

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL ANTHONY FOLEY,
Appellant,
vs.
OGDEN AVIATION TERMINAL
SERVICES, A MASSACHUSETTS
CORPORATION DOING BUSINESS IN
CLARK COUNTY; AND LARRY
NENSTIEL,
Respondents.

No. 41351

FILED

NOV 07 2007

JAMETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court judgment entered on jury verdict in a tort action and a post-judgment order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

During the period of time relevant to this appeal, appellant Michael Foley worked as a skycap for respondent Ogden Aviation Terminal Services at McCarran International Airport in Las Vegas. On May 1, 1996, Foley was fired for insubordination. Foley contends, however, that Ogden fired him in retaliation for filing a worker's compensation claim. Accordingly, Foley filed suit against Ogden and an Ogden official, respondent Larry Nenstiel (collectively, Ogden), in 1999 alleging four causes of action: retaliatory discharge, fraud, intentional infliction of emotional distress (IIED), and defamation. Foley unsuccessfully moved for partial summary judgment on his retaliatory discharge claim. Ogden then filed a successful motion for partial summary judgment on Foley's fraud, IIED, and defamation claims.

The case went to trial on Foley's retaliatory discharge claim in January 2003. After a two-day trial, the jury returned a verdict in Ogden's favor. Ogden then successfully moved for attorney fees under the penalty provisions of NRCP 68 and NRS 17.115, noting that Foley had rejected an offer of judgment in December 2001. This appeal followed.

Foley's motion for partial summary judgment

Foley first argues that the district court erred in failing to grant partial summary judgment on his retaliatory discharge claim. We disagree.

This court reviews a district court's grant of summary judgment de novo, and does not defer to the findings of the lower court.¹ Summary judgment is appropriate "when the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law."² When reviewing a motion for summary judgment, "the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party."³

"Employees in Nevada are presumed to be employed 'at-will' unless the employee can prove facts legally sufficient to show a contrary agreement was in effect."⁴ An at-will employment relationship generally

¹Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

²Id. (quoting NRCP 56(c)) (internal quotation marks omitted).

³Id.

⁴Dillard Department Stores v. Beckwith, 115 Nev. 372, 376, 989 P.2d 882, 884 (1999).

may be terminated at any time for any reason or no reason at all.⁵ However, the at-will employment rule is subject to limited exceptions founded upon strong public policy.⁶

In 1984, we carved out one such public policy exception in Hansen v. Harrah's, determining that an employee who was fired in retaliation for filing a worker's compensation claim could bring a tort claim for retaliatory discharge against his employer.⁷ Although we have never expressly articulated the elements necessary to establish a retaliatory discharge claim, we have stated that

the employee must be able to establish that the dismissal was based upon the employee's refusing to engage in conduct that was violative of public policy or upon the employee's engaging in conduct which public policy favors (such as, say, performing jury duty or applying for industrial insurance benefits).⁸

In Allum v. Valley Bank of Nevada, we clarified this holding, noting that a plaintiff alleging tortious or retaliatory discharge "must demonstrate that his protected conduct was the proximate cause of his discharge."⁹

⁵Id. at 376, 989 P.2d at 885.

⁶Id.

⁷100 Nev. 60, 64, 675 P.2d 394, 396-97 (1984).

⁸Bigelow v. Bullard, 111 Nev. 1178, 1181, 901 P.2d 630, 632 (1995).

⁹114 Nev. 1313, 1319-20, 970 P.2d 1062, 1066 (1998) (emphasis in original). In doing so, this court rejected the "mixed motives" theory prevalent in the federal courts, where a plaintiff could recover upon a showing that the retaliatory action was based in part upon legitimate motives and in part upon actionable violations of public policy.

Foley contends that there is no genuine issue of material fact regarding any element of retaliatory discharge and Foley is entitled to judgment as a matter of law. Although Ogden officially terminated Foley's employment for "insubordination," Foley argues that this insubordination occurred when Foley disobeyed an order from his supervisor directing him not to file an SIIS claim. Thus, in Foley's view, his decision to file a claim was, as a matter of law, the proximate cause of his firing. We disagree.

With respect to negligence claims, this court has repeatedly held that issues of proximate cause are "considered issues of fact and not of law, and thus they are for the jury to resolve."¹⁰ Ogden officials, including Nenstiel, have consistently maintained that Foley was fired due to his insubordination and failure to adhere to company policies, not in retaliation for filing a worker's compensation claim. Therefore, the parties dispute whether Ogden's stated basis for firing Foley was a mere pretext for retaliatory conduct. The district court apparently believed that this determination was a question of fact properly left to the jury. We agree and therefore conclude that the district court did not err when it denied Foley's motion for partial summary judgment.

Jury verdict

Foley next argues that the jury's verdict is not supported by substantial evidence. Foley also argues that the district court committed reversible error when it excluded certain evidence at trial.

¹⁰Brascia v. Johnson, 105 Nev. 592, 595, 781 P.2d 765, 767-68 (1989) (quoting Nehls v. Leonard, 97 Nev. 325, 328, 630 P.2d 258, 260 (1981)).

