

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN R. WARREN, AN INDIVIDUAL,
Appellant,

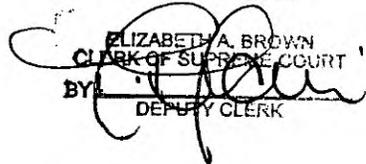
vs.

DOUGLAS R. BROWN, AN
INDIVIDUAL; AND LEMONS GRUNDY
& EISENBERG, CHARTERED, A
NEVADA PROFESSIONAL
CORPORATION,
Respondents.

No. 83995-COA

FILED

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

KEVIN R. WARREN, AN INDIVIDUAL,
Appellant,

vs.

DOUGLAS R. BROWN, AN
INDIVIDUAL; AND LEMONS GRUNDY
& EISENBERG, CHARTERED, A
NEVADA PROFESSIONAL
CORPORATION,
Respondents.

No. 84479-COA

ORDER AFFIRMING IN PART AND DISMISSING IN PART

Kevin R. Warren brings these consolidated appeals from a district court summary judgment and post-judgment order awarding attorney fees in a tort action. Second Judicial District Court, Washoe County; Lynne K. Jones, Chief Judge.¹

¹Judge Jones entered the final judgment and post-judgment order awarding attorney fees from which Warren appeals, but District Court Judge David A. Hardy entered the challenged interlocutory order granting summary judgment against Warren and sanctioning him.

Warren commenced the underlying proceeding against respondent Douglas R. Brown, who is an attorney, and the law firm with which he is employed, respondent Lemons Grundy & Eisenberg (collectively referred to as Brown), asserting claims for fraudulent concealment, intentional and negligent misrepresentation, constructive fraud, conversion, "fraud-promise without intent to perform," unjust enrichment, and constructive trust. To support those claims, Warren alleged in the operative complaint that he was involved in a business transaction with non-party Silvio Istrice in which Warren received an interest in Istrice's business, Silvio Trucking, LLC, and was to receive an interest in certain of Istrice's real property (the Frankie Way property). Warren further alleged that Istrice executed and delivered a grant, bargain, and sale deed for the Frankie Way property to him during a meeting at Brown's office and that Brown retained the deed, which he represented he would record on Warren's behalf. According to Warren's complaint, he later learned that Brown did not record the deed and discovered documentation in a bankruptcy action brought by Istrice indicating that Istrice executed a deed in favor of Brown for the Frankie Way property. From there Warren maintained that Brown concealed his failure to record the deed in Warren's favor to obtain an interest in the Frankie Way property, as well as attorney fees from Istrice based on the litigation that would ensue, and that Brown's actions caused Warren damages because he made investment decisions with respect to Silvio Trucking based on the belief that he would obtain an interest in the Frankie Way property.

Brown filed a motion which, although styled as a motion to dismiss, essentially argued for, as relevant here, summary judgment on Warren's claims for conversion, "fraud-promise without intent to perform,"

unjust enrichment, and constructive fraud, which Brown construed as being based on Warren's allegation that a deed for the Frankie Way property was executed in Brown's favor (the ownership-based claims). In particular, Brown argued that the ownership-based claims failed as a matter of law based on various documents he attached to his motion, including a declaration in which he swore that he never held any interest in the Frankie Way property and Istrice's bankruptcy petition, which indicated that Istrice was the sole owner of the property. Based on the foregoing, Brown also sought attorney fees as sanctions against Warren pursuant to, as relevant here, NRS 18.010(2)(b). Warren opposed Brown's motion, relying on a statement of financial affairs (SFA) that Istrice filed in his bankruptcy action. In that document, Istrice checked the box indicating that he transferred property outside the ordinary course of his business or financial affairs within the preceding two years and provided the following explanation: "Mr. Brown is hold [sic] a quit claim [sic] deed for ½ interest against [the Frankie Way property]." Brown in turn filed a reply in which he argued that Warren was mischaracterizing an abbreviated statement in the SFA, which was clarified in an amended SFA that Istrice filed in his bankruptcy action six days after the original SFA. In that document, which was attached to Brown's reply, Istrice revised the language quoted above to provide as follows: "Mr. Brown is holding a quit claim [sic] deed for ½ interest against [the Frankie Way property] in favor of Mr. Warren."

