

Case # 09-CV-0285

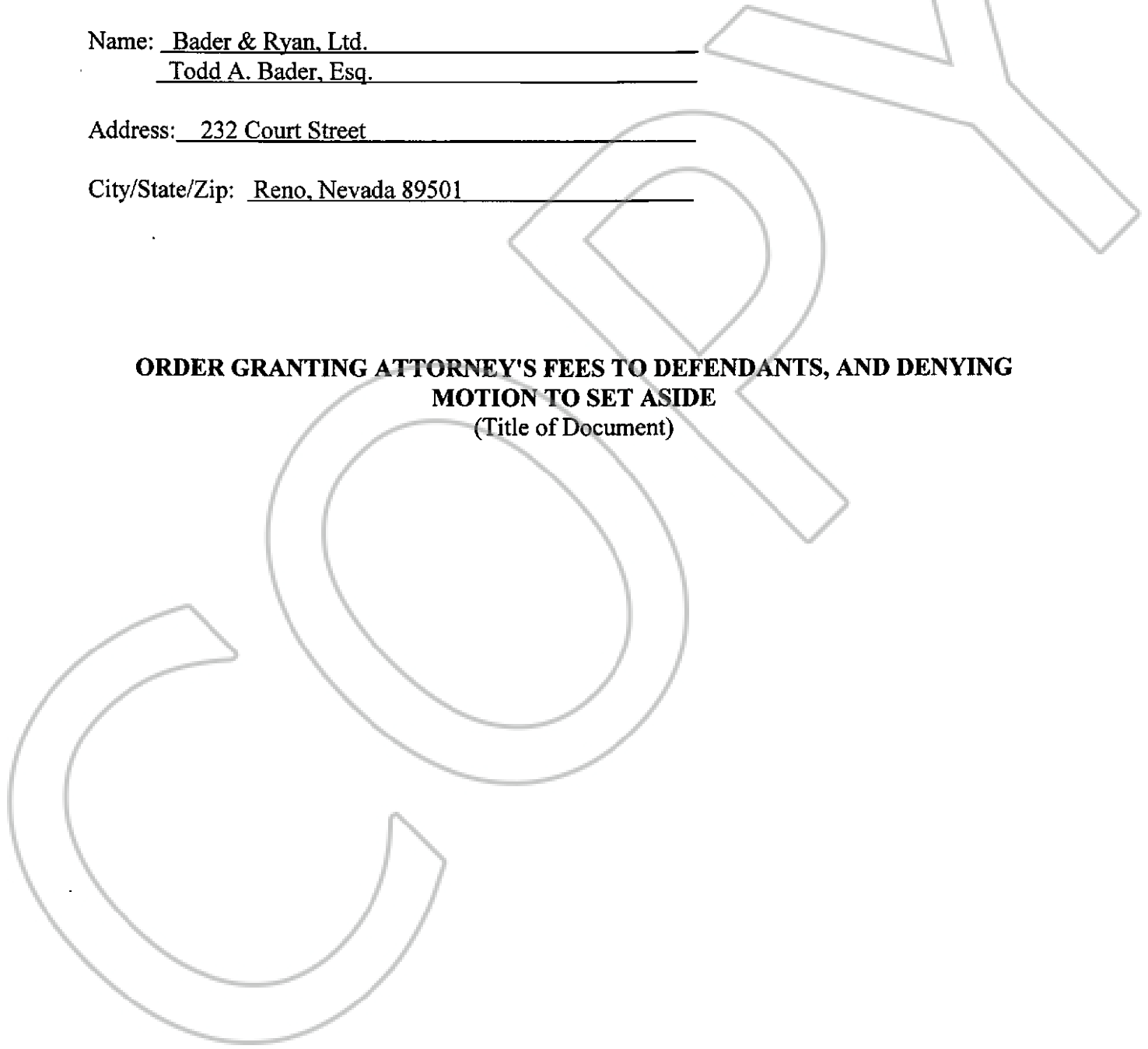
Recording Requested by:

Name: Bader & Ryan, Ltd.
Todd A. Bader, Esq.

Address: 232 Court Street

City/State/Zip: Reno, Nevada 89501

**ORDER GRANTING ATTORNEY'S FEES TO DEFENDANTS, AND DENYING
MOTION TO SET ASIDE**
(Title of Document)



1 Case No. 09-CV-0285

2 Dept. No. II

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EMILY HARRIS
PROPERTY

6 IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF DOUGLAS

8 SCHULZ PARTNERS, LLC,

9 Plaintiff,

10 vs.

