IN THE SUPREME COURT OF THE STATE OF NEVADA

O.P.H. OF LAS VEGAS, INC., Appellant, v. OREGON MUTUAL INSURANCE COMPANY; DAVE SANDIN; AND SANDIN & CO., Respondents.	)	Supreme Court No. 76966 District Case No. A672158

DAVE SANDIN AND SANDIN & CO.'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(1), and must be disclosed:

Sandin & Co. has no parent company and is not publicly traded. There is no publicly traded company that owns more than 10% of the stock of Sandin & Co.

Patrick Hutchins is an individual.

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These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 24 day of April, 2019.

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This is an untimely appeal from a post-judgment order awarding attorney's fees based on an offer of judgment.[1] Appellant's opening brief demonstrates how this matter has been pursued in bad faith from its inception.

JURISDICTIONAL STATEMENT

Although Sandin found no Nevada case law directly addressing the jurisdictional issue presented by this appeal, it is Sandin's belief that the appellate jurisdiction of this Court has not been properly invoked. No tenet of appellate law is more firmly established in Nevada than the proposition that an untimely notice of appeal fails to vest jurisdiction in this Court. *See In re Duong*, 118 Nev. 920, 922, 59 P.3d 1210, 1212 (2002) ("the proper and timely filing of a notice of appeal is jurisdictional"); *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987) (same); *Healy v. Volkswagenwerk Aktiengesellschaft*, 103 Nev. 329, 331, 741 P.2d 432, 433 (1987) (an untimely notice of appeal fails to vest jurisdiction in Nevada Supreme Court). Appellant's notice of appeal is untimely.

Appellant begins its jurisdictional statement with the assertion that "[t]his Court has jurisdiction pursuant to NRAP 3A(b)(8)," and ends with the statement "[t]his appeal is from a final judgment." The two statements are incompatible.

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[1]Although Oregon Mutual Insurance Company is listed on the caption of this appeal in both this Court's docket and on appellant's opening brief, Oregon Mutual has no interest in this appeal, and is not a proper party to this appeal.

NRAP 3A(b)(8) authorizes an appeal from a special order that follows a final judgment; the order in this case from which appeal is taken cannot be both a final judgment and an order that follows final judgment. This is either an appeal from a final judgment which allows for review of a prejudgment order on attorney's fees, or it is an untimely post-judgment appeal. It cannot be both.

On September 19, 2012, based on a fire loss and a refusal of insurance coverage by Oregon Mutual, plaintiff filed a complaint asserting separate causes of action against Oregon Mutual and Sandin. APP 106.

On June 30, 2015, in separate orders, the district court granted summary judgment in favor of Oregon Mutual and Sandin. APP 430; 458. There is no doubt that the combined orders of the district court constituted the final judgment in the action.[2] Appellant appealed to this Court. APP 450.

On September 2, 2015, while the appeal was pending, Sandin filed a motion for attorney's fees. APP 484. For reasons not clear to Sandin, after hearing the post-judgment motion for attorney's fees, the district court took the matter under advisement, and despite constant reminders and pleas from Sandin, never issued a

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[2]A separate judgment was entered in favor of Sandin on August 13, 2015, APP 482, but that judgment was superfluous. *See Campos- Garcia v. Johnson*, 130 Nev. ___, 331 P.3d 890, 891 (2014) ("When district courts, after entering an appealable order, go on to enter a judgment on the same issue, the judgment is superfluous.").

decision.[3] APP 627 (setting forth Sandin's attempts to procure a decision).

On September 14, 2017, in a published opinion authored by Justice Pickering, this Court reversed the summary judgment in favor of Oregon Mutual, affirmed the summary judgment in favor of Sandin, and remanded for further proceedings. *See O.P.H. of Las Vegas, Inc. v. Oregon Mut. Ins. Co.*, ___ Nev. ___, 401 P.3d 218, 219 (2017). APP 736. Specifically, as it relates to Sandin, this Court concluded that there was no evidence in the record to support, either factually or legally, appellant's causes of action.[4] *Id.* at 224.

The question presented with respect to this jurisdictional issue is whether that partial remand somehow abrogated the separate final judgment in favor of Sandin and rendered the remanded matter in district court non-final as to all parties, despite the fact that the final judgment had been affirmed as to Sandin and Sandin was in no way involved in any proceedings on remand. Stated another way, was Sandin's post-judgment motion for attorney's fees somehow converted by the remand into a prejudgment motion for attorney's fees? Sandin believes the

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[3]It appears the district court declined to rule on the post-judgment, non-tolling motion for fees and costs because of the pendency of the appeal from the final judgment. If so, this was error.

[4]This is critical, because appellant is still relying on his same theories to support this appeal, and is still asserting as facts matters this Court has determined are not supported by any evidence in the record.

district court's prior judgment remained final as to Sandin.

On October 23, 2017, following this Court's affirmance of the district court's judgment in favor of Sandin, Sandin filed a motion seeking an order on its long-pending post-judgment motion for attorney's fees. APP 624. Sandin included a new motion for attorney's fees on appeal. *Id.* The district court granted the motion on March 14, 2018, APP 773, and notice of entry of that order was served on appellant on March 16, 2018. APP 770. Sandin believes the district court's order awarding attorney's fees qualifies under NRAP 3A(b)(8) as a special order after final judgment, the final judgment being the original final judgment entered by the district court and affirmed on appeal as to Sandin by this Court.

Appellant filed a motion for reconsideration on March 30, 2018, APP 782, and the district court denied reconsideration on June 11, 2018. APP 881. Notice of entry of the denial was served on June 12, 2018. APP 878. The motion for reconsideration may or may not qualify as a tolling motion under NRAP 4(a)(4) and *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 245 P.3d 1190 (2010),[5]

[5]It is not clear whether the tolling provisions of NRAP 4(a)(4) apply in the context of a post-judgment order. In any event, the issue need not be addressed in this case.

but even if it was a tolling motion, the point is irrelevant.[6] Assuming the district court's order is what it purports to be, a special order after final judgment (and appeal) awarding attorney's fees, the last day to file a notice of appeal was either April 18, 2018 (allowing three days for electronic service), if the motion for reconsideration did not toll, or July 16, 2018 (allowing three days for electronic service), if the motion did toll. Appellant's notice of appeal was not filed until September 11, 2018. APP 883. The notice of appeal is not timely, and this Court's appellate jurisdiction has not been properly invoked.

Appellant, however, with no citation of authority, states that the district court's post-judgment motion awarding fees and costs, which appellant labels a special order after final judgment by relying on NRAP 3A(b)(8), was not appealable "until all claims were resolved against all parties." AOB at 1. This is only true if this Court's order affirming the final judgment in favor of Sandin simultaneously rendered that judgment non-final as to Sandin, leaving Sandin in limbo and at the mercy of the remaining parties in what was, in reality, a new, much narrower case in district court following partial remand. Sandin does not

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[6]Of course, if appellant's position that there was no final judgment at this point because this Court's remand had abrogated finality as to all parties, even though the final judgment in favor of Sandin had been affirmed, tolling or non-tolling is not an issue because the order is just a prejudgment order that can be reviewed in an appeal from a final judgment.

believe it did.

As a matter of appellate jurisprudence, this Court does not allow appeals from orders entered prior to a final judgment. *See Barbara Ann Hollier Tr. v. Shack*, 131 Nev. ___, 356 P.3d 1085, 1090 (Adv. Op. 59, 2015) ("Nevada has an interest in promoting judicial economy by avoiding the specter of piecemeal appellate review."); *see also Winston Prods. Co. v. DeBoer*, 122 Nev. 517, 526, 134 P.3d 726, 732 (2006) (expressing concern for judicial economy and avoiding piecemeal litigation). Piecemeal litigation leads to mistakes; review on a final, complete record promotes stability and uniformity. *Id.*

Post-final judgment orders awarding attorney's fees and costs are independently appealable as special orders after final judgment. NRAP 3A(b)(8); *see Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) ("[A] final judgment is one that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment, issues such as attorney's fees and costs."). Such appeals constitute matters complete and discrete in themselves, on full records of prior proceedings, that are ripe for appellate review because they follow a final judgment.

But there is no policy reason to justify allowing a post-final-judgment award of fees and costs to remain in limbo with respect to appeal simply because an

action following remand from an appellate court is proceeding against remaining parties, when that action does not involve parties who were finally removed following final judgment and appeal.[7] There is nothing piecemeal about a post-final-judgment appeal from a post-final-judgment order awarding fees to a party no longer a party to the ongoing action.

