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

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APPELLANT'S PETITION FOR REVIEW

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I. QUESTIONS PRESENTED

A. Whether, as set forth in the dissent, the Court of Appeals majority opinion conflicts with this Court's prior decisions by affirming an award of attorneys' fees pursuant to an offer of judgment despite the district court having failed to apply or properly weigh the factors in *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983).

B. Whether, as stated in the dissent, the Court of Appeals majority opinion erred concerning a fundamental issue of statewide public importance by affirming the district court's award of more than $125,000 in attorneys' fees pursuant to a token $2,000 offer of judgment that was designed to force O.P.H. of Las Vegas, Inc. ("OPH" or "Appellant") to forego its claims the day after it defeated Dave Sandin and Sandin & Co.'s (the "Sandin Defendants") motion to dismiss and after it had already expended in excess of this amount opposing the motion to dismiss.

II. INTRODUCTION

The Court of Appeals' majority decision (the "Majority"), authored by Judges Tao and Bulla, contradicted this Court's mandates in *Beattie* and its progeny by affirming a district court's six-figure attorneys' fees award in a matter where the district court failed to coherently implement the *Beattie* factors. The Majority then further uprooted this Court's principles by countenancing the district court's use of one conclusory statement about the *Beattie* factors in general as sufficient support for the judgment despite the record lacking any explicit or implicit support for it.

As explained by Chief Judge Gibbons in the dissenting opinion (the "Dissent"), such lack of detail setting forth an analysis supporting the district court's conclusions about each *Beattie* factor cannot be affirmed because it will allow lower courts to avoid the *Beattie* requirements and any meaningful appellate review.

Additionally, the Majority opinion impacts a fundamental issue of statewide public importance because it tramples upon the public's fundamental right of access to the courts. See *Bradley v. PNK (Lake Charles), L.L.C.*, 420 P.3d 559 (Nev. 2018) (unpublished) (citing *Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553, 558, 560–61, 563 (1920); *McBurney v. Young*, 569 U.S. 221, 231 (2013)). If the Majority decision is not reviewed, it will signal to future defendants that they should file a motion to dismiss in every single case and then, if they lose the motion to dismiss, immediately serve an unreasonably low offer of judgment that has no chance of resolving the matter solely as a mechanism to force the plaintiff to forego its claims or be subject to paying hundreds of thousands of dollars of attorneys' fees if the plaintiff is unable to prevail. This point was stressed by the Dissent, which noted that "litigants should not be coerced into settling cases of arguable merit because of fear of large awards of attorney fees, which the court might determine years later, in hindsight, should be awarded, because a token offer was reasonable."

This Majority opinion cannot be tolerated and therefore this Court should grant OPH's petition for review.

III. FACTUAL BACKGROUND

This matter involves OPH, a small business owner who operated a restaurant in Las Vegas, Dave Sandin, its insurance broker, and Sandin & Co., its insurance agency. Opinion at p. 1. Following a recommendation by Dave Sandin, OPH entered into a "Businessowners Protector Policy" with Oregon Mutual Insurance Company ("OMI") that became effective on December 26, 2011 (the "Policy"). *Id.*

As a result of OPH failing to pay its monthly premium to OMI in July 2012, OMI allegedly notified OPH and the Sandin Defendants that it would cancel the Policy effective August 16, 2012 if OMI did not receive the July premium by August 15, 2012. *Id.* at pp. 8-9. The Sandin Defendants never notified OPH of the pending cancellation and OPH never received the notice from OMI. *Id.* On August 17, 2012, OPH's restaurant was destroyed by a fire causing hundreds of thousands of dollars in damages. *Id.* at p. 9. OPH, devastated by the fire, notified the Sandin Defendants of the complete loss. *Id.* The Sandin Defendants reported OPH's claim to OMI, who summarily denied OPH's claim based on nonpayment of premium. *Id.*

On November 19, 2012, OPH filed a complaint against OMI and the Sandin Defendants, asserting claims against the Sandin Defendants for fraud in the inducement, fraud, breach of fiduciary duty, and negligence. *Id.* On December 26, 2012, the Sandin Defendants filed a motion to dismiss all of the claims against them for failure to state a claim pursuant to NRCP 12(b)(5). *Id.* The district court orally

denied the Sandin Defendants' motion to dismiss on February 13, 2013. *Id.* The *very next day*, the Sandin Defendants served a token $2,000 offer of judgment on OPH (the "Offer"). *Id.* OPH reasonably rejected the Offer. *Id.* at p. 20.

Years later, the district court granted summary judgment in favor of the Sandin Defendants and the Sandin Defendants sought attorneys' fees pursuant to their $2,000 Offer. *Id.* at p. 9. At the first hearing for attorneys' fees in 2015, the district court appeared to determine that OPH brought its claims in good faith and was not unreasonable in rejecting the Offer. *Id.* at p. 14. The district court simply wanted additional time to determine whether the $2,000 Offer was reasonable in timing and amount given that all parties knew OPH was seeking hundreds of thousands of dollars in damages and already spent significantly more than $2,000 to defeat the Sandin Defendants' motion to dismiss. *Id.* at pp. 9-10.

