

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LIBORIUS AGWARA, ESQ.,  
Appellant,  
vs.  
DCP INVESTMENT HOLDINGS, LLC,  
D/B/A DCP HOLDINGS, LLC,  
ERRONEOUSLY NAMED AS DCP LLC,  
Respondent.

No. 79733-COA

**FILED**

**NOV 25 2020**

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF REVERSAL AND REMAND*

Liborius Agwara, Esq., appeals from a district court order for attorney fees and costs and denying a counter-motion for summary judgment and attorney fees in an interpleader action. Eighth Judicial District Court, Clark County; James Crockett, Judge.

Agwara represented Pablo Payeras in a personal injury action wherein Payeras suffered several injuries, and incurred medical costs in the amount of \$386,356.70.<sup>1</sup> As relevant here, respondent, DCP Investment Holdings, LLC, had a medical lien for \$22,272.91 as a result of treatment Payeras received from Durango Outpatient Surgery Center, and DJO, LLC. In March of 2016, Payeras's personal injury action settled, and Payeras received a settlement in the amount of \$700,000, which was deposited into Agwara's IOLTA account.

Agwara proceeded to distribute \$624,717.60 of the settlement funds to various creditors and lienholders, including payments of approximately \$283,000 for Agwara's attorney fees and costs, and a payment of \$133,062 to Payeras. A total of \$75,282.40 was left of the settlement following these distributions. However, Agwara did not issue

---

<sup>1</sup>We do not recount the facts except as necessary to our disposition.

payment to DCP, nor to several other lienholders. Eventually, DCP retained counsel in an attempt to communicate with Agwara regarding its lien. After multiple phone calls, unanswered letters, and a bar complaint, Agwara filed an interpleader action and interpleaded the remainder of the settlement funds in August of 2017.

DCP, along with other creditors and lienholders, answered the complaint in interpleader. DCP filed a counterclaim along with its answer and asserted five separate causes of action for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) unjust enrichment, (4) intentional interference with contractual relations, and (5) declaratory relief. The parties then litigated the action in interpleader to determine each of the parties' rights to the contested funds. Eventually, DCP filed a successful motion for distribution and was awarded \$22,272.91, the full value of its medical lien.

Afterwards, DCP filed a "Motion for Attorneys' Fees or in the Alternative, to Amend Counterclaim," requesting its attorney fees and costs for its defense in the interpleader action, or, in the alternative, requesting leave to amend its counterclaim to explicitly plead attorney fees as special damages under NRCP 9(g) and *Sandy Valley*.<sup>2</sup> The district court denied this initial request for fees, but granted DCP leave to amend its counterclaim. DCP then filed its amended counterclaim, asserting the same causes of action, but pleading attorney fees as special damages under *Sandy Valley* for each cause of action.

---

<sup>2</sup>*Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 960, 35 P.3d 964, 971 (2001), *receded from on other grounds by Horgan v. Felton*, 123 Nev. 577, 170 P.3d 982 (2007), and *Liu v. Christopher Homes, LLC*, 130 Nev. 147, 321 P.3d 875 (2014).

Thereafter, the parties commenced discovery on the counterclaim, including DCP's request for attorney fees as special damages for each of its five causes of action. Agwara deposed Mark Lee Jaget, DCP's owner. About two months after filing the amended counterclaim, DCP filed its second motion for attorney fees and costs, asserting that "[Agwara] failed to adhere to his contractual and ethical duties to properly, promptly and completely distribute (or interplead) the settlement funds in Mr. Payeras's underlying personal injury matter," and that the interpleader action was unnecessary and forced DCP to incur more than \$12,000 in fees. DCP then moved for summary judgment, alleging that it was entitled to its attorney fees as special damages as a matter of law. Notably, DCP argued that the district court could dismiss its counterclaim if the court awarded fees under *Sandy Valley*, and also argued that attorney fees can attach as special damages to the "interpleader claim, or any of the claims asserted in the counterclaim."

Agwara opposed, stating that DCP was not entitled to recover attorney fees as special damages under an interpleader action, and filed a countermotion for summary judgment, stating that all five causes of action set forth in DCP's counterclaim were moot and should be dismissed because the interpleaded funds had been distributed and DCP's lien satisfied in full. Agwara also requested \$3,500 in attorney fees for having to oppose DCP's motion for attorney fees and costs.

