IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PETER ELIADES, INDIVIDUALLY,
Appellant,
vs.
HARRY V. MOHNEY,
Respondent.

No. 86262-COA

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Peter Eliades appeals from a district court order denying his motion for attorney fees and costs following an order of dismissal. Eighth Judicial District Court, Clark County; Veronica Barisich, Judge.

In June 2014, Harry V. Mohney filed a civil complaint against Eliades alleging a single cause of action for breach of an oral agreement, seeking approximately $158,000 in damages.[1] The parties proceeded to a jury trial in 2016. After Mohney testified, Eliades moved to strike his testimony and for a directed verdict under NRCP 50 because Mohney's testimony allegedly contained numerous misrepresentations and inconsistent statements. After finding that Mohney's testimony amounted to a fraud upon the court, the district court struck Mohney's testimony and entered a directed verdict in Eliades' favor. The district court denied Eliades' post-judgment motion for attorney fees.

Mohney appealed the judgment, and Eliades cross-appealed the denial of his motion for attorney fees. In an order of reversal and remand, this court concluded that the district court erred by striking Mohney's testimony and by finding that it amounted to a fraud on the court. *See Mohney v. Eliades*, Nos. 71677-COA & 71686-COA, 2017 WL 4711956, at *2

[1]We recount the facts only as necessary for our disposition.

(Nev. App. Oct. 13, 2017) (Order of Reversal and Remand). "Rather, Mohney's testimony presented conflicting evidence on a material issue, creating questions of fact for the jury." *Id.* Because Mohney's testimony should have been presented to the jury and was wrongfully stricken, this court reversed the district court's judgment as an improper directed verdict. *Id.* at *2-3. In light of the reversal, this court rejected as moot Eliades' cross-appeal challenging his denied request for attorney fees. *Id.* at *3 n.2.

In his sworn declaration, Eliades' counsel stated that following remand, Mohney offered to settle with Eliades and proposed a voluntary dismissal with both sides to bear their own fees and costs. Eliades responded that he would only agree to the dismissal if he received his attorney fees and costs incurred in defending the action, and Mohney rejected that counteroffer. In February 2019, the parties attended a private mediation. During the mediation, Mohney again proposed a similar walk-away settlement offer, but this time Mohney offered to pay Eliades a "small percentage" of his attorney fees and costs. Eliades rejected the offer, and the mediation was unsuccessful.

The jury trial was continued several times by both parties for various reasons, and eventually a firm trial setting was scheduled for October 2022, with calendar call set for September 27, 2022. Approximately two weeks before calendar call, the parties attended a second private mediation. In his sworn declaration, Eliades' counsel stated that, during this mediation, the mediator recommended that Mohney move to voluntarily dismiss the action.[2]

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[2]In both the district court and on appeal, Mohney did not challenge the disclosure of their settlement negotiations, nor dispute Eliades' representations regarding their content, or anything else that occurred during this private mediation.

Approximately a week after the mediation and a week before calendar call, Mohney filed a motion to voluntarily dismiss the case with prejudice due to "emergent medical concerns," with each side to bear their own fees and costs. Specifically, the motion contained an affirmation from Mohney's counsel which stated that "[o]n September 12, 2022, Mr. Mohney, who is 79 years old, informed my co-counsel . . . that he suffers from" a medical condition. However, Mohney's motion did not include any evidence regarding his alleged medical condition. Eliades agreed to the dismissal with prejudice but opposed Mohney's request that each side bear their own fees and costs. Eliades noted that Mohney's health issues "were not raised as a reason to forego trial until *after* the parties attended a private mediation last week." The district court granted Mohney's request to dismiss the case with prejudice but permitted Eliades to file a motion for attorney fees and costs.

Eliades initially filed a verified memorandum of costs and argued that, as the prevailing party, he was entitled to $14,735.27 in statutory costs under NRS 18.020(3). In response, Mohney filed a motion to retax costs wherein he argued that Eliades was *not* the prevailing party because Mohney voluntarily dismissed his case due to medical reasons, rather than to avoid a judgment on the merits. In opposition to the motion to retax costs, Eliades challenged Mohney's claim that he voluntarily dismissed the case because of a medical condition. In reply, Mohney reiterated his medical claim and stated that Eliades had "absolutely no basis to dispute Mr. Mohney's doctor's recommendation." However, Mohney again did not provide any evidence to support his emergent medical condition.