Over two years later, following this Court's ruling on certain appeals, the district court held another hearing on the Sandin Defendants' request for attorneys' fees. *Id.* at p. 10. At this hearing, the district court stated "that the parties acted in good faith, and it was reasonable for OPH to proceed with the case." *Id.* Despite these explicit findings, the district court awarded the Sandin Defendants $127,242 in attorneys' fees. *Id.* OPH sought reconsideration, which was denied. *Id.* at p. 3.

Based on this background, which the Dissent observed "suggested that perhaps none of the first three factors in *Beattie* favored Sandin," OPH appealed the

district court's order. On January 22, 2020, the Court of Appeals issued a split decision. The Majority affirmed the district court order and the Dissent issued a strong, lengthy opinion illustrating why this petition for review should be granted and explaining that "[a]llowing a court to impose a six-figure judgment against a party in a summary proceeding when the Court itself does not follow the law is incompatible with justice." *See* Opinion at p. 23.

IV. LEGAL ARGUMENT

A. The Majority's Decision Conflicts with this Court's Precedent

This Court mandates that district courts "must carefully evaluate the following factors" when deciding whether to award attorneys' fees under an offer of judgment:

(1) whether OPH's claims were brought in good faith;

(2) whether the Sandin Defendants' Offer 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.

Beattie v. Thomas, 99 Nev. 579, 588-89; 668 P.2d 268, 274 (1983). A district court's application of the *Beattie* factors is reviewed for an abuse of discretion. *LaForge v. State, Univ. & Cmty. Coll. Sys. Of Nev.*, 116 Nev. 415, 997 P.2d 130 (2000).

Here, the Majority admitted that the district court failed to make express findings on all of the *Beattie* factors, but concluded this was not an abuse of discretion because the district court need not do so "where support for an *implicit*

ruling regarding one or more of the factors is clear on the record." *Id.* at p. 4 (emphasis added). But as the Dissent notes, there was no support in the record, implicit or explicit, for the district court's ruling and the only thing that was clear from the record was that the district court failed to address or adequately analyze the *Beattie* factors. *Id.* at pp. 21-22.

Indeed, the Majority, similar to the district court, failed to perform any analysis of the first and third *Beattie* factors, instead simply assuming that the district court properly analyzed them because its written order summarily stated it had weighed the *Beattie* factors. *Id.* at p. 5. This dangerous error precludes a proper abuse of discretion review and its harm is underscored by the Dissent, which explains in great detail why the Majority's opinion is contrary to this Court's precedent and must be vacated. *See, e.g., id.* at p. 19 (concluding that reversal is warranted because "the facts and comments from the district court seemed to point in the opposite direction as to the result ultimately reached.").

1. The Dissent Established that the Majority Contradicted this Court's Prior Rulings By Affirming the District Court's Award of Attorneys' Fees When the First *Beattie* Weighed Heavily Against Awarding Attorneys' Fees

The Majority recognized that the district court failed to enter any explicit findings in its written order regarding the first *Beattie* factor. However, the Majority ignored and failed to address the indisputable, explicit evidence in the record identified by OPH and the Dissent that the district court specifically stated that OPH

acted in good faith. Opinion at pp. 4, 14, 16; *see also* OPH's Opening Brief at p. 14 (highlighting 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.").

This failure was critical here where the Majority affirmed the district court's order, determining without any support that "an implicit ruling regarding all of the *Beattie* factors is clear on the record." Opinion at pp. 6, 8. Given the lack of any such support and, moreover, that the record only indicates that the first *Beattie* factor favored *OPH*, the Majority necessarily contravened this Court's precedent by *assuming* the district court appropriately considered and weighed this factor when, as the Dissent highlights, the factor mandated a decision contrary to the one the district court actually issued. *Id.* at pp. 16-17.

2. The Dissent Revealed that the Majority Violated this Court's Past Decisions by Ratifying the District Court's Failure to Conduct the Required Fact Intensive Inquiry Regarding Whether the Offer was Made in Good Faith and Was Reasonable in Timing and Amount

When initially presented with the second *Beattie* factor in 2015, the district court 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." Opinion at pp. 9-10, 14. When revisiting this issue at the second hearing in 2018, the district court once again questioned whether $2,000 was a reasonable offer and acknowledged that everyone "realized that [OPH] was [making] a big claim" at the time the Offer was made. *Id.* at pp. 14-15. Despite these comments and the record

being devoid of any other statements detailing why a $2,000 offer made the day after the district court denied a motion to dismiss would be considered reasonable, the Majority rests its affirmance on the fact that the district court's written order has one unexplained, unsupported conclusory statement that the Offer was reasonable and in good faith in both timing and amount.

