IN THE SUPREME COURT OF THE STATE OF NEVADA

FORTUNET, INC., A NEVADA CORPORATION,
Appellant,
vs.
JULIE ROSTEN, AN INDIVIDUAL,
Respondent.

No. 85618

ORDER AFFIRMING IN PART, REVERSING IN PART, VACATING IN PART, AND REMANDING

This is an appeal from district court orders granting summary judgment and awarding attorney fees. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

This appeal pertains solely to appellant Fortunet's suit against respondent Juli Rosten; however, other proceedings and parties are relevant to the present action.[1] Fortunet manufactures, distributes, and operates casino systems. It sued its former employees, Jack Coronel and DeWayne Wooten, and their related entities, Playbook Publishing, Playbook Management, and Wooten Consulting. Fortunet also sued Coronel's wife, respondent Juli Rosten; Wooten's wife, Rosalie Wooten; and Bruce Himelfarb and Himelfarb & Associates (collectively Himelfarb). Fortunet alleged several claims including civil RICO, civil conspiracy, conversion, and unjust enrichment.

[1]Throughout this order, we refer to FortuNet as "Fortunet," PlayBook Publishing as "Playbook Publishing," and PlayBook Management as "Playbook Management" to maintain consistency with the conventions used in *Fortunet, Inc. v. Playbook Publ'g, LLC*, No. 72930, 2019 WL 2725664 (Nev. June 25, 2019) (Order Affirming in Part, Reversing in Part and Remanding). However, we retain the internal capitalization within the party names when quoting from the record.

24-03691

So far, there have been three trials that have occurred. Before Trial 1, Rosten and Coronel filed for bankruptcy. At the close of the trial, the jury was asked whether Fortunet proved that any defendant converted Fortunet's property by soliciting Fortunet's customers to pay for game enhancement strategies. Rosten and Coronel were included in the jury question, but their liability was not adjudicated because of the bankruptcy stay. The jury found that Wooten, Playbook Publishing, Playbook Management, and Wooten Consulting were liable, and each had caused Fortunet to suffer $1 in damages as a result of civil conspiracy, but that Himelfarb and Rosalie Wooten were not liable. Further, the jury found Fortunet had not proven that any of the defendants converted Fortunet's software systems, embezzled funds through Himelfarb, redirected funds from Himelfarb through Rosten and Rosalie Wooten, or obtained or exploited Fortunet's intellectual property. The district court found that Fortunet's claims against Himelfarb warranted attorney fees because the claims were frivolous.

After the bankruptcy case was dismissed and the stay lifted, Rosten and Coronel moved for summary judgment. As to the three claims pleaded against Rosten, she was granted summary judgment (along with Coronel) on civil RICO and unjust enrichment. The district court denied summary judgment on civil conspiracy, but limited Fortunet to claims unrelated to the Himelfarb agreement or ownership of the game enhancement strategies. Rosten and Coronel subsequently made a joint offer of judgment, which Fortunet rejected.

Thereafter, Trial 2 occurred during which Fortunet's civil conspiracy claim against Rosten was adjudicated. However, the Trial 2 judgment was reversed on appeal. We concluded in that appeal that the

district court's decision to strike Fortunet's chief executive officer's testimony for a violation of the witness exclusion rule warranted a new trial. In that appeal, we also affirmed the judgment that had resulted from Trial 1, the orders awarding attorney fees to Himelfarb, and the district court's order on Rosten's and Coronel's post-Trial 1 motion for summary judgment.

At our direction, a new district court judge heard the case on remand. Prior to Trial 3, Rosten and Coronel jointly moved for summary judgment, which the district court denied. Subsequently, Rosten and Coronel filed separate summary judgment motions, and Rosten's motion was granted (Coronel proceeded forth in Trial 3 individually). The district court also awarded Rosten fees under NRS 18.010(2)(b) from the date that Fortunet first involved Rosten in the case, totaling $667,054.79. Fortunet appeals.