Thereafter, Eliades filed a motion for attorney fees and costs, seeking $762,651.52 in attorney fees pursuant to NRS 7.085 and NRS 18.010(2)(b). Eliades contended that Mohney's complaint was frivolous, maintained without reasonable grounds, and brought solely to harass.

Eliades also again challenged the purported medical basis for Mohney's dismissal. In a subsequent hearing, Eliades argued that his request for attorney fees under NRS 7.085 applied only to Mohney's first counsel who initially filed the action.

Mohney opposed the motion for attorney fees and costs and further argued that the court of appeals' order of reversal and remand was the law of the case that his claim was not brought unreasonably or frivolously. Specifically, he argued that this court's order concluded that he "supported his claim with evidence creating a question of fact for the jury," which precluded a finding that his claim was improper. While Mohney reiterated the medical basis for his dismissal, he again did not provide any evidentiary support for the claim.

In February 2023, the district court denied Eliades' motion for attorney fees and costs and also denied Mohney's motion to retax as moot. In addressing Eliades' request for attorney fees, the district court concluded that "NRS 7.085 applies only to attorneys' actions and is not applicable." The court then determined that Eliades was not a prevailing party under *Valley Electric Association v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005), and thus was not entitled to attorney fees under NRS 18.010(2)(b). Specifically, the district court found that, considering the court of appeals' prior order of reversal, Eliades "did not prevail on a dispositive motion or otherwise succeed on a significant issue" as required by *Valley Electric*. Further, the court determined that, based on "the former holdings in this case," Mohney's complaint was a good faith filing and not frivolous. The court also found that Mohney presented evidence to support his claim and that there was insufficient evidence to establish that his claim was brought or maintained frivolously. Lastly, the court denied Eliades' request for statutory costs under NRS 18.020(3). It found that Eliades was not a

prevailing party under *145 East Harmon II Trust v. Residences at MGM Grand – Tower A Owners' Ass'n*, 136 Nev. 115, 460 P.3d 455 (2020), because "[this] case was reversed and remanded in favor of [Mohney], and [Mohney] dismissed the case for reasons other than a pending dispositive motion, to include medical reasons." Eliades timely appealed.

Eliades was the prevailing party under East Harmon

Eliades first contends that the district court erred when it concluded that he was not the prevailing party for purposes of awarding attorney fees and costs. The question of whether a litigant is a "prevailing party" under NRS 18.010(2) and NRS 18.020 is a question of law reviewed de novo. *E. Harmon*, 136 Nev. at 118, 460 P.3d at 457 (stating that the meaning of prevailing party as used in NRS 18.010(2) and NRS 18.020 is a question of law reviewed de novo); *Franchise Tax Bd. v. Hyatt*, No. 80884, 2021 WL 1609315, at *2 (Nev. Apr. 23, 2021) (Order Affirming in Part, Reversing in Part and Remanding) ("The district court's denial of FTB's statutory costs is subject to de novo review because it implicates a question of law—whether FTB fits the definition of 'prevailing party' under NRS 18.020.").

In *Valley Electric*, the Nevada Supreme Court held that a party prevails in an action "if it succeeds on any significant issue in the litigation." 121 Nev. at 10, 106 P.3d at 1200 (internal quotation marks omitted). However, a party need not prevail on *all* claims to be considered the prevailing party. *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 90, 343 P.3d 608, 615 (2015). Subsequently, in *East Harmon*, the Nevada Supreme Court addressed whether a defendant who successfully obtains a voluntary dismissal with prejudice could be considered the prevailing party in order to seek attorney fees and costs. Relying on authority from the United States Courts of Appeals for the Second, Fifth, Seventh, and Ninth Circuits, the court held that "[t]he weight of federal

authority is that a voluntary dismissal with prejudice confers prevailing party status on the defendant or nonmoving party." *E. Harmon*, 136 Nev. at 119, 460 P.3d at 458. The court further held that

> a voluntary dismissal with prejudice generally equates to a judgment on the merits sufficient to confer prevailing party status upon the defendant. This rule is not absolute, as there may be circumstances in which a party agrees to dismiss its case but the other party should not be considered a prevailing party. For instance, a party may have a strong case or defense but nonetheless stipulate to a dismissal with prejudice because it is without funds to pursue litigation. Thus, the district court should consider the reason for the voluntary dismissal with prejudice when determining whether a dismissal with prejudice equates to a judgment for purposes of awarding attorney fees and costs.

