

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD B. ELLIS AND MELBA
ELLIS,
Appellants,
vs.
SHIRLEY GIECK,
Respondent.

No. 41069

FILED

MAY 17 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a post-judgment order denying a motion for attorney fees. Second Judicial District Court, Washoe County; James W. Hardesty, Judge.

Appellants Donald and Melba Ellis successfully defended an action brought by respondent Shirley Gieck, and Mary Hansen,¹ for injunctive relief and damages. The Ellises, based upon a pre-trial offer of judgment, moved for an award of attorney fees. In the order denying the motion, the district court found that the claims brought by Gieck and Hansen were neither unreasonable nor frivolous, and that the rejection of the offer of judgment was not grossly unreasonable. In a footnote, the court noted that Gieck and Hansen essentially sought injunctive relief, and that the Ellises' offer of judgment, although substantial, failed to take into account that injunctive relief.

The Ellises argue that the district court failed to consider the appropriate factors in its decision, and erred in finding Gieck and

¹Co-plaintiff Mary Hansen died sometime after trial in this matter, before this appeal was considered.

Hansen's claims reasonable and not frivolous. We disagree and affirm the district court's judgment.

DISCUSSION

An award of attorney fees lies within the trial court's discretion, and will not be overturned absent a manifest abuse of discretion.² Where a district court clearly disregards guiding legal principles, this action may constitute an abuse of discretion.³

Attorney fees under NRCP 68

Prior to 1998, unapportioned offers of judgment were invalid for an attorney fee award under NRCP 68.⁴ However, NRCP 68 was amended in 1998 to permit unapportioned offers of judgment, under certain circumstances.⁵ NRCP 68(c)(3) now reads as follows:

Offers to Multiple Plaintiffs. An offer made to multiple plaintiffs will invoke the penalties of this rule only if (A) the damages claimed by all the offeree plaintiffs are solely derivative, such as that the damages claimed by some offerees are entirely derivative of an injury to the others or that the damages claimed by all offerees are derivative of

²County of Clark v. Blanchard Constr. Co., 98 Nev. 488, 492, 653 P.2d 1217, 1220 (1982).

³Franklin v. Bartsas Realty, Inc., 95 Nev. 559, 562-63, 598 P.2d 1147, 1149 (1979).

⁴Yada v. Simpson, 112 Nev. 254, 913 P.2d 1261 (1996) (finding plaintiff's unapportioned offer to multiple defendants invalid to support award of attorney fees); Ramadanis v. Stupak, 104 Nev. 57, 752 P.2d 767 (1988) (finding defendant's unapportioned offer to multiple plaintiffs, here a corporation and its principal, invalid to support award of attorney fees).

⁵NRCP 68, replaced, effective October 27, 1998.

an injury to another, and (B) the same entity, person or group is authorized to decide whether to settle the claims of the offerees.

When exercising its discretion to award attorney fees based on an offer of judgment, a court must consider four factors under Beattie v. Thomas:⁶

(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.⁷

No one factor is determinative; the district court is granted broad discretion as long as all appropriate factors are considered.⁸ Although trial courts have been cautioned to provide written support under the Beattie factors for attorney fee awards made pursuant to offers of judgment,⁹ this court has ruled that as long as the record is clear that the factors have been considered, the court's award will not be disturbed unless that consideration of the factors is arbitrary or capricious.¹⁰

⁶99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).

⁷Id.

⁸Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 252 n.16, 955 P.2d 661, 673 (1998).

⁹Schwartz v. Estate of Greenspun, 110 Nev. 1042, 1050, 881 P.2d 638, 643 (1994).

¹⁰Uniroyal Goodrich Tire v. Mercer, 111 Nev. 318, 324, 890 P.2d 785, 789 (1995) (citing Schouweiler v. Yancy Co., 101 Nev. 827, 833, 712 P.2d 786, 790 (1985)).

The Ellises contend that the district court erred by not considering all of the appropriate Beattie factors in its decision denying attorney fees. Gieck argues that no abuse of discretion occurred under Beattie.

The district court order denying attorney fees implicitly addresses all three of the relevant Beattie factors. The good faith of plaintiffs' claim is mentioned in the section of the order addressing NRS 18.010(2)(b): "The Court finds that Plaintiffs[] claim was neither unreasonable nor frivolous [and that] Plaintiffs were confronted with a substantial drainage problem on their property." Going further, the court observed: "Plaintiffs essentially sought injunctive relief against the wrongdoers. The relationship and agreements existing between Ellis and the County were murky at best. The Court cannot conclude that an action against Ellis was frivolous." The order goes on to address timing and reasonableness, with the court stating that the offer "failed to take into account the injunctive relief" sought by Gieck. The final factor was rendered moot by the court's findings that led to denial of the award of fees.

We conclude the court's denial of the motion for attorney fees under NRCF 68 was not an abuse of discretion. First, the parties extensively briefed the Beattie factors, which supports a finding that they were adequately considered by the court. Second, the court addressed each of the first three Beattie factors in the order, although not explicitly.

Attorney fees under NRS 18.010(2)(b)

NRS 18.010, governing awards of attorney fees, reads in pertinent part:

2. 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:

...

(b) Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party.