This is not an NRCP 54(b) situation, where parties removed in a district court action prior to entry of any final judgment must either seek certification of finality or await a final judgment in order to appeal. Certification of the award of attorney's fees in favor of Sandin would not have been contemplated under NRCP 54(b), because that order was not a partial judgment that resolved all claims against one of several parties to a district court action. Instead, the award of attorney's fees followed a judgment final as to all claims and all parties.

The order awarding attorney's fees and costs was immediately and independently appealable under NRAP 3A(b)(8) because it fits the definition of a special order after final judgment. *See Gumm v. Mainor*, 118 Nev. 912, 59 P.3d

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[7]Incidentally, this situation would not exist if the district court had timely ruled on Sandin's motion for attoney's fees before the appeal was decided. But it would still exist for the motion for attorney's fees on appeal, which necessarily must follow an appeal. When a party wins judgment on appeal, it makes no sense to rule that an order on a post-appeal motion for attorney's fees cannot become final until remanded proceedings between other parties are concluded.

1220 (2002) (a post-judgment order that affects rights growing out of the final judgment is appealable as a special order).

The portion of the prior action against Oregon Mutual may have been rendered non-final by this Court's order of reversal, but the portion against Sandin was unaffected by this Court's affirmation. Sandin's and appellant's rights that were affected by the order awarding fees grow out of the original final judgment, not the final judgment later entered between other parties following remand. No policy is promoted by delaying appeal from such an order.

If instead of stipulating to a dismissal, plaintiff and Oregon Mutual had proceeded to a trial, reaching final judgment years after the Sandin matter was final following appeal, it would make no sense to argue that the appeal from the post-final-judgment award of fees should remain in limbo for that period of time.

This Court has stated:

> Only one final judgment may exist in a case. *Low v. Crown Point Mining Co.*, 2 Nev. 75, 78 (1866). Such a judgment is one that resolves all the parties' claims and rights in the action, leaving nothing for the court's future consideration except post-judgment issues. *Simmons Self–Storage Partners v. Rib Roof.* 127 Nev. ___, ___, 247 P.3d 1107, 1108 (2011). This rule is designed to promote judicial economy by precluding multiple appeals arising from the same action. *Id.*

Friedman v. Friedman, 128 Nev. 897, 381 P.3d 613 (2012). One might argue that

this case before appeal and this case after remand are one and the same case, and there can be only one final judgment. But the purpose of the rule is expressly to "preclud[e] multiple appeals arising from the same action." *Id.* By definition, this final judgment rule could not preclude multiple appeals in a case following remand, where there has already been an appeal. The policy of *Friedman* is best served by treating the case that resulted in the first final judgment as one case resulting in one final judgment, and the case following remand as a separate case, also resulting in a final judgment, rather than pretending the first final judgment never existed, or changing its fundamental characteristics after the fact. That is especially true when a final judgment as to some defendants is affirmed, which should provide finality after appeal as to those defendants.

Because the order from which appellant has appealed was immediately and independently appealable, and appellant did not file a timely notice of appeal, this appeal should be dismissed for lack of jurisdiction.[8]

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[8]An alternative decision would mean that following appeal and partial remand, a party who prevailed on appeal from a final judgment would have to await a second final judgment in the district court affecting only other parties before seeking its attorney's fees, since such motions generally follow, rather than precede, final judgment. A much more logical conclusion is that once a party has had a final judgment affirmed on appeal in its favor, it may seek its attorney's fees and costs immediately in a post-judgment motion, and appeal from an award or denial of such attorney's fees and costs should proceed without delay occasioned by the partial remand. The character of the motion for attorney's fees as post-

ROUTING STATEMENT

This case is presumptively assigned to the Court of Appeals under NRAP 17(b)(7) (appeals from post-judgment orders in civil cases). Appellant asserts that this case should be retained by the Supreme Court because it "involves an important matter of public policy," and because the district court's routine award of attorney's fees, if upheld, "will vitiate the policy behind offers judgment," and etc. AOB 2. This assertion is consistent with appellant's hyperbole throughout its brief. This case could not be more routine. Respondents seek application of well settled law to the facts of this case, while appellant asserts garden variety abuse of discretion arguments. Rome will not fall if this case is assigned to the Court of Appeals.

As a consideration, however, respondents note that the underlying case was heard on the first appeal by the Supreme Court, specifically by Justices Douglas, Gibbons and Pickering. Justice Douglas has retired from the bench, but Justices Gibbons's and Pickering's knowledge of the underlying case might make it easier for them to quickly and efficiently resolve this related appeal, if the case were assigned to a panel included those two Justices.

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judgment does not change.

STATEMENT OF THE CASE

This is an appeal from a post-judgment order awarding attorney's fees and costs. APP 883. Eighth Judicial District Court, Clark County, Department XXVI, the Honorable Gloria Sturman, District Judge.

INTRODUCTION

Appellant O.P.H. of Las Vegas, Inc. ("OPH" or appellant) suffered a fire loss to a restraunt it operated that was not covered by insurance because OPH had allowed its policy with Oregon Mutual Insurance Company ("Oregon Mutual") to lapse for non-payment of the premium.[9]

OPH, looking to escape its own negligence, sued Oregon Mutual. But that was not enough for OPH. OPH included in its complaint claims against respondent Sandin & Co., and Dave Sandin (collectively "Sandin" unless the context otherwise requires), OPH's independent insurance agent that had assisted OPH in procuring the policy. OPH's theory for seeking to pick Sandin's pocket? That Sandin & Co. had a general duty to inform OPH that its policy was going to

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[9]OPH may cry foul because its policy with Oregon Mutual was held to be in effect by this Court in a prior appeal, but that was only because Oregon Mutual failed to comply with a statute in providing notice of cancellation of the policy. It had nothing to do with the fact that OPH knowingly allowed the policy to lapse, and then after suffering a fire loss, desperately began foraging about for any deep pocket on which to saddle its loss.

be canceled for non-payment of the premium. As a corollary position, OPH asserted that based on the past conduct of Dave Sandin, Sandin had assumed such a duty. OPH also pursued frivolous tort and fraud claims. But as a matter of law, there was no such duty. And although it is theoretically possible for an agent to assume such a duty based on a course of conduct, as a matter of fact, Dave Sandin had not acted in a manner to assume such a duty. Specifically, following discovery, both the district court and this Court concluded both that no general duty existed as a matter of law, and that there was no evidence that Dave Sandin had acted in a manner to assume such a duty.

Following judgment and appeal, Sandin sought in district court an award of its attorney's fees and costs based on a valid offer of judgment served at the onset of the case. Sandin argued and demonstrated that not only had OPH sued it in bad faith, it had done so knowing there was no legal or factual basis to support its claims of duty, assumption of duty, tort and fraud. The district court awarded respondent its attorney's fees and costs.[10] Still asserting as facts matters OPH knew were unsupportable when if filed its initial complaint, and for which it was

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[10]This district court reduced the amount of attorney's fees awarded for the initial portion of the case before the case was removed from the arbitration program. Respondent has not appealed from the reduction of its attorney's fees, so no issue regarding the reduction is before this Court.

unable to provide any support prior to the entry of judgment against it, as expressly affirmed by this Court, OPH argues that the district court abused its discretion. The arguments are as frivolous as was OPH's initial complaint.

STATEMENT OF FACTS

I. Note on Appellant's Statement of the Facts.

OPH has provided this Court with a much abbreviated appendix, choosing to omit many of the documents that form the complete record of the action in district court before the first appeal from the underlying judgment. These documents, which were included in the record of the first appeal, are relevant to the district court's award of attorney's fees and costs in this post-judgment matter. Also, the briefs that were filed in the first appeal, while not a part of the district court's record, are a part of the extended record of this matter. These documents are available to this Court as this Court's record of the appeal in Docket No. 68543. Sandin believes these documents may be properly relied on by this Court in resolving this appeal.

OPH asserts as a fact that "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." AOB 5. Indeed, this factual assertion has been the sole basis for OPH's claim of a duty

based on custom and practice by Sandin from the inception of this case. But this Court rejected this factual assertion, stating:

> Oregon Mutual sent its premium billings to OPH, not Sandin. OPH cites three instances over a ten-year period in which its broker alerted it to a past-due premium, but two of the three times this occurred, Sandin was working elsewhere, meaning the broker who provided OPH notice of impending cancellation was someone other than Sandin. This is not enough to establish a genuine issue of material fact sufficient to defeat summary judgment in favor of Sandin.

O.P.H. of Las Vegas, Inc. v. Oregon Mut. Ins. Co., 401 P.3d 218, 224 (Nev. 2017). APP 736.