After further proceedings and the filing of supplemental briefs and an affidavit from Istrice's bankruptcy counsel, Michael Lehnert, the district court entered an order in which it converted Brown's motion to dismiss into a motion for summary judgment, adopted his construction of the ownership-based claims, and ruled in his favor on those claims. In doing

so, the court found that Warren failed to produce any evidence that a rational trier of fact could rely upon to enter a verdict in his favor. Moreover, because the court also determined that Warren, who is an attorney, used his legal expertise to create the appearance of claims for which there was no evidentiary basis for the purpose of harassing Brown, the district court also awarded Brown \$5,000 in attorney fees as a sanction against Warren pursuant to NRS 18.010(2)(b).

Following extensive discovery, Brown moved for summary judgment with respect to Warren's remaining claims for fraudulent concealment, intentional and negligent misrepresentation, and constructive fraud, which Brown construed as being based on Warren's allegations that Brown failed to record the deed in Warren's favor despite his promise to do so and that Warren made investments in Silvio Trucking under the belief that he would obtain an interest in the Frankie Way property (the deed-based claims). In this respect, the parties' dispute primarily concerned how certain elements of the deed-based claims were affected by the timing of several events—specifically, Warren's business transaction with Istrice, the actions that Warren took to secure funding for Silvio Trucking, and Warren and Istrice's January 2019 meeting with Brown. The district court eventually entered an order in which it adopted Brown's construction of the deed-based claims and granted his motion for summary judgment, reasoning that Warren failed to establish a genuine dispute of material fact as to multiple elements of each of the deed-based claims. Warren then filed the appeal in Docket No. 83995-COA.

Brown subsequently moved for an award of attorney fees pursuant to NRCP 68 based on an offer of judgment that he served on Warren shortly after the district court entered summary judgment on the

ownership-based claims, which Warren rejected. Over Warren's opposition, the district court granted that motion and awarded Brown nearly \$77,000 in attorney fees based on its analysis of the relevant factors. Warren then filed the appeal in Docket No. 84479-COA.

Docket No. 83995-COA

In Docket No. 83995-COA, Warren challenges the interlocutory order granting summary judgment against him on the ownership-based claims and sanctioning him, as well as the order granting summary judgment on the deed-based claims.² We address each challenge in turn below.

Summary judgment on the ownership-based claims

With respect to the summary judgment on his ownership-based claims, Warren asserts that the district court improperly relied on its determination of Brown's credibility and the affidavit from Istrice's bankruptcy counsel, which Warren contends was inadmissible. This court reviews a district court order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine dispute of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.* General allegations and conclusory

²In challenging the summary judgment orders, Warren does not dispute the district court's construction of any of his claims and has therefore waived any challenge thereto. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that arguments not raised on appeal are deemed waived).

statements do not create genuine disputes of fact. *Id.* at 731, 121 P.3d at 1030-31.

As a preliminary matter, Warren's argument that the district court made an improper credibility determination relates to a colloquy during a hearing, in which the court indicated that it was inclined to accept Brown's sworn declaration as true based on the reputation for truthfulness that Brown had developed with the court by way of his prior appearances in other cases before the court. To the extent the foregoing entered into the court's eventual decision to grant summary judgment in Brown's favor on the ownership-based claims, the court erred, as credibility determinations are inappropriate at the summary judgment stage. *See Hidden Wells Ranch, Inc. v. Strip Realty, Inc.*, 83 Nev. 143, 145, 425 P.2d 599, 600-01 (1967) (explaining that the district court generally cannot pass upon witness credibility or the weight of the evidence in evaluating motions for summary judgment unless the evidence or testimony "is too incredible to be accepted by reasonable minds" (internal quotation marks omitted)). However, we conclude that any error in this respect was harmless because summary judgment on the ownership-based claims was still appropriate given the evidence in the record. *Cf.* NRCP 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.").

