IN THE SUPREME COURT OF THE STATE OF NEVADA

O.P.H. OF LAS VEGAS, INC., Appellant, v. DAVE SANDIN AND SANDIN & CO., Respondents.	Supreme Court No. 76966 District Court No. A-12-672158

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 REPLY BRIEF

******

Michael N. Feder
Nevada Bar No. 7332
Gabriel A. Blumberg
Nevada Bar No. 12332
DICKINSON WRIGHT PLLC
8363 West Sunset Road, Suite 200
Las Vegas, NV 89113
Tel: (702) 550-4400
Fax: (844) 670-6009
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

DISCLOSURE STATEMENT

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.

Current counsel for O.P.H. of Las Vegas, Inc. ("OPH")
Michael N. Feder, Esq.
Nevada Bar No. 7332
mfeder@dickinsonwright.com
Gabriel Blumberg, Esq.
Nevada Bar No. 12332
gblumberg@dickinsonwright.com
DICKINSON WRIGHT PLLC
8363 W. Sunset Road, Suite 200
Las Vegas, Nevada 89113
Tel: (702) 550-4400
Fax: (844) 670-6009

Counsel for Dave Sandin and Sandin & Co. (the "Sandin Defendants")
Michael Wall, Esq.
Nevada Bar No. 2098
mwall@hutchlegal.com
Patricia Lee, Esq.
Nevada Bar No. 8287
plee@hutchlegal.com
HUTCHISON & STEFFEN, LLC
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
Tel: (702) 385-2500
Fax: (702) 385-2086

Previous counsel for OPH
Margaret A. Mcletchie, Esq.
Nevada Bar No. 10931
maggie@nvlitigation.com
Alina M. Shell, Esq.
Nevada Bar No. 11711
alina@nvlitigation.com
MCLETCHIE SHELL LLC
701 E. Bridger Avenue, Suite 520
Las Vegas, Nevada 89101
(702) 728-5300

INTRODUCTION

The primary premise and theory underlying the Sandin Defendants' Opposition is that OPH brought its claims in bad faith to force a settlement.[1] Aside from being incorrect, the theory fails because it ignores the district court's unambiguous conclusion that it was "good faith to bring the case" and "it was good faith [for OPH] to plead it." APP00875-APP00876. Indeed, despite OPH's first argument in its Opening Brief being that the district court erroneously awarded attorneys' fees to the Sandin Defendants after finding that OPH brought its claims in good faith, not once do the Sandin Defendants ever address the district court's clear and undeniable finding at multiple hearings that OPH plead claims against the Sandin Defendants in good faith.

The Sandin Defendants also attempt to argue that OPH was grossly unreasonable in rejecting a token $2,000 offer of judgment the day after it defeated the Sandin Defendants' motion to dismiss. But again, the Sandin Defendants miss the mark entirely by wholly ignoring the district court's finding that "it wasn't unreasonable [for OPH] to proceed," as well as OPH's policy argument that an affirmance would create a chilling effect on future lawsuits by incentivizing

[1] Ironically, the only bad faith exhibited in this matter is by the Sandin Defendants who begin their Opposition arguing that this appeal should be dismissed on jurisdictional grounds despite admitting that OPH timely filed its notice of appeal in compliance with this Court's governing precedent. Opposition at pp. 1-9.

defendants to make unreasonably small offers of judgment in an effort to force plaintiffs to forego their claims.

The Sandin Defendants' constant failures to address these and other key arguments in OPH's Opening Brief must be deemed an admission that the district court committed reversible error. For these reasons and those that follow, the Court should conclusively determine that the Sandin Defendants' cannot recover any attorneys' fees pursuant to their unreasonably small, token offer of judgment.

