IN THE SUPREME COURT OF THE STATE OF NEVADA

ZURICH U.S.,
Appellant/Cross-Respondent,
vs.
UNITED ROAD SERVICES, INC., A DELAWARE CORPORATION, AND CITY TOWING, INC., A NEVADA CORPORATION, BOTH D/B/A QUALITY TOWING,
Respondents/Cross-Appellants.

No. 41373

FILED

APR 21 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a summary judgment and appeal and cross-appeal from an attorney fees/costs order. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Appellant/cross-respondent Zurich U.S. filed a subrogation claim against respondents/cross-appellants United Road Services, Inc., and City Towing, Inc., d/b/a Quality Towing (collectively referred to as Quality), seeking to recover money Zurich paid to its insured, Prestige Gunite of Nevada.

Prestige owned a cement mixer, which was involved in an accident at a construction site. The rear section of the mixer rolled onto its side, and Quality was hired to right it. Before righting it, Quality's driver took a picture that showed significant damage to the mixer. While righting the mixer, the winch on the tow truck malfunctioned, causing the mixer to drop two to three feet to the ground. The tow truck driver stated that the mixer was not further damaged as a result of the fall.

Prestige made an insurance claim with Zurich. An independent appraiser inspected the mixer and Zurich paid the claim based on the appraisal. However, the appraisal was unknowingly

performed on a different mixer than the one involved in the incident. After paying the claim, Zurich filed a subrogation action against Quality, alleging that Quality negligently caused damage to the mixer.

Two years into litigation, after the close of discovery, and shortly before trial, Quality filed a motion for summary judgment, alleging that Zurich failed to produce any evidence that Quality's actions caused damage to the mixer. Zurich never disclosed, nor listed as a witness, the driver of the mixer or any other person who observed the mixer after it turned over and before Quality attempted to right it. Zurich countered that it had designated Pat Hall, Prestige's owner, and Hall would testify as to what happened to the mixer and the cause of the damage. However, there was no evidence that Hall was at the site on the day of the incident and observed the mixer after it turned over, but before Quality touched it. Zurich sought more time to produce a witness to the incident.

The district court granted Zurich's request for more time. Shortly thereafter, Zurich produced a declaration from Terry Clayton, a Prestige representative, who declared that he arrived at the site after Quality attempted to right the mixer and that the mixer was a total loss. The declaration noted that a tip-over does not normally result in a total loss.

The next day, Zurich filed a voluntary motion to dismiss its action with prejudice. The motion was conditioned upon each party bearing its own attorney fees and costs. Quality opposed the motion to dismiss on Zurich's terms, arguing that, while it did not oppose dismissal, it opposed a dismissal with each party bearing its own fees and costs.

The district court denied Zurich's motion to dismiss and granted Quality's motion for summary judgment. Zurich then filed a motion for rehearing and reconsideration. Zurich stated that it had

located Barnabe Gomez, a former Prestige employee, who was at the site on the day of the incident. Gomez declared that he saw the mixer stuck in the dirt, requiring the services of a wrecker. Gomez further declared that he saw the mixer before Quality attempted to right it, and the damage was not severe. Gomez wrote that Quality caused significant damage to the mixer while attempting to right it, resulting in a total loss.

Quality opposed the motion for reconsideration, stating that a party may not use a motion for reconsideration to reargue matters already considered and decided but may only direct the court's attention to some controlling matter that the court originally overlooked or misapprehended. Quality argued that Zurich failed to present this evidence in over two years of litigation and that it was not appropriate at such a late date. Zurich replied, arguing that there is a genuine issue of material fact and summary judgment was not appropriate.

Quality moved for attorney fees and costs, pursuant to NRS 18.010(2). Quality argued that the lawsuit was frivolous and was without merit from its onset since the allegations in the complaint were not supported by credible evidence. Quality argued that sixteen months before suit was filed, Quality sent a letter informing Zurich that the mixer was damaged before Quality touched it. The letter informed Zurich of the driver's photo, which showed the damage prior to Quality's attempt to right the mixer. Furthermore, Quality pointed to a note in the claim file that admits that the cause of the damage is pure conjecture. Quality sought $22,380.00 in attorney fees.

