IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL BROCHU AND GABRIELA BROCHU, HUSBAND AND WIFE, Appellants, vs. FOOTE ENTERPRISES, INC. D/B/A FOOTE BROTHERS CONSTRUCTION, Respondent.	No. 55963
MICHAEL BROCHU AND GABRIELA BROCHU, HUSBAND AND WIFE, Appellants, vs. FOOTE ENTERPRISES, INC. D/B/A FOOTE BROTHERS CONSTRUCTION, Respondent.	No. 56086

FILED

NOV 29 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

These are consolidated appeals from a district court judgment in a tort, contract, and constructional defect action and from a post-judgment order awarding costs. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

Appellants Michael and Gabriela Brochu entered into a purchase agreement for a house which had an expedited closing period for tax purposes. Better Homes Inspections (BHI) inspected the house and developed a written report, which informed the Brochus that the house's support system was inadequate. BHI recommended that the Brochus consult a licensed contractor or structural engineer. From a disclosure form executed by the sellers of the house, the Brochus also had notice of expansive soils under the house's support system. After conferring with a handyman and deciding not to hire a structural engineer, the Brochus

hired Raymond Foote, a licensed contractor of Foote Enterprises, Inc. (Foote), to work on a portion of the house's crawlspace that did not encompass all of the areas affected by the expansive soils. Without acquiring a permit, Foote performed the work. A few months later, the house experienced significant movement and damage.

The Brochus brought various tort, contract, and construction defect-based claims against Foote. After a bench trial, the district court entered a judgment rejecting all the claims. Then, the district court entered a post-judgment order awarding costs to Foote. The award was based upon a memorandum of costs and an affidavit attesting that the costs were actual and reasonable. The Brochus appeal this judgment and post-judgment order. The primary issues on appeal are whether (1) substantial evidence supports the district court's rejection of the Brochus' negligence and negligence per se claims, (2) substantial evidence supports the district court's rejection of the Brochus' negligent misrepresentation claim, (3) substantial evidence supports the district court's rejection of the Brochus' contract-based claims, (4) substantial evidence supports the district court's rejection of the Brochus' constructional defect claim, and (5) the district court abused its discretion in awarding costs to Foote.

For the reasons set forth below, we affirm the district court's judgment on the tort, contract, and constructional defect claims. We reverse in part and affirm in part the post-judgment order awarding costs. As the parties are familiar with the facts of this case, we do not recount them further except as necessary for our disposition.

Substantial evidence supports the district court's rejection of the Brochus' negligence and negligence per se claims

The Brochus argue that the district court should have ruled in their favor on their negligence and negligence per se claims, contending

that the evidence showed that Foote breached its duty of care, Foote committed negligence per se by not obtaining a building permit before repairing the crawlspace, and the district court improperly determined that comparative negligence barred their negligence-based claims.

Substantial evidence supports the rejection of the negligence claims

Liability under a theory of negligence, or comparative negligence, is a question of fact. Anderson v. Baltrusaitis, 113 Nev. 963, 965-67, 944 P.2d 797, 799-800 (1997). Findings of fact and "fact-based conclusions of law . . . will not be disturbed if supported by substantial evidence." Manwill v. Clark County, 123 Nev. 238, 241, 162 P.3d 876, 879 (2007); see also Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). "Substantial evidence is evidence that a reasonable person could accept as adequately supporting a conclusion." Id. at 241 n.4, 162 P.3d at 879 n.4.

To succeed on a negligence claim, one must show a duty of care, a breach of that duty, actual and proximate causation, and damages. Klasch v. Walgreen Co., 127 Nev. ___, ___, 264 P.3d 1155, 1158 (2011). Causation requires actual and proximate cause. Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1481, 970 P.2d 98, 107 (1998), overruled in part on other grounds by GES, Inc. v. Corbitt, 117 Nev. 265, 271, 21 P.3d 11, 15 (2001). To show actual cause, "the [plaintiff must] prove that, but for the [defendant's wrongdoing], [the plaintiff's damages] would not have occurred." Id. "[P]roximate cause[ ] is essentially a policy consideration that limits a defendant's liability to foreseeable consequences that have a reasonably close connection with both the defendant's conduct and the harm which that conduct created." Id.