ARGUMENT

A. This Court Has Jurisdiction To Decide this Appeal

There is no principal more well-established than the rule that a party may not appeal a judgment as to one party until all matters against all parties have been resolved. *See Friedman v. Friedman*, 128 Nev. 897, 381 P.3d 613 (2012); *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."). Indeed, the Sandin Defendants concede that "this Court does not allow appeals from orders entered prior to a final judgment" and "[o]nly one final judgment may exist in a case." Opposition. at pp. 6, 8. In fact, the Sandin Defendants then go one step further in footnote 6, wherein they seem to admit jurisdiction is proper by noting that their jurisdictional argument fails as a

matter of law if there was no final judgment when the subject attorneys' fees order was entered. *Id.* at p. 5, n. 6.[2]

Here, there can be no doubt that there was a lack of finality as to all parties at the time the district court entered its order awarding the Sandin Defendants attorneys' fees. At the time the order was entered, OPH had viable claims against OMI that were scheduled for trial set in November 2018 (months after the district court had entered its order granting the Sandin Defendants their attorneys' fees). Once the OMI claims were resolved, OPH timely filed this appeal. Thus, pursuant to the Sandin Defendants' own admissions, this Court has jurisdiction to decide this appeal on the merits.

Despite the Sandin Defendants' concessions—which should foreclose any question about jurisdiction—they request that this Court upend its well-entrenched jurisdictional standards by enacting a new rule requiring a party to file a notice of appeal prior to a final judgment when the case has been remanded as to multiple parties. Opposition at pp. 6-9. This request must be denied.

First, the Sandin Defendants' proposed new rule cannot stand because it ignores the plain language of NRCP 54, which specifically provides that "any order or other decision, however designated, that adjudicates fewer than all the

[2] Had OPH filed a notice of appeal on July 16, 2018, the Sandin Defendants almost certainly would have argued that the appeal was premature because claims remained pending against OMI and there was no finality of the underlying action.

claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." NRCP 54(b). Based on the plain language of NRCP 54(b), the district court still could have revised or altered the award of attorneys' fees to the Sandin Defendants until OPH's claims against OMI were resolved via a final judgment. Therefore, OPH could not have appealed the award of attorneys' fees and the Sandin Defendants' proposed new rule would be unworkable given the current version of NRCP 54(b).[3]

Second, the Sandin Defendants' proposed new rule undoubtedly would severely prejudice OPH and deprive OPH of due process. "[D]ue process of law [is] guaranteed by the Fourteenth Amendment of the United States Constitution and Article 1, Section 8(5)... of the Nevada Constitution." *Gordon v. Geiger*, 402 P.3d 671, 674 (Nev. 2017) (citing *Rico v. Rodriguez*, 121 Nev. 695, 702–03, 120 P.3d 812, 817 (2005)). Due process protects substantial rights and demands notice before such a right is affected. *Id.* (citing *Wiese v. Granata*, 110 Nev. 1410, 1412, 887 P.2d 744, 745 (1994)).

[3] The Sandin Defendants claim that this "is not an NRCP 54(b) situation" because the award of attorney's fees followed a judgment that was final to all parties. This argument ignores the indisputable fact that OPH had pending claims against OMI scheduled for trial in November 2018 at the time the attorneys' fees order was entered on March 16, 2018.

OPH operated under the longstanding principle that an order as to one party cannot be appealed until all matters against all parties have been resolved. *Friedman v. Friedman*, 128 Nev. 897, 381 P.3d 613 (2012); *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000). If the Court were to accept the Sandin Defendants' new rule, it would bar OPH's appeal without providing OPH proper notice of its abridged deadline to file a notice of appeal. This outcome would severely prejudice OPH and violate basic tenets of due process and thus cannot be accepted.

This Court therefore should reject the Sandin Defendants' jurisdictional arguments and issue an opinion on the merits.

B. District Courts Must Adhere to the *Beattie* Factors When Deciding Whether To Award Attorneys' Fees Pursuant to an Offer of Judgment

A district court cannot award attorneys' fees to a party simply because that party obtained a result more favorable than their offer of judgment. *See Beattie v. Thomas*, 99 Nev. 579, 588-89; 668 P.2d 268, 274 (1983). Instead, a district court can only award attorneys' fees based on an offer of judgment if it properly applies and analyzes the following factors:

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.

Id.; *see also Ozawa v. Vision Airlines*, 216 P.3d 788, 792 (Nev. 2009).

