

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELIZABETH RODGERS GRACYAS,
Appellant,
vs.
PAT JOHNSON AND MITCHELL
JOHNSON,
Respondents.

No. 39528

FILED

SEP 02 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This appeal is taken from a final judgment in a personal injury case. Eighth Judicial District Court, Clark County; Gene T. Porter, Judge.

This case arises out of an automobile accident. Appellant Elizabeth Rodgers Gracyas initiated suit against respondents Pat Johnson and Mitchell Johnson. Gracyas complained that Pat, the driver of Johnson's vehicle, was negligent when he failed to stop and caused a collision with her vehicle. Gracyas alleged that Mitchell, who is Pat's father and the owner of the vehicle Pat was driving, is liable under the family purpose doctrine, pursuant to NRS 41.440. Gracyas claimed that Mitchell is responsible "for any liability imposed on his son as a result of the negligence hereinafter complained of."

On September 2, 1997, while in the Court Annexed Arbitration Program, the Johnsons made a joint offer of judgment to Gracyas for \$2,001.00, which included all costs accrued to date. Gracyas rejected this offer. On March 9, 1998, Gracyas made an offer of judgment to the Johnsons for \$25,000.00, "inclusive of costs accrued herein," which the Johnsons rejected.

After the arbitrator found in Gracyas' favor, the Johnsons requested a trial de novo. On June 10, 1998, Gracyas made another offer of judgment for \$17,886.71, "inclusive of costs accrued herein." The Johnsons countered this offer on May 24, 1999, with an offer of judgment for \$2,001.00, "including costs, attorney's fees, and prejudgment interest," which Gracyas did not accept.

On January 18, 2002, ten days before trial, Pat Johnson made an individual offer of judgment that stated:

Defendant, PAT JOHNSON, hereby offers to allow judgment to be taken against him in the sum of Four Thousand One and No/100 Dollars (\$4,001.00) exclusive of costs incurred to date. This offer does not contemplate the addition of fees.

Gracyas did not accept this offer.

After a three-day jury trial, the jury returned a verdict in Gracyas' favor in the amount of \$3,270.00. Gracyas filed a motion for attorney fees, alleging that she was the prevailing party and entitled to her attorney fees pursuant to NRS 18.010. The Johnsons opposed Gracyas' motion, arguing that Gracyas did not better the offer of judgment.

Pat filed his own motion for attorney fees, costs and post-judgment interest and to strike Gracyas' memorandum of costs. Pat contended that he was the prevailing party and was entitled to attorney fees pursuant to the offer of judgment rules.

Mitchell never filed a motion seeking his own attorney fees, costs or interest.

The district court found that Pat's offer of judgment was for \$4,001.00 plus costs incurred to the date of the offer and that the jury

award for \$3,270.00 was not a more favorable judgment. The district court awarded Pat his reasonable costs and fees, pursuant to NRCP 68 and NRS 17.115, of \$8,503.27. The district court then deducted the \$3,270.00 jury award to Gracyas from this amount, for a net award to Pat of \$5,233.27.

On appeal, Gracyas first contends that the district court abused its discretion by denying her motion for attorney fees from Mitchell. Gracyas argues that because both of Mitchell's offers for \$2,001.00, including costs, are less than the jury award of \$3,270.00, she is entitled to her attorney fees, costs and interest pursuant to NRS 18.010(2)(a).¹ We disagree.²

"A district court is not permitted to award attorney fees or costs unless authorized to do so by a statute, rule or contract."³ Pursuant to NRS 18.010(2)(a), a court may award attorney fees to a prevailing party when that party has not recovered more than \$20,000.00. This court will not disturb a district court's award of attorney fees on appeal unless the

¹Gracyas also argues that the district court failed to properly consider the factors listed in Uniroyal Goodrich Tire v. Mercer, 111 Nev. 318, 890 P.2d 785 (1987), in denying her motion. However, it was not necessary for the district court to consider these factors because there was not a statutory basis for such an award.

²The Johnsons argue that Gracyas did not preserve this argument for appeal. We conclude that Gracyas properly preserved this argument in her opposition to Pat's motion for attorney fees.

³U.S. Design & Constr. v. I.B.E.W. Local 357, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002).

district court abused its discretion or exercised its discretion arbitrarily or capriciously.⁴

We conclude that the district court did not abuse its discretion by denying Gracyas' motion for costs, attorney fees and pre-judgment interest from Mitchell.

