IN THE SUPREME COURT OF THE STATE OF NEVADA

9101 ALTA LLC, Appellant, vs. PENNYMAC MORTGAGE INVESTMENT TRUST HOLDINGS I, LLC; AND PENNYMAC HOLDINGS, LLC, Respondents.	No. 84691
9101 ALTA LLC, Appellant/Cross-Respondent, vs. PENNYMAC MORTGAGE INVESTMENT TRUST HOLDINGS I, LLC; AND PENNYMAC HOLDINGS, LLC, Respondents/Cross-Appellants.	No. 85632

ORDER OF AFFIRMANCE

These are consolidated appeals and a cross-appeal from a district court final judgment on a jury verdict (Docket No. 84691) and a post-judgment order awarding attorney fees and costs (Docket No. 85632). Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.[1]

9101 Alta LLC (Alta) purchased the subject property at an HOA foreclosure sale. It is undisputed that the HOA's sale did not extinguish PennyMac Mortgage Investment Trust's (PennyMac) first deed of trust. After Alta's purchase, it allegedly sent PennyMac a letter in 2017 requesting information regarding how to pay off the loan secured by PennyMac's deed of trust. PennyMac did not respond to that letter.

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted.

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Thereafter, PennyMac took steps to foreclose on its deed of trust, which prompted Alta to file the underlying action in 2018. Alta's complaint alleged that PennyMac had violated NRS 107.300 by "willfully fail[ing]" to provide Alta with payoff information in response to its 2017 letter. The district court granted summary judgment, concluding that PennyMac had not willfully failed to comply with the pertinent provisions of NRS Chapter 107. Alta appealed, and while its appeal was pending, it paid off the outstanding loan balance, which, at that time, amounted to roughly $918,000.

On appeal, we reversed, reasoning that PennyMac's policy of not providing payoff statements to anyone but the original borrower could constitute a willful failure under NRS 107.300. *See 9101 Alta LLC v. PennyMac Mortgage Inv. Tr. Holdings I, LLC*, Nos. 80983 & 81112, 2021 WL 1964775 at *1 (Nev. May 14, 2021) (Order of Reversal and Remand). In doing so, we observed that a factual issue needed to be resolved on remand regarding whether PennyMac had received Alta's 2017 letter. *Id.*

On remand, a jury trial was held on this issue. As relevant here, the jury was provided with the following instructions regarding disputable presumptions and PennyMac's receipt of the 2017 letter:

> 27. A presumption imposes on a party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.
>
> 30. There are two types of presumptions; conclusive and disputable. A conclusive, or irrefutable, presumption is a presumption that cannot be overcome by any additional evidence or argument. A disputable, or rebuttable, presumption shifts the burden of proof to the opposing party, who can then attempt to overcome the presumption by introducing contrary evidence.

> 31. Nevada law establishes the following disputable presumptions: 1. That *a letter duly directed and mailed was received* in the regular course of the mail. 2. *That the ordinary course of business has been followed.*

Emphases added.

Also, as relevant here, the jury was provided a special verdict form that contained the following questions regarding PennyMac's receipt of the 2017 letter:

> 1.1 ***Did 9101 Alta establish*** *by a preponderance of the evidence* ***that PennyMac received the letter*** allegedly sent to PennyMac by Michael Beede on or around June 20, 2017, requesting information under NRS 107.200, et seq.?
>
> ___ Yes ___ No
>
> If your answer is "YES," please go to Question 1.2. If your answer is "NO," 9101 Alta did not prove liability. You should leave the remainder of the verdict form blank, and the jury foreperson should date and sign the verdict form.
>
> 1.2 Did 9101 Alta establish by a preponderance of the evidence that PennyMac willfully failed to mail the statements requested under NRS 107.200 and NRS 107.210 within 21 days after receiving the June 2017 request?
>
> ___ Yes ___ No

Emphasis added. On its verdict form, the jury checked "No" for the first question and, per the form's instructions, it declined to answer the second question. The district court entered judgment in favor of PennyMac consistent with the jury's verdict.

