCP 50(a). *Bliss v. DePrang*, 81 Nev. 599, 601, 407 P.2d 726, 727 (1965).

> (c) Requested in good faith to review the books, records or other papers of the association.

While "retaliatory action" is not statutorily defined, the Nevada Real Estate Division (NRED) issued an advisory opinion defining retaliation under NRS 116.31183 as "harmful, punitive action" by an association against a homeowner for having done anything listed in NRS 116.31183(1)(a)-(c). *See* 15-02 Op. NRED 1 (2015); *see also Dezzani v. Kern & Assocs., Ltd.*, 134 Nev. 61, 71, 412 P.3d 56, 64 (2018) (Pickering, J., dissenting) (noting that, to recover damages for retaliation under NRS 116.31183, "a homeowner must establish a compensable injury, i.e., that the retaliation was wrongful and caused harm").[7]

Van Blarcom first alleged that Luiere retaliated against her by disseminating emails and campaign materials about her. However, she did not articulate how she was harmed by Luiere's actions or how distributing these documents constituted harmful conduct. A "reasonable jury would not have a legally sufficient evidentiary basis" to find that Van Blarcom was harmed as a result of Luiere sending an email or distributing campaign materials. NRCP 50(a). Therefore, insofar as Van Blarcom relied on these documents as the basis for her retaliation claim, the directed verdict was proper.

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[7]This court may rely on NRED advisory opinions as persuasive authority. *See Horizon at Seven Hills Homeowners Ass'n v. Ikon Holdings, LLC*, 132 Nev. 362, 370, 373 P.3d 66, 72 (2016) (finding persuasive an NRED advisory opinion interpreting a statute that NRED was charged with administering); *see also State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000) (stating that "courts generally give 'great deference' to an agency's interpretation of a statute that the agency is charged with enforcing").

Second, Van Blarcom claims that Luiere's defamation lawsuit itself was retaliatory. However, given that Van Blarcom was found liable for defamation, no reasonable jury would have an evidentiary basis to conclude that Luiere's lawsuit was "punitive" and premised on retaliation. *See* 15-02 Op. NRED 1 (2015). Though Van Blarcom blanketly asserts that Luiere would not have filed this lawsuit absent her "criticism," she provides no citation to the record to support this assertion. *See Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 997, 860 P.2d 720, 725 (1993) (concluding that this court need not consider the contentions of an appellant that are not supported by citations to the record on appeal). Therefore, we conclude that the district court properly granted a directed verdict dismissing Van Blarcom's counterclaim for retaliation under NRS 116.31183.[8]

The district court abused its discretion in awarding Luiere costs

Van Blarcom next contends that the district court abused its discretion in awarding Luiere costs under NRS 18.020 because he was not the prevailing party and because his memorandum of costs did not include any supporting documentation.

NRS 18.020(3) provides that costs "must be allowed of course to the prevailing party . . . [i]n an action for the recovery of money or damages,

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[8]We also note that, in response to Luiere's motion for a directed verdict in the district court, Van Blarcom expressly disclaimed her prior theory that the lawsuit was, itself, retaliatory. Specifically, she asserted that "[Luiere] keep[s] repeating to the [c]ourt that it's about the lawsuit, and that doesn't make it a fact. That is not a fact. The retaliatory claim under NRS 116.31183 is for events that happened before the lawsuit was filed." Therefore, Van Blarcom arguably waived any claim on appeal that the directed verdict was improper because Luiere's lawsuit was retaliatory. *See United States v. Olano*, 507 U.S. 725, 733 (1993) (defining waiver as an intentional relinquishment of a known right); *see also Sayedzada v. State*, 134 Nev. 283, 288, 419 P.3d 184, 190 (Ct. App. 2018).

where the plaintiff seeks to recover more than $2,500." An award of costs is reviewed for an abuse of discretion. *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 120, 345 P.3d 1049, 1054 (2015). However, the question of whether a litigant is a "prevailing party" under NRS 18.020 is a question of law reviewed de novo. *145 E. Harmon II Tr. v. Residences at MGM Grand – Tower A Owners' Ass'n*, 136 Nev. 115, 118, 460 P.3d 455, 457 (2020) (stating that the meaning of prevailing party as used in NRS 18.010(2) and NRS 18.020 is a question of law reviewed de novo). A party prevails in an action "if it succeeds on any significant issue in the litigation which achieves some of the benefit it sought in bringing suit," *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005) (internal quotation marks omitted), and a party need not prevail on all claims to be considered the prevailing party, *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 90, 343 P.3d 608, 615 (2015).

