IN THE SUPREME COURT OF THE STATE OF NEVADA

EAGLE MATERIALS, INC., A DELAWARE CORPORATION; AND NEVADA CEMENT COMPANY, A NEVADA CORPORATION, Appellants, vs. NICHOLAS F. STIREN, AN INDIVIDUAL, Respondent.	No. 53438
EAGLE MATERIALS, INC., A DELAWARE CORPORATION AND NEVADA CEMENT COMPANY, A NEVADA CORPORATION, Appellants, vs. NICHOLAS F. STIREN, Respondent.	No. 53808

ORDER OF AFFIRMANCE

These are consolidated appeals from a district court judgment in a contract action and a post-judgment order awarding attorney fees. Third Judicial District Court, Lyon County; David A. Huff, Judge.

Respondent Nicholas F. Stiren was the president of appellant Nevada Cement Company, which is a subsidiary of appellant Eagle Materials, Inc. (collectively, Eagle Materials). As president of Nevada Cement, Stiren participated in a bonus plan called the Long Term Compensation Pool (LTCP) that was offered and managed by Eagle Materials. The LTCP was an incentive-based bonus plan that was designed to promote employee retention. Once a bonus was awarded under the LTCP, the participant received an initial payment of 20% of the

total bonus and was paid the remaining 80% in 20% increments each year on the anniversary date of the bonus until it was paid in full.

For the fiscal years 2004 through 2006, Stiren was awarded a bonus under the LTCP, but upon his retirement in 2006, Eagle Materials refused to accelerate and pay out the remaining balance of his bonuses under the plan. Stiren initiated a breach of contract action against Eagle Materials for the unpaid LTCP bonuses. Following a bench trial, the district court found that the LTCP constituted a unilateral contract and that Stiren was entitled to the remaining balance of his bonuses. In a post-judgment order, the district court awarded Stiren attorney fees under NRS 17.115 and NRCP 68, finding that Stiren's final judgment was more favorable than his offer of judgment. Eagle Materials now appeals the district court's judgment and its post-judgment order awarding attorney fees.

On appeal, Eagle Materials argues that: (1) the district court erred in finding that a unilateral contract existed between Eagle Materials and Stiren, (2) the district court erred in finding that Stiren was entitled to accelerated payment of the balance of his bonuses under the LTCP, and (3) the district court abused its discretion in awarding attorney fees to Stiren. We conclude that Eagle Materials' contentions are without merit and we therefore affirm the orders of the district court. As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

DISCUSSION

The district court did not err in finding that a unilateral contract existed between Eagle Materials and Stiren

Eagle Materials argues that the district court erred in finding that a unilateral contract existed between it and Stiren. Specifically, it

asserts that the district court erred in determining (1) that the LTCP constituted an offer, and (2) that Stiren accepted the offer by continuing his employment.

Standard of review

"Contract interpretation is subject to a de novo standard of review," but "the question of whether a contract exists is one of fact, requiring this court to defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence." May v. Anderson, 121 Nev. 668, 672-73, 119 P.3d 1254, 1257 (2005).

The LTCP constituted an offer

Eagle Materials contends that the district court erred in finding that the LTCP constituted an offer. In particular, it argues that the district court improperly relied on Jensen v. International Business Machines, 454 F.3d 382 (4th Cir. 2006), as the legal standard for whether the LTCP was an offer. Eagle materials also asserts that the terms of the LTCP were insufficient to create an offer.

In the area of contracts, there is a general distinction between bilateral and unilateral contracts. 17A Am. Jur. 2d. Contracts §§ 7, 8 (2004). An offer for a unilateral contract invites acceptance by the performance of an act, whereas an offer for a bilateral contract invites acceptance by a return promise. Id. § 8. In general, an offer is defined as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Restatement (Second) of Contracts § 24 (1981). Bonus plans are consistently characterized by courts, depending on their terms, as constituting unilateral offers that invite acceptance by the performance of an act, which create binding contracts upon completion of the required performance. Jensen, 454 F.3d at 387; Neisendorf v. Levi

Strauss & Co., 49 Cal. Rptr. 3d 216, 226 (Ct. App. 2006); DiGiacinto v. Ameriko-Omserv Corp., 69 Cal. Rptr. 2d 300, 303 (Ct. App. 1997); Compton v. Shopko Stores, Inc., 287 N.W.2d 720, 725 (Wis. 1980).