The repetition of this allegation as though it were fact, and OPH's continued reliance on this assertion, is ongoing evidence of bad faith.

In addition, for most of the operative facts set forth in the opening brief, OPH cites to APP 431-33, with multiple assertions of fact following this citation simply cited to "*Id.*" Those pages of the appendix are the findings of fact of the district court in its order granting summary judgment in favor of Sandin. The district court's findings do not support OPH's factual representations. Many of appellant's *id.*-statements are not even referenced tangentially in the district court's findings. Indeed, the district court's findings of fact, which were affirmed by this Court on appeal, demonstrate that OPH's claims were without legal or factual basis. Relying on the same recitation of discredited facts here, OPH

continues to rationalize its behavior. No matter how many times OPH repeats its misrepresentations, it will not convert them to truth, nor will it make OPH's assertions sufficient to demonstrate that its complaint against Sandin was anything other than a wishing expedition on the day it was filed.

II. Factual Background.

The facts set forth in this section are, to some degree, not directly supported by the inadequate record presently before the Court. They are reported here exactly as they were reported in Sandin's answering brief in the prior appeal from the final judgment. The citations in this section are to the complete record provided in that prior appeal. These facts are reported in order to give this Court a full and fair statement of the facts, in contrast to the selection and misrepresentation of partial facts out of context that appears in the opening brief.

It is the duty of the appellant to provide an adequate record. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (appellant has the burden of providing the court with an adequate appellate record; when appellant "fails to include necessary documentation in the record, [this court] necessarily presume[s] that the missing portion supports the district court's decision''); *Carson Ready Mix, Inc. v. First Nat. Bank of Nevada*, 97 Nev. 474, 475, 635 P.2d 276, 276 (1981). It is not the duty of the respondent to correct or

supplement an inadequate record.

Appellant O.P.H. of Las Vegas, Inc., operated an Original Pancake House Restaurant at 4833 West Charleston Boulevard in Las Vegas, Nevada. I AA 4 (complaint ¶ 2). Stephan Freudenberger is the president of OPH and Lynda Snyder is the corporate office manager. (Appellant's Response to Interrogatories). Snyder reports to Freudenberger.

Defendant Dave Sandin is an insurance agent or broker based in Oregon. IV AA 541-43 (Depo of Sandin). In the early 2000s, Sandin and a colleague began working with appellant and other Original Pancake House franchisees. Sandin's colleague was initially the lead agent for appellant and Sandin was his assistant. In or around 2005, Sandin, then with a former company, became the insurance agent for appellant. He remained appellant's insurance agent through August of 2012, except for a period of just over two years when appellant was with a different agency.[11] IV AA 44-51.

Although they are based in Oregon, the Sandin defendants were licenced to sell insurance in Nevada. Dave Sandin first became licensed to sell insurance in Nevada in 2005. Dave Sandin, Anthony Sandin (a non-party), and Sandin & Co.

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[11] This is critical, because two of the three incidents relied on by appellant as creating a duty based on past conduct occurred during this two year period, when Sandin was not even appellant's agent.

were all licensed in Nevada when Sandin & Co. took over appellant's account from Dave Sandin's former employer in 2010. Dave Sandin, Anthony Sandin and Sandin & Co. have worked on appellant's account since 2010. Sandin & Co.'s and Anthony Sandin's respective Nevada licences expired on June 1, 2013. Dave Sandin's Nevada license expired on April 1, 2011. IV AA 567-68; 581.

In December 2011, on an urgent basis, the Sandin defendants were asked to obtain a new policy to cover the restaurant. Appellant's previous carrier, Fireman's Fund, charged high premiums and appellant expressed to Dave Sandin its displeasure with Fireman's Fund on multiple levels, most notably the cost of its premiums and its claims handling policies and procedures. Dave Sandin explained to appellant that Fireman's Fund's premium increases were significant and affected the entire hospitality industry, and that he had successfully moved several clients to Allied Insurance due to Allied Insurance's competitive rates and better long-term fit for appellant's coverage needs. Appellant decided to purchase a policy from Allied Insurance. IV AA 563-66; 580.

Appellant had a claim the first week of its policy with Allied Insurance. As a result of this claim, Allied Insurance reviewed appellant's credit history and cancelled appellant's policy due to appellant's poor credit. Allied Insurance's cancellation of this policy left Oregon Mutual as the next best alternative that was

willing to accept appellant at a premium appellant was willing and able to pay and that was available to negotiate terms of the policy during the holiday season. As Sandin testified, his "top six carriers would not write [appellant's] insurance because of their loss history and their bad credit." *Id.*; IV AA 593 (30(b)(6) Deposition of Sandin). Therefore, in December 2011, the Sandin defendants recommended an Oregon Mutual insurance policy to appellant based on appellant's coverage needs. *Id.*

Oregon Mutual issued a Business Owner Protector Policy to appellant that covered the restaurant ("the Policy"). IV AA 597. The term of the Policy was from December 26, 2011 through December 26, 2012. *Id.* Sandin & Co. is identified as the agent on the Policy. *Id.*

Appellant received monthly statements for the premiums directly from Oregon Mutual. V AA 708 (Deposition of Snyder); IV AA 513 (Deposition of Freudenberger). Oregon Mutual mailed a billing statement directly to appellant for the payment that was due on or before July 26, 2012. V AA 733. Appellant received the billing statement in July, 2012. V AA 709-10 (Deposition of Snyder).

Appellant failed to pay its monthly premium that was due on July 26, 2012. IV AA 514 (Deposition of Freudenberger). Indeed, Freudenberger never denied that the failure to make the monthly payment was not the fault of anyone except

himself. Freudenberger testified regarding the missed premium:

> Had I done my work that I'm paying myself to do to make sure that all this stuff gets paid in a timely manner . . . we wouldn't be sitting here, either. So that is the procedure. I didn't do my job in that moment. That's all I can say about that. I mean, it's a mishap in the company. There is no, I'm not trying to blame anybody for that payment not being made on July 26th, you know?

IV AA 519.

On August 1, 2012, Oregon Mutual sent a cancellation notice to appellant with an effective cancellation date of August 16, 2012. V AA 735. [The notices sent by Oregon Mutual were determined by this Court on appeal to be invalid.]

On August 13, 2012, prior to the cancellation of the Policy, appellant realized that it had not paid the monthly premium for July. Appellant, however, did not contact anyone at Oregon Mutual or the Sandin defendants regarding its failure to pay the July premium. V AA 715-720 (Deposition of Snyder). In fact, appellant cut a check on August 13, 2012, to Oregon Mutual for the July premium but never mailed it before the Policy was cancelled. *Id.*; V AA 774 (Check to Oregon Mutual, never sent).

The Sandin defendants did not receive a copy of Oregon Mutual's pre-cancellation notice. V AA 778 (Dave Sandin's admission upon appellant's request that Sandin never received a copy of any notice prior to cancellation of the

Policy). No party ever claimed that the Sandin defendants had notice of the cancellation of the policy prior to the time it was cancelled. Indeed, in the complaint, appellant affirmatively alleged that "Defendant OREGON MUTUAL did not send a cancellation notice to Defendant DAVE SANDIN." I AA 7 (complaint ¶ 27). [This fact alone demonstrates that appellant's complaint against Sandin was frivolous on the day it was filed. Sandin could not have informed appellant of a cancellation of which it had no knowledge, and appellant knew Sandin had no notice before its complaint was filed.]

Nevertheless, there was some confusion regarding whether the pre-cancellation notice was actually sent to the Sandin defendants. Specifically, Oregon Mutual's agency agreement with Sandin & Co. required Oregon Mutual to send copies of pre-cancellation notices to Sandin & Co. by mail or electronic transmission. III AA 350. In addition, the Policy stated that Oregon Mutual would send pre-cancellation notices to appellant, and that Oregon Mutual would "also provide a copy of the notice of cancellation . . . to the agent who wrote the policy." *Id*; III AA 426. Prior to June of 2010, by its own admission, Oregon Mutual provided such notices directly to its policy holder's agents. III AA 340. However, "on June 8, 2010 [Oregon Mutual] sent a Bulletin to its agents regarding provisional notices of cancellation. The Bulletin noted that as of June 14, 2010

[Oregon Mutual] was going to discontinue printing and mailing provisional Notices of Cancellation to agents. Instead, these notices would be available on-line through the BizLink profile under 'New Non-Payment Report'." *Id.*

The BizLink system is an electronic portal (like the Cloud) which Oregon Mutual now utilizes to provide agents with information relating to insurance policies. In other words, rather than providing notice as it did in the past, Oregon Mutual now makes that information available to agents on its "cloud." The Sandin defendants express no opinion herein as to whether such "notice" satisfies the requirements of the agency agreement and/or of the Policy, and/or of Nevada law.

