

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FIRE RED LLC, A NEVADA LIMITED
LIABILITY COMPANY; AND LOK
KAM, INDIVIDUALLY,

Appellants,

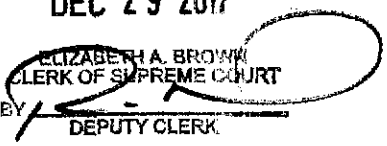
vs.

CASSIM SCHOLARSHARE, LLC, A
FOREIGN LIMITED LIABILITY
COMPANY; AND DARIUS
MOHSENSIN, INDIVIDUALLY,
Respondents.

No. 71520

FILED

DEC 29 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Fire Red, LLC, and Lok Kam appeal from a district court post-judgment order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Fire Red and its managing member, Lok Kam, submitted a land use application to Clark County, Nevada, in order to operate a medical marijuana cultivation and production facility.¹ To satisfy part of the application requirements, Fire Red searched for a commercial property to house this facility. Through a real estate broker, Fire Red found a suitable property, which respondent Cassim Scholarshare, LLC, owned.²

¹We do not recount the facts except as necessary to our disposition.

²Respondent Darius Mohsensing is a manager/officer of Cassim Scholarshare, LLC. We refer to Mohsensing and Cassim Scholarshare, LLC, collectively as “respondents.”

Fire Red executed an agreement with respondents to secure a potential lease³ of the property. As part of that agreement, Fire Red had to pay a \$5,000 nonrefundable deposit. Fire Red issued a check to respondents for this deposit but it was returned unpaid due to insufficient funds. Fire Red took no other steps to pay this deposit. Consequently, respondents informed their real estate broker that they no longer considered Fire Red a viable applicant for the lease, and the broker, in turn, notified Clark County. Consequently, Clark County withdrew Fire Red's land use application for the property, effectively terminating its application for a land use permit.

Because of respondents' actions and the real estate broker's actions, Fire Red, as an entity, and Lok Kam, as an individual, initiated a lawsuit against respondents, the real estate broker, and the real estate broker's company.⁴ Fire Red and Lok Kam alleged claims for breach of the implied covenant of good faith and fair dealing, breach of contract, fraud, misrepresentation, tortious interference with a business relationship, and civil conspiracy. Respondents filed a single counterclaim related to the unpaid deposit.

Before trial, respondents served Fire Red and Lok Kam with an offer of judgment. They offered to pay Fire Red and Lok Kam \$5,000 to settle their case. Fire Red and Lok Kam rejected this offer.

At trial, the jury returned a complete defense verdict on all of Fire Red and Lok Kam's claims. It also returned a defense verdict on respondents' counterclaim.

³Fire Red's lease was conditional upon two other lease applicants withdrawing or being unsuccessful in their applications.

⁴Fire Red and Lok Kam's claims against the real estate broker and her company are not relevant to this appeal.

After trial, respondents moved for attorney fees on two different grounds. First, they sought fees against Fire Red under a clause in the lease agreement that specified the “prevailing party” in an action brought by any party or broker involving the property was entitled to reasonable attorney fees. Second, in the alternative, they sought fees under NRCP 68 because Fire Red and Lok Kam failed to obtain a more favorable judgment than the pretrial offer they rejected.

The district court granted respondents’ motion on both grounds. It concluded that respondents were the prevailing party under the agreement and were thus entitled to attorney fees based on the relevant clause in that contract. Further, it concluded that the *Beattie*⁵ factors favored an award of post-offer attorney fees pursuant to NRCP 68(f)(2).

The district court ordered concurrent awards of attorney fees. Under the agreement, it ordered Fire Red to pay respondents \$31,450. Under NRCP 68(f)(2), it ordered Fire Red, as an entity, and Lok Kam, in her individual capacity, to be jointly and severally liable for \$21,813 in post-offer attorney fees.

Fire Red and Lok Kam appeal from this order for three reasons. First, Fire Red contends the district court erred by concluding respondents were the prevailing party under the agreement because they also prevailed against respondents on their counterclaim. Second, Fire Red and Lok Kam argue the district court abused its discretion in awarding respondents attorney fees under NRCP 68(f)(2) because it did not adequately consider its own determinations that Fire Red and Lok Kam acted in good faith both in bringing their claims and in rejecting respondents’ offer of judgment. Third,

⁵*Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983).

they argue the district court plainly erred by imposing joint and several liability on Lok Kam as an individual.