The ownership-based claims were premised on Warren's allegation that Istrice executed a deed in favor of Brown to the Frankie Way property. The only evidence that Warren proffered to support that allegation was the original SFA. However, as the district court correctly observed, the original SFA did not say anything about a deed in Brown's favor for the Frankie Way property; it said that Brown *held* a deed for the

property, which was an undisputed fact in this case. To establish that there was no genuine dispute of material fact with respect to Warren's allegation, Brown proffered, as relevant here, his sworn declaration and testimony that he never held an interest in the Frankie Way property; the amended SFA, which indicated that Brown *held* a deed in favor of Warren for the Frankie Way property; and Istrice's bankruptcy petition wherein Istrice claimed to be the sole owner of the Frankie Way property. This evidence, by itself, was sufficient to meet Brown's burden of production to show that there was no genuine dispute of material fact on the question of whether a deed was executed in his favor for the Frankie Way property. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007) (explaining that, when the nonmoving party bears the burden of persuasion at trial, the party moving for summary judgment may meet its burden of production by "submitting evidence that negates an essential element of the nonmoving party's claim").

As a result, Warren assumed a burden of production to show the existence of a genuine dispute of fact as to that issue through affidavits or other admissible evidence. *Id.* at 602-03, 172 P.3d at 134. But Warren did not proffer any evidence showing that Istrice executed a deed in Brown's favor to the Frankie Way property. Instead, Warren made vague suggestions that, because Istrice executed a grant, bargain, and sale deed in Warren's favor and the original and amended SFAs referred to a quitclaim deed, perhaps multiple deeds existed, one of which may have been in Brown's favor. Such a mere suggestion was wholly insufficient to establish a genuine dispute of material fact. *See Wood*, 121 Nev. at 732, 121 P.3d at 1031 ("The nonmoving party is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." (internal

quotation marks omitted)). Thus, because Warren failed to meet his burden of production by presenting evidence of a deed in Brown's favor to the Frankie Way property that a rationale trier of fact could rely on to enter a judgment in Warren's favor, *see id.* at 731, 121 P.3d at 1031 (providing that a genuine dispute of fact exists "when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party"), the district court properly entered summary judgment in Brown's favor on the ownership-based claims, and we therefore affirm that decision.³

Sanctions against Warren

Warren next challenges the district court's decision to award Brown \$5,000 in attorney fees as sanctions against him based on his litigation of the ownership-based claims, arguing that sanctions were not justified because his litigation of these claims amounted to careful

³Given our conclusion that the evidence presented above supported granting summary judgment in Brown's favor on the ownership-based claims, we need not reach Warren's arguments concerning the admissibility of Lehnert's affidavit.

To the extent Warren contends that the district court improperly entered summary judgment without permitting him to conduct discovery, Warren is incorrect, as the parties had conducted some discovery by that time. Moreover, Warren failed to preserve for appellate review any argument that additional discovery should have been permitted because he did not seek leave to conduct the same in opposing Brown's motion to dismiss, notwithstanding that the court provided notice that it was inclined to treat the motion as a motion for summary judgment. *See* NRCP 56(d) (authorizing the district court to allow time for discovery prior to the entry of summary judgment when the nonmoving party establishes by affidavit or declaration that he or she cannot present facts needed to justify the opposition); *see also Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal.").

lawyering and was warranted by the evidence. The decision whether to award attorney fees lies within the district court's sound discretion and will not be overturned absent a manifest abuse of discretion. *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 485, 851 P.2d 459, 463 (1993). The district court may award attorney fees as sanctions to the prevailing party pursuant to NRCPC 18.010(2)(b) when it determines that a claim was "brought or maintained without reasonable ground or to harass the prevailing party."

