IN THE SUPREME COURT OF THE STATE OF NEVADA

VIVIA HARRISON, AN INDIVIDUAL, Appellant, vs. RAMPARTS, INC., dba LUXOR HOTEL & CASINO, A NEVADA DOMESTIC CORPORATION, Respondents.	No. 80167 Appeal from the Eighth Judicial District Court, the Honorable, David M. Jones Presiding

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entitles as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification of recusal.

Ramparts, Inc., dba Luxor Hotel and Casino ("Luxor") is a Nevada domestic corporation, was represented in the District Court by Lincoln, Gustafson & Cercos, LLP.

Luxor is represented in this Court by Lincoln, Gustafson & Cercos, LLP.

DATED this 23 day of December, 2020.

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B. WHETHER THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY AWARDING ATTORNEY'S FEES TO LUXOR BASED UPON A REASONABLE $1,000 OFFER OF JUDGMENT ACCORDING TO THE *BEATTIE* AND *BRUNZELL* FACTORS.

II. STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

The underlying case relates to allegations by Appellant/Plaintiff, Vivia Harrison ("Harrison"), against Respondent/Defendant, Ramparts, Inc. dba Luxor Hotel and Casino ("Luxor"), from an incident that occurred at the Luxor on December 10, 2014. Plaintiff filed suit against Luxor, Desert Medical Equipment ("Desert Medical") and Pride Mobility Products ("Pride Mobility") on February 24, 2016. 1 AA 1-9.

The matter proceeded to trial on December 10, 2018 wherein the jury returned a defense verdict in favor of Luxor and Desert Medical. 4 AA 701-708. During the trial but prior to the jury's verdict, Harrison purportedly entered an unwritten trial agreement with Desert Medical that no matter what the jury's verdict was, Desert Medical would be obligated to pay Harrison according to the terms of the high-low ($750,000-$150,000) trial agreement. *Id.* Despite the defense verdict, Desert Medical was required to pay $150,000.00. *Id.* After the trial, on December 20, 2018

and January 8, 2019, Harrison's attorneys sent a notice of attorney lien to all parties claiming they are entitled to an attorney's lien in the amount of $169,246.73. 4AA 680-681.

On appeal, Harrison requests this Court to reverse that portion of Luxor's award of attorney fees and costs order allowing Luxor to offset its award of attorney fees and costs against Harrison's counsel attorney's lien. 4 AA 584. Alternatively, Harrison requests this Court to reverse the District Court's award of attorney fees and costs relying upon Luxor's $1,000 offer of judgment based upon the *Beattie*[1] and *Brunzell*[2] factors. *Id.*

As discussed in more detail below, this Court should deny Harrison's requests and affirm the award of $109,285.28 for attorney fees and costs to Luxor and that award must be offset from other funds received by Harrison prior to the satisfaction of all liens, including Harrison's counsel attorney's lien. Specifically, Luxor asks for these rulings based upon the following reasons:

First, the District Court did not err by ordering that the award of attorney's fees and costs to Luxor was an "offset" to the funds Harrison received from Desert Medical as a result of a trial agreement which was wholly contingent on the jury verdict.

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[1] *Beattie v. Thomas,* 99 Nev. 579, 668 P.2d 268 (1983)
[2] *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969)

It was Luxor's understanding that during the trial and before the jury verdict, Harrison reached a high/low trial agreement with Desert Medical that Harrison would receive a certain amount dependent on the jury verdict. In Nevada, as well as in other jurisdictions, "an offset is part of the trial judgment, and thus it takes priority over an attorney's lien." *See John J. Muije, Ltd. v. North Las Vegas Cab Co. Inc.*, 106 Nev. 664, 666, 799 P.2d 559, 560 (1990) (citing *Salaman v. Bolt*, 141 Cal.Rptr. 841 (Ct.App. 1977); *Galbreath v. Armstrong*, 193 P.2d 630 (Mont. 1948); *Hobson Constr. Co., Inc. v. Max Drill, Inc.*, 385 A.2d 1256 (N.J. Super.App.Div. 1978); *Johnson v. Johnston*, 254 P. 494 (Okla. 1927)).

On appeal, Harrison has argued that Harrison's counsel has perfected an attorney's lien and, thus, the attorney's lien takes priority over the judgment awarding Luxor fees and costs. Such is incorrect. A perfected attorney's lien attaches to the net judgment that the client receives after all setoffs arising from that action have been paid. *See Muije,*106 Nev. at 667. After the net judgment is finalized, then the attorney's lien will be superior to a later lien asserted against the judgment. *Id.*

Further, the underlying equitable principles enunciated in *Muije,* 106 Nev. at 666, with regard to an offset are applicable in the case *sub judice*.

