

DETERRING EGREGIOUS CONDUCT AND FRIVOLOUS LITIGATION:

AWARDING ATTORNEYS' FEES AS SPECIAL DAMAGES AND UNDER BAD FAITH LITIGATION STATUTES

BY JASON BACIGALUPI, ESQ.

Civil litigation is an expensive process, regardless of the interests at stake. Attorneys' fees are often one of the largest expenses in litigation, sometimes exceeding (or dwarfing) damage awards. For example, a recent case in the Eighth Judicial District resulted in a \$584,608 verdict in plaintiffs' favor – followed by an award of more than \$9 million in attorneys' fees, costs and interest. Thus, whether on the paying or receiving end, the possible recovery of attorneys' fees is a vital consideration for all parties in litigation.

Prior issues of *Nevada Lawyer* have addressed attorneys' fees from different (and helpful) perspectives. In the January 2012 issue, Joseph G. Went and Jenny L. Routheaux outlined some pitfalls to avoid when acquiring attorneys' fees from an adversary. In the August 2013 issue, Micah Echols provided useful guidance in drafting attorneys' fees orders that will withstand a challenge on appeal, including an analysis of the mandatory *Brunzell* and *Beattie/Yamaha* factors.

This article addresses two grounds for attorneys' fees that deter egregious conduct and frivolous litigation:

1. Attorneys' fees awarded as special damages; and
2. Attorneys' fees awarded under NRS 18.010(2)(b).

The American Rule

Under the long-standing American Rule, each party pays its own attorneys' fees. One policy reason supporting the rule is to encourage parties to legitimately "vindicate their rights," without fear of being penalized.¹ So, a natural exception to the rule is to deter bad faith conduct that undermines this policy.

For example, if the egregious conduct of another forces a party into litigation to vindicate its rights, the aggrieved party would not be made whole if it had to pay its own fees. Likewise, parties who pursue frivolous litigation are not

interested in vindicating their rights; rather, they are interested in abusing the judicial system for an improper purpose. In either case – whether by statute, common law or otherwise – we should discourage this egregious and abusive conduct.

Attorneys' Fees Awards in Nevada

In Nevada, "[i]t is well established ... that attorneys' fees cannot be recovered unless authorized by agreement or by statute or rule."² Nevada has several statutory grounds for attorneys' fees, such as NRS 17.115, NRS 18.010, NRS 40.655 and NRS 108.237, as well as some judicial exceptions, such as awarding attorneys' fees as special damages.

Attorneys' Fees as Special Damages

Although rare, Nevada law does provide for attorneys' fees as special damages – usually as a result of egregious conduct. While *Sandy Valley* was by no means the first Nevada case to address attorneys' fees as special damages, it provided an "opportunity for the Nevada Supreme Court to clarify its jurisprudence regarding the difference between attorney fees as a cost of litigation and attorney fees as an element of damage."³ In doing so, the court pointed out a long tradition of Nevada case law in which attorneys' fees were considered as an element of damage, as opposed to a cost of litigation.⁴

There is a common theme in cases involving attorneys' fees as special damages. Fees may be awarded when:

1. A party becomes involved in a third-party legal dispute as the result of a breach of contract or tortious conduct by the adverse party;
2. A party incurs fees to recover real or personal property lost due to wrongful conduct of the adverse party or to clarify a cloud on title;⁵ or
3. As part of a declaratory or injunctive relief action "necessitated by the opposing party's bad faith conduct."⁶ Thus, such awards usually occur in cases involving "bad faith" or "wrongful" conduct that forces a party to commence or defend itself in litigation.



Additionally, a party requesting attorneys' fees as special damages must satisfy the requisite pleading and proof requirements. Therefore, the requesting party must:

1. Satisfy the pleading requirement of NRCPC 9(g);⁷
2. Show reasonable foreseeability;
3. Provide competent evidence of the damages; and
4. Show proximate causation between the damages and injurious conduct.⁸

Also, if there are multiple claims (whether affirmative claims, counterclaims or defenses), the requesting party must satisfy this requirement under each individual claim.

