IN THE SUPREME COURT OF THE STATE OF NEVADA

201 NORTH 3RD STREET LV, LLC, A DOMESTIC LIMITED-LIABILITY COMPANY; DT3 MANAGER, LLC, A DOMESTIC LIMITED-LIABILITY; DTG LAS VEGAS, LLC, A DOMESTIC LMITED-LIABILITY COMPANY, A/K/A DOWNTOWN GRAND; DTG LAS VEGAS MANAGER, LLC, A DOMESTIC LIMITED-LIABILITY COMPANY; AND FIFTH STREET GAMING, LLC, A DOMESTIC LIMITED-LIABLITY COMPANY,
Appellants,
vs.
HOGS & HEIFERS OF LAS VEGAS, INC., A NEVADA CORPORATION,
Respondent.

No. 83907

FILED

OCT 12 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from district court post-judgment orders awarding attorney fees and costs in a civil action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

This appeal arises from a dispute between a business entity, Hogs & Heifers of Las Vegas, Inc. (hereinafter H&H), their landlord, 201 North 3rd Street LV, LLC (hereinafter Landlord), and Landlord's affiliated entities, DTG Las Vegas, LLC, Fifth Street Gaming, LLC, DT3 Manager, LLC, and DTG Las Vegas Manager, LLC (collectively DTG appellants), that collectively own and manage the Downtown Grand Hotel & Casino, located across the street from H&H.

Since H&H opened its business at 201 North Third Street in downtown Las Vegas in 2005, it regularly used a portion of Third Street (referred to as the Common Area) for outdoor events. H&H's lease (the Lease) permitted use of the Common Area for these events subject to Landlord's consent. But after DTG appellants began renovations on the Downtown Grand in 2019, Landlord reduced the portion of the Common Area that H&H could use. In March 2019, after a St. Patrick's Day event took place in the Common Area without Landlord's consent, Landlord issued H&H a default notice. Landlord issued supplemental default notices in April 2019 following disruptive incidents involving H&H patrons. H&H then sued Landlord and DTG appellants (collectively appellants) in May 2019 for breach of contract and related business torts. Appellants counterclaimed and terminated the Lease on June 28, 2019, although the district court enjoined termination of the Lease pending the outcome of legal proceedings.

A 13-day trial in early 2021 largely ended in a wash for both sides. H&H did not prevail on any of its claims, nor did appellants prevail on any of their counterclaims. The district court, however, permanently enjoined Landlord from terminating the Lease, after finding that Landlord was not entitled to declaratory relief that its termination of the Lease was proper. On November 4, 2021, the district court awarded $689,197.60 in attorney fees to H&H under a provision in the Lease (the Fees Clause) that entitles fees and costs to the "prevailing party," which the district court determined to be H&H. On November 23, 2021, the district court entered a separate order awarding $84,972.16 in costs to H&H under the Fees Clause and NRS 18.020. Appellants now appeal the district court's awards of fees and costs to H&H. They first contend that the district court erred in determining H&H was the prevailing party. Alternatively, they contend

that the district court erred in failing to apportion the fee and cost awards per the terms of the Lease.

Generally, we review a district court's decision regarding an award of attorney fees or costs, including its determination of who is the prevailing party, for an abuse of discretion. *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 89-90, 343 P.3d 608, 614-15 (2015). "An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or disregards controlling law." *Id.* at 89, 343 P.3d at 614. When the attorney fee matter concerns questions of law, however, our review is de novo. *JED Prop., LLC v. Coastline RE Holdings NV Corp.*, 131 Nev. 91, 93, 343 P.3d 1239, 1240 (2015); *see also Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015) (explaining that contract interpretation is a question of law that is reviewed de novo).

Applying these standards of review, we affirm in part, reverse in part, and remand the district court's fee and cost awards. The district court did not abuse its discretion in finding H&H, and not Landlord, to be the prevailing party entitled to fees and costs based on entry of the permanent injunction. However, the district court erred in failing to attempt apportionment of fees and costs between Lease-based and non-Lease-based claims, and between Landlord and DTG appellants, who were not parties to the Lease.

