

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD A. SCHIELD,  
Appellant,  
vs.  
RICHARD G. HORNE AND BRENDA J.  
HORNE,  
Respondents.

No. 41933

FILED

APR 21 2005

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *R. Schield*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting respondents' motions for summary judgment, attorney fees and costs, and from an order denying appellant's motion for attorney fees. Second Judicial District Court, Washoe County; Peter I. Breen, Judge.

Respondents Richard and Brenda Horne entered into an agreement to purchase real property from appellant Richard Schield. The written contract contained a condition precedent that the trees on adjacent parcels blocking views from the subject property would be pruned or removed. Schield was to obtain written agreement from the adjoining property owners acknowledging the obligation to deal with the trees. The adjoining owners stated that they would tend to the trees under protest, but had no obligation to do so. The Hornes then withdrew their purchase offer. Schield sued for breach of contract, and the Hornes counterclaimed for breach of contract and attorney fees. We affirm.

Hornes' motion for summary judgment

We review orders granting summary judgment de novo.<sup>1</sup> Summary judgment is appropriate when there are no genuine issues of

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<sup>1</sup>Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713, 57 P.3d 82, 87 (2002).

material fact, and the moving party is entitled to judgment as a matter of law.<sup>2</sup> The moving party has the burden of proving the absence of genuine issues of material fact,<sup>3</sup> with all inferences drawn in favor of the non-moving party.<sup>4</sup> Moreover, “all of the non-movant’s statements must be accepted as true, all reasonable inferences that can be drawn from the evidence must be admitted, and neither the trial court nor this court may decide issues of credibility based upon the evidence submitted in the motion or the opposition.”<sup>5</sup>

Schild contends that a material question of fact exists concerning the parties’ contractual intent. Where a document is clear on its face, it “will be construed from the written language and enforced as written.”<sup>6</sup> We conclude that the purchase contract and the counteroffer are unambiguous, and therefore, we need not consider extrinsic evidence. In short, the agreement was conditioned upon removal or pruning of trees located on adjacent land owned by third parties. When it became evident that Schild could not obtain permanent compliance with the condition, the Hornes rightfully repudiated the contract. Accordingly, Schild’s

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<sup>2</sup>Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441 (1993); see also, NRCPC 56(c).

<sup>3</sup>Butler v. Bogdanovich, 101 Nev. 449, 451, 705 P.2d 662, 663 (1985).

<sup>4</sup>Posadas, 109 Nev. at 452, 851 P.2d at 442.

<sup>5</sup>Pegasus, 118 Nev. at 714, 57 P.3d at 87.

<sup>6</sup>Ellison v. C.S.A.A., 106 Nev. 601, 603, 797 P.2d 975, 977 (1990) (stating that “issues of contractual construction, in the absence of ambiguity or other factual complexities, present questions of law for the courts and are suitable for determination by summary judgment”).

argument is without merit, and the district court properly awarded summary judgment in favor of the Hornes.

Motions for attorney fees and costs

A district court may not award attorney fees absent authorization by a statute, rule or agreement.<sup>7</sup> However, where the district court is authorized to award attorney fees and costs, this court will not disturb such an award absent an abuse of discretion.<sup>8</sup>

Here, on May 29, 2003, the district court granted the Hornes' motion for attorney's fees, based upon a previous separate finding in its July 10, 2001 order, granting summary judgment in their favor, that Schield prosecuted his complaint in bad faith.<sup>9</sup> As part of the May 29, 2003 order, applying NRS 18.010, NRCP 68 and Beattie v. Thomas,<sup>10</sup> the district court denied Schield's motion for attorney fees and costs on the Hornes' counterclaim.

The Hornes' motion for attorney fees and costs

Schild contends that the district court abused its discretion when it granted the Hornes' motion for attorney fees and costs. We disagree. First, the finding of bad faith under NRS 18.010(2)(b) was supported by substantial evidence. Second, the district court's award is consistent with the contract provision providing for such an award.

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<sup>7</sup>U.S. Design & Constr. v. I.B.E.W. Local 357, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002).

<sup>8</sup>Id.

<sup>9</sup>See NRS 18.010(2)(b).