The district court did not err in concluding that respondents were entitled to attorney fees under the agreement as a prevailing party

“[T]he district court may not award attorney fees absent authority under a statute, rule, or contract.” *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1028 (2006). “Contract interpretation is a question of law and, as long as no facts are in dispute, this court reviews contract issues de novo, looking to the language of the agreement and the surrounding circumstances.” *Redrock Valley Ranch, LLC v. Washoe Cty.*, 127 Nev. 451, 460, 254 P.3d 641, 647-48 (2011). “Parties are free to provide for attorney fees by express contractual provisions.” *Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012). “The objective in interpreting an attorney fees provision, as with all contracts, ‘is to discern the intent of the contracting parties.’” *Id.* (quoting *Cline v. Rocky Mountain, Inc.*, 998 P.2d 946, 949 (Wyo. 2000)). To do so, we apply traditional rules of contract interpretation and start our analysis by determining “whether the language of the contract is clear and unambiguous,” in which case, “the contract will be enforced as written.” *Id.*

In this case, Fire Red’s lease agreement with respondents provided, in relevant part:

If any Party or Broker brings an action or proceeding involving the Premises whether founded in tort, contract, or equity, or to declare rights hereunder, the Prevailing Party (as hereafter defined) in any such proceeding, action, or appeal thereon, shall be entitled to reasonable attorneys’ fees.

[. . .]

The term, ‘Prevailing Party’ shall include, without limitation, a Party or Broker who substantially

obtains or defeats the relief sought, as the case may be, whether by compromise, settlement, judgment, or the abandonment by the other Party or Broker of its claim or defense.

The clear and unambiguous terms of this clause prescribe that, in the event of a legal action or proceeding initiated by any party or broker to the agreement, the “prevailing party” is entitled to reasonable attorney fees. Further, the “prevailing party” is a party who “substantially obtains or defeats the relief sought.”

Fire Red argues that because both it and respondents defeated each other’s claims at trial, “both parties constitute prevailing parties under the contract definition.” Therefore, it concludes, “both sides were conceivably entitled to attorney[] fees” and so—strangely—the district court’s determination that respondents were entitled to attorney fees as the prevailing party was “invalid.”⁶ We disagree.

Even if both parties were prevailing parties under this provision, such a determination would not preclude one of the prevailing parties from seeking fees pursuant to the provision, which states “a Party” who qualifies as “the Prevailing Party” is entitled to “reasonable attorney[] fees” without any additional limitation. However, we need not consider this hypothetical as Fire Red did not seek fees. And, since the agreement is unambiguous, we need only enforce it as written. *See Davis*, 128 Nev. at 321, 278 P.3d at 515.

Here, respondents more than substantially defeated the relief sought by Fire Red—they completely defeated it. Accordingly, under the definition provided in the agreement’s attorney fees provision, they were a prevailing party. Consequently, as a prevailing party, respondents were

⁶Fire Red does not contest the amount of attorney fees awarded to respondents pursuant to the agreement.

entitled to reasonable attorney fees incurred as the result of these proceedings. Accordingly, we affirm the district court's award of attorney fees to respondents pursuant to the agreement.

The district court did not abuse its discretion by awarding post-offer attorney fees to respondents pursuant to NRCP 68


Under NRCP 68, a party may make an offer of judgment and serve it on another party at least ten days before trial. If the offeree rejects the offer and then fails to obtain a more favorable judgment at trial, the district court *may* order the offeree to pay the offeror reasonable, post-offer attorney fees. *See* NRCP 68(f)(2).

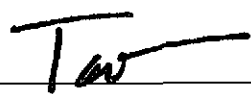
When determining whether to award attorney fees based on a rejected offer of judgment, a district court must evaluate: "(1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer 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*, 99 Nev. at 588-89, 668 P.2d at 274. Importantly, "[n]one of these factors are outcome determinative, however, and thus, each should be given appropriate consideration." *Frazier v. Drake*, 131 Nev. ___, ___, 357 P.3d 365, 372 (Ct. App. 2015).

After reviewing the district court's analysis of the *Beattie* factors, we conclude that the district court did not abuse its discretion in determining these factors weighed in favor of awarding attorney fees to respondents.