The district court did not abuse its discretion in finding H&H to be the prevailing party entitled to fees and costs

The district court awarded H&H attorney fees under the Fees Clause, found at section 28(h) of the Lease, which awards "cost[s] and legal expenses including reasonable attorney's fees" to the "*prevailing party*" resulting from "any action brought by either party to enforce any of its

rights under or arising from" the Lease. (Emphasis added.) The district court awarded H&H costs under the Fees Clause and NRS 18.020, a statute which requires a court to award costs to the "prevailing party." The district court, while acknowledging that trial ended in a wash, found H&H to be the prevailing party seeing that H&H obtained (1) entry of a permanent injunction against Landlord, and (2) "a ruling in its favor on how the parties' Lease is interpreted." Appellants argue that this finding was erroneous and that Landlord, not H&H, was the prevailing party under the Lease. We conclude that the district court was within its discretion in finding that H&H was the prevailing party.

"A party prevails if it succeeds on *any significant issue* in litigation which achieves some of the benefit it sought in bringing suit." *Blackjack Bonding, Inc.*, 131 Nev. at 90, 343 P.3d at 615 (internal quotation marks omitted). "To be a prevailing party, a party need not succeed on every issue." *Id.*

Whether H&H could remain a tenant under the Lease was a significant issue in this case. Landlord terminated the Lease on the grounds that the breaches in its default notices to H&H were material and uncured, and simultaneously counterclaimed for declaratory relief that Lease termination was proper. The district court denied Landlord this relief at trial, finding that neither party had breached the Lease, and thus, Landlord's attempt at termination was improper. On this basis, the district court converted its preliminary injunction into a permanent injunction prohibiting Landlord from further attempts at termination. Thus, H&H successfully defeated Landlord's eviction effort and affirmed its right to remain a tenant under the Lease. In succeeding on this issue, H&H achieved one of the primary benefits it sought in bringing suit. *Cf. Blackjack Bonding, Inc.*, 131 Nev. at 90, 343 P.3d at 615. Therefore, we

affirm the district court's finding that H&H was entitled to fees and costs under the Fees Clause and NRS 18.020.

The district court erred in failing to attempt apportionment of fees and costs by claim and defendant in accordance with the Fees Clause

The district court awarded H&H $689,197.60 in attorney fees under the Fees Clause, even though not all claims and counterclaims in this case arose under the Lease. Moreover, the district court awarded fees against all appellants, even though DTG appellants were not parties to the Lease. Appellants argue the district court erred by failing to attempt apportionment of fees unrelated to the Lease.[1] Because this issue raises the basis to apportion fees under Nevada law, as well as the terms of the Fees Clause, we review de novo. *JED Prop., LLC*, 131 Nev. at 93, 343 P.3d at 1240; *see also Am. First Fed.*, 131 Nev. at 739, 359 P.3d at 106.

This court has explained that "[t]he objective in interpreting an attorney fees provision, as with all contracts, is to discern the intent of the contracting parties" and that "the contract will be enforced as written" if its language is "clear and unambiguous." *Barbara Ann Hollier Trust v. Shack*, 131 Nev. 582, 593, 356 P.3d 1085, 1092 (2015) (quoting *Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012)). Here, the Fees Clause awards attorney fees and costs to the prevailing party "[i]n any action brought *by either party* to enforce *any of its rights under or arising from [the] Lease*."

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[1]While appellants did not raise their arguments regarding fee and cost apportionment before the district court, we are persuaded that these issues did not arise until after the district court entered its fee and cost orders. Thus, appellants did not waive these arguments on appeal. *See Thompson v. City of North Las Vegas*, 108 Nev. 435, 439, 833 P.2d 1132, 1134 (1992) ("A waiver is the intentional relinquishment of a known right. In order to be effective, a waiver must occur with full knowledge of all material facts . . . [and thus] a party cannot waive something unknown to her.").

