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11-5-2015

### WPH Architecture, Inc. v. Vegas VP, LP., 131 Nev. Adv. Op. 88 (Nov. 5, 2015)

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*Nevada Law Journal*

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#### Recommended Citation

Dyer, Emily, "WPH Architecture, Inc. v. Vegas VP, LP., 131 Nev. Adv. Op. 88 (Nov. 5, 2015)" (2015). *Nevada Supreme Court Summaries*. 913.

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## ARBITRATION: FEES

### **Summary**

The Court determined that (1) NRCP 68, NRS § 17.115, and NRS § 18.020, which allow costs and fees to be awarded in several types of district court cases, do not require an arbitrator to award fees and costs after an offer of judgment has been made; and (2) NRCP 68, NRS § 17.115, and NRS § 18.020 are substantive in their application to arbitration proceedings.

### **Background**

Vegas VP (VP) hired WPH Architecture, Inc. (WPH) to perform architectural services for a condominium project in Las Vegas. VP sued WPH for professional negligence relating to the services performed. The contract stated any disagreement would be resolved by mediation and, if that unsuccessful, binding arbitration before the American Arbitration Association (AAA). After a failed mediation attempt, VP filed a demand for arbitration and WPH submitted two statutory offers of judgment under NRCP 68 and NRS 17.115. VP did not accept the offer and the case proceeded to arbitration in favor of WPH. The order stated each party would bear its own costs and fees. WPH filed a post-award motion for costs, fees, and interests, in which the arbitration panel and district court denied.

### **Discussion**

The Court reviews this appeal de novo<sup>2</sup> to determine whether the arbitration panel erred in not awarding WPH reasonable attorney fees and costs under NRCP 68 and NRS § 17.115, which can be vacated based on statutory grounds or certain limited case law.<sup>3</sup>

*The arbitration was substantively governed by Nevada Law*

The contract between VP and WPH contained two arbitration clauses; one clause stating the arbitration would be governed by AAA rules and the second clause stating the contract itself to be governed by Nevada law. After reviewing *Mostrobuono v. Shearson*<sup>4</sup> the Court followed the Supreme Court's decision that Nevada law governs the substantive principles and the AAA rules govern the procedural aspects of the arbitration.

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<sup>1</sup> By Emily Dyer.

<sup>2</sup> *Sylver v. Regents Bank, N.A.*, 129 Nev., Adv. Op. 30, 300 P.3d 718, 721 (2013), *see also* *Bielar v. Washoe Health Sys., Inc.*, 129 Nev., Adv. Op. 49, 306 P.3d 360, 364 (2013)(holding contract interpretation is reviewed de novo).

<sup>3</sup> *Bohlmann v. Printz*, 102 Nev. 543, 546, 96 P.3d 1155, 1157 (2004), overruled on other grounds by *Bass-Davis v. Davis*, 122 Nev. 442, 452 n.32, 134 P.3d 103, 109 n.32 (2006).

<sup>4</sup> 514 U.S. 52, 53 (1995).

*NRCP 68, NRS § 17.115, and NRS § 18.020 are substantive laws*

The issue of whether attorney fees are procedural or substantive law is one of first impression.<sup>5</sup> Following several federal court decisions that state laws awarding attorney fees to be substantive, the Court holds that NRCP 68, NRS § 17.115, and NRS § 18.020 are substantive in their application to the arbitration proceedings.

*The award of attorney fees and costs is discretionary by an arbitrator*

After reviewing that NRCP 68, NRS § 17.115, and NRS § 18.020 are routinely held to award costs to the prevailing party in several district court actions, the Court held those statutes do not expressly apply nor have been applied in case law to include arbitration proceedings. Therefore, these statutes do not require an arbitrator to award attorney fees or costs. Additionally, NRS § 38.238 states and arbitrator may award fees and costs, thus making the decision to award discretionary.

*WPH has not shown that the AAA panel manifestly disregarded Nevada Law*

Since the panel considered both the issue under Nevada law and under AAA rules and found that the applicable statutes do not expressly apply and there is no applicable case law requiring fees to be awarded in an arbitration, WPH failed to demonstrate the arbitration panel manifestly disregarded Nevada law.

### **Conclusion**

Since the award of fees and costs by an arbitrator is discretionary and WPH failed to demonstrate that the AAA panel manifestly disregarded Nevada law, the Court affirmed the district court's denial of WPH's motion to confirm in part, modify, or correct the arbitration award.

### **Concurrence**

Justice Pickering concurs only in result that the arbitrators did not manifestly disregard the law as presented to them but finding that without reaching the majority's Substantive and Procedural distinctions because the arbitrators were not presented with those arguments as they just considered there was no case law to suggest a required post-judgment award of costs and fees.

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<sup>5</sup> The Court reviewed *Tipton v. Heeren*, 109 Nev. 920, 859 P.2d 465 (1993), where the Court previously held attorney fees to be procedural but without any analysis, the issue is now of first impression.