Zurich opposed Quality's motion for attorney fees, asserting that the lawsuit, if viewed from the time of filing, was not frivolous. Zurich contended that from the time that it learned that the appraisal was for the wrong mixer, it sought dismissal of the case. Furthermore, Zurich

contended that Quality's failure to submit an itemized billing statement precluded an award of attorney fees.

Quality replied that the court should not consider Zurich's opposition since it was filed seven days after the deadline. Quality argued that the case lingered for so long because Zurich refused to take responsibility for any of Quality's attorney fees and costs.

The district court denied the motion for reconsideration and granted the motion for attorney fees. The district court awarded Quality its costs in the amount of $2,689.43 and its attorney fees in the amount of $5,000.00.

On appeal, Zurich contends that the district court erred by granting Quality's motion for summary judgment because there remains a genuine issue of material fact regarding responsibility for the damage to the mixer. Zurich supports this argument with Clayton's declaration, its answer to Interrogatory Number 2, and Gomez's declaration. Zurich contends that a jury should determine the amount of property damage. Quality counters that the evidence that was before the district court when deciding the motion for summary judgment does not demonstrate that Quality is liable for negligence. Quality contends that Zurich did not have any evidence that showed Quality caused the damage to the mixer.

When reviewing the district court's order granting summary judgment, this court applies a de novo standard of review.[1] Summary judgment should be granted only when, based on the pleadings and discovery, no genuine issue of material fact exists.[2] "A genuine issue of

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[1]Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992).

[2]NRCP 56(c).

material fact [exists when] a reasonable jury could return a verdict for the non-moving party."[3] "'[C]onclusory statements along with general allegations do not create an issue of material fact.'"[4] In determining whether summary judgment is warranted, the court must view all evidence and reasonable inferences in the light most favorable to the non-moving party.[5]

We conclude that Zurich failed to timely provide evidence that Quality caused damage to the mixer. First, Clayton's declaration admits that he did not observe the mixer until after Quality attempted to right it, providing no evidence as to the cause of the damage. Second, Zurich's answer to Interrogatory Number 2 is only a bald assertion that Quality caused the damage, with no basis except Kaye's appraisal, which is of no relevance since it was performed on a different mixer. Third, while Gomez's declaration may have been sufficient to defeat the motion for summary judgment, it was not before the district court at the time it decided the motion for summary judgment.[6] Therefore, this court cannot consider the evidence in determining the appropriateness of the order granting summary judgment.[7]

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[3]Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993).

[4]Ortega v. Reyna, 114 Nev. 55, 58, 953 P.2d 18, 20 (1998) (quoting Michaels v. Sudeck, 107 Nev. 332, 334, 810 P.2d 1212, 1213 (1991)).

[5]Posadas, 109 Nev. at 452, 851 P.2d at 442.

[6]See Achrem v. Expressway Plaza Ltd., 112 Nev. 737, 742, 917 P.2d 447, 450 (1996).

[7]See id. (concluding that the district court properly refused to consider affidavits that were presented for the first time as an attachment

continued on next page . . .

At the hearing on the motion for summary judgment, Zurich admitted that, despite conducting discovery and the passage of the discovery cutoff date, it did not have a witness who was at the site and observed the cause of the damage. The district court granted Zurich additional time to produce such evidence. Despite this extension, Zurich was only able to produce Clayton's declaration, which was insufficient. Zurich also filed a voluntary motion to dismiss, allegedly recognizing that it was unable to meet its burden of proof.

