

A legal note from Marshal Willick about how fees incurred on appeal can be awarded in and by the district court on remand – sometimes

Somebody asked me a question in the recent past as to whether attorneys fees incurred on appeal could be awarded in the district court on remand. Because I can't remember who, and because my answer may no longer be correct, I thought it best to broadcast the revised response.

I answered “no,” based on the cases in the annotations. Specifically, in *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 971 P.2d 383 (1998), Berosini had won at trial, but the judgment was reversed on appeal. On remand, PETA requested and was awarded fees incurred during the prior appeal. This was reversed by the Nevada Supreme Court, which held:

the text of NRS 18.010 is silent with respect to attorney's fees on appeal. Pursuant to NRAP 38, attorney's fees and costs on appeal are permitted only in those contexts where “an appeal has frivolously been taken or been processed in a frivolous manner.” Accordingly, because NRS 18.010 does not explicitly authorize attorney's fees on appeal, and because NRAP 38(b) limits attorney's fees on appeal to those instances where an appeal has been taken in a frivolous manner, we conclude that PETA is not entitled to attorney's fees incurred through its appeal of Berosini's favorable trial judgment.

This holding has generally been taken as prohibiting a district court from considering fees and costs incurred on appeal, when the question of fees is considered after remand.

That may have just changed, at least in certain circumstances. In *In re Estate of Miller*, 125 Nev. ___, ___ P.3d ___ (Nev. Adv. Opn. 42, Sept. 24, 2009), the Nevada Supreme Court directed the district court to “award reasonable . . . fees incurred at the district court and appellate levels both on this appeal and the prior appeal.”

The case itself involved the general civil offer of judgment statute and rule (NRS 17.115 and NRCPP 68). At the district court level, fees had been denied because the result achieved was not better than the offer made. After the ruling in the first appeal, however, the result achieved **was** better than the offer, but on remand the district court denied fees to the offeror anyway, finding that the offer of judgment rules do not apply to judgments won by appellate reversal. This was the question in the second appeal.

Finding that the relevant “judgment” was not the trial court determination but the final judgment achieved after appeal, the Nevada Supreme Court held that the fee-shifting provisions in the offer of judgment rules applied, and directed the district court to assess fees for all efforts, at the district and appellate levels, incurred by the offeror after the offer was made.

The bottom line to all of this is that the question of when fees incurred on appeal can be considered in the trial court is more nuanced than it had appeared. However, there does not seem to be any good way to square *Berosini's* “fees are prohibited unless explicitly authorized” holding with the “fees are authorized unless prohibited” message of *Miller*. The former case was not addressed in any way in the latter – apparently no one noticed the conflicting directives.

Since there are a multitude of statutes, cases, and court rules permitting a fee award in some circumstances, this question would appear to go on the pile of topics made less clear by recent appellate holdings, perhaps to be clarified in some later case, or by amendment to the rules of appellate procedure.

In the meantime, if you are on remand, and prevailed on appeal, what the heck – may as well ask for the fees incurred at every stage.

.....

To visit our web site and review its contents, go to <http://www.willicklawgroup.com/home>. For more information on attorney's fees and costs, go to http://www.willicklawgroup.com/fees_and_costs.

This legal note is from Marshal S. Willick, Esq., 3591 E. Bonanza Road, Ste 200, Las Vegas, NV 89110. If you are receiving these legal notes, and do not wish to do so, let me know by emailing this back to me with "Leave Me Alone" in the subject line. Please identify the email address at which you got the email. Your State would be helpful too. In the mean time, you could add this to your email blocked list. And, of course, if you want to tell me anything else, you can put anything you want to in the subject line. Thanks.