IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY O. GARMONG,
Appellant/Cross-Respondent,
vs.
ROGNEY AND SONS CONSTRUCTION; PETER ROGNEY; GRAHAM ROGNEY; VALLEY DOOR WORKS; CHARLES GRANT AND KATHY GRANT, AS INDIVIDUALS; AND MCFARLAND DOOR MANUFACTURING COMPANY,
Respondents/Cross-Appellants.

No. 60517

ORDER AFFIRMING IN PART, REVERSING IN PART, VACATING IN PART, AND REMANDING

Appeal and cross-appeal from post-judgment orders awarding attorney fees and costs. Third Judicial District Court, Lyon County; William Rogers, Judge.

Appellant and cross-respondent Gregory Garmong filed suit against respondents and cross-appellants Peter Rogney and Rogney and Sons Construction (collectively Rogney); Charles Grant, Kathy Grant, and Valley Door Works (collectively VDW); and McFarland Door Manufacturing Company regarding the manufacture, sale, finishing, and installation of interior doors in Garmong's home. Garmong alleged fraud, conspiracy, and construction defect claims, and sought money damages and an injunction barring respondents from future business activities unless they notified potential customers that they defraud customers.

McFarland and Rogney served Garmong with a joint offer of judgment in the amount of $26,002, and VDW served Garmong with an offer of judgment for $5,000. Both offers stated that they included all damages, costs, and fees "accrued to date." Garmong rejected both offers.

Garmong later indicated that he would seek $3.3 million in damages at trial, but offered to settle the case for $300,000. About three months before trial, Frank Warren, a licensed contractor retained by Garmong, estimated that repairs would cost $28,071.40 and testified that VDW did not cause the damage alleged by Garmong. About one month before trial, Garmong offered to settle for "high six figures." The case proceeded to trial, the district court granted respondents judgment as a matter of law on Garmong's fraud claims, the jury found against Garmong on all remaining claims, and judgment was entered accordingly.

Garmong appealed to this court. Garmong proposed including only parts of the trial transcript in the record on appeal, but McFarland requested the whole trial transcript at Garmong's cost, and Rogney asked that Garmong include all or none of the transcript. Garmong included the entire transcript. On appeal, this court affirmed. *Garmong v. Rogney & Sons Constr.*, Docket No. 53427 (Order of Affirmance, April 27, 2011).

After remittitur issued, respondents sought attorney fees and costs incurred in the district court and on appeal. Garmong opposed the motions but did not move to retax costs. The district court awarded respondents attorney fees and costs incurred in district court, but stated that it lacked authority to award appellate attorney fees and costs. The district court denied Garmong's motion for costs of additional transcription. Garmong appealed, and respondents cross-appealed.

Standard of review

We review a district court's award of attorney fees or costs for an abuse of discretion, and a party's eligibility for such an award de novo. *In re Estate of Miller*, 125 Nev. 550, 552-53, 216 P.3d 239, 241 (2009). A district court's factual determinations will be upheld if they are supported by substantial evidence. *Horgan v. Felton*, 123 Nev. 577, 581, 170 P.3d

982, 985 (2007). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation marks omitted).

Respondents were eligible for awards of attorney fees and costs

A party may make a written offer of judgment at any time more than ten days before trial. NRS 17.115(1); NRCP 68(a). If an offeree rejects an offer of judgment and fails to obtain a more favorable judgment at trial, the court must award the offeror costs and may award reasonable attorney fees from the date the offer was served. NRS 17.115(4)(c)-(d)(3); NRCP 68(f)(2). A party to construction defect litigation may make an offer of judgment pursuant to NRS 17.115 and NRCP 68 "if the offer of judgment includes all damages to which the claimant is entitled pursuant to NRS 40.655." NRS 40.650(4). A plaintiff in a construction defect action may recover reasonable attorney fees, the reasonable cost of repairs, other costs reasonably incurred, interest, and other damages not applicable here. NRS 40.655(1). Garmong contends that NRS 40.650(4) requires the amount of an offer of judgment in a construction defect case to meet or exceed the plaintiff's alleged damages, and because the offers in this case did not meet this threshold, respondents are ineligible for awards of attorney fees and costs.

We review a district court's interpretation of a statute de novo. *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007). A statute's language is ambiguous if it is reasonably susceptible to two or more differing interpretations. *Id.* If a statute is ambiguous, this court will construe it to comport with legislative intent and to avoid absurd results. *Id.* at 476-77, 168 P.3d at 738.

