

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID W. UNGER, AN INDIVIDUAL,
Appellant,
vs.
THE GUITAMMER COMPANY, A
NEVADA CORPORATION,
Respondent.

No. 84915-COA

FILED

JUL 10 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: 
DEPUTY CLERK

ORDER OF AFFIRMANCE

David W. Unger appeals from a post-judgment district court order awarding attorney fees and costs under NRCP 68. First Judicial District Court, Carson City; James Todd Russell, Judge.

Respondent, The Guitammer Company, entered into a cash-out merger agreement with its majority shareholder whereby Guitammer's minority shareholders would receive the fair market value of their shares in exchange for the cancellation of those shares. In preparation for the merger, Guitammer retained a valuation firm, which concluded that the fair market value of Guitammer's common stock was \$0.0019 per share. When one of the company's minority shareholders—Unger—chose to exercise his dissenter's rights under NRS Chapter 92A, Guitammer sent him a check for what it believed to be the fair market value of his 7,500,000 shares (\$14,250). Unger thereafter demanded an additional \$386,612—a total of \$400,862—which he believed was the true value of his shares. Guitammer then filed the underlying action under NRS 92A.490, requesting a determination from the district court that the fair market value of Unger's shares was indeed \$0.0019 per share. In Unger's response to Guitammer's

petition, he requested a determination that his shares were worth at least \$0.054 per share.

The matter ultimately proceeded to a two-day bench trial, following which the district court entered a written judgment in favor of Guitammer. The court concluded that the preponderance of the evidence supported a valuation of \$0.0015 per share, which is lower than the \$0.0019 per share amount that Unger was previously paid, and that Unger was therefore not entitled to any further payment. Guitammer then filed a motion for attorney fees and costs under NRCP 68 on grounds that it had served Unger with two offers of judgment during the litigation—one before the commencement of discovery for \$30,000 and one following summary-judgment motion practice for \$14,250—both of which Unger rejected. Over Unger's opposition, and after considering all of the required factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), and *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), the district court entered an order awarding Guitammer \$125,000 in attorney fees¹ and \$50,597.07 in costs. This appeal followed.

As a preliminary matter, to the extent Unger challenges the district court's findings and conclusions following trial in his informal brief on appeal, Unger did not appeal from the final judgment, and our review in this matter is therefore confined to the district court's order awarding attorney fees and costs. *Cf. Holiday Inn Downtown v. Barnett*, 103 Nev. 60, 63, 732 P.2d 1376, 1378-79 (1987) (concluding that the court lacked jurisdiction to consider an appeal as a direct challenge to the final judgment where the appeal was not timely taken from that judgment and was instead

¹The district court declined to award the full \$168,117.60 in fees requested by Guitammer on grounds that some of those fees were excessive.

taken from a special order entered after final judgment, and limiting the scope of review to the special order only).

Under NRCP 68, if an offeree rejects an offer of judgment and fails to obtain a more favorable judgment, “the offeree must pay the offeror’s post-offer costs and expenses, including . . . reasonable attorney fees, if any be allowed, actually incurred by the offeror from the time of the offer.” NRCP 68(f)(1)(B). When considering whether to award attorney fees under NRCP 68, the district court must evaluate the *Beattie* factors, which are:

- (1) whether the [defendant’s defense] was brought in good faith;
- (2) whether the [plaintiff’s] offer of judgment was reasonable and in good faith in both its timing and amount;
- (3) whether the [defendant’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.

O’Connell v. Wynn Las Vegas, LLC, 134 Nev. 550, 554, 429 P.3d 664, 668 (Ct. App. 2018) (quoting *Beattie*, 99 Nev. at 588-89, 668 P.2d at 274). We review a district court’s decision to award fees under NRCP 68 for an abuse of discretion. *Id.* “The district court abuses its discretion when the court’s evaluation of the *Beattie* factors is arbitrary or capricious.” *Id.* (internal quotation marks omitted).

With respect to the first *Beattie* factor, the district court determined that Unger was not acting in good faith by maintaining his case after rejecting the \$30,000 offer, which was more than double the amount Guitammer was going to pay him pursuant to the merger agreement. The court found that Unger was not realistic in believing that his shares had the value he was demanding in light of his express knowledge of Guitammer’s troubled financials and of a federal bankruptcy court’s approval of Guitammer’s valuations in a separate proceeding. The court

further found that Unger failed to substantiate his proposed valuation at trial.

On these points, Unger argues primarily that the \$30,000 offer only amounted to a small portion of his original investment of \$375,000. He further contends that he was not a party to the bankruptcy proceedings and was not granted a right to participate in them despite his desire to do so. But neither of these arguments demonstrate that the district court in any way acted arbitrarily or capriciously in finding that Unger's unrealistic insistence on recouping his entire initial investment and more—when the value of his stock was significantly lower at the time Guitammer entered into the merger agreement—demonstrated a lack of good faith.² *Id.*

As to the remaining *Beattie* factors, Unger fails to meaningfully address them in his informal brief. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that the appellate courts need not consider claims unsupported by cogent argument). And we discern no abuse of discretion in the district court's findings that Guitammer's \$30,000 offer was reasonable in timing and amount, that Unger's decision to reject the offer and proceed to trial was grossly unreasonable, and that the fees awarded were reasonable and justified in amount.

²To the extent Unger takes issue with the district court's additional finding that Unger harassed Guitammer and its counsel in an attempt to increase his merger consideration, we need not address this point, as the district court's findings discussed above were sufficient to satisfy the first *Beattie* factor.

Because Unger fails to set forth any basis for reversal, we affirm the district court's order awarding attorney fees and costs.³

It is so ORDERED.⁴


_____, C.J.
Gibbons


_____, J.
Westbrook


_____, Sr.J.
Silver

cc: Hon. James Todd Russell, District Judge
David W. Unger
Law Offices of Carl A. Generes P.C.
Parsons Behle & Latimer/Reno
Carson City Clerk

³Insofar as Unger raises arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

⁴The Honorable Abbi Silver, Senior Justice, participated in the decision of this matter under a general order of assignment.