11 ZEPHYR COVE PROPERTY OWNERS
12 ASSOCIATION, INC., a Nevada
13 corporation,

14 Defendant.

ORDER GRANTING ATTORNEY'S
FEES TO DEFENDANTS,
AND
DENYING MOTION TO SET ASIDE

15
16 THIS court entered its *Order Dismissing Complaint in its*
17 *Entirety* on November 17, 2009. Plaintiff Schulz Partners, LLC
18 ("Schulz") filed its *Notice of Entry of Order* and its *Notice of*
19 *Appeal* on November 18, 2009.

20 Thereafter, Defendant Zephyr Cover Property Owners
21 Association ("the Association") filed its *Memorandum of Costs* on
22 November 23, 2009, and its *Motion for Attorney's Fees and Costs*
23 on November 25, 2009. Schulz opposed the motion on December 1,
24 2009, and the Association replied on December 11, 2009.

25 Schulz moved for an award of attorney's fees on December 1,
26 2009, under the substantial benefit exception. The Association
27 filed its opposition on December 14, 2009, and Schulz replied on
28

1 December 21, 2009.

2 Schulz filed a separate motion to set aside this court's
3 order on December 15, 2009. The Association filed its opposition
4 on January 5, 2010, and Schulz replied on January 7, 2010.

5 I. Motion to Set Aside

6 As a threshold matter this court must consider the
7 plaintiff's motion to set aside. Plaintiff's November 18, 2009,
8 notice of appeal divested this court of jurisdiction except in
9 matters that are collateral and independent from the appeal.
10 *Kantor v. Kantor*, 116 Nev. 886, 894-95 (2000). The motion to set
11 aside is not collateral or independent from the appeal. This
12 court does not have jurisdiction at this time to withdraw or
13 modify its previous order since that order is the very heart of
14 the pending appeal.
15

16 Pursuant to *Huneycutt v. Huneycutt*, 94 Nev. 79, 81 (1978),
17 this court certifies that it would likely have denied the motion
18 to set aside.

19 II. Motions for Attorney's Fees

20 Despite the appeal, this court does have jurisdiction to
21 resolve the parties' pending motions for attorney's fees. An
22 award of attorney's fees and costs post-judgment is collateral to
23 and independent from the matter being appealed.
24

25 A. Schulz's Motion for Attorney's Fees

26 Despite this courts order dismissing the complaint in its
27 entirety, plaintiff seeks an award of attorney's fees in its
28 favor pursuant to the substantial benefit doctrine.

1 Schulz claims that it achieved a substantial benefit for all
2 lot owners because the complaint caused the Association to change
3 its signs, clarifying that all lot owners (not just association
4 members) could access the beach. Schulz attaches exhibits
5 showing that he has incurred attorney's fees and costs of
6 approximately \$15,200. The Association asserts that the
7 substantial benefit doctrine does not apply because Schulz was
8 not a prevailing party.

9 Under this the substantial benefits doctrine, if a
10 substantial benefit is conferred by a successful party then the
11 attorney's fees and costs can be spread out proportionately among
12 the benefitted members of an ascertainable class. *Thomas v. City*
13 *of North Las Vegas*, 122 Nev. 82, 90-91 (2006). To qualify under
14 this exception, the prevailing party must show that the losing
15 party received some benefit from the litigation. *Id.* at 85.

16 Schulz is not the successful or prevailing party in this
17 matter. Furthermore, this court is reluctant to say that the
18 change in signs is a substantial benefit which would impose fees
19 and costs on individual property owners who have not been
20 properly served, otherwise noticed, nor did they participate in
21 this action.

22 Accordingly, Schulz's motion for attorney's fees is denied.

23
24 **B. The Association's Motion for Attorney's Fees and**
25 **Costs**
26

27 Pursuant to NRS 18.020(1) and (5), an award of costs is
28 mandatory to a prevailing party in a real property dispute. This

1 matter is just such a dispute. The Association's request for
2 \$623.65 is reasonable.

