

IN THE SUPREME COURT OF THE STATE OF NEVADA

O.P.H. OF LAS VEGAS, INC.,

Appellants,

v.

OREGON MUTUAL INSURANCE COMPANY;
DAVE SANDIN; AND SANDIN & CO.,

Respondents.

Supreme Court No. 76966

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Elizabeth A. Brown

Clerk of Supreme Court

**APPELLANT'S OPENING
BRIEF**

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable Gloria Sturman, Department XXVI, District Judge
District Court Case No. A-12-672158-B

APPELLANT'S OPENING BRIEF

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The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. No publicly traded company has a material interest in this appeal. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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TABLE OF CONTENTS

DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES	vi
JURISDICTIONAL STATEMENT	1
ROUTING STATEMENT	1
STATEMENT OF ISSUES	2
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	5
SUMMARY OF THE ARGUMENT	11
ARGUMENT	12
A. Standard of Review	12
B. Legal Standard Governing Offers of Judgment	12
1. OPH Brought Its Claims in Good Faith	14
2. The Offer of Judgment Was Unreasonable in Timing and Amount.....	15
a. The Offer of Judgment Was Unreasonable in Amount	15
b. The Offer of Judgment Was Unreasonable in Timing.....	17
3. OPH Reasonably Rejected the Offer of Judgment.....	19
a. OPH's Decision to Reject the Offer of Judgment Was Not Grossly Unreasonable	20
b. The District Court Agreed OPH Was Not Grossly Unreasonable.....	20
c. The District Court Reverses Course and States OPH's Decision to Reject the Offer of Judgment Was Not Reasonable	20

d. The District Court Erred in its Analysis of the Third <i>Beattie</i> Factor.....	21
e. The District Court’s Decision Violates Public Policy	22
4. The Attorneys’ Fees Sought by the Sandin Defendants Were Unreasonable and Unjustified	24
CONCLUSION.....	27
CERTIFICATE OF COMPLIANCE.....	28

TABLE OF AUTHORITIES

Cases

<i>Albios v. Horizon Cmtys., Inc.</i> , 122 Nev. 409, 132 P.3d 1022 (2006).....	12
<i>Assurance Co. of America v. Ironshore Specialty Ins. Co.</i> , 2018 WL 4468986 (D. Nev. Sept. 18, 2018).....	16
<i>Assurance Co. of America v. National Fire & Marine Ins. Co.</i> , 2012 WL 6626809 (D. Nev. Dec. 19, 2012)	14, 19
<i>Barrera v. W. United Ins. Co.</i> , No. 2:09-CV-02289-ECR, 2012 WL 1744975 (D. Nev. May 16, 2012).....	17
<i>Beattie v. Thomas</i> , 99 Nev. 579, 668 P.2d 268 (1983).....	passim
<i>Delta Air Lines, Inc. v. Aug.</i> , 450 U.S. 346 (1981).....	15
<i>Dillard Dep't Stores, Inc. v. Beckwith</i> , 989 P.2d 882 (Nev.1999).....	18
<i>Fernandez v. Infusaid Corp.</i> , 110 Nev. 187, 871 P.2d 292 (1994).....	1
<i>Ford v. Showboat Operating Co.</i> , 110 Nev. 752, 877 P.2d 546 (1994).....	10
<i>Frazier v. Drake</i> , 131 Nev. Adv. Op. 64, 357 P.3d 365 (Nev. Ct. App. 2015)	passim
<i>Gresham v. Petro Stopping Centers, LP</i> , No. 3:09-CV-00034-RCJ, 2012 WL 5198481 (D. Nev. Oct. 18, 2012)	18
<i>Kelly v. Helling</i> , No. 3:13-CV-00551-RCJ, 2014 WL 7177063 (D. Nev. Dec. 16, 2014).....	26
<i>Max Baer Productions Ltd. v. Riverwood Partners, LLC</i> , 2012 WL 5944767 (D. Nev. Nov. 26, 2012).....	14, 17, 19
<i>MB Am., Inc. v. Alaska Pac. Leasing</i> , 132 Nev. Adv. Op. 8, 367 P.3d 1286 (2016).....	12
<i>Muije v. A North Las Vegas Cab Co., Inc.</i> , 106 Nev. 664, 799 P.2d 559 (1990).....	15

<i>NOLM, LLC v. Cty. of Clark</i> , 120 Nev. 736, 100 P.3d 658 (2004).....	12
<i>O.P.H. of Las Vegas, Inc. v. Oregon Mutual Ins. Co.</i> , 401 P.3d 218 (2017).....	passim
<i>Ozawa v. Vision Airlines</i> , 216 P.3d 788 (Nev. 2009).....	13
<i>Sands Expo & Convention Center, Inc. v. Bonvouloir</i> , 385 P.3d 62 (2016).....	19
<i>Twitchell v. Paris</i> , No. 2:06-CV-0283-KJD-GWF, 2010 WL 3748316 (D. Nev. Sept. 20, 2010)	17
<i>Yamaha Motor Co., U.S.A. v. Arnoult</i> , 114 Nev. 233, 955 P.2d 661 (1998).....	18, 22
Statutes	
NRS 17.115	5, 10

JURISDICTIONAL STATEMENT

(a) This Court has jurisdiction pursuant to NRAP 3A(b)(8).

