

## ***Sellers v. Fourth Judicial Dist. Ct., 71 P.3d 495 (Nev. 2003).***

### **Summary**

The real party in interest Richard Matthews brought an action for unpaid attorney's fees against the petitioner Dean Sellers in Elko, Nevada's Justice Court. Both Matthews, an attorney, and Sellers, a non-attorney, represented themselves. The court entered judgment for Matthews. The award included Matthews' principle claim of \$5,075.00, pre-judgment interest, costs of \$230.00<sup>1</sup> and attorney's fees of \$1,500.00<sup>2</sup>.

Sellers unsuccessfully appealed to the District Court.<sup>3</sup> Subsequently, Sellers filed a proper person petition for a writ of certiorari in the Nevada Supreme Court. The petition challenged the justice court's judgment awarding damages, pre-judgment interest, costs and attorney fees. The court granted the petition in part, holding that the justice's court did not exceed its jurisdiction by awarding damages, pre-judgment interest and costs.<sup>4</sup> However, the court did find that the justice's court exceeded its jurisdiction by awarding attorney's fees to Matthews.

### **Issue and Disposition**

#### **Issue**

Does Nevada Revised Statutes 69.030 authorize an award of attorney's fees to a prevailing proper person litigant?

#### **Disposition**

No. The justice's court exceeds its jurisdiction if it awards attorney's fees to a prevailing proper person litigant, even if the proper person litigant is an attorney.

### **Commentary**

This case presented an issue of first impression to the court. Prior to its decision in *Sellers*, the Nevada Supreme Court had not heard a case concerning whether a prevailing proper person litigant was entitled to an award of costs from a justice's court. In deciding that a prevailing proper person litigant may not recover attorney's fees, the court looked to other states and to the plain language of Nevada Revised Statutes 69.030.<sup>5</sup>

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<sup>1</sup> See Nev. Rev. Stat. 69.040 (2003).

<sup>2</sup> See Nev. Rev. Stat. 69.030 (2003).

<sup>3</sup> The district courts serve as the court of appeals for the justices' courts.

<sup>4</sup> The court stated that Nevada Revised Statute 99.040(1)(a) (2003) authorized pre-judgment interest, Nevada Revised Statute 69.020 (2003) entitles a prevailing party to recover costs, and Nevada Revised Statute 69.040(1) (2003) requires a justice of the peace to tax costs at the time of judgment.

<sup>5</sup> *Sellers*, 71 P.3d at 499-98. Nevada Revised Statutes 69.030 provides "The prevailing party in any civil action at law in justices' courts of this state shall receive, in addition to the costs of court as now allowed by law, a reasonable attorney's fee. The attorney fee shall be fixed by the justice and taxed as costs against the losing party."

## **Other States- Prevailing proper person litigants who are non-attorneys**

Most state courts which have considered the issue have determined that non-attorney prevailing proper person litigants are not entitled to attorney's fees under the state's statutes and rules.<sup>6</sup> Courts have cited a number of rationales to support their decision not to award attorney's fees to pro se litigants. In *Alaska Federal Savings and Loan Association v. Bernhardt*, the Alaska Supreme Court highlighted some of these rationales which include: (1) difficulties quantifying the value of a non-attorney's time spent performing legal services; (2) the fear of frivolous lawsuits; (3) the plain language meaning of "attorney's fees" in a statute does not lend itself to an interpretation that would allow awards to non-attorneys; and (4) an award in a case in which a litigant incurs no actual fees amounts to a "windfall."<sup>7</sup> However, the California Supreme Court allowed a public utilities commission to recover attorney's fees for a non-lawyer who represented it in "quasi-judicial" proceedings, because non-attorneys frequently make appearances on other parties' behalf in quasi-judicial proceedings.<sup>8</sup>

## **Other States- Prevailing proper person litigant who is an attorney**

Some state courts have ruled that prevailing proper person litigants who are attorneys may recover attorney's fees.<sup>9</sup> The two main reasons cited by the courts in support of awarding attorney's fees are: (1) the attorney actually rendered the services, even if he performed them himself;<sup>10</sup> and (2) the attorney suffered an actual monetary loss because he had to forego other fees while working on his own case.<sup>11</sup> Nevertheless, other states have refused to allow recovery by a prevailing proper person litigant who is an attorney.<sup>12</sup> The primary rationale that courts cite for denying attorney's fees to attorney pro se litigants is the lack of an attorney-client relationship.<sup>13</sup>

## **Conclusion**

The Nevada Supreme Court interpreted Nevada Revised Statute 69.030 to allow attorney's fees as costs, only where the litigant has incurred an actual obligation to pay attorney's fees.<sup>14</sup> This means that justice courts are barred from taxing attorney's fees as part of costs when the prevailing party is a proper person litigant. The court was even-handed in applying the holding to both lawyers and non-lawyers. It based its reasoning

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<sup>6</sup> Sonja A. Soehnel, *Recovery Under State Law of Attorney's Fees by Lay Pro Se Litigant*, 14 A.L.R.5th 947 (2003).

<sup>7</sup> 794 P.2d 579, 581 (Ala. 1990).

<sup>8</sup> See *Consumers Lobby against Monopolies v. Public Utilities Commission*, 603 P.2d 41 (Cal. 1979).

<sup>9</sup> C. Clifford Allen, III, *Right of a Party Who is an Attorney and Appears for Himself to Award of Attorney's Fees Against Opposing Party as Element of Costs*, 78 A.L.R.3d 1119 (2003).

<sup>10</sup> See *Freidman v. Backman*, 453 So.2d 938 (Fla. App. 1984).

<sup>11</sup> See *Winer v. Jonal Corp.*, 545 P.2d 1094 (Mont. 1976).

<sup>12</sup> *Allen*, 78 A.L.R.3d 1119.

<sup>13</sup> See e.g., *Mix v. Tumanjan Development Corp.*, 126 Cal. Rptr.2d 267, 271 (Cal. App. 2002); *Connor v. Cal.-Az. Properties*, 668 P.2d 896, 899 (Ariz. 1983).

<sup>14</sup> *Sellers*, 71 P.3d at 498.

on the “Legislature’s clear intent that a prevailing party in justice’s court be reimbursed by the losing party for out-of pocket expenses incurred to prosecute a suit.”<sup>15</sup>

However, the statute applies only to justices’ courts and suits in the justices’ courts may not be for more than \$7,500. Hence, the court may be overlooking the fact that many litigants may not have the resources or the monetary incentives to hire attorneys. This means that many litigants will represent themselves in justice’s court. Moreover, the litigants who do hire attorneys seem likely to be those with the resources to do so. Therefore, one of the probable consequences from this decision will be that people who can afford to hire an attorney will hire an attorney in order to recover attorney’s fees. On the other hand, those who cannot afford attorneys will be forced to represent themselves in cases where the opposing party is represented by counsel. More troubling, the litigants who can least afford it may end up paying the attorney’s fees of those who can.

Thus, one of the main impacts *Sellers* may have on Nevada law is to encourage litigants with resources to hire attorneys to represent them in justices’ courts.

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<sup>15</sup> *Id.*