

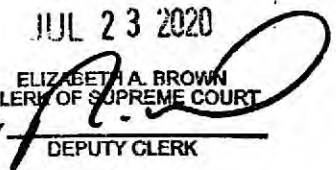
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CAROL MCLEOD; FRANK ELY;
FRANK ELY AS REPRESENTATIVE
OF ESTATE OF LINDA ELY; KIM
GATTUSO; STEVEN HANKS; ROBERT
LUMBARD; CHRISTOPHER MURPHY;
SHASSITY MURPHY; MARSHALL
TODD; CHARLES JONES; LINDA
JONES; GERALD SIMMONS; MARY
ANN SIMMONS; AND ALAN
WOJCIAK,
Appellants/Cross-Respondents,
vs.
SMITH VALLEY DAIRY, CORP.,
Respondent/Cross-Appellant.

No. 79010-COA

FILED

JUL 23 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Carol McLeod, et al., appeals and Smith Valley Dairy Corporation cross-appeals a district court order denying attorney fees and costs. Third Judicial District Court, Lyon County; Leon Aberasturi, Judge.

In April 2017, the McLeod plaintiffs—15 homeowners living in Smith Valley, Nevada—sued Smith Valley Dairy, alleging common law private nuisance claims based on the lights, particulate matter, smells, and sounds emanating from the defendant's dairy farm. The plaintiffs sought a permanent injunction, as well as damages. Smith Valley Dairy's answer denied it was a nuisance and asserted counterclaims for (1) abuse of process, contending that the plaintiffs were malicious in bringing their nuisance claim, and (2) civil conspiracy, contending that the plaintiffs conspired together in a concerted action to file a malicious nuisance claim.¹

¹We do not recount the facts except as necessary to our disposition.

After a three-week jury trial, the jury returned verdicts against the McLeod plaintiffs on their nuisance claim and against Smith Valley Dairy on its civil conspiracy claim. The district court also directed a verdict against Smith Valley Dairy on its abuse of process claim. Neither party was awarded money damages. After judgment was entered, both parties moved for attorney fees and costs pursuant to NRS 18.010 and NRS 18.020, each alleging that they were the “prevailing party.” The district court found that neither party had prevailed because each party had successfully defended against the other party’s claims, and neither party received a monetary judgment or affirmative relief from the jury. Therefore, the district court found that neither party was a prevailing party for the purposes of NRS 18.010 and NRS 18.020 and denied both motions.

On appeal, the McLeod plaintiffs timely argue that the district court’s decision as to attorney fees and costs should be affirmed (i.e., that neither party prevailed for the purposes of NRS 18.010 or NRS 18.020).² Smith Valley Dairy filed a cross-appeal, arguing that it was the prevailing party because, although its counterclaims failed, it still won the lawsuit. Specifically, Smith Valley Dairy argues that the McLeod plaintiffs did not receive a preliminary or permanent injunction, damages, or any other relief requested in their complaint. Thus, Smith Valley Dairy contends that it was the prevailing party for the purposes of recovering costs under NRS 18.020.³

²The Nevada Supreme Court previously limited this appeal to the district court’s order denying attorney fees and costs because the appeal was untimely as to the final judgment. *See McLeod v. Smith Valley Dairy, Corp.*, Docket No. 79010 (Order, September 30, 2019).

³On appeal, McLeod asks for an affirmance and Smith Valley Dairy makes no direct argument pursuant to NRS 18.010 for attorney fees. Therefore, both parties have waived the attorney fee issue and McLeod also

It points to *Parodi v. Budetti*, 115 Nev. 236, 984 P.2d 172 (1999), to argue that “when both parties obtain monetary awards, the monetary awards must be offset to determine which side is the prevailing party.” Smith Valley Dairy asserts that there was no monetary award, so the district court should not have concluded that both parties’ successful defenses were equivalent. It further argues that it avoided all liability whereas the McLeod plaintiffs obtained none of the benefits of bringing the suit, and therefore, it was the prevailing party.

