

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARK E. HAMILTON, INDIVIDUALLY,
Appellant,
vs.
TODD R. BOTT, INDIVIDUALLY,
Respondent.

No. 82410-COA

FILED

DEC 23 2021

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

ORDER REVERSING AND REMANDING

Mark E. Hamilton appeals from a district court order vacating attorney fees and costs. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Hamilton initiated a civil suit against Todd R. Bott for damages sustained from a motor vehicle collision.¹ Hamilton sent an offer of judgment under NRCP 68 to Bott for \$1,000,000, inclusive of “all fees, costs, attorney fees, and pre-judgment interest.” Bott then sent Hamilton an offer of judgment under NRCP 68 in the amount of \$75,001, inclusive “of costs, interest and fees.” Neither party accepted the other’s offer of judgment. The matter proceeded to trial and resulted in a jury verdict in favor of Hamilton for \$11,500.

Following trial, Hamilton filed a motion for an award of attorney fees as the prevailing party recovering less than \$20,000 pursuant to NRS 18.010(2)(a)² and requested costs under NRS 18.020(3) because he sought more than \$2,500 in damages. Bott opposed the motion, contending that he

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

²NRS 18.010(2) states, in part, “In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney’s fees to a prevailing party . . . [w]hen the prevailing party has not recovered more than \$20,000”

was the prevailing party at trial because he had served an offer of judgment of \$75,001, inclusive of fees, costs, and interest, and Hamilton failed to obtain a verdict greater than Bott's offer.³ Bott also filed his own motion for an award of attorney fees and costs based on Hamilton's failure to exceed Bott's offer of judgment pursuant to NRCP 68. The district court in its first order concluded that Hamilton was the prevailing party at trial because, after adding fees and costs to the verdict, his recovery exceeded Bott's offer of judgment and, therefore, Hamilton was entitled to fees under NRS 18.010(2)(a) as he recovered less than \$20,000 at trial.

In awarding fees, the district court also considered and made specific findings as to the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), determining that each of the *Brunzell* factors was met and that an award of attorney fees to Hamilton was both reasonable and justified. The district court also found that Hamilton was entitled to an award of costs under NRS 18.020(3), as Hamilton was the prevailing party and had sought more than \$2,500 in damages. Additionally, the court considered Bott's motion for fees, pursuant to *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983), and concluded that Bott's request did not satisfy the *Beattie* factors, precluding Bott from being awarded fees under NRCP 68.

Subsequently, Bott filed a motion to reconsider the award of attorney fees, arguing that (1) the court should have used the \$1,000,000 offer of judgment made by Hamilton when comparing it to Hamilton's verdict at trial to determine whether an award of fees under NRCP 68(f) was

³NRCP 68(f)(1)(A) provides that "[i]f the offeree rejects an offer and fails to obtain a more favorable judgment . . . the offeree cannot recover any costs, expenses, or attorney fees and may not recover interest for the period after the service of the offer and before the judgment."

proper; (2) since Hamilton's total recovery after including fees and costs exceeded Bott's offer of judgment, Hamilton's recovery was greater than the \$20,000 limitation of NRS 18.010(2)(a), thereby precluding an award of fees pursuant to the statute; and (3) at trial Hamilton sought more than \$20,000 in damages, and therefore NRS 18.010(2)(a) should not apply, as it only applies to parties seeking recovery of less than \$20,000. Hamilton opposed Bott's motion to reconsider. Nevertheless, the district court in its second order ultimately granted Bott's motion, concluding that upon reconsideration of its first order it should not have awarded attorney fees and costs based on further analysis of NRCP 68, and therefore, vacated Hamilton's award of attorney fees and costs. Because the district court reconsidered its first order based on Bott's first argument above, the court declined to address Bott's second and third reasons for reconsideration.

Hamilton next filed a motion to reconsider the district court's order granting Bott's motion to reconsider and vacating his award of attorney fees and costs, arguing that the district court erred in concluding that he was seeking an award of fees and costs pursuant to NRCP 68, when he had moved for fees and costs pursuant to NRS 18.010(2)(a) and NRS 18.202(3). Hamilton further argued that NRCP 68 was only relevant to the determination of whether he exceeded Bott's offer of judgment of \$75,001 in order to recover his statutory fees and costs as the prevailing party. Hamilton explained that such determination was based on whether he exceeded Bott's offer of judgment, and not whether his recovery at trial exceeded his own offer of judgment of \$1,000,000, previously served on Bott. And because the court had previously determined that Hamilton's recovery exceeded Bott's offer of judgment under NRCP 68, he was the prevailing party and entitled to an award of fees under NRS 18.010(2)(a) and costs

under NRS 18.020(3), and therefore, the district court abused its discretion in reversing his award.

