

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 REZA ZANDIAN A/K/A
4 GOLAMREZA ZANDIANJAZI
5 A/K/A GHOLAM REZA
6 ZANDIAN A/K/A REZA JAZI
7 A/K/A J. REZA JAZI A/K/A
8 G. REZA JAZI A/K/A
9 GHONOREZA ZANDIAN
10 JAZI, AN INDIVIDUAL,

11 Appellant,

12 vs.

13 JED MARGOLIN, AN
14 INDIVIDUAL,

15 Respondent.

Nevada Supreme Court

Case No. 65960

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16 **APPEAL**

17 FROM THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
18 IN AND FOR CARSON CITY
19 THE HONORABLE JAMES T. RUSSELL, DISTRICT JUDGE

20 **APPELLANT'S REPLY BRIEF**

21 SEVERIN A. CARLSON
22 Nevada Bar No. 9373
23 KAEMPFER CROWELL
24 50 West Liberty Street, Suite 700
Reno, Nevada 89501
(775) 852-3900

Attorneys for Appellant, Reza Zandian

KAEMPFER CROWELL
50 West Liberty Street
Suite 700
Reno, Nevada 89501

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KAEMPFER CROWELL
50 West Liberty Street
Suite 700
Reno, Nevada 89501

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KAEMPFER CROWELL
50 West Liberty Street
Suite 700
Reno, Nevada 89501

1 jurisprudence concerning awards of attorneys' fees. Nevada
2 generally follows the "American Rule" which requires that
3 litigants bear their own attorney's fees.³ The only exception to
4 application of the American Rule in Nevada occurs when a
5 contract, statute or court rule authorizes an award of
6 attorney's fees.⁴ However, because these exceptions are in
7 "derogation of common law," they are "**strictly construed**"
8 (emphasis added).⁵ Strict construction of exceptions to the
9 American Rule do not allow for a liberal construction of NRS
10 598.0999 as requested by MARGOLIN. In fact, deviations from
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15 ³ See *Smith v. Crown Fin. Servs.*, 111 Nev. 277, 281, 890 P.2d
16 769, 771-72 ("It has been a consistent rule throughout the United
17 States that a litigant has no inherent right to have his attorney's fees
18 paid by his opponent or opponents. Such an item is not recoverable in
19 the ordinary case as damages, nor as costs, and hence is held not
20 allowable in the absence of some provision for its allowance either in
21 a statute or rule of court, or some contractual provision or stipulation.
22 This sweeping general rule has been applied in legions of cases to
23 preclude recovery of attorney's fees, whether by the plaintiff or by the
24 defendant, from one's opponent in a civil action." (Quoting 1 Stuart
M. Speiser, *Attorneys' Fees* § 12:3 at 463-64 (1973)).

21 ⁴ See *Horgan v. Felton*, 123 Nev. 577, 583, 1780 P.3d 982, 986
22 (2007) (citing *Rowland v. Lepire*, 99 Nev. 308, 315, 662 P.2d 1332,
1336 (1983)).

23 ⁵ *Bobby Berosini*, 114 Nev. at 1352, 971 P.2d at 385 (citing
24 *Gibellini v. Klindt*, 110 Nev. 1201, 1205, 885 P.2d 540, 543 (1994)).

1 the American Rule are justified only by an “express”⁶ statutory
2 provision which establishes the exception in “plain terms.”⁷

3 MARGOLIN further claims that ZANDIAN’S argument
4 that NRS 598.0999(2) does not permit an award of attorney’s
5 fees because it is limited to an action brought by the District
6 Attorney or Attorney General is clearly erroneous.⁸ A plain
7 reading of NRS 598.0999(2) establishes a conclusion to the
8 contrary. NRS 598.0999 provides:

9
10 *Civil and criminal penalties for violations.*

11
12

13 2. Except as otherwise provided in NRS 598.0974, in
14 any action brought pursuant to the provisions of NRS
15 598.0903 to 598.0999, inclusive, if the court finds that a
16 person has willfully engaged in a deceptive trade practice,
the district attorney of any county in this State or the

17 ⁶ See *Sun Realty v. Dist. Ct.*, 91 Nev. 774, 776, 542 P.2d 1072,
18 1074 (1975) (citing *Dearden v. Galli*, 71 Nev. 199, 284 P.2d 384
(1955)).