Interpreting NRS 40.650(4) to require a defendant to offer an amount that meets or exceeds a plaintiff's claimed damages would remove

any incentive for defendants to make offers in construction defect cases, particularly where, as here, the plaintiff claimed to be entitled to millions of dollars. Accordingly, we reject this absurd interpretation and conclude that respondents' offers were not prohibited by NRS 40.650(4) merely because they did not meet or exceed Garmong's claimed damages. *See id.* at 477, 168 P.3d at 738.

Garmong also argues that the offers were impermissibly limited to damages "accrued to date" rather than including repair costs that he had not yet incurred. However, Garmong ignores the meaning of "accrue," which is defined as "[t]o come into existence as an enforceable claim or right; to arise." *Black's Law Dictionary* 23 (9th ed. 2009). The offers clearly included repair costs because those costs had already arisen, even though Garmong had yet to incur them. Accordingly, the district court correctly concluded that respondents' offers complied with NRS 40.650(4) and respondents were eligible to receive attorney fees and costs.

The district court did not abuse its discretion by awarding respondents attorney fees pursuant to NRS 17.115 and NRCP 68

Garmong next argues that even if the offers of judgment complied with NRS 40.650(4), the district court abused its discretion by awarding respondents attorney fees pursuant to NRS 17.115 and NRCP 68. When determining whether to award attorney fees under NRS 17.115 and NRCP 68, a district court must consider the following four factors:

> (1) [W]hether 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 offeror are reasonable and justified in amount.

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

Here, the district court found all four factors favored awarding respondents attorney fees. Given the facts mentioned above, we conclude that the district court's findings as to the first three factors are supported by substantial evidence and we therefore decline to disturb them.

In regard to the fourth factor, Garmong argues that McFarland's fees were unreasonable because they included fees incurred in representing a McFarland employee who was not a party to the offer of judgment. McFarland argues that defending its employee was essential to its own defense, and nothing in the record refutes this representation. Accordingly, we conclude that the district court did not abuse its discretion by finding that McFarland's claimed fees were reasonable.

Garmong also argues that Rogney was awarded attorney fees incurred prior to service of its offer of judgment in violation of NRS 17.115(4)(d)(3) and NRCP 68(f)(2). Because Rogney concedes that it was awarded attorney fees incurred prior to service of the offer, we vacate and remand the award of attorney fees to Rogney. However, we conclude that the district court did not abuse its discretion by awarding the other attorney fees to respondents pursuant to NRS 17.115 and NRCP 68.

The district court did not abuse its discretion by awarding VDW attorney fees pursuant to NRS 18.010(2)(b)

Next, Garmong argues that the district court abused its discretion by awarding VDW attorney fees pursuant to NRS 18.010(2)(b). A district court may award attorney fees if the court finds that a claim "was brought or maintained without reasonable ground or to harass the prevailing party." NRS 18.010(2)(b). A claim lacks reasonable grounds if it is "not supported by any credible evidence at trial." *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998) (internal quotation marks omitted). Courts must "liberally construe [NRS

18.010(2)(b)] in favor of awarding attorney's fees in all appropriate situations." NRS 18.010(2)(b).

Garmong sought unprecedented injunctive relief and damages in the "high six figures" even after estimating the cost of repair to be only $28,071.40. Warren, Garmong's own witness, testified before trial that VDW did not cause the damage Garmong alleged, but Garmong still proceeded to trial against VDW. Given these facts, we conclude that the district court's findings that Garmong brought or maintained his claims without reasonable grounds or to harass VDW are supported by substantial evidence, and the district court therefore did not abuse its discretion by awarding VDW attorney fees pursuant to NRS 18.010(2)(b).

Garmong waived his argument that VDW improperly documented its costs

Garmong also argues that the district court abused its discretion by awarding VDW costs without adequate documentation under NRS 18.110. When a prevailing party seeks its costs under NRS 18.110, the adverse party may move to retax costs. NRS 18.110(4). Failure to file a motion to retax costs constitutes waiver of appellate review of an order awarding costs. *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 493, 117 P.3d 219, 227 (2005).

Although Garmong opposed VDW's costs, he never filed a motion to retax costs. As a result, Garmong waived his argument against VDW's claimed costs and we decline to review this order. *See id.*

The district court did not abuse its discretion by denying Garmong's motion for costs of additional transcription

Garmong argues that the district court abused its discretion by denying his motion for costs of additional transcription. We disagree.