In this case, the pre-cancellation notice was posted by Oregon Mutual on Bizlink on July 31, 2012, and a quick-link to this notice was available on Sandin's portal to Bizlink for a period of 24 hours. III AA 342 (Oregon Mutual's MSJ). It is undisputed that no one at Sandin & Co ever accessed the portal or discovered the existence of the pre-cancellation notice.

On August 13, 2012, appellant's representative, Linda Snyder, contacted defendant Dave Sandin to report a break-in that had occurred at the restaurant overnight between August 10, 2012 and August 11, 2012. V AA 781(Sandin admission); IV AA 528 (Appellant's Response to Interrogatory); V AA 714 (Deposition of Snyder). Sandin did not inform Snyder of the pre-cancellation

notice because Sandin did not know about the notice.

On August 16, 2012, Snyder spoke with Dave Sandin to obtain a claim number for the break-in. V AA 781. Again, Sandin did not inform Snyder of the pre-cancellation notice because Sandin did not know about the notice.

On August 16, 2012, Oregon Mutual cancelled appellant's insurance policy. III AA 341. [This Court ruled in the first appeal that the cancellation was ineffective because it did not comply with statutory notice requirements.]

On August 17, 2012, a fire completely destroyed the restaurant. V AA 725. Thereafter, the Sandin defendants became aware that the Policy had been cancelled. IV AA 569-70 (Deposition of Sandin); IV AA 577-79 (Sandin Answer to Interrogatories). On August 17, 2012, after the Sandin defendants became aware that the Policy had been cancelled, Dave Sandin contacted appellant and notified appellant that the Policy had been cancelled. *Id.*

As a result of the cancellation of the Policy for non-payment on August 16, 2012, Oregon Mutual denied coverage for the loss caused by the fire. V AA 795. The sole reason for cancellation of the Policy was appellant's failure to pay its July 26, 2012 premium on or before August 15, 2012. V AA 802-03 (Oregon Mutual's admission).

III. Procedural Posture.

On November 19, 2012, OPH filed its complaint naming Oregon Mutual, Sandin & Co., and Dave Sandin as defendants. APP 109. Against the Sandin defendants, OPH asserted claims for fraud in the inducement (third cause of action), fraud (fourth cause of action), breach of fiduciary duty (fifth cause of action), violations of NRS 686A.310 (sixth cause of action), and negligence (seventh cause of action). *Id.*[12] Underlying most of these claims was OPH's theory that Sandin owed OPH a general duty, or by his prior conduct had assumed a duty, to inform Sandin that it's insurance policy was about to be cancelled for non-payment of the premium. *Id.*

On December 26, 2012, Sandin filed a motion to dismiss the complaint as to them. APP 123. Sandin argued that they had performed every duty they owed to OPH as OPH's insurance agent, and that they owed no duty to remind OPH to pay its premium. *Id.* On January 10, 2013, OPH opposed the motion to dismiss. APP 134. On January 24, 2013, Sandin replied. APP 152. The district court denied

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[12]The claim was entitled "negligence," but the text of the complaint asserted violations of the deceptive trade practices act and a hodgepodge of other alleged statutory violations which, in OPH's view, constituted negligence *per se*. APP 119. The proliferation of frivolous assertions, such as the hodgepodge of unsupportable allegations of this claim, greatly increased the expense of defending against OPH's frivolous complaint.

the motion to dismiss without prejudice. APP 164.[13]

On February 14, 2013, following the oral denial of their motion to dismiss, Sandin served on OPH an offer of judgment in the amount of $2,000 pursuant to NRCP 68 and then applicable NRS 17.115. APP 161. At that time, OPH was fully aware of Sandin's defenses, and OPH was in possession evidence disproving the factual theories of the complaint, making the offer of judgment generous.

OPH rejected the offer. Sandin was forced to defend. Sandin filed their answer on April 3, 2013. APP 168. Because of OPH's improper complaint, the parties were compelled to participate in months of exhaustive discovery in order to prove facts OPH knew on the date the complaint was filed.

On March 17, 2015, following the close of discovery, Sandin filed a motion for summary judgment on all claims asserted by OPH against them.[14] APP 199. Although OPH has included Sandin's motion in the appendix, OPH has not

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[13]Throughout the proceedings below and again on appeal, OPH asserts that the denial of the motion to dismiss is somehow evidence that the complaint was filed in good faith. The ability to plead a claim sufficient to survive a motion to dismiss is possessed by most attorneys. This says nothing about the good or bad faith of the claim.

[14]On that same date, Oregon Mutual filed a motion for summary judgment. The significance of this fact is that in response to Oregon Mutual's motion, OPH conceded essential facts demonstrating its claims against Sandin were without merit. These documents have not been included in the record in this appeal.

provided this Court with the extensive exhibits that were attached. The exhibits demonstrated OPH's pre-knowledge of the facts and bad faith in filing the complaint. Sandin's motion and exhibits comprised all of volumes IV and V of the appendix in the prior appeal.

Among other things, Sandin argued that they had performed every duty they owed OPH as OPH's insurance agent, and had no duty to warn OPH of the impending cancellation of the policy, especially in light of the fact that they did not know of the pre-cancellation notice and the cancellation until after the cancellation had occurred, and supported the arguments with evidence OPH has elected not to include in the appendix in this appeal. *Id.*

OPH opposed the motion, arguing that Sandin had a duty to warn OPH of the threatened cancellation notice based on past conduct of Dave Sandin on which OPH allegedly relied. APP 223.[15]

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[15]Interestingly, OPH chose to provide this Court with the exhibits to its opposition. APP 247-379. Apparently, OPH wants this Court to be aware only of its arguments and of the evidence it attempted to marshal in support of its invalid claims. It has affirmatively attempted to hide from this Court the evidence Sandin provided to the district court. But this Court, in the first appeal, when it had an appendix including all of the evidence, concluded there was no evidence to support OPH's claims. That holding is the law of this case. *See Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 42, 223 P.3d 332, 333 (2010).

Incidentally, the admissions of fact and the exhibits contained in OPH's opposition, APP 223-233, provide support for respondent's statement of facts in

Sandin filed a reply with numerous additional exhibits comprising over 100 pages, fully refuting OPH's arguments. OPH has elected not to include that reply or its exhibits in the appendix in this appeal.

A hearing was conducted by the district court on May 14, 2015. APP 380. The district court orally granted both motions for summary judgment. APP 427. On June 30, 2015, the district court entered an order granting summary judgment in favor of Oregon Mutual. APP 458. Later that same day, the district court entered an order granting summary judgment in favor of Sandin. APP 430. This was undoubtedly a final judgment. OPH appealed. APP 450.

The procedural facts that followed and led to this appeal have been set froth in the Jurisdictional Statement section of this brief, *supra.*, and they will not be repeated here. Suffice it to state that the district court fully considered all of Sandin's arguments in favor of it request for an award of attorney's fees, and all of OPH's invalid defenses thereto, and awarded attorney's fees and costs to Sandin. This untimely appeal followed.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion is awarding attorney's fees in favor of Sandin. There is no such thing as a premature offer of judgment; the offer

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subsection II, *supra.*

of judgment rule allows an offer to be made at any time. An early offer of judgment serves the purpose of putting the opposing party on notice that its failure to accept is at its own risk. The amount of the offer was not unreasonable under the circumstances of this case, because OPH knew at the time it filed its claims against Sandin that those claims were frivolous. The most important fact demonstrating the sufficiency of the amount of Sandin's offer of judgment is that OPH failed to beat that offer in the proceedings below. OPH's claims were worth zero dollars as a matter of law. The district court awarded OPH zero on its claims as a matter of law. This Court affirmed on appeal that OPH's claims were worth zero dollars as a matter of law, because there was no legal basis for the claims to begin with, and no factual evidence to support any exception to the rule that an agent does not owe the duty OPH claimed it owed. Sandin, after fully informing OPH in a motion to dismiss of its defenses and of the legal insufficiency of OPH's claims, offered appellant $2,000 to settle. This offer was reasonable both in its timing and amount under the circumstances of this case.

DISCUSSION

I. Standard of Appellate Review.

The standard set forth in the opening brief at pages 12-13 is correct.

II. This Court Did Not Find or Suggest That Appellant's Causes of Action Were Asserted in Good Faith, or That There Was a Legal or Factual Basis For Those Claims.

