IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CARMINE RIGA, III, AN INDIVIDUAL,
Appellant,
vs.
SHAIYA MCNABB, AN INDIVIDUAL; AND RODNEY MCNABB, AN INDIVIDUAL,
Respondents.

No. 81310-COA

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Carmine Riga, III, appeals from post-judgment order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

The underlying case is a personal injury action stemming from a motor vehicle accident.[1] Shaiya McNabb was driving her father Rodney McNabb's (collectively the McNabbs) truck when she backed into Riga's car, allegedly causing Riga injury. Subsequently, Riga filed a complaint alleging negligence against Shaiya and negligent entrustment and liability under the "family use doctrine" against Rodney. After a five-day jury trial, where the only issues were proximate cause and damages, the jury returned a defense verdict, determining that Riga was not entitled to damages.[2]

After obtaining a defense verdict, the McNabbs filed a motion for attorney fees and costs on the grounds that they were the prevailing party under NRS 18.020 and since they obtained a more favorable judgment

[1]We do not recount the facts except as necessary for our disposition.

[2]The trial itself is the subject of a separate appeal. *See Riga, III v. McNabb*, Docket No. 80856-COA.

than their offer of judgment under NRCP 68.[3] In their memorandum of costs, the McNabbs requested $87,291.84 in costs, and in their motion for attorney fees, they requested $79,573.80 in fees. Riga filed a motion to retax the costs and reduce the amount of attorney fees requested. After conducting a hearing on the parties' motions, the district court filed its decision, awarding fees and costs in the amounts of $35,000 and $46,102.42, respectively.

On appeal, Riga argues that the district court abused its discretion in awarding the McNabbs their costs because the costs were not "reasonable, necessary, and actually incurred," and lacked justifying documentation, and that the expert fees exceeded the presumptive statutory limit without proper explanation. Riga further argues that the district court abused its discretion in awarding attorney fees because the court did not adequately analyze the *Beattie*[4] or *Brunzell*[5] factors, and that the fees were otherwise unreasonable.

We first address costs. An award of costs is reviewed for an abuse of discretion. *Logan v. Abe*, 131 Nev. 260, 267, 350 P.3d 1139, 1144

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[3]The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Comm. To Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018) ("[T]his amendment to the [NRCP] shall be effective prospectively on March 1, 2019, as to all pending cases and cases initiated after that date."). Here, the offer of judgment was served prior to March 1, 2019, and accordingly we apply the pre-amendment version of the rule—although we note that the result is the same because the amendments did not substantively alter the rule.

[4]*Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983).

[5]*Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

(2015). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006).

Riga argues that the district court "took the easy way out" by not addressing each cost in the McNabbs' memorandum, specifically the costs enumerated under the heading "Copies/Postage/Telephone/Fax."[6] Riga further contends that receipts and invoices were insufficient to justify an award of these particular costs. The McNabbs, on the other hand, assert that the district court did not abuse its discretion in awarding such costs. We agree with the McNabbs.

Under NRS 18.020, "[c]osts must be allowed of course to the prevailing party" after entry of a judgment. Although an award of costs is mandated, "the district court still retains discretion when determining the reasonableness of the individual costs to be awarded." *U.S. Design & Constr. Corp. v. Int'l Bhd. of Elec. Workers, Local 357*, 118 Nev. 458, 463, 50 P.3d 170, 173 (2002).

Further, awarded "costs must be reasonable, necessary, and actually incurred." *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 120, 345 P.3d 1049, 1054 (2015); *see also Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971 P.2d 383, 385-86

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[6]Riga also argues that the district court "erred" as to a miscellaneous investigation fee report. The district court, under NRS 18.005(16), has the authority to allow for such miscellaneous fees, including an investigation report. There was evidence in the record demonstrating that justifying documentation was present supporting the court's decision. Therefore, Riga has not demonstrated, nor do we conclude, that the district court abused its discretion in awarding this miscellaneous cost. *See Logan*, 131 Nev. at 267, 350 P.3d at 1144.

(1998) (stating that costs awarded under NRS 18.005 must be reasonable, and that "reasonable costs must be actual and reasonable," rather than an estimate, even if the estimate itself is reasonable (internal quotation marks omitted)). To support an award of costs, justifying documentation must be provided to the district court to "demonstrate how such [claimed costs] were necessary to and incurred in the present action." *Cadle*, 131 Nev. at 120, 345 P.3d at 1054 (alteration in original) (internal quotation marks omitted). "Justifying documentation means something more than a memorandum of costs." *In re DISH Network Derivative Litig.*, 133 Nev. 438, 452, 401 P.3d 1081, 1093 (2017) (internal quotation marks omitted).