An award of attorney fees under NRS 18.010(2)(b) is discretionary with the district court.¹¹ To support such an award, however, "there must be evidence in the record supporting the proposition that the complaint was brought without reasonable grounds or to harass the other party."¹² "[U]nder NRS 18.010(2)(b), frivolousness is determined at the time the claim is initiated."¹³ A trial court's analysis of whether a plaintiff had reasonable grounds for his or her claims "depends upon the actual circumstances of the case rather than a hypothetical set of facts favoring plaintiffs[]"¹⁴

The Ellises cite Barozzi v. Benna¹⁵ for the proposition that failure to produce credible evidence at trial is "the litmus test" for awarding fees under NRS 18.010(2)(b). They further contend that the

¹¹Foley v. Morse & Mowbray, 109 Nev. 116, 124, 848 P.2d 519, 524 (1993).

¹²Chowdhry v. NLVH, Inc., 109 Nev. 478, 486, 851 P.2d 459, 464 (1993).

¹³Barozzi v. Benna, 112 Nev. 635, 639, 918 P.2d 301, 303 (1996).

¹⁴Bergmann v. Boyce, 109 Nev. 670, 675, 856 P.2d 560, 563 (1993).

¹⁵112 Nev. 635, 918 P.2d 301 (1996).

district court abused its discretion when determining if the claim was reasonable. The Ellises' interpretation of Barotti is flawed, however, since this court has held that the time a claim is brought is the "relevant point in time"¹⁶ for determining if the claim is groundless under NRS 18.010(2)(b). The Ellises further contend that Gieck and Hansen's claim for infliction of emotional distress was clearly brought without any reasonable basis, and that under Bergmann v. Boyce,¹⁷ the district court should have allocated attorney fees between reasonable claims and groundless claims.

Gieck simply contends that the district court did not manifestly abuse its discretion in finding that the claims were neither frivolous nor unreasonable. As to the claim for infliction of emotional distress, Gieck points out that the Ellises never requested apportioned fees, and never argued that they were alternatively entitled to a partial award of fees for their defense of a claim that was dismissed on summary judgment.

The record here shows that Hansen and Gieck investigated their claims before they initiated any action; and that the court considered the heart of their claim to be injunctive relief to ameliorate a drainage problem. The parties briefed the claim of infliction of emotional distress in the motion to dismiss and opposition, so we can reasonably conclude that they were considered by the court. We therefore conclude that the district court did not abuse its discretion in denying attorney fees based on NRS 18.010(2)(b). The evidence in the record supports the court's decision and

¹⁶Barozzi, 112 Nev. at 639, 918 P.2d at 303.

¹⁷109 Nev. 670, 856 P.2d 560 (1993).

the order denying the motion for fees provides a reasonable explanation of the court's decision.

NRCP 11

NRCP 11 permits a sanction against an attorney who signs a pleading in bad faith, a pleading that is not grounded in fact and existing law, or is otherwise filed for an improper purpose, such as to harass. NRCP 11 sanctions should be imposed for frivolous actions, those that are "both baseless and made without a reasonable and competent inquiry."¹⁸ Thus, determining if a claim is frivolous requires two steps: "(1) the court must determine whether the pleading is 'well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law'"¹⁹ and "(2) whether the attorney made a reasonable and competent inquiry."²⁰

NRCP 11 sanctions are mentioned in NRS 18.010(2)(b), as well:

It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of

¹⁸Bergman, 109 Nev. at 676, 856 P.2d at 564 (1993) (quoting Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir. 1990)).

¹⁹Id. (quoting Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1537 (9th Cir. 1986)).

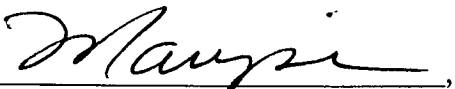
²⁰Id.

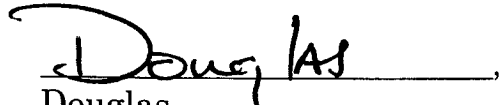
meritorious claims and increase the costs of engaging in business and providing professional services to the public.

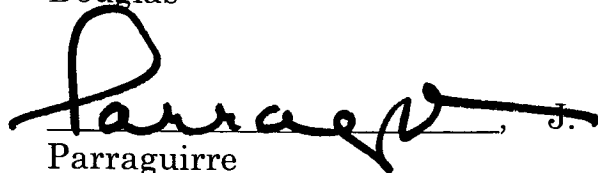
The Ellises argue that the infliction of emotional distress and the negligence claims against them were not well-grounded in fact. The Ellises also contend that counsel for Gieck did not make a reasonable and competent inquiry. Finally, the Ellises claim that the district court abused its discretion since the court did not address this basis for the imposition of fees as a sanction. We disagree.

Although the district court's order does not directly address the sanctions issue, the order does acknowledge that fees were sought under NRCP 11. Additionally, as noted above, the order finds that "Plaintiffs' claim was neither unreasonable nor frivolous," and the parties extensively briefed the issues of frivolous litigation and competent inquiry. Thus, the court was fully informed on the issue. Although the court's order denying fees does not explicitly address NRCP 11, we conclude that the court's award satisfies the necessary findings from Bergman as to sanctions under NRCP 11. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Maupin

 J.
Douglas

 J.
Parraguirre

cc: Second Judicial District Court Dept. 9, District Judge
Glade L. Hall
Law Offices of White & Meaney
Washoe District Court Clerk