(b) The district court entered its order granting Sandin's Motion for Attorneys' Fees on March 16, 2018. OPH filed a motion to reconsider and/or amend the judgment on March 30, 2018, which was resolved by the district court's June 11, 2018 order denying reconsideration. OPH could not appeal this order, however, until all claims were resolved against all parties. This did not occur until September 11, 2018, when a stipulation of dismissal was filed as to the remaining claims against OMI. OPH filed its notice of appeal that same day. *See* NRAP 4, NRCP 54(b); *Fernandez v. Infusaid Corp.*, 110 Nev. 187, 192, 871 P.2d 292, 295 (1994) ("In the absence of a proper certification of finality, an interlocutory order dismissing fewer than all the parties cannot be challenged on appeal until a final judgment is entered in the action fully and finally resolving all the claims against all the parties.").

(c) This appeal is from a final judgment.

ROUTING STATEMENT

This matter is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(8). Appellant believes this matter should be retained by the Supreme Court despite its presumptive assignment to the Court of Appeals because it

involves an important matter of public policy. If the district court's opinion is affirmed, it will vitiate the policy behind offers of judgment and will unfairly force plaintiffs to forego legitimate claims due to fear of an unreasonable award of attorneys' fees to defendants based on an unreasonable offer of judgment. *Beattie v. Thomas*, 99 Nev. 579, 588, 668 P.2d 268, 274 (1983).

STATEMENT OF ISSUES

(a) Whether the district court erred and misapplied Nevada's governing law relating to awarding attorneys' fees pursuant to an offer of judgment.

(b) Whether the district court erred by awarding attorneys' fees as a penalty pursuant to an offer of judgment that was made for a nominal amount the day after the offeror lost on its motion to dismiss and where the offeree's decision to reject the offer of judgment was not grossly unreasonable and the offeree had brought its claims in good faith.

(c) Whether the district court erred by awarding an unreasonable amount of attorneys' fees.

STATEMENT OF THE CASE

OPH is a small business owner who operated a restaurant at 4833 West Charleston Boulevard, Las Vegas, NV. APP00431. Sandin & Co. is an insurance agency and Dave Sandin is an insurance broker. *Id.* The Sandin Defendants became OPH's insurance broker and began procuring commercial insurance

policies for OPH in 2002. *Id.* Following a recommendation by Dave Sandin, OMI and OPH entered into a “Businessowners Protector Policy” that became effective on December 26, 2011 (the “Policy”). *Id.*

On August 17, 2012, during the effective period of the Policy, OPH’s restaurant burned to the ground as a result of a fire. APP00433. OPH, devastated by the loss of its restaurant, notified its insurance agent, the Sandin Defendants, of the complete loss. *Id.* The Sandin Defendants reported OPH’s claim to OMI, who summarily denied OPH’s claim based on nonpayment of premium. *Id.* The Sandin Defendants never notified OPH that they had missed any premium payment due under the Policy. APP00432.

On November 19, 2012, OPH filed a complaint against the Sandin Defendants asserting claims for fraud in the inducement, fraud, breach of fiduciary duty, and negligence.¹ APP00106.

On December 26, 2012, the Sandin Defendants filed a motion to dismiss seeking to dismiss all of the claims against them for failure to state a claim pursuant to NRCP 12(b)(5). APP00123. The district court orally denied the Sandin Defendants’ motion to dismiss on February 13, 2013. APP00160.

¹ OPH also named OMI as an additional defendant in the district court action and asserted various claims against OMI. OMI remained a party to the action until it was dismissed pursuant to stipulation on September 11, 2018. APP00873.

The *very next day*, on February 14, 2013, even though OPH was seeking hundreds of thousands of dollars in damages, the Sandin Defendants served an offer of judgment on OPH offering to settle all of OPH's claims for the sum of Two Thousand Dollars and No Cents (\$2,000.00) pursuant to NRCP 68 and/or NRS 17.115. APP00161. OPH rejected the offer of judgment.

More than two years later, the district court granted summary judgment in favor of the Sandin Defendants. APP00378; APP00430. On September 2, 2015, the Sandin Defendants brought a Motion for Attorneys' Fees and Costs seeking to recover attorneys' fees as the prevailing party on their token \$2,000 offer of judgment. APP00484. The matter came before the district court for oral argument on November 17, 2015, at which time the district court orally granted the Sandin Defendants' Motion for Costs and took their Motion for Attorneys' Fees under advisement. APP00607.