NRCP 68(f) states:

(f) Penalties for Rejection of Offer. If the offeree rejects an offer and fails to obtain a more favorable judgment,

(1) 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; and

(2) the 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 and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer.

NRS 17.115(4) contains an almost identical provision.

Both NRCP 68(f)(1) and NRS 17.115(4) state that if the offeree does not obtain a more favorable judgment than the offer, then she shall not recover any attorney fees, costs and interest. Gracyas would only be entitled to the benefit of the rule if the recovery was greater than her offer of judgment, an event that did not occur. Therefore, applying the language of NRCP 68(f) and NRS 17.115(4), Gracyas is not entitled to recover her attorney fees, costs or interest from anyone. However, Gracyas is obligated to pay Pat's attorney fees, costs and interest since he

⁴Id.; Schouweiler v. Yancey Co., 101 Nev. 827, 833, 712 P.2d 786, 790 (1985).

bettered his offer of judgment. She is not obligated to pay Mitchell's attorney fees, costs and interest since he was not party to the offer of judgment.

Next, Gracyas argues that the district court abused its discretion by awarding Pat his costs, attorney fees and post-judgment interest when his offer of judgment was unclear and contrary to Nevada law.⁵ Gracyas contends that Pat's offer of judgment was unclear as to whether it allows costs to be added to the \$4,001.00 or whether it completely precludes recovery of costs. We disagree.

Gracyas cites Bergmann v. Boyce⁶ for the proposition that an unclear offer of judgment cannot be used against the offeree. In Bergmann, this court concluded that attorney fees, costs and interest could not be awarded based on a defendant's unapportioned offer of judgment to multiple plaintiffs.⁷ This court explained that an unapportioned offer of judgment deprives the offerees of a meaningful choice between accepting and rejecting the offer because the offeree cannot assess the risks.⁸

⁵Gracyas also contends that her memorandum of costs should be reinstated because the Johnsons failed to file a timely motion to retax. NRS 18.110(4) states that a motion to retax must be served within 3 days after service of a copy of the memorandum. Gracyas filed her memorandum of costs on February 12, 2002. The Johnsons filed a motion to strike Gracyas' memorandum on February 15, 2002. Therefore, the Johnsons timely filed their motion.

⁶109 Nev. 670, 856 P.2d 560 (1993).

⁷Id. at 677-78, 856 P.2d at 564-65.

⁸Id.

Gracyas argues that because the terms of Pat's offer are not clear, she was unable to make a meaningful choice as to whether to accept or reject the offer. She contends that the offer is invalid and an improper basis for an award of attorney fees, costs and interest.

The Johnsons argue that the offer is clear, valid and consistent with Nevada law. The Johnsons contend that there are two generally accepted ways in Nevada practice to word an offer of judgment. An offer of judgment may be "inclusive of costs," which means that the stated amount is the total amount that will be paid to the offeree. Alternatively, an offer may be "exclusive of costs," which means that if the offer is accepted, the accepting party may file a memorandum of costs and all reasonable costs are tacked onto the stated amount.

In illustration of their argument, the Johnsons reference NRS 41.035, which states, "An award for damages in an action sounding in tort . . . may not exceed the sum of \$50,000.00, exclusive of interest computed from the date of judgment" This court interpreted this statute to mean that the interest is tacked onto the award.⁹


We conclude that Bergmann is not applicable to this case as it contemplates the entirely different situation of unapportioned offers. However, we agree with Gracyas that an unclear offer of proof cannot be held against a rejecting offeree.


Nevertheless, Pat's offer contains clear terms. The general meaning of the terms used in Pat's offer shows his intent. The offer of judgment states that the \$4,001.00 is exclusive of costs and that attorney


⁹See Arnesano v. State, Dep't Transp., 113 Nev. 815, 820, 942 P.2d 139, 142 (1997).

fees are not contemplated. The language of the offer clearly indicates that costs and attorney fees are being treated differently. Since the offer explicitly states that Pat will not pay Gracyas' attorney fees, it follows that he will pay her costs in addition to the \$4,001.00. Furthermore, while NRS 41.035 presents a different context for "exclusive" than presented in this case, it does indicate that the Johnsons' interpretation of this phrase is consistent with Nevada practice. Therefore, we conclude that the offer of judgment is clear and the district court did not abuse its discretion by basing an award of attorney fees, costs and interest on the offer.¹⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Eighth Judicial District Court Dept. 1, District Judge
Albert D. Massi, Ltd.
Mandelbaum Gentile
Clark County Clerk

¹⁰Having reviewed Gracyas' other arguments, we conclude they are without merit.