PennyMac then moved for attorney fees based on two offers of judgment it had extended to Alta in 2019 before the district court granted the summary judgment that was reversed in the previous appeal. Namely,

PennyMac had offered to settle the case in exchange for Alta paying roughly $868,000 (the February 2019 offer) and later for roughly $883,000 (the July 2019 offer), both of which represented the unpaid loan balance at the time of the offers. According to PennyMac, because Alta rejected those offers and did not obtain a judgment more favorable than this amount (i.e., Alta obtained a $0 judgment), PennyMac was entitled to roughly $195,000 in attorney fees under NRCP 68.

Following a hearing wherein the district court discussed various reasons for not awarding PennyMac's entire requested amount, the district court entered an order awarding PennyMac roughly $144,000 in fees. Alta now challenges the final judgment on the jury verdict (Docket No. 84691). Alta also challenges the district court's attorney fee award, and PennyMac challenges that same order on cross-appeal (Docket No. 85632). We address each case in turn.

Appeal from the final judgment (Docket No. 84691)

Alta raises two alternative arguments regarding the special verdict form that the district court provided the jury. First, Alta contends that the district court committed plain error with respect to the first question, in that the above-referenced portion of that question improperly imposed on Alta the burden to establish that PennyMac received the 2017 letter, which is an incorrect statement of the law and which contradicts the above-mentioned jury instructions. Second, and regardless of whether it has demonstrated reversible error with respect to its first argument, Alta contends that the district court again committed plain error in instructing the jury that it should not proceed to question 1.2 if it answered "No" to question 1.1. We are not persuaded by either argument.

With respect to Alta's first argument, we are not persuaded that the wording of question 1.1 constitutes plain error warranting reversal for three independent reasons. *Cf. In re J.D.N.*, 128 Nev. 462, 469, 283 P.3d 842, 847 (2012) ("Relief under the plain error standard is rarely granted in civil cases and is reserved for those situations where it has been demonstrated that the failure to grant relief will result in a manifest injustice or a miscarriage of justice." (quoting 5 Am. Jur. 2d *Appellate Review* § 720 (2007)). First, when read in conjunction with the jury instructions regarding the mailing presumption, question 1.1 does not necessarily misstate the law. Second, Alta's counsel jointly submitted the verdict form with PennyMac's counsel, thereby inviting any alleged error that Alta now complains about. *See Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) ("The doctrine of invited error embodies the principle that a party will not be heard to complain on appeal of errors which he himself induced or provoked the court . . . to commit." (internal quotation marks omitted)). Third, the jury was presented with ample evidence, including PennyMac's records and its 2018 correspondence to Alta's counsel, that PennyMac did not receive the 2017 letter. Thus, even if question 1.1 stated the law confusingly, it is by no means apparent that the jury would have reached a different result if that question had been worded more clearly. *See Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008) (recognizing that an erroneous jury instruction does not automatically provide a basis for reversal and that, instead, a party must "provid[e] record evidence showing that, but for the error, a different result might have been reached").

With respect to Alta's second argument, we conclude that the verdict form correctly instructed the jury not to answer question 1.2 if it

answered "No" to question 1.1. Alta contends that because PennyMac had a policy of not responding to NRS Chapter 107 payoff-statement requests from non-borrowers, the jury could have found that PennyMac "willfully fail[ed]" to provide a payoff-statement even if it did not receive Alta's 2017 letter. But PennyMac could not have "fail[ed]" to respond to a letter that it did not receive, so the possibility that PennyMac would not have responded to the letter if it was received cannot form the basis for liability.[2] Accordingly, the district court did not commit any error, plain or otherwise, in instructing the jury to not answer question 1.2 if it answered "No" to question 1.1.

In sum, under these circumstances, we are not persuaded that there was a "manifest injustice or a miscarriage of justice" so as to warrant disregarding the jury's verdict and reversing the district court's judgment in favor of PennyMac. *In re J.D.N.*, 128 Nev. at 469, 283 P.3d at 847. We therefore affirm the district court's judgment in Docket No. 84691.