> "In *Galbreath, Hobson* and *Salaman*, each court weighed the equities and determined that a perfected attorney's lien attaches to the net judgment that the client received after all setoffs arising from that action have been paid. Once a net judgment is determined, then the attorney's lien is superior to any later lien asserted against that judgment."

Ultimately, as the prevailing party, Luxor should not be encumbered by the losing party's attorney's lien. *See Hobson,* 385 A. 2d at 1258 (the prevailing party should not be burdened by the claims asserted by the losing party's attorney). As such, Luxor's award of fees and costs should be offset against the proceeds Harrison received from Desert Medical as they both originated from the same case. *See e.g., Schouweiler v. Yancy Co.,* 101 Nev. 827, 831-832 712 P. 2d 766 (1985) (when there are multiple parties and judgments in a given lawsuit, judgments may be offset amongst the parties). Certainly, Nevada law supports that Luxor receive an offset from the proceeds before Harrison's counsel attorney's lien attaches. *See Muije, 1*06 Nev. at 666 (A perfected attorney's lien attaches to the net judgment that the client receives after all setoffs arising from that action have been paid; once a net judgment is determined, then the attorney's lien is superior to any later lien asserted against that judgment.) If there is any amount remaining after Luxor's offset, Harrison's counsel may assert their attorney's lien against that net judgment.

Second, the District Court did not abuse its discretion according to the *Beattie* and *Brunzell* factors by awarding attorney's fees and costs to Luxor based upon a reasonable $1,000 offer of judgment. Contrary to Harrison's assertions, the District Court did not conclude that Luxor's $1,000 offer of judgment to Harrison was both "unreasonable" and "ludicrous." Just the opposite is true. After applying the *Beattie* and *Brunzell* factors, the Court's written order explicitly states that Luxor's offer of

judgment was "reasonable." 4 AA 576-577. Indeed, the District Court awarded Luxor the sum of $69,688 in attorney fees by analyzing the *Brunzell* factors for determining the reasonableness of the requested attorney fees. *Id.*

In summary, Luxor asks this Court to affirm the orders awarding attorney fees and costs to Luxor in the amount of $109,285.28 and further, that said award must be offset from other funds received by Harrison prior to satisfaction of all liens, including Harrison's counsel attorney's lien. 4 AA 584.

III. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND

The underlying case relates to allegations by Harrison against Luxor from an incident that occurred at the Luxor on December 10, 2014. Plaintiff filed suit against Luxor, Desert Medical and Pride Mobility Products ("Pride Mobility") on February 24, 2016. 1AA 1-9.

In 2016, Harrison filed a complaint and amended her complaint. 1 AA 1-9; 62-71. In her second amended complaint, filed on August 19, 2016, Harrison alleged causes of action for (1) negligence; and (2) negligent hiring, training, maintenance, and supervision against the Luxor;[3] (3) negligence; and (4) negligent hiring, training,

[3] Harrison stipulated with Luxor to remove the second cause of action for negligent hiring, training, maintenance, and supervision.

maintenance and supervision against Desert Medical; and (5) negligence; and (6) strict products liability against Pride Mobility. *Id.*[4]

In her second amended complaint, Harrison alleged that she was operating a motorized scooter and was entering the Backstage Deli at the Luxor. (¶¶ 10 & 11.) 1 AA 64. The second amended complaint continues stating as Harrison was entering the Deli, in an effort to accommodate Harrison and Harrison's scooter passageway, Harrison alleges that Backstage Deli employees proceeded to move the dining tables and chairs. (¶ 11) *Id.* It is asserted that Harrison unknowingly drove the scooter over the base of a table and the scooter's front wheel gave way and the scooter tipped over, to the right, causing injuries. (¶¶ 11, 12, 14) *Id.* Harrison asserts negligence against Luxor for failure to properly inspect and maintain the Backstage Deli. (¶ 15) *Id.* Although the second amended complaint neither identifies nor defines the "dangerous conditions," it appears Harrison contends the base of the table Harrison ran over is the condition.

However, the allegations in Harrison's second amended complaint were found to be inaccurate and/or false as it was Harrison's family and Mr. Sawamoto who moved the table to accommodate Harrison and that Luxor had no liability. 4 AA 510-511. Based on the lack of evidence and valid clams, Luxor served a reasonable offer

[4] At a hearing in August 2018, Pride Mobility had its motion for summary judgment granted, and the order granting summary judgment was filed on January 29, 2019. 3 AA 475-487.

of judgment for $1,000.00 to Harrison on March 23, 2017, which was rejected by Harrison. 2 AA 269-272.