After a hearing on the matter, the district court granted DCP's motion for attorney fees and costs pursuant to *Sandy Valley* and NRCP 56. In its order, the district court appears to have granted summary judgment on the issue of special damages for DCP's defense in the interpleader, as it does not address DCP's counterclaim. Consequently, the district court granted DCP's motion for attorney fees and costs, and denied Agwara's

countermotion for summary judgment and his request for attorney fees. Later, the district court entered a judgment against Agwara in the amount of \$15,869.54, which included \$12,942 in attorney fees as special damages, \$1,443.54 in costs and \$1,484 in prejudgment interest. This appeal followed.

This case presents two issues on appeal: (1) whether the district court erred in awarding attorney fees to DCP as special damages under *Sandy Valley*, plus costs and interest; and (2) whether the district court erred in denying Agwara's countermotion for summary judgment and attorney fees.

On appeal, Agwara argues that this case was an interpleader action "wherein DCP was a defendant," and therefore argues that DCP did not initiate a case to recover any personal property. Agwara also argues that at "the time it was filed, the amended counterclaim and the allegations contained therein had become moot because DCP no longer had an unpaid lien, meaning that it could not recover on any of the causes of action contained in the amended counterclaim." DCP responds by stating that "if [Agwara] had handled the distribution of the settlement correctly and ethically, an interpleader action, and the fees and costs incurred by the answering defendants including Respondent, would not have been necessary." DCP further argues that it satisfied the requirements articulated under *Sandy Valley*.

We note that it appears the district court took DCP at its word when it argued that the court could award DCP its fees as special damages in the interpleader action without resolving the counterclaim. In his opening brief, Agwara even acknowledges that "[t]he district court stated that it construed DCP's motion for fees as a motion for summary judgment because all issues were resolved in the Interpleader when DCP's motion for



distribution for [sic] was granted.” And DCP itself argued below that the district court could grant summary judgment on the issue of attorney fees as special damages based on the interpleader alone, without resolving the counterclaim. Accordingly, it appears that the district court never ruled on the merits of DCP’s counterclaim, and instead resolved the case only based on the resolution of the interpleader action.

Nevada traditionally “adheres to the American Rule of attorney fees.” *Pardee Homes of Nev. v. Wolfram*, 135 Nev. 173, 174, 444 P.3d 423, 424 (2019). Thus, attorney fees are usually not awarded “unless there is a statute, rule or contract providing for such an award.” *Id.* However, the Nevada Supreme Court has defined several “narrow and limited exceptions that permit attorney fees as special damages.” *Id.*

In *Sandy Valley*, the supreme court outlined the necessary steps to properly plead a claim for attorney fees as special damages, and defined three limited circumstances in which a party can request such fees. *Sandy Valley*, 117 Nev. at 956-57, 35 P.3d at 969-70. The supreme court first noted that attorney fees are only to be considered special damages “when a party claims it has incurred attorney fees as foreseeable damages arising from tortious conduct or a breach of contract.” *Id.* at 956, 35 P.3d at 969. To receive an award of fees, (1) the attorney fees “must be pleaded as special damages in the complaint pursuant to NRCP 9(g)”; (2) the attorney fees must be “proved by competent evidence just as any other element of damages”; and (3) the attorney fees “must be the natural and proximate consequence of the injurious conduct.” *Id.* at 956-57, 35 P.3d at 969. However, the court noted that “[b]ecause parties always know lawsuits are possible when disputes arise, the mere fact that a party was forced to file or defend a lawsuit is insufficient to support an award of attorney fees as damages.” *Id.* at 957, 35 P.3d at 970.

The *Sandy Valley* court then outlined three distinct circumstances wherein a party can request attorney fees as an element of damages: (1) where “a plaintiff becomes involved in a third-party legal dispute as a result of a breach of contract or tortious conduct by a defendant,” (2) in cases “in which a party incurred the fees in recovering real or personal property acquired through the wrongful conduct of the defendant or in clarifying or removing a cloud upon the title to property,” or (3) in actions for “declaratory or injunctive relief” which “may involve claims for attorney fees as damages when the actions were necessitated by the opposing party’s bad faith conduct.” *Id.* at 957-58, 35 P.3d at 970.