Here, the district court failed to apply the *Beattie* factors properly and abused its discretion in awarding attorneys' fees to the Sandin Defendants.

C. The Sandin Defendants Fail To Dispute that the District Court Determined OPH Brought Its Claims in Good Faith

The first *Beattie* factor required the district court to analyze whether OPH brought its claims in good faith. *Beattie v. Thomas*, 99 Nev. at 588-89. In its Opening Brief, OPH quoted the district court's statements at both the February 6, 2018 hearing and May 1, 2018 rehearing where the district court unambiguously stated that OPH acted in "good faith to bring the case" and "it was good faith [for OPH] to plead it." *See* Opening Brief at p. 14. These statements undoubtedly demonstrated that the Court found in favor of OPH on the first *Beattie* factor.

Tellingly, the Sandin Defendants do not address these statements at all.[4] Their silence speaks volumes and must be construed as an admission that the district court found in favor of OPH on the first *Beattie* factor. *Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating a party's failure to respond to an argument as a concession that the argument is meritorious).

[4] The Sandin Defendants similarly attempted to ignore these statements in the draft order they prepared that omitted any written findings regarding the first *Beattie* factor. *See* APP00777-APP00778.

Instead of addressing the district court's unambiguous conclusion, the Sandin Defendants argue that *this* Court did not conclude that OPH brought its claims against the Sandin Defendants in good faith. Opposition at pp. 28-30. This argument is irrelevant. The issue on appeal is whether the *district court* properly awarded attorneys' fees to the Sandin Defendants based on its analysis of the *Beattie* factors. The issue is not whether *this* Court determined that OPH filed its claims against the Sandin Defendants in good faith.

Furthermore, the Sandin Defendants' misguided argument regarding this Court's prior holding must be rejected because this Court never found that OPH brought its claims in bad faith. This much is clear given that the Sandin Defendants argument is not supported with any cite to the record and instead is pure (incorrect) conjecture. Moreover, as stated above, it fails to address the point in OPH's opening brief that the district court clearly and unambiguously determined that OPH brought its claims against the Sandin Defendants in good faith. *See* Opening Brief at p. 14.

Similarly, the Court must reject the Sandin Defendants' specious and unsupported argument that OPH's claims were not brought in good faith because "they were not based on law or any legal or equitable principle." Opposition at p. 36. This inaccurate statement ignores the rulings of this Court and the district court which both concluded that a party can establish liability of an insurance agent

by proving the insurance agent established a duty through course of conduct.[5] APP00761-APP00762; *O.P.H. of Las Vegas, Inc. v. Oregon Mut. Ins. Co.*, 401 P.3d 218, 223 (Nev. 2017) ("We recognize that an insurance broker may assume additional duties to its insured client in special circumstances.").[6]

Furthermore, OPH believed the Sandin Defendants had assumed such a duty based on their course of conduct and Sandin's admission in his deposition that he has a practice of notifying clients of pre-cancellation notices.[7] APP00228-APP00231. Ultimately, the district court and this Court concluded OPH did not meet its burden to prove that the Sandin Defendants had assumed such a duty. Those holdings do not demonstrate bad faith; rather, they simply show that OPH pursued a valid legal theory against the Sandin Defendants but ultimately did not prevail. This is why the district court concluded that OPH acted in "good faith to

---

[5] It also ignores that the district court denied the Sandin Defendants' motion to dismiss.

[6] Oddly, the Sandin Defendants quote this exact language in their Opposition despite later arguing that OPH's claims were not based on any legal or equitable principle. *See* Opposition at p. 28.

[7] The Sandin Defendants also argue that they could not have informed OPH of the pre-cancellation notice because OMI never sent them the notice. *See, e.g.*, Opposition at p. 35. This argument is belied by OMI's assertion that it posted the pre-cancellation notice in the Sandin Defendants' BizLink account for the Sandin Defendants to review. APP00227.

bring the case" and "it was good faith [for OPH] to plead it" and found in favor of OPH on the first *Beattie* factor, a factor never addressed by the Sandin Defendants.