In December, 2018, a nine (9) day jury trial took place. 2 AA 224-230. During the trial and before the jury's verdict, Harrison and Desert Medical purportedly entered into an unwritten high-low ($150,000/$750,000) trial agreement. 4 AA 701-708. Pursuant to the trial agreement, no matter what the jury's verdict was, Desert Medical would be obligated to pay Harrison wholly contingent on the jury's verdict. *Id.* On December 20, 2019, the jury returned a defense verdict in favor of Desert Medical and Luxor. 2 AA 231-234. The judgment on jury verdict filed January 16, 2019, provided that Harrison "take nothing" from Desert Medical and Luxor. 2 AA 235-241. Luxor entered a judgment on the jury verdict on January 16, 2019. 2 AA 242-251. In light of the defense verdict, Desert Medical was required to pay Harrison $150,000. 4 AA 701-708. After the trial, on December 20, 2018 and January 8, 2019, Harrison's counsel sent a notice of attorney lien in the amount of $169,246.73. 4 AA 680-681.

As the prevailing party, Luxor moved for attorney's fees and costs on January 17, 2019. 2 AA 252-292. Further, Luxor moved for recovery of its costs by filing its memorandum of costs and disbursements on January 17, 2019. 2 AA 293-471. Harrison did not file a motion to retax. Harrison filed an opposition on February 4, 2019, opposing the award of fees and contesting the costs associated with Luxor's

experts. 3 AA 488-496. Luxor filed its reply to Harrison's opposition on February 20, 2019. 4 AA 497-545.

Although found as the prevailing party, the District Court did not award all the fees and costs sought by Luxor from the date of the offer but rather, awarded Luxor $109,285.28 in fees and costs for the time Luxor spent in December, 2018, preparing and defending the case at trial. 4 AA 579-584. Further, the District Court requested that Luxor prepare the order granting the motion for attorney fees and costs. 4 AA 579-584.

Due to differences in the language of the proposed order, the parties submitted competing orders to the District Court. 4 AA 683. Luxor submitted its order on March 5, 2019 and Harrison submitted her order on March 11, 2019. *Id.* The District Court evaluated both orders and signed Luxor's order. *Id.* After applying the *Beattie* and *Brunzell* factors and determining that Luxor's offer of judgment was "reasonable," the District Court granted Luxor's motion for attorney's fees and costs. 4 AA 579-584. In the order, Luxor was awarded $39,597.28 in costs and $69,688 in attorney's fees, for a total $109,285.28 and the order provided that the total and final judgment must be offset from the other funds received by Harrison and Harrison's counsel as part of the trial judgment before any distribution and the judgment in favor of Luxor takes priority over any other lien, including an attorney's lien. 4 AA 579.

On March 28, 2019, Harrison filed a motion to reconsider not challenging the award of attorney's fees and costs to Luxor but only asking the District Court to reconsider its ruling on the attorney's lien offset. 4 AA 594-682. A notice of entry of order and an order denying Harrison's motion to reconsider was filed on May 21, 2019. 5 AA 727-731.

On May 20, 2019, Desert Medical filed a motion for interpleader and to deposit funds with the District Court, 4 AA 701-708, which was granted on July 24, 2019. 5 AA 735-743. Desert Medical has deposited the $150,000 in the District Court. *Id.*

In light of Desert Medical depositing the contested funds with the District Court, a stipulation and order was filed on November 26, 2019, wherein Harrison's claims of negligence and negligent hiring, training maintenance and supervision against Desert Medical were dismissed, with prejudice. 5 AA 766-767.

VII. LEGAL ARGUMENT

A. THE DISTICT COURT DID NOT ERR BY ALLOWING LUXOR'S AWARD OF ATTORNEY'S FEES AND COSTS TO BE "OFFSET" AGAINST ALL LIENS, INCLUDING HARRISON'S COUNSEL ATTORNEY'S LIEN

The District Court did not err by ruling that the judgment against Harrison for Luxor's attorney fees and costs must be offset from other funds received by Harrison prior to satisfaction of liens, including Harrison's counsel attorney's lien.