The district court's grant of summary judgment was permissible

Fortunet argues the district court ignored that it pleaded civil conspiracy against "all defendants" and that Rosten was necessarily implicated by the jury's verdict that Rosten's codefendants were liable for conspiracy. Fortunet contends the district court ignored evidence it presented to support its civil conspiracy claim against Rosten. Rosten argues that summary judgment was appropriate because, *inter alia*, the evidence that Fortunet emphasized was litigated in Trial 1 and the verdict of that trial has been affirmed.

A district court's grant of summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Under NRCP 56, summary judgment is appropriate "when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a

matter of law." *Id.* at 731, 121 P.3d at 1031. To constitute a genuine factual dispute, the evidence must be "such that a rational trier of fact could return a verdict for the nonmoving party." *Id.* The pleadings and proof must be interpreted "in a light most favorable to the nonmoving party." *Id.* at 729, 121 P.3d at 1029.

Civil conspiracy arises "where two or more persons undertake some concerted action with the intent to accomplish an unlawful objective for the purpose of harming another, and damage results." *Guilfoyle v. Olde Monmouth Stock Transfer Co.*, 130 Nev. 801, 813, 335 P.3d 190, 198 (2014) (internal quotation marks omitted). "Summary judgment is appropriate if there is no evidence of an agreement or intent to harm the plaintiff." *Id.* at 813, 335 P.3d at 199.

Fortunet's allegations that specifically named Rosten relate to Himelfarb or the Himelfarb kickback scheme or are specific to the claims on which Rosten was previously granted summary judgment: RICO or unjust enrichment. Against all defendants, Fortunet generally pleaded that "[d]efendants acting in concert, intended to accomplish the unlawful objective of converting FortuNet's property for their own benefit." More specifically, Fortunet also pleaded "[d]efendants accomplished the unlawful objective of converting money from FortuNet for their own benefit by embezzling funds through Himelfarb & Associates." In its other two specific subclaims under civil conspiracy related to soliciting customers to pay for game enhancement strategies and to converting property using Fortunet's software systems, Fortunet named defendants and did not name Rosten.

The evidence that Fortunet contends supports finding that Rosten's civil conspiracy claim was separate from the Himelfarb kickback scheme is that Rosten received approximately $250,000 in checks from

Himelfarb for work done by Coronel, Rosten was listed as the Playbook Publishing representative on an unexecuted installment order, Rosten testified that she did what Coronel told her to do relating to Playbook, Rosten testified she wrote 99% of the checks for Playbook Publishing, and Rosten encouraged Coronel to quit Fortunet to pursue the Playbook business. Additionally, Rosten testified that she did the bookkeeping for Playbook Publishing and that she wrote at least one check to herself.[2]

Viewing the pleadings and evidence in the light most favorable to Fortunet, the only allegation against Rosten as to civil conspiracy is the general claim that she intended to accomplish the unlawful objective of converting Fortunet's property for her own benefit and that she did so in concert with others. No specific factual allegations support this claim because the factual allegations naming Rosten pertain to Rosten's alleged actions of hiding money through the Himelfarb kickback scheme. These facts could not have been alleged against Rosten had her matter proceeded forward in Trial 3 because we affirmed the Trial 1 verdict and the district court's order to the contrary. Further, Fortunet's evidence is insufficient to raise any issue of genuine material fact that Rosten was engaged in a civil conspiracy unrelated to the off-limits Himelfarb kickback scheme. Thus, no issue of material fact is raised from Fortunet's allegations and evidence to support a claim that Rosten conspired to solicit customers to pay for game enhancement strategies, to convert property using Fortunet's software

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[2]Fortunet also cited to a trial exhibit as additional evidence against summary judgment. That evidence was not included in the appellate record and is thus presumed to support the district court's summary judgment. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (presuming missing portions of the record support the district court's decision).

systems, or to otherwise participate in a civil conspiracy, beyond speculation and conjecture. *Wood*, 121 Nev. at 732, 121 P.3d at 1031. Accordingly, we conclude Fortunet has not demonstrated that a genuine issue of material fact exists for trial on its sole claim against Rosten of civil conspiracy, and we affirm the district court's grant of summary judgment.