Thus, the Court should conclude that the first *Beattie* factor weighed in favor of OPH. *Ozawa*, 125 Nev. at 563.

D. The Offer of Judgment Was Unreasonable in Timing

The second *Beattie* factor requires the district court to determine whether the offer of judgment was reasonable in timing and amount. *Beattie v. Thomas*, 99 Nev. 579, 588, 668 P.2d 268, 274 (1983). The district court clearly abused its discretion by determining that the offer of judgment was reasonable in terms of timing and amount.

In their Opposition, the Sandin Defendants attempt to argue that, despite the offer of judgment being made the day after OPH defeated the Sandin Defendants' motion to dismiss, the timing of the offer of judgment was still reasonable because OPH's "lawyer had to have recognized the strength of Sandin's arguments, and the weakness of their claims." Opposition at p. 40, n. 22. Unsurprisingly, the Sandin Defendants offer no citation for this baseless, frivolous assertion and thus it must be rejected. *Browning v. State*, 120 Nev. 347, 354, 91 P.3d 39, 45 (2004) (noting that issues not presented with relevant authority and cogent argument will not be considered by this Court); *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (same).

The reality is that it would be impossible for any attorney to convince a client—especially one who lost its entire restaurant—to accept a $2,000 offer of judgment the day after the district court denied a motion to dismiss its complaint and after the client had already spent more than $2,000 to file its claims and defeat the motion to dismiss.[8] As such, the timing of the Sandin Defendants' paltry offer of judgment certainly was unreasonable and cannot permit an award of attorneys' fees.

In a further effort to justify its unreasonably timed offer of judgment, the Sandin Defendants cite to *LaForge v. State, Univeristy and Community College System of Nevada*, 116 Nev. 415, 997 P.2d 130 (2000). The Sandin Defendants' cite to *LaForge*, however, is misplaced and offers no basis for affirming the district court's decision in this matter. In *LaForge*, the plaintiff was a former professor at the University of Nevada, Reno (the "University") who had been terminated pursuant to the express terms of his employment contract. *LaForge*, 116 Nev. at 418. Despite this fact, LaForge filed complaints against the University in both federal and state courts in Nevada. *Id.* The federal court dismissed the federal

[8] Indeed, when initially presented with this issue in 2015, the district court even acknowledged "I don't know if [$2,000] is a reasonable amount" because the district court was "not even sure if that's enough to cover costs at the time." APP00618.

case on the grounds that the University properly terminated the plaintiff. *Id.* at 419.

After the federal court dismissed Laforge's complaint, the University tendered an offer of judgment to LaForge in the state case. *Id.* LaForge rejected the offer of judgment. *Id.* The University then filed a summary judgment motion and the state court granted the motion, ruling that issue preclusion prevented LaForge from pursuing his claims in state court. *Id.* The state court then granted the University's request for attorneys' fees based on the rejected offer of judgment. *Id.* On appeal, this Court affirmed the award of attorneys' fees because LaForge knew that his federal case had been dismissed and thus the district court did not abuse its discretion in awarding attorneys' fees. *Id.*

As evidenced by the factual background in *LaForge*, LaForge is highly distinguishable from the case at hand. At the time LaForge rejected the offer of judgment, he already had similar claims dismissed by a federal court and thus knew he could not prevail on his claims. Here, OPH's claims were not dismissed at the time the offer of judgment was made. Indeed, to the contrary, the district court denied the Sandin Defendants' motion to dismiss and permitted OPH to pursue its claims. As such, the Sandin Defendants' reliance on *LaForge* is misplaced and actually further demonstrates the error in the district court's mistaken conclusion that the token offer of judgment made at the outset of the

case, a mere one day after the motion to dismiss was denied and prior to any discovery, was reasonably timed.