The holding in *Sandy Valley* has been narrowed and clarified several times since the opinion was published in 2001, creating a limited exception to the American Rule. Thus, the supreme court has disavowed a broad reading of the holding in *Sandy Valley* that would “allow attorney fees as special damages whenever the fees were a reasonably foreseeable consequence of injurious conduct.” *Pardee Homes*, 135 Nev. at 177, 444 P.3d at 427 (acknowledging that *Sandy Valley* discussed three scenarios where attorney fees as special damages would be appropriate, but holding that special damages are inappropriate where “a plaintiff merely seeks to recover fees incurred for prosecuting a breach-of-contract action against a breaching defendant”).<sup>3</sup>

---

<sup>3</sup>See also *Horgan v. Felton*, 123 Nev. 577, 586, 170 P.3d 982, 988 (2007) (retreating from *Sandy Valley*, and holding that “attorney fees are only available as special damages in slander of title actions and not simply when a litigant seeks to remove a cloud upon title”); *Liu v. Christopher Homes, LLC*, 130 Nev. 147, 155, 321 P.3d 875, 880 (2014) (clarifying that *Sandy Valley* and *Horgan* do not preclude a party to a contract from recovering attorney fees as special damages “that arise from another party’s

We conclude that the district court erred in awarding DCP its attorney fees as special damages under *Sandy Valley* simply for defending its interests in an interpleader action. To begin with, DCP must prove that the attorney fees are a natural and proximate cause of Agwara's injurious conduct. Here, it is clear that Agwara violated his ethical duties, by first disbursing settlement funds to himself and his client, without also disbursing settlement funds to the other valid lienholders. And, it is equally clear that DCP ended up waiting for 2.5 years for its medical lien to be satisfied. The fact that DCP incurred attorney fees in the amount of \$12,942 in defense of this action is likewise undisputed.

However, this alone does not show that these fees are the "natural and proximate cause" of Agwara's conduct. *See Sandy Valley*, 117 Nev. at 957, 35 P.3d at 969-70. ("As a practical matter, attorney fees are rarely awarded as damages simply because parties have a difficult time demonstrating that the fees were proximately and necessarily caused by the actions of the opposing party and that the fees were a reasonably foreseeable consequence of the breach or conduct.")

When two or more parties claim an interest in funds, such as in this case, "an interpleader action is an appropriate procedure for determining the respective rights of those interested." *Michel v. Eighth Judicial Dist. Court*, 117 Nev. 145, 151, 17 P.3d 1003, 1007 (2001). And, due to the very nature of actions in interpleader, DCP would be required to defend its right to a portion of the contested funds.<sup>4</sup> As we noted above,

---

breach of the contract when the breach causes the former party to incur attorney fees in legal dispute brought by a third party").

<sup>4</sup>*See* 7 Wright & Miller, *Federal Practice and Procedure*, §1715 (3d ed. 2020) (stating that generally, complaints in interpleader, and actions in the

both *Sandy Valley* and *Pardee Homes* prohibit an award of attorney fees as special damages simply because of the necessity of commencing or defending an action based on the injurious conduct of another. See *Sandy Valley*, 117 Nev. at 957, 35 P.3d at 70 (“[T]he mere fact that a party was forced to file or defend a lawsuit is insufficient to support an award of attorney fees as damages.”); *Pardee Homes*, 135 Nev. at 177, 444 P.3d at 427 (“[U]nder [the respondents’] theory, any breach-of-contract suit would warrant attorney fees as special damages because it would be foreseeable that an aggrieved party would retain the services of an attorney to remedy a breach. This conflicts with our caselaw.”).