In this case, we conclude that Luiere was the prevailing party under *Valley Electric*. He succeeded on multiple significant issues in the litigation, including a determination of liability for his defamation claim and his successful motion for a directed verdict that dismissed Van Blarcom's counterclaim. Though Luiere only received a nominal jury award, it was still nonetheless an award in his favor. *See Farrar v. Hobby*, 506 U.S. 103, 112 (1992) (concluding that "a plaintiff who wins nominal damages is a prevailing party" under federal statute). As the prevailing party who sought more than $2,500 in damages, Luiere was entitled to costs under NRS 18.020(3).

However, Luiere's memorandum of costs summarily listed groups of expenditures, such as witness fees, filing fees, and deposition fees, but he did not provide any itemization or documentation in support of these costs. Notably, Luiere listed $5,191.98 for "deposition transcripts," though

Van Blarcom represented in her motion to retax costs that the only deposition taken was her own. In the district court's order granting Luiere his requested costs in full, it did not make any findings or address Van Blarcom's motion to retax costs.

Costs must be "actual and reasonable, rather than a reasonable estimate or calculation of such costs." *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971 P.2d 383, 385-86 (1998) (internal quotation marks omitted). To establish that costs were reasonably incurred, the party must provide some "justifying documentation." *Cadle Co.*, 131 Nev. at 121, 345 P.3d at 1054. "It is clear, then, that 'justifying documentation' must mean something more than a memorandum of costs. In order to retax and settle costs upon motion of the parties pursuant to NRS 18.110, a district court must have before it evidence that the costs were reasonable, necessary, and actually incurred." *Id.*

In this case, Luiere failed to provide any justifying documentation in support of his memorandum of costs, and he only summarily listed categories of costs and a total amount. In the absence of any supporting documents or findings that the costs incurred were reasonable and necessary, the district court abused its discretion in granting Luiere's motion for costs. Therefore, we vacate the district court's award of costs under NRS 18.020 and remand for further findings.

The district court abused its discretion in awarding Luiere attorney fees

As to attorney fees, Van Blarcom argues that the district court abused its discretion because Luiere failed to provide "competent evidence" to support his motion for attorney fees, he was prohibited from receiving fees under NRCP 68, and the district court did not make findings to support a fee award under NRS 18.010(2)(b). She also contends that the attorney fee award was unreasonable in light of Luiere's three-cent jury verdict. We

review an award of attorney fees for an abuse of discretion. *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1027-28 (2006).

We conclude that Luiere provided sufficient documentation to support his request for attorney fees. Though Luiere provided a short affidavit, his motion also included his counsel's resume and detailed billing logs. Therefore, the district court had a sufficient evidentiary basis to award attorney fees. *See Katz v. Incline Vill. Gen. Improvement Dist.*, No. 71493, 2019 WL 6247743, at *3 (Nev. Nov. 21, 2019) (Order of Affirmance) (upholding an attorney fees award based the district court's familiarity with the lawyers and a cursory affidavit that stated "[Counsel's] involvement was necessary to the defense of this matter, and the fees he charged are believed by Affiant to be reasonable and necessary in his capacity of official attorney for [the party]" (internal quotation marks omitted)).

We also conclude that Luiere was not precluded from an award of attorney fees under NRCP 68. Under NRCP 68(f)(1)(A), an offeree may not recover any costs, expenses, or attorney fees "[i]f the offeree rejects an offer and fails to obtain a more favorable judgment." While Van Blarcom compares her $5,000 offer of judgment with Lueire's $.03 jury award, she fails to account for Luiere's accrued pre-offer attorney fees as required by NRCP 68(g). NRCP 68(g) provides, in pertinent part:

> If a party made an offer in a set amount that precluded a separate award of costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees, the court must compare the amount of the offer, together with the offeree's pre-offer taxable costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees, with the principal amount of the judgment.