In the meantime and following the notice of entry of judgment in favor of the Sandin Defendants, OPH appealed the district court's order granting the Sandin Defendants' motion for summary judgment. APP00450. On September 14, 2017, the Nevada Supreme Court affirmed the ruling of the district court as to the summary disposition of OPH's claims against the Sandin Defendants and a remittur was issued on October 9, 2017. *O.P.H. of Las Vegas, Inc. v. Oregon*

Mutual Ins. Co., 401 P.3d 218 (2017).²

Following the remand back to the district court, the district court held another hearing on the Sandin Defendants' Motion for Attorneys' Fees on February 6, 2018. APP00749. At the February 6, 2018 hearing, the district court granted the Sandin Defendants' motion for attorneys' fees and awarded them attorneys' fees totaling \$127,242.00 and costs totaling \$7,546.55. APP00770.

OPH filed a motion for reconsideration, but the district court denied the motion. APP00782; APP00864. OPH then filed this appeal, challenging the district court's decision to award attorneys' fees to the Sandin Defendants based on a patently unreasonable offer of judgment. APP00869.

STATEMENT OF FACTS

In 2002, the Sandin Defendants became OPH's insurance broker and began procuring commercial insurance policies for OPH. APP00431. Throughout the course of the relationship between the Sandin Defendants and OPH, Sandin & Co. informed OPH on three separate occasions that OPH was late on an insurance premium payment. APP00263; APP00334. Indeed, Dave Sandin admitted during this case that he made it his practice to inform clients of pre-cancellation notices

² In the same opinion, the Nevada Supreme Court reversed the district court's order granting summary judgment in favor of OMI and remanded the matter back to the district court for further disposition. *O.P.H. of Las Vegas, Inc. v. Oregon Mut. Ins. Co.*, 401 P.3d 218, 224 (Nev. 2017).

because that gave his clients an opportunity to avoid having their policy terminate for non-payment. APP00313- APP00314. OPH relied on the Sandin Defendants to be its “buffer” in the event of any problems with its insurance policies. APP00323.

In 2011, at a time when Dave Sandin did not have the statutorily required license to serve as an insurance broker, Dave Sandin recommended that OPH purchase insurance from OMI. APP00431. As a result of Dave Sandin’s recommendation, OMI and OPH entered into the Policy that became effective on December 26, 2011. *Id.* The Policy covered two restaurant locations: 4833 West Charleston Boulevard, Las Vegas, Nevada (the “Premises”) and 4170 South Fort Apache Road, Las Vegas, Nevada. APP00001. The Policy provided a \$691,000 limit of insurance for the replacement cost of buildings and a \$350,000 limit of insurance for the replacement cost of business personal property for each location. *Id.* The Policy also provided that OMI would reimburse OPH for loss of business income in the event of a covered loss. *Id.* Furthermore, the Policy provided that OMI could not cancel the Policy absent providing OPH notice of cancellation at least ten days before the effective date of cancellation, if the cancellation was premised upon nonpayment of premium. *Id.*

On July 31, 2012, OMI allegedly sent a statutorily defective Notice of Cancellation to OPH stating that the Policy would be cancelled effective August

16, 2012 if OPH did not make a premium payment by August 15, 2012 (the “July 31 Notice”). APP00183. OMI also claimed to have notified the Sandin Defendants of the July 31 Notice. APP00184. OPH never received the July 31 Notice and the Sandin Defendants failed to inform OPH of the July 31 Notice or the missed July premium. *Id.*

On August 17, 2012, a fire completely destroyed the Premises resulting in hundreds of thousands of dollars of damages (the “Loss”). APP00433. OPH, via Dave Sandin, reported the Loss and OMI generated a claim number for the Loss on August 17, 2012. *Id.* Three days later, however, OMI denied coverage, stating that the policy had been canceled effective August 16, 2012 for failure to pay the premium pursuant to the July 31 Notice. *Id.*

On November 19, 2012, OPH filed a complaint against the Sandin Defendants asserting claims for fraud in the inducement, fraud, breach of fiduciary duty, and negligence.³ APP00105. On December 26, 2012, the Sandin Defendants filed a motion to dismiss seeking to dismiss all of the claims against them for failure to state a claim pursuant to NRCP 12(b)(5). APP000123. The district court orally denied the Sandin Defendants’ motion to dismiss on February 13, 2013.

³ OPH also named OMI as an additional defendant in the district court action and asserted various claims against OMI. OMI remained a party to the action until it was dismissed pursuant to stipulation on September 11, 2018. APP00873.

APP00160.

The *very next day*, on February 14, 2013, the Sandin Defendants served a small, token offer of judgment on OPH offering to settle all of OPH's claims for the sum of Two Thousand Dollars and No Cents (\$2,000.00), inclusive of attorneys' fees, costs, and interest, pursuant to NRCP 68 and/or NRS 17.115.

APP00161. OPH, who: (1) had just prevailed on the Sandin Defendants' motion to dismiss; (2) had already expended more than \$2,000 in attorneys' fees in the case; and (3) was seeking hundreds of thousands of dollars in damages, reasonably rejected the offer of judgment. APP00784.

