

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SHARON WHEELER, AN INDIVIDUAL,
Appellant,

vs.

CLEAR TITLE COMPANY, INC., A
NEVADA CORPORATION,
Respondent.

CLEAR TITLE COMPANY, INC., A
NEVADA CORPORATION,
Appellant,

vs.

SHARON WHEELER, AN INDIVIDUAL,
Respondent.

No. 83684-COA

FILED

MAR 24 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT

No. 84613-COA

DEPUTY CLERK

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

Sharon Wheeler appeals from an order granting summary judgment in a contract and tort action in favor of Clear Title Company, Inc. (Clear Title). Clear Title appeals from a separate order limiting the recovery of costs incurred for expert witnesses and denying Clear Title's request for attorney fees. These appeals were consolidated. Eighth Judicial District Court, Clark County; Veronica Barisich, Judge.

In 2018, Wheeler began looking for a new residence, but she did not have the financial capability to purchase another property at that time.¹ Keith, her ex-husband, purchased a property, in the Las Vegas area (the Flare Star Property), for Wheeler with the understanding that she would purchase the property from him when she was financially able and that she would live in it. In July 2018, the Journey Trust, for which Wheeler was the sole trustee, began the process of purchasing the Flare Star Property.

¹We recount the facts only as necessary for our disposition.

Neither Keith nor Wheeler wanted to use a realtor for this transaction, so Keith reached out to Clear Title, an escrow company, because he had used its services before and could save money. Clear Title is licensed to provide escrow services in Nevada.

Ela Rose, an escrow agent at Clear Title, began working with Keith to assist him in the process of selling the Flare Star Property to the Journey Trust. Rose and Keith filled out the Greater Las Vegas Association of Realtors Residential Purchase Agreement together, with Rose transcribing Keith's responses. As the closing was nearing, Rose emailed Wheeler and Keith a copy of the preliminary title report. The preliminary title report instructed Wheeler to contact the escrow office, Clear Title, for wiring instructions.

Rose, Keith, and Wheeler agreed to meet in December 2018 to close the escrow. Two days before the closing, Wheeler received an email from the address "closingfile12@comcast.net," informing her that the closing funds should be wired that day to avoid a closing delay. The email stated it was from Rose, but it was not sent from her email address. Wheeler replied to the email while she was driving to the closing appointment and received wiring instructions in response. The instructions were not on Clear Title letterhead, and the account the money was to be wired into contained the name of an individual not affiliated with Clear Title. Wheeler did not call Rose to confirm the instructions. Instead, she stopped at the bank on the way to the closing appointment and wired the money to the fraudulent account.

When Wheeler arrived at the closing, 15 minutes after the transfer, she informed Rose that she had transferred the funds and attempted to give Rose the written wire confirmation. Rose did not take the confirmation, telling Wheeler she would check the wire board. During the

meeting, Keith and Wheeler signed several escrow and loan documents, including the Clear Title Escrow Instructions. The instructions contained the contractual duties between the parties. It was during this meeting that Wheeler was first given Clear Title's wiring instructions.

The evening of the closing, Rose noticed that Clear Title had not received the wire from Wheeler. Rose called Wheeler and notified her of the problem. The following day, Rose requested that Wheeler send her a copy of the emailed wire instructions. When Rose looked at the instructions, she realized Wheeler had been the victim of a scam. By that time, however, it was too late to reverse the wire transfer.

Wheeler filed an initial complaint against Clear Title in April 2019 and an amended complaint in May 2019.² In September 2019, Clear Title filed a motion to dismiss, which was denied by the district court. In October 2019, Clear Title made an offer of judgment in the amount of \$20,000. Wheeler did not respond to the offer, so it was deemed rejected.

Clear Title filed a motion for summary judgment in June 2021 after discovery had closed. The district court granted Clear Title's motion, and a judgment was entered in Clear Title's favor on all claims asserted in Wheeler's amended complaint. After the motion for summary judgment was granted, Clear Title filed a verified memorandum of costs and a motion seeking attorney fees under the offer of judgment rule. The district court awarded Clear Title some of the costs it requested but denied Clear Title's motion for attorney fees. The district court's decision to limit Clear Title's

²Wheeler raised the following claims against Clear Title: (1) negligence; (2) intentional or gross negligence; (3) duty to warn; (4) respondeat superior; (5) negligent training, supervision, and retention against Clear Title; (6) breach of fiduciary duty; (7) breach of contract; and (8) emotional distress.

recovery of costs was based on the district court's finding that Nevada law limits a party's recovery of expert witness fees to \$1,500, unless the party shows that a larger fee was necessary based on the *Frazier*³ factors, which the court found Clear Title had failed to meet. The district court failed to address the costs incurred by Clear Title in deposing Wheeler's expert. The district court also found that the *Beattie*⁴ factors militated against an award of attorney fees.