Here, despite Riga's contention otherwise, there was sufficient documentation to support the district court's award of this category of costs. The McNabbs listed every cost that they incurred in their memorandum of costs, and also attached corresponding itemized invoices, receipts, or checks to demonstrate each claimed cost. The McNabbs also included a declaration, which explained that the costs were necessary and incurred during the course of litigation.

To the extent that Riga argues that invoices do not adequately justify an award of costs, he has not provided any relevant authority to support such a proposition. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). We note, however, that in order to properly document that a cost was necessarily incurred, a party must provide just "something more" than the memorandum of costs. *In re DISH Network*, 133 Nev. at 452, 401 P.3d at 1093 (internal quotation marks omitted). An invoice is indeed something other than a memorandum and also demonstrates that the party is obligated to pay such a debt. *See Logan,*

131 Nev. at 262, 350 P.3d at 1140 (providing that an expense has been incurred when a party has paid it or "become[s] legally obligated to pay it" (internal quotations omitted)).

Therefore, we conclude that the district court did not abuse its discretion in awarding the McNabbs their costs as to the "Copies/Postage/Telephone/Fax" and other miscellaneous costs as its determination was supported by substantial evidence and was otherwise not clearly erroneous. *See Cadle*, 131 Nev. at 120, 345 P.3d at 1054.[7]

Next, Riga argues that the district court abused its discretion in awarding certain expert fees as costs by not providing an explanation as to why the court awarded expert fees in excess of $1,500, which is the presumptive limit under NRS 18.005. The McNabbs argue the expert fees were reasonable and necessary in prevailing. We agree with Riga.

"A district court's decision to award more than $1,500 in expert witness fees is reviewed for an abuse of discretion." *Frazier v. Drake*, 131 Nev. 632, 644, 357 P.3d 365, 373 (Ct. App. 2015). NRS 18.005(5) provides for the recovery of "[r]easonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each 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." A district court abuses it discretion when it fails to explain "by an express, careful, and preferably written explanation of the court's analysis of factors pertinent to determining the reasonableness of the requested fees and

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[7]To the extent that Riga asks this court to retax the costs of the copies under NRS 629.061(5), he has not demonstrated that this subsection of the statute applies in this case. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

whether the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee." *Frazier*, 131 Nev. at 650, 357 P.3d at 377 (internal quotation marks omitted).

In retaxing the expert costs, the district court limited Drs. Tung's, Peles', and Janzen's[8] trial testimony fees to $1,500, but also awarded Drs. Tung and Peles additional expert fees reflective of the experts' extensive pre-trial preparation and travel expenses.[9] Further, despite failing to make specific findings as to the necessity and reasonableness of Dr. Rothman's expert fee, the district court awarded the McNabbs Dr. Rothman's total fee of $10,614.

Although it appears that the district court limited the trial testimony fees of Drs. Tung and Peles to $1,500, it also awarded additional fees that combined exceed the presumptive statutory limit of $1,500, without explaining its reasons for doing so. Under *Frazier*, the court was required to explain how each expert's role on behalf of the McNabbs' defense necessitated a greater fee award under the *Frazier* factors. While arguably the district court may have made some of these considerations, as evidenced by the reduction of the experts' fees, there was nothing either at the hearing or in the district court's written decision or final order, which expressly sets forth the court's rationale for awarding expert fees above the presumptive statutory limit. Therefore, we conclude that the district court abused its discretion in awarding Drs. Tung, Peles, and Rothman expert fees above

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[8]The district court referred to this doctor as "Dr. Jansa"; however, this appears to be a typographical error.

[9]Because the award as to Dr. Janzen was not over the presumptive statutory limit, the district court was not required to detail its reasoning as to the award and, therefore, the court did not abuse its discretion as to Dr. Janzen's expert fee award. *See* NRS 18.005(5).

$1,500 without providing its analysis for doing so. Accordingly, we reverse the district court's order in part and remand for application of the *Frazier* factors.

Finally, we address attorney fees. Riga argues that the district court erred in its analysis of the *Beattie* factors and that "[d]e novo review by this court . . . would favor denial of attorney's fees." The McNabbs on the other hand argue that the district court did not abuse its discretion in awarding fees, and the court's application of the *Beattie* factors was not arbitrary or capricious.

Here, the district court found that "the attorneys' fees sought by the Defendants [were] reasonable, *Brunzell*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), but an order that Plaintiff pay them in their entirety is not justified." The district court then reduced the attorney fee award to $35,000 from $79,573.80.