In sum, attorneys' fees are available as special damages in limited cases, usually involving wrongful or bad faith conduct. However, one seeking these fees must carefully plead and prove them just as any other type of special damage.

Attorneys' Fees for Bringing or Maintaining Frivolous Litigation

There is a strong public policy against filing frivolous claims and pursuing baseless legal actions. In recognition of this public policy, the Nevada Legislature significantly strengthened the bad faith litigation statutes in 2003.⁹

Sometimes it is difficult to interpret the legislature's intent; but other times, as here, the intent is abundantly clear:

*The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph ... in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.*¹⁰

Importantly, these bad faith litigation statutes do not apply to parties attempting to vindicate their rights. Rather, courts may allow for attorneys' fees "when the court finds that the claim, counterclaim, cross-claim or third-party complaint

or defense of the opposing party was *brought or maintained without reasonable ground or to harass the prevailing party.*"¹¹

Courts are given broad discretion to award fees under NRS 18.010(2)(b). For example, the Nevada Supreme Court recently upheld a district court's award of attorneys' fees where:

1. Two averments in a defendant's answer were "blatantly false;" and
2. The defendant "affirmatively pursued several groundless claims."¹²

Thus, courts must liberally construe NRS 18.010(2)(b), consider the facts and circumstances at issue in each case, and award fees in all appropriate situations.

Conclusion

Parties may not recover attorneys' fees unless authorized by agreement, statute or rule. As outlined above, Nevada law provides for the recovery of attorneys' fees as special damages (subject to pleading and proof requirements), and for bringing or maintaining frivolous litigation. Both of these exceptions are founded in an important goal of our legal profession – to deter egregious conduct and abusive litigation practices. ■

1. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).
2. *Young v. Nevada Title Co.*, 103 Nev. 436, 442, 744 P.2d 902, 905 (1987).
3. *Sandy Valley Associates v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 955, 35 P.3d 964, 968 (2001).
4. *Id.* at 955, 35 P.3d 969 n.7.
5. In 2007, the Nevada Supreme Court "primarily reexamine[d]" the *Sandy Valley* decision to correct an "inadvertent expansion" of this narrow exception. *Horgan v. Felton*, 123 Nev. 577, 579, 170 P.3d 982, 983 (2007). Thus, the court retreated slightly from *Sandy Valley* as follows: a party may only recover attorneys' fees as special damages in "real property matters" for slander of title. *Id.* at 587, 170 P.3d at 988.
6. *Sandy Valley*, 117 Nev. at 957-58, 35 P.3d at 969-70.
7. *But cf. id.* at 958-59, 35 P.3d at 970-71; see also *Wynn v. Smith*, 117 Nev. 6, 16 P.3d 424 (2001) (If fees have not been pled under 9(g), but evidence of them has been introduced without objection, motions pursuant to NRCPC 15(b) may be sufficient to award damages after they have been tried by implication.)
8. *Sandy Valley*, 117 Nev. at 956-57, 35 P.3d at 969.
9. With Senate Bill 250, the 72nd Nevada Legislature made significant changes to several provisions of the NRS relating to "regulated businesses and professions." This included changes to bad faith litigation statutes. See e.g., Nev. Rev. Stat. § 18.010(2)(b); Nev. Rev. Stat. § 7.085; EDCR 7.60.
10. Nev. Rev. Stat. § 18.010(2)(b) (emphasis added).
11. *Id.* (emphasis added).
12. *Prestige of Beverly Hills, Inc. v. Weber*, No. 55837, 2012 WL 991696 (Nev. Mar. 21, 2012).



JASON M. BACIGALUPI is an associate attorney at Kolesar and Leatham, Chtd. in Las Vegas. He practices primarily in commercial and general civil litigation and can be reached at (702) 362-7800 or jbacigalupe@klnvada.com.