A little more than two years later, on March 17, 2015, the Sandin Defendants filed their motion for summary judgment (the "MSJ"), seeking judgment in their favor on all of OPH's claims against them. APP00199. The district court orally granted the Sandin Defendants' MSJ at a hearing on May 14, 2015 and entered its written MSJ order on June 30, 2015. APP00378; APP00430. On August 13, 2015, judgment was entered in favor of the Sandin Defendants and against OPH on all of OPH's claims against the Sandin Defendants. APP00480.

On September 2, 2015, the Sandin Defendants brought a Motion for Attorneys' Fees and Costs seeking to recover attorneys' fees as the prevailing party on their token \$2,000 offer of judgment. APP00484. The matter came before the district court for oral argument on November 17, 2015, at which time the district

court orally granted the Sandin Defendants' Motion for Costs and took their Motion for Attorneys' Fees under advisement. APP00607. The district court wanted to examine two issues: (1) whether the \$2,000 Offer of Judgment was reasonable in timing and amount and (2) whether it should reduce the Sandin Defendants' requested attorneys' fees during the period when the case was in court-annexed arbitration. APP00617- APP00618.

In the meantime and following the notice of entry of judgment in favor of the Sandin Defendants, OPH appealed the district court's order granting the Sandin Defendants' motion for summary judgment.⁴ APP00450. On September 14, 2017, the Nevada Supreme Court affirmed the ruling of the district court as to the summary disposition of OPH's claims against the Sandin Defendants and a remittur was issued on October 9, 2017.⁵ *O.P.H. of Las Vegas, Inc. v. Oregon Mutual Ins. Co.*, 401 P.3d 218 (2017).

Following the remand back to the district court, the district court held another hearing on the Sandin Defendants' Motion for Attorneys' Fees on

⁴ OPH also appealed the district court's order granting OMI's motion for summary judgment. APP00450.

⁵ In the same opinion, the Nevada Supreme Court reversed the district court's order granting summary judgment in favor of OMI and remanded the matter back to the district court for further disposition. *O.P.H. of Las Vegas, Inc. v. Oregon Mut. Ins. Co.*, 401 P.3d 218, 224 (Nev. 2017).

February 6, 2018. APP00749. At the February 6, 2018 hearing, the district court concluded that the miniscule, token \$2,000 Offer of Judgment was reasonable, but found it was unreasonable for the Sandin Defendants to incur \$35,000 in attorneys' fees during the arbitration stage.⁶ APP00763- APP00765. The district court also noted that the third *Beattie* factor requires "if your client decided to reject not in good faith, it had to be grossly unreasonable." APP00762. Immediately upon stating this standard, the district court concluded "I thought pretty much everybody was operating in good faith here. Nobody – it's just you guys didn't agree." *Id.* The district court then repeated its finding that "it wasn't unreasonable to proceed." APP00763. After issuing these findings, the district court granted the Sandin Defendants' motion for attorneys' fees and awarded them attorneys' fees totaling \$127,242.00 and costs totaling \$7,546.55. APP00770.

OPH filed a motion for reconsideration seeking to have the Court reverse its improper application of NRCP 68 as penalty provision, but the district court denied the motion. APP00782; APP00881. At the hearing on the motion for reconsideration, the district court supported its denial of the motion by seemingly backtracking from its prior findings and repeatedly stated "I never said that I

⁶ The Sandin Defendants have not appealed the district court's decision regarding the reduction of their attorneys' fees during arbitration and thus that holding cannot be disturbed on appeal. *Ford v. Showboat Operating Co.*, 110 Nev. 752, 755, 877 P.2d 546, 548 (1994).

thought that that was - - that it was a reasonable decision to reject the offer.” APP00874; APP00875 (“I never said that I thought it was reasonable to reject that offer. I never said that.”); APP00876 (“So I never said it was good faith to not accept the award. I never said it . . . I never said it was good faith to reject the offer. So for that reason, that’s why I did what I did.”).

OPH then filed this appeal, challenging the district court’s decision to award attorneys’ fees to the Sandin Defendants based on a patently unreasonable offer of judgment. APP00885.

SUMMARY OF THE ARGUMENT

The district court committed multiple reversible errors by turning the Offer of Judgment into a penalty provision and awarding the Sandin Defendants attorneys’ fees in contravention of Nevada’s public policy. First, the district court abused its discretion by awarding attorneys’ fees pursuant to *Beattie* after specifically identifying that OPH acted in good faith and it was not unreasonable for OPH to proceed with its case. Second, the district court made a clearly erroneous factual finding when it determined that the \$2,000 offer of judgment was reasonable, despite being issued the day after OPH prevailed on the Sandin Defendants’ motion to dismiss in a case where “everybody realized that it was a big claim.” Third, the district court disregarded controlling law by focusing on whether OPH’s decision to reject the offer of judgment was reasonable, instead of

utilizing this Court’s governing standard requiring the district court to analyze whether OPH’s decision to reject the offer of judgment was grossly unreasonable.

