

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAVIER GONZALEZ-ULLOA, AN
INDIVIDUAL; OMAR FLORES-GOMEZ,
AN INDIVIDUAL; AND JOSEPH J.
PURDY, ESQ.,
Appellants,
vs.
NANCY GUTIERREZ, AN
INDIVIDUAL,
Respondent.

No. 75422-COA

FILED

MAR 25 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Javier Gonzalez-Ulloa, Omar Flores-Gomez, and Joseph J. Purdy, Esq.,¹ appeal from a district court order awarding attorney fees to the plaintiff in a tort action and dismissing the case under NRCP 68(d).² Eighth Judicial District Court, Clark County; Rob Bare, Judge.

¹Purdy was counsel of record below, but purports to be a party to this appeal because the district court's order states that the defendants and their counsel are "jointly and severally" liable for the award of attorney fees. The parties do not challenge whether Purdy can be a party to this appeal, but he was not a party to the action below, and attorneys cannot be personally subjected to fee awards under NRS 18.010. The district court's order also references NRCP 11 and EDCR 7.60(b), which permit attorneys to be personally sanctioned, but "[s]anctioned attorneys do not have standing to appeal because they are not parties in the underlying action; [instead], extraordinary writs are a proper avenue for attorneys to seek review of sanctions." *Watson Rounds v. Eighth Judicial Dist. Court*, 131 Nev. 783, 786-87, 358 P.3d 228, 231 (2015). Nevertheless, we need not reach this issue because we vacate the fee award on other grounds.

²We note that the Nevada Rules of Civil Procedure, including NRCP 68, were recently amended, effective March 1, 2019. *See In re Creating a Committee to Update and Revise the Nevada Rules of Civil Procedure*, ADKT

Nancy Gutierrez sued Gonzalez-Ulloa and Flores-Gomez for damages in connection with a motor-vehicle collision.³ The parties litigated the matter through court-annexed arbitration and into full discovery following the defendants' request for a trial de novo. However, it was later revealed that defense counsel had responded to discovery requests and continued litigating the matter in spite of having lost all contact with the defendants soon after the collision.

After the defendants failed to appear for their scheduled depositions, their counsel served Gutierrez with an offer of judgment under NRCP 68 for \$15,000—the full policy limit. That offer read in relevant part as follows:

Pursuant to N.R.C.P. Rule 68 and N.R.S. 17.115, Defendants . . . hereby offer to allow Judgment to be taken against them in this action by Plaintiff . . . in the total amount of [\$15,000.00]. Costs accrued and prejudgment interest to date are included in the amount offered and are not to be awarded in addition to the sum of \$15,000.00.

This Offer of Judgment is made for the purposes specified in N.R.C.P. 68 and N.R.S. 17.115 and is not to be construed as an admission that said Defendants are liable in this action or that the Plaintiff has suffered any damages.

This offer is not to include attorney's fees and is voided by an award of the same.

0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018). Because the prior version of NRCP 68 applies to this case, that version is cited herein.

³We do not recount the facts except as necessary to our disposition.

(emphasis added).⁴ Despite some confusion as to the meaning of that final sentence, Gutierrez accepted the offer. She then moved for an award of attorney fees as sanctions on grounds that the defendants and their counsel had unreasonably multiplied the proceedings. The defendants opposed the motion and filed a countermotion to dismiss the case under NRCP 68(d) because they had already paid Gutierrez the full amount of the offer. The district court granted both motions, dismissing the case under NRCP 68(d) and awarding \$10,000 in attorney fees to Gutierrez as sanctions, for which the defendants and their counsel (Appellants) were held jointly and severally liable.

On appeal, Appellants argue that the district court erred as a matter of law when it awarded attorney fees because the offer of judgment expressly precluded such an award. Specifically, they argue that parties are entitled to bargain away compensatory sanctions and that Gutierrez did just that when she accepted the offer of judgment. Gutierrez counters that the plain language of the offer did not prevent the district court from awarding attorney fees as punitive sanctions for litigation misconduct. However, because we conclude that the offer itself was legally invalid and therefore not subject to acceptance, we need not address the specific grounds urged by the parties. *See Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986) (“The ability of this court to consider relevant issues *sua sponte* in order to prevent plain error is well established. Such is the case where a statute which is clearly controlling was not applied by the trial court.” (internal citation omitted)); *see also Mardian v. Greenberg Family*

⁴The offer states compliance with NRS 17.115, but that statute was repealed over a year before the offer was first served. 2015 Nev. Stat., ch. 442, § 41, at 2569.

Tr., 131 Nev. 730, 733-34, 359 P.3d 109, 111 (2015) (noting that on de novo review of denial of summary judgment, the court is not limited only to what the parties expressly argue: “While the arguments made by the parties focus on Nevada law, the issue of whether the Arizona law should have been applied must also be addressed.”); *Nev. Power Co. v. Haggerty*, 115 Nev. 353, 365 n.9, 989 P.2d 870, 877-78 n.9 (1999) (explaining that the court would resolve an issue of statutory interpretation not litigated below “in the interests of judicial economy”).

In their briefing before this court, the parties overlook controlling Nevada precedent that is dispositive of this appeal. While this court will generally avoid addressing issues not raised by the parties on appeal, *see Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011), the primary issue before us concerns the legal effect of the language in the offer of judgment purporting to void it upon entry of any award of attorney fees. We conclude that this language constitutes an impermissible condition rendering the offer of judgment invalid as a matter of law.

