

IN THE SUPREME COURT OF THE STATE OF NEVADA

COSTCO WHOLESALE
CORPORATION, A WASHINGTON
CORPORATION,
Appellant,
vs.
ADRIANA SCRIMA,
Respondent.

No. 52995

FILED

OCT 25 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a post-judgment order denying appellant's motion for attorney fees and costs based on an offer of judgment. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Respondent Adriana Scrima slipped and fell at a warehouse owned by appellant Costco Wholesale Corporation. After this incident, Scrima filed a lawsuit against Costco to recover damages for the injuries that she suffered from the accident. Three years after Scrima filed this action, Costco served Scrima with an offer of judgment for \$1,000. Scrima did not accept the offer and the case proceeded to trial. During trial, a juror collapsed and Scrima's medical expert administered aid to the juror in front of the rest of the jury. As a result, the district court declared a mistrial and held a new trial several months later.

After the second trial, the jury returned a verdict in favor of Costco. Costco then moved for attorney fees and costs pursuant to NRS 17.115 and NRCP 68. The district court denied Costco's motion. With regard to NRS 17.115, the district court concluded that the sum of Scrima's pre-offer taxable costs and the jury verdict was more favorable than the offer of judgment. As to NRCP 68, the district court concluded

that an award of attorney fees and costs was inappropriate under Beattie v. Thomas, 99 Nev. 579, 668 P.2d 268 (1983).

Costco now appeals, arguing that (1) the district court erred by denying attorney fees and costs under NRS 17.115, and (2) the district court abused its discretion by denying attorney fees and costs under NRCP 68 based on the Beattie factors. For the reasons set forth below, we conclude that Costco's arguments lack merit and we affirm the district court's order. Because the parties are familiar with the facts and procedural history in this case, we do not recount them further except as necessary for our disposition.

The district court did not err by denying attorney fees and costs under NRS 17.115

Costco argues that the district court erred by denying its request for attorney fees and costs under NRS 17.115. According to Costco, the district court misinterpreted NRS 17.115 because it considered Scrima's pre-offer taxable costs when determining whether she failed to obtain a more favorable jury verdict than the offer of judgment. We disagree.

District courts generally have sound discretion to award attorney fees and costs. In re Estate of Miller, 125 Nev. ___, ___, 216 P.3d 239, 241 (2009). However, this court applies a de novo standard of review if a party's eligibility for attorney fees and costs is a matter of statutory interpretation, id., as is the case here. NRS 17.115 is Nevada's offer-of-judgment statute. Under NRS 17.115, a defendant may recover attorney fees and costs if the plaintiff rejects an offer of judgment and fails to obtain a more favorable jury verdict.

NRS 17.115(5)(b) applies in this case because Costco's offer of judgment precluded a separate award of costs. When a party rejects an offer of judgment that precluded a separate award of costs, "the court must

compare the amount of the offer with the sum of: (1) [t]he principal amount of the judgment; and (2) [t]he amount of taxable costs that the claimant who obtained the judgment incurred before the date of service of the offer.” NRS 17.115(5)(b). If the offer is greater than the sum of the verdict and pre-offer taxable costs, the district court may order the offeree to pay the offeror’s attorney fees and costs under NRS 17.115(4).

Costco argues that the district court erred by considering Scrima’s pre-offer taxable costs because NRS 17.115(5) only permits courts to consider these costs when the offeree obtained a favorable jury verdict. We conclude that this argument lacks merit. The Nevada Legislature’s 2005 amendment to NRS 17.115(5) allows courts to consider pre-offer taxable costs when determining whether the offeror should receive attorney fees and costs. 2005 Nev. Stat., ch. 58, § 1, at 117-18.

In 2005, the Legislature amended NRS 17.115(5) because the statute’s former language incorrectly stated that, when an offer of judgment precludes a separate award of costs, courts should compare the sum of the offer and the offeree’s pre-taxable costs to the principal amount of the judgment. Hearing on A.B. 166 Before the Assembly Judiciary Comm., 73d Leg. (Nev., March 16, 2005). The Legislature amended NRS 17.115(5) to set out the correct formula in this situation: courts add “any judgment rendered [with] the cost incurred by the plaintiff up to the time of offer of judgment, and compare that sum to the offer of judgment.”¹

¹The formula in amended NRS 17.115(5) encourages the settlement of cases, whereas Costco’s interpretation of the statute does not. Costco’s interpretation may encourage defendants to submit small, token offers of judgment so they can obtain attorney fees and costs every time the jury gives a verdict in their favor.