The district court in its third order acknowledged that its second order was “faulty” because Hamilton was not requesting attorney fees and costs under NRCP 68. Nevertheless, the district court ultimately concluded that an award of attorney fees under NRS 18.010(2)(a) is discretionary and because the matter “could have gone either way” neither side should be awarded fees. Based on the district court’s third order, it appears that the court’s decision was based on its determination that the jury “sided with” Bott and awarded damages “substantially lower” than what Hamilton had asked for at trial. We note that these factual determinations in the district court’s third order are contrary to those contained in its first order. Hamilton timely appealed.

On appeal, Hamilton argues that the district court abused its discretion in denying Hamilton’s motion for reconsideration of the court’s order granting Bott’s motion for reconsideration that vacated his award of attorney fees under NRS 18.010(2)(a) and costs under NRS 18.020(3), as Hamilton was the prevailing party and recovered less than \$20,000 at trial and sought more than \$2,500 in damages.

As a preliminary matter, although the denial of a motion for reconsideration is not independently appealable, this court may review that decision for an abuse of discretion where, as here, the decision is part of the appellate record from the appealable order and the district court addressed the motion on the merits. *See AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010); *Arnold v. Kip*, 123 Nev. 410, 417, 168 P.3d 1050, 1054 (2007).

Under EDCR 2.24(b), a district court may reconsider a previous ruling of the court. A district court “may reconsider a previously decided

issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous.” *Masonry & Tile Contractors Ass’n of S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). A district court’s decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *AA Primo Builders*, 126 Nev. at 589, 245 P.3d at 1197. Additionally, questions of law are reviewed de novo. *Soro v. Eighth Judicial Dist. Court*, 133 Nev. 882, 885, 411 P.3d 358, 361 (Ct. App. 2017). As such, “deference is not owed to legal error.” *AA Primo Builders*, 126 Nev. at 589, 245 P.3d at 1197. To determine whether the district court abused its discretion by denying Hamilton’s motion for reconsideration of the court’s order granting Bott’s motion for reconsideration, this court must first determine whether the district court had a legal basis for granting Bott’s NRCP 59(e) motion for reconsideration and vacating Hamilton’s award of fees and costs.

First, we conclude that the district court abused its discretion in granting Bott’s motion to reconsider the award of fees and costs based on the court’s reasoning set forth in its second order. Among the “basic grounds” for a NRCP 59(e) motion are “correct[ing] manifest errors of law or fact, newly discovered or previously unavailable evidence, the need to prevent manifest injustice, or a change in controlling law.” *AA Primo Builders*, 126 Nev. at 582, 245 P.3d at 1193 (alteration in original) (internal quotation marks omitted).

Here, the district court’s rationale for granting Bott’s motion for reconsideration, presumably based on an “error of law” in the court’s initial interpretation of NRCP 68, was not well-founded. The district court did not specifically address any of the legal grounds for reconsidering its initial award of fees and costs as articulated in *AA Primo Builders*, 126 Nev. at 582, 245 P.3d at 1193 (setting forth the grounds for a Rule 59(e) motion).

Further, the district court's second order granting Bott's motion for reconsideration was based on the incorrect belief that Hamilton was seeking attorney fees and costs pursuant to NRCP 68, and not the applicable statutes, and in determining that Hamilton was not the prevailing party under NRCP 68 because of its erroneous belief that Hamilton was required to exceed his own offer of judgment of \$1,000,000 pursuant to NRCP 68(f) in order to be awarded fees and costs under NRS 18.010(2)(b) as the prevailing party recovering less than \$20,000. However, this is an erroneous interpretation of NRCP 68, which encourages settlement "by placing the risk of loss on the non-accepting offeree, with no risk to the offeror." *Matthews v. Collman*, 110 Nev. 940, 950, 878 P.2d 971, 978 (1994). Therefore, the only offer of judgment relevant in determining whether to award Hamilton attorney fees and costs is Bott's offer of \$75,001 to Hamilton, and not Hamilton's \$1,000,000 offer to Bott. Accordingly, the district court abused its discretion in granting Bott's motion for reconsideration based on its incorrect interpretation of NRCP 68. Simply, there was no reasonable basis for reconsidering and vacating Hamilton's award of fees and costs based on Hamilton's offer to Bott.

