IN THE SUPREME COURT OF THE STATE OF NEVADA

WARFIELD T. MORSELL,
Appellant/Cross-Respondent,
vs.
VINCENT FISCHELLA,
Respondent/Cross-Appellant.

No. 42550

FILED

MAR 18 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a post-judgment order awarding costs and attorney fees. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Respondent/cross-appellant Vincent Fischella rear-ended a car that contained appellant/cross-respondent Warfield Morsell. Morsell filed an action for negligence. Morsell, proceeding in proper person, rejected two offers of judgment for $7,486.55 and $10,481.12, as well as a $24,102.95 arbitration award. Both Morsell and Fischella then requested a trial de novo. Because Fischella had admitted liability, the trial proceeded only on the issue of damages. The jury awarded Morsell $3,000.00. Morsell then moved for additur or a new trial, while Fischella moved for $8,046.11 in costs, which included $6,067.00 in expert witness fees, and $9,000.00 in attorney fees. The district court denied Morsell's motion, but granted Fischella $3,479.11 in costs and $116.86 in attorney fees, the total of which equaled the amount of Morsell's $3,000.00 jury award plus interest.[1] The district court deemed the judgment satisfied.

[1]The district court apparently arrived at the $3,479.11 cost figure by taking the $8,046.11 in total requested costs, isolating the $6,067.00 requested for expert witness fees and reducing it to the $1,500.00 limit

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Morsell appealed the order denying his motion for additur or a new trial, and Fischella cross-appealed the order awarding costs and fees. Morsell's appeal was dismissed for lack of jurisdiction. Therefore, only the cost and fee issues remain.

Costs

Fischella contends that he was entitled to his full costs. Specifically, Fischella argues that, under NRCP 68 and NRS 17.115, he was entitled to the full $6,067.00 in expert witness fees because he made two offers of judgment, which were rejected, and both were more favorable than the $3,000.00 awarded by the jury. Fischella also argues that he was entitled to all incurred costs because Morsell did not oppose Fischella's motion for costs or move to retax and settle them. Fischella bases this argument on Hellman v. Capurro,[2] Reno Electric Works, Inc. v. Ward,[3] and EDCR 2.20(b). Finally, Fischella argues that he is entitled to costs under NAR 20 because Morsell requested a trial de novo but failed to obtain a judgment that exceeded the $24,102.95 arbitration award by ten percent. We conclude that Fischella's arguments are without merit.

NRS 18.005(5) defines costs as "[r]easonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each

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found in NRS 18.005(5). The court then added the $1,500.00 back to the remaining requested costs for a cost award of $3,479.11.

[2]92 Nev. 314, 549 P.2d 750 (1976) (holding that appellant's claim that respondent's memorandum set forth excessive costs and disbursements was inappropriately raised on appeal).

[3]53 Nev. 1, 290 P. 1024 (1930) (holding that the judgment of the district court was binding and the only way to void it was to move for a new trial and appeal from an order denying the same).

witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee." "The determination of allowable costs is within the sound discretion of the trial court. However, statutes permitting the recovery of costs are to be strictly construed . . . ."[4] For purposes of statutory interpretation, words in a statute should be given their plain meaning unless it violates the spirit of the statute.[5]

NRCP 68 does not provide for payment of expert witness fees and, thus, is inapplicable here.[6] However, NRS 17.115 "provide[s] for a discretionary award of expert witness fees."[7] NRS 17.115 states:

> 4. . . . [I]f a party who rejects an offer of judgment fails to obtain a more favorable judgment, the court:
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> . . . .
>
> d. May order the party to pay to the party who made the offer . . .
>
> (1) A reasonable sum to cover any costs incurred by the party who made the offer for each expert witness whose services were

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[4]Bobby Berosini, Ltd. v. PETA, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998) (citing Gibellini v. Klindt, 110 Nev. 1201, 1205, 885 P.2d 540, 543 (1994)).

[5]Trustees v. Developers Surety, 120 Nev. 56, ___, 84 P.3d 59, 62 (2004).

[6]See Trustees, Carpenters v. Better Building Co., 101 Nev. 742, 747, 710 P.2d 1379, 1382-83 (1985) (holding that the district court did not abuse its discretion by denying defendant's expert witness fees because the offer of judgment was tendered expressly pursuant to NRCP 68, which does not provide for recovery of expert witness fees).

[7]Id.

> reasonably necessary to prepare for and conduct the trial of the case.

EDCR 2.20(b), which pertains to motions, states in pertinent part, "Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion is meritorious and a consent to granting the same."

NAR 20(B)(2)(b) states:

> Where the arbitration award is more than $20,000, and the party requesting the trial de novo fails to obtain a judgment that exceeds the arbitration award by at least 10 percent of the award, the non-requesting party is entitled to its attorney's fees and costs associated with the proceedings following the request for trial de novo.

Because NRS 17.115(4)(d)(1) uses the word "may" and not "shall," awarding expert witness fees is within the discretion of the district court and not mandatory. We also read EDCR 2.20(b) to imbue the district court with the discretion to grant an unopposed order without alteration. Furthermore, Hellman and Reno Electric are inapplicable because they do not state that the district court must accept the total amount presented in uncontested memorandums of costs, nor do they address the issue of whether the district court has any discretion in determining a reasonable expert witness fee. Finally, the plain meaning of NAR 20 is that only a non-requesting party is entitled to his attorney fees and costs, and we conclude that Fischella is not a non-requesting party since he also moved for trial de novo.