1. **The Policies Outlined in Muije With Regard to an Offset Involving Priority of an Attorney Lien Are Present in the Instant Case**

The policies outlined in *Muije* with respect to an offset involving priority of an attorney lien are present in the case *sub judice*. In *Muije*, a plaintiff refused to accept two separate offers of judgment to settle a case and proceeded to trial. *Id.*, 106 Nev. at 665. Prior to the jury verdict, plaintiff's counsel perfected an attorney lien pursuant to NRS 18.015. *Id.* Eventually, the jury reached a verdict in favor of plaintiff, but the award was much less than the prior offer of judgment. *Id.* As a result, defendant filed a motion for fees and costs which was granted by the district court. *Id.* Defendant enforced its judgment against plaintiff which resulted in plaintiff's attorney receiving nothing despite the existence of an attorney's lien. *Id.* Plaintiff's counsel then challenged the setoff of plaintiff's verdict against defendant's fees and costs arguing, *inter alia*, that a perfected attorney's lien outweighs the provision of fees and costs to the prevailing party and that failure to satisfy the attorney's lien has a chilling effect on litigation. *Id.*, 106 Nev. at 666. In *Muije,* the Nevada Supreme Court held that a perfected attorney's lien attaches to the net judgment that the client receives after all setoffs arising from that action have been paid. Once a net judgment is determined, then the attorney's lien is superior to any later lien asserted against that judgment. *Id.*

In *Muije*, 106 Nev. at 666, the Nevada Supreme Court summed up its policy analysis this way:

> The purpose of NRS 17.115[Nevada's former statute regarding the offer of judgment]is to promote settlement of suits by rewarding defendants who make reasonable offers and penalizing plaintiffs who refuse to accept them. Early settlement saves time and money for the court system, the parties, and the taxpayers. NRS 18.015 [Nevada's statute governing attorney charging liens] also accomplishes an important function of securing attorney's fees and thereby encouraging attorneys to take cases of those who could not otherwise afford to litigate. However, the imposition of attorney's fees pursuant to NRS 18.015 should not reduce the advantage the defendant gains by making a reasonable offer to settle. NRS 17.115 requires a plaintiff's attorney to advise his or her client to accept reasonable offers. The possibility that a client will not heed sound advice is a risk that the attorney, not the opposing party, must bear.

Applying the forgoing, Luxor made a reasonable offer of judgment to Harrison, which was rejected. 2 AA 269-272. As such, the imposition of an attorney's lien pursuant to NRS 18.015 should not reduce the advantage Luxor gained by making a reasonable offer to settle. The possibility that Harrison would not accept Luxor's reasonable offer of judgment is a risk Harrison's counsel, not Luxor, should have to bear.

2. Nevada Law Provides That an Offset of Luxor's Judgment for Fees and Costs Must Occur From All Proceeds Recovered by Harrison Prior to Harrison's Counsel Attorneys' Lien Attaching

As such, Luxor's award of fees and costs should be offset against the proceeds Harrison received from Desert Medical as they both originated from the same case. *See e.g., Schouweiler v. Yancy Co.,* 101 Nev. 827, 712 P.2d 766 (1985), (where some defendants prevailed at trial and others did not, the prevailing parties were permitted to offset their judgments for fees and costs against the losing parties before

distribution of funds and payments were provided to plaintiff). The *Schouweiler* decision is analogous to the case *sub judice* in that the District Court permitted Luxor to offset its award of fees and costs against the proceeds Harrison recovered from Desert Medical as a result of the jury verdict.

Ultimately, as the prevailing party, Luxor should not be encumbered by the losing party's attorney's lien. *See Hobson*, 385 A.2d at 1258 (the prevailing party should not be burdened by the claims asserted by the losing party's attorney). The proceeds from Desert Medical as result of the high/low trial agreement are not "separate settlement funds." When Harrison proceeded to trial against Luxor and Desert Medical, all of Harrison's causes of action related to the same litigation. Harrison did not introduce any new theories or pursue allegations which were unrelated to the instant case. Harrison's purported trial agreement with Desert Medical did not dismiss Desert Medical nor did it dismiss any claims against Desert Medical but rather, only reduced Desert Medical's exposure of damages.

This is not a situation where third-parties settled for a specific amount as part of a settlement agreement prior to trial alleviating the need for trial. Here, the amount Desert Medical was required to pay was wholly contingent on the outcome of the trial. The high/low trial agreement only reduced Desert Medical's exposure of damages and did not settle the case. Rather, Harrison and Desert Medical were still required to try the case and the amount Desert Medical was required to pay Harrison

was dependent on the jury verdict. As such, Luxor's award for fees and costs should be offset against the proceeds Harrison received from Desert Medical as they both originated from the same litigation and are clearly related to the same incident, set of facts and/or causes of action. If there is any amount remaining after Luxor's offset, Harrison's counsel may assert their attorney's lien against that net judgment. 4 AA 584. *See Muije,* 106 Nev. at 666 (a perfected attorney's lien attaches to the net judgment that the client receives after all setoffs arising from that action have been paid, once a net judgement is determined, then the attorney's lien is superior to any later lien asserted against that judgment).

