

# APPELLATE BRIEFS

By: Paul Georgeson, McDonald Carano Wilson LLP

## ATTORNEY AS AGENT

As attorneys, we are trained and well-versed in representing our clients. Those of us who practice litigation are used to representing parties to lawsuits. However, it becomes a whole different ballgame when the attorney becomes a party. In the recent case of *Dezzani v. Kern & Associates, Ltd.*, 134 Nev. Adv. Op. 9 (March 1, 2018), the Court was faced with the issue of whether an attorney was appropriately named as a direct party to a lawsuit and whether an attorney who represents herself in such a lawsuit is entitled to recover attorneys' fees and costs. In *Dezzani*, the Dezzanis owned a condominium in Incline Village. All of the homeowners in that complex were members of the Homeowners' Association. The Association was represented by local attorney Gayle Kern. In 2013, a dispute arose between the Dezzanis and the HOA regarding a deck built onto the Dezzanis' unit. As a result of that dispute, with the advice and assistance of its counsel, the HOA issued a Notice of Violation to the Dezzanis. The Dezzanis objected to the Notice. In the process of the dispute, the Dezzanis criticized Kern and sought to have another counsel represent the Association. The Association rejected their request.

NRS 116.31183 allows a unit owner in a homeowners' association to bring an action for damages, attorneys' fees, and costs when "an executive board, a member of an executive board, a community manager or officer, employer or **agent** of the association" retaliates against an owner based on certain activities of the owner. (Emphasis added.) One of the activities for which retaliation is prohibited is if the owner recommends the selection or replacement of any attorney. NRS 116.31183(1)(b). The Dezzanis sued the Association and their

attorney Kern, based on the statute.

In their Complaint, the Dezzanis argued that Kern was an "agent" of the Association. They alleged that Kern retaliated against the Dezzanis because they recommended that she be replaced. Kern, representing herself and her law firm, moved to dismiss the Dezzanis' complaint. In the motion to dismiss, Kern argued that NRS 116.31183 does not permit attorneys to be held personally liable for actions of their association clients. The district court agreed and dismissed the complaint with prejudice. The district court also found that the Dezzanis (who were representing themselves *pro se*), violated Rule 11. Therefore, the court awarded attorneys' fees and costs to Kern pursuant to NRS 18.010 and NRCP 11.

The Dezzanis appealed. Their appeal was initially assigned to the Nevada Court of Appeals, which affirmed the dismissal. However, the Court of Appeals reversed the attorneys' fees and costs award. Kern filed a petition for review with the Nevada Supreme Court. In a very rare occurrence, the Supreme Court granted review.

In their appeal, the Dezzanis argued that Kern was clearly an "agent" of the Association. Therefore, they argued that she was subject to suit pursuant to plain language at NRS 116.31183. Kern argued, however, that she was not an agent of the association as that term was used in the statute.

The Court recognized that the term "agent" in the applicable statute was not defined. Therefore, the Court turned to rules of statutory construction to determine the meaning of that word. The Court reiterated that the leading rule of statutory construction is to ascertain the intent of the legislature in enacting the statute. To determine legislative intent,

the Court first gives effect to the statute's plain meaning. Further, when possible, courts should interpret provisions within a common statutory scheme harmoniously with one another and in accordance with the general purpose of the statutes.

The Court noted that although the term "agent" was not specifically defined in Chapter 116, another statute in that Chapter distinguished between the association's "agent" and the association's "attorney". Specifically, NRS 116.31164(4) states that a foreclosure sale can be conducted "by the association, its agent or attorney". Thus, the majority of the Court determined that such distinction demonstrated the legislature's intent to distinguish between the association's attorney, and the association's other agents. The majority concluded that, given the Legislature's distinction between "agent" and "attorney" in other statutes found in Chapter 116, that the legislature did not intend for attorneys to be included in the term "agent" for the purposes of NRS 116.31183. Based on that conclusion, the Court affirmed the district court's dismissal.

However, the Court reversed the award of fees to Kern. Citing to previous cases, the Court noted that it has consistently held that attorney litigants who represent themselves *pro se* may not be awarded fees. That is because, when attorneys represent themselves or their law firms, no fees are actually incurred. Based on that line of cases, the Court reversed the district court's award of attorneys' fees to Kern. However, also based on historical rulings, the Court held that *pro se* attorney litigants who incur costs associated with claims may be entitled to recover those costs.

Continued on page 12

In addition to the specific ruling identified above, there are also two other interesting aspects of this case. First, as noted above, this is a case that was originally assigned to the Court of Appeals. However, the Supreme Court thereafter granted review by the Supreme Court. This is a very rare occurrence. Unfortunately, the Supreme Court did not provide any comment or guidance as to why it decided to grant review.