Substantial evidence reveals a lack of causation between Foote's actions and the Brochus' damages, supporting the district court's rejection of the negligence claim

Here, the evidence supported the determination that factors beyond Foote's control caused the Brochus' damages. Testimony at trial showed that soils under the house were expanding and damaging its support structure and that the perimeter supports had contact with these soils. Even if Foote repaired all of the supports in the crawlspace, the house still would have experienced significant movement. Michael Brochu admitted at trial that, before closing on the house, he became aware of and did not investigate the risks posed by these soils. Hence, the district court could reasonably find that (1) the Brochus would have incurred their damages regardless of Foote's actions, (2) the expansive soils beneath the house and the Brochus' decision not to investigate the soils before closing on the home proximately caused the damages, and (3) the Brochus' extensive damages were not a reasonably foreseeable consequence of the repairs Foote performed. Therefore, we conclude that substantial evidence supports the district court's conclusion that any alleged negligence by Foote did not cause the Brochus' damages, because the presence of expanding soils, together with the Brochus' knowing disregard of these soils, caused the Brochus' damages.

Substantial evidence revealing a lack of causation between Foote's actions and the Brochus' damages supports the rejection of the negligence per se claim

To prevail under a negligence per se claim, a plaintiff must prove that (1) he or she belongs to a class of persons that a statute is intended to protect, (2) the plaintiff's injuries are the type the statute is intended to prevent, (3) the defendant violated the statute, (4) the violation was the legal cause of the plaintiff's injury, and (5) the plaintiff

suffered damages. Anderson v. Baltrusaitis, 113 Nev. 963, 965, 944 P.2d 797, 799 (1997). The violation of a building code provision adopted by a local ordinance may support a negligence per se claim. Vega v. Eastern Courtyard Assocs., 117 Nev. 436, 440, 24 P.3d 219, 221 (2001).

Here, the negligence per se claim in this case implicates the 2003 International Residential Code (IRC), which is part of the Reno Municipal Code. IRC section R105.1 provides that "[a]ny owner or authorized agent who intends to construct, enlarge, alter, repair, move, demolish, or change the occupancy of a building or structure, . . . or to cause any such work to be done, shall first make application to the building official and obtain the required permit." IRC section R105.2.2 states that a permit is not required for "ordinary repairs to structures," but "the removal or cutting of any structural beam or load bearing support" is not an ordinary repair.

Regardless of whether Foote's failure to obtain a permit for cutting and removing posts supports a negligence per se claim, the lack of causation between Foote's actions and the Brochus' damages precludes Foote's liability under such a claim.

Any IRC violation did not cause the Brochus' damages. The Brochus argue that if Foote had applied for a permit, information revealed about the expansive soils would have dissuaded them from purchasing the house. This argument lacks merit because the Brochus were aware of the soil problem and closed escrow anyway. In light of the Brochus' blatant disregard of the problem with the soil, their decision not to hire a structural engineer, and their desire to quickly close escrow, the district court properly found that the Brochus would have incurred the damages even if Foote applied for a permit. Accordingly, we conclude that

substantial evidence supports the district court's determination that any negligence per se on the part of Foote did not cause the Brochus' damages, which would have arisen regardless of the application for or issuance of a permit.

Substantial evidence reveals the Brochus' comparative negligence

The Brochus argue that the district court incorrectly determined that, even if Foote was negligent, their comparative negligence barred their recovery because (1) Foote acted willfully, such that comparative negligence was not a viable defense; (2) Foote's lack of a permit created a presumption of willful misconduct under NRS 624.3011(2), which Foote failed to rebut; and (3) substantial evidence does not reveal that their actions were causally connected to the harm they incurred.

Foote did not engage in willful misconduct

Under NRS 41.141, a plaintiff may recover damages for negligence if "his or her comparative negligence is not greater than that of the defendant." Woosley v. State Farm Ins. Co., 117 Nev. 182, 189-90, 18 P.3d 317, 322 (2001). A plaintiff's "mere negligence . . . will not constitute a defense to [a defendant's] wanton or willful misconduct." Davies v. Butler, 95 Nev. 763, 771, 602 P.2d 605, 610 (1979). "Wil[l]ful or wanton misconduct is intentional wrongful conduct, done either with knowledge that serious injury to another will probably result, or with a wanton or reckless disregard of the possible results." Id. at 769, 602 P.2d at 609 (emphasis omitted). Under NRS 624.3011(2), "[i]f a contractor performs construction without obtaining any necessary building permit, there is a rebuttable presumption that the contractor willfully and deliberately violated the building laws."

