

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENA BROTT AND AL JOHNSON,  
Appellants/Cross-Respondents,  
vs.  
JOSEPH N. CATALDO AND APEX  
BULK COMMODITIES, INC.,  
Respondents/Cross-Appellants.

No. 45149

**FILED**

NOV 21 2007

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

This is an appeal and cross-appeal from a district court judgment entered on a jury verdict in a personal injury action and a post-judgment order awarding attorney fees. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

FACTS

Appellants/cross-respondents Dena Brott and Al Johnson filed a personal injury action against respondents/cross-appellants Joseph N. Cataldo and Apex Bulk Commodities, Inc. as a result of a vehicular accident. Early in the case, Cataldo and Apex agreed to pay Brott \$1318 and Johnson \$5405, and the parties stipulated that these advance payments would be deducted from any future damages awarded to Brott and Johnson.

The case proceeded through the mandatory court-annexed arbitration program, after which an arbitrator awarded Brott \$7069 and Johnson \$1547, in addition to the advance payments already made to them, bringing Brott's award to \$8387 and Johnson's award to \$6952. The arbitrator also awarded Brott and Johnson a total of \$1500 in attorney fees and \$321.48 in costs.

Cataldo and Apex then requested a trial de novo. Before trial, Cataldo and Apex extended offers of judgment to Brott and Johnson. The offer to Brott was for \$2818, which included the advance payment of \$1318, together with costs and attorney fees. The offer to Johnson was for \$5905, which included the advance payment of \$5405, together with costs and attorney fees. Brott and Johnson rejected the offers.

Despite a pretrial ruling that excluded evidence of liability insurance, Brott mentioned "insurance" four times during both her direct and cross-examinations at trial. Each time Brott mentioned insurance, Cataldo and Apex objected and the district court sustained the objections. As a result of Brott's testimony, Cataldo and Apex moved for a mistrial. In granting the motion, the district court commented that it did not feel that Brott's testimony about insurance "was intentionally done," but observed that Brott mentioned insurance "more than once."

Following the mistrial, Cataldo and Apex filed a motion for fees and costs as a sanction against Brott under NRS 18.070(2) for purposely causing the mistrial. Following a hearing, the district court granted the motion, imposing \$6000 in attorney fees and \$3161.20 in costs against Brott.

In the subsequent trial, the jury found Cataldo and Apex 100 percent at fault for the accident. The jury awarded \$8720 to Brott and \$6500 to Johnson, and judgment was accordingly entered.

Both sides sought attorney fees and costs. Cataldo and Apex sought attorney fees from Brott under NRS 17.115(4)(d) and NRCP 68(f)(2) on the ground that she had received a judgment less favorable than the rejected offer of judgment. Cataldo and Apex's motion for attorney fees and costs urged the district court to deduct the \$6,000 in

attorney fees and the \$3161.20 in costs that were imposed against Brott for causing a mistrial from the judgment that she ultimately received following the jury verdict. The district court, however, refused to offset the judgment with the sanctions imposed against Brott for causing a mistrial and thus the court found that Brott had received a judgment that was more favorable than the offer of judgment. The district court then awarded Brott \$9000 in attorney fees under Nevada Arbitration Rule (NAR) 20(B)(2). Regarding Johnson, the district court deducted the advance payment from the arbitration award and the judgment and then determined that Cataldo and Apex had reduced the arbitration award by more than 20 percent at trial; therefore, Johnson was not entitled to attorney fees under NAR 20(B)(2). Nevertheless, the district court found that Johnson was entitled to attorney fees as the prevailing party under NRS 18.010(2)(a) and awarded him \$9000.

Regarding costs, the district court concluded that, while Brott and Johnson were entitled to costs under NRS 18.020, the court was “without sufficient information to determine [actual and reasonable] costs.” Despite Brott and Johnson’s efforts to supplement their memorandum of costs with copies of checks, receipts, and bills, for each item listed, the district court found that Brott and Johnson had failed to demonstrate that the requested costs were necessary and incurred in litigating the matter. The district court therefore denied costs to Brott and Johnson. All parties have appealed.

