IN THE SUPREME COURT OF THE STATE OF NEVADA

PHILLIS M. BOYD, D.O.,
Appellant,
vs.
LOIS ZAMPELLA, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF RICHARD ZAMPELLA, DECEASED,
Respondent.

No. 45854

FILED

JAN 23 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court judgment on a jury verdict in a medical malpractice action and a post-judgment order awarding attorney fees and costs. Second Judicial District Court, Washoe County; Peter I. Breen, Judge.

Richard Zampella was a patient of Dr. Phyllis Boyd, a family practitioner, when he complained of severe coughing, fatigue, fever, and chills on August 28, 2000. Zampella had a long history of diabetes and heart disease, which was well-known to Boyd. Boyd admitted Zampella to Washoe Medical Center with pneumonia, where he died two days later following a massive heart attack. During Zampella's two-day stay, Boyd administered several diagnostic tests which she testified confirmed her diagnosis of pneumonia. As such, Boyd treated Zampella as a pneumonia patient despite her knowledge that administering fluids could exacerbate his diagnosed congestive heart failure.

Zampella's widow, Lois, brought suit for loss of consortium and on behalf of Zampella's estate for medical malpractice and wrongful death. During trial, the parties disputed the appropriate standard of care.

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Zampella argued that the appropriate standard of care required a family practitioner to refer the patient to a specialist or, if the practitioner fails to refer, she must exercise the same duty of care as the appropriate specialist. Boyd objected to this instruction, and argued that the appropriate standard was that of a similarly situated family practitioner. The jury found that Boyd should have referred Zampella to a pulmonary or cardiac specialist, but absent such a referral, Boyd was held to the standard of a pulmonary or cardiac specialist and was therefore liable for Zampella's death.

After trial, Zampella filed and was granted a motion for attorney fees and costs and prejudgment interest pursuant to the penalty provisions of NRCP 68 and NRS 17.115. Zampella served Boyd with two offers of judgment months before the trial ensued, both of which Boyd rejected. Zampella argued that under a lodestar theory, her post-offer fees totaled between $50,100 and $66,900, but argued that she should be awarded $110,727.68 in attorney fees, reflecting a forty-percent contingency fee agreement. The district court agreed with Zampella that, given counsel's expertise, the risk level of the case, and the trial preparation time, Zampella was entitled to attorney fees in the amount of $110,727.68 under NRCP 68 and NRS 17.115.

Boyd raises three arguments on appeal. First, Boyd argues that the district court erred in its statement of the law as to the standard of care stated in the jury instructions. Second, Boyd claims that certain aspects of the district court's award, including inter alia, permitting expert witness fees in excess of $1,500, constituted an abuse of discretion. Third, she argues that the district court abused its discretion in its award of attorney fees to Zampella. We agree that the district court abused its

discretion in its calculation of attorney fees, but affirm as to the issues of the standard of care jury instruction and expert witness fees.

Standard of care

Boyd argues that the district court utilized an incorrect standard of care by holding her to the standard of care of a specialist in pulmonary and cardiac care. We review a district court's decisions regarding jury instructions for an abuse of discretion or judicial error.[1] The jury instruction at issue stated that "a board certified family practitioner has a duty to refer a patient to another physician who is a specialist if under the circumstances a reasonably careful and skillful family practitioner would so refer." Further, the instructions stated that if the family practitioner did not refer and undertook the duties of a specialist, she would be held to the same standard as the specialist. The language used in this jury instruction is nearly identical to that of Nevada Model Jury Instruction 6.04 and is in accordance with several other state supreme court holdings regarding the issue of a family practitioner's standard of care.[2] Therefore, the jury instruction was an accurate statement of the law.

Boyd next argues that the instruction was unsupported by the evidence, because the experts did not present an assumed duty theory and Zampella's experts were not family practitioners. We stated in Rees v.

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[1]Insurance Co. of the West v. Gibson Tile, 122 Nev. 455, 463, 134 P.3d 698, 702-03 (2006).

[22]See Larsen v. Yelle, 246 N.W.2d 841, 845 (Minn. 1976) (a leading case on this issue), Simone v. Sabo, 231 P.2d 19, 22 (Cal. 1951), King v. Flamm, 442 S.W.2d 679, 681 (Tex. 1969).

Rodriques, that "[t]here is no requirement that the expert medical witness be from the same specialty as the defendant," but rather the standard is whether the witness possesses actual knowledge of the procedures, treatments or diagnosis at issue.[3] We do not require an expert to be from the same medical specialty, because there are many matters that are simply common medical knowledge to all physicians.[4] Finally, this court does not reweigh the credibility of witnesses on appeal because that duty rests within the trier of fact's sound discretion.[5] We conclude that the district court did not abuse its discretion because the instructions issued were an accurate statement of the law and permitted the jury to weigh the evidence and determine which standard of care should apply.

Costs and expert fees

Boyd next contended that the district court improperly awarded costs, including an award of over $1500 in expert witness costs. The determination of which expenses are allowable costs is within the sound discretion of the trial court.[6] As to these types of costs, we do not disturb the district court's discretionary award of costs absent abuse of discretion.[7]

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[3]101 Nev. 302, 304, 701 P.2d 1017, 1019 (1985).

[4]Fernandez v. Admirand, 108 Nev. 963, 970, 843 P.2d 354, 359 (1992).

[5]Castle v. Simmons, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004).

[6]Albios v. Horizon Communities, Inc., 122 Nev. 409, 431, 132 P.3d 1022, 1036 (2006).

[7]Waddell v. L.V.R.V. Inc., 122 Nev. 15, 25, 125 P.3d 1160, 1166 (2006).

