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### Summary of Trustees of the Plumbers and Pipefitters

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***Trustees of the Plumbers and Pipefitters, Union Local 525 Health and Welfare Trust Plan v. Developers Surety and Indemnity Co.,  
84 P.3d 59 (Nev. 2004)***<sup>1</sup>

**COMMERCIAL LAW & CIVIL PROCEDURE – SURETY, ATTORNEY FEES, OFFER OF JUDGMENT**

**Summary**

Appeal from a district court order granting summary judgment to trustee for bond amount after principal, employer of union workers, failed to pay requisite contributions and filed for bankruptcy.

**Disposition/Outcome**

Reversed and remanded for attorney fees determination.

**Factual and Procedural History**

Appellant, the Joint Trust, is a group of non-profit organizations formed to provide pension, health, and other benefits to the plumbers of Pipefitters Union Local No. 525 (Pipefitters). P & P Plumbing (P & P), a plumbing company employing union workers, entered into a contract with Pipefitters requiring P & P to make contributions to the Joint Trust for the employees' pension, health, and welfare benefits. Pursuant to the contract, P & P posted a bond with Developers Surety, an indemnity company, to protect the workers' interests in the event that P & P failed to make the requisite benefit contributions. The bond covered all reasonable expenses incurred by Pipefitters in the collection of any of the sum due under the terms and provisions of the labor agreement, including accounting, bookkeeping, clerical, and professional fees related to collecting on the bond. The initial bond amount was for \$5,000. On October 8, 1999, the Joint Trust and P & P, allegedly without Developers Surety's consent, raised the bond's value to \$20,000.

P & P failed to pay the required employee contributions in the amount of \$30,853.57 and filed bankruptcy. After the bankruptcy, Pahor Air Conditioning (Pahor) assumed some of P & P's general contractor projects and agreed to pay the Joint Trust \$10,853.57, the portion of P & P's delinquencies exceeding the bond's \$20,000 value.

On May 21, 2001, the Joint Trust filed a complaint against Developers Surety to recover the \$20,000 bond amount. On June 19, 2001, the Joint Trust made an offer of judgment in the amount of \$19,200, including fees and costs. Developers Surety, however, rejected the offer and answered the complaint. The district court assigned the case to the mandatory, court-annexed arbitration program.

While arbitration was still ongoing, the Joint Trust filed a motion for summary judgment with the district court to recover the bond's face amount. Developers Surety filed an

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<sup>1</sup> By: Christina H. Wang

opposition/counter-motion for summary judgment. The trial court, however, granted the Joint Trust's motion and entered judgment in its favor for \$20,000, the bond's penal amount.

Subsequently, the Joint Trust requested attorney fees and costs on the following grounds: (1) as a prevailing party under NRS 18.010(2)(a); (2) for Developers Surety's alleged bad faith litigation under NRS 18.010(2)(b); and (3) for making an offer of judgment and later obtaining a more favorable judgment under NRS 17.115 and NRCP 68. The district court granted the Joint Trust's request for interest and costs, but refused to award attorney fees. The court stated that Basic Refractories precluded an attorney fees award above the bond's penal limit.

However, on appeal, the Nevada Supreme Court concluded that a surety may be ordered to pay attorney fees even if a fees award, in conjunction with the judgment, would exceed the bond amount because the surety engaged in direct litigation over the bond.

## **Discussion**

### **I. *Basic Refractories v. Bright*<sup>2</sup>**

According to the Nevada Supreme Court, the district court erred in determining that *Basic Refractories* prohibited attorney fees because the holding of *Basic Refractories* is expressly limited to the procedural posture of that case.<sup>3</sup> Consequently, the court held that when a secured entity becomes obligated to pay attorney fees in third-party litigation, the surety is not liable for these fees if they exceed the bond amount. However, when the secured entity incurs attorney fees in direct litigation with the surety over the bond, attorney fees may be awarded under NRS 17.115, NRCP 68, and NRS 18.010.

#### *1. NRS 17.115 and NRCP 68*

NRS 17.115(4)(d)(3) permits the district court to award attorney fees against a party who rejects an offer of judgment and later fails to obtain a more favorable judgment. Pursuant to NRCP 68(f)(2), the offeree who rejects an offer and later fails to obtain a more favorable judgment must pay the offeror such attorney fees as the district court allows.

Words in a statute are to be given their plain meaning unless this violates the spirit of the act.<sup>4</sup> The plain language of NRS 17.115 and NRCP 68 refers to "a party," meaning any party, and an "offeree," meaning any offeree. Developers Surety falls within the purview of NRS 17.115 because the statutory language contains no exception for sureties. If the Legislature

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<sup>2</sup> 72 Nev. 183, 298 P.2d 810 (Nev. 1956).

<sup>3</sup> In *Basic Refractories*, Standard Slag Company subcontracted with Long Construction Company ("Long") for the construction of residential dwellings. Under the subcontract, Long promised to surrender the dwellings "free and clear" and posted a bond for fifty percent of the contract price. Globe Indemnity Company issued the bond. Long constructed the residential units, but failed to pay certain labor and material claims. Consequently, several lien claimants filed actions against Standard to foreclose on their liens. 72 Nev. at 188-90, 298 P.2d at 812-13. The lien claimants obtained judgment against Standard in the amount of \$29,077.22, \$2,004.41 in costs and interest, and \$6,188.62 in attorney fees. *Id.* at 198, 298 P.2d at 817. Standard then obtained a judgment on its third-party complaint against Globe and recovered the bond's penal limit. After Globe admitted on appeal responsibility for costs and interest, even though these amounts exceeded the bond's penal sum, the Nevada Supreme Court increased Standard's award to include such costs and interest. *Id.* at 198-201, 298 P.2d at 817-19. Nevertheless, the court rejected Standard's claim on appeal that it was also entitled to recover the attorney fees that it owed on the lien claimants' judgment. *Id.* at 200-01, 298 P.2d at 818.