E. The Offer of Judgment Was Unreasonable in Amount

The Sandin Defendants also failed to demonstrate that their offer of judgment was reasonable in amount. The Sandin Defendants' primary argument in their Opposition is that the $2,000 offer of judgment was reasonable in amount because the Court ultimately decided in favor of the Sandin Defendants. Opposition at pp. 27, 41. Under the Sandin Defendants' theory, any offer amount would have to be deemed reasonable when a defendant prevails because that amount will necessarily exceed $0. This is not the governing standard, nor could it be because it would eliminate the second *Beattie* factor altogether. As such, the Court cannot affirm the award of attorneys' simply because the Sandin Defendants ultimately beat the offer of judgment.

In an alternative attempt to justify the district court's erroneous decision, the Sandin Defendants argue that $2,000 was a reasonable amount because the case was in court-annexed arbitration at the time the offer of judgment was made. Opposition at p. 41. As OPH identified repeatedly without any dispute from the Sandin Defendants, OPH alerted the Sandin Defendants at the outset of the case that its damages were in excess of $50,000 by noting as much on the first page of

its complaint in bold font. APP00106. Thus, the Sandin Defendants' argument regarding arbitration is meritless and must be rejected.

Lastly, the Sandin Defendants opine that $2,000 was a reasonable amount because OPH filed its complaint as a "shakedown with a real value of zero dollars." Opposition at p. 43. Once again, however, the Sandin Defendants make an argument that is unsupported by the record as demonstrated by the Sandin Defendants' failure to provide any citation. As such, this argument must be rejected because it is not supported by the record and is actually contrary to the district court's conclusion that OPH brought its claims against the Sandin Defendants in good faith. APP00762; APP00875-APP00876; *see also Browning v. State*, 120 Nev. 347, 354, 91 P.3d 39, 45 (2004) (noting that issues not presented with relevant authority and cogent argument will not be considered by this Court); *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (same).

The Sandin Defendants' therefore fail to offer this Court any valid basis for affirming the district court's arbitrary and unsustainable conclusion that the offer of judgment was reasonable in timing and amount.

. . .

. . .

. . .

. . .

F. The Sandin Defendants Cannot Demonstrate that the District Court Concluded that OPH Was Grossly Unreasonable in Rejecting the Offer of Judgment or that the District Court Applied the Proper Standard for the Third *Beattie* Factor

1. The District Court Never Found that OPH Was Grossly Unreasonable

The third *Beattie* factor required the district court to determine whether the party rejecting the offer of judgment was *grossly* unreasonable. *Beattie*, 99 Nev. at 588-89. In its opening brief, OPH identified that the district court specifically concluded that "it wasn't unreasonable [for OPH] to proceed." Opening Brief at p. 20 (citing APP00763). The Sandin Defendants again fail to address the district court's unambiguous finding as to the third *Beattie* factor and thus must be deemed to have conceded this issue. *Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (failure to respond to an argument may deemed a confession of error); *see also Ozawa*, 125 Nev. at 563.

Instead of addressing the district court's indisputable language, the Sandin Defendants instead focus on another portion of the February 6, 2018 hearing transcript in an effort to construct a whole new interpretation of the Court's findings. *See* Opposition at pp. 30-31. The Sandin Defendants' tactic is meritless and must be rejected.

First, the language the Sandin Defendants' focus on actually demonstrates that the district court concluded OPH was not grossly unreasonable in rejecting the

offer of judgment because the Court determined OPH was acting in good faith. *See id.*

Second, it is unfathomable that the Sandin Defendants could believe their manufactured, ascribed meaning to the district court's statements are "a fairer construction of the district court's comment as a whole" given their failure to address the "good faith" and "wasn't unreasonable" quotes OPH cited to for the proposition that the district court determined OPH was not grossly unreasonable in rejecting the offer of judgment. *See id.* at p. 32. The Sandin Defendants simply cannot offer "a fairer construction" without any support, especially given the key statement made by the district court that "it wasn't unreasonable [for OPH] to proceed." As such, the Sandin Defendants' argument must be rejected.