Accordingly, Zurich did not produce evidence to support all the elements of its claim. To the contrary, Quality produced evidence that the damage was done to the mixer in the rollover. Therefore, the district court did not err by granting Quality's motion for summary judgment.[8]

Next, Zurich argues that the district court abused its discretion by awarding Quality its attorney fees because it never made a finding that the action was groundless and Quality failed to submit itemized billing statements. Quality cross-appeals, arguing that the attorney fees award was not an abuse of discretion and that the district

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. . . *continued*
to a motion for reconsideration because they were not properly submitted as evidence before the court reached its decision in the case).

[8]Zurich lists as one of its issues for appeal, "Whether the District Court erred in denying Appellant's Motion for Rehearing/ Reconsideration." However, the argument section of the opening brief does not contain any argument in support of this contention. Nevertheless, Zurich uses the evidence attached to the motion for reconsideration in support of its arguments regarding summary judgment and attorney fees. In this case, the district court did not abuse its discretion by denying the motion for reconsideration. Gomez's affidavit should have been obtained long before the filing of Quality's motion for summary judgment and Zurich's motion to dismiss.

court should have awarded $22,380.00 in attorney fees, rather than $5,000.00. Quality argues that the amount awarded is not reasonable under the circumstances and is contrary to fairness and public policy. Furthermore, Quality states that NRS 18.010 does not require an itemized billing statement, and if the district court wished to see a specific accounting of the fees, it was willing to submit one for in camera review since it contains privileged information.

A district court's award of attorney fees will not be disturbed on appeal unless there is a manifest abuse of discretion.[9] NRS 18.010(2)(b) provides, in pertinent part, that a district court may award attorney fees to a prevailing party "when the court finds that the claim . . . was brought or maintained without reasonable ground or to harass the prevailing party."[10] A claim is groundless if it cannot be supported by any credible evidence at trial.[11]

The evidence indicates that Zurich filed suit without conducting a thorough investigation. Zurich's own claim file indicates that the cause of the damage was pure conjecture. Furthermore, Quality sent Zurich a letter before suit was initiated that indicated that the mixer was damaged prior to Quality touching it and that it had evidence to support this assertion. Zurich did not request a copy of the photo until after it

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[9]Nelson v. Peckham Plaza Partnerships, 110 Nev. 23, 26, 866 P.2d 1138, 1139-40 (1994).

[10]See also Duff v. Foster, 110 Nev. 1306, 1308, 885 P.2d 589, 591 (1994), overruled on other grounds by Halbrook v. Halbrook, 114 Nev. 1455, 971 P.2d 1262 (1998).

[11]Semenza v. Caughlin Crafted Homes, 111 Nev. 1089, 1095, 901 P.2d 684, 688 (1995).

initiated suit. Finally, Zurich failed to have the vehicle in question inspected or appraised prior to initiating suit.

The record indicates that at the time Zurich initiated suit, it did not have any credible evidence to support its claim that Quality caused the damage. Therefore, we conclude that the district court did not abuse its discretion by awarding Quality its attorney fees pursuant to NRS 18.010(2)(b).

Furthermore, we conclude that the amount of the award was justified. A request for attorney fees that is unaccompanied by an itemized billing statement is substandard.[12] Also, the submission of sealed billing statements to the district court for in camera review unfairly precludes the other party from disputing the amount and legitimacy of the award.[13] However, the lack of contemporaneous records and poorly documented time records is not a reason to deny an attorney fee request in its entirety.[14]

In this case, we conclude that the district court did not abuse its discretion by awarding Quality $5,000.00 in attorney fees. An attorney fee award is within the district court's discretion. It is entirely reasonable that in two years of litigation, including several depositions, an impending trial, and numerous motions, Quality incurred, at the very least, $5,000.00 in attorney fees. As to Quality's cross-appeal, we conclude that the district court did not abuse its discretion in awarding only $5,000.00. While it is reasonable that Quality incurred $22,380.00 in attorney fees, the district

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[12]Duff, 110 Nev. at 1310, 885 P.2d at 592, overruled on other grounds by Halbrook, 114 Nev. 1455, 971 P.2d 1262.