The district court did not violate the law-of-the-case doctrine by granting summary judgment

Fortunet argues it was contrary to the law of the case for the district court to grant summary judgment and to find that Rosten's civil conspiracy claim was entirely derivative of the claims against Himelfarb. Rosten contends the law-of-the-case doctrine bars Fortunet's claims against Rosten.

"The law-of-the-case doctrine provides that when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case." *Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010). For the doctrine to apply, "the appellate court must actually address and decide the issue explicitly or by necessary implication." *Id.*

In the appeal of Trial 2, we affirmed the Trial 1 verdict that Himelfarb was not liable to Fortunet. We also affirmed the order that Fortunet's claims against Himelfarb were frivolous. Therefore, Himelfarb's lack of liability and the frivolous nature of Fortunet's claims against Himelfarb were the law of the case. In addition, we affirmed the district court's denial of summary judgment on Rosten's and Coronel's civil conspiracy claim. However, that decision was limited to civil conspiracy allegations that did not relate to the Himelfarb agreement or the ownership of the game enhancement strategies. By affirming the partial denial of summary judgment, we simply determined that the limited claim of civil

conspiracy could proceed forward against Rosten. Nothing was addressed and decided during appeal that prevented the district court from thereafter resolving the civil conspiracy claim on summary judgment. *See Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 445-46, 956 P.2d 1382, 1385-86 (1998) (concluding a party may timely file a second, more-developed motion for summary judgment that addresses the same issues as the first motion); *see also* NRCP 56(b) (providing a party may file a motion for summary judgment "at any time until 30 days after the close of all discovery"). Thus, we conclude the district court did not violate the law-of-the-case doctrine by granting Rosten's motion for summary judgment. Accordingly, we affirm the grant of summary judgment on this ground as well.[3]

The district court did not violate the court's mandate by granting summary judgment

Fortunet argues that, following this court's decision in the appeal of Trial 2, the district court violated this court's mandate that a new trial was warranted by granting summary judgment. We disagree. This court did not mandate that the matter had to proceed to a trial, rather, we simply concluded that a new trial was warranted due to error occurring in Trial 2. Our decision in no way prohibited the district court from resolving the matter on motion practice short of trial. In granting summary judgment, the district court appropriately found "that no triable issues of fact remain[ed] and then determine[ed] the rights of the parties by applying

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[3]Fortunet also argues that the district court erred by awarding fees under NRS 18.010(2)(b) because its decision was contrary to the law of the case. The law-of-the-case doctrine similarly did not bar the district court from finding Fortunet liable to Rosten for attorney fees under NRS 18.010(2)(b) because nothing was addressed and decided on appeal that prevented the district court from finding that Fortunet's claim against Rosten was frivolous under NRS 18.010(2)(b) after remand.

the law to the facts." *United Ass'n of Journeymen & Apprentices of Plumbing & Pipe Fitting Indus. v. Manson*, 105 Nev. 816, 817, 819-20, 783 P.2d 955, 956-57 (1989) (concluding that granting summary judgment constitutes bringing the case to trial for purposes of NRCP 41(e)). Further, like the law-of-the-case doctrine, the mandate rule does not preclude actions incidental to the mandate or actions on issues not governed by the scope of the mandate. *See Estate of Adams v. Fallini*, 132 Nev. 814, 819, 386 P.3d 621, 624 (2016) (concluding the mandate rule applies only to issues the appellate court addressed and decided). We never addressed and decided that the case could not be resolved by summary judgment on remand. Accordingly, we determine the district court did not err by granting Rosten's summary judgment request, and we affirm its decision to do so.