### DISCUSSION

In resolving this appeal and cross-appeal, we address whether the district court properly 1) imposed costs and attorney fees as a sanction against Brott under NRS 18.070(2); 2) refused to offset the attorney fees portion of the sanction against the judgment before comparing the

judgment to the rejected offer for purposes of NRCP 68 and NRS 17.115; 3) refused to deduct from the judgment the cost portion of the sanction before the NRCP 68 and NRS 17.115 comparison; 4) awarded attorney fees to Johnson and, if so, properly determined the amount of fees to award; 5) refused to award costs to Brott and Johnson.

The district court did not abuse its discretion in imposing sanctions against Brott for causing a mistrial

Under NRS 18.070(2), the district court may, in its discretion, impose costs and reasonable attorney fees against a party who, in the court's opinion, "purposely" causes a mistrial. Here, the district court declared a mistrial and imposed sanctions against Brott, under NRS 18.070(2), after Brott violated a pretrial order that excluded evidence of liability insurance.<sup>1</sup> During her testimony, Brott referred to Cataldo and Apex's liability insurance four times, despite the district court's pretrial ruling excluding such evidence, an admonishment from her attorney during trial, and Cataldo and Apex's sustained objections. Although when the district court granted the oral mistrial motion it indicated that Brott's statements appeared unintentional, the district court subsequently determined, in considering the written motion for sanctions and the opposition thereto, that Brott's references to insurance were intentional. The district court then entered a written order imposing sanctions against Brott for purposely causing a mistrial.

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<sup>1</sup>Under NRS 48.135(1), "[e]vidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully."

We conclude that the record supports the district court's written decision. Brott mentioned insurance four times, despite the district court's pretrial ruling, objections from opposing counsel and admonishments from her counsel and the court. Under these circumstances, we conclude that the district court did not abuse its discretion by imposing sanctions against Brott under NRS 18.070(2).

Monetary sanctions cannot be considered in comparing a judgment to an offer under NRCP 68 and NRS 17.115

Cataldo and Apex argue that the sanction imposed against Brott for causing a mistrial should be offset against Brott's damages award in the judgment for purposes of determining whether Brott obtained a more favorable judgment than the rejected offer of judgment. Taking this approach, Brott would have failed to obtain a more favorable judgment than the offer, and therefore she would not have been entitled to recover any attorney fees or costs, and would have been required to pay Cataldo and Apex's post-offer costs and attorney fees.<sup>2</sup> We conclude that this approach is inconsistent with the policy and purpose behind the offer-of-judgment rule and statute.

The imposition of a monetary sanction is not a judgment on the merits of an action. Instead, a decision to impose a monetary sanction involves determining a collateral issue, which in this case was whether Brott purposely caused a mistrial and, if so, whether she should be penalized with the attorney fees and costs associated with that trial. Neither NRCP 68 nor NRS 17.115 refers to or contemplates monetary sanctions as an element to be factored into the comparisons between an

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<sup>2</sup>See NRCP 68(f); NRS 17.115(4).

offer of judgment and the judgment obtained. Accordingly, we construe the “more favorable judgment” language in NRCP 68 and NRS 17.115(4) as referring to judgments rendered on an action’s merits and not to monetary sanctions imposed during the litigation process.<sup>3</sup> This construction comports with the purpose underlying offers of judgment, that is, to promote settlement.<sup>4</sup> In contrast, sanctions generally are imposed for the purpose of deterring certain behavior.<sup>5</sup> Additionally, including sanctions in the NRCP 68 and NRS 17.115 calculation would confuse a party’s decision as to whether to accept an offer of judgment because whether a district court exercises its discretion to impose monetary sanctions for an abuse of the litigation process is not foreseeable and thus cannot form a basis for negotiating or considering an offer of judgment. Thus, we conclude that the district court properly refused to offset the judgment by the sanctions imposed against Brott when considering whether Brott received a more favorable judgment than Cataldo and Apex’s rejected offer.

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<sup>3</sup>See, e.g., Foothill v. Lyon/Copley Corona Associates, 54 Cal. Rptr. 2d 488, 494-95 (Ct. App. 1996) (concluding that discovery sanctions awards are not a factor in determining “net monetary recovery” for purposes of identifying the “prevailing party” entitled to an award of attorney fees).

