

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NICA RAMIREZ FERNANDEZ; AND  
MIGUEL FERNANDEZ,  
Appellants/Cross-Respondents,  
vs.  
MARIA W. PEINADO,  
Respondent/Cross-Appellant.

No. 71197

**FILED**

NOV 20 2017

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

*ORDER AFFIRMING IN PART, REVERSING IN PART, AND  
REMANDING*

Nica Ramirez Fernandez and Miguel Fernandez appeal from a judgment on a short trial jury verdict in a tort action. Maria W. Peinado cross-appeals from the same judgment. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Senior Judge.<sup>1</sup>

Respondent/cross-appellant Maria Peinado filed a complaint against appellants/cross-respondents Nica Ramirez Fernandez and Miguel Fernandez (“appellants”) for damages she suffered as the result of a car accident where Ramirez Fernandez collided with the rear of her vehicle.<sup>2</sup> At the same time appellants filed their answer to Peinado’s complaint, they also served Peinado with an offer of judgment for \$7,000.00, excluding costs and interest. Peinado rejected this offer.

While an arbitrator during mandatory arbitration awarded Peinado \$12,082.74, including damages for pain and suffering, appellants requested and were granted a trial de novo. The jury found for Peinado and

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<sup>1</sup>Patrick N. Chapin, Pro Tempore Judge, presided over the jury trial in this case as part of the Short Trial Program and issued the orders subject to these appeals.

<sup>2</sup>We do not recount the facts except as necessary to our disposition.

awarded her \$6,082.74 for past medical expenses, but nothing for her claimed pain and suffering.

Because Peinado rejected their offer of judgment and failed to obtain a more favorable judgment, appellants moved for attorney fees and costs under NRCP 68(f). Peinado also moved for attorney fees and costs. Further, Peinado moved for additur, or in the alternative, for a new trial regarding damages, arguing *Arnold v. Mt. Wheeler Power Co.*, 101 Nev. 612, 614, 707 P.2d 1137, 1139 (1985), established that a jury errs if it awards the exact amount of an injured plaintiff's past medical expenses, but nothing for pain and suffering.

The short trial judge issued orders on these motions without a hearing. First, the short trial judge, without citing a legal basis, granted Peinado's request for attorney fees in the amount of \$1,500.00, costs and disbursements in the amount of \$2,621.83, and interest in the amount of \$347.34. Second, the short trial judge denied appellants' motion for attorney fees and costs based on its finding that Peinado's "rejection of Defendant's Offer of Judgment was not unreasonable." Third, the short trial judge denied Peinado's motion for additur. The district court entered a judgment on the jury verdict wherein it confirmed the short trial judge's orders.

Appellants appeal from the short trial judge's first two orders. Peinado cross-appeals from the short trial judge's third order.

*The short trial judge misapplied NRCP 68*

Appellants argue the short trial judge misapplied NRCP 68 by both granting Peinado's request for post-offer attorney fees, costs, and interest, and denying their request for post-offer costs because Peinado did not obtain a more favorable judgment after rejecting appellants' offer of judgment. We conclude reversal is necessary on this point.

“[W]hen a party’s eligibility for a fee award is a matter of . . . interpretation of court rules, we review the district court’s decision de novo.” *See Logan v. Abe*, 131 Nev. \_\_\_, \_\_\_, 350 P.3d 1139, 1141 (2015) (quoting *In re Estate & Living Trust of Miller*, 125 Nev. 550, 553, 216 P.3d 239, 241 (2009)). “Because ‘the rules of statutory interpretation apply to Nevada’s Rules of Civil Procedure,’ *Id.* at \_\_\_, 350 P.3d at 1141-42 (quoting *Webb v. Clark Cty. Sch. Dist.*, 125 Nev. 611, 618, 218 P.3d 1239, 1244 (2009)), we interpret unambiguous statutes, including rules of civil procedure, by their plain meaning.” *Id.* at \_\_\_, 350 P.3d at 1142 (internal citation omitted).

“If the offeree rejects an offer and fails to obtain a more favorable judgment, the offeree *cannot* recover any costs or attorney’s fees and shall not recover interest for the period after the service of the offer and before the judgment.” NRCP 68(f)(1) (emphasis added). Further, such an offeree “*shall* pay the offeror’s post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment . . . .” NRCP 68(f)(2) (emphasis added).

Here, appellants served Peinado with an offer of judgment for \$7,000.00, and Peinado rejected this offer. At trial, a jury awarded Peinado \$6,082.74, a sum less than \$7,000.00. Thus, NRCP 68(f)(1) prohibited Peinado from recovering attorney fees, costs, or interest, and NRCP 68(f)(2) required her to pay appellants’ post-offer costs and interest. Consequently, the short trial judge misapplied NRCP 68 in this case by awarding Peinado her attorney fees and costs and denying appellants their post-offer costs.

Accordingly, we reverse these orders on these points and remand this case to the district court to issue orders properly applying NRCP 68.<sup>3</sup>

*The short trial judge abused his discretion by denying appellants' motion for attorney fees without considering all the required factors*

Appellants argue, in part, the short trial judge abused his discretion by failing to consider all the required factors established in *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983), when he denied their motion for attorney fees. We agree.