Here, the district court essentially determined that the ownership-based claims were both brought and maintained against Brown, who was the prevailing party, without reasonable ground and to harass him. That decision is supported by substantial evidence. *See Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015) (providing that an attorney fees award will generally be upheld if supported by substantial evidence); *see also Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007) (explaining that substantial evidence is that which a reasonable person may accept as adequate to sustain a judgment). In particular, Warren relied exclusively on the original SFA in bringing the ownership-based claims notwithstanding that its relevant language was revised by the amended SFA, which was available to Warren at the time he added the claims to the present action since the amended SFA was filed in Istrice's bankruptcy action nearly four months earlier. Nevertheless, Warren proceeded with the ownership-based claims notwithstanding the district court's repeated warnings concerning their dubious nature and the possibility of sanctions and the mounting documentation proffered by Brown showing that he never held any interest in the Frankie Way property, including documentation that Brown provided before Warren even added the ownership-based claims to the present action. Under these circumstances, we conclude that relief is

unwarranted in this respect, and because Warren does not otherwise challenge the reasonableness of the attorney fees award, we conclude that Warren failed to demonstrate that the district court abused its discretion by granting Brown's motion for attorney fees as sanctions and affirm that decision. *See Logan*, 131 Nev. at 266, 350 P.3d at 1143.

Summary judgment on the deed-based claims

In challenging the summary judgment on the deed-based claims, Warren argues that the district court incorrectly determined that he did not rely on Brown to record the deed or suffer damages. However, in presenting this argument, Warren overlooks that the court determined that Brown was entitled to judgment as a matter of law on each of the deed-based claims for additional reasons. In particular, with respect to Warren's claim for fraudulent concealment, the court concluded that Warren failed to meet his burden by showing that Brown concealed his failure to record the deed with the intent to defraud Warren. *See Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 1485, 970 P.2d 98, 110 (1998) (providing that, to prevail on a claim for fraudulent concealment, the plaintiff must demonstrate that, among other things, "the defendant intentionally concealed or suppressed [a material] fact with the intent to defraud the plaintiff").

The district court also concluded that Warren failed to demonstrate that his alleged damages were foreseeable, and, therefore, did not establish a genuine dispute of material fact with respect to the proximate cause element of his claims for negligent and intentional misrepresentation. *See Nelson v. Heer*, 123 Nev. 217, 225, 163 P.3d 420, 426 (2007) (providing that a plaintiff asserting an intentional misrepresentation claim must show that his or her alleged damages were proximately caused by reliance on a misrepresentation or omission, and

explaining that “[p]roximate cause limits liability to foreseeable consequences that are reasonably connected to both the defendant’s misrepresentation or omission and the harm that the misrepresentation or omission created”); *see also Goodrich & Pennington Mortg. Fund, Inc. v. J.R. Woolard, Inc.*, 120 Nev. 777, 781, 784, 101 P.3d 792, 795, 797 (2004) (providing that a plaintiff may recover for damages proximately caused by justifiable reliance on a negligent misrepresentation and defining proximate cause as “any cause which in natural [foreseeable] and continuous sequence, unbroken by any efficient intervening cause, produces the injury complained of and without which the result would not have occurred” (alteration in original) (internal quotation marks omitted)). And the court reached the same conclusion with respect to Warren’s claim for constructive fraud. *See Long v. Towne*, 98 Nev. 11, 13, 639 P.2d 528, 530 (1982) (“Constructive fraud is characterized by a breach of duty arising out of a fiduciary or confidential relationship.”); *see also Klein v. Freedom Strategic Partners, LLC*, 595 F. Supp. 2d 1152, 1162 (D. Nev. 2009) (listing proximate cause as an element of a claim for breach of a fiduciary duty).

Because Warren does not attempt to address the district court’s reasons for reaching these conclusions and reliance on them as bases to grant summary judgment on the deed-based claims in favor of Brown, Warren has waived any argument on these issues and has therefore failed to demonstrate that the court erred in this respect.⁴ *See Hung v. Genting*

⁴With regard to the fraudulent concealment claim, Warren does briefly assert that Brown concealed his failure to record the deed in the portion of his opening brief addressing his alleged reliance on Brown’s representation that he would record the deed. But critically, Warren fails to present any argument with respect to what evidence demonstrated that Brown did so with the intent to defraud him.