Perhaps recognizing that they ignored the district court's critical comment that "it wasn't unreasonable [for OPH] to proceed," the Sandin Defendants then bizarrely argue that the district court's statements are irrelevant. Opposition at p. 32. The Sandin Defendants' position is untenable as the district court's comment on the record is clearly relevant. Indeed, this Court reviews and references comments made by the district court relating to appealable orders. *See, e.g., Lopez v. Lopez*, No. 65196, 2016 WL 380265, at *1 (Nev. Jan. 27, 2016) (unpublished). Here, the hearing transcripts have been included as part of the appellate record and thus the Court can, and should, review the district court's statements, especially

ones stating that OPH proceeded in good faith and was not unreasonable, when rendering a decision on this appeal. *Id.*

2. The District Court Failed To Apply the Correct Standard for the Third *Beattie* Factor

The Sandin Defendants try to assert that the district court applied the correct grossly unreasonable standard by merely noting that the district court's March 14, 2018 Order stated the correct legal standard and thus the district court must have accurately applied the proper standard. Opposition at p. 53. What the Sandin Defendants ignore, however, is that the Court did not issue any written findings regarding this *Beattie* factor. *See* APP00777-APP00778.

Given the district court's silence in the order, this Court must look to the transcript from the two hearings to determine whether the district court erred in its analysis of the third *Beattie* factor.[9] *See Lopez*, No. 65196, 2016 WL 380265, at *1. As identified above, the February 6, 2018 transcript clearly reflects that the district court did not believe OPH was unreasonable in pursuing its case and

[9] Tellingly, the Sandin Defendants offer no citation to any transcript where the district court used the proper standard of grossly unreasonable. Indeed, the Sandin Defendants seem to recognize the district court only analyzed whether the decision to reject the offer was unreasonable arguing that it should not make a difference whether "OPH's rejection of the offer was grossly unreasonable, as opposed to just mildly unreasonable." Opposition at p. 53. The Sandin Defendants' argument once again would require this Court to change or ignore the governing "grossly unreasonable" *Beattie* standard in order to affirm the district court's erroneous judgment.

rejecting the offer of judgment. APP00810 (district court stating "it wasn't unreasonable [for OPH] to proceed"). And although the district court on reconsideration determined OPH's decision was unreasonable—a new factual decision rendered absent any new evidence being presented—the district court *never* concluded or even analyzed whether OPH was *grossly* unreasonable. *See* APP00796-APP00816; APP00864-APP00877.[10] This failure constitutes reversible error. Indeed, the record is devoid of any evidence whatsoever that could support a finding that OPH was grossly unreasonable in rejecting the Sandin Defendants' premature, bad faith, miniscule offer of judgment. That is because it "wasn't unreasonable" for OPH to reject the token $2,000 offer of judgment.

G. The Sandin Defendants Fail to Address the Public Policy Problems Associated with the District Court's Decision

As they do throughout their Opposition, the Sandin Defendants once again attempt to oppose OPH's argument by misstating and misinterpreting it. In its Opening Brief, OPH argued that affirming the district court's order would create a chilling effect on future lawsuits because defendants would automatically issue trivial, token offers of judgment every time they lost a motion to dismiss in an attempt to guarantee recovery of all of their attorneys' fees if they prevailed later in

[10] Notably, the Sandin Defendants failed to cite to a single case in their argument relating to the third *Beattie* factor and failed to identify any portion of either transcript where the district court concluded that OPH was grossly unreasonable. *See* Opposition at pp. 43-46. That is because it never happened.

the case. This unworkable standard, and incredibly dangerous and expensive penalty provision, undoubtedly would preclude numerous plaintiffs from attempting to pursue their rights and recover for defendants' wrongful actions. Indeed, the exact fear this Court had attempted to avoid through imposition of the *Beattie* factors would be borne out: offers of judgment would be used as "a vehicle to pressure offerees into foregoing legitimate claims in exchange for unreasonably low offers of judgment." *Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998).

Rather than address this legitimate policy concern, Defendants instead interpret OPH's argument to be 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." Opposition at p. 52. Though *Beattie* does require a finding that a refusal was *grossly* unreasonable, this is not the public policy argument raised in OPH's Opening Brief and thus Defendants offer no cogent response to OPH's public policy argument. The Court therefore must reject the Sandin Defendants' argument and view them as having conceded the merit of OPH's public policy argument. *Browning v. State*, 120 Nev. 347, 354, 91 P.3d 39, 45 (2004); *Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984).