19 ⁷ *Dixon v. Second Judicial Dist. Ct.*, 44 Nev. 98, 101, 190 P. 352,
20 353 (1920) (“The general rule is that counsel fees are not recoverable
21 by a successful party either in an action at law or in equity except in
the enumerated instances where they are expressly allowed by a
22 statute.... And in the absence of a statute authorizing it in plain
23 terms, no such fee can be taxed on appeal.” (Citing *Mooney v.*
Newton, 43 Nev. 441, 187 P. 721; *Miller v. Kehoe*, 107 Cal. 340, 40 P.
485)).

24 ⁸ See *Answering Brief* at 8:4-6.

1 Attorney General bringing the action may recover a civil
2 penalty not to exceed \$5,000 for each violation. The court
3 in any such action may, in addition to any other relief or
4 reimbursement, award reasonable attorney's fees and
5 costs.⁹

6 This provision does not support the District Court's ruling
7 awarding MARGOLIN post-judgment attorney's fees, nor does
8 it support MARGOLIN'S claim in his *Answering Brief*.

9 NRS 598.0999(2) is only triggered by actions "brought
10 pursuant to NRS 598.0903-598.0999."¹⁰ Those provisions
11 authorize the commencement of an action by the Nevada
12 Attorney General¹¹ and Nevada's district attorneys¹² in regard
13 to deceptive trade practices. The statute does not authorize a
14 private right of action. Since the statute's inception on July 1,
15 2001¹³, this Court has not interpreted it to authorize an award
16 of attorney's fees to a private litigant like MARGOLIN.
17 MARGOLIN points to no case analyzing this statutory
18 provision that suggests otherwise.
19

20 ⁹ NRS 598.0999(2).

21 ¹⁰ *Id.*

22 ¹¹ *See* NRS 598.096; NRS 598.0963

23 ¹² *See* NRS 598.0983; NRS 598.0985

24 ¹³ *See* 2001 Stat. of Nev. 482.

1 When the statute was amended in 2013, the Nevada
2 Legislature expanded the authorization beyond district
3 attorneys and the Attorney General to also include the
4 Commissioner of Consumer Affairs and the Director of the
5 Department of Business and Industry.¹⁴ That amendment,
6 however, did not authorize a private cause of action either.
7

8 Even if the statute is deemed to authorize private causes
9 of action, the plain unambiguous language of NRS 598.0999(2)
10 restricts an award of attorney's fees to only those actions
11 brought by the Attorney General or a District Attorney. The
12 statute provides that the Attorney General or District Attorney
13 "may recover a civil penalty" up to \$5,000 for a deceptive trade
14 practice.¹⁵ Then the final sentence of NRS 598.0999 goes on
15 to state, "The court *in any such action* may, in addition to any
16 other relief or reimbursement, award reasonable attorney's
17 fees and costs."¹⁶ The language "any such action" clearly refers
18
19
20

21 ¹⁴ See Senate Bill 488 (77th (2013) Session of the Nevada
22 Legislature). The referenced amendment does not go into effect until
23 July 1, 2015.

23 ¹⁵ NRS 598.0999(2).

24 ¹⁶ See *id.* (emphasis added).

1 to the preceding sentence which addresses the recovery of a
2 civil penalty by the Attorney General or district attorney. To
3 read the language otherwise renders the words “in any such
4 action” superfluous and removes all meaning provided by the
5 context. Nevada law rejects such an interpretation.¹⁷
6

7 This clear point becomes unmistakable when the
8 provision at issue is considered in conjunction with NRS
9 598.0975. That statute directs the disposition of “*all* fees, civil
10 penalties and *any other money* collected pursuant to the
11 provisions of NRS 598.0903 to 598.0999, inclusive.”¹⁸ Money
12 collected by actions initiated by the Attorney General are to be
13 deposited into the State General Fund¹⁹, while money collected
14 in an action initiated by a district attorney are deposited with
15

17 ¹⁷ *Butler v. State*, 120 Nev. 879, 892-93, 102 P.3d 71 (2004)
18 (“Statutes should be given their plain meaning and ‘must be
19 construed as a whole and not be read in a way that would render
20 words or phrases superfluous or make a provision nugatory. Further,
21 every word, phrase, and provision of a statute is presumed to have
22 meaning.” (footnote omitted) (quoting *Charlie Brown Constr. Co. v.*
Boulder City, 106 Nev. 497, 503, 797 P.2d 946 (1990); *overruled on*
other grounds, Calloway v. City of Reno, 116 Nev. 250, 993 P.2d 1259
(2000)).

