IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARIA JONES, AS EXECUTOR OF THE ESTATE OF JOSEPH GUGINO,
Appellants,
vs.
MARY C. GUGINO, AN INDIVIDUAL; AND MARIO GUGINO, AN INDIVIDUAL,
Respondents.

No. 67359

FILED

NOV 04 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court order granting a motion to dismiss and awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

This appeal stems from a lawsuit initiated by Joseph Gugino, now deceased, against respondents Mary and Mario Gugino, and has been continued on Joseph's behalf by appellant Maria Jones. Key to this appeal, the Guginos moved to dismiss the suit following Joseph's death, and a senior judge sitting for the district court ruled on the motion. The Guginos renewed their motion to dismiss at the beginning of trial, and Judge Escobar reconsidered the motion, granted it, and awarded the Guginos attorney fees and costs. On appeal, the primary questions before this court are whether the district court erred in reconsidering and granting the Guginos' motion to dismiss, and in awarding the Guginos attorney fees and costs. As the parties are familiar with the many

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additional facts and arguments underlying this appeal, we do not enumerate them here except as necessary to this disposition.

Jones first argues the district court erred in reconsidering the motion to dismiss. A district court "may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n. of Southern Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). Thus, if the trial judge properly determines the earlier decision was clearly erroneous, the trial judge does not err in reconsidering the motion.[1] *Id.*

Under *Masonry*, the district court properly reconsidered the motion to dismiss if the earlier decision denying the motion was clearly erroneous. We therefore consider whether the district court erred in concluding the earlier decision denying the Guginos' motion to dismiss was clearly erroneous. In so doing, we review the district court's decision granting the motion for abuse of discretion. *AA Primo Builders, LLC v. Washington*, 126 Nev. ___, ___, 245 P.3d 1190, 1197 (2010) (noting that a motion for reconsideration is reviewed for an abuse of discretion where appealed with the underlying judgment). In its order granting the motion to dismiss, the district court found that dismissal was proper because (1) Jones failed to file a substitution of parties within the time mandated by NRCP 25(a)(1), (2), Jones failed to move for an enlargement of time under

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[1]Under *Masonry*, Jones' arguments the district court was barred from reconsidering the decision by the law-of-the-case doctrine or by established law discouraging reconsideration are without merit. Likewise meritless is Jones' argument that the Guginos were required to present new evidence before Judge Escobar could reconsider their motion.

NRCP 6(b), and (3) no excusable neglect existed to justify an enlargement of time under NRCP 6(b). We agree.

NRCP 25(a)(1) requires a district court to dismiss an action as to the deceased party if a motion for substitution is not made within 90 days after the death is suggested upon the record. In *Wharton, By and Through Wharton v. City of Mesquite,* 113 Nev. 796, 798, 942 P.2d 155, 157 (1997), the Nevada Supreme Court addressed this statute and clarified that despite public policy generally favoring deciding cases on the merits, NRCP 25's language clearly requires dismissal if the motion for substitution is not made within the 90-day deadline.[2] As Jones does not argue on appeal that her motion was made within the 90-day deadline,[3] we cannot say the district court abused its discretion in determining Jones' motion for substitution was untimely under the statute.[4]

Jones argues, however, the district court nevertheless abused its discretion by relying on *Wharton* instead of *Moseley v. Eighth Judicial District Court,* 124 Nev. 654, 188 P.3d 1136 (2008), which, Jones asserts, supersedes *Wharton.* We disagree. In *Moseley,* the Nevada Supreme Court considered whether the time to file for a substitution under NRCP 25 may be enlarged under NRCP 6(b)(2) despite NRCP 25's strict 90-day

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[2]This clarification moots Jones' argument that public policy requires allowing the case to proceed on the merits.

[3]The Guginos argue Jones' motion was filed 8 days after the deadline, while Jones asserts the district court found the motion was filed 1 day after the deadline.

[4]And, to the extent the earlier decision denied the Guginos' motion to dismiss because Jones' motion for substitution was only "one day late," this was clear error under *Wharton.*

deadline. 124 Nev. at 657, 188 P.3d at 1139. The court concluded that "a motion for an extension of time to substitute a party under NRCP 6(b)(2) may be used to obtain relief when excusable neglect is established." *Id.* The opinion does not address *Wharton*. Accordingly, the two opinions are compatible and together hold that a party must file a motion to substitute within 90 days of the suggestion of death, but in cases of excusable neglect the court may, under NRCP 6(b)(2), grant an enlargement of the time to file the motion.

NRCP 6(b) provides

> When by these rules . . . an act is required or allowed to be done at or within a specified time, the parties, by written stipulation of counsel filed in the action, may enlarge the period, or the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or *(2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect*[.] (Emphasis added).