3 The Association also seeks an award of attorney's fees
4 pursuant to NRS 18.010(2)(b). Under this statute, the court may
5 award attorney's fees when there was no reasonable ground to
6 bring a complaint. "The court shall liberally construe [NRS
7 18.010(2)(b)] in favor of awarding attorney's fees . . . to
8 punish for and deter frivolous or vexatious claims...." *Id.*
9 (also referencing the court's ability to sanction under NRCP 11).
10 In awarding reasonable attorney's fees, the court must consider:
11 the abilities of the advocate; the character of the work done;
12 the work actually done; and the result achieved. *Brunzell v.*
13 *Golden Gate Nat'l. Bank*, 85 Nev. 345, 349 (1959). However, in
14 awarding attorney's fees as a sanction, the sanction is limited
15 to what is sufficient to deter repetition of such conduct. NRCP
16 11(c)(2)

17
18 The Association asserts that Schulz's complaint was brought
19 without reasonable grounds in law, especially in light of the
20 1987 final judgment by Judge Robison and the established case law
21 on issue and claim preclusion. The Association attaches a
22 January 2009 decision from the First Judicial District Court
23 clearly putting Schulz on notice of the res judicata effects of
24 the 1987 final judgment. Association's Motion at Ex. 2. As far
25 as this court can tell, the 2009 First Judicial District Court
26 case was dismissed without the imposition of any attorney's fees
27 or sanctions. The Association requests attorney's fees of
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1 \$13,198.89.

2 Schulz asserts that Rule 11 cannot be a basis for this
3 court's decision, but fails to recognize that NRS 18.010(2)(b)
4 specifically references Rule 11 as part of the rationale for the
5 statutory authority to impose sanctions. Hence, Rule 11 becomes
6 persuasive in understanding when and how NRS 18.010(2)(b) should
7 be applied.

8 Further, Schulz asserts that its appeal shields it from any
9 sanctions under this statute because the court's order might be
10 reversed on appeal, thereby showing that Schulz's complaint had
11 a legal basis. Schulz claims it will be prejudiced if an order
12 on fees and costs is entered now. The court disagrees. Any
13 order on fees and costs can be appealed, subjecting this matter
14 to review. Additionally, this court should not indefinitely
15 defer a decision on fees and costs which are collateral to any
16 current appeal.

17
18 This court finds that an award of fees pursuant to NRS
19 18.010(2)(b) is appropriate. The Association's request for
20 attorney's fees is reasonable. All work was performed by a
21 licensed attorney, was appropriately implemented, and achieved
22 the most favorable result one can achieve for a client. The
23 defendant's attorney's fees are less than that of the plaintiff,
24 demonstrating their reasonableness. Finally, this court finds
25 that the imposition of fees is appropriate to deter Schulz from
26 continued attempts to undermine the 1987 final order. Simple
27 dismissal has proven to be inadequate in deterring such conduct.
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Accordingly, the court awards the Association \$13,198.89 in attorney's fees and \$623.65 in costs.

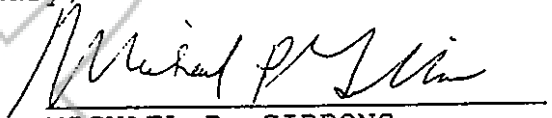
III. Conclusion

Plaintiff Schulz Partners, LLC, is directed to pay Defendant Zephyr Cover Property Owners Association, Inc., \$13,198.89 in attorney's fees and \$623.65 in costs. This amount is reduced to judgment and shall accrue interest from today's date until paid in full.

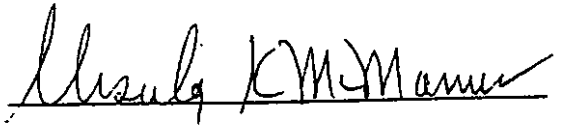
All other matters are DENIED.

IT IS SO ORDERED.

Dated this 11 day of February, 2010.


MICHAEL P. GIBBONS
DISTRICT JUDGE

Copies served this 12th day of February, 2010, to: Harry W. Swainston, Esq., 4040 Hobart Road, Carson City, NV 89703; Todd A. Bader, Esq., 232 Court Street, Reno, NV 89501-2220.



COPY

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The document to which this certificate is attached is a full, true and correct copy of the original in file and of record in my office.

DATE 2/26/10
TED THIRAN Clerk of the 9th Judicial District Court
of the State of Nevada, in and for the County of Douglas,
By Balaban Deputy