IN THE SUPREME COURT OF THE STATE OF NEVADA

ASHLEY SCOTT-HOPP, Appellant, vs. ELSA HELEN BASSEK; AND INTERVENOR AMERICAN FAMILY INSURANCE, Respondents.	No. 60501
ASHLEY SCOTT-HOPP, Appellant, vs. ELSA HELEN BASSEK; AND INTERVENOR AMERICAN FAMILY INSURANCE, Respondents.	No. 61943

FILED

FEB 28 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals from a district court order granting summary judgment in a tort action and a post-judgment award of attorney fees, costs, and interest. Second Judicial District Court, Washoe County; Charles M. McGee, Senior Judge.

Ashley Scott-Hopp was struck by a car driven by Elsa Helen Bassek while she walked across a street. Scott-Hopp was at work at the time of the accident and filed a workers' compensation claim for a neck injury that she allegedly suffered in the accident. The workers' compensation hearing officer found against her on the issue of causation, and Scott-Hopp did not appeal the decision. Instead, she sued Bassek in district court, alleging a single count of negligence. The district court granted summary judgment to Bassek on the grounds of issue preclusion because the workers' compensation hearing officer had decided the issue of causation. The district court also awarded costs, post-settlement-offer

attorney fees, and interest to Bassek under NRCP 68 and NRS 17.115. As the parties are familiar with the facts, we do not recount them further except as necessary for our disposition.

We conclude that the district court (1) did not err in granting summary judgment to Bassek on the grounds of issue preclusion, (2) did not err in refusing to exempt Scott-Hopp from NRCP 56, (3) did not abuse its discretion by awarding attorney fees and interest to Bassek, and (4) did not abuse its discretion by awarding costs to Bassek.

The district court did not err in granting summary judgment on issue preclusion

Scott-Hopp argues that no preclusive effect may be given to a workers' compensation hearing officer's decision because workers' compensation hearings employ a lower burden of persuasion and less formality than do district court adjudications. She also argues that the exclusive and remedial nature of workers' compensation prevents the hearing officer's decision from being preclusive.

In our de novo review of the district court's grant of summary judgment, we address two issues to determine whether the resolution of Scott-Hopp's workers' compensation claim precludes her tort claim. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). First, we hold that Scott-Hopp's workers' compensation decision can be the basis for issue preclusion. Second, we determine that the workers' compensation decision negates a necessary element of Scott-Hopp's negligence claim. Therefore, it precludes her negligence claim.

A workers' compensation decision can be issue preclusive

We have "adopt[ed] a general rule of administrative res judicata" and apply it to all administrative decisions of state agencies except for the "factual determinations of the employment security

department," which are made non-preclusive by NRS 612.533. *Britton v. City of N. Las Vegas*, 106 Nev. 690, 692 & n.1, 799 P.2d 568, 569 & n.1 (1990). Furthermore, administrative res judicata includes both claim preclusion and issue preclusion and applies to workers' compensation claims except as prohibited by statute. *Jerry's Nugget v. Keith*, 111 Nev. 49, 54, 888 P.2d 921, 925 (1995). Since no statute prohibits issue preclusion with regard to injury causation, the workers' compensation decision can be preclusive.

Scott-Hopp's workers' compensation decision has an issue preclusive effect with respect to her claim against Bassek

For issue preclusion to apply in a case, four factors must be met:

> (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; . . . (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated.

Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008) (internal quotations and citations omitted). The parties agree that the first, third, and fourth factors are met and favor issue preclusion. They only dispute whether the second factor is met.

The second factor favors issue preclusion because the workers' compensation decision was final and on the merits

The second factor is whether the first ruling was final and on the merits. *Five Star Capital Corp.*, 124 Nev. at 1055, 194 P.3d at 713. Because the hearing officer's decision analyzed the evidence to conclude that the accident did not cause Scott-Hopp's neck injury, it addressed the merits of this issue.

Scott-Hopp argues that a hearing officer's decision is not final because the statute authorizing a workers' compensation hearing is silent on the issue of finality. Additionally, she argues that because NRS 616C.340(6) establishes the finality of an appeals officer's decision, it necessarily prevents a hearing officer's decision from being final.