(Emphases added.) This language clearly and unambiguously permits only a *party* to *the Lease* to receive fees and costs for claims *under or arising from the Lease*. While this case involved many Lease-based claims and counterclaims,[2] it also included several tort claims and counterclaims that did not arise under the Lease.[3] Most of these non-Lease-based tort claims and counterclaims were brought by or against DTG appellants, who were not parties to the Lease. *See Clark County v. Bonanza No. 1*, 96 Nev. 643, 648-49, 615 P.2d 939, 943 (1980) ("As a general rule, none is liable upon a contract except those who are parties to it."). Despite these factual discrepancies, the district court's order awarded H&H attorney fees under the Fees Clause without any apportionment between Lease-based and non-Lease-based claims, nor any apportionment between Landlord and DTG appellants. This was an erroneous conclusion given the plain language of the Fees Clause.

We do not dismiss H&H's concern that the claims and appellants in this case are so inextricably intertwined that apportionment may be impracticable. In these circumstances, however, Nevada law requires the district court to first attempt apportionment and then, if apportionment is impracticable, make specific findings regarding the circumstances that render apportionment impracticable. *Mayfield v.*

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[2]These include H&H and Landlord's respective claims and counterclaims for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief, as well as H&H's claim for constructive eviction.

[3]These include: (1) H&H's claims for (a) intentional interference with contractual relations against DTG appellants and (b) intentional interference with prospective economic advantage against all appellants; (2) DTG appellants' counterclaims for (a) defamation and (b) intentional interference with prospective economic advantage.

Koroghli, 124 Nev. 343, 353-54, 184 P.3d 362, 368-69 (2008) (citing *Abdallah v. United Savings Bank*, 51 Cal. Rptr. 2d 286, 293 (Ct. App. 1996)). Because the fees order made no effort to apportion fees, and the district court made no findings as to why apportionment would be impracticable, the fees order must be reversed and remanded for an apportionment analysis regarding H&H's fees incurred against Landlord pertaining to Lease-based claims.[4]

Relatedly, the district court awarded H&H $84,972.16 in costs under the Fees Clause and NRS 18.020. However, like the fees order, the costs order made no attempt to apportion costs between Lease-based and non-Lease-based claims and defendants. *Cf. Shack*, 131 Nev. at 593, 356 P.3d at 1092; *Mayfield*, 124 Nev. at 353, 184 P.3d at 368-69. Therefore, we reverse the costs order and remand for an apportionment analysis as to which costs may be awarded under the Fees Clause and NRS 18.020.[5]

In sum, the district court did not abuse its discretion in determining H&H to be the prevailing party entitled to attorney fees and

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[4]We further note that because H&H only requested fees under the Fees Clause, H&H will not be entitled to fees incurred with respect to non-Lease-based claims and/or against DTG appellants, unless the district court determines that apportionment is impracticable.

[5]NRS 18.020 provides that "[c]osts *must* be allowed *of course* to the *prevailing party* against *any adverse party against whom judgment is rendered*" in the types of cases enumerated at NRS 18.020(1)-(5). (Emphases added.) Because H&H only prevailed against Landlord, and did not prevail against DTG appellants, NRS 18.020 only entitles H&H to costs pertaining to the permanent injunction against Landlord, unless the district court determines that such apportionment is impracticable. *See also* NRS 18.020(1) (permitting cost award in an action for recovery of a possessory right to real property). Accordingly, NRS 18.020 only permits H&H to recover the same costs that it may recover under the Fees Clause.

costs. However, the district court's failure to attempt apportionment of fees and costs between Lease-based and non-Lease-based claims and defendants, and, if necessary, enter findings as to why apportionment was impracticable, was error.[6] Therefore, we

ORDER the judgments of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Herndon

_____, J.
Lee

_____, J.
Parraguirre

[6]We further agree with H&H that the district court did not mistakenly award pre-complaint attorney fees, as appellants argue. Rather, it appears that the order contains a scrivener's error with respect to the date from which H&H began to incur reasonable attorney fees (March 28, 2019, instead of March 18, 2019). This error does not affect the substance of the order, because it does not alter the *amount* of fees awarded. Therefore, the error may be corrected at any time. *See* NRS 176.565 (explaining that "[c]lerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time")).

cc: Hon. Susan Johnson, District Judge
Thomas J. Tanksley, Settlement Judge
Brownstein Hyatt Farber Schreck, LLP/Las Vegas
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Eighth District Court Clerk