The record supports the district court's decision that Jones did not properly move for an enlargement of time under NRCP 6(b)(2). Specifically, Jones does not argue, nor does the record show, she made a *motion* to enlarge the time. A motion is required by NRCP 6(b)(2) where the time to file has expired before the party requests an enlargement of time, and here the 90-day deadline had passed before Jones, through her reply brief rather than a motion, requested the district court extend the time in which to file the motion for substitution. Accordingly, Jones did not properly request an enlargement of time under NRCP 6(b)(2).

Because Jones did not timely file a motion to substitute under NRCP 25, nor properly request an enlargement of time under NRCP 6(b)(2), dismissal was proper and the district court did not abuse its discretion in determining the earlier order was clearly erroneous, reconsidering the motion to dismiss, and granting the motion. Based on these findings, the district court was not required to consider whether Jones had shown excusable neglect.[5]

We agree, however, that the district court improperly granted attorney fees. We review an award of attorney fees for abuse of discretion. *Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001). Jones asserts the district court abused its discretion in awarding attorney fees because no statute or rule allowed the award, and the district court failed to consider the *Beattie*[6] factors before making the award. The Guginos counter that an award was proper under NRS 18.010, and under NRCP 68 and NRS 17.115, and the district court did not abuse its discretion.

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[5]This determination moots Jones' argument that Judge Escobar was required to make specific findings on the excusable neglect factors. Further, Jones does not support with legal authority her argument that Judge Escobar was required to make findings of fact, and, therefore, we need not consider that argument. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

We note that even had Jones properly moved for an enlargement of time under NRCP 6(b), the record supports the district court's conclusion that Jones failed to show excusable neglect. Jones' arguments to the district court do not necessarily establish excusable neglect, as no facts showed Jones could not have met the 90-day deadline or was actually hindered in any attempt to do so. *See, e.g., Moseley*, 124 Nev. at 664-67, 188 P.3d at 1143-46 (discussing situations where the movant's neglect was excusable).

[6]*Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983).

The statutory basis for an award of attorney fees is, at best, questionable under the facts of this case. First, the supreme court has interpreted NRS 18.010 as permitting an award of attorney fees only where there is actually a monetary judgment awarded to the prevailing party. *See Smith v. Crown Fin. Servs. Of Am.*, 111 Nev. 277, 285, 890 P.2d 769, 774 (1995). Yet here the Guginos did not recover a monetary award aside from attorney fees. Thus, to the extent the district court awarded fees under this statute, the award was clearly improper.

Second, while NRCP 68 and NRS 17.115[7] allow an award of attorney fees where a party rejects an offer of judgment and fails to obtain a more favorable judgment at trial, "offers of judgment are designed to encourage settlement and are not intended to unfairly force parties to forego legitimate claims." *Frazier v. Drake*, 131 Nev. ___, ___, ___ P.3d ___, ___ (Ct. App. 2015). The district court is therefore required, under *Beattie*, to assess whether the parties acted in good faith before awarding attorney fees under NRCP 68 and NRS 17.115. *Id.* Yet here, the Guginos' offer of settlement was for $1, and the district court made no findings at all regarding this offer or whether the parties acted in good faith. This failure to make the necessary findings was an abuse of discretion.

Further, *Beattie* requires the district court to assess four factors before ordering an award of attorney fees. *Beattie,* 99 Nev. at 588-89, 668 P.2d at 274. The district court's consideration of these factors must be apparent from the district court's order or from the record. *See id.*; *Wynn,* 117 Nev. at 13, 16 P.3d at 428-29. But, here, there is no

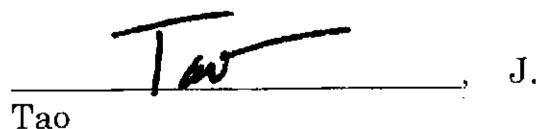
[7]NRS 17.115 was repealed by the 78th Nevada Legislature effective October 1, 2015. A.B. 69, 78th Leg. (Nev. 2015).

indication in the written order as to the basis for awarding attorney fees, nor is there any indication in the record that the parties either argued the *Beattie* factors to Judge Escobar or that she considered those factors.

As nothing supports a conclusion that the district court engaged in the analysis required by law before awarding attorney fees, we must remand on this issue only for further written findings. *See State Drywall, Inc. v. Rhodes Design & Development*, 122 Nev. 111, 119 n.18, 127 P.3d 1082, 1088 n.18 (2006) (holding the district court did not properly consider the *Beattie* factors where the record did not reflect "what, if any, analysis was made," and holding that the record must reflect this analysis for a decision to be upheld); *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1050, 881 P.2d 638, 643 (1994) (cautioning trial courts to provide a written record of the *Beattie* factors when awarding attorney fees). Accordingly, we

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

_______________, C.J.
Gibbons



_______________, J.
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cc: Hon. Adriana Escobar, District Judge
Persi J. Mishel, Settlement Judge
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Eighth District Court Clerk