Eagle Materials misconstrues the district court's order in asserting that it improperly relied on Jensen as the legal standard for determining whether the LTCP constituted an offer to contract. In the proceedings below, Eagle Materials argued that the terms of the LTCP did not create an offer and relied on Jensen in support of its position. Given Eagle Materials' reliance on Jensen, the district court summarized its facts and holding and distinguished the specific terms of the incentive plan in Jensen from the specific terms of the LTCP. The district court did not exclusively rely on the facts or legal standards set forth in Jensen. Rather, it cited general contract principles, provided a definition of an offer, and analyzed the LTCP's specific terms.

The LTCP provided that at the end of each fiscal year "each participant's performance criteria w[ould] be evaluated by Eagle Materials EVP's and awards recommended to Eagle Materials CEO's approval." The LTCP stated that "[o]nce a LTCP award has been determined 20% shall be paid to the participant with cumulative 20% increments on each of the first through fourth anniversaries of the award date . . . provided the participant must be in continuous employment from the award date through the date of the applicable anniversary." (Emphasis added.)

The terms of the LTCP clearly indicated that the plan was to be construed as an offer that could be accepted to form a contract. Although the LTCP provided Eagle Materials with the initial discretion to award a bonus, it stated that, once awarded, "20% shall be paid" each year provided the participant was still employed by the company. (Emphasis

added.) The LTCP did not state that the plan was not an offer or that there were no conditions that Stiren could satisfy to create a binding contract. Although the plan did provide that the "CEO retains the final right of interpretation and administration of the plan and to amend or terminate the plan at any time," this statement did nothing more than restate Eagle Materials' right to administer, amend, or terminate the LTCP before acceptance and was insufficient to preclude the LTCP from constituting an offer. See Jensen, 454 F.3d at 387 ("[M]erely including in the offer the general statement that the employer retains the power to alter or end a benefit does not preclude the formation of a contract."). Critically, the LTCP provided that even if the plan were to be terminated, a previously earned bonus would nonetheless be fully accelerated and paid out, which was clearly a "manifestation of [Eagle Materials'] willingness to enter into a bargain." Restatement (Second) of Contracts § 24 (1981). Thus, we conclude that the bonuses awarded by Eagle Materials, combined with the terms of the LTCP, demonstrated its willingness to enter into a bargain, and therefore, the district court properly determined that the LTCP constituted an offer to contract.

Stiren accepted Eagle Materials' offer by continuing employment

Eagle Materials argues that the district court erred in finding that Stiren accepted the offer by continuing his employment with Nevada Cement. Specifically, it asserts that Stiren could only accept its offer by (1) continuing employment with Nevada Cement, and (2) retiring with CEO approval.

"Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." Restatement (Second) of Contracts § 50 (1981). "Where an offer invites an offeree to accept by rendering a performance . . . [a] contract is

created when the offeree tenders or begins the invited performance." Id. § 45.