On appeal, Wheeler challenges the order granting summary judgment, arguing the district court erred because: (1) Wheeler was a proper party to the lawsuit; (2) Clear Title had a duty to receive and transfer Wheeler's funds; (3) Clear Title was negligent in executing its duty because Clear Title violated the industry standard, did not follow company policy, and was passive to fraud; (4) there was an issue of fact regarding Clear Title's duty and alleged breach of that duty; (5) there was an issue of fact raised in Wheeler's causes of action for negligence; (6) Clear Title breached its fiduciary duty; (7) the economic loss doctrine was misapplied; (8) the law regarding negligent training, supervision, and retention were misapplied; (9) not all facts regarding Wheeler's breach of contract claim were considered; and (10) there were issues of fact regarding Wheeler's claim for emotional distress.

On appeal, Clear Title challenges the order regarding its motion for attorney fees and Wheeler's motion to retax, arguing that the district court abused its discretion by limiting the recovery of expert witness fees and by declining to award Clear Title attorney fees.

³*Frazier v. Drake*, 131 Nev. 632, 357 P.3d 365 (Ct. App. 2015).

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

We disagree that the district court erred in granting Clear Title's motion for summary judgment and therefore affirm.⁵ Although we agree that the district court abused its discretion by failing to consider Clear Title's request for costs in connection with its deposition of Wheeler's expert witness, we disagree that the district court abused its discretion in any other manner.

We review a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a). "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn

⁵Wheeler argues that the district court erred when it found that Wheeler was not the proper party to bring the case and that she assigned the trust's right of litigation to herself, citing her affidavit in support of her motion opposing summary judgment, wherein she made the conclusory statement that the right of litigation was assigned to her. Clear Title responds that the Journey Trust was the injured party and Wheeler's production of an undated purported Assignment of Rights, which was not disclosed during discovery but only disclosed after the motion for summary judgment was filed, does not make her the real party in interest. The district court concluded that the "Assignment of Rights" did not contain an execution date and "[t]he sole purpose of the document was to create a factual dispute." While facts must be construed in the light most favorable to the nonmoving party, the nonmoving party must "do more than simply show that there is some metaphysical doubt." *Wood*, 121 Nev. at 732, 121 P.3d at 1031 (quoting *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). Additionally, the nonmoving party may not build a case on whimsy, speculation, and conjecture. *Id.* Here, the assignment provided by Wheeler is undated, which is concerning because it was not produced until after Clear Title moved for summary judgment and argued that Wheeler was not a proper party to this litigation. Nevertheless, we need not decide this issue because we address every other issue raised by Wheeler and conclude that they do not provide a basis for reversal.

from it, must be viewed in a light most favorable to the nonmoving party.”
Wood, 121 Nev. at 729, 121 P.3d at 1029.

Clear Title had no duty to receive Wheeler’s funds

Wheeler argues that the district court erred when it found that Clear Title had no duty until the escrow instructions were signed because this interpretation would make the contract created by the escrow instructions meaningless. Wheeler also argues that Clear Title was bound to the contract created by the escrow instructions, which required Clear Title to receive and transfer the funds, even if some work had been done before the instructions were signed. Clear Title responds that its duties begin when it receives funds.

At the outset, we note that the escrow instructions were not signed until 15 minutes after the funds had been transferred to the fraudster. Wheeler provides no authority to support her argument that Clear Title was required to ensure the money was transferred before the escrow instructions were signed. Wheeler also fails to provide any authority to support her implied argument that a contract was formed before the escrow instructions were signed. Since Wheeler has failed to provide authority to support her arguments, we need not consider them. *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).