3. **Any Equitable Considerations as to Setoffs as Contemplated By *Muije*, Weigh Heavily in Favor of Luxor**

Further, the underlying equitable principles enunciated in *Muije,*106 Nev. at 666, with regard to an offset are applicable in the case *sub judice*:

> "In *Galbreath, Hobson* and *Salaman*, each court weighed the equities and determined that a perfected attorney's lien attaches to the net judgment that the client received after all setoffs arising from that action have been paid. Once a net judgment is determined, then the attorney's lien is superior to any later lien asserted against that judgment."

After weighing the equities, a perfected attorney's lien attaches to the net judgment that the client receives after all setoffs arising from that action have been paid, once a net judgement is determined, then the attorney's lien is superior to any later lien asserted against that judgment. *Id.*

Clearly, any equitable considerations as to setoffs as contemplated by *Muije* tip heavily in favor of Luxor. It must be remembered that Harrison's counsel, not Harrison, will receive the proceeds at issue, since Harrison's counsel's claim an attorney's lien of $169,246.73, leaving nothing for Harrison herself. As between Luxor's and Harrison's counsel, all arguments based in equity weigh heavily in favor of Luxor as the more deserving party of payment of its fees and costs, especially in light of the fact that Luxor, early in the litigation requested a voluntary dismissal of the complaint and in exchange would agree to waive attorney's fees and costs and said proposal was rejected by Harrison. Then Luxor made a reasonable offer of judgment which was also rejected by Harrison. Further, Luxor was the prevailing party receiving a complete defense verdict at trial.

In *Lindsay v. Pettigrew*, 8 S.D. 244, 66 N.W. 321, 321 (S.D. 1896), and presumably here, the plaintiff was insolvent, and the South Dakota Supreme Court reversed a superior court order refusing to set off the judgments noting that "by the order appealed from, the defendant, although a prevailing party, [was], in effect, required to pay plaintiff's attorney." S*ee also*, *Angel Home Health Care, Inc. v. Mederi of Dade County, Inc.*, 696 So.2d 487, 488 (Fla. Dist. Ct. App. 1997) (remanding for entry of net judgment where separate judgments could give rise to the "totally absurd" result of insolvent net loser collecting from solvent net winner).

By rejecting Luxor's reasonable offer of judgement, Harrison and her counsel assumed the risk that the jury verdict would be lower than the award. Luxor should not be made to pay Harrison's attorney's lien merely because Harrison lost her gamble. *See Bennett v. Weitz*, 559 N.W. 2d 354, 357 (Mich. Ct. App. 1996) (By rejecting the mediation award, plaintiffs and their counsel assumed the risk that the verdict would be lower than the award. Defendants should not be made to pay plaintiffs' attorney fees merely because plaintiffs lost their gamble.) As such, equity requires that Luxor's award of attorney fees and costs must be offset from other funds received by Harrison prior to the satisfaction of liens, including Harrison's counsel attorney's lien. 4 AA 584.

4. The Court's Order Entering Judgment Against Harrison for Luxor's Attorney's Fees and Costs is Superior to a Perfected Attorney's Lien, and Must be Satisfied Prior to the Attachment of an Attorney's Lien

Further, the creation date of Harrison's counsel attorney's lien is of no import. Assuming, *arguendo,* Harrison's counsel have a perfected attorney lien, the creation of the same is not applicable here as Luxor received a judgment, and not a lien, against Harrison. As in *Muije*, where the Nevada Supreme Court held that a judgment offset is superior to a perfected attorney's lien, here, too, the District Court's offset of the judgment against the proceeds Harrison received from Desert Medical should not be disturbed. As enunciated in *Muije,* "a perfected attorney's lien attaches to the net judgment that the client receives after all setoffs arising from that action have

been paid." *See Muije,* 106 Nev. at 666. Therefore, Luxor's judgment for fees and costs is superior to Harrison counsel's attorney lien irrespective of when it may have been created and their lien may only be asserted against the proceeds remaining after payment of Luxor's judgment.

5. Since Harrison's Due Process Argument Was Not Made in the District Court, Harrison Has Waived This Argument and It Should Not Be Considered on Appeal

In her opening brief (at 15-17), Harrison makes the argument that [s]ince Luxor has no legal right to 'offset' the Desert Medical settlement funds, Luxor's only avenue for attempted recovery was through normal execution procedures to afford due process to Harrison." Nonsense.

