

IN THE SUPREME COURT OF THE STATE OF NEVADA

VALLEY HOSPITAL MEDICAL
CENTER, A NEVADA CORPORATION
D/B/A VALLEY HOSPITAL,

Appellant,

vs.

ROSIE PUCKETT, INDIVIDUALLY
AND ROSIE PUCKETT, AS SPECIAL
ADMINISTRATOR OF THE ESTATE
OF HENRY L. PUCKETT, DECEASED,

Respondent.

No. 35581

FILED

FEB 11 2002

JANE T. M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

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Respondent.

No. 36623

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

These are consolidated appeals from a district court judgment upon a jury award for negligent infliction of emotional distress and

wrongful death and a district court special order awarding respondent Rosie Puckett attorney fees.¹ On appeal, appellant Valley Hospital argues that: (1) allowing recovery for negligent infliction of emotional distress, as well as for "grief and sorrow" pursuant to Nevada's wrongful death statute, would result in a double recovery for the same injury; (2) the jury's award of damages was the result of passion and/or prejudice due to cumulative evidence and the non-apportionment of emotional trauma; and (3) the district court abused its discretion by awarding excessive attorney fees. We find Valley Hospital's first two arguments to be meritless, but find merit with its third argument. Accordingly, we affirm the jury's award of damages, but reverse the order awarding attorney fees and remand the matter to the district court to determine a reasonable amount.

Henry Puckett died of asphyxiation at Valley Hospital. Mr. Puckett's wife, Rosie Puckett, witnessed her husband's death. On August 7, 1997, Mrs. Puckett, individually and as Special Administrator of the estate of Henry Puckett, filed a complaint against Valley Hospital, alleging wrongful death and negligent infliction of emotional distress.² Prior to trial, Valley Hospital conceded liability for Mr. Puckett's death. The district court denied Valley Hospital's motion for partial summary judgment, which asserted that negligent infliction of emotional distress

¹On January 2, 2002, the court ordered the consolidation of Valley Hospital's two appeals: (1) No. 35581, appealing the district court judgment upon a jury award for negligent infliction of emotion distress and wrongful death; and (2) No. 36623, appealing the district court special order awarding respondent attorney fees.

²Puckett's complaint also included claims for intentional infliction of emotional distress and punitive damages; those issues were removed by Valley Hospital's successful motion for summary judgment.

and wrongful death are duplicative claims. The district court granted Mrs. Puckett's motion in limine to preclude Valley Hospital from presenting evidence intended to attribute a portion of her emotional distress to other traumas she had endured both before and after Mr. Puckett's death. Trial concluded in December 1999, with a jury verdict in Mrs. Puckett's favor in the amount of \$1,168,681.55. The district court subsequently awarded Mrs. Puckett \$127,985.00 in attorney fees based on an hourly rate of \$325.00. Valley Hospital now appeals.

Valley Hospital first argues that allowing recovery for claims of negligent infliction of emotional distress, as well as for "grief and sorrow" pursuant to Nevada's wrongful death statute, would result in a double recovery for the same injury. We disagree. Nevada law "recognize[s] a cause of action for serious emotional distress which results in physical symptoms caused by apprehending the death or serious injury of a loved one due to the negligence of the defendant."³ Additionally, Nevada's wrongful death statute provides for heirs of a decedent to recover for their own "grief or sorrow."⁴ The injury components of claims for negligent infliction of emotional distress and wrongful death, although similar, are different.⁵ We find the reasoning of other states that have

³State Dept. of Transp. v. Hill, 114 Nev. 810, 815, 963 P.2d 480, 483 (1998) (quoting State v. Eaton, 101 Nev. 705, 718, 710 P.2d 1370, 1379 (1985)).

⁴NRS 41.085.

⁵Hill, 114 Nev. at 820 n.1, 963 P.2d at 486 n.1 (Maupin, J., concurring).

held similarly to be persuasive.⁶ Accordingly, we conclude that the district court did not err in denying Valley Hospital's motion for partial summary judgment on the issue of double recovery.

Valley Hospital next argues that testimony from several of Mrs. Puckett's witnesses relating to liability or causation should have been excluded as being irrelevant because Valley Hospital had already conceded liability. Further, Valley Hospital argues that this evidence became cumulative, and thereby prejudicial to Valley Hospital. We disagree. The testimony with which Valley Hospital takes issue was relevant to damages. The jury was entitled to hear specific and precise expert medical testimony as to Mr. Puckett's pain and suffering. Additionally, "[t]he admission of the evidence after the district judge [has] balanced its probative value against its potential for undue prejudice, a judgment committed to his sound discretion, will not be disturbed in the absence of an abuse."⁷ Here, the district court weighed the evidence and

⁶Cimino v. Milford Keg, Inc., 431 N.E.2d 920, 927 (Mass. 1982) ("Since emotional distress is a wrong to the plaintiff distinct from that done [to the decedent] and the statutory beneficiaries of the decedent, it is not a duplicative remedy and is not 'preempted' by the wrongful death statute"); Dawson v. Hill & Hill Truck Lines, 671 P.2d 589, 593 (Mont. 1983) ("A negligent infliction action . . . compensates for mental distress from having witnessed an accident. The mental distress for which recovery can be sought [in a wrongful death action] is limited to mental anguish, sorrow or grief resulting from the death. The two actions are distinct and separate."); R.D. v. W.H., 875 P.2d 26, 32 (Wyo. 1994) (finding that the appellant's intentional and negligent infliction of emotional distress claims "clearly were not parasitic to the wrongful death claims even though they arose out of the same circumstances."); Stump v. Ashland, Inc., 499 S.E.2d 41, 51 (W. Va. 1997).