The LTCP was designed to "recognize 'best in business' performances in the company" and "performances that improve the long term profitability of the company." Once a bonus was awarded under the plan, it was to be paid out in 20% increments over the course of four years, to encourage participants to continue their employment with the company. Thus, the LTCP invited Stiren to earn a bonus, based on his performance as president and, once determined, to accept the offer by remaining employed with Nevada Cement. In 2004, 2005, and 2006, Stiren was awarded a bonus under the LTCP, and he continued his employment with the company throughout each of those years. Therefore, Stiren demonstrated a "manifestation of assent to the terms" made by Eagle Materials in a manner invited by the offer. Restatement (Second) of Contracts § 50 (1981). Once Stiren accepted the LTCP offer, namely, by earning a bonus and continuing employment with the company, "[a] contract [wa]s created" because he "beg[an] the invited performance," and the terms of the contract became clear and definite. Id. § 45. Stiren would be entitled to the remaining 80% of the bonus awarded for each particular fiscal year, provided that one of the contract's remaining conditions precedent was fulfilled, specifically, (1) Stiren continued employment with Nevada Cement for four additional years, (2) termination of the LTCP, or (3) Stiren's retirement under the 2004 and 2005 LTCP or CEO approved retirement under the 2006 LTCP.

In sum, we conclude that the LTCP constituted an offer for the 2004 through 2006 fiscal years, consisting of the terms as provided in the plan for those years. Stiren accepted the LTCP offer each year by earning

a bonus and continuing employment with Nevada Cement. Because the LTCP was an offer to contract and Stiren accepted that offer by rendering partial performance, a binding contract was formed between Eagle Materials and Stiren. We therefore determine that there is substantial evidence to support the district court's determination that a unilateral contract existed between Eagle Materials and Stiren for the 2004 through 2006 fiscal years.

The district court did not err in finding that Stiren was entitled to accelerated payment of the balance of his bonuses under the LTCP

Eagle Materials contends that the district court erred in finding that Stiren was entitled to accelerated payment of the balance of his bonuses under the LTCP. In particular, it asserts that the district court erred in interpreting the 2006 LTCP's phrase "CEO approved retirement" and in determining that Stiren had met that condition, thereby entitling him to acceleration of his bonuses.

Standard of review

"Contract interpretation is [a question of law] subject to a de novo standard of review." May v. Anderson, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). We defer to the district court's findings of fact, however, "unless they are clearly erroneous or not based on substantial evidence." Id. at 672-73, 119 P.3d at 1257.

The 2004 and 2005 LTCP provision

In general, when a contract is clear on its face, it "will be construed from the written language and enforced as written." Ellison v. C.S.A.A., 106 Nev. 601, 603, 797 P.2d 975, 977 (1990). "A contract is ambiguous [however,] when it is subject to more than one reasonable interpretation." Anvui, LLC v. G.L. Dragon, LLC, 123 Nev. 212, 215, 163 P.3d 405, 407 (2007). We give contractual terms their plain and ordinary

meaning. Traffic Control Servs. v. United Rentals, 120 Nev. 168, 174, 87 P.3d 1054, 1058 (2004).

For the 2004 and 2005 fiscal years, the plan provided that "[t]he payment of a participant's award shall be accelerated and fully paid . . . in the event of . . . retirement of the participant." (Emphasis added.) We conclude that this provision is subject to one interpretation and therefore unambiguous. It simply provides that in the event a participant retires, the balance of his or her LTCP bonuses will be accelerated and fully paid out. The record also demonstrates that Stiren retired from Eagle Materials. In particular, Stiren informed the executive vice president of Eagle Materials, Gerald Essl, and the CEO, Steven Rowley, of his intent to retire; Joseph Sells was selected to replace Stiren upon his retirement from Nevada Cement; Stiren's retirement was announced, by memorandum, to Eagle Materials and its subsidiaries; and a retirement party and gift were given in recognition of his retirement from the company. Thus, the 2004 and 2005 LTCP provision is unambiguous and there is substantial evidence supporting the district court's finding that Stiren retired from Eagle Materials. Accordingly, the district court properly determined that Stiren had fulfilled the conditions of the 2004 and 2005 LTCP and was therefore entitled to acceleration of the bonuses awarded to him under the plan for those years.

The 2006 LTCP provision

Eagle Materials argues that the district court erred in interpreting the 2006 LTCP's phrase "CEO approved retirement." It contends that the district court's interpretation was unreasonable and usurped the CEO's final right to interpret and administer the LTCP.

