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Watson Rounds v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 79 (Sept. 24, 2015)

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Watson Rounds v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 79 (Sept. 24, 2015)[1]

SANCTIONS: NRS § 7.085 AND NRCP 11 MECHANISMS; DISTRICT COURT'S ABUSE OF DISCRETION

Summary

NRS 7.085 allows a district court to make an attorney personally liable for the attorney fees and costs an opponent incurs when the attorney files, maintains or defends a civil action that is not well-grounded in fact or is not warranted by existing law or by a good faith argument for changing the existing law.[2] The Court considered (1) whether NRCP 11[3] supersedes NRS 7.085 in sanctioning a law firm and (2) whether the district court abused its discretion in sanctioning the law firm under under NRS 7.085. The Court held NRCP 11 does not supersede NRS § 7.085 because each represents an independent method for sanctioning attorneys. The Court also found the district court abused its discretion in sanctioning the petitioner under NRS § 7.085 without making adequate findings.

Background

In 2011, FortuNet, Inc. filed an initial complaint in the Eighth Judicial District Court alleging former employees breached duties and improperly used FortuNet's intellectual property. FortuNet later retained petitioner, Watson Rounds, P.C. who filed a second amended complaint on behalf of FortuNet, adding Himelfarb & Associates, LLC, and its president, Bruce Himelfarb, as defendants. FortuNet's claims against the newly named defendants alleged a kickback scheme and theft of FortuNet's intellectual property.

The district court dismissed several of FortuNet's claims for lack of evidence under NRCP 50(a). Additionally, FortuNet voluntarily dismissed some of its claims against Himelfarb and Himelfarb & Associates. The rest of FortuNet's claims made it to the jury. The jury rejected these remaining claims against Himelfarb and Himelfarb & Associates, found for Himelfarb and Himelfarb & Associates on its counterclaims, and asked the district court if it could include these defendants' attorney's fees when calculating damages. The district court instructed the jury it could not include attorney's fees into its damages calculation because those fees would be assessed after the trial's conclusion.

The district court held FortuNet liable for Himelfarb's attorney's fees, totaling $551,216.38. Additionally, pursuant to NRS § 7.085, the district court found Watson was jointly and severally liable with FortuNet for the fees. The district court premised Watson's liability on its determination that Watson maintained FortuNet's claims against Himelfarb and Himelfarb & Associates, as well as defended FortuNet against Himelfarb and Himelfarb & Associate's counterclaims, "despite not being well-grounded in fact and not warranted by existing law or good faith argument for a change in existing law."

Further, pursuant to NRS § 7.085, the district court sanctioned Watson "based on (1) its review of the various pre-trial motions, (2) the evidence presented at trial, (3) NRCP 50(a) rulings, (4) FortuNet's voluntary dismissal with prejudice of certain claims, (5) the jury's

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[2] *See* NEV. REV. STAT. § 7.085 (1995).

[3] NEV. R. CIV. P. 11.

unanimous verdict in favor of [Himelfarb], (6) the jury's expressed desire to award [Himelfarb its] entire attorney's fees incurred relating to this case," (7) the testimony of FortuNet's CEO and principal witness, who stated Watson "was responsible for 99.99% of the factual and legal content of FortuNet's pleadings," and (8) the district court's determination "that Watson could not have made the required inquiries . . . [and] could not have reassessed the evidentiary support for FortuNet's claims before filing [the second amended complaint] . . . and could not have had a reasonable belief that the claims against [Himelfarb] were well-grounded in either fact or law."

Discussion

Watson sought a writ of mandamus vacating the district court's order making it liable for Himelfarb's and Himelfarb & Associate's attorney's fees. Watson argued (1) the court should exercise its discretion to consider Watson's petition; (2) NRCP 11 supersedes NRS § 7.085, making the district court's award improper; and (3) the district court abused its discretion when it made Watson liable for Himelfarb's and Himelfarb & Associate's attorney's fees without first making adequate findings.

This court will exercise its discretion to consider Watson's petition

The Court has discretion to issue extraordinary writs.[4] The Court generally exercises this discretion when a party does not have a plain, speedy and adequate remedy at law. Where a party is able to appeal a final judgment in the future, the party generally has an adequate and speedy legal remedy, which precludes writ relief.[5] However, a sanctioned attorney lacks standing to appeal because the attorney is not a party in the underlying action, which makes writs the proper avenue for an attorney seeking sanction review.[6] Here, Watson was not a party to the underlying action and cannot appeal the district court's order. This entitled Watson to seek a writ of mandamus.

