

***McCrary v. Bianco*, 122 Nev. Adv. Op. 10 (Feb. 9, 2006)<sup>1</sup>**

**CIVIL PROCEDURE- PREJUDGMENT INTEREST**

**Summary**

Thomas and Rebecca McCrary (“McCrary”) appealed from a post-verdict district court order awarding attorney fees based upon the cost shifting provisions of NRC 68 and NRS 17.115. Dominic Bianco (“Bianco”) cross-appealed from the denial of its motion for partial satisfaction of judgment. McCrary unsuccessfully argued that the district court erred in its failure to consider pre-offer attorney fees and costs as part of its determination of the total judgment for cost-shifting purposes. McCrary successfully argued that the district court erred in not including pre-offer prejudgment interest in its comparison between the total amount awarded and the offer of judgment, for cost-shifting purposes. Bianco unsuccessfully argued that he should receive an offset under the repair contract. McCrary unsuccessfully argued that the offer of judgment was invalid for lack of service and failure to file in a timely manner. The district court’s decision was affirmed in part, reversed in part, and remanded.

**Disposition/Outcome**

Affirmed in part, reversed in part, and remanded. In this appeal, the Nevada Supreme Court clarified the cost-shifting provisions of NRC 68 and NRS 17.115 concerning offers of judgment in civil cases. The Court held that district courts must, where applicable, and where the offer did not preclude such comparison, include pre-offer judgment interest along with the principal judgment amount when comparing the judgment obtained and an offer of judgment in post-trial proceedings for relief. The Court also held that the district court properly excluded pre-offer attorney fees and costs in making its comparison.

**Factual and Procedural History**

McCrary contracted with Bianco to repair insured water damage to their home. McCrary agreed to pay Bianco \$9,926.76 for his work. However, McCrary was unhappy with the work performed, and brought suit against Bianco for damages based upon negligence and breach of contract claims for relief. In addition, McCrary alleged that Bianco caused \$75,000 in additional damages to their home.

Bianco attempted to serve a timely pretrial offer of judgment to McCrary’s attorney. The offer of judgment was for a principal amount of \$23,999 and provided for a separate award of statutory costs, in the event of acceptance. The offer specifically stated, “Plaintiff shall be entitled to statutory costs of suit.” McCrary did not respond to the offer, and it was deemed rejected.

At trial, the jury awarded McCrary a total of \$15,800; \$10,800 was awarded for the

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negligence claim and \$5,000 was awarded for the breach of contract claim. Bianco then filed a copy of its offer of judgment, and both parties moved for attorney's fees. McCrary sought recovery of fees under NRS 18.010(2) and a provision in the repair contract. Bianco sought recovery of attorney's fees under the cost-shifting provisions of NRCP 68 and NRS 17.115. In addition, Bianco sought an offset under the repair contract for \$11,914 which was previously paid to McCrary by their homeowner's insurer.

The district court ultimately agreed with Bianco regarding the offer of judgment, and awarded Bianco \$15,000 in attorney's fees plus costs of suit. Because the offer exceeded the judgment under the district court's analysis, the district court refused to award attorney's fees to McCrary. The district court determined the offer of judgment exceeded the judgment by comparing the offer of judgment and the jury verdict. Further, the district court stated that Bianco's offer of judgment was reasonable in its timing and amount and that McCrary's refusal of the offer was grossly unreasonable. In regards to Bianco's request for the offset, the district court denied the request.

On appeal, McCrary challenged the fee award to Bianco and the district court's refusal to award attorney's fees to them. On cross-appeal, Bianco asserted that the district court erred in not allowing the offset as a partial satisfaction of judgment.

## **Discussion**

McCrary asserted that the district court should have included accrued pre-offer attorney's fees, pre-offer costs, and pre-offer prejudgment interest as part of the judgment when it compared the judgment with the offer. The Nevada Supreme Court stated that the district court was correct in not considering attorney's fees and costs, but agreed with McCrary that the district court should have considered pre-offer prejudgment interest as part of the judgment when it compared the judgment with the offer.

The Court discussed NRCP 68 and NRS 17.115 as setting forth Nevada's "offer of judgment" protocols. McCrary argued that the 1998/1999 changes to NRCP 68 and NRS 17.115 validated their contention that pre-offer costs and fees may be considered as part of the judgment for purposes of comparing the offer of judgment to the judgment awarded.