Attorney fees and costs

An award of attorney fees, costs, or prejudgment interest is reviewed for an abuse of discretion. *Logan v. Abe*, 131 Nev. 260, 267, 350 P.3d 1139, 1144 (2015) (costs); *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 916, 193 P.3d 536, 546 (2008) (prejudgment interest); *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1353-54, 971 P.2d 383, 386 (1998) (attorney fees). It is an abuse of discretion "if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006) (internal quotation marks omitted).

The district court abused its discretion by awarding Rosten attorney fees and costs incurred in unrelated bankruptcy proceedings, and we reverse that part of the fee award

Fortunet argues that Rosten's attorney fees and costs for her joint bankruptcy case with Coronel were not incurred *in this case*. Rosten

counters that the district court did not err in awarding her the bankruptcy fees because but for Fortunet's frivolous actions in the litigation, there would not have been a bankruptcy in the first place. It is an abuse of discretion to award fees for claims ostensibly unrelated to the claim covered by the statute that provided the basis for the fee award or for claims on which the party did not prevail. *Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 823, 192 P.3d 730, 732 (2008). The attorney fees that Rosten incurred in her bankruptcy litigation are ostensibly unrelated to the award of fees under NRS 18.010(2)(b) for Fortunet's frivolous civil conspiracy claim. Indeed, because the Himelfarb kickback scheme was found to be frivolous in Trial 1, Rosten could have proceeded to trial and had her claim adjudicated at that point rather than pursuing bankruptcy litigation. Accordingly, we conclude the district court abused its discretion by awarding Rosten attorney fees for the bankruptcy litigation and, we reverse this part of the fee award.

The district court abused its discretion by awarding Rosten half of the fees incurred on appeal, and we reverse the portion of the award pertaining to Rosten's appeal

Fortunet argues that Rosten was not entitled to half of all attorney fees charged on appeal because its appeal was not frivolous. "When an appeal has frivolously been taken . . . or whenever the appellate processes of the court have otherwise been misused, the court may, on its own motion, require the offending party to pay, as costs on appeal, such attorney fees as it deems appropriate to discourage like conduct in the future." NRAP 38(b). Fortunet appealed Trial 2 to this court, and we reversed the judgment because the district court's decision to strike the entire testimony of Fortunet's chief executive officer for a violation of the witness exclusion rule was unduly harsh. Our decision to reverse the

judgment that Fortunet appealed demonstrates that Fortunet's appeal was not frivolous. Thus, the district court abused its discretion by awarding the fees incurred during the appeal of Trial 2 because the appeal was not frivolous. Accordingly, we reverse the award of fees to Rosten that pertain to her appeal.

The district court abused its discretion by awarding costs based on inadequate documentation, and we vacate its award

Fortunet argues that Rosten was impermissibly awarded costs because she failed to provide adequate documentation of costs actually incurred that were reasonable and related to her defense. Parties seeking costs must "demonstrate how such fees were necessary to and incurred in the present action" rather than merely telling the court that they were necessary and reasonable. *Bobby Berosini, Ltd.*, 114 Nev. at 1352-53, 971 P.2d at 386. Rosten's attorney stated in his affidavit attached to Rosten's motion for fees that "the costs incurred by [his current firm] in this case have been reasonable and are true and correct to the best of my knowledge and information as formed after a review of the related invoices." However, many of the invoices and billing entries included generic descriptions such as "Westlaw/Lexis Electronic Research" and "Photocopy charges" and only listed the associated dates and costs. Thus, Rosten's cost descriptions failed to demonstrate how each of the costs were necessary to and incurred in the present action. *See id.* at 1353, 971 P.2d at 386 (rejecting claim for costs for photocopies when only the dates and total charges of the copies were provided). Instead, her attorney's affidavit amounts to merely telling the court the costs were reasonable. Accordingly, the district court abused its discretion, and we vacate the award of costs.