Here, testimony revealed that Foote did not obtain a building permit because, in doing past jobs, the building department assured Foote that a permit was not required to eliminate earth-to-wood contact on the support posts in crawlspaces. Foote did not investigate or analyze structural problems in the house's crawlspace because the Brochus already had a home inspection performed and Foote was not hired to do so. Thus, viewing this testimony in the light most favorable to Foote, the evidence does not suggest willfulness. See Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998) ("This court is not at liberty to weigh the evidence anew, and where conflicting evidence exists, all favorable inferences must be drawn towards the prevailing party."). The testimony also rebutted NRS 624.3011(2)'s presumption of willfulness. Hence, we conclude that substantial evidence supports the district court's finding that Foote did not engage in willful misconduct.

The Brochus' own negligence caused their damages

"Comparative negligence applies only to conduct that proximately contributes to an injury's causation, and not to subsequent acts that merely aggravate the injury or its consequences." Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 859, 124 P.3d 530, 546 (2005). "Thus, '[t]he plaintiff's negligence is a legally contributing cause of his harm if, but only if, it is a substantial factor in bringing about his harm.'" Id. (quoting Restatement (Second) of Torts § 465(1) (1965)). In the constructional defect context, when a homeowner plays "a role in planning and construction . . . the extent of the comparative negligence defense may be expanded to include the owner's participation in either the planning or construction and whether such participation caused any damage." Skender v. Brunsonbuilt Constr. & Dev. Co., 122 Nev. 1430, 1437, 148 P.3d 710, 715-16 (2006).

Here, there was ample evidence of the Brochus' sophistication regarding real estate transactions, knowing disregard of the house's problems, and desire to close quickly on the house despite those problems. Michael Brochu testified that he was formerly a licensed real estate agent and had engaged in numerous real estate transactions. He testified that he had purchased 15 to 20 properties in Nevada, owned 11 rental properties, and repaired plumbing, roofing, framing, concrete, and crawlspace issues on those properties. He also testified that he knew about the house's structural issues before closing on the house and that he needed to close escrow on the house quickly to avoid tax liabilities. Despite having read the BHI report and the seller's disclosure form noting the expansive soils under the house, he did no further investigation about the dangers posed by the soils. Given this evidence, the district court could reasonably find that the Brochus knew of the structural issues and closed on the house anyway, thereby directly and substantially causing their own damages. Thus, we conclude that substantial evidence supports the district court's conclusion that the Brochus' comparative negligence precluded recovery under their negligence and negligence per se claims, since the evidence substantially revealed that Foote did not engage in willful misconduct and the Brochus' negligence caused their damages.

Substantial evidence supports the district court's rejection of the Brochus' negligent misrepresentation claim

The Brochus argue that the district court erred when it rejected their negligent misrepresentation claim. This court has described the tort of negligent misrepresentation as follows:

> "One who, in the course of his business, profession or employment . . . supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary

> loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information."

Barmettler v. Reno Air, Inc., 114 Nev. 441, 449, 956 P.2d 1382, 1387 (1998) (quoting Restatement (Second) of Torts § 552(1) (1965)). "[P]roof of reliance" is required to prevail on a claim for negligent misrepresentation. Bill Stremmel Mtrs. v. First Nat'l Bank, 94 Nev. 131, 134, 575 P.2d 938, 940 (1978)).

The evidence established that the Brochus knew of the various issues with the house and closed escrow despite those issues. Hence, the district court could logically find that the Brochus' decision to close escrow did not arise from any reasonable reliance on Foote's representations. We therefore conclude that substantial evidence supports the district court's rejection of the Brochus' negligent misrepresentation claim by showing that the Brochus' damages did not arise from a reasonable reliance on Foote's representations.

Substantial evidence supports the district court's rejection of the Brochus' contract-based claims

The Brochus contend that the district court should have ruled in their favor on their breach of contract and breach of the implied covenant of good faith and fair dealing claims.

Whether a contract was breached is a question of fact, and the district court's decision on the issue must be upheld unless clearly erroneous and not supported by substantial evidence. Sheehan & Sheehan v. Nelson Malley & Co., 121 Nev. 481, 486, 117 P.3d 219, 223 (2005).

To prove a breach of contract, the plaintiff must show an existing valid agreement with the defendant, the defendant's material breach, and damages. See Saini v. International Game Technology, 434 F. Supp. 2d 913, 919-20 (D. Nev. 2006); see also Bernard v. Rockhill Dev. Co., 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987). "[A]ll contracts impose upon the parties an implied covenant of good faith and fair dealing, which prohibits arbitrary or unfair acts by one party that work to the disadvantage of the other." Nelson v. Heer, 123 Nev. 217, 226, 163 P.3d 420, 427 (2007).