An example of OPH's bad faith is its continued misrepresentation of this Court's decision in the prior appeal. OPH asserted from the beginning that Sandin owed OPH a general duty to protect it from its own knowing failure to pay its premium. OPH cited no authority in or out of this state to support that assertion, and this Court ruled that no such duty exists as a matter of law.[16] But OPH also asserted that Sandin had undertaken such a duty based on a "course of conduct." Specifically, OPH argued that Sandin had allegedly engaged in the course of conduct of warning OPH when it missed prior premium payments. OPH knew these factual assertions were unsupportable when it pleaded them, and two courts have so ruled, not just initially, but multiple times. In the prior appeal, this Court stated:

> We recognize that an insurance broker may assume additional duties to its insured client in special circumstances. *See Gary Knapp, Annotation, Liability of Insurer or Agent of Insurer for Failure to Advise Insured as to Coverage Needs*, 88 A.L.R. 4th 249, § 2[a]

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[16]Indeed, this Court stated: "[E]even OPH recognizes the usual relationship between an insurance broker and its client is not the kind which would logically give rise to a duty to monitor and remind the client about overdue premium payments." *O.P.H. of Las Vegas, Inc. v. Oregon Mut. Ins. Co.*, 401 P.3d 218, 223 (Nev. 2017) (citation and internal punctuation omitted). APP 736. OPH knew there was no basis for asserting such a duty when it filed its complaint.

(1991) (collecting cases). But here, the record does not establish that Sandin undertook the duty OPH claims.

O.P.H. of Las Vegas, Inc. v. Oregon Mut. Ins. Co., 401 P.3d 218, 223–24 (Nev. 2017). APP 736.

Amazingly, OPH seizes on the first sentence, recognizing that such a duty can possibly arise in special circumstances, to argue that this Court held that its claims were properly asserted. Specifically, OPH argues that because such a cause of action is possible, its cause of action–which it knew at the time it filed it was factually unsupportable, and which both the district court and this Court determined after full discovery were unsupported–was filed in good faith. That is the same as arguing that because a cause of action exists for personal injuries arising from an automobile accident, a person who was never in an automobile accident and who suffered no personal injuries can file a complaint in good faith against an entirely innocent party. The salient point is not that such a cause of action exists and could be asserted if the facts supported it; the salient point is that no facts supported OPH's assertion of that cause of action. The record in the first appeal demonstrated that no facts supported OPH's claim, and the record in this appeal demonstrates OPH was aware that no facts supported its claim when the claim was filed.

Nevertheless, OPH has asserted these same facts to support it claims in this appeal. One is not allowed to file a complaint asserting a cause of action that is frivolous in the hopes of discovering facts to support that claim in discovery, or in the hopes of coercing a settlement because the defense of the action will be expensive. That is the definition of bad faith. Especially when information in OPH's possession that was not disclosed until it was ferreted out through months of discovery demonstrated OPH's knowledge of falsity from before the time the complaint was filed. OPH's twisting of this Court's holding in the prior appeal is not clever lawyering.

III. The District Court Did Not Find or Suggest That Appellant's Rejection of Sandin's Offer of Judgment Was Reasonable.

At the hearing on Sandin's motion for attorney's fees, the district court, addressing the *Beattie*[17] factors, made many comments, including the following

> THE COURT: So that's kind of what was new in *Frazier v Drake* was this concept that if you decide to reject -- if your client decided to reject not in good faith, it had to be grossly unreasonable. *And that's -- I mean, I thought pretty much everybody was operating in good faith here.* Nobody -- it's just you guys didn't agree. Your clients were relying on this course of conduct that they felt they had with their real estate agent -- insurance agent, which was what Ms. Lee was talking about, this course of conduct. You know, ultimately the Court didn't find that that standard was met. That's a very unusual and way outside normal duties of insurance agents.

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

> So, I mean, it wasn't unreasonable to proceed, but on the other hand, it was certainly a reasonable offer from them because they just -- there is no such -- there is no such global duty. It's not a duty. It's just this exception from the failure to have a duty that is just a course of conduct if you can establish it. It's not technically a duty. The point is there is no duty, but there is an exception. And it's a high burden to carry that the exception should apply.
>
> So the problem that they found was with the -- what the District Court found that reasonable -- that the reasonableness of the offer alone supported the award of attorney's fees, and they said that's not enough. You can't just award everything just based on reasonableness, you have to go back and look at it all. So that was the point in saying I'm going to -- I have to take another look at it under *Frazier v Drake.*

APP 761-62 (sentence relied on by OPH in italics).

This general discussion of the *Beattie* factors could be understood in a number of ways. OPH insists despite vehement denials from the District Judge that the sentence in italics was a finding by the district court that OPH refused to accept the offer of judgment in good faith. That statement might just as well mean that in conducting the litigation, the district court thought the parties were acting in good faith. More to the point, if the statement is read in the complete context of the discussion, a fair paraphrase might be, "I thought you were all acting in good faith, because such a claim is possible, but in light of all the circumstances now available to me, it appears you were not acting in good faith because you presented no evidence to support your difficult theory of recovery. I will have to

give further consideration to the issue of whether refusal to accept was grossly unreasonable under the standard articulated in *Frazier v Drake*." This seems a fairer construction of the district court's comments as a whole.

Fixating on and pedantically misconstruing that single phrase from the District Judge during the hearing on the motion, OPH repeatedly argued below, and insists on appeal, that the District Judge made an about face on the issue of unreasonable refusal of acceptance. OPH hangs several of its arguments on appeal on that misapprehension, and indignantly cites as proof of this supposed about-face several statements from the Judge insisting that she did and said no such thing. AOB 11. Rather than crediting the Judge's denials and explanations of OPH's misunderstanding at face value, as any person acting in good faith would do, OPH finds in the comments deception and improper conduct on the part of the Judge. This entire line of argument smacks of sophistry and bad faith. It is a continuation of the conduct OPH has engaged in from the inception of this case.

Even if the district court's statement indicates that at that moment the district court was suggesting that OPH's refusal to accept the offer of judgment was not unreasonable (a dubious assumption at best in light of the Judge's denials), the point is irrelevant. The district court is not bound by statements made on the fly at a hearing; it is the district court's written judgments and orders that

are enforceable and reviewable. *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) ("An oral pronouncement of judgment is not valid for any purpose . . . only a written judgment has any effect . . . ."). And a district court's about-face before, during, or after a hearing is of no consequence. What matters is the district court's ruling.

IV. The District Court Did Not Abuse Its Discretion In Awarding Attorney's Fees in Favor of Sandin.

A. Legal standard to enforce an offer of judgment.

Under NRCP 68(a), "[a]t any time more than 10 days before trial, any party may serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions." 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).[18]

NRCP 68, which permits fee-shifting penalties to be assessed against an offeree who "rejects an offer and fails to obtain a more favorable judgment," extends to fees incurred on and after appeal. *In re: The Estate and Living Trust of*

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[18]OPH raises a warning cry against using the Rule as a "penalty," but that is precisely the purpose of the Rule.

Miller, 125 Nev. 550, 555 (2009).

The district court must consider the following factors when determining whether to award attorney's fees and costs under NRCP 68: (1) Whether the offeree's claims were brought in good faith; (2) whether the offeror's offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the offeree's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount. *See RTTC Commc'ns., LLC v. Saratoga Flier, Inc.*, 121 Nev. 34, 41, 110 P.3d 24, 28 (2005) (citing *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983)). In addition, when deciding whether to award attorneys' fees, the Court must consider the factors in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

The district court's discretion to grant attorney's fees pursuant to the offer of judgment rule is broad and can only be overturned if the district court's exercise of discretion in evaluating the *Beattie* factors is arbitrary or capricious. *See Uniroyal Goodrich Tire v. Mercer*, 111 Nev. 318, 324, 890 P.2d 785, 789 (1995) (superseded by statute on other grounds, but specifically reaffirmed as to this standard, in *RTTC Commn'ns, LLC v. Saratoga Flier, Inc.*, 121 Nev. 34, 41–42, 110 P.3d 24, 29 (2005)). No single *Beattie* factor is determinative; the district

court has broad discretion in awarding attorney's fees so long as all factors are considered in a non-arbitrary manner. *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 251, 955 P.2d 661, 672 (1998).

