

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ALEMTSEHAY DEMESSIE,
Appellant/Cross-Respondent,
vs.
NAKESHA DUNCAN,
Respondent/Cross-Appellant.

No. 84363-COA

FILED

OCT 23 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF REVERSAL

Alemtsehay Demessie appeals and Nakesha Duncan cross-appeals from a district court order awarding attorney fees and costs to Duncan. Eighth Judicial District Court, Clark County; Jessica K. Peterson, Judge.

Duncan filed a complaint on October 14, 2016, alleging that Demessie negligently caused an automobile accident. On March 23, 2017, Demessie served Duncan with an offer of judgment (2017 offer) in the amount of \$5,951.99, which stated costs accrued were included in the amount offered and further stated that the offer did not include attorney fees and would be void if any were awarded. Duncan did not accept that offer prior to its expiration. The matter proceeded to an arbitration hearing, the arbitrator ruled in favor of Duncan, and awarded Duncan \$7,234.59. Demessie subsequently requested a trial de novo and removal from the short trial program.

The case proceeded in district court and Demessie made several offers of judgment, but her final offer of judgment was served on June 18,

2021, in the amount of \$15,000, inclusive of any damages, attorney fees, costs, and pre-judgment interest (2021 offer). Duncan did not accept the offer of judgment prior to its expiration and this matter proceeded to trial. A jury returned a verdict in favor of Duncan and awarded damages totaling \$4,273.58.

Both parties moved for attorney fees, but the district court concluded that Duncan was the prevailing party and that, in consideration of the attorney fees, costs, and pre-judgment interest, she obtained a judgment more favorable than Demessie's 2021 offer. The district court noted that Demessie made several offers of judgment and that each successive offer of judgment extinguished the prior ones pursuant to *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 424, 132 P.3d 1022, 1032 (2006) (reviewing the pre-2019 version of NRCP 68 and stating that the most recent offer of judgment extinguishes previous offers of judgment). The court therefore concluded that the June 2021 offer of judgment was the surviving offer of judgment. The court accordingly utilized the June 2021 offer of judgment to calculate whether Duncan obtained a more favorable judgment at trial.

The district court also found that because Duncan recovered less than \$20,000 in damages, she was entitled to attorney fees pursuant to NRS 18.010(2)(a). In addition, because Duncan was the prevailing party at the trial de novo after Demessie requested that this matter be removed from the short trial program, the district court concluded that Duncan was entitled to attorney fees pursuant to NSTR 27(a)(1).

The district court reviewed the reasonableness of the \$282,545.00 in attorney fees requested by Duncan and, in a written order addressing the appropriate factors under *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), the district court decided to reduce the amount of attorney fees requested by Duncan. The district court ultimately awarded Duncan attorney fees in the amount of \$125,897.11 and costs in the amount of \$4,724.58. This appeal and cross-appeal followed.

“We review an award of attorney fees for an abuse of discretion, and will affirm an award that is supported by substantial evidence.” *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015) (internal citation omitted).

First, Demessie contends that NRCP 68 was amended in 2019 to permit a district court to review multiple offers of judgment, and that, pursuant to the amendment to NRCP 68(f)(2), “[t]he penalties in this rule run from the date of service of the earliest rejected offer for which the offeree failed to obtain a more favorable judgment.” Thus, Demessie argues that based on the 2019 amendment to NRCP 68(f)(2), the district court abused its discretion by utilizing the June 2021 offer of judgment instead of the 2017 offer of judgment made during the arbitration proceedings when it determined whether Duncan obtained a more favorable judgment at trial and was thus entitled to attorney fees. Demessie specifically argues that Duncan’s judgment at trial was not more favorable than the 2017 offer, which is the offer the district court should have utilized pursuant to the

2019 amendment.¹ We review the district court's decision de novo, "when a party's eligibility for a fee award is a matter of statutory interpretation or the interpretation of court rules." *Logan*, 131 Nev. at 264, 350 P.3d at 1141 (internal quotation marks omitted).

The 2019 amendments to NRCP 68 were effective on March 1, 2019, and applied prospectively to all pending cases, see *In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 522 (Order Amending the Rules of Civil Procedures, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018), and the 2019 amendments to NRCP 68 altered the meaning of successive offers of judgment, see NRCP 68(f)(2) (2019). Specifically, the advisory note accompanying the 2019 amendments to NRCP 68 states that the amendments "change[] the approach to multiple settlement offers that is prescribed by *Albios*" and states that "the penalties in [NRCP] 68(f)(1) run from the offer earliest in time that is more favorable than the judgment."