The 2006 LTCP provided that the balance of a participant's bonuses would be accelerated "in the event of . . . CEO approved

retirement." The plan also stated, however, that the CEO had the final right to interpret and administer the LTCP.

The district court properly determined that the phrase "CEO approved retirement" is unambiguous. The word "approve" or "approved" means "to find to be acceptable" or "to confirm or sanction formally." Random House Webster's College Dictionary 66 (2d ed. 1997). Thus, the plain and ordinary meaning of the phrase "CEO approved retirement" contemplates a retirement that is acceptable or confirmed or formally sanctioned by the CEO. Accordingly, the phrase is susceptible to one interpretation and therefore unambiguous.

Eagle Materials suggests that the district court's interpretation of the phrase "CEO approved retirement" was not in accord with the LTCP's designation of the CEO's final right to interpret the plan. Rowley testified that the term "CEO approved retirement" meant that a participant had to retire in good standing with him in order to be entitled to acceleration. But his interpretation reads language into the contract that is not present and contravenes our long established jurisprudence of enforcing a contract as written. Ellison, 106 Nev. at 603, 797 P.2d at 977 ("[C]ontracts will be construed from the written language and enforced as written."). Moreover, because Rowley's testimony was inconsistent with respect to Stiren's retirement—that Stiren had resigned instead of retired—the district court properly "considered the testimony of Mr. Rowley not to be credible," and gave Rowley's testimony regarding his interpretation of the LTCP provision the appropriate weight. Quintero v. McDonald, 116 Nev. 1181, 1184, 14 P.3d 522, 524 (2000) ("The credibility of witnesses and the weight to be given their testimony is within the sole province of the trier of fact.").

Because the provision "CEO approved retirement" is unambiguous and the phrase contemplates a retirement that is acceptable or confirmed or formally sanctioned by the CEO, there is substantial evidence to support the district court's determination that Stiren retired with Rowley's approval. Two years prior to his actual retirement, Stiren informed Essl and Rowley that he intended to retire and the three discussed a potential replacement, deciding that Sells would replace Stiren upon his retirement. Stiren's retirement was formally announced, by memorandum, to all of Eagle Materials and its subsidiaries. Although Rowley testified that he did not approve of Stiren's retirement because of the events that occurred between February and March of 2006, subsequent to those incidents, Stiren received a satisfactory performance evaluation and Rowley awarded him a LTCP bonus for 2006. Finally, Nevada Cement organized and paid for a retirement party for Stiren and gave him a gold watch as a retirement gift, in recognition of his service to the company. Thus, there was substantial evidence supporting the district court's finding that Stiren retired with Rowley's approval. Accordingly, the district court properly determined that Stiren had fulfilled the conditions of the 2006 LTCP and was therefore entitled to acceleration of the bonuses awarded to him under the plan for that year.

The district court did not abuse its discretion in awarding attorney fees to Stiren

Eagle Materials argues that the district court abused its discretion in awarding attorney fees to Stiren under NRS 17.115 and NRCP 68. It contends that the district court erred in considering two of the four factors outlined in Beattie v. Thomas, 99 Nev. 579, 668 P.2d 268 (1983)—(1) whether Eagle Materials' defenses were asserted in good faith,

and (2) whether Stiren's offer of judgment was reasonable and justified in amount.

Standard of review

"It is within the discretion of the trial court judge to allow attorney[ ] fees pursuant to" NRS 17.115 and NRCP 68, and "[u]nless the trial court's exercise of discretion is arbitrary or capricious, this court will not disturb the lower court's ruling on appeal." Schouweiler v. Yancey Co., 101 Nev. 827, 833, 712 P.2d 786, 790 (1985).

The district court properly considered the Beattie factors

NRS 17.115(4) and NRCP 68(f) provide that a district court may order a party who rejects a pretrial offer of judgment and fails to obtain a more favorable judgment at trial, 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. We have set forth the following four factors a district court must weigh in exercising its discretion to award attorney fees under NRS 17.115 and NRCP 68:

> (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.