Thus, we affirm the district court's award of post-offer attorney fees to respondents.⁷ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

, C.J.
Silver

, J.
Tao

GIBBONS, J., concurring in part and dissenting in part:

I agree with my colleagues that the district court's decision awarding attorney fees to Cassim Scholarshare, LLC, and Darius Mohsensin ("respondents") because they were a prevailing party under the agreement should be affirmed. However, I would reverse the district court's concurrent award of post-offer fees under NRCP 68 because the district court failed to give weight to each of its findings under *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983) such that its award of attorney fees pursuant to the respondents' offer of judgment was an abuse of discretion. Accordingly, I respectfully dissent from my colleagues' affirmance of this portion of the district court's order.

⁷We have reviewed Fire Red and Lok Kam's claim that the district court plainly erred by imposing joint and several liability against Lok Kam in her individual capacity. We conclude this argument is unpersuasive. Lok Kam filed suit against respondents in her individual capacity and maintained this position throughout the proceedings below. Accordingly, the district court did not err by imposing liability on Lok Kam in her individual capacity under NRCP 68(f)(2).

If a party makes an offer of judgment to an opposing party prior to trial and the opposing party rejects that offer (or fails to accept it within 10 days after service), but fails to obtain a more favorable judgment at trial, then the district court may exercise its discretion to award the offering party its post-offer attorney fees. *See* NRCP 68(f)(2). However, the district court's discretion to award these post-offer attorney fees to the offering party in this circumstance is limited. Before it awards these attorney fees, the district court *must* "carefully evaluate . . . (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 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*, 99 Nev. at 588-89, 668 P.2d at 274. And because "no one factor under *Beattie* is determinative," the district court has discretion to award these post-offer attorney fees only "so long as *all* appropriate factors are considered." *See Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252 n.16, 955 P.2d 661, 673 n.16 (1998) (emphasis added).

The first three *Beattie* factors require the district court to assess whether the parties' actions were taken in good faith. *Frazier v. Drake*, 131 Nev. ___, ___, 357 P.3d 365, 372 (Ct. App. 2015). Here, the district court determined that two of the good-faith *Beattie* factors favored Fire Red and Lok Kam, collectively "the party that rejected the offer of judgment." *Id.* In particular, the district court found that: (1) Fire Red and Lok Kam did not bring their claims "in bad faith"; and (2) Fire Red and Lok Kam's rejection of respondents' offer of judgment was not "grossly unreasonable or in bad faith."

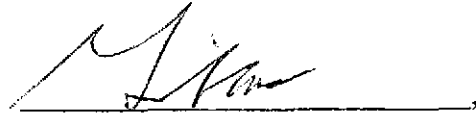
However, the district court concluded that the *Beattie* factors favored awarding attorney fees based on only the following findings:

- (1) Plaintiffs rejected an offer of \$5,000 when they received nothing at trial;
- (2) At the time Plaintiffs rejected the offer of \$5,000, Plaintiffs knew what Defendants' defenses were from the initial motion for summary judgment and these defenses prevailed at trial.
- (3) Defendants' offer was reasonable and in good faith in both its timing and amount.
- (4) Defendants' attorney fees are reasonable and justified in amount.

It did not consider its own findings that Fire Red and Lok Kam brought their claims in good faith and that they rejected respondents' offer of judgment in good faith.

By failing to consider these findings in concluding the *Beattie* factors favored awarding attorney fees, the district court ignored the clear mandate articulated by *Beattie* and its progeny that district court's must consider and carefully evaluate each *Beattie* factor. *See Frazier*, 131 Nev. at ___, 357 P.3d at 372 ("None of these factors are outcome determinative, and thus, each should be given appropriate consideration."). In so doing, the district court abused its discretion when it awarded post-offer attorney fees to respondents under NRCP 68(f)(2). Therefore, I would reverse the district court's order awarding post-offer attorney fees to respondents against both Fire Red as an entity and Lok Kam as an individual and remand with instructions to reevaluate whether post-offer attorney fees should be

awarded to the respondents after properly applying the *Beattie* factors.⁸
Accordingly, I concur in part and dissent in part.


_____, J.
Gibbons

cc: Hon. Eric Johnson, District Judge
Thomas J. Tanksley, Settlement Judge
Kirk T. Kennedy
Andersen & Broyles, LLP
Eighth District Court Clerk

⁸If this court reversed the district court's award of post-offer attorney fees under NRCP 68, we would not need to address Fire Red and Lok Kam's argument regarding the imposition of liability for this award upon Lok Kam in her individual capacity. See *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) ("This court's duty is not to render advisory opinions but, rather, to resolve actual controversies by an enforceable judgment.").