Thus, to determine whether the 2017 offer of judgment was extinguished by Demessie's successive offers of judgment we must review under which version of NRCP 68 those successive offers of judgment were

¹Duncan contends that the 2017 offer was invalid because it was conditional as it stated it was voided by an award of attorney fees. "An offer of judgment must be unconditional . . . in order to be valid for purposes of NRCP 68." *Pombo v. Nev. Apartment Ass'n*, 113 Nev. 559, 562, 938 P.2d 725; 727 (1997). We have reviewed this issue and conclude that the explanation in the 2017 offer that it was not to include an award of attorney fees did not constitute a condition that invalidated the offer of judgment.

made. And the record reveals that Demessie made her second offer of judgment on June 12, 2019, her third offer of judgment on June 15, 2020, and her fourth offer of judgment on June 18, 2021. Thus, all of Demessie's successive offers of judgment occurred after the March 1, 2019, effective date of the 2019 amendments to NRCP 68. Because the successive offers of judgment were made when the amended NRCP 68 (2019) was in effect, those offers did not extinguish the 2017 offer. Further, as the advisory note stated that the 2019 amendments to NRCP 68 require a different approach than that prescribed by the *Albios* decision, we conclude that the district court erred by relying upon that decision to find that the 2017 offer of judgment was extinguished by Demessie's subsequent offers of judgment.

Having determined that Demessie's successive offers of judgment did not extinguish the 2017 offer, and because the 2019 amendments to NRCP 68(f)(2) state that the court must consider "the earliest rejected offer for which the offeree failed to obtain a more favorable judgment," we must review the 2017 offer to ascertain whether Duncan obtained a judgment more favorable at trial. However, because the 2017 offer was made prior to the 2019 amendments to NRCP 68, we must apply the rule that was in effect when it was made. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 522 (Order Amending the Rules of Civil Procedures, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018).

As stated previously, Demessie served the 2017 offer in the amount of \$5,951.99 and Duncan was awarded damages totaling \$4,273.58 at trial. We note when Demessie made the 2017 offer of judgment, if a party

made an offer of judgment in a set amount which precluded a separate award of costs, the district court was required to compare the amount of the offer against the principal amount of the underlying judgment together with the offeree's pre-offer costs. See NRCP 68(g) (2005). And the record reveals that Duncan filed a memorandum of costs indicating that she only incurred \$43 of pre-offer costs. Thus, even including Duncan's pre-offer costs, Duncan did not beat Demessie's 2017 offer of judgment. Because Duncan did not beat the 2017 offer of judgment, Duncan was not the prevailing party and thus not entitled to recover attorney fees and costs pursuant to NRS 18.010 and NSTR 27(a)(1). See *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 80, 319 P.3d 606, 615 (2014) ("NRS 18.010 and 18.020 do not preclude the application of the penalty provisions of NRCP 68 Thus, when an offeree rejects a valid offer and does not obtain a more favorable judgment, [] NRCP 68(f)(1) preclude[s] the offeree from recovering any costs, attorney fees, or interest for the period after the service of the offer and before the judgment." (internal citation omitted)); *Hamilton v. Bott*, No. 82410-COA, 2021 WL 6105008 (Nev. Ct. App. Dec. 23, 2021) (Order Reversing and Remanding) ("NRCP 68 can also preclude an award of fees and costs requested pursuant to NRS 18.010(2)(a) and NRS 18.020(3), if an offeree rejects an offer of judgment under NRCP 68 and fails to obtain a more favorable judgment. Under these circumstances, an offeree is not considered to be the prevailing party under NRS 18.010(2)(a) and NRS 18.020(3), and therefore, is not entitled to recover fees and costs pursuant

to these statutory provisions.”). Accordingly, we reverse the district court’s decision to award attorney fees and costs to Duncan.²

It is so ORDERED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

²We note that the district court found that Duncan beat the 2017 offer based upon a calculation of her money damages and her attorney fees. However, the district court should not have included attorney fees when it determined whether Duncan beat the offer of judgment, *see* NRCP 68(g) (2005), and thus the district court’s finding in this regard was erroneous.

In light of our decision to reverse the district court’s award of attorney fees, we need not address Duncan’s arguments, on cross-appeal, asserting that she was entitled to additional fees. Moreover, insofar as the parties raise 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.

cc: Hon. Jessica K. Peterson, District Judge
Desert Ridge Legal Group
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Springel & Fink, LLP
Eighth District Court Clerk