Here, the evidence does not evince a material breach of the contract or a breach of the implied covenant of good faith and fair dealing but revealed a contract in which Foote agreed to perform a limited amount of work, unrelated to the support or stabilization of the home, within a limited area of the house. The contract and the testimony of Raymond Foote, Michael Brochu, and Mock revealed that the purpose of Foote's work was to remedy a termite issue and eliminate earth-to-wood contact on three or four posts within a specific section of the house's crawlspace. The contract did not include language that required Foote to investigate or correct the house's support structure. The limited scope of Foote's contractual obligation rebuts the Brochus' argument that Foote breached the covenant of good faith and fair dealing by not disclosing or diagnosing the house's structural issues. The services agreed upon did not impose on Foote a duty to disclose or diagnose the house's structural issues. Hence, the district court could rationally find that Foote did not act arbitrarily or unfairly to the Brochus' disadvantage.

Consequently, we conclude that substantial evidence supports the district court's rejection of the Brochus' contract-based claims.[1]

Substantial evidence supports the district court's rejection of the Brochus' NRS 40.615 constructional defect claim

The Brochus contend that the district court should have ruled in their favor on their NRS 40.615 constructional defect claim.

> NRS 40.615 defines constructional defect as
>
> a defect in the design, construction, manufacture, repair or landscaping of a new residence, [or] of an alteration of or addition to an existing residence, . . .
>
> 1. Which is done in violation of law, including, without limitation, in violation of local codes or ordinances;

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[1]In asserting the merits of their contract-based claims, the Brochus cite to authorities outside of this jurisdiction that provide for a contractor's implied warranty to disclose the defects that he or she knows, or reasonably should have known, when working on a project. See Lewis v. Anchorage Asphalt Paving Co., 535 P.2d 1188, 1195 (Alaska 1975); Three Way, Inc. v. Burton Enterprises, Inc., 177 P.3d 219, 227-28 (Wyo. 2008). However, these authorities also reveal that the scope of this warranty is limited by the scope of services contracted for. See Lewis, 535 P.2d at 1196 ("The scope of these warranties, however, is directly related to the scope of the duties and obligations imposed on the parties by their contract."); Three Way, Inc., 177 P.3d at 227-28 (articulating the warranty to disclose defects in relationship to how those defects undermine the work contracted for). Here, any potential warranty to disclose defects was limited by the scope of this contract. The contract limited Foote's services and the area of the home that was worked upon. Hence, the contract did not implicate the discovery or disclosure of the house's structural defects. Accordingly, we maintain that substantial evidence supports the district court's finding that the scope of Foote's work was unrelated to correcting structural issues of the house, such that it did not err in determining that Foote lacked a duty to disclose or diagnose the house's structural issues.

> 2. Which proximately causes physical damage to the residence, an appurtenance or the real property to which the residence or appurtenance is affixed;
>
> 3. Which is not completed in a good and workmanlike manner in accordance with the generally accepted standard of care in the industry for that type of design, construction, manufacture, repair or landscaping; or
>
> 4. Which presents an unreasonable risk of injury to a person or property.

NRS 40.640 provides that "[i]n a claim to recover damages resulting from a constructional defect, a contractor . . . is not liable for any damages caused by . . . [t]he acts or omissions of a person other than the contractor or the contractor's agent, employee or subcontractor." (Emphasis added.)

Here, the evidence supports the district court's determination that Foote did not cause the Brochus' damages, but rather the Brochus caused their own damages. Though it did not specifically cite NRS 40.640 in its judgment, the district court correctly applied the concept contained therein in concluding that the Brochus failed to prove Foote's liability under NRS 40.615. Accordingly, we conclude that substantial evidence supports the district court's rejection of the Brochus' NRS 40.615 construction defect claim by revealing that the Brochus' acts proximately caused their damages.

The district court did not abuse its discretion in awarding costs that it could not discern as actually incurred and reasonable from the memorandum and affidavit

The Brochus assert that the district court abused its discretion in awarding costs to Foote because Foote failed to provide sufficient supporting documentation beyond the memorandum of costs and affidavit.

We review the district court's award of costs for an abuse of discretion. Village Builders 96 v. U.S. Laboratories, 121 Nev. 261, 276, 112 P.3d 1082, 1092 (2005).