Berhad, 138 Nev., Adv. Op. 50, 513 P.3d 1285, 1288 (Ct. App. 2022) (holding that when a district court provides independent alternate grounds to support its ruling, the appellant must properly challenge all of the grounds, otherwise the ruling will be affirmed); *see also Wood*, 121 Nev. at 729, 121 P.3d at 1029. Consequently, we affirm the summary judgment in favor of Brown on the deed-based claims.

Docket No. 84479-COA

Warren’s appeal in Docket No. 84479-COA is directed at the district court’s post-judgment order awarding Brown attorney fees pursuant to NRCP 68 based on the offer of judgment that Brown served on Warren shortly after summary judgment was entered on the ownership-based claims.⁵ 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 factors set forth in *Beattie v. Thomas*, which are:

- (1) whether the plaintiff’s claim was brought in good faith;
- (2) whether the defendants’ offer of

⁵To the extent Warren’s appeal in Docket No. 84479-COA is directed at the district court’s March 14, 2022, “judgment” in which the court purported to enter judgment on its prior appealable orders, we dismiss that portion of Warren’s appeal, as the “judgment” did not alter the parties’ rights or obligations under those determinations, and, therefore, was not appealable. *See Campos-Garcia v. Johnson*, 130 Nev. 610, 611, 331 P.3d 890, 890 (2014) (explaining that “superfluous or duplicative orders and judgments—those filed after an appealable order has been entered that do nothing more than repeat the contents of that order—are not appealable and, generally, should not be rendered”).

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.

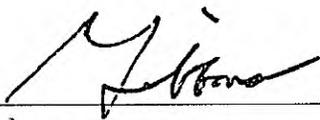
99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983). We review a district court's decision to award attorney fees under NRCP 68 for an abuse of discretion. *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 554, 429 P.3d 664, 668 (Ct. App. 2018). An abuse of discretion occurs when the district court's "evaluation of the *Beattie* factors is arbitrary or capricious." *Id.*

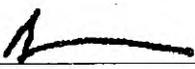
Here, in granting Brown's request for attorney fees pursuant to NRCP 68, the district court concluded that the *Beattie* factors weighed in his favor because Brown's offer was reasonable and in good faith in both timing and amount and since Brown's requested attorney fees were reasonable and justified based on its analysis of the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). Warren's challenge to this decision focuses exclusively on the court's conclusion that Brown's offer was reasonable and in good faith in both timing and amount, which was based on its findings that the offer was made following the summary judgment in favor of Brown on the ownership-based claims and that Warren did not prove his purported damages in pursuing the deed-based claims.

To the extent that Warren contends that Brown's offer was not reasonable and in good faith in its timing, we are not persuaded that relief is warranted. Indeed, the offer was made following some discovery shortly after summary judgment was entered against Warren on over half of his claims (the ownership-based claims), which was more than a year after Warren initially asserted the deed-based claims but still well before the

originally scheduled trial in this matter and eventual summary judgment on the deed-based claims. *See* NRCP 68(a) (providing that “[a]t any time more than 21 days before trial, any party may serve an offer in writing to allow judgment” (emphasis added)). Insofar as Warren contends that Brown’s offer was unreasonable in amount, we cannot conclude that the district court’s decision to the contrary was arbitrary or capricious under the circumstances presented here—particularly given the numerous evidentiary deficiencies that the court identified with respect to Warren’s deed-based claims, including those which Warren fails to acknowledge, much less address on appeal. *See O’Connell*, 134 Nev. at 554, 429 P.3d at 668. Consequently, we conclude that Warren failed to demonstrate that the district court abused its discretion by granting Brown’s post-judgment motion for attorney fees pursuant to NRCP 68, *see id.*, and we therefore affirm that decision.

It is so ORDERED.⁶


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

⁶Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.

cc: Hon. Lynne K. Jones, Chief Judge
Kevin R. Warren
Laxalt Law Group, Ltd./Reno
Washoe District Court Clerk