

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ESTATE OF LYLE OWENS, BY AND
THROUGH DAVID OWENS AS THE
PERSONAL REPRESENTATIVE,
Appellant,

vs.

JOHN SAMUEL AUGUST, AN
INDIVIDUAL; AND CATE
EQUIPMENT COMPANY OF NEVADA,
LLC, A NEVADA LIMITED LIABILITY
COMPANY,

Respondents.

No. 68728

FILED

SEP 08 2016

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

ESTATE OF LYLE A. OWENS, BY AND
THROUGH DAVID OWENS, AS
PERSONAL REPRESENTATIVE,
Appellants,

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JOHN SAMUEL AUGUST, AN
INDIVIDUAL; AND CATE
EQUIPMENT COMPANY OF NEVADA,
LLC, A NEVADA LIMITED LIABILITY
COMPANY,

Respondents.

No. 69375

ORDER OF AFFIRMANCE

This is an appeal from a jury verdict, an order denying a new trial, and an order granting a motion for attorney fees and costs in a personal injury case. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

In the case underlying this appeal, Lyle Owens¹ sued John August and Cate Equipment Company (collectively "August") to recover for injuries arising from a car accident.² A jury found in favor of August. The district court subsequently denied Owens' motion for a new trial and awarded August attorney fees and costs.

Owens appeals the district court's order denying his motion for a new trial and the district court's order granting August's motion for fees and costs. Owens contends (1) the district court erred in its handling of August's testimony at trial and (2) the district court abused its discretion in awarding attorney fees to August.³

Under NRCP 59(a), a new trial may be granted on the basis of an "[e]rror in law occurring at the trial." But, the court must disregard any error that is harmless. NRCP 61. In order to obtain a new trial, "the movant must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have

¹Lyle Owens passed away from causes unrelated to the injuries at issue in this case before the appeal was filed. His interests are now represented by his estate, which we refer to as "Owens" in this order.

²We do not recount the facts except as necessary to our disposition.

³Owens also argues (1) the jury manifestly disregarded the law in reaching its verdict, (2) the district court erred in commenting on the weight to be given to August's testimony, (3) the district court erred by refusing to admit evidence of a stipulation related to indemnification, (4) the district court erred by allowing August's counsel to introduce evidence in violation of Owens' Motion in Limine 12, (5) the district court was biased against Owens, (6) August was not entitled to expert fees as part of costs, and (7) August's costs associated with trial preparation services should have been classified as attorney fees. Having considered these arguments, we conclude they are without merit.

been reached.” *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010). We will not reverse an order denying a motion for new trial without a showing that the district court palpably abused its discretion in reaching its decision. *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 424-25 (2007).

We agree with Owens that the district court erred in its handling of August’s direct and cross-examination at trial. Under NRS 50.115(4), a party may ask an adverse party leading questions. But, the adverse party’s attorney may ask leading questions during cross-examination “only to the extent permissible if the attorney had called that person on direct examination.” *Id.* Here, though August was an adverse party, the district court cautioned Owens’ counsel against using leading questions during direct examination. In contrast, the district court permitted August’s counsel to freely ask August leading questions during cross-examination.

We conclude, however, that this error was harmless. Despite the district court’s cautioning, Owens’ counsel still asked August leading questions. In addition, the testimony that August’s counsel obtained on cross-examination was previously presented during direct examination. Owens’ counsel thoroughly explored and contradicted August’s testimony during redirect examination. Based on this, we cannot conclude that the jury would have reached a different conclusion had the district court not erred. Finally, we note that a trial court’s error regarding the mode of examination of witnesses does not generally warrant reversal. See *Leonard v. State*, 117 Nev. 53, 70, 17 P.3d 397, 408 (2001) (citations omitted) (discussing how allowing leading questions on direct examination

is within the discretion of the district court). We therefore affirm the district court's denial of a new trial.

We next turn to the district court's grant of attorney fees. "This court generally reviews a district court's decision awarding or denying costs or attorney fees for an abuse of discretion." *Gunderson v. D.R. Horton, Inc.*, 130 Nev. ___, ___, 319 P.3d 606, 615 (2014). "However, the district court may not award attorney fees absent authority under a statute, rule, or contract." *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1028 (2006). NRCP 68 and NRS 17.115⁴ provide that if a party rejects an offer of judgment and fails to obtain a more favorable judgment at trial, the offeree must pay the offeror's reasonable attorney fees and costs incurred after the offer was made.

Beattie v. Thomas, 99 Nev. 579, 668 P.2d 268 (1983), sets forth the factors the district court must consider in evaluating fees and costs under 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.


Id. at 588-89, 668 P.2d at 274. The district's court's analysis must take the respective good faith of the parties into account to avoid forcing


⁴NRS 17.115 was repealed effective October 1, 2015, after August filed a motion for fees and costs and after the district court held a hearing on the motion.

litigants to forego legitimate claims. *Frazier v. Drake*, 131 Nev. ___, ___, 357 P.3d 365, 371–72 (Ct. App. 2015).

We conclude the district court did not abuse its discretion in awarding attorney fees to August. Here, the record reflects the district court weighed each *Beattie* factor. Further, contrary to Owens' assertion, the district court's analysis is distinguishable from *Frazier*. In *Frazier*, the district court awarded attorney fees despite finding each of the first three *Beattie* factors weighed against awarding fees, "effectively deem[ing] the respective good faith of the parties to be of no import." 131 Nev. at ___, 357 P.3d at 373. But, in this case, the district court found August's offer of judgment was reasonable, and, therefore, did not abuse its discretion in considering the respective good faith of the parties and balancing the *Beattie* factors. We therefore affirm the district court's grant of attorney fees in favor of August. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Susan Johnson, District Judge
Persi J. Mishel, Settlement Judge
Christiansen Law Offices
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP/Las Vegas
Eighth District Court Clerk