Since the statute granting authority to a workers' compensation hearing officer, NRS 616C.330, is silent on this issue, we interpret it to "conform[ ] to reason and public policy." *Great Basin Water Network v. State Eng'r*, 126 Nev. ___, ___, 234 P.3d 912, 918 (2010). In so doing, this court avoids interpretations that produce absurd results. *City Plan Dev., Inc. v. Office of Labor Comm'r*, 121 Nev. 419, 435, 117 P.3d 182, 192 (2005). "Whenever possible, this court will interpret a rule or statute in harmony with other rules and statutes." *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 295, 995 P.2d 482, 486 (2000).

Several related statutes state that a hearing officer's decision is final. NRS 616C.330(11) states that a hearing officer's decision is not stayed upon appeal unless a stay is granted by a hearing officer or an appeals officer. NRS 616C.345(1) provides a party thirty days to appeal a hearing officer's decision to an appeals officer. NRS 616C.427(6) governs determinations of compensation based on average monthly wage, identifies a hearing officer's decision as final, and states that such a decision is applicable to NRS 616C.330, which governs the decisions of hearing officers. Together these statutes demonstrate that the Legislature intended for a hearing officer's decision to be final and subject to administrative appeal.

The alternative construction of NRS 616C.330, proposed by Scott-Hopp, would produce an absurd result because it would allow a party to avoid the finality of an adverse hearing officer's judgment by not

appealing it. *See Smith v. Kisorin USA, Inc.*, 127 Nev. ___, ___, 254 P.3d 636, 639 (2011) (holding that we construe statutes to avoid absurd results). It would also contradict the related statutes that provide for the finality of a hearing officer's judgment. Thus, because other workers' compensation statutes consider hearing officers' determinations to be final and because we interpret statutes to avoid absurd results, we hold that a workers' compensation hearing officer is able to render final decisions.

To be final, a decision must not leave issues unresolved. *See Pub. Serv. Comm'n of Nev. v. Cmty. Cable TV,* 91 Nev. 32, 42–43, 530 P.2d 1392, 1398-99 (1975). In the decision and order, the hearing officer stated that Scott-Hopp was not knocked to the ground by the accident and that the preponderance of the evidence did not support her theory of causation. By this finding, the hearing officer resolved the issue of compensability against Scott-Hopp and did not leave any issue for further consideration. Thus, the hearing officer's decision was final and on the merits. Scott-Hopp's decision not to appeal the hearing officer's decision, despite an opportunity to do so, is irrelevant to the finality of the order. Thus, the second issue preclusion factor is met and the workers' compensation decision is issue preclusive.

Issue preclusion prevents Scott-Hopp from relitigating the issue of causation

All four factors favor the application of issue preclusion as to the issue of causation for Scott-Hopp's injuries. Therefore, Scott-Hopp is prevented from relitigating this issue. Because causation is a necessary element of a negligence claim, the hearing officer's finding that the accident did not cause Scott-Hopp's injuries prevents her from prevailing on her negligence claim. *Scialabba v. Brandise Const. Co., Inc.*, 112 Nev. 965, 968, 921 P.2d 928, 930 (1996) (stating that causation is an elements

of the tort of negligence). Therefore, the district court did not err in granting summary judgment to Bassek on the issue of causation.

The district court did not err in refusing to grant partial summary judgment to Scott-Hopp on the issue of negligence

Scott-Hopp argues that she is entitled to summary judgment on the issue of negligence because Bassek's vehicle struck her while she was in the crosswalk. Furthermore, she contends that *Cool Fuel, Inc. v. Connett*, 685 F.2d 309 (9th Cir. 1982), exempts her from NRCP 56's duty to file a motion if seeking summary judgment.

In our de novo review of the district court's refusal to grant summary judgment on the issue of negligence, we consider "the evidence, and any reasonable inferences drawn from it . . . in a light most favorable to the nonmoving party." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Furthermore, a moving party must "demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (alternation in original) (quoting NRCP 56(c)).

