

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY SCHOOL DISTRICT,  
A POLITICAL SUBDIVISION OF THE  
STATE OF NEVADA,

Appellant,

vs.

RICHARDSON CONSTRUCTION, INC.,  
A NEVADA CORPORATION,

Respondent.

No. 45679

**FILED**

DEC 26 2006

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Carrolls*  
DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

This is an appeal from a post-judgment district court order denying costs and attorney fees in a third-party construction contract action. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Appellant Clark County School District (CCSD) awarded respondent Richardson Construction, Inc., a general contract to complete work on various projects. Richardson subcontracted with Ford Mechanical Inc. to perform heating, air, and ventilation work on the various construction projects. A dispute arose between Richardson and Ford as to payment for Ford's work. Richardson eventually hired another subcontractor to complete the work.

Ford brought suit against Richardson for, among other things, breach of contract. Richardson filed a counterclaim against Ford and a third-party complaint against CCSD alleging, inter alia, that CCSD breached its contract with Richardson. Prior to trial, CCSD made an offer of judgment to Richardson, which Richardson did not accept, and the matter proceeded to trial.

During cross-examination of a former Ford employee, Richardson and CCSD became aware of the fact that Ford may not have been a duly licensed contractor at all times during the performance of its contract with Richardson. To initiate and maintain its lawsuit, Ford must have been a duly licensed contractor at all times during the performance of its contract with Richardson.<sup>1</sup>

Richardson moved for, and the district court granted, a motion for a separate trial on the validity of Ford's contractor license. At the conclusion of the trial on this issue, the district court determined that Ford did not employ a qualified licensed contractor at all times during the performance of its subcontract with Richardson, in contravention of NRS 624.260.<sup>2</sup> Ford's failure to employ a qualified employee for the entire project invalidated its license. Accordingly, the district court found that Ford could not maintain an action against Richardson based on the

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<sup>1</sup>NRS 624.320 states that

No . . . corporation . . . engaged in the business or acting in the capacity of a contractor shall bring or maintain any action [in state court] . . . for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that . . . [the] corporation . . . was a duly licensed contractor at all times during the performance of such act or contract and when the job was bid.

<sup>2</sup>NRS 624.260(3) requires that when a licensee corporation, in this case Ford, is actively engaged as a contractor, it must employ a qualified individual who "exercise[s] authority in connection with . . . [the] employer's contracting business" by making "technical and administrative decisions" and "devot[ing] himself solely to his . . . employer's business."

subcontract and dismissed Ford's initial suit against Richardson with prejudice.<sup>3</sup>

Additionally, the district court dismissed Richardson's third-party action against CCSD with prejudice because the action was moot. However, the district court later amended its order and deleted its dismissal of Richardson's third-party action against CCSD, which effectively reinstated Richardson's third-party claim.

CCSD twice moved to amend the district court's order, seeking to dismiss the third-party action against CCSD. The district court granted CCSD's second motion to amend and dismissed CCSD as a third-party defendant. Within its motion to amend, CCSD also requested that the district court deem CCSD the prevailing party and award it costs under NRS 18.020. The district court found that CCSD was not entitled to costs as a matter of law.

CCSD subsequently filed a motion for attorney fees and costs under NRS 7.085 and NRS 17.115. The district court denied both requests after reviewing the pleadings and papers and considering the Beattie v. Thomas<sup>4</sup> factors, finding that CCSD was not a prevailing party under NRS 17.115. Further, the district court reversed its earlier position and specifically found that Richardson's third-party claims against CCSD were never adjudicated on the merits, but instead became moot upon dismissal of Ford's claims. We assume the parties are familiar with the facts and do not recite them further, except as necessary to this order.

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<sup>3</sup>See NRS 624.320.

<sup>4</sup>99 Nev. 579, 668 P.2d 268 (1983).