B. The District Court Correctly Applied the *Beattie* and *Brunzell* Factors in Granting Sandin's Motion for Attorney's Fees

(1) OPH's Action and Appeal Were Not Brought in Good Faith.[19]

OPH's underlying claims were not brought in good faith. OPH attempted to shift the blame for its conscious choice not to pay its premium to Sandin. OPH's claims against Sandin by the time of appeal were centered on the theme that Sandin had a legal duty, either general or assumed, to notify OPH that it was late in making its monthly insurance premium. OPH eventually conceded below that Sandin had no idea of the pending cancellation and could not have reminded OPH to pay its premium.

As a practical matter, whether or not Sandin had a legal obligation to notify OPH of the pending cancellation, Sandin simply could not have informed OPH of the pending cancellation because Sandin did not know about it. This was evident

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[19] In its opposition to the motion for summary judgment, OPH consented to judgment in Sandin's favor on the claim for violation of NRS 686A.310. Clearly, this claim was not brought in good faith. *See Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 969 P.2d 949 (1998).

when OPH filed its complaint.[20]

Further, OPH was aware as of August 13, 2012 (prior to the cancellation) that it had not yet paid its July premium. OPH cut a check on August 13, 2012, for the premium. APP 205; 227, ¶ 13 (Undisputed Material Facts). In its opposition to Sandin's motion for summary judgment, OPH did not cite any authority (statutory, administrative, or case law) from Nevada or any other jurisdiction to support its theory that Sandin had a legal duty to notify OPH that it had failed to pay its premium. APP 235-241. OPH's claims were not based on law or any legal or equitable principle. In Nevada, insurance agents do not have a fiduciary relationship with their clients. OPH was unable to muster any evidence that Dave Sandin assumed such a duty by his conduct. This Court so held in the first appeal, and that holding is the law of this case. *See Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 42, 223 P.3d 332, 333 (2010) ("When an appellate court explicitly or by necessary implication determines an issue, the law-of-the-case doctrine provides that the determination governs the same issue in subsequent proceedings in the same case.").

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[20]Below in defense of its claim that its complaint was filed in good faith OPH pursued a theory that Oregon Mutual might have provided such notice based on its prior policies, but OPH knew when it filed the complaint this was not true. OPH pleaded: "Defendant OREGON MUTUAL did not send a cancellation notice to Defendant DAVE SANDIN." APP 110 (complaint ¶ 27).

In addition, OPH aggressively pursued negligence *per se* and fraud claims below against Dave Sandin based on the theory that Dave Sandin breached some duty to OPH by allowing his Nevada license to lapse. These were pleaded in the complaint, APP 109, and were still being actively pursued in opposition to the motion for summary judgment. APP 235-241. These and other red herrings and non-issues ran up the expense of discovery.

But the fact that Dave Sandin allowed his Nevada license to lapse had nothing to do with any legitimate issue in this case.[21] The licensing status of a non-resident agent is purely an administrative matter. *See* NRS 683A.201(1)&(3). NRS 683A.201 does not provide for a private right of action. And the position was unsupportable on other grounds. APP 595-97 (discussion of reasons these claims were frivolous). OPH finally abandoned that claim at the summary judgment stage, but not before it had caused Sandin to expend a huge amount of money on an issue it knew, or should have known, was without legal basis. That and other red herrings were pursued below, on appeal, and in this appeal.

OPH always knew that it had no legal basis for its claims against Sandin.

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[21] The facts regarding licensing are set forth at page 15-16 of this brief, *supra*. Sandin & Co is primarily an Oregon firm. This was never a legitimate issue, but OPH pursued it like a pit bull terrier below. Eventually, even plaintiff's expert agreed that Dave's expired license was a non-issue. The issue is ignored by OPH in its opening brief in this appeal.

Sandin was just a deep pocket to pick. OPH pursued claims hoping that a jury would return a verdict in its favor out of sympathy for the tragic loss, or that the expense and uncertainty of litigation would coerce an unjustified settlement. It hoped that its legitimate claims against Oregon Mutual and the circumstances would shield its improper conduct directed at Sandin, and possibly that Oregon Mutual would put pressure on Sandin to participate in a settlement. When this did not happen, OPH doubled down on its house of cards and filed an equally tenuous appeal against Sandin, which was rejected by this Court. The fact that OPH prevailed against Oregon Mutual (on a technical notice issue) does not mitigate its conduct against Sandin.

In both the first appeal and this appeal, OPH has ignored the fact that it pursued frivolous claims against Sandin, focusing instead again on its claim that Dave Sandin assumed a duty that was actionable when the complaint was filed. The record in this appeal demonstrates that OPH brought its underlying claims, its first appeal, and this appeal in bad faith.

(2) The Offer of Judgment Was Reasonable in Both its Timing and Amount.

In its opposition, OPH argued that "[t]he Sandin Defendants had not answered the Complaint at the time that the offer was presented. As such, OPH

was not given notice of Sandin's contentions, affirmative defenses, or access to any allegedly exculpatory discovery." APP 590, ln. 24. Sandin served its offer of judgment one day after the hearing on Sandin's motion to dismiss, after the district court denied the motion. Thus, OPH had notice of Sandin's defenses. The offer was served early in an effort to resolve the case before the parties expended a large amount of time and money. This is a good faith motive for an offer of judgment.

There is no hard and fast rule as to when the presentation of an offer of judgment is reasonable. It is a fact intensive inquiry that must be analyzed on a case by case basis. This Court has stated, "the offer of judgment is a useful settlement device which should be made available at every possible juncture where the rules allow." *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 995, 860 P.2d 720, 724 (1993). Sandin's offer of judgment was made at a time "the rules allow."

OPH repeatedly complains that Sandin's offer was made too early, but all of the facts constituting the bad faith nature of this lawsuit were known to OPH at the inception. In *LaForge v. State, Univ. & Cmty. Coll. Sys. of Nevada*, 116 Nev. 415, 423, 997 P.2d 130, 136 (2000) (citing *Bidart v. American Title*, 103 Nev. 175, 179, 734 P.2d 732, 735 (1987)), this Court rejected a similar argument.

In *LaForge*, the appellant argued that his rejection of respondents' offer of judgment was reasonable because respondents had not previously disclosed to him

that they would raise an issue preclusion defense.[22] Appellant further argued that respondents' failure to give notice of the issue preclusion defense prior to making the offer made their offer unreasonable in its timing. *Id.* This Court rejected that argument, stating, "[w]here the district court properly considers these *Beattie* factors, the award of attorney's fees is discretionary." *Id.* This Court held that respondents' failure to bring the issue preclusion defense earlier did not constitute withholding of information that rendered appellant's rejection of the offer of judgment reasonable. Not only had respondents not actually withheld information from appellant–appellant's failure to anticipate respondents' defense did not amount to a withholding of information, *id.* at 424–the information was equally available to appellant. The award of attorney's fees was not an abuse of discretion.

Just as the appellant in *LaForge* had a duty to evaluate his own case before pursuing it and before rejecting an offer of judgment, OPH had a duty to properly evaluate its case before rejecting Sandin's offer. In point of fact, OPH knew or

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[22]In this case, OPH knew precisely what Sandin's defenses were; Sandin had presented them in a motion to dismiss. Feeling its oats because it had defeated a motion to dismiss was no basis for OPH to reject the offer of judgment. Its lawyer had to have recognized the strength of Sandin's arguments, and the weakness of their claims, but they were willing to pursue the matter to coerce a bigger settlement nonetheless. This is precisely the conduct NRCP 68 is intended to punish. OPH proceeded at its own risk, eyes open.

should have known its claims were frivolous when they were filed. They were unsupported by any law and based on facts OPH knew were untrue. If OPH did not do sufficient diligence to discover the frivolous nature of its claims, the fault is with OPH. More importantly, if OPH pursued its action hoping to coerce a settlement, the action is inexcusable.

The offer of judgment for $2,000 was also reasonable in amount. Sandin felt confident it would successfully defend against OPH's frivolous claims, whether on summary judgment or at trial. The district court ultimately granted summary judgment on all of OPH's claims, and this Court affirmed, proving Sandin right. OPH, on the other hand, elected to pursue the action and did so expensively, at its own, voluntarily assumed risk.

At the time of the offer of judgment, the case was part of the mandatory arbitration program.[23] In the mandatory arbitration program, damages are limited to $50,000. NAR 16(B). Given the $50,000 cap on damages, the $2,000 offer of

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[23]Six months after the offer of judgment, OPH filed a tardy request for exemption from arbitration. The Commissioner granted the request on September 17, 2013. But by that time, the parties had engaged in motion practice and discovery far more expensive than an arbitration case would normally have warranted. The district court did not award Sandin attorney's fees for this period of time and Sandin has not appealed. But the decision not to appeal is not a concession that the district court was right. Sanding believes the district court erred. It is merely a business decision not to pursue this issue on appeal.

judgment was reasonable.