In *Beattie*, the district court ordered the appellant to include in the record on appeal a transcript of the opening and closing statements.

99 Nev. at 589, 668 P.2d at 274. This court held that requiring the appellant to bear the cost of this additional transcription was error because those portions of the transcript were irrelevant to the issues on appeal. *Id.* at 589, 668 P.2d at 275.

Here, Garmong appealed from numerous district court orders, including judgment on the jury verdict, so the additional portions of the transcript may have appeared relevant at the time they were requested. Further, Garmong did not object to paying for additional transcription until after his first appeal. As a result, the district court did not abuse its discretion by denying Garmong the costs of additional transcription.

The district court had authority to award respondents appellate attorney fees and costs pursuant to NRS 17.115 and NRCP 68

Respondents argue on cross-appeal that the district court erred by concluding that it lacked authority to award appellate attorney fees and costs pursuant to NRS 17.115 and NRCP 68. We agree.

In *In re Estate of Miller*, we held "that the fee-shifting provisions in NRCP 68 and NRS 17.115 extend to fees incurred on and after appeal." 125 Nev. at 555, 216 P.3d at 243. Our holding in *In re Estate of Miller* makes clear that a district court has authority to award a prevailing party appellate attorney fees.

Garmong does not appear to argue that a district court lacks such authority, but instead argues that this principle should not apply retroactively. This argument is unpersuasive.

This court has considered three factors in determining whether a judicial decision should apply retroactively: (1) whether the decision "establish[ed] a new principle of law," (2) whether retroactive application of the decision would "further or retard its operation," and (3) "whether retroactive application could produce substantial inequitable

results." *Breithaupt v. USAA Prop. & Cas. Ins. Co.*, 110 Nev. 31, 35, 867 P.2d 402, 405 (1994) (internal quotation marks omitted).

First, Garmong argues that our decision in *In re Estate of Miller* established a new principle of law by overruling this court's prior decisions regarding appellate attorney fees. However, the cases cited by Garmong discussed appellate attorney fees awarded pursuant to NRS 18.010 and NRAP 38, not NRS 17.115 and NRCP 68. *See Bd. of Gallery of History, Inc. v. Datecs Corp.*, 116 Nev. 286, 288, 994 P.2d 1149, 1150 (2000); *Bobby Berosini, Ltd.*, 114 Nev. at 1356-57, 971 P.2d at 388. Further, our holding in *In re Estate of Miller* was foreshadowed by prior decisions of this court. *See Tipton v. Heeren*, 109 Nev. 920, 925, 859 P.2d 465, 467 (1993) (holding that to determine whether an offeree who rejected an offer of judgment obtained a more favorable judgment under NRS 17.115 and NRCP 68, the court must look to the final judgment entered after any appeal); *Musso v. Binick*, 104 Nev. 613, 614-15, 764 P.2d 477, 477 (1988) (holding that a contractual provision awarding attorney fees to a prevailing party in the event of litigation included appellate attorney fees).

Second, the purpose of NRS 17.115 and NRCP 68 is to encourage settlement. *In re Estate of Miller*, 125 Nev. at 553, 216 P.3d at 242. Applying *In re Estate of Miller* retroactively would further this purpose by providing additional penalties for unreasonably rejecting an offer of judgment and creating additional incentives to make offers of judgment, thereby encouraging settlement.

Third, a district court must conduct a *Beattie* analysis when considering an award of attorney fees pursuant to NRS 17.115 and NRCP 68, regardless of whether those fees are incurred in the district court or on appeal. Because *Beattie* requires a district court to consider the good faith

of the parties, we conclude that retroactive application of *In re Estate of Miller* will not produce substantial inequitable results.

In short, we find no reason that our decision in *In re Estate of Miller* should not apply retroactively. Accordingly, we conclude that the district court erred by determining that it lacked authority to award attorney fees and costs incurred on appeal.

Conclusion

We conclude that the district court abused its discretion by awarding Rogney attorney fees and costs incurred prior to service of the offer of judgment. Accordingly, we vacate this order and remand for the district court to recalculate Rogney's attorney fees and costs from the date the offer of judgment was served. We also conclude that, in light of our decision in *In re Estate of Miller*, the district court erred by holding that it lacked authority to award appellate attorney fees and costs pursuant to NRS 17.115 and NRCP 68. We therefore reverse and remand this order with instructions to calculate appellate costs and to determine whether to award respondents appellate attorney fees. Accordingly, we

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

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

cc: Hon. William Rogers, District Judge
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