Id. at 120, 460 P.3d at 459. *East Harmon* thus created a general rule that a plaintiff's voluntary dismissal with prejudice will confer prevailing party status to the defendant, while recognizing a limited exception for circumstances where the reason for the voluntary dismissal would not equate to a judgment on the merits.

Mohney contends that Eliades was not the prevailing party under *Valley Electric* because he did not prevail on a dispositive motion or succeed on a significant issue. Rather, Mohney suggests that *he* was the prevailing party because he obtained a reversal from this court in 2017. However, because Mohney voluntarily dismissed his complaint, we apply the more specific rule announced in *East Harmon* instead of the general rule set forth in *Valley Electric*. Under *East Harmon*, it does not matter whether Eliades prevailed on a dispositive motion or succeeded on a significant issue.

Mohney argues that the federal authorities discussed in *East Harmon* conferred prevailing party status only when the dismissal with prejudice was involuntary or otherwise avoided entry of judgment on the merits. Eliades responds that the federal authorities cited in *East Harmon* recognized that *all* dismissals "with prejudice" are the equivalent of a judgment on the merits—regardless of the motivation behind the dismissal—unless the exception applies. We agree with Eliades.

The federal authorities cited in *East Harmon* reasoned that a dismissal with prejudice conferred prevailing party status because it altered the legal relationship of the parties for purposes of res judicata. *See, e.g.*, *Anthony v. Marion Cnty. Gen. Hosp.*, 617 F.2d 1164, 1169-70 (5th Cir. 1980) ("Although there has not been an adjudication on the merits in the sense of a weighing of facts, there remains the fact that a dismissal with prejudice is deemed an adjudication on the merits for purposes of res judicata. As such, the [defendant] has clearly prevailed in this litigation."); *see also Carter v. Inc. Vill. of Ocean Beach*, 759 F.3d 159, 165 (2d Cir. 2014) (concluding that a "voluntary dismissal of an action with prejudice works such alteration [of the legal relationship of the parties], because it constitutes an adjudication on the merits for purposes of res judicata" (internal quotation marks omitted)). To emphasize the distinction, the supreme court also cited cases that held a dismissal *without* prejudice will *not* confer prevailing party status. *E. Harmon*, 136 Nev. at 120, 460 P.3d at 459 (citing *Cadkin v. Loose*, 569 F.3d 1142, 1145 (9th Cir. 2009) (concluding that "[b]ecause the plaintiffs in this lawsuit remained free to refile" their claims after a voluntary dismissal without prejudice, "the defendants are not prevailing parties and thus not entitled to the attorney's fees the district court awarded them") and *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1076-77 (7th Cir. 1987) (distinguishing between a dismissal without prejudice, which does not confer

prevailing party status, and a dismissal with prejudice, which "enables the defendant to say that he has prevailed" (internal quotation marks omitted))). Therefore, because Mohney voluntarily dismissed his claim with prejudice, the *East Harmon* rule confers prevailing party status to Eliades unless the exception applies.