The amount was also reasonable in amount in terms of potential exposure. Oregon Mutual was the primary defendant. Sandin was a scapegoat defendant. Sandin correctly believed that the liability, if any, would rest with Oregon Mutual. OPH elected to pursue questionable claims against Sandin, and assumed the risk of failure. Therefore, the $2,000 offer of judgment was reasonable in amount.

Below and on appeal OPH points to the amount Sandin spent on the defense of this action as evidence that an offer of $2,000 was unreasonable. The suggestion that because OPH forced defendant to spend a lot of money to defend against its frivolous claims, the amount of defendant's offer of judgment was inadequate is a non-sequitur. It belies OPH's motive in filing the complaint in the first place: to compel a settlement based on nuisance value.

A person who is sued has two option: defend or pay. When a person is sued in a frivolous manner, the options do not change. There is no basis in law, fact, reason, logic or equity for OPH's suggestion that because it is going to be expensive to defend against a frivolous lawsuit, a defendant has some kind of duty to offer judgment in an amount tied to or dependent on the cost of defense. Indeed, the opposite is true. One purpose of the offer of judgment rule, NRCP 68, is to allow a person who has been frivolously sued an avenue of redress for costs

and attorney's fees unjustly imposed on him or her by making an offer of judgment.

At the time OPH filed its suit, it knew the action was a shakedown with a real value of zero dollars. It does not make OPH's refusal of Sandin's early offer good faith because Sandin did not tender an amount that approximated OPH's perceived nuisance value of the shakedown. Nor is the amount of OPH's loss relevant to whether the offer was made in good faith, or refused in good faith. No matter how badly I am injured in an accident, if I knowingly sue a person with no liability, I cannot argue when an offer is made that the amount of the offer is too small because my injuries are great. A frivolous lawsuit does not become less frivolous because the person bringing it has suffered a loss, or because the person defending it will expend funds.

(3) OPH's Decision to Reject the Offer and Proceed to Discovery and Toward Trial Was Grossly Unreasonable.

OPH's decision to reject the offer was unreasonable. OPH's claims were brought in bad faith and were not grounded in the law. There was no legal basis for OPH's claims against Sandin. This Court agreed.

OPH nonetheless continues to hang its hat on the fact that discovery had not

yet commenced when Sandin's offer of judgment was made.[24] OPH argues that any offer of judgment made prior to discovery is per se unreasonable. OPH fails to acknowledge three material and undisputed facts which were known to OPH before it filed this lawsuit: (1) as stated in paragraph 27 of OPH's complaint, "Defendant OREGON MUTUAL did not send a cancellation notice to Defendant Dave Sandin;" (2) as stated in paragraph 28 of the complaint, "DAVE SANDIN did not receive a cancellation notice;" and (3) as OPH admitted, on August 13, 2012, prior to the cancellation, OPH realized that it had not made the monthly premium and made a conscious decision not to correct its own error.

OPH knew its policy was in jeopardy of being cancelled before the policy was canceled. OPH did not need to rely on Sandin to notify it of the pending policy cancellation or to remind it to make a payment. Plaintiff also knew that Oregon Mutual did not supply Sandin with the notice of termination. Plaintiff's knowledge of this fact is the law of this case, as found by this Court. Knowing all of these facts, OPH's rejection of an offer, any offer, to settle against a defendant

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[24]In rejecting this argument, the district court stated: "Their motion to dismiss was very thorough on why this case was just never going to reach the affirmative standard necessary to show that a duty had been assumed. That was on the record from the beginning. They put you on notice after they were not successful in having the case dismissed that they felt confident in their position." APP 874.

it knew it had sued in bad faith was not justified.[25]

OPH continues to assert that because it beat a motion to dismiss, its' claims were not without merit when pleaded. Although the district court did deny Sandin's motion to dismiss, the district court was careful to note that Nevada has a low pleading standard. APP 160. Later, the district court explained that OPH had been afforded an opportunity to attempt to prove its claims, but had completely failed. APP 655-56.

OPH has cited no case law to support the proposition, under the minimal pleading standards of Nevada, that a case's survival of a motion to dismiss is evidence the claim was brought in good faith. Survival at that stage simply suggests that counsel pleaded enough facts to satisfy the elements of the claim. That a clever pleading of claims may allow a party to defeat a motion to dismiss, where all assertions of fact must be deemed true, does not make the pleading less frivolous.

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[25]OPH asserted below in opposition to the motion for attorney's fees that these facts "came to light almost six months after Defendants made their offer of judgment to OPH." This assertion was disingenuous, at best. Perhaps what OPH meant to write was that six months after Sandin made their offer of judgment, these facts were revealed by OPH to Sandin for the first time. This should not be conflated with what OPH knew at the time the offer of judgment was made. None of these facts "came to light" for OPH. This information was always within the exclusive knowledge of OPH.

Even assuming for the sake of argument that OPH did not know its pleading was frivolous when it was filed, after discovery proved the factual allegations to be false, OPH's continued adherence to those facts is evidence of bad faith. To reassert as true those same facts after a district court and an appellate court have both determined that there is no evidence to support the facts is inexcusable. It is noteworthy that OPH has not asserted that at the time the complaint was filed it believed in its claims, acknowledging that it was unable to prove them. No. OPH has asserted those same factual claims in this appeal as though they were true. Years after this frivolous litigation was commenced in the desperate hopes of finding someone to pay for its own, knowing failure to pay a premium, OPH is still pursuing this action against an innocent defendant, forcing it to respond and defend, and to incur additional attorney's fees and costs.

Therefore, OPH's decision to reject the offer and proceed through years of arduous, contentious and multi-jurisdictional discovery was grossly unreasonable.

(4) The Fees Sought by Sandin Are Reasonable and Justified in Amount.

The penalty for rejecting an offer and failing to secure a more favorable outcome is that the rejecting party pays costs and attorney's fees from the date of the offer forward. Sandin provided the district court with itemized statements to

document its attorney's fees, both in district court and on appeal, and the district court found the charges to be reasonable. APP 526-84; 667-77. Indeed, the charges are well below prevailing market rates.

In district court, the primary attorneys on the case billed their time at deeply discounted rates. Patricia Lee billed her time at a rate of $160 per hour and the associates (Michael Kelley and Katy Branson) billed their time at a rate of $140. These discounted rates are far below the market rate for the Las Vegas area. Indeed, their standard billing rates at that time were $360 and $295, respectively. These hourly rates were more than reasonable based on the experience of counsel, the quality of representation, and the results achieved. *See* Declaration of Patricia Lee, APP 502-03.

Further, the fees and costs were reasonable given the circumstances of the case. OPH commenced this litigation on November 11, 2012. Discovery did not close until March 6, 2015, almost two-and-a-half years later. The motions for summary judgment were not filed until March 17, 2015. The delay in the case was entirely attributable to OPH and its multiple discovery abuses, as detailed in Sandin's motion papers below. *See* APP 494. In addition to those procedural hurdles, sixteen unnecessary depositions were taken, eleven of which were taken

outside of Las Vegas and out of state.[26] The fees sought by Sandin were reasonable and justified in amount because of the length of the litigation, the complexity of the claims, and the travel required for litigation that spanned over two-and-a-half years. *Id.*

On the first appeal, Sandin was primarily represented by seasoned appellate attorney and partner Michael K. Wall, and Patricia Lee, also a partner. APP 646, Lee decl at ¶ 18. Mr. Wall conducted all levels of research and drafting in support of opposing OPH's appellate efforts. *Id.* at ¶ 19. Ms. Lee continued to engage in active mediation and settlement efforts and further managed the majority of communications with the clients and opposing counsel. *Id* at ¶ 20. Counsel for Sandin spent time reviewing and responding to various communications with the Nevada Supreme Court, coordinating logistics for mandatory mediation, preparing mediation briefs, participating in multiple mediations and settlement negotiations, communicating extensively and routinely with all counsel and their clients, reviewing the district court record, preparing the answering brief, and monitoring the appeal. APP 646, Lee decl. at ¶¶ 19-21. This was a complex appeal involving defendants with differing defenses and issues to consider. Incidentally, Sandin

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[26]Some of these depositions may have been necessary to OPH's claims against Oregon Mutual, but as to Sandin, they were all unnecessary, although Sandin was compelled to participate.

has again had to perform all of these functions in this pending appeal.

The hourly rates of Sandin's counsel are reasonable. Seasoned appellate attorney Michael K. Wall billed his time at a rate of $160.00 per hour, as did the other partner, Patricia Lee. These attorneys' standard billable rates at that time were $475.00 and $360.00, respectively. APP 646, Lee decl. at ¶¶ 22, 23.