CCSD challenges the district court's order denying CCSD's costs and attorney fees, arguing that (1) NRS 17.115(4)(c) is mandatory in that it requires the district court to award the offering party costs where an offer of judgment is rejected by the adverse party and the adverse party fails to obtain a more favorable judgment, and (2) the district court abused its discretion when it declined to award CCSD attorney fees under NRS 17.115(4)(d)(3) because the district court did not meaningfully consider the factors set forth in Beattie.<sup>5</sup> We conclude that the district court erred in disallowing CCSD costs under NRS 17.115(4)(c). We further conclude that the district court did not abuse its discretion in denying CCSD attorney fees under NRS 17.115(4)(d)(3).

The award of costs under NRS 17.115(4)(c) is mandatory

NRS 17.115 states, in pertinent part, that

4. Except as otherwise provided in this section, if a party who rejects an offer of judgment fails to obtain a more favorable judgment, the court:

....

(c) Shall order the party to pay the taxable costs incurred by the party who made the offer; and

(d) May order the party to pay to the party who made the offer any or all of the following:

(1) A reasonable sum to cover any costs incurred by the party who made the offer for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case.

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<sup>5</sup>Id. at 588-89, 668 P.2d at 274.

(2) Any applicable interest on the judgment for the period from the date of service of the offer to the date of entry of the judgment.

CCSD argues that NRS 17.115(4)(c) is mandatory in that it requires the district court to award the offering party costs in factual situations that trigger NRS 17.115. CCSD argues that this requirement is evinced by the use of the word “[s]hall” in NRS 17.115(4)(c) and the use of the word “[m]ay” in NRS 17.115(4)(d). Thus, CCSD argues, the district court erred in denying it costs incurred. We agree.

Statutory interpretation is a question of law which this court reviews de novo.<sup>6</sup> If a statute is clear on its face, this court cannot go beyond the statute in determining legislative intent.<sup>7</sup> This court has previously determined that “[t]he word ‘shall’ is a term of command; it is imperative or mandatory, not permissive or directory.”<sup>8</sup>

NRS 17.115 facially mandates that costs be awarded when a party receives and rejects an offer of judgment and then fails to obtain a

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<sup>6</sup>Birth Mother v. Adoptive Parents, 118 Nev. 972, 974, 59 P.3d 1233, 1235 (2002).

<sup>7</sup>White v. Warden, 96 Nev. 634, 636, 614 P.2d 536, 537 (1980).

<sup>8</sup>Adkins v. Oppio, 105 Nev. 34, 37, 769 P.2d 62, 64 (1989).

more favorable judgment.<sup>9</sup> Thus, we conclude that the district court erred when it denied CCSD its costs under NRS 17.115(4)(c).<sup>10</sup>

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<sup>9</sup>Additionally, NRCP 68(f) plainly states

Penalties for Rejection of Offer. If the offeree rejects an offer and fails to obtain a more favorable judgment,

....

(2) the offeree shall pay the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer. If the offeror's attorney is collecting a contingent fee, the amount of any attorney's fees awarded to the party for whom the offer is made must be deducted from that contingent fee.

<sup>10</sup>Richardson also argues on appeal that CCSD untimely filed its memorandum of costs in contravention of the five-day filing requirement contained in NRS 18.110(1). However, we decline to address this argument because Richardson did not preserve it for appeal. The record reflects that Richardson failed to object to the timing of CCSD's submission of its memorandum of costs. See Diamond Enterprises, Inc. v. Lau, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997) (stating that "[i]t is well established that arguments raised for the first time on appeal need not be considered by this court").

Similarly, on appeal, Richardson challenges the formality of CCSD's verified memorandum of costs. We again decline to address this argument because Richardson did not preserve it for appeal. The record reflects that Richardson failed to object to the submission of CCSD's verified memorandum of costs.

Additionally, the dismissal of Richardson's third-party complaint as moot does not affect the offer of judgment rule as set forth in NRS 17.115 and NRCP 68.

Attorney fees under NRS 17.115(4)(d)(3)

CCSD sought attorney fees under NRS 17.115(4)(d)(3). CCSD maintains that the district court abused its discretion when it declined to award CCSD attorney fees, arguing that (1) the district court did not meaningfully consider the Beattie factors, and (2) the district court improperly denied attorney fees based on the finding that CCSD was not a prevailing party. Richardson argues that the district court properly considered the Beattie factors.