NRCP 11 does not supersede NRS 7.085

Watson argued that, because NRS § 7.085 is a statute that was last amended in 2003 and NRCP 11 is a procedural rule that was last amended in 2004, NRCP 11 supersedes NRS § 7.085, or, alternatively, NRS § 7.085 now incorporates NRCP 11's safe harbor provisions. NRCP 11's 2004 amendment added safe harbor provisions preventing attorneys from being sanctioned until they are able to cure the sanctionable conduct or appear at a show cause hearing. Watson relied on *State v. Connery* for this argument.[7] There, the Court addressed whether a statute or a later-enacted appellate rule governed time for an appeal.[8] The rule and statute in *Connery* were irreconcilable because each provided different start dates to calculated a thirty-day window for appeal.[9] The Court held the procedural rule superseded the statute.[10] Here, the Court

[4] MountainView Hosp., Inc. v. Eight. Jud. Dist. Ct., 128 Nev. Adv. Op. 17, 273 P.3d 861, 864 (Apr. 5, 2012).
[5] D.R. Horton, Inc. v. Eighth Jud. Dist. Ct., 123 Nev. 468, 474, 168 P.3d 731, 736 (2007).
[6] *See* Emerson v. Eighth Jud. Dist. Ct., 127 Nev. Adv. Op. 61 (Oct. 6, 2011), 263 P.3d 224, 227 (2011); *see also* Albany v. Arcata Assocs., Inc., 106 Nev. 688, 690, 799 P.2d 566, 567–68 (1990).
[7] 99 Nev. 342, 661 P.2d 1298 (1983).
[8] *Id.* at 344.
[9] *Id.* at 342.
[10] *Id.* at 345–46.

distinguished *Connery* from Watson's case because Watson did not provide any justification as to why NRCP 11 and NRS § 7.085 could not be read in harmony.

The Court next looked to federal authority for indication that NRCP 11 does not supersede NRS § 7.085. Nevada adopted the Federal Rules of Civil Procedure in their entirety in 1993. The 1993 Advisory Committee Notes provide that FRCP 11 does not supersede 28 USC § 1927, a statute that "makes attorneys personally liable for the unreasonable and vexatious multiplication of proceedings." Further, federal courts recognize that FRCP 11 and § 1927 "apply to different types of misconduct and provide independent mechanisms for sanctioning attorney conduct." Following this line of reasoning, the Court found the relationship between NRCP 11 and NRS § 7.085 comparable to the relationship between FRCP 11 and § 1927.

Lastly, the Court looked to Nevada's statutory interpretation rules to support its conclusion that NRCP 11 does not supersede NRS § 7.085. A court will read a rule or statute in harmony with other rules or statutes whenever possible.[11] Therefore, the Court found that NRCP 11 does not supersede NRS § 7.085 because it appropriate to "treat the rule and statute as independent methods for district courts to award attorneys fees for misconduct."

The district court failed to make adequate findings supporting sanctions against Watson

The Court held the district court's findings were insufficient to support a conclusion that Watson violated NRS § 7.085. First, it was improper for the district court to rely on the jury's question about awarding attorney's fees for FortuNet's breach of the implied covenant of good faith and fair dealing. NRS § 7.085 does not empower juries to sanction attorneys and there is no authority indicating Watson could be liable for damages resulting from its client's breach. Second, the district court's order contains several conclusions unsupported by sufficient factual detail and reasoning, making it impossible to meaningfully review the sanctions. Third, "it is not clear the NRCP 50(a) rulings and FortuNet's voluntary dismissal of some claims support an award for attorney fees." Lastly, FortuNet's CEO's testimony does not explain why the award against Watson is justified. This evidence blames Watson for "any groundlessness that might have existed," but does not say anything about whether the claims were well grounded in fact or law. Therefore, the Court found the district court abused its discretion in sanctioning Watson.

Conclusion

The Court exercised its discretion to hear Watson's writ petition because, as a nonparty to the underlying action, Watson is unable to appeal the district court's order. NRCP 11 does not supersede NRS § 7.085 because they are distinct mechanisms for sanctioning attorney misconduct. The district court abused its discretion in sanctioning Watson pursuant to NRS § 7.085 because its order did not sufficiently explain why Watson should be liable for attorney fees. The Court ordered the clerk to issue a writ of mandamus instructing the district court to vacate the portion of its order holding Watson jointly and severally liable for attorney fees and costs.

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[11] Nev. Power Co. v. Haggerty, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999); *see also* Bowyer v. Taack, 107 Nev. 625, 627–28, 817 P.2d 1176, 1178 (1991).