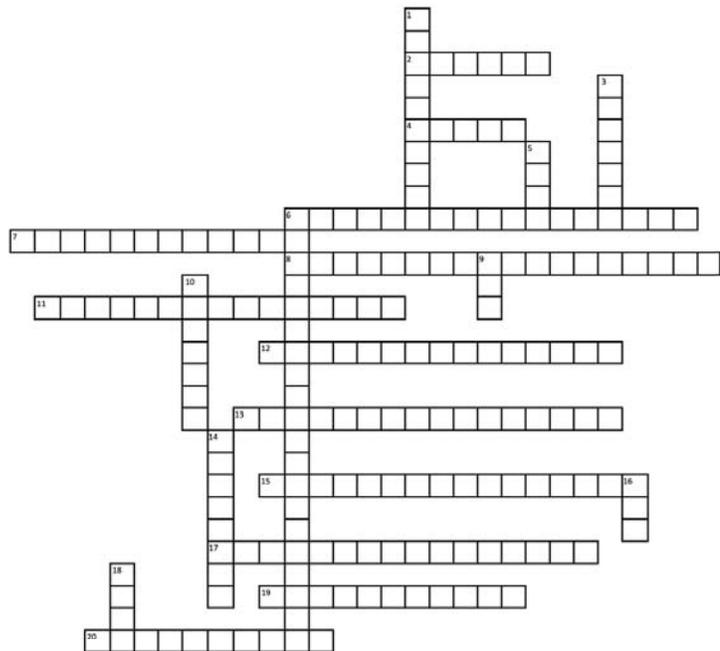
Another reason why this decision is somewhat rare is because of the vigorous dissent by Justice Pickering. In this case, Justice Pickering issued a strongly worded, detailed, 10-page dissent. Further, the majority spent almost half of its decision addressing the dissent. Therefore, in what ultimately resulted in a 27-page opinion (including the dissent), almost half of the total decision was made up by the dissent and by the majority's response to the dissent. This is very different from the vast majority of cases issued by the Supreme Court that are issued without dissent.

It will be interesting to see if these issues—acceptance by the Supreme Court of a Petition for Review and a legitimate dissent—are simply anomalies, or if they are harbingers of things to come. Stay tuned.

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## Second Judicial District Court Crossword



### Across

- 2 Commissioner \_\_\_\_\_ is currently the Probate Commissioner.
- 4 Judge \_\_\_\_\_ was the first presiding Judge over specialty courts.
- 6 The \_\_\_\_\_ is an option for parents to have supervised visits with their children. You must have a court order to use the facility.
- 7 What was the Washoe Court originally known for?
- 8 \_\_\_\_\_ is a program that assists patrons with their legal questions every Tuesday and Wednesday.
- 11 The Family Division is located next to a building named after the Honorable \_\_\_\_\_.
- 12 Who is the artist who painted the two paintings outside of the historical courtroom at 75 Court Street?
- 13 \_\_\_\_\_ are used by the Probate Department and Guardianship Department to help assist patrons and attorneys with upcoming filing deadlines.
- 15 Which department in the Court reformed the way bail is set?
- 17 What is an alternative to paper filing?
- 19 \_\_\_\_\_ was tried in 1992 in the Second Judicial District Court for back masking.
- 20 Where was the Second Judicial District Court originally located?

### Down

- 1 The \_\_\_\_\_ is a department in the Court house that provides legal information, education, resources, tools, and materials to all.
- 3 Judge \_\_\_\_\_ is currently the Chief Judge.
- 5 There are \_\_\_\_\_ General Jurisdiction Judges.
- 6 \_\_\_\_\_ was the first specialty court in the Second Judicial District Court.
- 9 How many specialty courts are there?
- 10 \_\_\_\_\_ is a free legal resource you can access in the Law Library.
- 14 The \_\_\_\_\_ Center is a place where self-represented litigants can go to get procedural help with family court cases.
- 16 There are \_\_\_\_\_ Family Court Judges.
- 18 \_\_\_\_\_ is a volunteer group who speak on behalf of children who are abused, neglected, or involved in the juvenile courts.

Answers: Across 2. Wright 4. Brown 6. Family Peace Center 7. Quick Divorce 8. Lawyer in the Library 11. Mills Boyer Knapp 13. Mike Stone Tracker 15. Parent Services 17. Electronic Filing 19. Judge Priest 20. Washoe City. Down 1. Law Library 3. Freeman 5. Nine 6. Felony Adult Drug Court 9. Ten 10. Westlaw 16. Self Help 18. Six 18. CASA