Accordingly, we conclude that the district court was not required to award Fischella the full amount of his expert witness fees. Rather, such a decision was within the court's discretion. We now turn to whether the district court abused that discretion.

Fischella argues that the district court abused its discretion in failing to award the actual amount of expert witness fees, which exceeded the $1,500.00 limit imposed by NRS 18.005(5), because the nature of the expert's testimony and surrounding circumstances necessitated a larger amount.

In the absence of express findings of fact and conclusions of law by the district court in denying a motion for expert witness fees in excess of the limit imposed by NRS 18.005(5), we rely on an examination of the record to see if the district court's decision constituted an abuse of discretion.[8] However, where the trial transcript is not part of the record on appeal, it is presumed that denial of excess fees is correct.[9]

Here, the district court did not make any express findings of fact or conclusions of law when it limited Fischella's overall costs to $3,479.11 and expert witness fees to $1,500.00. More importantly, the record on appeal does not contain the trial transcript. Therefore, we must conclude that the district court's denial of the expert witness fees in excess of $1,500.00 was presumably correct and the court did not abuse its discretion. Thus, we affirm the cost award.

Attorney fees

Fischella argues that under NAR 20(B)(2)(b), the district court must award attorney fees to a successful litigant when the opponent who requested trial de novo does not obtain a judgment exceeding the

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[8]Schouweiler v. Yancey Co., 101 Nev. 827, 831, 712 P.2d 786, 789 (1985) (decided under a previous version of NRS 18.005, which allowed party to recover an expert witness fee of only $750.00).

[9]Id.

arbitration award. As with costs, we conclude that NAR 20 does not apply to Fischella in the matter of attorney fees since he is not a non-requesting party.

Next, Fischella argues that the district court abused its discretion by only awarding him attorney fees of $116.86 because, in making its decision, the district court: (1) provided no justification, (2) relied on incorrect standards of law, and (3) was arbitrary or capricious. According to Fischella, the district court's only consideration in awarding attorney fees was balancing out the amount of the jury verdict.

Attorney fee awards under NRS 17.115 and NRCP 68 are fact intensive; thus, this court will not disturb such awards absent an abuse of discretion.[10] The failure of a district court to state a basis for the attorney fee award is an arbitrary and capricious action and, thus, is an abuse of discretion.[11]

In exercising its discretion to award costs and attorney fees to an offeror whose pretrial offer of judgment has been rejected, the district court must evaluate the factors articulated in Beattie v. Thomas (the Beattie factors): (1) whether the claim was brought in good faith, (2) whether the offeror's offer of judgment was brought in good faith, (3) whether the offeree's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith, and (4) whether the fees sought are reasonable and justified in amount.[12]

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[10]Wynn v. Smith, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001).

[11]Henry Prods., Inc. v. Tarmu, 114 Nev. 1017, 1020, 967 P.2d 444, 446 (1998).

[12] 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).

In determining the amount of attorney fees, the district court should consider the factors set forth in Brunzell v. Golden Gate National Bank (the Brunzell factors): (1) the qualities of the advocate: his ability, training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, intricacy, importance, the time and skill required, the responsibility imposed and the prominence and character of the parties when they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; and (4) the result: whether the attorney was successful and what benefits were derived.[13]

In Uniroyal Goodrich Tire v. Mercer, a 1995 case, we affirmed an award of attorney fees because it was clear to us that the district court had considered the Beattie factors: the parties extensively argued the factors, the judge stated in his order that he had read and considered those arguments, and there was substantial evidence to support the conclusion that the award of attorney fees under NRS 17.115 and NRCP 68 was proper.[14] However, in Henry Products, Inc. v. Tarmu, a 1998 case, we remanded the attorney fee matter for findings justifying a reduced attorney fee award or for an amended award because the district court failed to state a basis for a reduced attorney fee award of $1,750.00 in the face of a documented claim for approximately $30,000.00.[15] In Wynn v. Smith, a 2001 case, we affirmed a district court's order denying attorney

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[13]85 Nev. 345, 349, 455 P.2d 31, 33 (1969); see also Schouweiler, 101 Nev. at 833-34, 712 P.2d at 790; .

[14]111 Nev. 318, 324, 890 P.2d 785, 789 (1995).

[15]114 Nev. at 1020, 967 P.2d at 446.

fees despite its failure to explicitly address each Beattie factor, because such an evaluation was reflected both in the record on appeal and, in particular, its explanation of the decision in its order.[16] We conclude that the approach taken in Uniroyal, in which the district court stated that it had read and considered the legal memoranda and exhibits relating to the motion for attorney fees, is not consistent with the later cases of Henry Products and Wynn, which require a more detailed analysis and explanation of the court's decision under Beattie.

Here, in its order, the district court simply stated that it had read the submitted briefs and heard the parties' arguments. However, it did not provide written support or explanation for its decision. We conclude that this failure was arbitrary and capricious and constitutes an abuse of discretion. We therefore reverse that portion of the district court's order pertaining to attorney fees and remand to the district court for findings based on the Beattie and Brunzell factors justifying the $116.96 award of attorney fees or, in the alternative, for an amended award. The remainder of the district court's order is affirmed.

It is so ORDERED.

_____, J.
Rose

_____, J.
Gibbons

_____, J.
Hardesty

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[16]117 Nev. at 13-14, 16 P.3d at 429.

cc: Hon. Stewart L. Bell, District Judge
Warfield T. Morsell
Ronald M. Pehr
Clark County Clerk