IN THE SUPREME COURT OF THE STATE OF NEVADA

AHERN RENTALS, INC.,
Appellant/Cross-Respondent,
vs.
LEGACY CONSTRUCTION, INC., A/K/A LEGACY CONSTRUCTION ENTERPRISES, A NEVADA CORPORATION; AND ANDY J. KAY, INDIVIDUALLY AND D/B/A LEGACY CONSTRUCTION ENTERPRISES,
Respondents/Cross-Appellants.

No. 52846

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal and cross-appeal from a district court judgment in a contracts action. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

This appeal and cross-appeal arise from an action related to the nonpayment of rent for the rental of equipment by appellant/cross-respondent Ahern Rentals, Inc., to respondents/cross-appellants Legacy Construction, Inc., Legacy Construction Enterprises, and Andy J. Kay (collectively, Kay). On August 7, 2003, Ahern filed an action against Kay, which it amended on October 15, 2003, alleging nonpayment for its equipment rentals and breach of contract. On February 1, 2006, Kay filed a counterclaim. After a seven-day bench trial, the district court ruled in favor of Ahern, but entered a 15-percent offset for the two rented scrapers

for periods in which the equipment was inoperable. The district court also awarded attorney fees to Ahern. All parties now appeal.[1]

On appeal, Ahern challenges the award of the 15-percent offset, and on cross-appeal, Kay challenges the award of attorney fees to Ahern based upon an offer of judgment.[2] We conclude that Ahern has failed to demonstrate that the district court erred in granting the offset. We further conclude that Kay is correct in its assertion that the district court erroneously awarded attorney fees to Ahern.

The 15-percent offset

Ahern argues that the district court erred when it overlooked the substantial weight of the evidence presented and found that a 15-percent offset against Ahern's total principal damages was appropriate. Ahern contends that substantial evidence showed that Kay failed to fulfill its contractual obligations to regularly maintain and service the two rented scrapers, thereby creating or contributing to the alleged inoperability of the scrapers. Further, Ahern contends that the offset was arbitrary because Kay failed to establish at trial any resultant harm or prejudice from the alleged inoperability of the scrapers.

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[1]The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

[2]In its brief, Kay also argues that the proper 15-percent offset amount is $53,307.56, and not $41,040, which results in an incorrect net recovery figure for Ahern. However, Kay fails to support its argument and, as such, we conclude that it is without merit. See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

We conclude that Ahern's argument fails as a matter of law. Ahern makes numerous assertions without citations to authorities or the record in violation of NRAP 28(a)(8)(A), which requires that an appellant's brief include an argument that contains "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." In fact, Ahern fails to provide this court with the transcripts of the trial proceedings, rendering this court unable to review the evidence presented to the trial court.

"When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision." Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. 598, 603, 172 P.3d 131, 135 (2007); see also Allianz Ins. Co. v. Gagnon, 109 Nev. 990, 997, 860 P.2d 720, 725 (1993) (court need not consider contentions of appellant where opening brief fails to cite to record on appeal). As such, we conclude that Ahern has failed to demonstrate that the district court erred in awarding the 15-percent offset.

Attorney fees

In its cross-appeal, Kay argues that because Ahern's total recovery was less than the $150,000 offer of judgment, the trial court erroneously awarded attorney fees and interest to Ahern in violation of NRCP 68 and NRS 17.115. We agree because we conclude that the district court abused its discretion in awarding attorney fees without making proper findings.

"The decision whether to award attorney's fees is within the sound discretion of the [district] court." Bergmann v. Boyce, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993) (citing County of Clark v. Blanchard Constr. Co., 98 Nev. 488, 492, 653 P.2d 1217, 1220 (1982)). A district court's

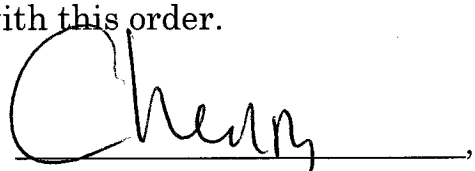
award of attorney fees will not be disturbed on appeal absent a manifest abuse of discretion. McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 673, 137 P.3d 1110, 1129 (2006). However, the award must be authorized by a statute, rule, or contract. Id. Pursuant to NRS 17.115 and NRCP 68, a party who "rejects an offer of judgment more favorable than the verdict obtained" is not entitled to recover their attorney fees. Albios v. Horizon Communities, Inc., 122 Nev. 409, 417, 419, 132 P.3d 1022, 1028 (2006).

We conclude that the district court abused its discretion in awarding attorney fees to Ahern. The district court determined that after crediting Kay for the $41,040 offset plus the $15,000 for the dozer rental, Kay owed Ahern $120,345.44, which is less than the $150,000 offer of judgment. However, we have held that "'pre-offer prejudgment interest must be added to the judgment when comparing it to the offer of judgment, unless the offeror clearly intended to exclude prejudgment interest from its offer.'" Albios, 122 Nev. at 426, 132 P.3d at 1033 (quoting State Drywall v. Rhodes Design & Dev., 122 Nev. 111, 118, 127 P.3d 1082, 1087 (2006)); see also McCrary v. Bianco, 122 Nev. 102, 109-10, 131 P.3d 573, 577-78 (2006). Here, Kay's $150,000 offer of judgment did not clearly exclude prejudgment interest, so interest should be properly included in the analysis. However, while the district court made findings that Kay also owed Ahern $187,766.61 as interest on the unpaid principal balances from October 14, 2002, through June 1, 2008, the record does not contain a calculation of the interest from the time the interest began to accrue until the November 13, 2006, offer of judgment—the pre-offer prejudgment interest. Without these findings, we cannot conclude that Ahern's judgment was greater than Kay's offer of judgment.

Accordingly, we reverse the grant of attorney fees and remand this issue to the district court to make specific findings on the record of the pre-offer prejudgment interest. We further instruct the district court to reconsider whether attorney fees are warranted pursuant to NRCP 68 and NRS 17.115 once this finding is made.

Based on the foregoing discussion, we

ORDER the judgment of the district court AFFIRMED IN PART, REVERSED IN PART, and REMAND this matter to the district court for proceedings consistent with this order.



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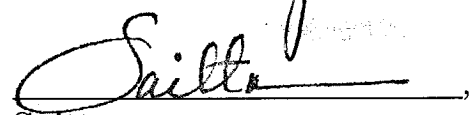

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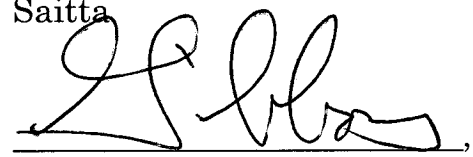

_____, J.
Gibbons

cc: Hon. Mark R. Denton, District Judge
Stephen E. Haberfeld, Settlement Judge
Dixon Truman & Fisher
Callister & Reynolds
Eighth District Court Clerk