As a preliminary matter, we note that this court does not review a district court's analysis of the *Beattie* factors de novo; rather, we review for an abuse of discretion. *Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318, 324, 890 P.2d 785, 789 (1995) ("Unless the trial court's exercise of discretion in evaluating the *Beattie* factors is arbitrary or capricious, this court will not disturb the lower court's ruling on appeal."), *superseded on other grounds by statute as stated by RTTC Commc'ns, LLC v. Saratoga Flier, Inc.*, 121 Nev. 34, 110 P.3d 24 (2005). "It is within the discretion of the trial court judge to allow attorney's fees pursuant to Rule 68" and "[u]nless the trial court's exercise of discretion is arbitrary or capricious, this court will not disturb the lower court's ruling on appeal." *Schouweiler v. Yancey Co.*, 101 Nev. 827, 833, 712 P.2d 786, 790 (1985).

When exercising its discretion to award attorney fees, the district court must evaluate the following factors:

> (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, 99 Nev. at 588-89, 668 P.2d at 274. While it is preferable, express factual findings on each factor are not necessary for a court to properly exercise its discretion; instead, "the district court need only demonstrate that it considered the required factors, and the award must be supported by substantial evidence." *Logan*, 131 Nev. at 266, 350 P.3d at 1143. Further, while all of these factors must be considered, not one is outcome determinative, "and thus, each should be given appropriate consideration." *Frazier*, 131 Nev. at 642, 357 P.3d at 372.

Here, the district court made express findings as to the *Beattie* factors and determined that they weighed in favor of awarding attorney fees, though it ultimately reduced the total amount of fees awarded. Based on the record, we conclude that the district court did not abuse its discretion in analyzing and considering the *Beattie* factors.[10]

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[10]To the extent that Riga argues that the district court impermissibly considered the policy limits in making its determination under *Beattie*, we disagree, and Riga fails to cite to any *relevant* authority for support. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. Riga cites to inapplicable cases regarding the trial admissibility of policy limits and the per se rule barring a collateral source of payment into *evidence at trial*, but does not cite to any cases which states that a policy limits offer cannot be considered in assessing whether a party made a good faith offer of judgment under *Beattie*. In fact, in an unpublished disposition, the supreme court has affirmed a district court's analysis under *Beattie*, even when policy limits were acknowledged. *See Taylor v. Kilroy*, Docket No. 75131 (Order of

Riga also argues that the district court abused its discretion in awarding attorney fees because the McNabbs did not provide sufficient documentation, the billing was excessive, and the fees were otherwise unreasonable. Specifically, Riga argues that this court should retax certain fees for being unreasonable. We disagree.

After reviewing both the *Beattie* and *Brunzell* factors, the district court significantly reduced the amount of attorney fees awarded. To the extent that Riga now asks us to further determine that such fees are unreasonable, or indeed reverse the fee award altogether, based on the award of improper paralegal fees and fees related to two specific attorneys, we decline to do so. The paralegal fees were permissible,[11] and we cannot conclude that the district court abused its discretion in awarding $816 in fees incurred by two individual attorneys, particularly where the court evaluated and approved the billing records of other attorneys in the same firm under *Brunzell*. As an aside, this de minimis amount that Riga is now asking this court to reduce the overall fee award by, could conceivably have already been reduced by the district court in its significant reduction of fees.

Affirmance, July 15, 2019) (affirming a district court's consideration of the *Beattie* factors in light of the $1 million policy limit).

[11]Although Riga argues that paralegal and other office staff fees should not be permitted, this defies controlling precedent. *See LVMPD v. Yeghiazarian*, 129 Nev. 760, 769-70, 312 P.3d 503, 510 (2013) (citing *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989) (providing that reasonable attorney fees "must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client," and therefore reasonable attorney fees "should compensate the work of paralegals, as well as that of attorneys")).

Therefore, we cannot find the district court abused its discretion as to the award of attorney fees.[12]

In sum, we reverse in part only the district court's award of expert fees as to Drs. Tung, Peles, and Rothman, and remand for the district court to make findings under *Frazier* related to the award of expert fees above the presumptive statutory limit should the court determine that such fees are justified. We affirm all other aspects of the district court's award of attorney fees and costs.[13] 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.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Mark R. Denton, District Judge
Nicolas M. Bui, Ltd.
Winner & Sherrod
Eighth District Court Clerk

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[12]Riga also argues that the district court erred in not addressing the *Brunzell* factors in any detail; however, it is not required that a court make express findings in detail as to each factor, as "the district court need only demonstrate that it considered the required factors." *Logan*, 131 Nev. at 266-67, 350 P.3d at 1143.

[13]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.