Mohney contends that because he dismissed his claim "for medical purposes only," the district court properly found that Eliades was not the prevailing party under the exception in *East Harmon*. We note that the district court did not find that Mohney dismissed his claim solely for medical reasons; rather the court found that he "dismissed the case for reasons other than a pending dispositive motion, to include medical reasons."[3] However, Mohney never presented any evidence to the district court to substantiate that he had a medical basis for voluntarily dismissing the case.[4]

Further, it is not clear that Mohney had a "strong case" that would support a finding that he dismissed the case for a purpose unrelated to the merits. Although Mohney asserts that "there can be no question" that

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[3]The district court appears to have determined that Mohney was not the prevailing party under *East Harmon* because the facts of this case were not similar to those in *East Harmon*, where the appellant dismissed certain claims in response to a pending dispositive motion that it was likely to lose. However, the *East Harmon* rule is broadly phrased, and its application is not limited to factual circumstances identical to those that existed in that case. In any event, we note that a dismissal on the eve of trial that avoids a jury verdict is similar to a dismissal while a dispositive motion is pending.

[4]We note that the affirmation filed by Mohney's counsel detailing his medical condition contains double hearsay that Mohney had informed his other co-counsel of a diagnosis. *See* NRS 51.035; DCR 13(5) (providing that affidavits must conform with the requirements of NRCP 56(c)(4), which in turn requires that an affidavit "must be made on personal knowledge [and] set out facts that would be admissible in evidence").

he "sought dismissal for reasons unrelated to the case and not out of a fear of an adverse judgment on the merits," we note that during 2016 jury trial, the district court found Mohney's testimony to be so incredible that it struck his testimony as a fraud on the court and entered a directed verdict. While this court reversed the district court's decision to strike Mohney's testimony and its subsequent entry of a directed verdict, this court did so because, under NRCP 50(a)(1), the district court was not permitted to consider Mohney's credibility but was, instead, *required* to "view the evidence and all inferences most favorably to the nonmoving party." *See Mohney*, 2017 WL 4711956, at *3-4.

Notably, after remand, Mohney repeatedly sought to dismiss the case with prejudice with each side to bear their own fees and costs. Mohney proposed a similar settlement at the parties' first private mediation, offering to pay a small percentage of Eliades' attorney fees and costs.[5] Moreover, Mohney does not dispute Eliades' contention that, on the eve of trial, just one week before he moved to voluntarily dismiss his case, the mediator suggested

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[5]Eliades argued in the district court and on appeal that the parties' settlement offers and negotiations were admissible under NRS 48.105 for the purpose of requesting attorney fees and costs. The statute provides that evidence of offers to compromise is "not admissible to prove liability for or invalidity of the claim or its amount," but such evidence may be admissible "when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or purpose." We note that Mohney did not argue, either in the district court or on appeal, that Eliades' representations as to their settlement negotiations were inaccurate or should not be considered for this limited purpose. Any such arguments are, therefore, waived. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that arguments not raised on appeal are deemed waived).

that he do so. And all of these settlement proposals were made before Mohney ever asserted that he had medical reasons for dismissing his case.

Under these circumstances, we cannot conclude that Mohney sought dismissal for reasons unrelated to the merits that would permit us to apply the exception to *East Harmon*. Therefore, we conclude that Eliades is the prevailing party for purposes of statutory costs under NRS 18.020(3) and attorney fees under NRS 18.010(2)(b).

The district court abused its discretion in denying Eliades' request for statutory costs

NRS 18.020(3) provides that costs "must be allowed of course to the prevailing party against any adverse party against whom judgment is rendered . . . [i]n an action for the recovery of money or damages, where the plaintiff seeks to recover more than $2,500." The parties did not dispute that Mohney sought more than $2,500, but because the district court determined that Eliades was not the prevailing party, it denied his requested costs in the amount of $14,735.27. An order awarding or denying costs is reviewed for an abuse of discretion. *See generally Logan v. Abe*, 131 Nev. 260, 267, 350 P.3d 1139, 1144 (2015).