23 ¹⁸ NRS 598.0975(1) (emphasis added).

24 ¹⁹ See NRS 598.0975(1)(a).

1 the county treasurer.²⁰ The only exceptions to the required
2 disposition of funds collected pursuant to NRS 598.0999 are:

3 (1) criminal fines²¹ and (2) "restitution".²² The first category,
4 criminal fines, is not at issue in this appeal. As to the second,
5
6 NRS 598.0975 directs:

7 Money collected for restitution ordered in such an action
8 *must* be deposited by the Attorney General and credited
9 to the appropriate account of the Attorney General for
10 distribution to the person for whom the restitution was
11 ordered.²³

12 NRS 598.0975 comprehensively addresses money collected
13 pursuant to NRS 598.0999 and directs the disposition of that
14 money. And there is no category of money which flows directly
15 from a judgment debtor, such as ZANDIAN, to a judgment
16 creditor, such as MARGOLIN. This conclusively establishes
17 that NRS 598.0999 does not provide authorization for an
18 award of attorney's fees in a private cause of action.
19
20

21 ²⁰ See NRS 598.0975(1)(b).

22 ²¹ Presumably, such fines are disbursed in the same manner as
23 other criminal fines.

24 ²² NRS 598.0975(3)(b).

²³ *Id.*

1 Finally, even if it was applicable to MARGOLIN's claim in
2 general, the provision does not apply to post-judgment
3 attorney's fees which the *Motion* requested and the *Order*
4 granted. Nothing in the language of the provision expresses or
5 implies that it authorizes any award subsequent to a judicial
6 adjudication that there has been a violation of Chapter 598 of
7 Nevada Revised Statutes.
8

9 **II. MARGOLIN has Never Sought Attorney's Fees**
10 **Pursuant to NRS 41.600 and has Therefore Waived**
11 **Any Claim for Fees Under that Statute.**

12 The record on appeal contains no reference to NRS
13 41.600 because: (1) MARGOLIN never sought an award of
14 attorney's fees pursuant to NRS 41.600 before the District
15 Court²⁴ and (2) the District Court never based its award of
16 attorney's fees to MARGOLIN upon NRS 41.600, let alone
17 referenced NRS 41.600 in its *Order* granting the award of post-
18
19
20

21 ²⁴ See *Complaint*, J.A. at Vol. I, 1-10; *Amended Complaint*, J.A. at
22 Vol. 1, 11-18; see also *Motion*, J.A. Vol. III, 411-418; *Declaration of*
23 *Adam McMillen in Support of Plaintiff's Motion*, J.A. Vol. III, 419-
24 *494*; *Reply in Support of Motion*, J.A. at Vol. IV, 506-512;
Declaration of Adam McMillen in Support of Reply in Support of
Plaintiff's Motion, J.A. at Vol. IV, 513-533.

1 judgment attorney's fees.²⁵ MARGOLIN, now for the first time,
2 and with no prior notice to ZANDIAN, seeks to apply NRS
3 41.600 as a basis for an award of attorney's fees. As this Court
4 is well aware, arguments raised for the first time on appeal
5 need not be considered.²⁶ As such, MARGOLIN's new attempt
6 to seek attorney's fees pursuant to NRS 41.600 should be
7 disregarded by this Court.
8

9 **III. The District Court Abused its Discretion in**
10 **Authorizing Specialized Fee Rates for Routine Legal**
11 **Work.**²⁷

12 The District Court enjoys discretion in determining the
13 amount of a reasonable fee award when such an award is
14 authorized by law. But that discretion is not without restraint.
15 *Brunzell v. Golden Gate Nat'l Bank*²⁸ established the framework
16 by which fees are to be evaluated. That *Brunzell* framework
17

18 ²⁵ See *Order on Motion*, J.A. at Vol. IV, 549-558.

19 ²⁶ *Montesano v. Donrey Media Group*, 99 Nev. 644, 650 n. 5, 668
20 P.2d 1081, 185 N. 5 (1983); *Tupper v. Kroc*, 88 Nev. 146, 149, 494
21 P.2d 1275, 1278 (1972).

22 ²⁷ If the Court determines that NRS 598.0999 or NRS 41.600 do
23 not support the District Court's award in the *Order*, the issue
24 addressed in this Section III is rendered moot and need not be
reviewed.