However, if we consider the merits of Wheeler’s argument, then the district court did not err. Wheeler claims that Clear Title was negligent “because they were [supposed] to work with the buyer in receiving money.” Wheeler argues that this means that Clear Title should have told her that the wiring instructions had not been sent to her yet, looked at the wire

documents she offered to Rose to determine the instructions were fraudulent, and should have warned Wheeler about the dangers of wire fraud. Escrow instructions define the duties of an escrow agent. *Mark Props., Inc. v. Nat'l Title Co.*, 117 Nev. 941, 946, 34 P.3d 587, 591 (2001). There is no dispute that Wheeler signed the escrow instructions after she wired the money to the fraudster. The Residential Purchase Agreement, which was incorporated into the escrow instructions, states that Clear Title's duties are limited "to the safekeeping of all monies . . . received by it as ESCROW HOLDER." However, the duties that Wheeler imputed to Clear Title are not found within the escrow instructions, and Wheeler provides no other authority that imposes these duties on Clear Title. Accordingly, we conclude that Clear Title only had a duty to safekeep any money that it received directly from Wheeler; further, that Clear Title did not have a duty to ensure that Wheeler transferred the money to Clear Title regardless of when the escrow instructions were signed. Therefore, the district court did not err when it granted summary judgment.

Clear Title was not negligent in executing its duty

Wheeler argues that Clear Title failed to follow both the industry standard and its own company policy, and if it had, then it would have discovered the fraud. Clear Title responds that Nevada has articulated a standard of care for an escrow agent, so the industry standard and company policy are irrelevant. Additionally, Clear Title argues that the transfer had already occurred before Wheeler arrived at Clear Title, so it is unlikely that the wire transfer could have been reversed even if Clear Title had discovered the fraud earlier.

We first note that Wheeler has failed to articulate what industry standards and company policies were violated by Clear Title in her brief and has failed to articulate how following these standards and policies

would have prevented the fraudulent transfer of money. She also fails to provide any authority to show that industry standards create an additional duty for escrow companies. Since Wheeler has failed to argue cogently, we need not consider her argument. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

Yet, if we consider the merits of Wheeler's argument, Wheeler appears to argue that the industry standard required Clear Title to send her the wire instructions one-to-two days before closing. Under Nevada law, an escrow agent is *required* to deliver a copy of the escrow instructions at the time of execution, but the law does not specify when the wire instructions *should* be delivered. NAC 645A.220(10). Unless escrow instructions provide otherwise, an escrow company is not required to deliver instructions one-to-two days before closing. *See Mark Props., Inc.*, 117 Nev. at 946, 34 P.3d at 591. Even so, Wheeler had already received the preliminary title report that instructed her to contact Clear Title for the wiring instructions. Therefore, even though Clear Title did not send the wire instructions to Wheeler one-to-two days before closing, Clear Title did comply with Nevada law, and it also gave notice to Wheeler that she would have to contact Clear Title to receive the wire instructions.⁶ Therefore, we conclude that the district court did not err when it granted summary judgment.

⁶Wheeler appears to argue that Clear Title had a policy prohibiting escrow agents from filing out purchase agreements for parties to the escrow and that Rose violated that policy. It is undisputed that Rose helped fill out the purchase agreement, but Wheeler fails to articulate how this allowed her to fall victim to the fraud. Additionally, while it may have been the practice of Clear Title to not assist in filling out forms, the duties of an escrow company are defined by the escrow instructions not individual escrow companies. *See Mark Props., Inc.*, 117 Nev. at 946, 34 P.3d at 591. Therefore, we conclude that the district court did not err when it granted summary judgment.

Additionally, Wheeler appears to argue that Clear Title allowed the fraud to occur by taking no affirmative steps to avoid the fraud until it was too late. The only exception to the rule that escrow instructions define the duties of an escrow agent is the requirement that escrow agents must disclose fraud to the parties in an escrow. *Id.* at 947, 34 P.3d at 591. However, escrow agents do not have a duty to investigate or to discover fraud, thus the facts known by the escrow agent must present substantial evidence of fraud. *Id.* at 945, 34 P.3d at 590-91.

The facts presented to Rose did not present substantial evidence of fraud. Substantial evidence is evidence that a reasonable mind “accept[s] as adequate to support a conclusion.” *Hall v. SSF, Inc.*, 112 Nev. 1384, 1389, 930 P.2d 94, 97 (1996) (internal quotation marks omitted). Wheeler told Rose that Wheeler had wired the money to Clear Title before the closing appointment, but this does not present substantial evidence of fraud. Rose testified during her deposition that she thought Wheeler received the wire instructions from either Rose’s assistant or the lender and did not find it shocking that Wheeler had already wired the funds before the closing. Additionally, Rose checked the wire board throughout the day, in accordance with Clear Title’s procedures. This evidence does not present substantial evidence of fraud; therefore, we conclude that Clear Title had no duty to disclose the potential fraud to Wheeler, especially since Clear Title did not suspect that fraud had occurred.