Lastly, the district court erred by inadequately evaluating the Sandin Defendants’ requested attorneys’ fees pursuant to *Brunzell*. The Sandin Defendants’ billing records include obvious and unsustainable overbilling that should have been reduced by the district court once it decided to award attorneys’ fees pursuant to the offer of judgment.

ARGUMENT

A. Standard of Review

“An award of attorney fees is reviewed for an abuse of discretion.” *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. Adv. Op. 8, 367 P.3d 1286, 1292 (2016) (citing *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1027–28 (2006)). “An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or it disregards controlling law.” *Id.* (citing *NOLM, LLC v. Cty. of Clark*, 120 Nev. 736, 739, 100 P.3d 658, 660–61 (2004)).

B. Legal Standard Governing Offers of Judgment

An offer of judgment made pursuant to NRCP 68 may be made at any time more than ten days prior to trial. NRCP 68(a). If the offeree rejects an offer and fails to obtain a more favorable 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." NRCP 68(f)(2). An offer is rejected if it is not accepted within ten days of the offer being made. NRCP 68(e).

In addition to the mandates of NRCP 68, this Court requires district courts to analyze the following factors when determining whether to award attorneys' fees pursuant to an offer of judgment:

- (1) whether OPH's claims were brought in good faith;
- (2) whether the Sandin Defendants' Offer of Judgment was reasonable and in good faith in both its timing and amount;
- (3) whether OPH's decision to reject the offer was grossly unreasonable or in bad faith; and
- (4) whether the attorneys' fees sought by the Sandin Defendants are reasonable and justified in amount.

See Beattie v. Thomas, 99 Nev. 579, 588-89; 668 P.2d 268, 274 (1983); *see also Ozawa v. Vision Airlines*, 216 P.3d 788, 792 (Nev. 2009). Where the first three factors weigh in favor of denying attorneys' fees, "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." *Frazier v. Drake*, 131 Nev. Adv. Op. 64, 357 P.3d 365, 373 (Nev. Ct. App. 2015).

Here, the district court abused its discretion and committed reversible error by awarding attorneys' fees to the Sandin Defendants pursuant to an unreasonable, patently small offer of judgment made prior to discovery commencing that OPH reasonably rejected while in good faith pursuing its claims seeking hundreds of thousands of dollars in damages.

1. OPH Brought Its Claims in Good Faith

The first *Beattie* factor considers whether OPH brought its claims in good faith. *Beattie v. Thomas*, 99 Nev. at 588-89. In evaluating this factor, it is important to note that “[c]laims may be unmeritorious and still be brought in good faith.” *Max Baer Productions Ltd. v. Riverwood Partners, LLC*, 2012 WL 5944767, *3 (D. Nev. Nov. 26, 2012). In fact, a party can pursue claims in good faith even if the plaintiff’s belief that it will prevail on its claims turns out to be incorrect in hindsight. *Assurance Co. of America v. National Fire & Marine Ins. Co.*, 2012 WL 6626809, *3 (D. Nev. Dec. 19, 2012).

Here, the district court concluded during the February 6, 2018 hearing that OPH was acting “in good faith.” APP00762. The district court echoed this sentiment at the hearing on OPH’s motion for reconsideration, whereat it affirmed OPH acted in “good faith to bring the case” and it “felt it was good faith to plead it.” APP00875- APP00876. As a result, the first *Beattie* factor undoubtedly favored OPH and denying attorneys’ fees to the Sandin Defendants.

2. The Offer of Judgment Was Unreasonable in Timing and Amount

The district court clearly erred in finding that the Sandin Defendants made a good faith offer of judgment and that the offer of judgment was reasonable in timing and amount. APP00763 (“it was certainly a reasonable offer”). The purpose of an offer of judgment “is to promote settlement of suits by rewarding defendants who make reasonable offers.” *See Muije v. A North Las Vegas Cab Co., Inc.*, 106 Nev. 664, 667, 799 P.2d 559, 561 (1990). It is not intended to be used “as a mechanism to unfairly force plaintiffs to forego legitimate claims,” nor is it supposed to be used as a trap by defendants to force attorneys’ fees upon plaintiffs who seek to pursue colorable claims in good faith. *Drake*, 357 P.3d at 373.

a. The Offer of Judgment Was Unreasonable in Amount

This Court has explained that district courts should not encourage defendants to submit small, token offers of judgment designed to force plaintiffs to forego legitimate claims due to fear of an unreasonable award of attorneys’ fees based on an unreasonably small offer of judgment. *Beattie v. Thomas*, 99 Nev. 579, 588, 668 P.2d 268, 274 (1983). In enforcing this policy, courts have routinely looked with disfavor upon token offers of judgment. *See, e.g., Delta Air Lines, Inc. v. Aug.*, 450 U.S. 346, 353 (1981) (noting that a “plaintiff’s rejection of an

utterly frivolous settlement offer” should not be “a watershed event” that allows a defendant to recover on an offer of judgment); *Assurance Co. of America v. Ironshore Specialty Ins. Co.*, 2018 WL 4468986, *2 (D. Nev. Sept. 18, 2018) (noting that a \$39,000 offer of judgment was unreasonable in amount and not made in good faith when the defendant’s potential liability was \$835,000).