<sup>10</sup>99 Nev. 579, 668 P.2d 268 (1983).

Schild also contends that the Hornes' affidavit of fees and costs did not contain an adequate description of the fees and costs incurred and that the district court failed to make any findings that the fees sought were reasonable. On July 18, 2001, the Hornes submitted an affidavit stating that they incurred \$3,278.75 in attorney fees and \$168.06 in costs, totaling \$3,446.81, with no further breakdown of these items. As noted, the district court waited until May 2003, to enter an order awarding the Hornes this amount.

The record indicates that Schild never objected to the July 2001 affidavit, never sought any district court relief, never argued that the description of fees incurred was inadequate or that the district court failed to conduct a Beattie analysis.<sup>11</sup> The Hornes point out that, because Schild had almost two years to voice an objection in the district court and failed to do so, he waived any argument concerning the reasonableness of the attorney fees and costs.

We agree that, in addition to the findings under NRS 18.010(2)(b), that Schild has waived this argument.

Schild's motion for attorney fees and costs

Schild contends that the district court abused its discretion when it denied his motion for attorney fees on the Hornes' counterclaim. On January 17, 2003, months prior to the final decision on the Hornes' claim for fees, Schild served an offer of judgment on the counterclaim in the amount of \$3,500.00. The district court found that the Hornes' counterclaim was filed in good faith and that Schild's fee request was

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<sup>11</sup>See Nye County v. Washoe Medical Center, 108 Nev. 490, 493, 835 P.2d 780, 782 (1992) (noting that the failure to raise an issue before the district court will generally bar consideration on appeal).

unjustified. The court further found that the Hornes' rejection of the offer of judgment was reasonable.

The district court noted that it considered both statutory law and Beattie in making its determination.<sup>12</sup> In Beattie, we determined that, when awarding attorney fees, a district court must consider the following factors:

- (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 offer or are reasonable and justified in amount.<sup>13</sup>

When a district court properly considers the Beattie factors, the award of attorney fees is discretionary and will not be disturbed on appeal absent clear abuse.<sup>14</sup>

The district court determined that the Hornes pursued their claim in good faith, and that they filed a counterclaim to protect themselves from Schield's breach of contract claim, which the court determined he brought in bad faith. Further, while the district court granted Schield summary judgment on the Hornes' counterclaim, this

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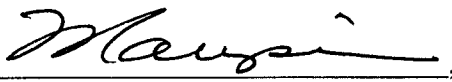
<sup>12</sup>99 Nev. at 588-89, 668 P.2d at 274.

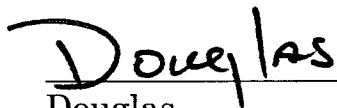
<sup>13</sup>Id.

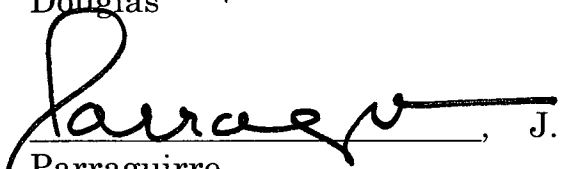
<sup>14</sup>Bidart v. American Title, 103 Nev. 175, 179, 734 P.2d 732, 735 (1987); see also, Wynn v. Smith, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001) (stating "[a]lthough explicit findings with respect to these factors are preferred, the district court's failure to make explicit findings is not a per se abuse of discretion").

ruling was largely based upon the fact that, given the prior rulings, the counterclaim was moot. Although the district court made no findings as to the Hornes' failure to accept the adjoining property owner's offer, the offer was irrelevant given that the condition precedent of the contract was not satisfied. Importantly, the district found that Schield made an offer of judgment only after the court indicated that it would award the Hornes attorney fees. Finally, although the district court did not make any findings as to the reasonableness of the Hornes' requested \$3,446.81 in attorney fees and costs, Schield did not object to this amount. Thus, it appears that the district court adequately considered the Beattie factors, and did not abuse its discretion when it denied Schield's motion for attorney fees and costs. Accordingly, we

ORDER the district court orders AFFIRMED.

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Peter I. Breen, District Judge  
Robert E. Dickey Jr.  
Law Office of Richard C. Blower  
Washoe District Court Clerk