“A district court’s [decision concerning] attorney fees and costs will not be disturbed on appeal unless the district court abused its discretion in making the award.”<sup>11</sup> The “Beattie [factors] appl[y] after a district court finds that an offeree failed to obtain a more favorable jury verdict than the offer tendered and merely guides the district court’s discretion to award attorney fees.”<sup>12</sup> The Beattie factors are

- (1) whether the plaintiff’s claim was brought in good faith;
- (2) whether the defendant’s offer of judgment was reasonable and in good faith in both its timing and amount;
- (3) whether the plaintiff’s decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and
- (4) whether the fees sought by the offeror are reasonable and justified in amount.<sup>13</sup>

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<sup>11</sup>U.S. Design & Const. v. I.B.E.W. Local 357, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002).

<sup>12</sup>Albion v. Horizon Communities, Inc., 122 Nev. \_\_\_\_, \_\_\_\_, 132 P.3d 1022, 1030 (2006).

<sup>13</sup>Wynn v. Smith, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001) (citing Beattie v. Thomas, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983)).

“Although explicit findings with respect to these factors are preferred, the district court’s failure to make explicit findings is not a per se abuse of discretion.”<sup>14</sup> “If the record clearly reflects that the district court properly considered the Beattie factors, we will defer to its discretion.”<sup>15</sup>

In Schwartz v. Estate of Greenspun,<sup>16</sup> this court held that although the district court did not enter express findings regarding the Beattie factors, the district court did not abuse its discretion because the record revealed “that the district court considered and evaluated the Beattie factors.”<sup>17</sup> The court determined that the district court “reviewed written points and authorities addressing each . . . factor[ ] as [it] pertained to the facts of th[e] case and heard the argument of counsel on the subject,” and that the district court’s order “indicated that it had considered and evaluated the four factors.”<sup>18</sup>

In this case, the district court did not make express findings as to the Beattie factors. However, the record clearly reflects that the district court considered the Beattie factors because they were discussed in submitted motions and the court stated that it had considered the factors in its order. Therefore, the district court did not abuse its discretion in declining to award CCSD attorney fees under NRS 17.115.

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<sup>14</sup>Id.

<sup>15</sup>Id. at 13, 16 P.3d at 428-29.

<sup>16</sup>110 Nev. 1042, 881 P.2d 638 (1994).

<sup>17</sup>Id. at 1049, 881 P.2d at 643.

<sup>18</sup>Id. at 1049-50, 881 P.2d at 643.



Additionally, because NRS 17.115 does not have a prevailing party requirement, and the district court reviewed the Beattie factors, the district court's denial of attorney fees was not an abuse of discretion irrespective of the district court's statement that CCSD was not a prevailing party in the initial action. Consequently, we conclude that the district court did not abuse its discretion in denying an award of attorney fees to CCSD under NRS 17.115(4)(d)(3). Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART.<sup>19</sup>

Becker, J.  
Becker

Hardesty, J.  
Hardesty

Parraguirre, J.  
Parraguirre

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<sup>19</sup>CCSD argues that it was the prevailing party against Richardson and thus, the district court erred when it did not award costs under NRS 18.020(3). However, we decline to address this argument because CCSD did not preserve it for appeal. The record reflects that counsel for CCSD orally withdrew this argument during a motion hearing on November 29, 2004. See Diamond Enterprises, 113 Nev. at 1378, 951 P.2d at 74.

CCSD also argues that the district court abused its discretion when it declined to award attorney fees and costs under NRS 7.085 because Richardson unreasonably and vexatiously extended the action. We conclude that this argument lacks merit, particularly because both parties only learned during trial that Ford failed to continuously employ a qualified contractor.

cc: Hon. Jessie Elizabeth Walsh, District Judge  
Lefebvre & Associates, Chtd.  
Parker Nelson & Arin, Chtd.  
Clark County Clerk