See also Lee v. Patin, No. 83212, 2024 WL 238082, at *2 (Nev. Jan. 22, 2024) (Order of Affirmance) (providing that where "an offer precludes a separate award of costs, fees, and interest, the current version of NRCP 68 directs courts to factor in pre-offer costs, fees, and interest to determine whether the offeree beat an offer").

Van Blarcom's $5,000 offer of judgment precluded a separate award of attorney fees and costs.[9] Therefore, when determining whether Luiere obtained a more favorable judgment, the district court must compare her $5,000 offer against Luiere's $.03 jury award *plus* Luiere's pre-offer attorney fees and costs. NRCP 68(g). Based on our review of the billing statements attached to Luiere's motion for attorney fees, it is clear that Luiere's attorney fees at the time of Van Blarcom's offer of judgment exceeded $5,000. Therefore, Luiere obtained a more favorable judgment than Van Blarcom's offer, and thus he is not precluded from an award of attorney fees under NRCP 68(f).

However, in its order granting Luiere's motion for attorney fees, the court did not state a basis for the fee award. The district court generally "may not award attorney fees absent authority under a statute, rule, or contract." *Albios*, 122 Nev. at 417, 132 P.3d at 1028. The district court abuses its discretion when it awards fees without specifying the basis for doing so. *See Henry Prod. Inc. v. Tarmu*, 114 Nev. 1017, 1020, 967 P.2d 444,

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[9]Van Blarcom failed to include her $5,000 offer of judgment in the record on appeal. Therefore, we presume that her offer was inclusive of attorney fees and costs. *See* NRCP 68(a) ("Unless otherwise specified, an offer made under this rule is an offer to resolve all claims in the action between the parties to the date of the offer, including costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees.").

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.").[10]

The district court's error is further compounded by its failure to provide any factual findings to support the fee award. Luiere's motion expressly sought attorney fees under NRS 18.010(2)(b), and on appeal he contends that the district court did not abuse its discretion in awarding fees under that statute. However, NRS 18.010(2)(b) provides, in pertinent part, that attorney fees may be awarded to the prevailing party when the court finds that the opposing party's claim or counterclaim "was brought or maintained without reasonable ground or to harass the prevailing party." To the extent that the district court did grant fees under this statute, the court abused its discretion because it failed to make any findings that Van Blarcom's defense or counterclaim was unreasonable or intended to harass Luiere. *See In re Execution of Search Warrants for: 12067 Oakland Hills, Las Vegas, Nev. 89141*, 134 Nev. 799, 804, 435 P.3d 672, 677 (Ct. App. 2018)

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[10]Luiere asserts that this court should uphold the attorney fees award because Van Blarcom failed to provide the transcripts of the hearing addressing his motion for attorney fees, and the missing portions of the record are presumed to support the district court's decision. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) ("When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision."). While we agree that Van Blarcom failed to provide the necessary portions of the record on appeal, *see* NRAP 30(b)(3), applying the *Cuzze* presumption does not cure the district court's error. Even if this court presumes that the district court stated its basis for the fee award during the hearing, the court's subsequent order failed to include this basis, and the court's final order controls. *Rust v. Clark Cnty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) ("An oral pronouncement of judgment is not valid for any purpose.").

(reversing an attorney fees award as an abuse of discretion because "the district court made no findings, and the record contains no evidence, that would enable us to affirm an award of attorney fees" under NRS 18.010(2)(b)).

We therefore vacate the award of attorney fees and remand for further findings. On remand, we encourage the district court to consider the reasonableness of Luiere's attorney fees in light of the nominal damages award. *See Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) (establishing four factors that the district court must consider before awarding attorney fees, including the fourth factor, whether the attorney was successful and what benefits were derived); *Farrar*, 506 U.S. at 115 ("In some circumstances, even a plaintiff who formally 'prevails' under [federal statute] should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party.").

Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND VACATED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[11]

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

[11]Insofar as the parties have raised any other arguments that are not specifically addressed, 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.

cc: Hon. Adriana Escobar, District Judge
The Law Offices of Laura Payne, Esq.
Mushkin & Coppedge
Eighth District Court Clerk