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In re Estate of Miller, 125 Nev. Adv. Op. 42 (Sept. 24, 2009)¹

CIVIL PROCEDURE – FEE SHIFTING PROVISIONS

Summary

This case is an appeal and cross-appeal from the district court's order denying the defendant's motion for attorney fees but awarding costs in a case pertaining to the distribution of the decedent's (Rose Miller's) estate.

Disposition/Outcome

Reversed and remanded. The Nevada Supreme Court, sitting en banc, reversed the district court's order denying the defendant's motion for attorney fees and remanded the case for further proceedings. The Court held that (1) a judgment obtained on or after appeal can qualify as a "more favorable judgment" for purposes of the fee-shifting provisions of NRCPP 68² and NRS 17.115,³ (2) appellate fees are recoverable, and (3) an unrepresented party who serves an offer of judgment may recover fees later paid to a lawyer hired to prosecute or defend the case.

Facts and Procedural Background

The underlying dispute in this case involved a contest over the distribution of Rose Miller's estate. The defendant, Barbara LePome, proceeding without a lawyer, initially made separate offers of judgment to the plaintiffs, Marilyn Berkson and Gertrude Malacky, for \$12,500 each. Berkson and Malacky refused LePome's offers of judgment, and LePome subsequently hired a defense attorney.

After a unanimous jury verdict, the district court ruled in favor of Berkson and Malacky. On appeal, however, the Nevada Supreme Court reversed and ruled LePome deserved judgment as a matter of law. As a result, Berkson and Malacky ultimately failed to receive more favorable judgments than LePome's \$12,500 offer.

The Nevada Supreme Court issued a remittitur, and LePome then moved at the district court level for the attorney fees she incurred during her appeal. The district court held that LePome was not entitled to the costs and attorneys fees she incurred during her appeal under NRCPP 68 and NRS 17.115.

Both parties appealed the district court's judgment. Berkson and Malacky argue that a judgment rendered by the district court upon remittitur cannot serve as the basis for an award of attorney's fees and costs under Nevada law. In their view, the district court's judgment before the initial appeal was binding. Second, Berkson and Malacky argue that an offer of judgment does not include post-offer fees and costs incurred on appeal. Finally, Berkson and Malacky argue that because they rejected LePome's \$12,500 offer under the impression she was unrepresented by an attorney, she is not entitled to attorney fees and costs.⁴ LePome, on the

¹ By Daniel M. Ryan

² NEV. R. CIV. P. 68.

³ NEV. REV. STAT. § 17.115 (2007).

⁴ See *Sellers v. Dist. Court*, 119 Nev. 256, 259, 71 P.3d 495, 498 (2003) (holding that a litigant must pay attorney fees to receive an award of attorney fees if he or she prevails in court).

other hand, appealed the district court's holding that she was not entitled to the attorney fees and costs she incurred during her initial appeal.

Discussion

The Court determined that a party's eligibility for a fee award is a matter of statutory interpretation, a question of law and, accordingly, the proper standard for review is *de novo*.

Contrary to Berkson and Malacky's arguments, the Court first held that a district court's judgment as a result of appellate reversal can serve as the basis for attorney's fees and costs. Relying on NRCP 68 and NRS 17.115, the Court emphasized that fee shifting penalties are assessed against an offeree who "rejects an offer and fails to obtain a more favorable judgment."⁵ The Court concluded that the word "judgment" in those provisions connotes a final judgment. Appellate reversals comprise a final judgment binding upon the parties and district court. Accordingly, the Court held that the fee-shifting provisions in NRCP 68 and NRS 17.115 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 entered by the district court.

Next, the Court held that the fee-shifting provisions allow a party to recover appellate costs and fees and nothing in the language of NRCP 68 and NRS 17.115 suggests otherwise. To reinforce its holding, the Court emphasized that other jurisdictions with similar statutory provisions also allow a party to recover post-offer fees and costs incurred on appeal.⁶

Finally, the Court rejected Berkson and Malacky's argument that LePome could not recover attorney's fees because she was not represented by an attorney at the time she made her offer of judgment. The Court emphasized that when an offeree evaluates an offer of judgment, the offeree should not rely on whether an offeror then has counsel, but should be aware that the offeror may change his or her mind about representation. The Court urged that such a policy promotes settlement by encouraging the offeree to accept an offer of judgment. Accordingly the Court concluded that an unrepresented party who serves an offer of judgment may recover post-offer fees incurred and paid to a lawyer later hired to represent the offering party.

Conclusion

The Nevada Supreme Court concluded that LePome was entitled to the attorney fees and costs she incurred on appeal. Furthermore, a judgment entered by a district court after appellate reversal can serve as a basis for attorney's fees under NRCP 68 and NRS 17.115. Finally, the fact that LePome was not represented when she made her offer of judgment to Berkson and Malacky did not preclude her award of attorney's fees and costs.

⁵ NEV. REV. STAT. § 17.115(4); NEV. R. CIV. P. 68(f).

⁶ See, e.g., *Rosenauro v. Scherer*, 105 Cal. Rptr. 2d 674, 693 (Cal. Ct. App. 2001) (holding that a statute authorizing an attorneys fees award at the trial court level includes appellate attorneys fees *unless the statute specifically provides otherwise*) (emphasis added).