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Frazier v. Drake, 131 Nev. Adv. Op. 64 (Sep. 3, 2015)

Adrian Viesca
Nevada Law Journal

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TORTS: ATTORNEYS FEES AND EXPERT WITNESS FEES

Summary

The Court of Appeals determined that (1) when three of the good-faith *Beattie*² factors weigh in favor of the party that rejected the offer of judgment, the reasonableness of the fees requested by the offeror becomes irrelevant, and cannot, by itself, support a decision to award attorney fees to the offeror and (2) expert witness fees in excess of \$1,500 now have factors to take into consideration in awarding such fees.

Background

This is an appeal arising from Anika Frazier and Randy Keys' (collectively referred to as "Frazier," except when context requires otherwise) personal injury action following a motor vehicle collision in which their vehicle was rear-ended by a semitrailer truck driven by Patrick Drake and owned by MS Concrete Company, Inc. (collectively referred to as "Drake").

Drake was an employee of respondent MS Concrete Company, Inc. As Drake drove an MS Concrete semitrailer truck in North Las Vegas, bees purportedly flew into the truck's cabin and landed on his eye. Drake attempted to remove the bee from his eye, failed to observe a stoplight, and rear-ended appellant Frazier, whose vehicle was stopped at the light.

Approximately one month before trial, Drake made an offer of judgment to Frazier and Keys for \$50,001 and \$70,001, respectively, pursuant to NRCP 68³ and NRS § 17.115.⁴ Both rejected the offers.

Drake's defense at trial was that the bee landing on his eye constituted a sudden emergency, which rendered him unable to avoid the collision. Over Frazier's objection, the court instructed the jury on sudden emergency and the jury ultimately found in favor of Drake. Frazier then moved for a new trial arguing that the sudden emergency instructions should not have been given and that the jury ignored the court's instruction regarding Drake's standard of care in reaching its verdict. Drake opposed and the district court ultimately denied Frazier's motion.

Drake then moved for attorney fees and costs, citing Frazier's and Keys' failure to improve upon the offers of judgment at trial and Drake's status as a prevailing party. Drake's motion sought both general costs and \$107,635.73 in fees for five expert witnesses.

Ultimately, the district court granted Drake's motion in part. Despite finding that three of

¹ By Adrian S. Viesca.

² *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).

³ NEV. R. CIV. P. 68.

⁴ NEV. REV. STAT. § 17.115 (2015). This has been repealed by the 78th Nev. Leg. effective Oct. 1, 2015.

the four *Beattie*⁵ factors weighed in favor of Frazier, the district court awarded Drake all of his requested attorney fees. The court reduced the award for expert witness fees as costs to \$47,400, as it found some of the fees to be “unreasonable and excessive.” In total, Drake received \$144,808.59 in attorney fees, general costs, and expert witness fees.

Discussion

Sudden emergency instructions

Frazier argues that the sudden emergency doctrine should not have been applied because Drake created or contributed to the emergency by failing to apply his brakes when the bees flew in his cab window. In response, Drake argues that the sudden emergency instructions were proper because the bees flying in his window and one bee landing on his eye, created a sudden emergency that prevented him from avoiding the collision. The Court, citing *Posas*,⁶ found that Drake presented sufficient evidence to allow the jury to determine that, through no fault of his own, Drake was directly placed in a position of peril beyond the ordinary hazards of driving and responded to that situation as a reasonably prudent person would. The Court further determined that the district court did not abuse its discretion in refusing to grant a new trial based on the instructions regarding sudden emergencies.

Disregard of jury instructions

Frazier argues that the district court abused its discretion by not granting a new trial based on the jury’s alleged disregard of the court’s instructions regarding the applicable standard of care. Frazier contends that a reasonably prudent person would have applied the brakes in the situation of bees in the cabin and relied on expert witnesses that asserted that they would roll down the window or apply the brakes and pull to the side of the road. Drake responded that none of Frazier’s witnesses testified about a bee landing on their eye. Drake then presented expert testimony that when the bee landed on his eye, his brain would focus its attention on dealing with the bee and could not focus on avoiding a collision until the bee was no longer in his eye.

Based on this evidence, the jury could have found that when faced with a bee in his eye, Drake acted as a reasonably prudent person would act under the same circumstances. Therefore, because Frazier cannot demonstrate that, as a matter of law, the jury could not have reached a verdict in Drake’s favor without manifestly disregarding its instructions, the district court properly denied Frazier’s request for a new trial.