The district court abused its discretion by awarding Rosten interest charged by her attorneys for unpaid fees, and we reverse the portion of the award that constitutes interest

Fortunet argues that the district court's award of $257,653.64 in interest on unpaid attorney fees to Rosten amounted to an impermissible award of prejudgment interest. A prevailing party can recover prejudgment interest on attorney fees when the fees are awarded as an element of damages. *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 430, 132 P.3d 1022, 1036 (2006). Rosten's fees were awarded under NRS 18.010(2)(b) because Fortunet's claim was frivolous; thus, the fees were not awarded as an element of damages. Accordingly, we conclude the district court abused its discretion by awarding interest on the attorney fees and reverse the award of interest.

The district court abused its discretion by failing to permissibly apportion the attorney fees and costs award amongst the multiple defendants, and we vacate and remand the award for the district court to make findings as to apportionment

Fortunet argues that the district court failed to make findings on the issue of apportionment when it awarded Rosten half of all fees incurred by the defendants without considering what portion of the award was incurred in Rosten's litigation and what portion was incurred by Coronel, Playbook Publishing, and Playbook Management. Rosten counters that the district court permissibly awarded her half of the fees the defendants incurred because Fortunet attempted to litigate the entire set of claims against Rosten rather than only those alleged and because of Rosten's and Coronel's husband-wife relationship.

"[I]n an action in which a plaintiff pursues claims based on the same factual circumstance against multiple defendants, it is within the district court's discretion to determine whether apportionment is rendered impracticable by the interrelationship of the claims against the multiple defendants." *Mayfield v. Koroghli*, 124 Nev. 343, 353, 184 P.3d 362, 369 (2008). However, the district court must attempt to apportion costs before

finding it is impracticable to do so. *Id.* "[T]he district court must make specific findings, either on the record during oral proceedings or in its order, with regard to the circumstances of the case before it that render apportionment impracticable." *Id.* at 353-54, 184 P.3d at 369. The apportionment rule extends to attorney fees. *Cf. Detwiler v. Eighth Judicial Dist. Court*, 137 Nev. 202, 213, 486 P.3d 710, 720-21 (2021).

For most of this litigation, Rosten and Coronel were represented collectively on overlapping issues. However, Coronel litigated additional causes of action and issues in this suit that Fortunet did not bring against Rosten. To determine Rosten's award of fees, the district court added fees, costs, and interest from the law firms that represented Rosten and divided the total in half to calculate her award amount. The district court did not make findings regarding apportionment. Thus, we conclude the district court abused its discretion by awarding fees and costs without attempting to apportion which fees and costs were incurred in Rosten's defense specifically and without finding that apportionment was impracticable. Accordingly, we vacate the fee and cost award and remand for findings as to apportionment.

The district court did not abuse its discretion by awarding attorney fees under NRS 18.010(2)(b)

Fortunet argues that the district court abused its discretion by awarding Rosten attorney fees under NRS 18.010(2)(b) because the district court ignored the evidence that Fortunet presented to support its claim that Rosten conspired to convert Fortunet's customer relationships to sell game strategies. Rosten contends that Fortunet's claims were frivolous. NRS 18.010(2)(b) provides that the district court may award attorney fees to a prevailing party "when the court finds that the claim . . . was brought or maintained without reasonable ground." This provision shall be liberally

construed. NRS 18.010(2)(b). "[A] claim is frivolous or groundless if there is no credible evidence to support it." *Capanna v. Orth*, 134 Nev. 888, 895, 432 P.3d 726, 734 (2018) (internal quotation marks omitted). Fortunet continued litigation against Rosten with allegations and evidence that only related to the Himelfarb kickback scheme. Fortunet chose to do so after the jury found Himelfarb was not liable, the law of the case established that Fortunet could not pursue a claim against Rosten specific to the Himelfarb agreement, and a district court found Fortunet's claims against Himelfarb were frivolous. Accordingly, we conclude the district court's award of attorney fees under NRS 18.010(2)(b) on the basis that Fortunet's claim against Rosten was frivolous was not an abuse of discretion. Thus, we affirm the district court's decision to award fees on this ground. However, as discussed *supra*, we reverse, vacate, and remand the fee award on other grounds.