First, Harrison's "due process" argument was not made in the district court and as such, Harrison has waived this argument and it should not be considered on appeal. 3 AA 488-496, 4 AA 594-604. *See Schuck v. Signature Flight Support of Nev., Inc.,* 126 Nev. 434, 436, 245 P.3d 542, 544 (2010) ("[A] de novo standard of review does not trump the general rule that a point not urged in the trial court . . . is deemed waived and will not be considered on appeal." (quotations omitted)); *see* also, *McKay v. City of Las Vegas*, 106 Nev. 203, 207, 789 P.2d 584, 586 (1990) (declining to consider issue not litigated before or ruled upon by the district court), overruled on other grounds by *Salais-Cooper v. Eighth Judicial District Court,* 117 Nev. 892, 34 P.3d 509 (2001). As such, Harrison's "due process" argument is of no moment.

Notwithstanding, Harrison's argument fails to recognize Luxor's status as party and not a lienholder or third-party creditor and as such, NRS 21.120 and NRS 31.070 do not apply. *See Muije*, 106 Nev. at 666.

Second, Harrison has been afforded "due process" in the district court. With competing claims to the $150,000, Desert Medical filed a motion to interplead. 4 AA 701-726. The motion to interplead was granted and the proceeds are currently on deposit with the District Court.5 AA 735-743. Interpleader is an equitable proceeding to determine the rights of rival claimants to property by a third person having no interest therein. *See Balish v. Farnham,* 92 Nev. 133, 137, 546 P.2d 1297, 1299 (1976). In such a proceeding, each claimant is treated as a plaintiff and must recover on the strength of his own right or title and not upon the weaknesses of the adversaries. *Id.* An interpleader action is an appropriate procedure for the determining the respective rights of those interested. *See Michel v. Eighth Judicial Dist. Court,* 117 Nev. 145, 151, 17 P.3d 1003, 1007 (2001). An interpleader action is utilized in order to conclusively determine the respective rights of all interested parties as to the entire amount in dispute. *Id.*

6. The District Court Did Not Conclude That Luxor's $1,000 Offer of Judgment Was Unreasonable and Ludicrous

In her opening brief (at 17), Harrison argues that "[c]ertainly, *Muije* does not stand for the principle that Harrison should have settled with Luxor for $1,000, which the District Court itself characterized as "unreasonable" and "ludicrous" in light of

her $420,000 in medical bills." 4 AA 576-577. Harrison's argument fails on several levels.

Contrary to Harrison's repeated assertions, the District Court did not conclude Luxor's $1,000 offer of judgement was "unreasonable" and "ludicrous." Just the opposite is true. In its order, the District Court determined that "the offer served by Luxor was ***reasonable*** and [Harrison] did not obtain a more favorable judgement than the offer." (Emphasis added.) 4 AA 582. Additionally, Harrison has taken the District Court's comments regarding $1,000 offers of judgment as being "ludicrous" out of context. The District Court was actually speaking in generalities and not specifically to Luxor's offer. What the District Court actually said was "[a]ll the years of my practice both on the plaintiff and defense side, we looked at these $1,000 offers of judgment from the plaintiff's side as just ludicrous." 4 AA 576-577. As evident from foregoing, Harrison has misapprehended the District Court's comments and erroneously extrapolated the same to apply to Luxor's offer.

As to Harrison's argument regarding the $420,000 in medical bills, it is skewed since Harrison did not present any evidence of past and/or future medical bills at trial. 4 AA 501. Although Harrison presented a life care planner at trial, Harrison later stipulated on the record during trial that Plaintiff would not be asking the jury to award any damages for past and/or future medical bills but just "pain and suffering." *Id.* Given the fact that the medical bills sought at trial was $0, and not $420,000, and

that liability was highly unlikely against Luxor, an offer of $1,000 early in the case, almost two years prior to trial, and months before incurring substantial fees and costs in taking depositions, retaining experts, and other discovery, was not only reasonable in timing but predictive. *Id.* *See Gallagher v. Crystal Bay Casino, LLC,* No. 3:08-cv-00055-ECRVPC, 2010 WL 4669399, 2012 U.S. Dist. LEXIS 56264 (D.C. Nev. Apr. 20, 2012) ("the timing was both reasonable and in good faith in that the offer was made early in the course of litigation, after initial exchange of documents and prior to later, more extensive discovery and significant pre-trial motion practice).

