

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ASHLEY GREEN, AN INDIVIDUAL,
Appellant,

vs.

DIANE BUCHANAN, AN INDIVIDUAL,
Respondent.

DIANE BUCHANAN, AN INDIVIDUAL,
Appellant,

vs.

ASHLEY GREEN, AN INDIVIDUAL,
Respondent.

No. 71131

No. 72107

FILED

DEC 11 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Ashley Green appeals from an order denying in part her motion in limine and the final judgment, pursuant to a jury trial. Diane Buchanan cross-appeals from an order denying her motion for attorney fees and costs. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Green and Buchanan were involved in a motor vehicle collision. The parties stipulated that Buchanan was 100 percent at fault, leaving only causation and damages to be determined at trial. The jury found for Green and awarded her \$5,000.¹ On appeal, Green argues the district court erred in denying in part her motion in limine to exclude Buchanan's biomechanical expert's testimony regarding forces. Buchanan cross-appeals arguing the district court erred in denying her attorney fees after Green rejected her offer of judgment for \$35,000. Buchanan also argues that the district court erred in failing to properly consider expert fees in excess of \$1,500.

¹We do not recount the facts except as necessary to our disposition.

First, we address Green's appeal. Green appeals from an order denying in part her motion in limine and the final judgment. In its order, the district court precluded Buchanan's biomechanical expert's testimony as to causation but allowed him to testify to forces. Green argues the district court abused its discretion in allowing Buchanan's expert's testimony at all because there was insufficient foundation to support his opinions.

We review a district court's ruling on a motion in limine for an abuse of discretion. *Whisler v. State*, 121 Nev. 401, 406, 116 P.3d 59, 62 (2005). A district court abuses its discretion when it "fail[s] to apply the full, applicable legal analysis," *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 82, 319 P.3d 606, 616 (2014), or "bases its decision on a clearly erroneous factual determination or it disregards controlling law," *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. ___, ___, 367 P.3d 1286, 1292 (2016).

"The threshold test for the admissibility of testimony by a qualified expert is whether the expert's specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue." *Townsend v. State*, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987); see NRS 50.275. "An expert's testimony will assist the trier of fact only when it is relevant and the product of reliable methodology." *Hallmark v. Eldridge*, 124 Nev. 492, 500, 189 P.3d 646, 651 (2008) (footnotes omitted).

Here, we need not address the merits of Green's claim because she failed to provide this court with an adequate record on appeal. *Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) ("We cannot consider matters not properly appearing in the record on appeal."). An appellant is responsible for making an adequate appellate record, and when "appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district

court's decision." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007). Moreover, to warrant reversal, an appellant must show the errors "affect[ed] [their] substantial rights so that, but for the alleged error, a different result might reasonably have been reached." *Khoury v. Seastrand*, 132 Nev. ___, ___, 377 P.3d 81, 94 (2016) (quotation marks omitted).

Next, we address Buchanan's claim that the district court erred in denying her motion for attorney fees and costs. We review a district court's decision to award or deny costs or attorney fees for an abuse of discretion. *Gunderson*, 130 Nev. at 80, 319 P.3d at 615.

NRCP 68 provides that if a party rejects an offer of judgment and fails to obtain a more favorable judgment at trial, the district court may order that party to pay the offeror reasonable attorney fees. The Nevada Supreme Court in *Beattie* held that the district court is to evaluate the following factors in determining whether to award attorney fees based on a rejected offer of judgment:

- (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 v. Thomas, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983). The district court "should consider the [*Beattie*] factors in exercising its discretion regarding NRCP 68 award of attorney's fees." *LaForge v. State, Univ. & Cmty. Coll. Sys. of Nev.*, 116 Nev. 415, 423, 997 P.2d 130, 135 (2000). But none of the *Beattie* factors are outcome determinative. *Frazier v. Drake*, 131 Nev. ___, ___, 357 P.3d 365, 372 (Ct. App. 2015). An abuse of discretion

occurs when a district court's evaluation of the *Beattie* factors is arbitrary or capricious. *Id.* “[T]he Nevada Supreme Court has emphasized that, while Nevada’s offer of judgment provisions are designed to encourage settlement, they should not be used as a mechanism to unfairly force plaintiffs to forego legitimate claims.” *Frazier*, 131 Nev. at ___, 357 P.3d at 371.