⁷Seim v. State, 95 Nev. 89, 97, 590 P.2d 1152, 1157 (1979) (citing NRS 48.035(1)).

determined that its probative value outweighed any prejudicial effect. Perceiving no abuse of discretion, we conclude that the district court properly admitted the testimony.

Valley Hospital also argues that it should only be responsible for that part of Mrs. Puckett's emotional state which can be attributed to her husband's death. The district court properly determined that testimony of Mrs. Puckett's previous personal traumas was temporally remote and legally irrelevant, and that the jury could not properly apportion the trauma due solely to Mr. Puckett's death. Since Mrs. Puckett's emotional trauma is indivisible, Valley Hospital is responsible for her entire current emotional state.⁸ Accordingly, we affirm the judgment based on the jury award for damages.

Finally, it is undisputed that Mrs. Puckett is entitled to attorney fees pursuant to NRS 41A.059. Valley Hospital argues, however, that the district court abused its discretion by awarding an unreasonable amount of attorney fees based on an excessive rate of \$325.00 per hour. Valley Hospital instead proposes a rate of \$125.00 per hour, which it represents is the customary hourly attorney's rate for medical malpractice insurance defense in Clark County. When determining the reasonable value of an attorney's services, a court should consider several factors:

- (1) the qualities of the advocate: his ability, training, education, experience, professional standing and skill;
- (2) the character of the work to be done: its difficulty, intricacy, importance, the time and skill required, the responsibility imposed and the prominence and character of the parties when they affect the importance of the litigation;

⁸See Kleitiz v. Raskin, 103 Nev. 325, 738 P2d 508 (1987).

(3) the work actually performed by the lawyer: the skill, time and attention given to the work; and (4) the result, whether the attorney was successful and what benefits were derived.⁹

Additionally, the factors set forth in SCR 155 are important in determining the reasonableness of a fee.¹⁰ These factors are:

(a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(b) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(c) The fee customarily charged in the locality for similar legal services;

(d) The amount involved and the results obtained;

(e) The time limitations imposed by the client or by the circumstances;

(f) The nature and length of the professional relationship with the client;

(g) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(h) Whether the fee is fixed or contingent."¹¹

Based on these factors, we conclude that the district court's award of attorney fees was unreasonable due to its excessive hourly rate.

⁹Schouweiler v. Yancey Co., 101 Nev. 827, 833-34, 712 P.2d 786, 790 (1985) (citing Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969)).

¹⁰Harvey v. United Pacific Ins. Co., 109 Nev. 621, 624, 856 P.2d 240, 241 (1993).


¹¹SCR 155(1)(a)-(h).


We do not quarrel with the quality of counsel who pursued this case from its inception through trial. Nor do we disagree with the employment of two attorneys. The character of the work was not unusually complicated and became significantly less complicated when, shortly before trial was to commence, Valley Hospital conceded liability. Each attorney worked many hours to obtain an excellent result for Mrs. Puckett. The district court appears to have approved, as reasonable, the number of hours expended by counsel on Mrs. Puckett's behalf. However, the district court never questioned the hourly rate used in the calculation offered by Mrs. Puckett. This hourly rate seems extraordinarily high and strikes us as unjustifiable and excessive.¹² Defense counsel was paid by the hour regardless of the result, just as any attorney whose fee agreement is based upon an hourly rate expects to be paid regardless of the outcome. The record does not support a determination that the hourly rate Mrs. Puckett wants is customarily charged. The district court did not address this issue, apparently preferring to adopt the requested hourly rate without inquiry, critical review or analysis. Application of a

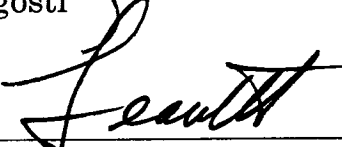
¹²We recognize that customarily a medical malpractice case is taken on a contingency fee. Under a contingency fee arrangement, counsel receives a higher fee if the verdict is large but also bears the risk that his labor will not be compensated at all if he or she is unsuccessful at trial. It would be unreasonable to require Valley Hospital to pay a fee that reflects in any fashion the absorption of the risk a plaintiff's attorney takes since the payment of the fee pursuant to the statute is mandatory as long as the plaintiff meets the statutory criteria. Thus, reference to the hourly rate charged by counsel for a defendant in a medical malpractice case may be a reasonable way to decide what is a reasonable fee under the statute. We will, however, leave this determination to the district court after it has the opportunity to receive evidence and argument.

customary hourly rate, or its equivalent, to the hours of work would be an indication of reasonableness when determining an appropriate fee award.

Accordingly, we AFFIRM the judgment for negligent infliction of emotional distress and for wrongful death. We REVERSE the district court's order awarding attorney fees and REMAND the matter of attorney fees to the district court to determine an appropriate hourly rate based on the fee customarily charged in the locality for similar legal services.


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Allan R. Earl, District Judge
Cotkin, Collins & Ginsberg
Mayor, Horner, Kling, Stryker & Burk, Ltd.
Beckley, Singleton, Chtd.
Bourgault & Harding
Clark County Clerk