

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM WILHITE,  
Appellant/Cross-Respondent,  
vs.  
KOLOB PLUMBING CO.,  
Respondent,  
and  
TIME FOR LIVING, INC.; AND  
ENVIRONMENT FOR LIVING, INC.,  
Respondents/Cross-Appellants.

No. 48637

**FILED**

MAY 05 2009

TRACIE A. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment on a jury verdict in a premise liability tort case and cross-appeal from a district court order denying attorney fees.<sup>1</sup> Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

On appeal, appellant/cross-respondent William Wilhite argues that the amount of additur that the district court awarded him was insufficient. On cross-appeal, respondents/cross-appellants Time for Living, Inc. and Environment for Living, Inc. (collectively "TFL") allege that the district court erred in denying their motion for attorney fees. For the following reasons, we conclude that both Wilhite and TFL's arguments fail and therefore affirm the district court's judgment. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Amount of additur

<sup>1</sup>Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

Although the district court granted his motion for additur for past pain and suffering damages, Wilhite contends that the district court erred because the amount it awarded was insufficient. We conclude that this argument fails.

At trial, there was conflicting evidence as to the cause of Wilhite's injuries. Evidence was presented that Wilhite suffered two subsequent unrelated accidents. Presumably based on this evidence, the jury awarded Wilhite \$68,296.84 in damages for past medical expenses and \$23,109.50 in damages for past lost wages, but nothing for Wilhite's past pain and suffering. Because the jury did not award Wilhite any past pain and suffering damages, the district court granted Wilhite's motion for additur in the amount of \$9,000.00, which was later reduced to \$4,500.00 in proportion to his comparative fault.

By their very nature, damages for pain and suffering are subjective. Canterino v. The Mirage Casino-Hotel, 117 Nev. 19, 24, 16 P.3d 415, 418 (2001). As a result, a district court's determination of the appropriate amount of additur for past pain and suffering damages is afforded great deference, particularly when there is conflicting evidence as to the extent of the damages. See Jacobson v. Manfredi, 100 Nev. 226, 232-33, 679 P.2d 251, 255 (1984) ("We must accord deference to the point of view of the trial judge since he had the opportunity to weigh evidence and evaluate the credibility of witnesses." (quoting Harris v. Zee, 87 Nev. 309, 311, 486 P.2d 490, 491-92 (1971))).

Here, given the evidence of Wilhite's two subsequent accidents, there was substantial conflicting evidence as to the cause of his injuries. Accordingly, we defer to the district court's evaluation of this evidence in determining the appropriate amount of additur in this case

and we decline to disturb the district court's award on appeal. See Lee v. Ball, 121 Nev. 391, 394, 116 P.3d 64, 66 (2005). We conclude that the amount of additur awarded by the district court was not an abuse of its discretion. Donaldson v. Anderson, 109 Nev. 1039, 1041, 862 P.2d 1204, 1206 (1993).

#### Attorney fees

Respondent/cross-appellant TFL argues that it was entitled to an award of attorney fees because Wilhite did not improve on the pre-trial offer of judgment, and that by denying its motion for fees without explaining its reasoning, the district court abused its discretion. We disagree.

Under NRCP 68 and NRS 17.115, if a party rejects an offer of judgment and subsequently fails to obtain a more favorable judgment at trial, the district court may order the offeree to pay reasonable attorney fees incurred by the party who made the offer for the period from the date of service of the offer to the date of entry of the judgment.

Before awarding attorney fees, the district court must carefully evaluate the four factors outlined in 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 [and i]f the record clearly reflects that the district court properly considered the Beattie factors, we will defer to its discretion." Wynn v. Smith, 117 Nev. 6, 13-14, 16 P.3d 424, 428-29 (2001) (concluding that the district court did not abuse its discretion even though it did not explicitly address each Beattie factor because the parties' moving papers and the district court's explanation of its ruling indicated that the court evaluated the attorney fee request under the proper factors).

Here, because Wilhite's award of \$50,203.17 was less than TFL's \$100,000.00 offer of judgment, TFL filed a motion for attorney fees and costs. In their moving papers, both parties vigorously argued their respective positions under the Beattie factors. After conducting an off-the-record hearing in chambers and "having considered the papers and pleadings on file," the district court denied TFL's motion for attorney fees but granted its motion for costs.

Although there is no record of what transpired during the hearing in chambers, because both parties substantially addressed the Beattie factors in their moving papers and the district court considered those papers in making its decision, the district court certainly evaluated the Beattie factors in making its ruling. Accordingly, we conclude that the district court did not abuse its discretion in denying TFL's motion for attorney fees. See Allianz Ins. Co. v. Gagnon, 109 Nev. 990, 993, 860 P.2d 720, 722 (1993).<sup>2</sup>

#### Conclusion

For the reasons set forth above, we conclude that Wilhite's arguments on appeal lack merit.<sup>3</sup> Separately, we conclude that TFL's arguments on cross-appeal fail. Accordingly, we

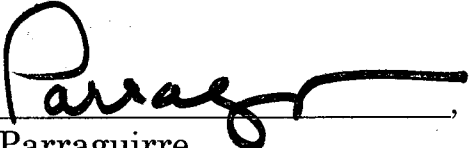
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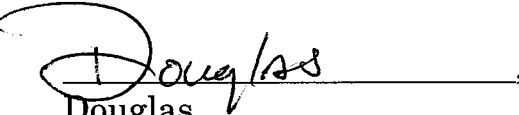
<sup>2</sup>Although we affirm the district court's decision, we are nonetheless troubled that the district court did not conduct a hearing on the record or make any express findings in its order.

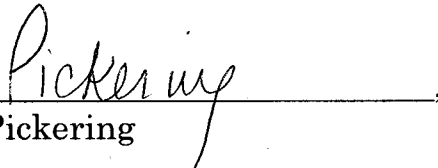
<sup>3</sup>Wilhite additionally alleges that the district court abused its discretion by permitting the defendants' expert to testify beyond the scope of the expert's prior disclosed opinion, refusing to grant a mistrial after his own expert inadvertently mentioned that he had insurance, and excluding photographs of the defendant's subsequent remedial measures. Having carefully reviewed these arguments, we conclude that (1) the defense

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ORDER the judgment of the district court AFFIRMED.

  
Parraguirre, J.

  
Douglas, J.

  
Pickering, J.

cc: Hon. Valerie Adair, District Judge  
Stephen E. Haberfeld, Settlement Judge  
Mainor Eglet Cottle, LLP  
Springel & Fink  
Christian-Kravitz, LLC  
McCormick, Barstow, Sheppard, Wayte & Carruth, LLP  
Eighth District Court Clerk

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expert's testimony was reasonably related to his prior disclosed opinions in his report and deposition, (2) the district court did not abuse its discretion in refusing to grant a mistrial because the reference to Wilhite's insurance was inadvertent and the district court sustained Wilhite's objection, offered to admonish the jury, and removed from deliberations the jurors who allegedly questioned whether Wilhite had insurance, and (3) Wilhite's subsequent remedial measures argument is unfounded because the district court admitted some photographs of the defendant's remedial actions and did not abuse its discretion in excluding others. Accordingly, these arguments are without merit.