Here, Buchanan made an offer of judgment of \$35,000 to Green roughly six months prior to trial. Green did not accept the offer, and the jury awarded her only \$5,000. The district court reviewed the *Beattie* factors, finding the first and third factors favored Green while the second and fourth factors favored Buchanan. Buchanan argues the court abused its discretion by finding that Green brought her claim in good faith and that Green was not grossly unreasonable in rejecting the offer. We disagree.

The record reflects that the district court did not abuse its discretion in determining that Green brought her claim in good faith. The parties stipulated that Buchanan was 100 percent at fault and the jury awarded Green \$5,000, demonstrating that she suffered at least some damage; therefore, Green brought her claim in good faith. *See Scott-Hopp v. Bassek*, Docket No. 60501 (Order of Affirmance, Feb. 28, 2014) (“[B]ecause [the plaintiff] suffered an injury which she reasonably believed [the defendant] was responsible for, she filed her lawsuit in good faith.”).² Moreover, resolving this factor in favor of Buchanan may deter future plaintiffs from pursuing legitimate claims—exactly what the supreme court sought to prevent when interpreting offer of judgment statutes. *See Frazier*,

²Buchanan argues that the district court should have given great weight to the small verdict returned by the jury and the fact that Green untimely disclosed her future damages during discovery. But even if Buchanan is correct, the district court reached the correct conclusion so any error, even if one occurred, is harmless.

131 Nev. at ___, 357 P.3d at 371 (providing that Nevada's offer of judgment provisions "should not be used as a mechanism to unfairly force plaintiffs to forego legitimate claims"). Additionally, because Green was not at fault and had incurred roughly \$70,000 in past medical expenses, it was not grossly unreasonable to reject Buchanan's \$35,000 offer and to choose to pursue additional damages claim before a jury.

Therefore, because Green brought her claim in good faith and it was not grossly unreasonable for her to deny Buchanan's offer of judgment, we conclude that the district court did not abuse its discretion in denying Buchanan's motion for attorneys' fees.

Last, we address whether the district court erred in denying Buchanan's request for expert fees in excess of \$1,500.


NRS 18.005 defines "costs" to include reasonable fees not more than \$1,500 for each expert witness, "unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee." An award of excess expert fees must be "supported by an express, careful, and preferably written explanation of the court's analysis of factors. *Frazier*, 131 Nev. at ___, 357 P.3d at 377-78 (offering a non-exhaustive list of factors to consider when awarding excess expert fees). A district court's decision to award more than \$1,500 in expert fees is reviewed for an abuse of discretion. *Id.*, 131 Nev. at ___, 357 P.3d at 373.


Here, the district court denied Buchanan's request because she failed to provide the court with information showing when and how her experts spent their time working on the case. Although, the record reflects that Buchanan did include detailed billing statements from her experts in her reply, a district court is not required to address why it is denying excess

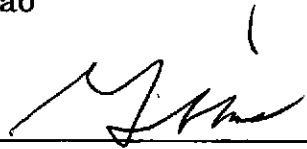
expert fees. *See Frazier*, 131 Nev. at ___, 357 P.3d at 378 (requiring district courts to explain its reasoning for granting excess expert fees); *cf. Stubbs v. Strickland*, 129 Nev. 146, 152 n.1, 297 P.3d 326, 330 n.1 (2013) (stating that while a district court is required to make findings when awarding attorney fees, such findings are not required when a district court denies a motion for attorney fees). Because the district court awarded the statutorily prescribed expert fees, it did not abuse its discretion. Therefore, we affirm the district court's denial of excess expert fees.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Susan Johnson, District Judge
Nathaniel J. Reed, Settlement Judge
Ganz & Hauf/Las Vegas
Rogers, Mastrangelo, Carvalho & Mitchell, Ltd.
Eighth District Court Clerk