Scott-Hopp's request for summary judgment in the absence of a motion is improper

Nevada Rules of Civil Procedure require a party seeking summary judgment to file a motion. NRCP 56(a)-(b). A motion must "set[ ] forth each fact material to the disposition of the motion which the party claims is or is not genuinely in issue, citing the particular" evidence that supports the party's claim. NRCP 56(c). Though summary judgment motions are to be in writing and conform to NRCP 56(c)'s requirements, we recognize two limited exceptions. The first exception is for oral motions that do not prejudice the nonmoving party. *Exber, Inc. v. Sletten Const. Co.*, 92 Nev. 721, 733, 558 P.2d 517, 524 (1976). In *Exber*, several codefendants orally joined another codefendant's written motion for

summary judgment at a hearing. *Id.* Because the nonmoving party already had an adequate opportunity to present its arguments and evidence in defending against the written motion, this oral motion for summary judgment was non-prejudicial. *Id.* at 734, 558 P.2d at 525.

The second exception occurs when a district court sua sponte grants summary judgment if it provides adequate procedural protection, including a minimum notice of 10 days to the losing party to defend its claim. *Soebbing v. Carpet Barn, Inc.*, 109 Nev. 78, 83, 847 P.2d 731, 735 (1993). Before the district court grants summary judgment sua sponte, the nonmoving party must have an opportunity to present an argument and submit evidence to the court. *Sierra Nev. Stagelines, Inc. v. Rossi*, 111 Nev. 360, 363-64, 892 P.2d 592, 594 (1995).

These exceptions do not apply to Scott-Hopp. She did not seek to join another party's motion, nor did the district court initiate summary judgment proceedings on its own. Instead, Scott-Hopp summarily requested summary judgment as part of her response to Bassek's motion.

Furthermore, the exception in *Cool Fuel, Inc.* is inapposite in this case. In *Cool Fuel, Inc.*, the United States Court of Appeals for the Ninth Circuit affirmed an order granting summary judgment against Cool Fuel, Inc. on the issue for which it filed a motion for summary judgment. 685 F.2d at 311. In this case, the opposing party did not file a written motion but may have made an oral motion during argument on the issue on which Cool Fuel, Inc. moved for summary judgment. *Id.* Because it had briefed and argued the issue, Cool Fuel, Inc., "the moving party against whom summary judgment was rendered[,] had a full and fair opportunity to ventilate the issues involved in the motion." *Id.* at 312. Unlike in *Cool Fuel, Inc.*, Scott-Hopp sought summary judgment on the issue of negligence, which is distinct from the issue of causation that

Bassek raised and briefed in her motion. Thus, Scott-Hopp would not be entitled to summary judgment under *Cool Fuel, Inc.*, even if Nevada applied this exception. Because Scott-Hopp fails to identify an applicable exception to Nevada's summary judgment motion requirement, the district court properly denied her summary judgment request.

The district court did not abuse its discretion in awarding post-settlement-offer attorney fees and interest to Bassek

Scott-Hopp argues that the district court abused its discretion by awarding attorney fees and interest to Bassek under NRCP 68 and contends that three of the four factors articulated in *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983), do not favor the award of attorney fees. Specifically, Scott-Hopp argues that her claim was brought in good faith, that Bassek's offer of judgment was unreasonably filed the day after Bassek filed her motion for summary judgment, and that Scott-Hopp reasonably rejected the offer of judgment. However, she concedes that the fourth factor is met because Bassek's attorney fees were reasonable.

The decision "to award attorney's fees is within the sound discretion of the trial court," and we review the decision for an abuse of discretion. *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993). However, "a [district] court may not award attorney's fees unless authorized by statute, rule or contract." *State, Dep't of Human Res., Welfare Div. v. Fowler*, 109 Nev. 782, 784, 858 P.2d 375, 376 (1993). If a party makes an offer of judgment and the other party fails to obtain a more favorable judgment, then the offering party may be entitled to recover reasonable attorney fees and any interest on the judgment from the date of the offer until the date of judgment. NRCP 68(f)(2); NRS

17.115(4). In determining whether to award attorney fees, a district court must consider four 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 . . . was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

Beattie, 99 Nev. at 588-89, 668 P.2d at 274. Each factor need not favor awarding attorney fees because "no one factor under *Beattie* is determinative." *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252 n.16, 955 P.2d 661, 673 n.16 (1998). Instead, a district court is to consider and balance the factors in determining the reasonableness of an attorney fees award.