The district court did not abuse its discretion in only considering costs appearing within Foote's timely filed memo

To recover costs, the prevailing party must file the statutorily required memorandum of costs within five days after the entry of judgment. NRS 18.110(1).

Here, the district court appropriately refused to consider any costs other than those appearing in Foote's original memorandum of costs. Although Foote submitted the original memorandum within five days of the judgment, and subsequently submitted two untimely filed supplemental memoranda with documentation regarding costs in its response to a motion to retax, the five-day time limit in NRS 18.110(1) allowed the district court to reject the two untimely filed supplemental memoranda. Thus, we conclude that the district court did not abuse its discretion in refusing to consider any costs other than those appearing within Foote's original memorandum of costs.

The district court did not abuse its discretion in awarding costs that it could discern as actually incurred and reasonable from the memorandum and affidavit

A prevailing party is entitled to recover litigation costs in certain cases. NRS 18.020. Costs include: (1) fees for witnesses, depositions, and expert witnesses; (2) expenses for service of process, photocopies, long distance phone calls, and postage; (3) travel and lodging expenses arising from depositions or discovery; and (4) any "reasonable and necessary" expenses arising from the action. NRS 18.005(2), (4), (5), (7), (12)-(15), (17). In order to recover costs, the prevailing party must provide "a memorandum of the items of the costs in the action or

proceeding, which . . . must be verified by . . . the party's attorney . . . , stating that to the best of his or her knowledge and belief the items are correct, and that the costs have been necessarily incurred in the action or proceeding." NRS 18.110(1).

These costs must be "actual and reasonable, 'rather than a reasonable estimate or calculation of such costs.'" Bobby Berosini, Ltd. v. PETA, 114 Nev. 1348, 1352, 971 P.2d 383, 385-86 (1998) (quoting Gibellini v. Klindt, 110 Nev. 1201, 1206, 885 P.2d 540, 543 (1994)).

Demonstrating that a cost was actually incurred often requires documentation. See Village Builders, 121 Nev. at 277-28, 112 P.3d at 1093 ("[D]ocumentation is precisely what is required under Nevada law to ensure that the costs awarded are only those costs actually incurred."); Gibellini, 110 Nev. at 1205-06, 885 P.2d at 543 (reversing part of an order awarding costs not documented to be actual and remanding for a determination of actual costs incurred).

The district court has discretion to determine if an actually incurred cost was reasonable. Village Builders, 121 Nev. at 278, 112 P.3d at 1093. Determining necessity and reasonableness may require detailed documents, such as itemizations. See Berosini, 114 Nev. at 1353, 971 P.2d at 386 (determining that a prevailing party was not entitled to costs for photocopies, long distance phone calls, and juror fees where the party failed to give documentation or itemizations necessary to determine reasonableness and necessity). But specific documentation alone does not always suffice to show a cost to be reasonable or necessary. See id. at 1352-53, 971 P.2d at 386 (concluding that the submission of itemized costs for investigative fees did not justify the recovery of such costs, because the itemization did not reveal reasonableness or necessity); see also Gilman v.

State, Bd. of Vet. Med. Exam'rs, 120 Nev. 263, 273-74, 89 P.3d 1000, 1007 (2004) (determining that the itemization of investigative fees alone did not suffice to show reasonableness or necessity). Hence, the nature, extent, and specificity of the documentation required to prove an actual and reasonable cost depends upon the court's ability to make this finding from the circumstances and the materials presented by the prevailing party.

Here, the question is whether Foote's original memorandum of costs, and the affidavit in which counsel declared the costs to be actual and reasonable, were sufficient to allow the district court to determine if the costs were actual and reasonable.

The district court did not abuse its discretion in awarding ordinarily incurred and reasonable costs

The district court did not abuse its discretion in awarding costs for filing, e-filing, depositions of opposing party experts, audio and visual equipment, court reporting services, and witness fees. Given the court's general knowledge of ordinarily incurred costs and familiarity with the actual proceedings, Foote's memorandum and affidavit provided a sufficient basis upon which the court could determine the actual and reasonable nature of these costs.

As standard fees, the district court did not need additional documentation to determine that the filing fees were actual and reasonable.

Foote's memorandum and affidavit, although rather generic in nature, were adequate for the district court to discern that the costs for deposing the plaintiffs' experts, court reporting services, renting audio and visual equipment, and engaging the services of a mediator were actual and reasonable. It is well known that a party deposes the opposing party's expert witnesses and that experts charge for their time during deposition.