Expert witness fees may be awarded up to $1500 per 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."[8] Further, NRS 18.005(17) permits the award of "[a]ny other reasonable and necessary expense incurred in connection with the action." Here, the fees were $8,743.30 for one medical expert and $4,091.40 for another. The district court indicated that the fees were justified by travel, expertise, and value in understanding the case. Because Nevada law requires a medical malpractice plaintiff to provide expert testimony fixing the applicable standard of care, the district court did not abuse its discretion in determining that these experts were necessary to Zampella's case and awarding costs based on the expert's necessity.[9]

The attorney fee award

We review a district court's decision regarding attorney fees for an abuse of discretion.[10] However, the district court must award attorney fees pursuant to a statute, rule or contract.[11] We review

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[8]NRS 18.005(5).

[9]See NRS 41A.100, Gilman v. State, Bd. of Veterinary Medical Examiners, 120 Nev. 263, 273, 89 P.3d 1000, 1006 (2004).

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

[11]State, Dep't of Human Resources v. Fowler, 109 Nev. 782, 784, 858 P.2d 375, 376 (1993).

questions of statutory interpretation de novo.[12] Boyd first contends that the district court abused its discretion by not following a Beattie v. Thomas analysis. Second, Boyd argues that the fee award amount of $110,727 improperly includes fees incurred from the inception of the case, which is a direct contradiction to NRCP 68 and NRS 17.115. We agree that the district court erred in the amount awarded, but we conclude based on the record that the district court properly applied the Beattie guidelines.

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 of time from the date of service of the offer to the date of entry of the judgment."[13] In Beattie, we devised four factors for a district court to utilize when determining whether to award attorney fees under NRS 17.115. Those factors are: (1) whether the claim was brought in good faith; (2) whether the offer of judgment was made in good faith in its timing and amount; (3) whether the rejection of an offer of judgment was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in their amount.[14]

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[12]Banks v. Sunrise Hospital, 120 Nev. 822, 846, 102 P.3d 52, 68 (2004).

[13]NRS 17.115(4)(d)(3).

[14]Beattie v. Thomas, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).

Where a defendant is the offeree rather than the offeror, we have held that the first factor should be whether the defendant's claims or defenses were litigated in good faith.[15] While we prefer explicitly written findings detailing that all Beattie factors are met, we do not equate a district court's failure to make explicit written findings with a per se abuse of discretion.[16] Rather, we look for evidence in the record that the district court considered the Beattie factors through the points and authorities submitted by the parties, oral argument, or the district court's language itself.[17] Here, we conclude that the district court did not abuse its discretion because the record demonstrates that the district court considered the Beattie factors. The record reflects that both parties submitted points and authorities discussing the Beattie factors, and the district court's order contained language similar to the Beattie factors, even though it did so without citation.

Next, we consider Boyd's argument that the district court abused its discretion when it awarded $110,727.58 in attorney fees, reflective of Zampella's forty-percent contingency fee agreement. We agree.

NRCP 68(f) states that if an offeree rejects an offer and fails to obtain a more favorable judgment, then the offeree shall pay the offeror's reasonable attorney's fees "actually incurred . . . from the time of the

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[15]Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998).

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

[17]Id. at 13, 16 P.3d at 428-29.

offer."[18] An offer is considered rejected if it is not accepted within ten days after service of the offer.[19] NRS 17.115(4)(d)(3) echoes NRCP 68(f) and states that fees must be paid to the offering party, "for the period from the date of service of the offer to the date of entry of judgment." NRCP 68(f) further states that, "[i]f the offeror's attorney is collecting a contingent fee, the amount of any attorney's fees awarded to the party for whom the offer is made must be deducted from that contingent fee."[20]

We have previously held that a district court may not award attorney fees pursuant to the penalty provisions of NRCP 68 and NRS 17.115 for legal services performed prior to the date of the offer of judgment.[21]

Here, Zampella was clearly eligible for an award of attorney fees because Boyd rejected two offers of judgment and failed to obtain a more favorable result at trial. However, Zampella is only entitled to those fees incurred between the time of the offer and the entry of judgment, not the entire forty-percent contingency fee for all services rendered during litigation. Further, the attorney fee award based on Boyd's rejection of Zampella's offer must be deducted from Zampella's total contingent fee. According to the record in this case, the proper amount of these post-offer

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[18]NRCP 68(f)(1)-(2).

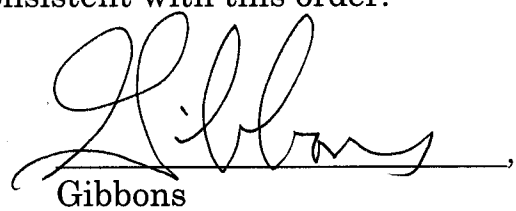
[19]NRCP 68(d).

[20]NRCP 68(f)(2).

[21]Nurenberger Hercules-Werke v. Virostek, 107 Nev. 873, 884, 822 P.2d 1100, 1107 (1991).

fees, calculated using the "lodestar" method, is between $50,000 and $67,000. Therefore, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



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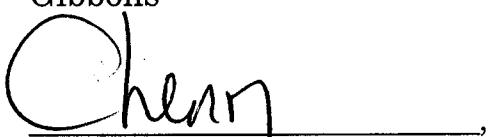

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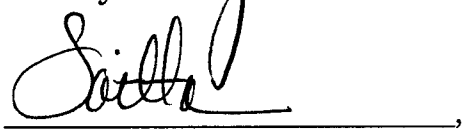

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cc: Second Judicial District Court Dept. 7, District Judge
Paul F. Hamilton, Settlement Judge
Lemons Grundy & Eisenberg
Stephen H. Osborne
Washoe District Court Clerk