Beattie, 99 Nev. at 588-89, 668 P.2d at 274. While the Beattie factors assume the defendant is the offeror and the plaintiff is the offeree, when the roles are reversed and the plaintiff is the offeror and the defendant is the offeree, the first Beattie factor is considered in light of "whether [the defendant's] defenses were litigated in good faith." Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998).

The district court's order demonstrates that it considered all of the Beattie factors and made findings with respect to each one. After finding that Eagle Materials had rejected Stiren's pretrial offer of judgment and failed to obtain a more favorable judgment at trial, which Eagle Materials does not dispute, the district court found that one of Eagle Materials' defenses was not brought in good faith. In particular, Rowley's testimony that he did not accelerate the balance of Stiren's LTCP bonuses because he believed Stiren had resigned from the company, instead of retiring. Eagle Materials asserts that this finding is inconsistent and irreconcilable with the district court's judgment, where it denied Stiren's claim for breach of the implied covenant of good faith and fair dealing.

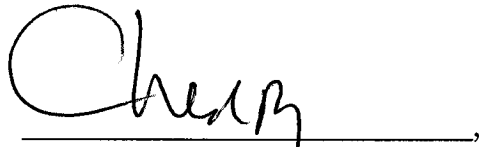
The district court's findings are reconcilable. Although the district court determined that Stiren had failed to demonstrate that Eagle Materials acted in bad faith or engaged in misconduct, that determination concerned Stiren's claim and his burden to produce evidence showing bad faith or misconduct. On the other hand, Beattie requires the district court to assess whether Eagle Materials' defense was brought in good faith. Thus, one finding assesses the weight of the evidence and the plaintiff's burden of persuasion, while the other measures whether the defendant's defenses were litigated in good faith.

Moreover, the district court did not find that all of Eagle Materials' defenses were litigated in bad faith. It acknowledged that Eagle Materials had raised meritorious defenses with respect to the LTCP and the conditions contained therein, but found the resignation defense not to have been asserted in good faith, which was certainly supported by the record. At no point during the entire trial was it ever suggested that Stiren resigned rather than retired, and the record certainly demonstrated

otherwise—Stiren informed Essl and Rowley of his intent to retire, Sells was selected to replace Stiren upon his retirement, Stiren's retirement was formally announced by memorandum to all of Eagle Materials, and the company paid for a retirement party and gift for Stiren.

As to the second Beattie factor, the district court found that Stiren's offer of judgment was reasonable and in good faith in both its timing and amount. Stiren made the offer of judgment on May 17, 2007, approximately five months before trial. The offer was for $155,000, which was approximately the same amount as the balance of Stiren's LTCP awards ($150,848). Although Stiren's offer was for the entire amount he believed he was entitled to under the LTCP, in light of potential attorney fees and interest, the district court properly determined that the amount of the offer was reasonable and made in good faith. Because Stiren was entitled to attorney fees under NRS 17.115 and NRCP 68, and three of the four Beattie factors weighed in Stiren's favor, we conclude that the district court did not abuse its discretion in awarding Stiren attorney fees. Accordingly, for the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.



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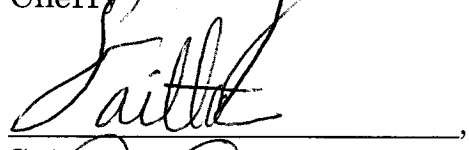

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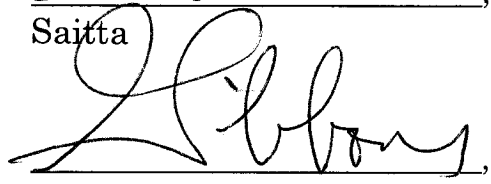

_____, J.
Gibbons

cc: Hon. David A. Huff, District Judge
Laurie A. Yott, Settlement Judge
Littler Mendelson/Reno
Maupin, Cox & LeGoy
Lyon County Clerk