Attorney fees

NRCP 68⁷ and NRS § 17.115⁸ allow for the district court to order “reasonable attorney fees” when a party rejects an offer and then fails to obtain a more favorable judgment at trial.

⁵ *Beattie*, 99 Nev. at 588-89, P.2d at 274.

⁶ *Posas v. Horton*, 126 Nev. 112, 228 P.3d 457 (2010).

⁷ NEV. R. CIV. P. 68.

⁸ NEV. REV. STAT. § 17.115 (2015). This has been repealed by the 78th Nev. Leg. effective Oct. 1, 2015.

Although the district court found that the three good-faith *Beattie*⁹ factors favored Frazier and that the fourth favored Drake, the court awarded Drake the entirety of his requested attorney fees.

By awarding the attorney fees, the district court elevated one *Beattie*¹⁰ factor above the others and deemed the respective good faith of the parties to be of no import. The Court of Appeals concluded that where the district court finds the three good-faith *Beattie*¹¹ factors weigh in favor of the party that rejected the offer of judgment, the reasonableness of the fees requested by the offeror becomes irrelevant, and cannot, by itself, support a decision to award attorney fees to the offeror. Therefore, the Court of Appeals concluded that the district court's weighing of the *Beattie*¹² factors was arbitrary and capricious, and constituted legal error, and reversed the district court's award of attorney fees

Expert witness fees

NRS § 18.005(5) provides for the recovery of “[r]easonable fees of not more than five expert witnesses in an amount of not more than \$1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert’s testimony were of such necessity as to require the larger fee.”¹³ With limited guidance from the Nevada Supreme Court, the Court undertook an “extrajurisdictional authority” survey to determine what factors Nevada district courts should consider in assessing expert witness fees.

*Factors for consideration in awarding expert witness fees as costs in excess of \$1,500 per expert under NRS 18.005(5)*¹⁴

The Nevada Supreme Court has made clear “that the importance of the expert’s testimony to the party’s case plays a key role in assessing the propriety of such an award.”¹⁵ Therefore, the Court of Appeals concludes that any expert witness fees in excess of \$1,500 per expert under NRS § 18.005(5)¹⁶ must be supported by an “express, careful, and preferably written explanation of the court’s analysis of factors pertinent to determining the reasonableness of the requested fees.”¹⁷

The factors district courts should consider require a case-by-case examination, may not be pertinent to every situation, and are nonexhaustive but include:

the importance of the expert’s testimony to the party’s case; the degree to which the expert’s opinion aided the trier of fact in deciding the case; whether the expert’s reports or testimony were repetitive of other expert witnesses; the extent

⁹ *Beattie*, 99 Nev. at 588-89, P.2d at 274.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ NEV. REV. STAT. § 18.005(5) (2015).

¹⁴ *Id.*

¹⁵ *See Gilman v. State Bd. of Veterinary Med. Exam’rs*, 120 Nev. 263, 273, 89 P.3d 1000, 1007-07 (2004).

¹⁶ NEV. REV. STAT. § 18.005(5).

¹⁷ *Frazier v. Drake*, 131 Nev. Adv. Op. 64 1, 25 (2015).

and nature of the work performed by the expert; whether the expert had to conduct independent investigations or testing; the amount of time the expert spent in court, preparing a report, and preparing for trial; the expert's area of expertise; the expert's education and training; the fee actually charged to the party who retained the expert; the fees traditionally charged by the expert on related matters; comparable experts' fees charged in similar cases; and, if an expert is retained from outside the area where the trial is held, the fees and costs that would have been incurred to hire a comparable expert where the trial was held.¹⁸

The district court's award of expert witness fees as costs

The Court found that the district court abused its discretion in awarding Drake his expert witness fees. The district court failed to explain why it found the fees for four expert witnesses unreasonable and that \$10,000 was reasonable. The district court further failed to explain why the \$7,400 fee was reasonable for the fifth expert and that the district court did not address NRS 18.005(5)'s¹⁹ requirement that fees over \$1,500 should only be awarded if the court determines that the circumstances surrounding the experts' testimony were of such necessity as to require the larger fees.

Conclusion

The Court of Appeals (1) affirmed the judgment on the jury verdict and the denial of Frazier's motion for a new trial; (2) reversed the award of attorney fees; and (3) reversed the award of expert witness fees as costs and remand the matter to the district court.

¹⁸ *Id.* at 25.

¹⁹ NEV. REV. STAT. § 18.005(5).