Nevada courts have found much higher attorney hourly rates to constitute "prevailing market rates." *See, e.g., Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 606, 172 P.3d 131, 137 (2007) (finding that the trial court "properly determined . . . that the $250 per hour fee claimed by respondents' counsel was reasonable."); *Tallman v. CPS Sec. (USA), Inc.,* 23 F. Supp. 3d 1249, 1259 (D. Nev. 2014) (awarding a labor and employment attorney with over 20 years of experience $400 an hour, and a labor and employment attorney with four years of experience $240 an hour); *CLM Partners LLC v. Fiesta Palms, LLC,* No. 2:11-CV-01387-PMP, 2013 WL 6388760, at *5 (D. Nev. Dec. 5, 2013) (surveying rate determinations among cases in the District of Nevada and finding "hourly rates as much as $450 for a partner and $250 for an experienced associate to be the prevailing market rate"); *Easley v. U.S. Home Corp.,* No. 2:11-CV-00357-ECR, 2012 WL 3245526, at *3 (D. Nev. Aug. 7, 2012) (objections overruled, No. 2:11-CV-00357-MMD, 2013 WL 1145138 (D. Nev. Mar. 18, 2013) (finding $340

an hour to be reasonable in the Las Vegas legal market for someone with ten years of experience in the areas of labor and employment law)).

Based on the experience of counsel, the quality of representation, and the results achieved, the hourly rates of counsel staffing the appellate phase of this matter were below industry standards and reasonable.

(5) The District Court Properly Considered and Applied the *Brunzell* Factors.

The fourth *Beattie* factor (whether the fees sought by the offeror are reasonable and justified in amount) implicates *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). *Brunzell* mandates that the trial court consider:

(1) the character and difficulty of the work performed;

(2) the work actually performed by the attorney;

(3) the qualities of the advocate; and

(4) the result obtained.

See Brunzell, 85 Nev. at 350, 455 P.2d at 33.

In this appeal, under *Brunzell*, OPH has challenged only the sufficiency of Sandin's billing records, *i.e.*, the work actually performed. The specific challenges OPH now brings, however, were not raised in district court. In district

court, OPH argued generally that there was over billing, but OPH did not provide any examples. The particular matters OPH now claims on appeal were over billed were not pointed out to the district court in its motion papers below. APP 591-92; 616.[27] Raising these specific arguments now for the first time on appeal is improper. *See Diamond Enterprises, Inc. v. Lau*, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997) ("It is well established that arguments raised for the first time on appeal need not be considered by this court.").

Sandin provided detailed billings which the district court carefully considered. APP 526-84; 667-77. The district court considered and rejected on the record OPH's challenges to the amounts billed. APP 759-67. The district court also considered the other *Brunzell* factors and made specific findings on those issues. APP 777-79. OPH complains on appeal that Sandin's attorney's billed too much in preparing the motion for summary judgment and the reply in support of that motion, but it was OPH that made the case complex and overly burdened with non-essential discovery and documents, all of which Sandin had to address in its motion for summary judgment. This specific challenge was not

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[27]Indeed, in district court, the only over billing of which OPH claimed was for the period of time before the case was exempted from arbitration. APP 591. Most of both hearings on the motions below focused on this point, and the district court did not award Sandin any fees for this period of time. APP 779.

raised in district court, giving Sandin no proper opportunity to address it there, but OPH's general claim that Sandin's attorney's billed too much was specifically rejected by the district court. APP 778. It is appellant's burden to prove the district court abused its discretion. OPH has not shouldered that burden.

OPH has not challenged the district court's findings with respect to the other *Brunzell* factors, but they were well established in the motion papers in district court. Sandin will rely on the district court record to support the district court's award with respect to those factors, rather than repeating those discussions here.

6. The District Court Did Not Abuse Its Discretion in Determining that Appellant's Refusal to Accept the Offer Was Grossly Unreasonable.

Treating the third *Beattie* factor as a standard, rather than a factor, OPH makes two related arguments: First, that the district court erred in applying an incorrect standard, and second, that the error violates public policy. Citing and misrepresenting cases dissimilar to the facts of this case, OPH attempts to demonstrate that the public policy of this state is that attorney's fees cannot be awarded unless it is demonstrated that the offeree's refusal to accept the award was grossly unreasonable.

But OPH is wrong as a matter of law. As previously set forth, the standard

of review on appeal is abuse of discretion, and the *Beattie* factors are not individual legal standards that must be met; they are factors for the district court to consider. This Court has held that no single *Beattie* factor is determinative; the district court has broad discretion in awarding attorney's fees so long as all factors are considered in a non-arbitrary manner. *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 251, 955 P.2d 661, 672 (1998). Thus, even if it were true that the district court did not believe OPH's rejection of the offer was grossly unreasonable, as opposed to just mildly unreasonable, that fact would not require reversal so long as the district court considered all the factors, and weighed them in a manner that does not rise to the level of an abuse of discretion.

OPH is also factually wrong. In its order granting attorney's fees, the district court correctly stated the standard, APP 777 ¶22, and then stated that it had considered all of the factors and that they supported an award of attorney's fees. APP 778 ¶28. OPH filed a motion for reconsideration in which it insisted that the district court had found on the transcript of the hearing on the motion for attorney's fees (not in its order) both that the offer was unreasonable in timing and that OPH acted reasonably in rejecting it. APP 782; 785-86.[28] In the motion, OPH complained vociferously that the district court had applied the incorrect

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[28]This was a misrepresentation of the transcript, as set forth above.

standard as to the level of unreasonableness required to support an award of attorney's fees. APP 787-90. The district court disagreed.

At the hearing on the motion for reconsideration, the district court denied that it had ever stated that OPH acted reasonably in rejecting Sandin's offer of judgment. The district court denied this not once, not twice, not thrice, but eight times. APP 874-76.[29] The district court simply never concluded that OPH's rejection of the offer was justified. Appellant's assertions to the contrary are inappropriate. Instead, the district court recognized why OPH made the choice it did, and reaffirmed multiple times that OPH made that choice at its own risk. APP 874.[30] Weighing that rejection and the level of that rejection along with all of the other factors, the district court concluded that attorney's fees should be awarded.

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[29]For example, the district court stated: "And I never said that I thought that that was -- that it was a reasonable decision to reject the offer. I felt it was a choice that was made by OPH to take the risk. They were on notice that they had a substantial risk before them it was going to be a tough fight and if they proceeded with the Sandin defendants, you know, there's a risk. And that's, I'm assuming, the decision analysis that they followed and determined that it was worth the risk to proceed. APP 874.

[30]THE COURT: "And that was the problem in this case. And at the time of the motion to dismiss, again with our low standard, I feel that the Court was pretty clear that this is only because we've got the Nevada standard and not the Federal standard, you wouldn't have passed muster under the Federal standard, but if you wish to proceed, I felt -- while I may not have used these words, I feel that it was pretty clear from this record, that you did so at your own risk or your client did." *Id.* This idea was repeated several times by the district court.

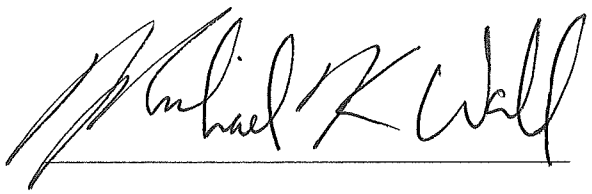
This was not an abuse of discretion.

CONCLUSION

This Court should dismiss this appeal.

DATED this 24 day of April, 2019.

HUTCHISON & STEFFEN, LLC.



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ATTORNEY'S CERTIFICATE

1. I certify that this petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect X4 in 14 point Times New Roman font.

2. I further certify that this petition complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 13,401 words.

3. Finally, I certify that I have read this petition, 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 petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the petition regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter

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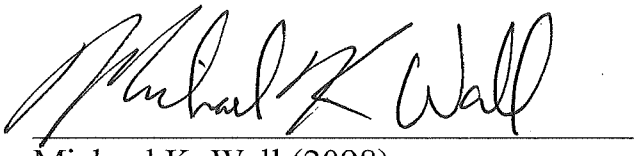
relied on is to be found. I understand that I may be subject to sanctions in the event the accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 24 day of April, 2019.

HUTCHISON & STEFFEN, LLC.



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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date **DAVE SANDIN AND SANDIN & CO.'S ANSWERING BRIEF** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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DATED this 24th day of April, 2018.

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