B. ALTERNATIVELY, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY AWARDING ATTORNEY'S FEES TO LUXOR BASED UPON A REASONABLE $1,000 OFFER OF JUDGMENT ACCORDING TO THE *BEATTIE* AND *BRUNZELL* FACTORS.

In the case *sub judice*, the District Court did not abuse its discretion in awarding attorney fees to Luxor. Here, the District Court, after applying the *Beattie* and *Brunzell* factors, found that Luxor's $1,000 offer of judgment was reasonable. As such, this Court should affirm the District Court's grant of attorney fees in favor of Luxor.

1. The District Court Did Not Abuse its Discretion in Awarding Attorney Fees to Luxor Based Upon the Reasonable $1,000 Offer of Judgment According to the *Beattie* and *Brunzell* Factors

When deciding whether to award penalties under Rule 68, the court's discretion is governed by the *Beattie* factors: "(1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable

and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer . . . was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount." *See Beattie v. Thomas*, 668 P.2d 268, 274 (Nev. 1983). No one *Beattie* factor is dispositive, and the court need not necessarily make explicit findings as to all of the factors. *See Nat'l Union Fire Ins. v. Pratt and Whitney,* 107 Nev. 535, 815 P.2d 601, 606 (1991); *Certified Fire Prot. Inc. v. Precision Constr.,* 128 Nev. 371, 283 P.3d 250, 258 (2012).

In determining the fourth *Beattie* factor, the Court must also examine the attorney's quality, work performance and amount, and the result. *See Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969). After analyzing the *Beattie* and *Brunzell* factors, the Court may award all or some of the fees requested. *See Beattie*, 99 Nev. at 589.

The court considers these factors in light of the underlying policy of Rule 68: "to encourage litigants who receive offers of judgment to settle their lawsuits by forcing the offeree to balance the uncertainty of receiving a more favorable judgment against the risk of receiving a less favorable judgment and being forced to pay the offeror's costs and attorney's fees." *See Lentz v. ID.S. Fin. Servs., Inc.,* 890 P.2d 783, 785 (Nev. 1995) (quotation marks and citation omitted); *see also, Ginena v. Alaska Airlines, Inc.,* No. 2:04-CV-01304-MMD, 2013 WL 3297074, at*2, 2013 U.S. Dist. LEXIS 14006 (D. Nev. June 27, 2013). The court is required to consider each of the

factors and no single factor is determinative. *See Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 250-51, 955 P.2d 661, 673 n. 16 (1998). Nor are explicit findings on every *Beattie* factor required for the district court to adequately exercise its discretion. *See id.; see also, Wynn v. Smith,* 117 Nev. 6, 13, 16 P.3d 424, 428 (2001) ("Although explicit findings with respect to these factors are preferred, the district court's failure to make explicit findings is not a per se abuse of discretion."). Further, the court may properly award fees even where the plaintiff litigated his claims and defenses in good faith and did not act unreasonably in rejecting the offer of judgment. *See RTTC Commc'ns, LLC v. Saratoga Flier, Inc.,* 121 Nev. 34, 42-43, 110 P.3d 24, 29-30 (2005).

2. Harrison Has Failed to Make a Cogent Argument in Her Briefing as to the Costs Awarded to Luxor and Thus, This Court Should Decline to Consider Claims Not Cogently Argued

Initially, it must be observed that Harrison has failed to make a cogent argument in her briefing as to the costs awarded to Luxor. Absent such, this Court should decline to consider the same and affirm the award of costs to Luxor in the amount of $39,597.28. *See Edwards v. Emporer's Garden Rest.,* 122 Nev. 317, 330 N. 38, 130 P.3d 1280, 1288 n. 38 (2006) (stating that this court need not consider claims that are not cogently argued or supported by relevant authority).

3. The District Court Did Not Err by Awarding Attorney's Fees to Luxor Based Upon a Reasonable $1,000 Offer of Judgment According to the *Beattie* and *Brunzell* Factors

Notwithstanding, in her opening brief (at 18), Harrison argues that ". . . the District Court erred by awarding attorney's fees to Luxor based upon a $1,000 offer of judgment according to the *Beattie* and *Brunzell* factors." Simply put, Harrison is wrong.

Interestingly, and more significant, Harrison's entire argument in her opening brief (at 18-22) regarding the award of attorney's fees is premised on the colloquy between the District Court and counsel during oral argument and the oral pronouncement of the District Court. 4 AA 562, 567-569, 574-577. In addition, Harrison's argument completely ignores the written order. 4 AA 579-584. The reason being, the written order defeats Harrison's argument. In the written order, the District Court applied the *Beattie* and *Brunzell* factors and found that Luxor's offer of judgment was "reasonable." 4 AA 582-583.