Foley, however, has failed to provide this court with transcripts of the jury trial before the district court.¹¹ Without these transcripts, this court is unable to determine whether the jury's verdict is supported by substantial evidence. As this court has held, "[i]t is the appellant's responsibility to ensure that the record on appeal contains the material to which exception is taken."¹² Where the record is incomplete, "the missing portions of the record are presumed to support the district court's decision, notwithstanding an appellant's bare allegations to the contrary."¹³ Because this court has no basis upon which to review Foley's contention, we presume that the jury's verdict in this case was supported by substantial evidence.

Additionally, Foley's failure to provide a complete record on appeal impedes appellate review of the district court's pre-trial evidentiary rulings that he is challenging. Pursuant to NRCP 61, Nevada's civil harmless error rule, "[n]o error in either the admission or the exclusion of evidence . . . is ground for granting a new trial or for setting aside a verdict . . . unless refusal to take such action appears to the court inconsistent with substantial justice." Without the trial transcript, it is impossible for this court to determine whether the district court's conclusions regarding these motions in limine constitute reversible error.

Attorney fees

¹¹Foley specifically noted in his proper person appeal statement that transcripts of the district court proceedings were not necessary for review of this appeal.

¹²Prabhu v. Levine, 112 Nev. 1538, 1549, 930 P.2d 103, 111 (1996).

¹³Riggins v. State, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991).

Finally, Foley challenges the district court's post-judgment order awarding \$25,000 in attorney fees to Ogden based upon the penalty provisions of NRCP 68 and NRS 17.115. This court generally reviews a district court's decision regarding attorney fees for an abuse of discretion.¹⁴ We conclude that the district court did not abuse its discretion in awarding Ogden attorney fees.

Under NRCP 68 and NRS 17.115, if a party rejects an offer of judgment and subsequently fails to obtain a more favorable judgment at trial, the district court may order the offeree to pay "[r]easonable attorney's fees incurred by the party who made the offer for the period from the date of service of the offer to the date of entry of the judgment."¹⁵ In Beattie v. Thomas, this court enumerated four factors that the district court must consider when determining whether to exercise its discretion to award reasonable attorney fees under these provisions:

(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.¹⁶

¹⁴Allianz Ins. Co. v. Gagnon, 109 Nev. 990, 993, 860 P.2d 720, 722 (1993).

¹⁵NRS 17.115(4)(d)(3).

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

Where it is clear from the record that the district court properly considered the Beattie factors, this court will defer to its discretion.¹⁷

On December 19, 2001, Ogden served a \$10,000 offer of judgment upon Foley pursuant to NRCP 68 and NRS 17.115. Foley rejected the offer of judgment and the case proceeded to trial. As noted above, the jury found in favor of Ogden and Foley was awarded no damages. Ogden filed a motion for attorney fees, seeking approximately \$99,000 in fees incurred between Foley's December 2001 rejection of the offer of judgment and trial. The district court partially granted the motion, awarding Ogden \$25,000 in attorney fees.¹⁸

Although the district court's order granting Ogden's motion for attorney fees included no discussion of Beattie, we have made clear that district courts need not make explicit findings with respect to the Beattie factors.¹⁹ In this case, both parties filed points and authorities which included a thorough discussion of the Beattie factors and the district court's evaluation of the factors permeates the record on appeal. We therefore conclude that the district court did not abuse its discretion when it granted Ogden's motion for attorney fees.²⁰

Conclusion

¹⁷Wynn v. Smith, 117 Nev. 6, 13, 16 P.3d 424, 428-29 (2001).

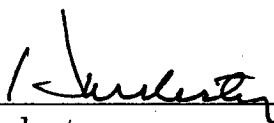
¹⁸Notably, Ogden did not file a cross-appeal challenging the district court's decision to award only \$25,000 in attorney fees rather than the approximately \$99,000 Ogden allegedly incurred.

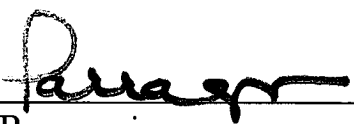
¹⁹Wynn, 117 Nev. at 13, 16 P.3d at 428-29.

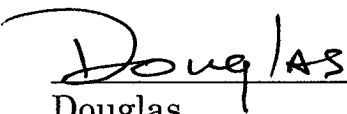
²⁰Foley's proper person appeal statement does not challenge the district court's award of costs.

We conclude that the district court properly denied Foley's motion for partial summary judgment.²¹ Because Foley has failed to provide this court with the transcripts of the jury trial, we presume that the district court's pre-trial evidentiary rulings and the jury's verdict are proper. Furthermore, we conclude that the district court did not abuse its discretion in granting Ogden's motion for attorney fees. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

²¹Foley also argues that the district court erred when it granted Ogden's motion for partial summary judgment as to Foley's fraud, IIED, and defamation claims. We disagree. "Where an essential element of a claim for relief is absent, the facts, disputed or otherwise, as to other elements are rendered immaterial and summary judgment is proper." Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992). Foley's fraud claim fails because he has failed to demonstrate reliance on Nenstiel's alleged misrepresentations. Foley's IIED claim fails because there is no evidence in the record indicating Foley suffered extreme emotional injury as a result of his May 1996 termination. Foley's defamation claim fails because there is no evidence in the record indicating that Nenstiel made defamatory statements to anyone regarding Foley's termination. Accordingly, we conclude that the district court's grant of partial summary judgment was proper.

cc: Hon. Stewart L. Bell, District Judge
Michael Anthony Foley
Barron & Pruitt, LLP
Barron, Vivone & Pruitt
Eighth District Court Clerk