The McLeod plaintiffs contend that Smith Valley Dairy cannot be a prevailing party because it lost on both of its counterclaims. They also argue that, if both sides lose, neither party prevails for the purposes of NRS 18.020. In reply, Smith Valley Dairy contends that the McLeod plaintiffs’ appellate argument—that there need not be a prevailing party—is inconsistent with their argument below (i.e., that they had prevailed). Smith Valley Dairy further argues that Nevada precedent only requires the district court to offset awards if a monetary award is rendered. *See N. Nev. Homes, LLC v. GL Constr., Inc.*, 134 Nev. 498, 501, 422 P.3d 1234, 1237 (2018) (“*Parodi* only requires the district court to consider judgments for monetary damages when determining the prevailing party for the purposes of NRS 18.010(2)(a) and 18.020(3)” (citing 115 Nev. at 236, 984 P.2d at 172)). We agree with the district court that neither party prevailed.

“Absent an abuse of discretion, a district court’s award of fees and costs will not be disturbed on appeal.” *Parodi*, 115 Nev. at 240, 984 P.2d at 174. If an issue of fees or costs implicates a question of law, the proper

waived the costs issue. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (stating that issues not raised in appellant’s opening brief are waived).

standard of review is de novo. See *145 E. Harmon II Tr. v. Residences at MGM Grand*, 136 Nev., Adv. Op. 14, 460 P.3d 455, 457 (2020) (“The issue here [whether a defendant was a prevailing party after the plaintiff voluntarily dismissed its complaint with prejudice] implicates a question of law because it involves statutory interpretation—the meaning of ‘prevailing party,’ as used in NRS 18.010(2) and NRS 18.020.”).


“A party can prevail under NRS 18.010 if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit, [and] the judgment must be monetary in nature.” *Valley Elec. Ass’n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005) (internal quotations omitted); see also *Shalov v. Ladah*, Docket No. 69973-COA (Ct. App. Order of Affirmance, April 28, 2017) (applying *Valley Electric* to NRS 18.020). “[T]he term ‘prevailing party’ is broadly construed so as to encompass plaintiffs, counterclaimants, and defendants.” *Valley Elec.*, 121 Nev. at 10, 106 P.3d at 1200. In *Parodi*, where both parties were awarded damages, the supreme court concluded that “the trial court must offset all awards of monetary damages to determine which side is the prevailing party.” 115 Nev. at 241, 984 P.2d at 175. In *Northern Nevada Homes*, the supreme court likewise noted that “*Parodi* only requires the district court to consider judgments for monetary damages when determining the prevailing party for purposes of NRS 18.010(2)(a) and 18.020(3).” 134 Nev. at 501-02, 422 P.3d at 1237.


Here, we conclude that neither party “succeed[ed] on any significant issue in litigation,” *Valley Elec.*, 121 Nev. at 10, 106 P.3d at 1200 (internal quotations omitted), because (1) Smith Valley Dairy did not prevail on its abuse of process (directed verdict) or civil conspiracy (jury verdict) claims, and (2) the McLeod plaintiffs did not prevail on their nuisance claims


(jury verdict). Further, no monetary judgment was rendered for either party. Even though the McLeod plaintiffs failed to succeed on a significant issue in litigation because they did not prove that the dairy farm was a nuisance and did not obtain damages or an injunction, Smith Valley Dairy also failed to succeed on a significant issue in litigation because it did not obtain the compensatory or punitive damages it requested in relief for its counterclaims. The Nevada Supreme Court recently held that a defendant could be considered a prevailing party specifically when it obtains a voluntary dismissal of a lawsuit with prejudice. *145 E. Harmon II Tr.*, 136 Nev., Adv. Op. 14, 460 P.3d at 456. Even if a monetary judgment is not required to confer prevailing party status, we nonetheless conclude that the district court did not misapply the law or abuse its discretion in this case as both parties brought claims that were unsuccessful.

Thus, the district court did not misapply NRS 18.020 nor abuse its discretion in finding that neither party was a prevailing party.⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

⁴Persuasive authority supports our conclusion. See *Tao of Sys. Integration, Inc. v. Analytical Servs. & Materials, Inc.*, 412 F. Supp. 2d 571, 576 (E.D. Va. 2006) (holding that, in litigation with a mixed outcome, there was no prevailing party); see also *Olive v. Gen. Nutrition Ctrs., Inc.*, 242 Cal. Rptr. 3d 15, 32, 34 (Ct. App. 2018) (holding that the trial court did not abuse its discretion in finding that there was no prevailing party when neither party had an “unqualified win”).

cc: Hon. Leon Aberasturi, District Judge
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