"[E]xplicit findings on every *Beattie* factor [are not] required for the district court to adequately exercise its discretion." *Certified Fire Prot., Inc. v. Precision Constr., Inc.* 128 Nev. ___, ___, 283 P.3d 250, 258 (2012). Instead, the district court may adequately exercise its discretion if the parties brief the application of the *Beattie* factors. *See Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318, 324, 890 P.2d 785, 789 (1995) (holding that a district court did not abuse its discretion because the parties analyzed the application of the *Beattie* factors "and there was substantial evidence to support" its award of attorney fees), *superseded by statute on other grounds as stated in RTTC Commc'ns, LLC v. Saratoga Flier, Inc.*, 121 Nev. 34, 41-42 & n.20, 110 P.3d 24, 29 & n.20 (2005).

The first Beattie *factor does not support the award of attorney fees because Scott-Hopp's claim was made in good faith*

The parties do not dispute that Scott-Hopp made her claim in good faith. Bassek struck Scott-Hopp with her vehicle. After the accident,

Scott-Hopp incurred substantial medical bills for a neck ailment that may have been caused by the accident. Because Scott-Hopp suffered an injury which she reasonably believed Bassek was responsible for, she filed the lawsuit in good faith.

The second Beattie *factor supports the award of attorney fees because there is substantial evidence that Bassek's offer of judgment was reasonable and in good faith*

Bassek made her offer of judgment nearly two years after the start of the case, and after each party had an opportunity to conduct discovery and to assess the strengths and weaknesses of its case. Since the offer was made approximately four months before the trial date, it complied with NRCP 68(a)'s and NRS 17.115(1)'s requirements of being made "more than 10 days before trial." NRCP 68(a); NRS 17.115(1). The fact that the offer of judgment was made the day after Bassek filed her motion for summary judgment is immaterial because NRCP 68 and NRS 17.115 do not consider attorney work load or the state of motion practice in determining whether an offer of judgment was made at a reasonable time. Because the offer was made after the parties had time to assess the merits of the case and was made more than ten days before trial, there was substantial evidence that the offer was made at a reasonable time.

Additionally, the offer was of a reasonable amount. Bassek offered $25,000 to settle Scott-Hopp's claims, which included over $150,000 in alleged medical expenses. Though this offer covered only a fraction of Scott-Hopp's alleged damages, it was reasonable in light of the dispute of factual issues and Bassek's summary judgment motion. While she conceded that her vehicle struck Scott-Hopp, Bassek contested causation and liability, and proffered expert witnesses to testify to a lack of causation. In addition, the eyewitness testimony was ambiguous about liability and causation. Because of the uncertainty about the strength of

Scott-Hopp' case, there was substantial evidence that the offer was of a reasonable amount. Since Bassek's offer was reasonable in time and amount, the second *Beattie* factor was met.

The third Beattie *factor supports the award of attorney fees because substantial evidence shows that Scott-Hopp was grossly unreasonable in rejecting the offer*

Scott-Hopp argues that because she subjectively believed in the strength of her case and because the settlement offer did not cover her medical bills, she was reasonable in rejecting the offer. In addition, there was conflicting evidence about the issues of causation and liability.

If a party lacks access to key evidence, then its rejection of a settlement offer is more reasonable. *Trustees of Carpenters for S. Nev. Health & Welfare Trust v. Better Bldg. Co.*, 101 Nev. 742, 746, 710 P.2d 1379, 1382 (1985) (holding that a party's decision to reject a settlement offer was not unreasonable because key information was not disclosed until nine months after the settlement offer was made). Here, there was no allegation that Scott-Hopp lacked access to evidence. Because the factual record was developed, causation and liability were strongly contested. Additionally, the hearing officer found Scott-Hopp not to be a credible witness. There is substantial evidence that Scott-Hopp was grossly unreasonable in rejecting the offer. Therefore, the third *Beattie* factor was met.