There is no issue of fact regarding Clear Title’s duty to Wheeler

Wheeler argues that Clear Title had a duty to receive the funds and breached that duty when it failed to receive the funds. Additionally, Wheeler argues that Clear Title was so aware of the fraud that they became a participant in the fraud by not acting. Clear Title responds that it had no

duty to receive Wheeler's funds. It also contends that no contract existed when the fraud occurred, so Clear Title had no duty to Wheeler.

As discussed above, the escrow instructions do not include a duty to receive the funds. Instead, Clear Title was required to safekeep the money that it received. Additionally, Clear Title was only empowered to perform the acts in the residential purchase agreement to the extent that the terms and conditions were within the control of the escrow. As demonstrated by the facts in this case, Clear Title had no control over receiving funds. It can only receive funds that are sent to it, and it has no control over the parties sending the funds. This case is a very unfortunate situation in which Wheeler was duped by a clever fraudster without Clear Title's involvement. Therefore, we conclude that Clear Title had no duty to receive the funds from Wheeler, since she did not send them any funds.

There are no issues of fact in Wheeler's causes of action for negligence

Wheeler argues that there are issues of fact in her causes of action for negligence and intentional or gross negligence. Wheeler specifically argues that Clear Title breached its duty by not giving Wheeler a warning about wire fraud and that Wheeler believes that her money was stolen by Clear Title. Clear Title responds that a duty to warn only exists when the parties have a special relationship and that no such relationship existed between Clear Title and Wheeler, and that even if a duty existed, the fraud was a superseding cause that broke the chain of causation. Clear Title also contends that Wheeler's claim that Clear Title stole her money is all conjecture with no support.⁷

⁷Clear Title is correct; Wheeler has failed to provide any support for her claim that the fraud was an "inside job." While we review the evidence in the light most favorable to the party, Wheeler's claim that Clear Title

To establish a negligence claim, Wheeler needed to prove the following four elements: “(1) the existence of a duty of care, (2) breach of that duty, (3) legal causation, and (4) damages.” *Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 824, 221 P.3d 1276, 1280 (2009).⁸ Wheeler’s negligence claims rely on Clear Title’s duty to perform the escrow instructions and her assertion that Clear Title had a duty to warn her about the potential for wire fraud. But at the time of the fraud, Clear Title did not have a special relationship with Wheeler—especially since the escrow instructions were not signed until after Wheeler wired the money—it also did not undertake an obligation to protect her, nor did its conduct increase the risk that Wheeler would become a victim of fraud. As Wheeler provides no authority for her contention that Clear Title had a duty to warn her about wire fraud,⁹ we conclude the district court did not err when it granted Clear Title’s motion for summary judgment because the duty element of negligence has been negated.

Assuming without concluding Clear Title had a duty to warn, Clear Title’s breach would not be the legal cause of harm to Wheeler. “[U]nlawful conduct can interrupt and supersede the causation between a negligent act and injury, [but] an unlawful act will not supersede causation if it was foreseeable.” *Anderson v. Mandalay Corp.*, 131 Nev. 825, 833, 358

stole her money is mere conjecture and there are no related factual issues in dispute.

⁸Wheeler argues that these elements apply to her claim of intentional or gross negligence as well; therefore, we address these claims together.

⁹*Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. Additionally, we again note that Clear Title’s duties were defined by the escrow instructions, which did not include a duty to warn. See *Mark Props., Inc.*, 117 Nev. at 946, 34 P.3d at 591.

P.3d 242, 248 (2015). The fraud in this case acted as a superseding cause because Clear Title did not have a relationship with Wheeler that required it to protect her from harm. *See* Restatement (Second) of Torts § 449 cmt. a. (“It is only where the actor is under a duty to the other, because of some relation between them, to protect him against such misconduct, or where the actor has undertaken the obligation of doing so, or his conduct has created or increased the risk of harm through the misconduct, that he becomes negligent.”). Therefore, even if a duty had existed, the fraud was a superseding cause that broke the chain of causation, so Clear Title’s actions or inactions were not the legal cause of Wheeler’s harm. Thus, even considered alternatively, this element of negligence has been negated, and summary judgment was appropriate on Wheeler’s negligence claims.