The Court stated that the 1998/1999 changes embraced a new comparison formula. Under the new formula, in the event that the offer provided for a separate award of costs, the district court should conduct a post-trial comparison between the amount of the offer and the principal amount of the judgment. The Court noted that the 1999 amendments to NRS 17.115 reflected changes in the comparison formula by making costs part of the comparison when the offer precluded a separate award of costs. The Court emphasized, however, that this was not awarded as part of the judgment; rather, the pre-offer costs were calculated, added to the offer, and then compared with the principal amount of the judgment. However, this analysis was not relevant to the present case because Bianco's offer did not preclude a separate award of costs upon acceptance.

The Court cited its decision in *Bowyer v. Taack*, where the Court held that, when litigants

are precluded from obtaining taxable costs and attorney fees under NRCP 68 and NRS 17.115, they are likewise precluded from recovering under NRS 18.010.<sup>2</sup> The Court further held that costs and fees could not be included as part of a judgment to determine whether the judgment obtained exceeded the offer for relief purposes under the cost-shifting provisions.<sup>3</sup> The Court stated that, to this extent, when the offer provided for a separate award of costs, *Bowyer* remained valid precedent, regarding exclusion of costs and fees within the comparison. The Court emphasized that costs become part of the equation only when the offer precludes a separate award for costs. Thus, the Court concluded that, in the present case, the district court correctly refused to consider pre-offer fees and other costs generated by McCrary in making their NRCP 68 and NRS 17.115 comparisons.

Next, the Court discussed pre-offer prejudgment interest and offers of judgment. The Court again referred to its decision in *Bowyer*. In *Bowyer*, the Court held that a claimant who failed to secure a judgment greater than a previously tendered offer of judgment could not recover awards of prejudgment interest under a court rule or statute.<sup>4</sup> The Court further held that prejudgment interest could not be included as part of a judgment to determine whether the judgment exceeded the offer.<sup>5</sup> The Court noted that this holding was consistent with Nevada statutes, at the time of the decision.

However, in 1998, the Court amended NRCP 68 by promulgating NRCP 68(f)(1), which limited the “loss of prejudgment interest sanction” for failure to exceed an offer of judgment to loss of post-offer judgment interest. The Legislature amended NRS 17.115 to conform the statute to the rule. In the present case, the Court noted that, although pre-offer prejudgment interest was not expressly included in the 1998/1999 comparison formula, there was no reason not to include such an award in the comparison. Thus, in the present case, the Nevada Supreme Court held that pre-offer prejudgment interest could be added to the principal award as part of the comparison formula.

The Court further concluded that the offer should be construed against Bianco to allow the pre-offer prejudgment interest to be included with the judgment in comparing the judgment with the offer because the offer was “inclusive of all claims” and noted that Bianco’s offer did not preclude inclusion of prejudgment interest in the comparison with the offer.

Thus, the Nevada Supreme Court reversed this matter with instructions to compute the amount of pre-offer prejudgment interest and to add that sum to the judgment award for purposes of comparing the judgment to the offer of judgment. If the principal award and pre-offer prejudgment interest now exceeded the offer, Bianco should not be awarded relief under NRCP 68 and NRS 17.115. If the principal award and pre-offer prejudgment interest did not exceed the offer of judgment, the district court could consider granting Bianco relief.

The Court discussed McCrary’s alternative argument that the offer of judgment was

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<sup>2</sup> 107 Nev. 625, 817 P.2d 1176 (1991).

<sup>3</sup> *Id.* at 627, 817 P.2d at 1177.

<sup>4</sup> *Id.* at 628, 817 P.2d at 1178.

<sup>5</sup> *Id.* at 629, 817 P.2d at 1179.

invalid for lack of service and for failure to file the offer until after the conclusion of trial. The Court noted that Bianco had attempted service by mail but had mailed the offer to the wrong zip code. However, the record confirmed that Bianco had sent all pleadings to the same address with the wrong zip code, and that McCrary's attorney had received all other pleadings sent to this incorrect address. The district court had found that McCrary's counsel received the offer, and this finding was supported by substantial evidence in the record. Further, the Court stated that failure to file the offer until after the trial was not fatal to relief under the cost-shifting provisions of NRCP 68 and NRS 17.115.

Finally, the Court discussed Bianco's cross-appeal. The Court stated that the insurance proceeds were only payable to Bianco in the event that there was no breach of contract. Because the jury found that Bianco breached the contract, and neither party challenged this decision, the Court stated that Bianco's cross-appeal was without merit.

### **Conclusion**

The Court determined that the district court properly refused to award or consider pre-offer attorney's fees and costs as part of its determination under NRCP 68 and NRS 17.115. However, the Court held that the district court erred in refusing to include pre-offer prejudgment interest to the total judgment awarded in its comparison between the total judgment awarded at trial and Bianco's offer of judgment. Thus, the Court affirmed in part, reversed in part, and remanded the matter for further proceedings consistent with its opinion.