Appeal and cross-appeal from the fees and costs order (Docket No. 85632)

As indicated, Alta challenges the district court's conclusion that PennyMac was entitled to attorney fees under NRCP 68, and PennyMac challenges the district court's decision to not award its full amount of requested fees. We address each issue in turn.

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[2]To the extent that Alta contends that our disposition of the previous appeal contemplated such a result, we disagree with that reading of the disposition. *See Liu v. Christopher Homes, LLC*, 130 Nev. 147, 151, 321 P.3d 875, 877 (2014) (observing that this court reviews de novo the interpretation of its previous dispositions). Relatedly, to the extent that Alta contends that the jury could have found PennyMac liable based on communications other than the 2017 letter, we again note that Alta's counsel agreed to the verdict form that referenced only the 2017 letter. *See Pearson*, 110 Nev. at 297, 871 P.2d at 345.

Alta's appeal

Alta contends that the district court abused its discretion in awarding PennyMac attorney fees under NRCP 68. *Cf. Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1027-28 (2006) (recognizing that this court generally reviews a district court's decision to award attorney fees for an abuse of discretion). In this, Alta makes two main arguments. First, Alta contends that it did not fail to obtain a more favorable judgment than what was set forth in PennyMac's offers for purposes of NRCP 68(f)-(g). Alternatively, Alta contends that the district court misapplied the *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), factors. We are not persuaded that the district court abused its discretion in determining that PennyMac was entitled to attorney fees under NRCP 68.

Alta's first argument is premised on the fact that PennyMac's offers to settle were in exchange for Alta paying off the loan balance, which is something Alta was statutorily entitled to do at any time. Thus, according to Alta, these offers were essentially offers to settle the case for $0, and even though the jury ultimately awarded Alta $0 on its claim for statutory damages, Alta nevertheless prevailed on PennyMac's counterclaim for assignment of rents (which PennyMac voluntarily dismissed), such that Alta did not necessarily "fail[ ] to obtain a more favorable judgment" than PennyMac's offers. NRCP 68(f)-(g). But we disagree with this logic, as it misstates the basis for the jury's verdict. Namely, Alta sought statutory damages representing the difference between the unpaid loan balance as of when it allegedly sent the 2017 letter (roughly $811,000) and when Alta ultimately paid off the loan (roughly $918,000). By virtue of offering to settle the case for $883,000, PennyMac

offered to accept a lesser amount than $918,000. When the jury awarded Alta $0 on its claim for statutory damages, it determined by necessary implication that Alta owed $918,000 to pay off the loan. Because this amount was more than Alta would have owed if it had accepted PennyMac's offers, the district court correctly determined that Alta "fail[ed] to obtain a more favorable judgment" for purposes of NRCP 68(f)-(g).

Alta's second argument is premised on the district court having improperly analyzed the four *Beattie* factors, which require the district court to assess:

> (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendant's 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.

Alta primarily contends that the district court's analysis of the first *Beattie* factor was erroneous, in that the district court analyzed the potential merits of Alta's statutory damages claim at the time PennyMac made its offers of judgment, as opposed to when Alta filed its complaint. We are not persuaded that this amounts to an abuse of discretion, as Alta has not cited any authority to support the proposition that the first *Beattie* factor requires the district court to assess the viability of the offeree's claims at the time they were asserted, as opposed to at the time the offer was made. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (recognizing that it is a party's responsibility to support its arguments with salient authority). Here, the district court found that at the time PennyMac made its second offer of judgment,

discovery had been closed, and that the evidence produced in discovery strongly suggested that PennyMac had not received Alta's 2017 letter.[3] Thus, the district court was within its discretion in determining that the first *Beattie* factor weighed in PennyMac's favor. *See LaForge v. State, Univ. & Cmty. Coll. Sys. of Nev.*, 116 Nev. 415, 423, 997 P.2d 130, 136 (2000) ("Where the district court properly considers these *Beattie* factors, the award of attorney's fees is discretionary and will not be disturbed absent a clear abuse." (internal quotation marks omitted)).