We review a district court's decision regarding attorney fees under NRCP 68 for an abuse of discretion. See *Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001). "In exercising its discretion under NRCP 68, the district court *must* carefully evaluate the following factors: (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendant's 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.* (citing the *Beattie* factors) (emphasis added); see also *Frazier v. Drake*, 131 Nev. \_\_\_, \_\_\_, 357 P.3d 365, 371-72 (Ct. App. 2015). "Although explicit findings with respect to these factors are preferred, the district court's failure to

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<sup>3</sup>Peinado counters that NRCP 68 only gives a court discretion to award post-offer costs where appropriate. Further, she argues appellants' offer of judgment was ambiguous "and thus unenforceable" under NRCP 68(g). Peinado's first point is unsupported by the record and by the caselaw she cites, see *Bobby Berosini, Ltd., v. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998) (acknowledging that a court has discretion to determine "allowable costs" under NRS 18.005 and holding that "statutes permitting the recovery of costs are to be strictly construed because they are in derogation of the common law"), and her second point is unsupported by NRCP 68(g) and the record.

make explicit findings is not a per se abuse of discretion.” *Id.* at 13, 16 P.3d at 428. “If the record clearly reflects that the district court properly considered the *Beattie* factors, [this court] will defer to its discretion.” *Id.* at 13, 16 P.3d at 428-29.

Here, the short trial judge’s order cites no legal basis for denying appellants’ request for attorney fees, but does make a factual finding regarding the reasonableness of Peinado’s decision to reject appellants’ offer of judgment, apparently applying the third *Beattie* factor. Since the short trial judge reached this decision based on the parties’ filings alone and no hearing took place, the record does not “clearly reflect[ ] that the [short trial judge] properly considered” all the *Beattie* factors. *Id.* Accordingly, we conclude the short trial judge abused his discretion by failing to consider all of the *Beattie* factors before denying appellants’ motion for attorney fees. *See id.* Therefore, we reverse the order denying appellants’ motion for attorney fees and remand this case with instructions to consider all of the *Beattie* factors.

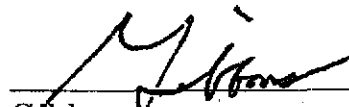
*Peinado’s motion for additur, or in the alternative, for a new trial regarding damages only*

Peinado argues in her cross-appeal that the short trial judge abused his discretion by denying her motion for additur, or in the alternative, for a new trial regarding damages only, by misapplying *Arnold*. However, “[t]he efficient administration of justice requires that any doubts concerning a verdict’s consistency with Nevada law be addressed before the court dismisses the jury.” *Cramer v. Peavy*, 116 Nev. 575, 582-83, 3 P.3d 665, 670 (2000). “[F]ailure to timely object to the filing of the verdict or to move that the case be resubmitted to the jury’ constitutes a waiver of the issue . . . .” *Id.* at 583, 3 P.3d at 670 (quoting *Eberhard Mfg. Co. v. Baldwin*, 97 Nev. 271, 273, 628 P.2d 681, 682 (1981)). Had Peinado raised her

objection before the jury was discharged, the short trial judge would have had the opportunity to consider whether the jury's verdict was inconsistent with Nevada law. Because Peinado did not timely object, she is precluded from raising this argument on appeal. *Id.* 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.  
Silver

  
\_\_\_\_\_, J.  
Gibbons

TAO, J., concurring:

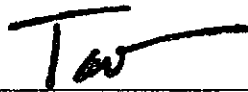
I concur in the judgment, but for slightly different reasons than articulated by my colleagues. The short trial judge awarded fees and costs in favor of Peinado and denied fees and costs to Fernandez. Fernandez argues that NRCP 68(f)(2) permitted fees and costs only to be awarded to her, not to Peinado, because of Peinado's failure to obtain a verdict surpassing the offer of judgment. But this is a little oversimplified. Although the short trial judge erred with respect to his award of costs, there exists a scenario under which he might not have erred with respect to fees and could have awarded fees to Peinado while denying them to Fernandez.

NRCP 68(f)(2) doesn't mandate that fees must be awarded to Fernandez if Peinado failed to meet the offer of judgment; it only permits such an award of fees (although costs must be awarded). So the trial court

wasn't required to give an award of fees to Fernandez; it could have done so but could have refused to do so.

As to Peinado's fees, the timing matters. My colleagues conclude that the trial court couldn't have awarded any fees whatsoever to Peinado. But NRCP 68(f)(2) only addresses awarding fees and costs incurred by Peinado after the offer of judgment was made. It says nothing about any fees and costs incurred before the offer of judgment was extended. Pre-offer fees and costs are left to be governed by other rules instead. For example, Peinado was the prevailing party in the litigation under NRS 18.010 and 18.020. Hypothetically, under these statutes the short trial judge could have awarded Peinado fees and costs incurred prior to the offer of judgment. If he awarded Peinado pre-offer fees and costs while awarding no post-offer fees to Fernandez – or, alternatively, if he awarded fees and costs to both parties but Peinado's pre-offer fees and costs exceeded Fernandez's post-offer fees and costs (probably unlikely here since the offer of judgment was extended so early in the litigation, but not out of the question) – then the net result would be an award of fees and costs in favor of Peinado notwithstanding the offer of judgment not being met.

While this is theoretically possible, the difficulty here is that the short trial judge's findings aren't clear that this is what was intended. The record also isn't quite clear how the relative pre- and post-offer fees and costs pencil out between the parties as the trial court didn't do the necessary math in its findings. Consequently, I concur in the judgment of remand for better and more complete findings regarding what was intended.

  
\_\_\_\_\_, J.  
Tao

cc: Chief Judge, Eighth Judicial District Court  
Hon. Kathy A. Hardcastle, Senior Judge  
Patrick N. Chapin, Pro Tempore Judge  
William C. Turner, Settlement Judge  
Law Offices of Karl H. Smith/Las Vegas  
Nettles Law Firm  
Eighth District Court Clerk