[13]Love v. Love, 114 Nev. 572, 582, 959 P.2d 523, 529 (1998).

[14]Fischer v. SJB-P.D. Inc., 214 F.3d 1115, 1121 (9th Cir. 2000).

court may have reasonably awarded only $5,000.00 due to the lack of an accounting.[15] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Becker, C.J.
Becker

Douglas, J.
Douglas

cc: Hon. Lee A. Gates, District Judge
Parker Nelson & Arin, Chtd.
Gugino Law Firm
Clark County Clerk

[15]Quality urges this court to sanction Zurich for filing a frivolous appeal and for violating the Nevada Rules of Appellate Procedure. We admonish Zurich's counsel, Paul A. Acker, for failure to comply with this court's Rules of Appellate Procedure. While he may find the NRAP to only contain "hyper-technical" rules regarding procedure, an attorney appearing before this court has an obligation to follow these rules. We caution Mr. Acker that this court will consider sanctions for similar conduct in the future.

MAUPIN, J., concurring:

I concur in the result reached by the majority. I write separately to take issue with the majority's implication that the district court had no power to consider new information on appellant's motion for reconsideration below, and that, accordingly, we were precluded from considering the information on appeal.

The majority relies upon Achrem v. Expressway Plaza Ltd.,[1] in which this court affirmed the district court's refusal to consider information presented for the first time on a motion to reconsider a ruling granting summary judgment. Quoting from Achrem:

> The district court refused to consider the affidavits because they were not properly submitted as evidence before the district court reached its decision in this case.
>
> We conclude that the district court properly refused to consider the arguments raised [below] which were based on evidence that was not properly within the record. Points or contentions not raised in the original hearing cannot be maintained or considered on rehearing.[2]

I am of the opinion that we should retreat from Achrem's apparent prohibition against the consideration of new matters during the rehearing phase of matters still pending in district court. First, the blanket statement that points or contentions not raised in an original hearing cannot be considered upon rehearing is antithetical to the rehearing process at the trial court level. Second, new matters are often, under certain circumstances, properly raised on rehearing. Third, the cases cited

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[1]112 Nev. 737, 742, 917 P.2d 447, 450 (1996).

[2]Id.

in Achrem for the proposition stated apply to claims made on rehearings before this court. Fourth, assuming lack of finality, i.e., as long as the district court retains jurisdiction to decide a rehearing motion, NRCP 54(b) allows interim rulings under NRCP 56 to be reconsidered at any time prior to the rendition of final judgment.[3] Fifth, district courts should be allowed to consider new evidence when justice so requires. Sixth, our review of the consideration of new materials by a district court should be based upon an abuse of discretion standard.

Applying these precepts, the district court committed no abuse of discretion in it its refusal to consider information provided in NRCP 56 affidavits first submitted after the initial grant of summary judgment. First, the district court gave Zurich ample opportunity to oppose the original summary judgment application. Second, as noted by the majority, Zurich first lodged the new information with the district court as part of its motion for reconsideration of the summary judgment order. Third, and most tellingly, the information in the late affidavits was not acquired for a period in excess of two years after commencement of the litigation.

Thus, although the district court in this case was empowered to consider the new evidence on reconsideration, it properly refused to do so. That Zurich failed to generate support for its case for a period exceeding two years from the commencement of the action implicated the district court's discretion to refuse consideration of the new evidence.

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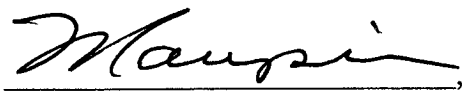
[3]It is unclear whether the order granting summary judgment below was final for NRCP 54(b) purposes. Assuming finality, my view of the district courts' prerogatives would remain the same.

In light of the above, I conclude that the majority reaches the correct result but applies an improper procedural construct in doing so.



Maupin, J.

Maupin