

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES SENN VAN BASEL,
INDIVIDUALLY, AND AS PARENT
AND GUARDIAN AD LITEM OF
ANNALES SENN VAN BASEL, A
MINOR CHILD,

Appellant/Cross-Respondent,

vs.

NAOMI RUTH LUCAS,

Respondent/Cross-Appellant.

No. 35721

FILED

OCT 09 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING

This is an appeal and cross-appeal from an order denying appellant/cross-respondent Charles Senn Van Basel's motion for attorney fees and costs, and awarding costs, but not attorney fees, to respondent/cross-appellant Naomi Ruth Lucas. We conclude that the district court erred in its method of comparing the offer of judgment to the jury verdict, and we, therefore, affirm that portion of the district court's order denying Lucas' request for attorney fees, reverse the decision of the district court awarding Lucas costs, and remand the case for the district court to consider an award of cost and fees to Van Basel.

The underlying facts of this dispute arise from a motor vehicle collision that occurred in Las Vegas in October 1995. Van Basel's car was struck by Lucas' car, which ran a red light. On July 9, 1996, Van Basel filed a complaint for personal injuries arising from the accident.

On October 29, 1999, ten days prior to trial, Lucas served an offer of judgment pursuant to NRCP 68 and NRS 17.115 on Van Basel for \$11,500.00. The terms of the offer included costs accrued to that date. At the time of the offer, Van Basel had incurred approximately \$3,532.00 in costs.

This matter went to trial on November 8 and 9, 1999. The jury returned a verdict in favor of Van Basel in the amount of \$9,367.00, an amount that appears, on its face, to be less than the October 29, 1999, offer of judgment.

On November 15, 1999, following the trial, Lucas filed a motion for taxation of costs and fees. On January 20, 2000, the district court granted Lucas' motion for taxation of costs, denied Lucas' request for attorney fees, and denied Van Basel's countermotion for fees and costs.

Van Basel now timely appeals, arguing that the district court incorrectly awarded Lucas costs based on a comparison of the "lump sum" offer of judgment (which included costs) with the net jury verdict (which excluded costs).

Lucas cross-appeals, arguing that the district court was correct with regard to the award of costs, but that she was also entitled to attorney fees.

The decision to award attorney fees is within the sound discretion of the trial court.¹ A district court's award of attorney fees will not be disturbed on appeal absent a manifest abuse of discretion.² An abuse of discretion occurs if the district court's decision is arbitrary or capricious, or if it exceeds the bounds of law or reason.³

The purpose of NRC 68 is to encourage settlement of litigation but not to force plaintiffs to unfairly forego legitimate claims.⁴ "The offer of judgment rule, NRC 68, invests the court with discretion to allow such fees when the judgment obtained by the offeree is not more favorable than the offer."⁵

The combined effect of NRC 68 and NRS 17.115 (the statutory offer of judgment section) is to allow an award of attorney fees and costs when a party fails to recover more than a tendered offer of judgment. The primary difference between NRC 68 and NRS 17.115 is that NRS 17.115 provides additional advantages to the prevailing party relating to prejudgment interest and expert witness fees. An offer made

¹See Bergmann v. Boyce, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993).

²See Nelson v. Peckham Plaza Partnerships, 110 Nev. 23, 26, 866 P.2d 1138, 1139-40 (1994).

³See State, Dep't Mtr. Veh. v. Root, 113 Nev. 942, 947, 944 P.2d 784, 787 (1997).

⁴See Beattie v. Thomas, 99 Nev. 579, 668 P.2d 268 (1983).

⁵Armstrong v. Riggi, 92 Nev. 280, 281, 549 P.2d 753, 754 (1976).

solely under NRCP 68 is limited to the scope of NRCP 68.⁶ Offers of judgment made pursuant to NRS 17.115 must specifically be made with reference to that statute.⁷

The issue raised in Van Basel's appeal is whether the district court should have added costs to the jury's verdict before determining whether Van Basel obtained a more favorable judgment than Lucas' offer of judgment made pursuant to NRCP 68 and NRS 17.115.

As a threshold matter, the parties disagree over which version of NRCP 68 governs the resolution of this dispute.

The distinction between the pre-1998 NRCP 68 and the current NRCP 68 is significant. Under the former NRCP 68, "lump sum" offers (including costs) were not contemplated. This produced inequitable results for plaintiffs who were unable to compare their net jury verdict (which excluded costs) with the offer of judgment (which included costs). The current version of NRCP 68 requires a comparison between the defendant's lump sum offer and the principal amount of judgment plus plaintiff's pre-offer costs. The rule provides for different methods, depending on whether the offer allowed the addition of costs by the court or whether the offer was expressed as a lump sum which precluded a separate award of costs.⁸ The advisory committee notes for the 1998 amendment to the rule explain the committee's desire to address the inequity of comparing "apples and orange[s]," that is, comparing net jury verdicts (which excluded costs) with offers of judgment (which often included costs).⁹

We conclude that the current version of NRCP 68, as amended in October 1998, controls the resolution of this dispute because the offer of judgment was made when the current version was in effect and because the parties' litigation strategies were not affected by its application. Although Lucas cites to several cases regarding the prospective application of statutes, these cases are inapplicable because this appeal

⁶Id.

⁷See Ramadanis v. Stupak, 104 Nev. 57, 752 P.2d 767 (1988).

⁸See NRCP 68(g).

⁹See In the Matter of the Repeal of Nevada Rule of Civil Procedure 68, ADKT 151, March 25, 1998.

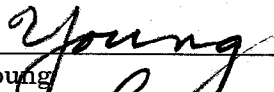
involves the application of a rule of procedure and not a statute.¹⁰ Moreover, as a rule of procedure, "this court can construe the provisions of NRCP 68 as it deems appropriate."¹¹

The district court abused its discretion by applying the former version of NRCP 68 instead of its amended version. Had the district court correctly compared the offer (which included costs) with the judgment plus the pre-offer costs, Van Basel would have obtained a recovery that exceeded the offer of judgment. Accordingly, we conclude that the award of costs to Lucas under NRCP 68 and NRS 17.115 was improper.

Lucas cross-appeals from the district court's decision denying her attorney fees. Because the district court incorrectly compared Van Basel's judgment amount to the offer of judgment, we conclude Lucas was not entitled to fees based on the offer of judgment. Accordingly, although the district court erred in its application of NRCP 68, it did not abuse its discretion by declining to award Lucas attorney fees.¹²

Based on the foregoing we

AFFIRM that portion of the district court's order denying attorney fees to Lucas, we REVERSE that portion of the order awarding Lucas costs, and we REMAND this matter to the district court for further proceedings consistent with this order.


_____, J.
Young


_____, J.
Leavitt


_____, J.
Becker

¹⁰See, e.g., County of Clark v. Roosevelt Title Ins., 80 Nev. 530, 396 P.2d 844 (1964).

¹¹Bowyer v. Taack, 107 Nev. 625, 629, 817 P.2d 1176, 1178 (1991).

¹²This court will affirm the district court if it reached the correct result, albeit for different reasons. Rosenstein v. Steele, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987).

cc: Hon. Michael L. Douglas, District Judge
Keith E. Galliher, Jr.
Beckley Singleton Jemison Cobeaga & List
Rawlings, Olson, Cannon, Gormley & Desruisseaux
Clark County Clerk