Here, the Sandin Defendants’ Offer of Judgment contravened the spirit and policy reasoning behind offers of judgment. They submitted a small, token \$2,000 offer of judgment in the face of claims seeking hundreds of thousands of dollars in damages for the loss of a local small business. APP00764. Rather than deem this offer unreasonably small, the district court instead abused its discretion by declaring this paltry sum reasonable. APP00763. In doing so, the district court contradicted this Court’s governing precedent, and even its own admission that OPH was “entitled to try to prove [its] case,” by imposing a penalty of over one hundred thousand dollars in attorneys’ fees on OPH. APP00765. Indeed, the district court effectively told future litigants that they will be assessed attorneys’ fees if they ultimately cannot prevail on their claims, regardless of the unreasonable nature of the offer of judgment made by a defendant or the reasonableness of the plaintiff pursuing its case. This is directly contrary to Nevada’s controlling precedent, which focuses on using *Beattie* to avoid the exact outcome that the district court implemented in this case. *See e.g. Drake*, 357 P.3d

at 371.

b. The Offer of Judgment Was Unreasonable in Timing

Nevada courts regularly examine the stage and extent of discovery when analyzing the reasonableness of the timing of an offer of judgment. *Max Baer Prods., Ltd. v. Riverwood Partners, LLC*, No. 3:09-CV-00512-RCJ, 2012 WL 5944767, at *3 (D. Nev. Nov. 26, 2012), *aff'd*, 564 F. App'x 901 (9th Cir. 2014)(observing that an offer may be reasonable in timing when made *after the close of discovery* because it enables the Plaintiff an opportunity “to better assess his chances of success when the offer was made, *as opposed to the situation where a Defendant makes a token offer at the outset of a case.*”); *Barrera v. W. United Ins. Co.*, No. 2:09-CV-02289-ECR, 2012 WL 1744975, at *4 (D. Nev. May 16, 2012), *aff'd*, 567 F. App'x 491 (9th Cir. 2014) (finding timing of offer of judgment to be reasonable because it was made after discovery was closed); *Twitchell v. Paris*, No. 2:06-CV-0283-KJD-GWF, 2010 WL 3748316, at *2 (D. Nev. Sept. 20, 2010) (noting that an offer of judgment was unreasonable in regard to timing when it was made prior to Defendants producing documents relevant to Plaintiff’s claims).

Courts focus on discovery because “discovery is required for a [party] to assess not only the potential for liability, but also the proper scope of damages” and thus a party “cannot fairly be penalized for rejecting such an offer [prior to any

discovery occurring].” *Gresham v. Petro Stopping Centers, LP*, No. 3:09-CV-00034-RCJ, 2012 WL 5198481, at *5 (D. Nev. Oct. 18, 2012) (citing *Dillard Dep’t Stores, Inc. v. Beckwith*, 989 P.2d 882, 888 (Nev.1999)) (observing Nevada’s well-entrenched policy that the “purpose of this fee-shifting statute is to reward parties for making reasonable offers and to punish parties for unreasonably rejecting offers”).

Here, the timing of the Sandin Defendants’ small, token offer was unreasonable and in bad faith because it was made: (1) *prior to any discovery* and (2) *the day after OPH had defeated the Sandin Defendants’ motion to dismiss*. Thus, at the time the Offer of Judgment was made, OPH, whose restaurant burned to the ground, reasonably believed it had valid claims seeking hundreds of thousands of dollars in damages and was entitled to conduct discovery on those claims. The Sandin Defendants’ Offer of Judgment attempted to preclude OPH from conducting discovery and clearly was submitted solely as a trap intended to spring an outrageous amount of attorneys’ fees on OPH in the event OPH ultimately could not prevail on its good faith claims. This type of offer is exactly what this Court seeks to discourage and therefore it is apparent that the district court abused its discretion in determining that the Offer of Judgment was made in good faith and reasonable in its timing and amount. *See Yamaha Motor Co.*,

U.S.A. v. Arnoult, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998) (citing *Beattie*, 99 Nev. at 588).