Clear Title did not breach its fiduciary duty

Wheeler argues that Clear Title breached its fiduciary duty because it failed to instruct Wheeler on how to transfer the money and likewise failed to give Wheeler instructions on how to stop the wire transfer after Clear Title learned that Wheeler had transferred the funds. Clear Title responds that its fiduciary duties to Wheeler were limited to the duties provided in the escrow instructions, which it did not breach.

There are three elements in a claim for breach of fiduciary duty: (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) the breach proximately caused the damages. *See Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009). The duties of an escrow agent are defined by the escrow instructions. *Mark Props., Inc.*, 117 Nev. at 946, 34 P.3d at 591. Additionally, an escrow agent “is required to conduct his affairs with scrupulous honesty, skill, and diligence” and “must strictly comply with the terms of the escrow agreement.” *Broussard v. Hill*, 100 Nev. 325, 329, 682 P.2d 1376, 1378 (1984).

Wheeler and Clear Title agree that a fiduciary duty existed but disagree about whether the duty was breached. Wheeler's argument relies on the assertion that Clear Title had a duty to receive Wheeler's funds and that Clear Title became a party to the fraud by ignoring the fraud when brought to its attention. But Clear Title did not have a duty to receive the funds. Instead, Clear Title was required to safekeep the money that it received and was only empowered to perform the acts in the residential purchase agreement to the extent that the terms and conditions were within the control of the escrow company. As demonstrated by the facts in this case, Clear Title had no control over receiving funds. Therefore, Wheeler's first argument fails.

Wheeler's second argument fails because Clear Title did not know that fraud had occurred. Escrow agents do not have a duty to investigate to discover fraud and the facts known by the escrow agent must present substantial evidence of fraud. *Mark Props., Inc.*, 117 Nev. at 945, 34 P.3d at 590. There was not substantial evidence of fraud. Rose thought Wheeler received the wire instructions from either Rose's assistant or the lender and did not find it shocking that Wheeler had already wired the funds before the closing. Wheeler never told Rose that she received an email sent in Rose's name with wire instructions. Additionally, Rose checked the wire board throughout the day according to Clear Title's procedures. Accordingly, we conclude that Clear Title did not breach its fiduciary duty, so the district court did not err when it granted summary judgment on Wheeler's breach of fiduciary duty claim.

The district court properly applied the economic loss doctrine

Wheeler argues that the economic loss doctrine applies to the breach of contract claim but not all of the causes of action she raised. Clear Title responds that the district court correctly applied the economic loss

doctrine when it barred Wheeler from recovering anything for her causes of action based on unintentional torts.

The economic loss doctrine “bars unintentional tort actions when the plaintiff seeks to recover purely economic losses.” *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 125 Nev. 66, 73, 206 P.3d 81, 86 (2009) (internal quotation marks omitted). The district court used the economic loss doctrine to bar recovery only for any unintentional tort acts. We conclude that the district court properly applied the doctrine and did not err.

The district court did not err in the application of the law of negligent training, supervision, and retention

Wheeler argues that the district court misapplied the law stated in *Blanck*¹⁰ and therefore her claim of negligent training, supervision, and retention should have survived Clear Title’s motion for summary judgment. Clear Title responds that the district court did not solely rely on *Blanck* when it granted summary judgment; rather, it also determined that “there can be no claim for negligent training, supervision, and retention if there is no showing that the contractual duties were breached.”

Clear Title is correct that the district court had an independent and alternative ground that also formed a basis for granting Clear Title’s motion for summary judgment on this issue. Wheeler does not challenge this independent and alternative ground on appeal, so we affirm. *See Hung v. Genting Berhad*, 138 Nev., Adv. Op. 50, 513 P.3d 1258, 1289 (Ct. App. 2022) (holding that when a district court provides independent and alternative grounds to support its ruling, the appellant must properly challenge all of the grounds, otherwise the ruling will be affirmed).

¹⁰*Blanck v. Hager*, 360 F. Supp. 2d 1137 (D. Nev. 2005).

Finally, if we consider the merits of Wheeler's argument, the district court properly applied *Blanck*. The court in *Blanck* found that the economic loss doctrine applied to claims of negligent supervision and retention. *Blanck v. Hager*, 360 F. Supp. 2d 1137, 1157, 1159 (D. Nev. 2005). Since Wheeler cannot show that she has suffered a personal injury, property damages, or intentional tortious behavior, the district court properly applied *Blanck* and granted Clear Title's motion for summary judgment on Wheeler's claim of negligent training, supervision and retention.