Hearing on A.B. 166 Before the Assembly Judiciary Comm., 73d Leg. (Nev., March 16, 2005).

In this case, the district court applied the correct formula set forth in the amended version of NRS 17.115(5) when determining that Costco was not entitled to attorney fees and costs. Pursuant to this formula, the sum of Scrima's pre-offer taxable costs (\$8,659.84) and the principal amount of the jury verdict (\$0) is more favorable than Costco's offer of judgment (\$1,000). In reaching this determination, we note that Nevada's offer-of-judgment provisions may apply when the jury gives a verdict for the defendant. See Beattie, 99 Nev. at 588, 668 P.2d at 274 (explaining that NRCP 68 applies when the jury gives a verdict for the defendant). Thus, we conclude that the district court did not err by denying Costco's request for attorney fees and costs under NRS 17.115.

The district court did not abuse its discretion by denying attorney fees and costs under NRCP 68 based on the Beattie factors

Costco also argues that the district court abused its discretion because it should have awarded attorney fees and costs under NRCP 68 based upon the Beattie factors. We disagree.

NRCP 68 is Nevada's offer-of-judgment rule. In Beattie, this court set out factors for courts to consider when determining whether to award attorney fees and costs under NRCP 68. Id. at 588-89, 668 P.2d at 274. The factors in Beattie include:

- (1) whether the plaintiff's claim was brought in good faith;
- (2) whether the defendants' 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.

Id. When a district court properly weighs the Beattie factors, its decision regarding whether to award or deny attorney fees and costs under NRCP

68 is discretionary. LaForge v. State, University System, 116 Nev. 415, 423, 997 P.2d 130, 136 (2000). This court will not overturn the district court's decision absent an abuse of discretion. Id.

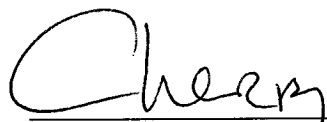
In this case, the district court weighed the Beattie factors and determined that NRCP 68 did not permit the award of attorney fees and costs to Costco. The district court did not abuse its discretion when making this finding. As to the first Beattie factor, Costco argues that Scrima did not file the lawsuit in good faith because she continued to pursue the litigation even after the district court declared a mistrial. Costco notes that it informally polled jurors in the hallway after the district court declared a mistrial and the jurors indicated that they planned to give a verdict against Scrima.

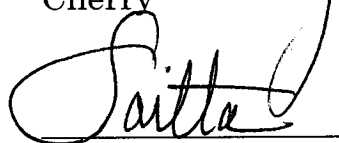
This informal poll is not persuasive evidence showing that Scrima filed the action in bad faith. The record shows that Scrima filed this action after she fell at the Costco warehouse and suffered injuries. In her complaint, Scrima alleged that Costco caused the slip-and-fall accident by improperly inspecting and cleaning the floor. Although Costco argues that Scrima's lawsuit lacked evidentiary support, this court cannot confirm this argument because the parties did not include a trial transcript in the record.

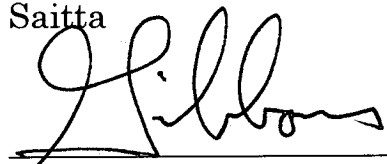
As to the second Beattie factor, Costco's offer of judgment was not reasonable in both its timing and amount. The \$1,000 offer could not compensate Scrima for the costs associated with the case, nor would it cover her slip-and-fall injuries. By the time Costco made the offer, Scrima had incurred approximately \$8,659.84 in pre-offer taxable costs. Scrima also contends that she had suffered an injury to her knee that required two surgeries and resulted in medical bills of approximately \$68,000. This supports the conclusion that the \$1,000 offer was not reasonable or made in good faith.

As to the third and fourth Beattie factors, Scrima's failure to accept the offer of judgment and her decision to advance to trial was not grossly unreasonable or in bad faith. As set forth above, this offer would not fully compensate Scrima for her costs or injuries. Despite this fact, Costco seeks \$32,013 in attorney fees and \$30,461.50 in costs. We decline to consider whether the attorney fees and costs are excessive because the other Beattie factors already support the conclusion that the district court did not abuse its discretion by denying Costco's request for attorney fees and costs. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Elissa F. Cadish, District Judge
William F. Buchanan, Settlement Judge
Nelson Law
Hofland Beasley & Galliher
Eighth District Court Clerk