Alta next contends that the district court erroneously applied the second and third *Beattie* factors because PennyMac's offers were "nothing more than an offer for Alta to give up its lawsuit." While we agree with Alta's characterization of PennyMac's offer, that is the purpose of an offer of judgment, and we are not otherwise persuaded that the district court abused its discretion in concluding that the second and third *Beattie* factors weighed in favor of PennyMac. *Cf. Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 382, 989 P.2d 882, 888 (1999) ("The purpose of . . . NRCP 68 is to save time and money for the court system, the parties and the taxpayers. [It] reward[s] a party who makes a reasonable offer and punish[es] the party who refuses to accept such an offer.").

Alta finally contends that the district court erroneously applied the fourth *Beattie* factor, in that the district court should not have awarded PennyMac fees that it incurred with respect to Alta's first *successful* appeal.

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[3]While Alta complains about the lack of factual findings in the district court's written order, the district court explained its rationale at the June 7, 2022, hearing. *Cf. Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 635, 643 n.1, 289 P.3d 201, 206 n.1 (2012) (recognizing that a district court's oral findings may be used to supplement findings that are absent from a written order).

We are not persuaded by this argument. Namely, Alta chose to appeal the district court's summary judgment order, thereby incurring the risk that PennyMac would incur additional attorney fees in defending that appeal. While the resolution of that appeal was favorable to Alta, that same resolution remanded for litigation on an additional issue that had not been adjudicated in favor of Alta, which was ultimately adjudicated against Alta. Thus, we are not persuaded that the district court abused its discretion in including PennyMac's appellate fees in its ultimate award. *Cf. In re Estate & Living Tr. of Miller*, 125 Nev. 550, 554, 216 P.3d 239, 243 (2009) ("[T]he fee-shifting provisions in NRCP 68 . . . apply to the judgment that determines the final outcome in the case which, in the event of an appellate reversal, may be different from the judgment originally entered by the district court.").

In sum, we affirm the district court's post-judgment order awarding attorney fees insofar as it determined that PennyMac was entitled to fees under NRCP 68.

PennyMac's cross-appeal

PennyMac contends that it should be entitled to its full amount of requested fees stemming from the February 2019 offer and not just the fees that the district court awarded, which stemmed from the July 2019 offer. In particular, PennyMac contends that the district court erroneously determined that the February 2019 offer was ambiguous and therefore invalid.

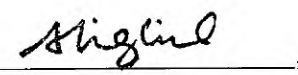
We disagree. PennyMac's February 2019 offer stated that "[t]he judgment will also expressly acknowledge that the deed of trust . . . remains a valid encumbrance against the [subject] property." The district court found this language to be ambiguous, in that it could be

construed as PennyMac retaining its security interest in the property even after Alta paid off the loan balance and the matter was settled. While PennyMac contends that this was obviously not the intent behind its offer, we agree with the district court's conclusion that the offer could be construed as such. *Cf. McCrary v. Bianco*, 122 Nev. 102, 109-10, 131 P.3d 573, 577-78 (2006) (observing that an ambiguous offer of judgment should be construed against the offeror). Accordingly, we affirm the district court's post-judgment order insofar as it declined to award PennyMac the full amount of its requested fees.

PennyMac also contends that it should be entitled to its attorney fees in litigating the instant appeals, which Alta has not opposed. Accordingly, PennyMac may file a motion in district court requesting the attorney fees it incurred in litigating these appeals. *See In re Estate & Living Tr. of Miller*, 125 Nev. at 555, 216 P.3d at 243 ("[T]he fee-shifting provisions in NRCP 68 . . . extend to fees incurred on and after appeal.").

Consistent with the foregoing, we

ORDER the judgments of the district court AFFIRMED.



_____, J.
Stiglich

_____, J.
Lee

_____, J.
Bell

cc: Hon. Gloria Sturman, District Judge
Thomas J. Tanksley, Settlement Judge
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Eighth District Court Clerk