3. OPH Reasonably Rejected the Offer of Judgment

The third *Beattie* factor also suggests that the district court erred in awarding attorneys' fees because OPH was not grossly unreasonable in rejecting the offer of judgment. The third *Beattie* factor requires the district court to determine whether the party rejecting the offer of judgment was *grossly* unreasonable. *Beattie*, 99 Nev. at 588-89. This standard does not merely inquire as to whether the party rejecting the offer was incorrect. Rather, "grossly unreasonable or bad faith rises to a much higher level than poor judgment or incorrect tactical decisions." *Assurance Co. of America v. National Fire & Marine Ins. Co.*, 2012 WL 6626809, *3 (D. Nev. Dec. 19, 2012). A plaintiff's rejection of an offer of judgment is not grossly unreasonable when the "offer was made for a token amount after Plaintiff had already expended many times the offer in legal fees." *Max Baer*, 2012 WL 5944767, *3; *see also Sands Expo & Convention Center, Inc. v. Bonvouloir*, 385 P.3d 62 (2016) (unpublished) (holding that it was not grossly unreasonable for a plaintiff to reject a \$12,000 offer of judgment "in the face of extensive anticipated damages and on-going discovery").

a. OPH's Decision to Reject the Offer of Judgment Was Not Grossly Unreasonable

The Offer of Judgment was in the token amount of \$2,000 and made the day after OPH prevailed on the Sandin Defendants' motion to dismiss (a motion that by itself required OPH to expend more than \$2,000 in attorneys' fees). APP00784. Based on these facts and the fact that discovery had yet to begin on OPH's claims—claims which sought hundreds of thousands of dollars in damages—it was perfectly reasonable for OPH to reject the Offer of Judgment.

b. The District Court Agreed OPH Was Not Grossly Unreasonable

During the February 6, 2018 hearing, the district court appeared to agree that OPH's decision to reject the offer of judgment was not grossly unreasonable. APP00762 (identifying that a decision to reject an offer of judgment must be "grossly unreasonable" and then immediately concluding that "I thought pretty much everybody was operating in good faith here . . . it's just you guys didn't agree"). The district court then appeared to make its ruling even clearer by noting "it wasn't unreasonable to proceed." APP00763.

c. The District Court Reverses Course and States OPH's Decision to Reject the Offer of Judgment Was Not Reasonable

At the hearing on the motion for reconsideration, however, the district court appeared to overlook its prior decision. It repeatedly stated that it never found

OPH acted in good faith or was reasonable in rejecting the Offer of Judgment. APP00874-APP00876. The district court then stated it awarded attorneys' fees based on this position and standard. APP00876 ("So for that reason, that's why I did what I did.").

d. The District Court Erred in its Analysis of the Third *Beattie* Factor

There are three reversible errors associated with the district court's analysis of the third *Beattie* factor. First, the district court wholly ignored its unambiguous findings from the February 6, 2018 hearing whereat it clearly concluded that OPH was not unreasonable, let alone grossly unreasonable, in rejecting the offer of judgment and continuing to pursue its claims and extensive damages in good faith. APP00762-APP00763. Having made that factual finding, the district court simply could not have found that the third *Beattie* factor favored an award of attorneys' fees.

Second, if the district court changed its factual findings to conclude that it was unreasonable for OPH to reject the Offer of Judgment, such a reversal of fact-finding was not supported by the record and constituted an abuse of discretion. There were no changes in facts between the time the district court issued its findings of fact on the record at the February 6, 2018 hearing and the time the district court heard OPH's motion for reconsideration on May 1, 2018. Thus, there

was no basis for the district court to suddenly reverse course and deem OPH unreasonable for rejecting the Offer of Judgment. The district court's arbitrary and capricious finding of unreasonableness at the hearing on OPH's motion for reconsideration therefore constituted a reversible abuse of discretion.

Third, regardless of whether the district court erred in determining that OPH was unreasonable, the award of attorneys' fees would still need to be reversed because the district court applied the wrong legal standard in analyzing the third *Beattie* factor. The district court simply examined whether OPH's decision was reasonable, but never addressed whether it was *grossly unreasonable*. *Beattie*, 99 Nev. at 588-89. Having failed to apply this appropriate standard—one that could never be satisfied in this set of circumstances—the district court abused its discretion and misapplied the law by basing its decision solely on an incorrect legal standard. APP00876.

e. The District Court's Decision Violates Public Policy

Furthermore, the public policy behind implementing the grossly unreasonable standard is best exemplified in this case. As this Court has repeatedly indicated, offers of judgment should not be used as "a vehicle to pressure offerees into foregoing legitimate claims in exchange for unreasonably low offers of judgment." *Drake*, 357 P.3d 365, 373 (quoting *Yamaha Motor Co.*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998)); *see also Beattie*, 99 Nev. at 588

(announcing the *Beattie* factors must be implemented to force district courts to focus on whether the parties' actions were undertaken in good faith or whether they were grossly unreasonable).

By awarding attorneys' fees in this case, the district court acted in direct contravention of this policy by wholly disregarding OPH's good faith. Indeed, the district court's imposition of attorneys' fees creates an outcome directly contrary to this Court's guidance by signaling to future litigants they should forego their viable claims out of fear of an extremely large and unjust penalty of attorneys' fees being imposed upon them in the event they do not ultimately prevail on their claims.