The district court properly applied the facts to the breach of contract claim

Wheeler argues that Clear Title breached the parties' contract by failing to assist in the receipt and disbursement of funds. Wheeler also argues that the district court failed to consider all of the actions taken by Clear Title that violated industry standards or company policy. Clear Title responds that it has not breached any of its contractual duties.

The contract, which is the escrow instructions, only required that Clear Title safekeep the money it received. Additionally, Clear Title did assist Wheeler in the proper transfer of the funds when it instructed Wheeler to contact Clear Title to receive the wire instructions. Therefore, Clear Title did not breach the contract. Accordingly, we conclude that the district court did not abuse its discretion when it granted Clear Title's motion for summary judgment on Wheeler's breach of contract claim.

There are no issues of fact regarding Wheeler's claim for emotional distress

Wheeler argues that the negligence in this case was so extreme and outrageous that it created an issue of fact as to her emotional distress claims. Clear Title responds that there is no evidence that shows that Clear Title engaged in extreme and outrageous conduct with the intent to cause Wheeler emotional distress.

Nevada law recognizes claims for both intentional and negligent emotional distress.¹¹ Since we agree that the circumstances giving rise to a claim for negligent infliction of emotional distress are not present here, we only address Wheeler intentional infliction of emotional distress claim. To establish a cause of action for intentional infliction of emotional distress, the plaintiff must show: “(1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff’s having suffered severe or extreme emotional distress and (3) actual or proximate causation.” *Olivero v. Lowe*, 116 Nev. 395, 398-99, 995 P.2d 1023, 1025-26 (2000) (quoting *Star v. Rabello*, 97 Nev. 124, 125, 625 P.2d 90, 91-92 (1981)). Extreme and outrageous conduct “is that which is outside all possible bounds of decency and is regarded as utterly intolerable in a civilized community.” *Maduikie v. Agency Rent-A-Car*, 114 Nev. 1, 4, 953 P.2d 24, 26 (1998) (internal quotation marks omitted).

The district court found that Wheeler had made an insufficient showing of extreme and outrageous conduct by Clear Title and that any extreme and outrageous conduct was done by the fraudster. Wheeler fails to identify any conduct by Clear Title that was extreme and outrageous. Clear Title told Wheeler to contact Clear Title to receive the wire instructions. Wheeler failed to do so. When Rose was informed that Wheeler had transferred the funds, Rose assumed that her assistant or the lender had given Wheeler the wire instructions, which, in her experience, had occurred before. Finally, Rose checked the wire board for incoming wires and alerted Wheeler the same day when Clear Title did not receive her funds

¹¹Contrary to Clear Title’s argument, we note that Nevada does recognize a claim for negligent infliction of emotional distress, but under limited circumstances not present here. *See Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 482, 851 P.2d 459, 462 (1993).

by wire. Wheeler fails to articulate how this, or other acts by Clear Title, constitutes conduct “outside the bounds of decency” and which is “utterly intolerable in a civilized community.” *Id.* Accordingly, we conclude that the district court did not err when it granted Clear Title’s motion for summary judgment on Wheeler’s claim for emotional distress, either intentional or negligent.

The district court abused its discretion by failing to address Clear Title’s request for expert fees for deposing Wheeler’s expert witness, but did not abuse its discretion when it limited Clear Title’s recovery of fees incurred for its own expert witness

Clear Title argues that the district court abused its discretion because the court failed to consider the importance of Clear Title’s rebuttal witness, Clear Title should not be penalized for being forced to incur rebuttal expert fees, and the court failed to award reasonable fees Clear Title incurred deposing Wheeler’s expert witness. Wheeler responds that the district court properly applied *Frazier* and that Clear Title has failed to establish any evidence of an error by the court.