<sup>4</sup>See, e.g., Bergmann v. Boyce, 109 Nev. 670, 677, 856 P.2d 560, 565 (1993) (noting that the offer of judgment rule “encourages the settlement of lawsuits by raising the stakes for a litigant who receives an offer of judgment”).

<sup>5</sup>E.g., Smith v. P.A.C.E., 753 N.E.2d 353, 361 (Ill. App. Ct. 2001) (observing that sanctions may be imposed to “accomplish the objectives of discovery and promote the unimpeded flow of litigation”).

The district court properly determined that Johnson is entitled to attorney fees

Cataldo and Apex argue that NAR 20(B)(2)(a) precludes an award of attorney fees to Johnson and that the more general statutory provisions for awarding attorney fees to a prevailing party under NRS 18.010 cannot control over the more specific provisions of NAR 20(B)(2)(a). We disagree.

NAR 20(B) includes two provisions for attorney fees and costs when a trial de novo is requested following court-annexed arbitration. First, NAR 20(B)(1) provides that the prevailing party is entitled to fees, costs, and interest that are recoverable under statute or NRCP 68. Second, NAR 20(B)(2) provides that, “[e]xclusive of any award of fees and costs” under NAR 20(B)(1), the party who did not request the trial de novo is entitled “to a separate award of attorney’s fees and costs” if the party requesting the trial de novo failed to obtain a judgment that reduces the amount for which the requesting party is liable under the arbitration award by at least 20 percent. As this court explained in Scott v. Zhou, NAR 20(B)(1) and (B)(2) “are independent of one another.”<sup>6</sup> Therefore, “[a]n attorney fee award may be justified under either section and need not be justified under both.”<sup>7</sup> Therefore, we conclude that pursuant to NAR 20(B)(1), the district court was within its discretion to award attorney fees to Johnson under NRS 18.010.

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<sup>6</sup>120 Nev. 571, 573, 98 P.3d 313, 314 (2004).

<sup>7</sup>Id.

The district court abused its discretion in fixing the amount of the attorney fees awards to Brott and Johnson

Brott and Johnson argue the district court abused its discretion by awarding attorney fees in an amount far less than they requested. In particular, Brott and Johnson argue that the district court failed to consider the time spent by their counsel or the reasonableness of their counsel's hourly rate. Additionally, Brott and Johnson complain that the district court failed to state any findings in support of the reduced award.

When an attorney fees award is authorized, the method of determining a reasonable fee is within the district court's discretion, which "is tempered only by reason and fairness."<sup>8</sup> Thus, in Nevada, the district court is not limited to one specific method of determining a reasonable fee.<sup>9</sup> As we have explained, the district court's "analysis may begin with any method rationally designed to calculate a reasonable amount, including those based on the 'lodestar' amount or a contingency fee."<sup>10</sup> But "the court must continue its analysis by considering the requested amount in light of the factors"<sup>11</sup> set forth in Brunzell v. Golden Gate National Bank.<sup>12</sup> The factors to be considered include the attorney's

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<sup>8</sup>Shuette v. Beazer Homes Holding Corp., 121 Nev. 837, 864, 124 P.3d 530, 548-49 (2005) (quoting University of Nevada v. Tarkanian, 110 Nev. 581, 591, 879 P.2d 1180, 1186 (1994)).

<sup>9</sup>Shuette., at 864 n.99, 124 P.3d at 549 n.99.

<sup>10</sup>Id., (footnote omitted).

<sup>11</sup>Id. at 865, 124 P.3d at 549.

<sup>12</sup>85 Nev. 345, 455 P.2d 31 (1969).



professional qualities, the nature of the litigation, the work actually performed, and the result.<sup>13</sup> And when an attorney fees award under NRS 18.010(2)(a) is justified under NAR 20(B)(1), this court has further indicated that the court should also take into consideration whether the party that requested the trial de novo reduced his liability on the arbitration award.<sup>14</sup> Ultimately, the district court's attorney fees award will not be overturned "absent a manifest abuse of discretion";<sup>15</sup> however, failure to provide sufficient reasoning and findings in support of the award may amount to such an abuse.<sup>16</sup>

Here, Brott and Johnson requested combined attorney fees of \$73,408.50. The district court awarded \$9,000 each to Brott and Johnson, but did not provide any reasoning for awarding less than what was requested and made no findings as to the relevant factors under Brunzell. We therefore conclude that the district court abused its discretion in fixing the amount of the attorney fees awards without providing any reasoning for its decision. Accordingly, we vacate the order awarding attorney fees and remand for the district court to reconsider its calculation of attorney fees. In determining the amount of any award to Brott, the court should

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<sup>13</sup>Id. at 345, 455 P.2d at 33.