Since the Brochus had two expert witnesses testify at trial, the district court could deduce that Foote actually incurred the costs for deposing them. These costs appeared reasonable and necessary in a trial that required expert testimony. The district court thus correctly determined that the costs related to court reporting services were reasonable. Similarly, expenses for audio and visual equipment used during trial to present certain evidence can readily be deemed reasonable with little other explanation. Finally, the record reveals that the parties used mediation services, thereby actually incurring this cost. The record suggests that the district court assessed and determined that the amounts for those costs were reasonable. Hence, the court appropriately awarded these costs without needing documentation beyond the memorandum and affidavit.

Foote's original memorandum and affidavit provided enough information to determine that the $30 witness fees were reasonable, and thus the district court appropriately awarded these fees. Given the reasonable amount attributed to these witness fees, the district court appropriately awarded a reasonable cost of $30 for Kirby Fischer's witness fees as well.

Accordingly, we conclude that the district court did not abuse its discretion in awarding costs for filing, e-filing, depositions of opposing party experts, audio and visual equipment, court reporting services, mediation services, and witness fees because Foote's memorandum and affidavit adequately supported the district court's determination that Foote actually and reasonably incurred these costs.

The district court abused its discretion in awarding costs that required more documentation

Here, the reasonableness of the costs attributed to UPS services, outside reproductions, lodging, air travel, parking, taxi services, rental car fees, long distance phone calls, postage, and photocopies depended upon the circumstances, such as the time, nature, extent, and value of such services. Determining such circumstances required additional documentation beyond the memorandum and affidavit. Hence, we conclude that the district court abused its discretion in awarding costs for UPS services, outside reproduction, lodging, air travel, parking, taxi services, and rental car expenses, and that it appropriately denied the costs for long distance phone calls, postage, and photocopies, because the reasonable value of these costs required documentation beyond the memorandum and accompanying affidavit.

The district court did not abuse its discretion in awarding a reasonable cost for the process server

NRS 18.005(7) provides that a district court can award costs for "[t]he fee of any sheriff or licensed process server for the delivery or service of any summons or subpoena used in the action, unless the court determines that the service was not necessary."

Here, the district court appropriately awarded Foote a lesser amount than it requested for a process server. In doing so, the district court implied that such costs were necessary costs under NRS 18.005(7). The district court awarded this lesser amount upon finding that Foote's requested cost exceeded the standard fee charged within the community. Consequently, it awarded an amount based on the typical rate for a

process server in that community, thereby reducing the award to $50.00 for each of the ten subpoenas served.[2] Accordingly, we conclude that the district court did not abuse its discretion in awarding a reasonable cost for the necessarily incurred expenses of the process server.

The district court did not abuse its discretion in determining a reasonable award for expert witness fees

NRS 18.005(5) provides that costs can be awarded for:

> Reasonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each 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.

Here, the memorandum and affidavit offered enough information for the district court to determine that Foote incurred the expert witness fees, but failed to justify the amount Foote requested. Since this case required review and presentation of complicated issues, Foote necessarily sought the assistance of an expert. But the amount paid to the expert exceeded the statutory allowance of $1,500. Since Foote did not submit additional documentation to support an award exceeding the statutory allowance, the district court appropriately reduced the award to $1,500. Thus, we conclude that the district court did not abuse its discretion in awarding the statutory allowance of $1,500 for Foote's expert

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[2]When determining reasonable attorney fees, courts often reference community standards, also referred to as market rates. See Gaskill v. Gordon, 160 F.3d 361, 363 (7th Cir. 1998) ("When a fee is set by a court . . . , the object is to set it at a level that will approximate what the market would set."). Hence, the use of this principle in determining the reasonableness of costs was similarly appropriate.

witness fees because Foote incurred the cost but failed to justify a greater amount by submitting only the memorandum and affidavit.

Calculation of costs

On remand, the district court is directed to recalculate the award of costs, consistent with this order.

For the foregoing reasons,[3] we

ORDER the judgment of the district court AFFIRMED (Docket No. 55963) and ORDER the post-judgment order awarding costs AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter for further proceedings consistent with this order. (Docket No. 56086).

_____, J.
Saitta

_____, J.
Pickering

_____, J.
Hardesty

cc: Hon. Robert H. Perry, District Judge
Robert L. Eisenberg, Settlement Judge
Richard G. Hill, Chartered
Prince & Keating, LLP
Washoe District Court Clerk

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[3]We have considered the Brochus' remaining arguments and conclude that they are without merit.