The fourth Beattie *factor supports the award of attorney fees because Bassek's attorney fees were reasonable*

The parties do not dispute Bassek's attorney fees for the period of time from the offer of judgment to the grant of summary judgment. The total fees for this period of time are $4,375.00. Bassek's attorneys billed 30.9 hours over 47 days at hourly rates of $140.00 to $150.00. During this period, Bassek's attorneys (1) received Scott-Hopp's

response to Bassek's motion for summary judgment, (2) filed a reply, and (3) responded to a motion to strike. Therefore, there was sufficient litigation activity to justify the fees charged. Because the evidence demonstrates that the second, third, and fourth *Beattie* factors were met and favor an award of attorney fees, the district court did not abuse its discretion in awarding attorney fees and interest to Bassek.

The district court did not abuse its discretion in awarding costs

Scott-Hopp argues that the district court abused its discretion in awarding costs to Bassek for expenses related to the deposition of Scott-Hopp, Bassek's medical expert witness fees, and the Federal Express charges for shipping records to the expert. The disputed costs total $12,934.35. Scott-Hopp contends that these expenses were improperly awarded because they concerned the developed evidence that was unrelated to Bassek's motion for summary judgment.

We review the award of costs for an abuse of discretion. *Vill. Builders 96, L.P. v. U.S. Labs., Inc.*, 121 Nev. 261, 276, 112 P.3d 1082, 1092 (2005). A prevailing party is entitled to recover litigation costs in certain circumstances, including reasonable expert witness fees, witness deposition fees, and reasonable postage fees. NRS 18.005; NRS 18.020. To recover costs, the prevailing party must provide a memorandum of costs "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). Furthermore, costs "must be actual and reasonable." *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998).

Demonstrating that a cost was an actual cost generally requires documentation. *Vill. Builders 96, L.P.*, 121 Nev. at 277-78, 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 v. Klindt*, 110 Nev. 1201, 1206, 885 P.2d 540, 543 (1994) (reversing part of an order awarding costs because the party failed to document its actual costs). Detailed documentation, such as itemization, may be required to demonstrate that costs are reasonable and necessary. *See Bobby Berosini, Ltd.*, 114 Nev. at 1352-53, 971 P.2d at 386.

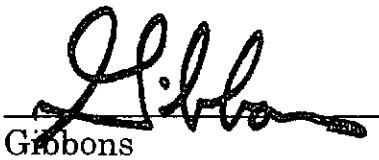
In the present case, NRS 18.005 authorized all three types of disputed costs. Bassek submitted itemized bills from her expert witness that documented his actual fees and described the professional services that he performed. The expert fees totaled $11,934.35. They represent the cost of having an orthopedic surgeon review Scott-Hopp's medical records and provide an opinion on the cause of her neck injury. Given the contested nature on the issue of causation, the district court did not abuse its discretion in finding that these expert fees were reasonable.

Bassek's deposition costs were $831.50 and her Federal Express costs were $176.85. Both of these costs were reasonable because the deposition of Scott-Hopp likely assisted Bassek's exploration of Scott-Hopp's claims, and the Federal Express charges were caused by Bassek providing her expert witness with the information necessary for him to form a competent opinion.[1] Even though these expenses did not develop the evidence that was used in Bassek's motion for summary judgment, they represent preparations for the contest of a core issue if summary

[1]To the extent that these costs were not adequately documented in the record on appeal, the omitted evidence is presumed to favor the district court's finding that the costs were reasonable. *See M & R Inv. Co., Inc. v. Mandarino*, 103 Nev. 711, 718, 748 P.2d 488, 493 (1987).

judgment was not granted. Because the costs were reasonable and necessary and authorized by NRS 18.005 and NRS 18.020, we hold that the district court did not abuse its discretion. Therefore, we[2]

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Gibbons

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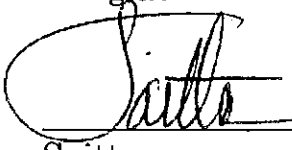

_____, J.
Saitta

cc: Hon. Scott N. Freeman, District Judge
Hon. Charles M. McGee, Senior Judge
Margo Piscevich, Settlement Judge
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Washoe District Court Clerk

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[2]We have also considered the parties other arguments and conclude that they are without merit.