²⁸ 85 Nev. 345, 455 P.2d 31 (1969).

1 involves consideration of several factors in determining the
2 reasonable value of legal services.²⁹ One factor, the most
3 pertinent in this case, requires the District Court to consider
4 “*the character of the work to be done: its difficulty, its intricacy,*
5 *its importance, time and skill required....*”³⁰
6

7 Most of the legal work during the timeframe addressed in
8 the *Motion* was completed by two attorneys for MARGOLIN,
9 both of whom charged \$300 per hour.³¹ MARGOLIN claimed
10 that this elevated hourly rate was necessary due to counsels’
11 experience and specialized skills in regard to “patent and
12 deceptive trade practices litigation” which is a “niche practice
13 that requires a high degree of legal skill and care in order to be
14 performed properly and effectively.”³² Noting that “the
15 customary fee charged by attorneys with our experience for
16 similar patent and deceptive trade practices matters in Nevada
17
18

19 ²⁹ See *Brunzell*, 85 Nev. at 349-50, 455 P.2d at 33-34.

20 ³⁰ *Brunzell*, 85 Nev. at 349, 455 at 33 (emphasis in original).

21 ³¹ See J.A. Vol. IV at 553 (“The amount of attorney’s fees awarded
22 only includes reasonable attorney’s fees from October 18, 2013 to
23 April 18, 2014, as follows: 11.4 hours of work performed by [Attorney
24 1] at \$300 per-hour (\$3,420.00); [and] 75.3 hours of work performed
by [Attorney 2] at \$300 per-hour (\$22,590.00).”)

³² J.A. at Vol. III, 416, 419-23.

1 ranges between \$275-\$450 per-hour,” MARGOLIN’s counsel
2 argued that the \$300 hourly fee was an appropriate rate for
3 the work performed from October 18, 2013 through April 18,
4 2014.³³

5
6 While it may very well be the case that an attorney
7 experienced and specialized in patent and intellectual trade
8 practice issues justifies a rate of \$300 per hour, that rate is
9 not consistent with the work at issue here. The work of
10 MARGOLIN’s counsel from October 2013 to April 2014
11 involved collection efforts toward satisfaction of the *Default*
12 *Judgment* and oppositions to ZANDIAN’s efforts to set aside
13 and stay the *Default Judgment*.³⁴ This work does not implicate
14 any need for a legal specialist. While MARGOLIN has every
15 right to employ and pay for the services of whomever he
16 wishes to perform work related to his case, the fees for the
17 post-judgment work performed are not reasonable and the
18
19
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22 ³³ J.A. at Vol. III, 420.

23 ³⁴ See J.A. at Vol. I, 44-Vol. III, 410; *Docket Sheet* at 3-4 (Nov. 5,
24 2014) *Zandian v. Margolin*, Nevada Supreme Court Case No. 65960).

1 District Court should have reduced the rate to reflect the non-
2 specialized rate of a general practitioner.

3 For this reason, the District Court abused its discretion
4 in applying a rate of \$300 per hour for the attorneys involved
5 in this case, and the *Order* should be reversed and remanded
6 on that basis.
7

8 **CONCLUSION**

9 ZANDIAN respectfully requests that this Court reverse
10 the District Court's *Order on Motion for Order Allowing Costs*
11 *and Necessary Disbursements and Memorandum of Points and*
12 *Authorities in Support Thereof*, and remand this matter to the
13 District Court for further proceedings consistent with this
14 ruling.
15

16 DATED this 5th day of March, 2015.

17 KAEMPFER CROWELL

18
19 BY: 

20 SEVERIN A. CARLSON

21 Nevada Bar No. 9373

22 50 West Liberty Street, Suite 700

23 Reno, Nevada 89501

24 **Attorneys for Appellant**

1 **CERTIFICATE OF COMPLIANCE**

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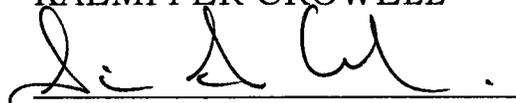
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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 5th day of March, 2015.

KAEMPFER CROWELL



SEVERIN A. CARLSON (NBN 9373)
50 West Liberty Street, Suite 700
Reno, Nevada 89501
(775) 852-3900

Attorneys for Appellant

KAEMPFER CROWELL
50 West Liberty Street
Suite 700
Reno, Nevada 89501

