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Summary of Logan v. Abe, 131 Nev. Adv. Op. No. 31 (Jun. 4, 2015)

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LITIGATION: THIRD PARY ATTORNEY AND EXPERT WITNESS FEES

Summary

A party incurs an expense even if a third party pays the expense on the party's behalf, as long as the party would otherwise be legally obligated to pay the expense. Thus, costs and reasonable attorney fees that a third party paid on behalf of a litigant can be recovered under NRS 17.115(4) and NRCP 68(f)(2). In addition, a party can recover expert witness fees even if the expert did not testify at trial and was not deposed.

Background

Appellants Robert and Jamie Logan sued respondents Calvin J. Abe, Abe Pacific Heights Properties, LLC, and Ron Martinson ("defendants") for personal injuries that Robert Logan suffered when he was shot by an employee of a hotel. Before trial, defendants made an offer of judgment to the Logans in which they offered to pay \$55,000 to settle the claims. The Logans did not accept the offer, and the case proceeded to trial. After the jury returned a verdict in their favor, defendants made a motion for attorney fees and costs, which had been paid by their insurer. The Logans opposed the motion. Reasoning that defendants were entitled to attorney fees and costs under NRS 17.115 and NRCP 68 because the Logans failed to improve upon their offer of judgment, the district court awarded \$71,907.50 in attorney fees and \$24,812.60 in costs, including \$7,290 for the fees of an expert witness who did not testify. The Logans appealed the award of attorney fees and costs.

Discussion

In relevant part, NRCP 68(f)(2) provides that if an offeree fails to improve upon a rejected offer of judgment, "*the offeree shall pay the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer . . .*" (Emphases added).

"An expense can only be 'incurred' when one has paid it or become legally obligated to pay it."² While the Court had not previously decided whether a party incurs an expense that is ultimately satisfied by another party, other jurisdictions had persuasively held that an expense can be incurred even if it is ultimately satisfied by someone other than the party.³ Therefore, a party can incur an expense that was paid on its behalf if the party would have been liable for the

¹ By Michael S. Valiente.

² *United Servs. Auto Ass'n v. Schlang*, 111 Nev. 486, 490 (1995).

³ See e.g., *Hoffman v. Oakley*, 647 S.E.2d 117, 124 (N.C. Ct. App. 2007) (interpreting "incur" in the context of an insurer's payment of an insured's litigation expenses); *Mullins v. Kessler*, 83 P.3d 1203, 1204 (Colo. App. 2003) (The "arrangement between [a] defendant and [its] liability insurer for the disbursement and repayment of those costs is of no consequence."); cf. *Manor Healthcare Corp. v. Lomelo*, 929 F.2d 633, 639 (11th Cir. 1991) (holding that a prevailing party may recover litigation costs without regard to whether a third party advanced the funds for the costs); *Aspen v. Bayless*, 564 So. 2d 1081, 1083 (Fla. 1990) (same).

expense regardless of the third party's payment.

Additionally, NRS 17.115 and NRCP 68 each authorize a party to recover the reasonable attorney fees and costs that it incurs after it makes an offer of judgment that is not improved upon.⁴ Because the statutes are limited to the costs incurred rather than the party who pays them, NRS 17.115 and NRCP 68 allow a party to recover qualifying attorney fees and costs that were paid on its behalf by a third party.

Finally, NRS 18.005(5) allows the recovery of “reasonable 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.” (Emphasis added).⁵ Furthermore, NRS 17.115(4)(d)(1) authorizes the district court to award “[a] reasonable sum to cover any costs incurred by the party who made the offer [of judgment] *for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case.*” (Emphasis added). While NRS 18.005 does not require an expert witness to testify in order to recover fees less than \$1,500, the award of the expert's fees in this case was not an abuse of discretion. The district court found that defendants did not call their expert witness, who was retained to rebut the Logans' expert witness, because “[the Logans] chose on the *eve* of trial (or during trial) to not call” their expert. Thus, the “circumstances surrounding the expert's testimony,” or in this case, the lack thereof, were of the Logans’ creation and “were of such necessity as to require the larger fee.”⁶

Conclusion

A party is entitled to recover certain costs and reasonable attorney fees that it incurs after making an unimproved-upon offer of judgment pursuant to NRS 17.115 and NRCP 68. Because a party incurs an expense when it becomes legally obligated to pay the cost, it may recover qualifying expenses pursuant to NRS 17.115 and NRCP 68 that are paid by a third party on the party's behalf. Here, the district court did not abuse its discretion in awarding attorney fees or costs to defendants. Therefore, the Court affirmed the district court's award of attorney fees and costs.

⁴ NEV. REV. STAT. §17.115(4)(c)-(d); NEV. R. CIV. P. 68(0)(2).

⁵ *Gilman v. State Bd. of Veterinary Med. Exam'rs*, 120 Nev. 263, 272-73, 89 P.3d 1000, 1006-07 (2004) (observing that a district court has discretion to award more than \$1,500 for an expert's witness fees), disapproved of on other grounds by *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev., Adv. Op. 27, 327 P.3d 487, 491 (2014).

⁶ See NEV. REV. STAT. § 18.005(5).