Here, because the district court did not adjudicate DCP’s counterclaim and resolve the five causes of action, it clearly awarded special damages to DCP solely based on the necessity of its defense in the interpleader action, and awarded attorney fees based on Agwara’s delay in filing the interpleader. We conclude that this finding is in error. The mere fact that DCP was required to defend its interests in the interpleader action is by itself insufficient to merit attorney fees as special damages. Thus, although Agwara violated ethical duties and delayed in filing the interpleader, the action in interpleader would nonetheless be necessary to

---

nature of interpleader, are equitable actions, wherein “the stakeholder’s complaint must show a right to the remedy of interpleader. Ordinarily, each claimant should file an answer setting out any defenses to the interpleader action, a statement of the claim to the res in contest, and any additional claims against the stakeholder or the other claimants . . . . When interpleader is ordered, each claimant should respond to the claims of the other claimants by denying their validity so that issue is joined”)



resolve the disputes between Agwara, DCP and the other lienholders, or claimants to the funds.<sup>5</sup>

Additionally, prohibiting an award of attorney fees on this basis protects the integrity of the judicial process. As explained by Robert L. Rossi in his treatise on attorney fees:

[i]f the wrongful conduct of a defendant causing the plaintiff to sue him would give rise to an independent tort and a separate cause of action, there would be no end to the litigation, for immediately upon the entry of judgment the plaintiff would start another action against the defendant for his attorney's fees and expenses incurred in obtaining the preceding judgment.

Robert L. Rossi, *Attorneys' Fees* §8.1 (3rd. ed. 2020).

---

<sup>5</sup>We have considered DCP's argument that it is entitled to its attorney fees as special damages as it "incurred the fees in recovering real or personal property acquired through the wrongful conduct of [Agwara]" and conclude this argument is unpersuasive. We acknowledge that NRS 10.045 defines personal property as "money, goods, chattels, things in action and evidences of debt." But it is less certain that Agwara acquired the property through wrongful conduct. Indeed, Agwara initially received the settlement through his representation of Payeras, and since that time, has kept the funds in his IOLTA account, ultimately filing the interpleader action in order to distribute them instead of simply holding the funds in his trust account and failing to take further action. Thus, it is difficult to say that Agwara acquired the funds at issue through wrongful conduct, particularly since the funds were received as the result of his efforts as an attorney in procuring a legal settlement on behalf of his client, even though he held them for an inordinately long period of time before filing an interpleader action. We note that DCP did not file an action against Payeras.

Further, we note that Agwara was already disciplined by the Nevada State Bar for his delay in timely satisfying the outstanding liens from the settlement funds. *See In the Matter of Discipline of Liborious Agwara, Bar No. 7576, No. 77121* (Order Approving Conditional Guilty Plea Agreement, October 21, 2019).

Thus, for the same reasons the *Sandy Valley* court found that “[b]ecause parties always know lawsuits are possible when disputes arise, the mere fact that a party was forced to file or defend a lawsuit is insufficient to support an award of attorney fees as damages,” we likewise conclude that attorney fees should not be awarded as special damages simply for asserting a claim in an action in interpleader. 117 Nev. at 957, 35 P.3d at 969-70.

To find otherwise would permit litigants to perpetually file lawsuits seeking attorney fees simply because they resolved a dispute through litigation. Such a broad conclusion would encourage litigants to seek such fees if attorneys do not instantly place settlement funds in interpleader. We conclude that such a holding would run counter to public policy and the holdings in *Sandy Valley* and *Pardee Homes*.

However, because DCP agreed to dismiss its counterclaim based upon the erroneous belief that it is entitled to attorney fees based upon its actions in defending the interpleader, we reverse and remand for the district court to conduct further proceedings on DCP’s counterclaim.<sup>6</sup> Accordingly, we need not consider Agwara’s countermotion for summary judgment and request for attorney fees on appeal, as the district court will necessarily be required to readdress it on remand.<sup>7</sup>

---


<sup>6</sup>We express no opinion as to whether damages would be appropriate upon the resolution of DCP’s counterclaim.

<sup>7</sup>Insofar as the parties raise arguments that are not specifically addressed in this order, 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.

Therefore, we

ORDER the judgment of the district court REVERSED AND  
REMAND this matter to the district court for proceedings consistent with  
this order.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. James Crockett, District Judge  
Law Offices of Libo Agwara, Ltd.  
Wiley Petersen  
Eighth District Court Clerk