The district court's improper message is especially troubling in this case, where it would have been nearly impossible for any attorney to explain to a client that it should accept a \$2,000 offer of judgment the day after the district court just ruled that the client plead a viable claim for relief. This impossibility is further magnified here, where the client is a small business owner whose restaurant burned to the ground, causing hundreds of thousands of dollars in extensive damages, and who had already expended more than the value of the offer of judgment in attorneys' fees at the time the offer was made. APP00764 (district court acknowledging that "everybody realized that it was a big claim").

Thus, the district court committed clear error when analyzing the third *Beattie* factor and the facts of this case render it impossible for any fact-finder to

determine that OPH was grossly unreasonable in rejecting the premature, unreasonable, lowball Offer of Judgment the day after OPH defeated the Sandin Defendant's motion to dismiss. As a result, the third *Beattie* factor weighed heavily against awarding attorneys' fees to the Sandin Defendants and the district court's sole reliance on this factor to award such attorneys' fees constituted reversible error.

4. The Attorneys' Fees Sought by the Sandin Defendants Were Unreasonable and Unjustified

Given that all of the first three *Beattie* factors disfavored an award of attorneys' fees, the district court could not award attorneys' fees pursuant to the Offer of Judgment. *Frazier*, 357 P.3d at 373. Even if the district court did not err by awarding attorneys' fees pursuant to the offer of judgment, however, it certainly erred by failing to reduce the Sandin Defendants' requested attorneys' fees based on the unreasonable number of hours expended by their counsel.

The most glaring example of the Sandin Defendants' counsel's overbilling is seen in the time entries associated with the Sandin Defendants' motion for summary judgment that was filed on March 17, 2015 (the "MSJ"). Beginning on August 11, 2014, more than six months before filing the MSJ, the Sandin Defendants' counsel began billing for work on the MSJ. APP00558. Over the

course of the next six months, the Sandin Defendants billed **123.2 hours** to prepare the 23-page MSJ.⁷ APP00558-APP00571.

The Sandin Defendants' counsel then continued to overbill when it came time to prepare the reply brief in support of the MSJ (the "Reply"). Indeed, the overbilling began immediately upon the Sandin Defendants' counsel's receipt of OPH's opposition to the MSJ, when the Sandin Defendants' counsel spent a total of 7.5 hours to review the Opposition. The 7.5 hours was comprised of 0.8 hours of time reviewing by Ms. Lee and an inexplicable 6.7 hours of time reviewing by Mr. Kelley. APP00576.

Following this lengthy review, the Sandin Defendants' counsel spent an additional **63.5 hours** to prepare the Reply. APP00576-APP00577. When combined with the time the Sandin Defendants' counsel spent preparing for and attending the hearing, the Sandin Defendants (and now, in turn, OPH) were billed in excess of 200 hours⁸ for the MSJ.⁹ APP00579-APP00580. This amount of

⁷ This figure excludes the 19.4 hours that were no charged relating to the MSJ. Notably, 15.4 of these 19.4 no charged hours were for legal research, which were in addition to the 13.4 hours of legal research that were billed for the MSJ. APP00558-APP00571.

⁸ These 200-plus hours do not even include the 19.3 hours the Sandin Defendants' counsel billed relating to the order granting the MSJ. APP00580- APP00581.

hours is per se unreasonable and the district court abused its discretion by failing to reduce the requested attorneys' fees to account for unreasonable overbilling. *See Kelly v. Helling*, No. 3:13-CV-00551-RCJ, 2014 WL 7177063, at *2 (D. Nev. Dec. 16, 2014), *aff'd*, 671 F. App'x 567 (9th Cir. 2016) (deeming 100 hours billed on a motion for summary judgment to be excessive and reducing the recoverable number of hours to 50 hours).


⁹ The fact that the Sandin Defendants' counsel expended over 200 hours on summary judgment issues further exemplifies the patent unreasonableness of the \$2,000 Offer of Judgment.

CONCLUSION

Based on the foregoing, OPH respectfully requests that the Court reverse the district court's award of attorneys' fees and conclusively determine that the Sandin Defendants' cannot recover any attorneys' fees pursuant to their Offer of Judgment.

Respectfully submitted this 21st day of February 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5) and the type style requirements of Nev. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, font size 14-point, Times New Roman. I further certify that this brief complies with the page- or type-volume limitations of Nev. R. App. P. 32(a)(7) because, excluding the parts of the brief exempted by Nev. R. App. P. 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 5899 words. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of

the Nevada Rules of Appellate Procedure.

Respectfully submitted this 21st day of February 2019.

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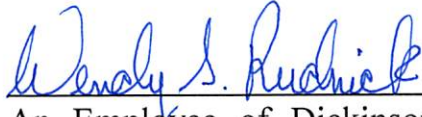
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of February 2019, I submitted the foregoing Appellant's Opening Brief for filing via the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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