As the Dissent correctly identifies, this Court "should not now countenance the use of the one unexplained finding (as to factor two) to be decisive." *Id.* at p. 19. The Dissent's remark is particularly compelling here where: (1) the nominal Offer was for $2,000; (2) OPH was seeking hundreds of thousands of dollars in damages because its business was destroyed; (3) the Offer was made the day after the district court denied the Sandin Defendants' motion to dismiss; (4) OPH already incurred more than $2,000 in attorneys' fees to defeat the Sandin Defendants' motion to dismiss; (5) an answer had not been filed; and (6) no discovery had been conducted.

Without addressing these issues, the Majority violated this Court's precedent by affirming the district court's failure to analyze the second *Beattie* factor properly or provide sufficient detail in its order to permit any form of meaningful appellate review under an abuse of discretion standard.

3. The Dissent Demonstrates that the Majority Decision Conflicted with this Court's Precedent by Affirming the District Court's Misconception and Misapplication of the Third *Beattie* Factor

Similar to the first factor, the Majority again agreed that the district court

failed to provide any explicit findings regarding the third *Beattie* factor, but forgave this exclusion because the record allegedly implicitly supported the district court's decision. Opinion at p. 4. But as the Dissent noted, this reasoning is fundamentally flawed because the record explicitly demonstrated that OPH was *not* grossly unreasonable and did *not* exhibit bad faith in rejecting the Offer. *Id.* at p. 21.

Indeed, nowhere in the record did the district court find that OPH's rejection of the Offer was grossly unreasonable or in bad faith. To the contrary, the record explicitly revealed that "it wasn't unreasonable [for OPH] to proceed" and OPH "acted in good faith." *Id.* at p. 15. If OPH acted in good faith and was not unreasonable in rejecting the Offer, the district court could not find that OPH was *grossly* unreasonable or acted in bad faith when rejecting the Offer. The Majority's failure to reverse on this basis defied this Court's established precedent.

B. The Majority's Decision Involves Fundamental Issues of Statewide Public Importance Because It Will Deter Future Litigants from Filing Meritorious Lawsuits

As the Dissent observed, the Majority's decision violates public policy and this Court's precedent because it encourages defendants to submit small, token offers of judgment at the outset of the case solely to force plaintiffs to forego their fundamental right to justice due to the fear of an unreasonable award of attorneys' fees based on an unreasonably small offer of judgment. *See Yamaha*, 114 Nev. at 252 (stating a primary reason why this Court instituted the mandatory *Beattie* factors

was to avoid "the effect of unfairly forcing litigants to forego legitimate claims").

The Majority opinion is especially troubling in this case, where it would have been nearly impossible for any attorney to explain to a client that it should accept a $2,000 offer of judgment the day after the district court ruled that the client plead a viable claim for relief. This impossibility is further magnified here, where the client: (1) is a small business owner whose business was destroyed just six months prior to the token offer of judgment; (2) incurred hundreds of thousands of dollars in extensive damages; and (3) had already expended more than the value of the offer in attorneys' fees defeating a motion to dismiss at the time the offer was made.

Simply put, the Majority's affirmance creates a chilling effect on future lawsuits by incentivizing defendants to make unreasonably small offers of judgment at the outset of litigation because they know that even a paltry offer of judgment will be sufficient "to create the foundation to file a motion for attorney fees years later" even if the offer is "not really trying to settle the case." Opinion at p. 17. This outcome is in direct contravention of the policy concerns outlined by this Court in *Beattie* and highlighted in the Dissent concerning this State's established history of protecting its citizens' constitutional right to justice. Any other result is antithetical to these principles and will erode the abuse of discretion standard that is supposed to protect litigants from the type of arbitrary and capricious judgments issued in this matter. Thus, this Court should grant OPH's petition for review.

Respectfully submitted this 7th day of February 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition 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 petition has been prepared in a proportionally spaced typeface using Microsoft Word 2016, font size 14-point, Times New Roman. I further certify that this petition complies with the page- or type-volume limitations of Nev. R. App. P. 32 and Nev. R. App. P. 40B, it is proportionately spaced, has a typeface of 14 points or more, and contains 2,602 words. Finally, I hereby certify that I have read this appellate 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 Nev. R. App. P. 28(e)(1), which requires every assertion in the petition 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 petition is not in conformity with the requirements of the

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Nevada Rules of Appellate Procedure.

Respectfully submitted this 7th day of February 2020.

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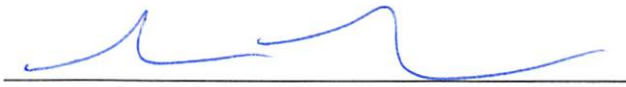

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of February 2020, I submitted the foregoing PETITION FOR REVIEW for filing via the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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