However, the district court should have reconsidered its initial award to Hamilton, based on the proper application of NRCP 68. NRCP 68(f)(1)(A) precludes a party from receiving fees and costs if the party *rejects* an offer of judgment and fails to obtain a more favorable judgment. The supreme court has held that the purpose of NRCP 68 is to reward parties who make reasonable offers and punish the party who refuses to accept such an offer. *See RTTC Commc'ns, LLC v. Saratoga Flier, Inc.*, 121 Nev. 34, 42, 110 P.3d 24, 29 (2005). Additionally, NRS 18.010 and NRS 18.020 do not preclude the application of the penalty provisions of NRCP 68(f)(1)(A) in determining whether fees and costs should be awarded under NRS 18.010

and NRS 18.020. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 80, 319 P.3d 606, 615 (2014). Accordingly, NRCP 68 can also preclude an award of fees and costs requested pursuant to NRS 18.010(2)(a) and NRS 18.020(3), if an offeree rejects an offer of judgment under NRCP 68 and fails to obtain a more favorable judgment. Under these circumstances, an offeree is not considered to be the prevailing party under NRS 18.010(2)(a) and NRS 18.020(3), and therefore, is not entitled to recover fees and costs pursuant to these statutory provisions. *See Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1028 (2006) (holding that “even when a statute authorizes an award of attorney fees, if an offeree rejects an offer of judgment more favorable than the verdict obtained, the offeree shall not receive attorney fees and costs”).

Nevertheless, we agree that district court should have reconsidered its award of attorney fees and costs to Hamilton based on the proper application of NRCP 68(g).⁴ Initially, the district court found that Hamilton exceeded Bott’s offer of judgment of \$75,001, by adding Hamilton’s fees and costs from the inception of the case up to the jury verdict, in order to compare it to Bott’s offer of judgment. Based on a review of the record, it appears that the district court failed to include only the pre-offer fees, costs,

⁴NRCP 68(g) address how expenses and fees are considered, and provides as follows:

If a party made an offer in a set amount that precluded a separate award of costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees, the court must compare the amount of the offer, together with the offeree’s pre-offer taxable costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees, with the principal amount of the judgment.

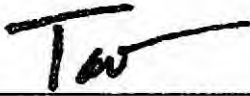
expenses, and interest in applying NRCP 68(g). Therefore, reconsideration is appropriate in order to compare the value of Hamilton's total recovery (by including only the pre-offer fees, costs, expenses, and interest to the verdict) to Bott's offer of judgment of \$75,001 in order to determine whether a statutory award of fees and costs is precluded by NRCP 68(f). Thus, we conclude that the district court in its first order erred in its interpretation and application of NRCP 68 when deciding which party was the "prevailing party" for the purpose of awarding fees and costs under NRS 18.010(2)(a) and NRS 18.020(3).


Therefore, on remand, the district court should first determine, consistent with the correct application of NRCP 68, whether Hamilton's recovery based on NRCP 68(g) exceeded Bott's offer of judgment of \$75,001. If the court determines that Hamilton's recovery exceeds Bott's offer of judgment, then recovery of fees is not precluded by NRCP 68(f), and the court would then consider whether to exercise its discretion and award Hamilton attorney fees based on prevailing-party status.


However, unlike an award of attorney fees that is discretionary with the court, an award of costs to the prevailing party is mandatory pursuant to NRS 18.020(3). *Smith v. Crown Fin. Serv. Of Am.*, 111 Nev. 277, 287, 890 P.2d 769, 775 (1995) (holding that the court must award costs to the prevailing party under NRS 18.020(3) "as a matter of right"). A party does not need to succeed on all claims to be designated as the prevailing party. *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 90, 343 P.3d 608, 615 (2015). Specifically, NRS 18.020(3) mandates the following: "Costs must be allowed of course to the prevailing party against any adverse party against whom judgment is rendered . . . [i]n an action for the recovery of money or damages, where the plaintiff seeks to recover more than \$2,500."

Here, the district court initially made findings supporting an award of costs under NRS 18.020(3), but then reconsidered the award based on an erroneous interpretation of NRCP 68(f)(1)(A) and NRCP 68(g), as analyzed *supra*.⁵ Therefore, on remand, after properly comparing Hamilton's recovery under NRCP 68(g) against Bott's offer of judgment, if the district court determines that Hamilton is the prevailing party, then the court will necessarily be required to award Hamilton costs as mandated by NRS 18.020(3). Accordingly, we

ORDER the judgment of the district court REVERSED and REMAND for further proceedings consistent with this order.⁶


_____, J.
Tao


_____, C.J.
Gibbons


_____, J.
Bulla

⁵In addition, with respect to the award of costs, the district court in its third order declined to award costs because it erroneously determined that Hamilton did not beat Bott's offer of judgment because it excluded the attorney fees incurred by Hamilton when comparing Hamilton's "total judgment" to Bott's offer of judgment of \$75,001. Pursuant to NRCP 68(g), pre-offer attorney fees must be included in determining whether Hamilton's total recovery exceeded Bott's offer.

⁶Although we remand this matter to the district court to determine if fees and costs should be awarded to Hamilton, we do not intend for the district court to reconsider an award of fees and costs to Bott, as Bott did not challenge the denial of his request for fees and costs and the ability to appeal that denial has expired.

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Department 1
Persi J. Mishel, Settlement Judge
Injury Lawyers of Nevada
Rogers, Mastrangelo, Carvalho & Mitchell, Ltd.
Eighth District Court Clerk