Because Eliades was the prevailing party in this case and Mohney sought to recover more than $2,500, Eliades was entitled to an award of statutory costs under NRS 18.020(3), and the district court abused its discretion in denying his request. However, Mohney challenged several of Eliades' claimed costs in his motion to retax costs. The district court did not address Mohney's motion to retax costs on the merits because it was denied as moot. Therefore, we remand this case for the district court to

determine in the first instance what statutory costs Eliades is entitled to recover.[6]

The district court did not abuse its discretion in refusing to award attorney fees

Finally, Eliades argues that he was entitled to an award of attorney fees under NRS 18.010(2)(b) and NRS 7.085 because the district court erroneously relied on this court's prior order of reversal and remand as the law of the case. He contends that the order does not preclude a finding that Mohney's claims were improperly brought or maintained, and the law-of-the-case doctrine does not apply because the order rejected Eliades' attorney fee cross-appeal as moot. In response, Mohney argues that this court determined that he "ha[d] evidence to support his claim and this created a question of fact for the jury." As a result, he asserts that under the law-of-the-case doctrine, this determination is "preclusive" to any finding that his claim was frivolous or unreasonably maintained. When it denied Eliades' request for attorney fees, the district court also noted that "[t]he Court of Appeals reversed and remanded the case" and found that "the former holdings in this case held that Plaintiff supported his arguments with evidence creating a question of fact for the jury and Plaintiff's complaint was a good faith filing and not frivolous."

NRS 18.010(2)(b) provides that the prevailing party may be awarded attorney fees when the claim "was brought or maintained without

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[6]Mohney also argues that Eliades' request for costs under NRS 18.020(3) is waived because he only requested costs in his verified memorandum of costs, but not in his motion for attorney fees and costs that is subject to this appeal. However, Eliades' motion for attorney fees and costs expressly incorporated by reference his verified memorandum of costs. Therefore, Eliades' request for costs under NRS 18.020(3) was properly preserved.

reasonable ground or to harass the prevailing party." NRS 7.085 states that an attorney may be personally liable for attorney fees and costs if the court finds that the attorney either "filed, maintained or defended a civil action . . . and such action . . . was not well-grounded in fact or is not warranted by existing law" or the attorney "[u]nreasonably and vexatiously extended a civil action or proceeding."

The decision to award or deny attorney fees is within the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. *Nelson v. Peckham Plaza P'ships*, 110 Nev. 23, 26, 866 P.2d 1138, 1139-40 (1994).

We agree with Eliades insofar as our prior order of reversal did not establish the law of the case with regard to his request for attorney fees because the order did not make a final ruling that Mohney did not bring or maintain his claim for an improper purpose. *See Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010) ("In order for the law-of-the-case doctrine to apply, the appellate court must actually address and decide the issue explicitly or by necessary implication."); *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 266, 71 P.3d 1258, 1262 (2003) ("The doctrine only applies to issues previously determined, not to matters left open by the appellate court."). However, we disagree that the district court abused its discretion in denying an award of fees. [7]

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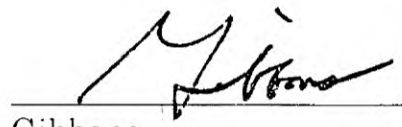
[7]Eliades argues the district court abused its discretion by failing to specifically identify the evidence supporting Mohney's claim. However, while a district court must make findings to explain the basis for awarding attorney fees, it is not required to "articulate [specific] findings as to why attorney fees are *not* warranted." *Stubbs v. Strickland*, 129 Nev. 146, 152 n.1, 297 P.3d 326, 330 n.1 (2013) (emphasis added). Therefore, we conclude that Eliades' argument is unpersuasive.

In this case, notwithstanding the district court's reference to our prior order, the court also made independent findings that Mohney's "claim was not brought or maintained without reasonable grounds" for purposes of attorney fees under NRS 18.010(2)(b) and NRS 7.085. The court reiterated this finding multiple times in its order and determined that "[Mohney] has pointed to evidence to support his claim, and there is insufficient evidence to support a showing that [Mohney's] claim was brought or maintained frivolously."[8] Under these circumstances, we conclude that the district court did not abuse its discretion in declining to award attorney fees.

Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART, REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[9]



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Gibbons

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Bulla

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Westbrook

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[8]While the district court referenced "prior holdings" in support of this determination, we also note that even after striking Mohney's trial testimony and granting Eliades a directed verdict, it also denied Eliades' original post-judgment motion for attorney fees.

[9]Insofar as the parties have raised any other arguments that are not specifically addressed, 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.

cc: Hon. Veronica Barisich, District Judge
Bailey Kennedy
Fox Rothschild, LLP/Las Vegas
Eighth District Court Clerk