The district court did not abuse its discretion by failing to perform a Brunzell *analysis*

Fortunet argues the district court failed to perform a *Brunzell* analysis in awarding some of Rosten's attorney fees, and the fees could not have been analyzed under *Brunzell* because Rosten failed to provide billing statements for some of her awarded fees. In determining the amount to award, the district court may begin its analysis "with any method rationally designed to calculate a reasonable amount, so long as the requested amount is reviewed in light of the factors set forth in *Brunzell*." *Haley v. Eighth Judicial Dist. Court*, 128 Nev. 171, 178, 273 P.3d 855, 860 (2012) (internal quotation marks omitted). The four *Brunzell* factors include "the qualities of the advocate . . . the character of the work to be done . . . the work actually performed by the lawyer . . . [and] the result." *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). "[T]he district

court need only demonstrate that it considered the [*Brunzell*] factors, and the award must be supported by substantial evidence." *Logan*, 131 Nev. at 266, 350 P.3d at 1143. Here, the district court reviewed the *Brunzell* analyses that were performed after Trial 1 and Trial 2, and it conducted its own *Brunzell* analysis. Rosten's attorney attached an affidavit to the motion for fees in which he provided information as to each of the four *Brunzell* factors, and the motion included four fee award alternatives and numerous billing statements that the district court evaluated. Thus, we conclude the district court did not abuse its discretion because it considered the *Brunzell* factors, the substantial evidence, and the four fee formulations to determine the award amount. *See A Cab, LLC v. Murray*, 137 Nev. 805, 819, 501 P.3d 961, 975 (2021) (determining no abuse of discretion when three possible formulations and the *Brunzell* factors were considered). Accordingly, we affirm the district court's decision to award fees on this basis. However, as discussed *supra*, we reverse, vacate, and remand the fee award on other grounds.[4]

The district court did not abuse its discretion by failing to conduct a Beattie *analysis*

Fortunet contends that the district court abused its discretion by failing to perform a *Beattie* analysis regarding the validity of the offer of judgment. When exercising discretion to award fees and costs under NRCP 68, a district court must evaluate the *Beattie* factors. *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983). The issue of whether the district court abused its discretion by failing to apply *Beattie*, as would be required

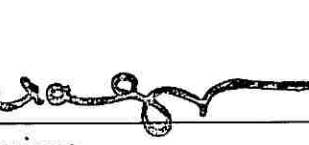
[4]The district court's comments, emphasized by Fortunet, are insufficient to demonstrate that the district court unreasonably failed to consider the *Brunzell* factors in awarding fees.

for fees awarded under NRCP 68, is not before us because the district court awarded fees under NRS 18.010(2)(b). *See McCrary v. Bianco*, 122 Nev. 102, 110, 131 P.3d 573, 578 (2006) (distinguishing the recovery of attorney fees pursuant to NRCP 68 from recovery pursuant to NRS 18.010). Thus, Fortunet has not shown the district court abused its discretion by failing to make findings under *Beattie*, and we affirm the district court's decision.[5]

Accordingly, we ORDER the judgment of the district court AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Herndon

_____, J.
Lee



_____, J.
Parraguirre

cc: Hon. Timothy C. Williams, District Judge
Lansford W. Levitt, Settlement Judge
Hartwell Thalacker, Ltd.
Lex Domus Law
Eighth District Court Clerk

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[5]Insofar as Fortunet raised arguments not specifically addressed in this order, we have considered them and conclude that they either do not warrant relief or need not be reached given the disposition.