A prevailing party is entitled to recover the reasonable fees of 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 a larger fee.” NRS 18.005(5); NRS 18.020(3). “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). A district court abuses its discretion when it fails to adequately set forth the basis for its decision. *Id.* at 652, 357 P.3d at 378. Additionally, this court has held that a district court must consider 12 factors when evaluating the request for expert fees. *Id.* at 650-51, 357 P.3d at 377-78. The factors relevant to this appeal are “the importance of the

expert's testimony to the party's case" and "the degree to which the expert's opinion aided the trier of fact in deciding the case." *Id.*

First, Clear Title argues that the district court misapplied the facts when it found that the first factor did not weigh in Clear Title's favor and conflated the analysis of factor one with factor two. The district court found that the first factor did not weigh in Clear Title's favor because summary judgment was granted based on other grounds. While this does appear to be similar to the analysis that one would expect to see for factor two, that does not negate the district court's analysis. The district court determined that an expert opinion on the practices of the industry was not important to Clear Title's case because of numerous reasons to grant summary judgment. The district court has adequately set forth a basis for its decision; therefore, we conclude that it did not abuse its discretion. *See id.* at 652, 357 P.3d at 378.

Next, Clear Title argues that it has effectively been penalized for being forced to retain an expert witness since the full cost of the expert witness was not reimbursed by the district court. Nevada law does not require that every cost associated with retaining an expert witness be reimbursed by the losing party. The only guarantee made by Nevada law is that the victorious party receive up to \$1,500 for each witness, when such fees are reasonable. *See* NRS 18.005(5). Any additional award is left to the court's discretion, which as discussed above, was not abused in this instance.

Finally, Clear Title argues that the district court abused its discretion by not awarding Clear Title \$1,125 for the cost of deposing Wheeler's expert witness. At the outset, the prevailing party is entitled to recover the costs of deposing witnesses, unless the court finds that the prevailing party called that witness "without reason or necessity." *See* NRS 18.005(4); NRS 18.020(3). We note that the district court did not address

the request for costs related to the deposition of Wheeler's expert, and, therefore, failed to provide an explanation for its failure to award costs. See *Henry Prods. Inc. v. Tarmu*, 114 Nev. 1017, 1020, 967 P.2d 444, 446 (1998). Accordingly, we conclude that the district court abused its discretion and remand for the purpose of considering an award of costs for the expert deposition.

The district court did not abuse its discretion when it found that Clear Title was not entitled to attorney fees

Clear Title argues that the district court abused its discretion by concluding that Wheeler's claims were brought in good faith, concluding that Clear Title's offer of judgment was not reasonable, and failing to consider Clear Title's request for attorney fees by applying the *Brunzell*¹² factors. Wheeler responds that Clear Title failed to establish the required elements to receive attorney fees.

"An award of attorney fees is reviewed for an abuse of discretion." *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 88, 367 P.3d 1286, 1293 (2016). "An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or it disregards controlling law." *Id.* Clear Title requested attorney fees under NRCPC 68; therefore, the district court was required to analyze 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

¹²*Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

fees sought by the offeror are reasonable and justified in amount.

Beattie, 99 Nev. at 588-89, 668 P.2d at 274.

To determine if the fees were reasonable and justified in amount, the district court was required to evaluate the *Brunzell*¹³ factors, but only after concluding that an award of fees was warranted after weighing the first three *Beattie* factors. See *Frazier*, 131 Nev. at 644, 357 P.3d at 373. Clear Title only challenges the findings as to the first two *Beattie* factors, which are supported by substantial evidence. But even if they were not, Clear Title did not challenge the third factor. All of the first factors have to be balanced. See *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 557, 429 P.3d 664, 670 (Ct. App. 2018); *Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428-29 (2001).

The district court properly declined to consider whether the fees were reasonable and justified after it found that the first three *Beattie* factors were in Wheeler's favor. Even though Clear Title argues that the district court abused its discretion by finding that Wheeler's claims were brought in good faith, Wheeler relied on facts in her amended complaint. Additionally, Wheeler was seeking over \$151,000 in damages to recover the money she lost in the fraud, so it was not an abuse of discretion for the district court to conclude that rejecting an offer for \$20,000 was reasonable when the offer was made immediately after a motion to dismiss was denied. Further, Clear Title did not challenge factor 3. Therefore, the district court did not abuse its discretion in only reviewing the first three *Beattie* factors since they all weighed in Wheeler's favor.

¹³*Brunzell*, 85 Nev. at 349, 455 P.2d at 33.

Accordingly, we

ORDER the judgment of the district court granting summary judgment AFFIRMED and AFFIRM IN PART, REVERSE IN PART, AND REMAND the order regarding Clear Title's motion for attorney fees and costs and Wheeler's motion to relax.¹⁴


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Veronica Barisich, District Judge
Solomon Dwiggins & Freer, Ltd.
David J. Winterton & Associates, Ltd.
Eighth District Court Clerk

¹⁴Insofar as the parties have raised 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.