Under NRCP 68(a), “any party may serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions.” However, the Nevada Supreme Court has held that “[a]n offer of judgment must be unconditional and for a definite amount in order to be valid for purposes of NRCP 68.” *Pombo v. Nev. Apartment Ass’n*, 113 Nev. 559, 562, 938 P.2d 725, 727 (1997); *see Barella v. Exchange Bank*, 101 Cal. Rptr. 2d 167, 172 (Ct. App. 2000) (noting that “while [California’s similar offer of judgment] statute contemplates that an offer made pursuant to its terms may properly include nonmonetary terms and conditions, the offer itself

must, nonetheless, be *unconditional*).⁵ Despite changes to NRCP 68 and the former NRS 17.115 over the years—including the addition of language to NRCP 68 explicitly authorizing apportioned offers to multiple offerees that are conditioned upon acceptance by all offerees⁶—the supreme court continues to recognize the general rule that offers of judgment shall be unconditional. *See Quinlan v. Camden USA, Inc.*, 126 Nev. 311, 314, 236 P.3d 613, 615 (2010) (citing *Pombo*, 113 Nev. at 562, 938 P.2d at 727, and noting the rule that an offer of judgment must be unconditional as an example of “formal requirements” to which such offers must adhere). This limitation comports with the general purpose underlying offers of judgment, as conditional language can lead to protracted post-acceptance litigation like the instant appeal. *See Marek v. Chesny*, 473 U.S. 1, 5 (1985) (“The plain purpose of Rule 68 is to encourage settlement and avoid litigation.”); *Thomann v. Fouse*, 93 P.3d 1048, 1050 (Alaska 2004) (applying a similar version of Rule 68 and noting that the prohibition of conditional offers “is designed to avoid post-trial litigation concerning the meaning of the offer”).

⁵Courts in other jurisdictions apply similar rules. *See* Laura T. Kidwell, J.D., *Construction of State Offer of Judgment Rule—Sufficiency of Offer and Contract Formation Issues*, 118 A.L.R. 5th 91 (2004) (“[C]ourts have limited the arenas in which offers of judgment can be extended, and in those arenas permitted, they have scrutinized whether offers of judgment are sufficiently specific to give offerees the ability to evaluate them and make reasoned decisions about whether to accept them. The courts have especially examined offers of judgment addressing multiple claims and ones containing nonmonetary terms and conditions.”).

⁶Previously, the supreme court had recognized that such offers were impermissibly conditional and thus invalid. *See Lentz v. I.D.S. Fin. Servs., Inc.*, 111 Nev. 306, 307-09, 890 P.2d 783, 784-85 (1995), *superseded by statute and rule as recognized by Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 423 n.23, 132 P.3d 1022, 1031 n.23 (2006).

A second purpose of NRCP 68 is to establish the foundation for a later award of fees when a reasonable offer is not accepted and the rejecting party fails to obtain a better outcome at trial. *See* NRCP 68(f) (setting forth the penalties for rejecting an offer and failing to obtain a more favorable judgment). But if the offer contains conditions that may or may not render it void based upon the occurrence of other events, then it becomes unclear whether an offer was subject to being accepted or rejected when it was made, and consequently it may not be clear whether the offer could trigger an award of fees or not.

Here, the language purporting to void the offer upon any award of attorney fees rendered the offer conditional and thus invalid under *Pombo v. Nevada Apartment Association*, 113 Nev. at 562, 938 P.2d at 727.⁷ *See Condition, Black's Law Dictionary* (10th ed. 2014) (defining “condition” as “[a] future and uncertain event on which the existence or extent of an obligation or liability depends; an uncertain act or event that triggers or negates a duty to render a promised performance”); *id.* (defining “condition subsequent” as “[a] condition that, if it occurs, will bring something else to an end; an event the existence of which, by agreement of the parties, discharges a duty of performance that has arisen”). District courts have inherent authority to award attorney fees as sanctions, either on a party’s motion or sua sponte. *Emerson v. Eighth Judicial Dist. Court*, 127 Nev.

⁷Ironically, even if Gutierrez had rejected the offer and not received a more favorable verdict at trial, Appellants would not have been able to move for attorney fees for having successfully beaten their own offer of judgment. This is because an award of attorney fees—to which they would have been entitled—would have voided the offer under its own language. Thus, Appellants would not even have been able to reap the benefits of making an offer of judgment. *See* NRCP 68(f).

672, 680, 263 P.3d 224, 229 (2011). Accordingly, at the time the offer was extended and accepted, there remained a possibility that the district court—even without any prompting from the parties—would enter an award of fees in the future. Because the continued viability of the offer depended upon the happening of an uncertain event that could (and did) lead to further litigation, the offer included an impermissible condition that rendered it invalid, and we reverse the district court's order dismissing the case under NRCP 68(d).⁸ Because we reverse the underlying judgment, the district court's award of fees was premature, and we necessarily vacate it. *See W. Techs., Inc. v. All-Am. Golf Ctr., Inc.*, 122 Nev. 869, 876, 139 P.3d 858, 862 (2006).

Based on the foregoing, we


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



_____, J.
Tao



_____, J.
Gibbons



_____, J.
Bulla

⁸We note that Appellants likely could have avoided this issue by drafting the offer to state simply that each party would bear their own attorney fees or that the offer was inclusive of fees. With such phrasing, the validity of the offer itself would not have hinged upon the happening of some future and uncertain event; rather, the settlement agreement contained within the offer likely would have been fully effective upon acceptance.

cc: Hon. Rob Bare, District Judge
Keating Law Group
Relief Lawyers LLC
Eighth District Court Clerk