<sup>14</sup>Scott, 120 Nev. at 573-74, 98 P.3d at 314-15.

<sup>15</sup>Collins v. Murphy, 113 Nev. 1380, 1383, 951 P.2d 598, 600 (1997).

<sup>16</sup>See Shuette, 121 Nev. at 865, 124 P.3d at 549 ("[W]hichever method the court ultimately uses, the result will prove reasonable as long as the court provides sufficient reasoning and findings in support of its ultimate determination.").

also take into consideration whether any of the requested fees are associated with the mistrial.

Brott and Johnson's appeal regarding costs

Brott and Johnson also argue that the district court abused its discretion by denying their request for costs. In particular, they argue that the memorandum of costs and supporting documentation that they provided to the district court were adequate to support their costs. We agree.

NRS 18.020 provides that costs must be allowed to a prevailing party in an action for the recovery of damages. Brott and Johnson were required under NRS 18.110 to provide the district court with information necessary to show that the costs were actual and reasonable.<sup>17</sup> Brott and Johnson provided to the district court various cost breakdowns and copies of invoices with checks cross-indexed to each cost. Yet, the district court found that Brott and Johnson failed to prove their costs. We conclude that the district court abused its discretion in denying Brott and Johnson's request for costs.<sup>18</sup>


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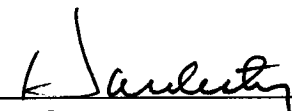
<sup>17</sup>See Gibellini v. Klindt, 110 Nev. 1201, 1206, 885 P.2d 540, 543 (1994).

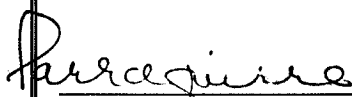
<sup>18</sup>Although both parties raised several other issues on appeal, after review of the record and consideration of the parties' briefs, we find that they lack merit.


Accordingly, we

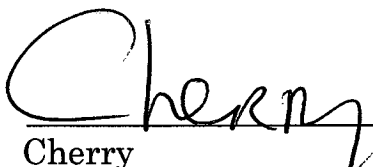
ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.<sup>19</sup>

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguire

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Cherry

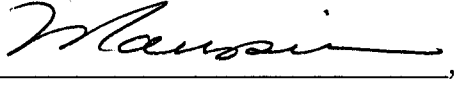
cc: Hon. Michelle Leavitt, District Judge  
Lester H. Berkson, Settlement Judge  
Benjamin B. Childs  
Kenneth L. Hall  
Toschi, Sidran, Collins, and Doyle  
Eighth District Court Clerk

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<sup>19</sup>The Honorable Michael L. Douglas, Justice, voluntarily recused himself from participation in the decision of this matter.

MAUPIN, C.J., concurring:

I agree that the district court did not abuse its discretion in granting a mistrial, in imposing sanctions upon Brott, in excluding the sanction award from the NRCP 68 comparison in the Brott matter, in determining fees under NAR 20(B)(2) in the Brott matter, and in determining fees under NAR 20(B)(1) in the Johnson matter. I would note further, however, that the district court properly applied equitable set offs for advance payments to both Brott and Johnson in the consideration of their claims for fees under NAR 20(B)(2).<sup>1</sup> I also concur in the majority's limited remand to determine the amount of fees and costs.

  
\_\_\_\_\_, C.J.  
Maupin

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<sup>1</sup>After the deductions for the advance payments from the damages found by the jury in the trial de novo proceedings, Cataldo and Apex failed to reduce Brott's arbitration award by over 20 percent. They did, however, manage to reduce Johnson's award by over 20 percent. Thus, the district properly awarded fees to Brott under NAR 20(B)(2) and, as noted by the majority, to Johnson under NAR 20(B)(1).