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

The Sandin Defendants focus the majority of the *Brunzell* argument in their Opposition on their billing rates, but OPH never challenged counsel's billing rates. Rather, OPH challenged Defendants' counsel's apparent attempt to compensate for their discounted billing rates by inflating the number of hours they spent working on the case. *See* Opening Brief at pp. 24-25. As noted in the Opening Brief, the Sandin Defendants billed 123.2 hours to prepare a 23-page Motion for Summary Judgment, 7.5 hours to review OPH's Opposition to the Motion for Summary Judgment, and 63.5 hours to prepare the Reply in support of the Motion for Summary Judgment.[11] Opening Brief at pp. 24-25. In addition, OPH cited to case law holding that such time was excessive and required reducing an award of attorneys' fees. *See id.* (citing *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)).

The Sandin Defendants do not address OPH's case law, nor do they provide any of their own to support the untenable notion that the approximately 200 hours

[11] This figure excludes the 19.4 hours that were no charged relating to the motion for summary judgment. 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 motion for summary judgment. APP00558-APP00571.

spent on the summary judgment motion were reasonable. The only defense the Sandin Defendants provide is a vague allegation, unsupported by any citation to the record, that "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." Opposition at p. 51. This defense fails because it is not supported by any authority, nor does it justify the outrageous amount of time the Sandin Defendants spent working on the summary judgment papers.

Similarly, the Court must reject the Sandin Defendants attempt to categorize OPH's argument as improperly being raised for the first time on appeal. Opposition at pp. 50-51. In the same paragraph where the Sandin Defendants claim OPH is arguing overbilling for the first time, the Sandin Defendants readily admit that "[i]n district court, OPH argued generally that there was over billing." *Id.* As a result, OPH is not inappropriately raising overbilling for the first time on appeal, but rather is correctly articulating that the district court erred by failing to reduce the award of attorneys' fees to account for overbilling.[12]

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

[12] The transcript also reflects that overbilling was raised in the district court because the district court erroneously concluded that it "didn't see any problems with the billing, no over billing, no double billing." APP00876.

Defendants' cannot recover any attorneys' fees pursuant to their unreasonably small, token offer of judgment.

Respectfully submitted this 24th day of June 2019.

DICKINSON WRIGHT PLLC

Michael N. Feder, Nevada Bar No. 7332
Email: mfeder@dickinson-wright.com
Gabriel Blumberg, Nevada Bar No. 12332
Email: gblumberg@dickinson-wright.com
8363 West Sunset Road, Suite 200
Las Vegas, Nevada 89113-2210
Tel: (702) 550-4400
Fax: (844) 670-6009
Counsel of Record for Appellant

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 4,863 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 24th day of June 2019.

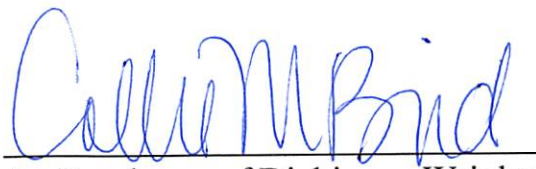
DICKINSON WRIGHT PLLC

Michael N. Feder, Nevada Bar No. 7332
Email: mfeder@dickinson-wright.com
Gabriel Blumberg, Nevada Bar No. 12332
Email: gblumberg@dickinson-wright.com
8363 West Sunset Road, Suite 200
Las Vegas, Nevada 89113-2210
Tel: (702) 550-4400
Fax: (844) 670-6009
Counsel of Record for Appellant
Signed in Clark County, Nevada

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of June 2019, I submitted the foregoing Appellant's Reply Brief for filing via the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

Michael K. Wall, Esq.
Patricia Lee, Esq.
HUTCHISON & STEFFEN
10080 W. Alta Drive, Suite 200
Las Vegas, NV 89145
Email: mwall@hutchlegal.com
Email: plee@hutchlegal.com



An Employee of Dickinson Wright PLLC

LVEGAS 78140-1 305792v1