

IN THE SUPREME COURT OF THE STATE OF NEVADA

MOSHE ELAZAR,
Appellant,
vs.
JOHN BERRY,
Respondent.

No. 58724

FILED

DEC 18 2013

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malm
DEPUTY CLERK

This is an appeal from a district court judgment on a jury verdict and an order awarding attorney fees and costs.

This appeal arises from a negligence action based on an automobile accident. In the district court proceedings, appellant Moshe Elazar admitted liability for the accident without alleging any affirmative defenses against respondent John Berry. Accordingly, the district court judge granted partial summary judgment on liability and causation, leaving only the issue of Berry's damages.

Prior to trial, Berry presented Elazar with an offer of judgment for \$750,000. Elazar rejected the offer, and the matter proceeded to trial. After a seven-day jury trial as to the issue of damages, Berry was awarded \$2,303,103.47, which included past and future damages. The district court entered a judgment in the amount of \$2,819,550.76, awarding pre-judgment interest on both past and future damages, plus 5.25 percent per annum post-judgment interest. Elazar then filed a motion to alter or amend the judgment, arguing that the court: (1) erroneously awarded post-judgment interest on pre-judgment interest

and pre-judgment interest on future damages; and, (2) erroneously concluded that the post-judgment interest was subject to change every six months.

After the district court's judgment, Berry also filed a motion to alter or amend the judgment, arguing for an award of costs and attorney fees. Specifically, Berry asked for a fee award of \$1,274,528.10, equaling 45 percent of the entire judgment per his contingency agreement with his attorney. Thereafter, the district court heard arguments regarding the parties' motions.

During this hearing, the district court granted Berry's motion for attorney fees and clarified that the legal rate of interest is applicable, but subject to change biannually. It affirmed its award of pre-judgment interest on both past and future damages and awarded Berry's attorney fees totaling \$1,127,820.30, which equaled 40 percent of the principal and pre-judgment interest.

We now consider whether the district court erred in awarding Berry \$1,127,820.30 in attorney fees under NRS 17.115 and NRCP 68.¹ We conclude that the district court did not err and affirm its decision.

This court reviews the amount of attorney fees awarded by the district court for an abuse of discretion. *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 350, 455 P.2d 31, 33 (1969). "Claims for attorney fees under NRS 17.115 and NRCP 68 are fact intensive," and "[i]f the record clearly reflects that the district court properly considered the *Beattie*

¹In oral argument, Elazar acknowledged that he waived his challenge related to the award of pre-judgment interest on future damages.

factors, we will defer to its discretion.” *Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428-29 (2001); *see also Beattie v. Thompson*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).

In *Schuette v. Beazer Homes Holdings Corp.*, we stated that a district court can base its award of attorney fees on a lodestar amount or a contingency fee so long as it considers the *Brunzell* factors and provides sufficient reasoning and findings to support its determination. 121 Nev. 837, 864-65, 124 P.3d 530, 548-49 (2005). Additionally, an award of reasonable attorney fees on a contingent basis is not precluded in the offer of judgment context. NRS 17.115(4) (d) (3). In determining whether to award attorney fees in this context, the district court must evaluate:

- (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.

We emphasize at the outset that the district court is only required to consider and weigh these factors in making its determination of whether to award fees. *Id.* at 589, 668 P.2d at 274. However, Elazar argues that the district court did not satisfy this requirement in deciding to award attorney fees. The record clearly shows that the district court evaluated the first three factors and found that they weighed in Berry's favor. Elazar contends that the offeree's ability to pay should be dispositive of a rejection's reasonableness under factor three. We disagree,

but acknowledge that the district court may consider this in assessing the weight of factor three.² Thus, only factor four remains to be evaluated.

In determining whether the fees sought by the offeror are reasonable and justified in amount, the district court must consider:

(1) *the qualities of the advocate*: his ability, his training, education, experience, professional standing and skill; (2) *the character of the work to be done*: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) *the work actually performed by the lawyer*: the skill, time and attention given to the work; (4) *the result*: whether the attorney was successful and what benefits were derived.

Brunzell, 85 Nev. at 349, 455 P.2d at 33 (emphasis added).

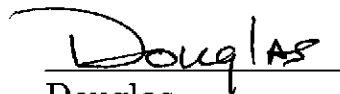
While explicit findings with respect to the *Beattie* factors are preferred, if the record reflects that the court properly considered them, there is no abuse of discretion. *Wynn*, 117 Nev. at 13, 16 P.3d at 428-29. Because factor four in the *Beattie* test encompasses the *Brunzell* analysis, this proposition naturally extends to the district court's consideration of those factors. See *Brunzell*, 85 Nev. at 349, 455 P.2d at 33. Here, the record demonstrates that the district court properly considered the *Brunzell* factors. The court explicitly referenced the *Brunzell* factors and expressly applied several of them in its reasonableness determination, including the role of competent performance, experience, skill, education,

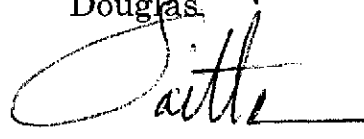
²We also note that the *Beattie* test is a balancing test, not a conjunctive one. Thus, even if factor three weighed in favor of Elazar, it would not be dispositive. See *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252 n.16, 955 P.2d 661, 673 n.16 (1998).

and prevailing charges in the Las Vegas community. Accordingly, the district court correctly considered both the *Beattie* and *Brunzell* factors and its contingency fee award of 40 percent was not an abuse of discretion.³ Thus, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Saitta

cc: Hon. Susan Johnson, District Judge
Craig A. Hoppe, Settlement Judge
Lewis Roca Rothgerber LLP/Las Vegas
Laxalt & Nomura, Ltd./Las Vegas
Ganz & Hauf
Eighth District Court Clerk

³We also note that the district court appropriately acknowledged and incorporated the requirements of NRS 17.115(4)(d)(3) and NRCP 68(f)(2) into its fee award.