<sup>4</sup> *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (Nev. 1986).

intended to create such an exception, it would have done so. This interpretation is consistent with the spirit of NRS 17.115 and NRCP 68 because the Nevada Legislature aimed to promote settlement and avoid litigation.<sup>5</sup>

Here, the Joint Trust submitted an offer of judgment in the amount of \$19,200 to Developers Surety, but Developers Surety rejected the offer. Subsequently, the district court awarded \$20,000 to the Joint Trust. Because Developers Surety rejected the Joint Trust's offer and the Joint Trust later obtained a more favorable judgment, the Nevada Supreme Court found that the district court could have awarded the Joint Trust attorney fees under NRS 17.115 and NRCP 68.

The court noted that precluding attorney fees recovery in surety bond disputes contradicts legislative intent because it removes the incentive to settle. By enacting NRS 17.115, the Legislature intended to speed up cases in the courts.<sup>6</sup> The purpose of NRS 17.115 is to place the risk of loss on the offeree who fails to accept the offer, thus encouraging both offers and acceptance of offers.<sup>7</sup> Limiting attorney fees recovery to the bond's remaining penal limit when the secured party engages in direct litigation with the surety over the bond would decrease the surety's potential litigation loss. From an attorney fees standpoint, it would generally not matter whether the surety litigated the claim or settled before trial. Consequently, the surety would not be stimulated to make or accept settlement offers and this would attenuate Nevada's policy to encourage pretrial dispute resolution.

The court found that limiting attorney fees in all surety bond disputes against the surety would not only remove the incentive to settle, it would create an incentive to litigate. Sureties that can invest at rates higher than the legal interest rate might prefer to litigate regardless of the litigation outcome. The court noted that this result would contradict Nevada's policy to encourage pretrial settlement. Thus, the court concluded that NRS 17.115 and NRCP 68 apply to direct actions between the secured entity and the surety, and that the district court should have considered awarding attorney fees to the Joint Trust under these provisions.

## 2. *NRS 18.010(2)(a)*<sup>8</sup>

NRS 18.010(2)(a) authorizes the court to award attorney fees to a prevailing party who has recovered no more than \$20,000. According to the statute, the court shall liberally construe the provisions of the statute in favor of awarding attorney's fees in all appropriate situations. Thus, the statute clearly encourages the district court to award attorney fees and it makes no exemptions for sureties. Consequently, the court found that the district court should have considered awarding attorney fees under NRS 18.010(2)(a).

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<sup>5</sup> *Matthews v. Collman*, 110 Nev. 940, 950, 878 P.2d 971, 978 (1994); *Fleischer v. August*, 103 Nev. 242, 245, 737 P.2d 518, 520 (1987).

<sup>6</sup> Hearing on A.B. 587 Before the Assembly Comm. on Judiciary, 56th Leg. (Nev., March 25, 1971) (statement of Assemblyman Howard F. McKissick).

<sup>7</sup> *Matthews*, 110 Nev. at 950, 878 P.2d at 978.

<sup>8</sup> The Joint Trust argued that the district court should have granted its attorney \*63 fees request under NRS 18.010(2)(a) because it recovered \$20,000.

### 3. *NRS 18.010(2)(b)*<sup>9</sup>

Prior to 1985, NRS 18.010 did not contain the “bad faith” basis for attorney fees recovery. In 1985, the Legislature authorized the district court to award attorney fees without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought without reasonable ground or to harass the prevailing party.<sup>10</sup>

According to the court, the Legislature’s express policy of discouraging frivolous litigation applies when the surety is involved in direct bond litigation with the secured entity. Consequently, the court held that the district court should have considered whether NRS 18.010(2)(b) warranted an attorney fees award.

Furthermore, the court noted that when two or more claims exceed a surety bond's penal limits, the surety may initiate an interpleader proceeding under NRCP 22 to avoid exposure to double or multiple liability. The claims do not have to be identical or have a common origin. The court has the discretion to approve the interpleader and permit the surety to deposit the bond’s remaining penal limits with the court. The court may then discharge the surety from any further liability and equitably distribute the proceeds among the various claimants.

### **Dissent**

MAUPIN, J., concurring in part and dissenting in part.

Justice Maupin concurred in the result reached by the majority. However, he wrote separately to note his concern with the majority's speculations regarding a bonding company’s investment strategies. He found no support in the record for the proposition that sureties might withhold settlement commitments based upon their abilities to invest reserved funds at a rate of return greater than the legal rate of interest.

### **Conclusion**

This decision makes clear that a surety may be ordered to pay attorney fees even if a fees award, in conjunction with the judgment, would exceed the bond amount because the surety engaged in direct litigation over the bond.

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<sup>9</sup> The Joint Trust asserted that the district court should have considered its attorney fees request under NRS 18.010(2)(b) because Developers Surety acted in bad faith by defending the claim without reasonable grounds and by unlawfully obstructing the Joint Trust's access to evidence.

<sup>10</sup> 1985 NEV. STAT., ch. 83, § 1, at 327.