As evident from the forgoing, Harrison's argument is belied by the record. *Id.* Moreover, a district court's oral pronouncement is not final and can be modified before a written order is filed. *See Miller v. Hayes,* 95 Nev. 927, 929, 604 P.2d 117, 118 (1979). If there are differences between the findings and conclusions issued during the hearing and those recorded in the order, the written order controls. *See Rust v. Clark Cty. Sch. Dist.,* 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987)

(explaining that oral pronouncements from the bench are ineffective and only a written judgment has legal effect). Therefore, differences between the oral findings and the written findings do not render the written order invalid, as only the written order has legal effect. *Id.* Applying the forgoing, the written order controls and the District Court's oral pronouncement from the bench is ineffective for any purpose.

4. The District Court was Not Required to Make a Finding of Bad Faith According to the *Beattie* Factors

In her opening brief (at 18), Harrison further argues that "the District Court did not make a finding of bad faith according to the *Beattie* factors, but applied other considerations to reach an award of attorney's fees." Luxor disagrees. After reviewing the District Court's written order, it is apparent that the District Court applied the *Beattie* factors in awarding attorney fees to Luxor. 4 AA 582. Having weighed the *Beattie* factors, the District Court was not required to make a explicit finding on every *Beattie* factor to adequately exercise its discretion. *See Wynn v. Smith,* 117 Nev. 6, 13, 16 P.3d 424,428 (2001) ("Although explicit findings with respect to these factors are preferred, the district court's failure to make explicit findings is not per se abuse of discretion.") As such, the District Court's failure to make an explicit finding of "bad faith" was not an abuse of discretion. Moreover, the district court may properly award fees even where a plaintiff litigated his/her claims in good faith and did not act unreasonably in rejecting the offer of judgement. *See RTTC Commc'ns, LLC v Saratoga Flier, Inc.,* 121 Nev. at 42-43.

5. Luxor's $1,000 Offer of Judgment was Reasonable as Luxor had a Reasonable Basis to Believe that Exposure to Liability was Minimal

In the case *sub judice,* Luxor had cause to believe it would prevail at trial, a fact now proven. Luxor's subjective belief about the strength of its position is legally relevant. "[W]here the offeror has a reasonable basis to believe that exposure to liability is minimal, a nominal offer is appropriate." *See Arrowood Indem. Co. v. Acosta, Inc.,* 58 So. 3d 286, 289 (Fla. Dist. Ct. App. 2011) (discussing the good faith prong of an offer of judgment from a Florida statute analogous to NRCP 68). At the time Luxor made their offer of judgment, it was accompanied by a letter which provided, in pertinent part (4 AA 510-511):

> Plaintiff's complaint asserts that Plaintiff was operating a motorized scooter and was entering the Backstage Deli at the Luxor. (*See* Second Amended Complaint ¶¶ 10& 11). The Complaint continues stating as Plaintiff was entering the Deli, in an effort to accommodate Plaintiff and Plaintiff's scooter passageway, Plaintiff alleges that Backstage Deli employees proceeded to move the dining tables and chairs. *Id. at ¶ 11.* It is asserted that Plaintiff unknowingly drove the scooter over the base of a table and the scooter's front wheel gave way and the scooter tipped over, to the right, causing injuries. *Id.* at ¶¶ 11, 12 & 14.
>
> Stating in paragraph 15 of the complaint, Plaintiff asserts negligence against Luxor for failure to properly inspect and maintain the Backstage Deli. Although the complaint neither identifies nor defines the "dangerous conditions," it appears Plaintiff contends the base of the table Plaintiff ran over is the condition. Plaintiff's complaint continues asserting negligent hiring, training, maintenance and supervision based on the placement of the subject table. This allegation appears to be based

> on the facts alleged that the Deli employees moved the tables and chairs.
>
> As you discussed with my associate on February 21, 2017, the video of the area and the subject incident reveals that Plaintiff had already entered the Deli, without incident and, in fact, Plaintiff was exiting the Deli when the incident occurred. During the telephone conference, you acknowledged the video is correct and these facts alleged in the complaint are incorrect. The video also clearly reveals that Plaintiff's friends and Mr. Sawamoto moved the tables in the deli to accommodate Plaintiff. I spoke with Mr. Sawamoto's counsel who also confirmed with his client that Deli employees did not move tables and chairs at any time, but he and the others with Plaintiff moved the tables and chairs. You were advised of these facts. Thus, if it is Plaintiff's contention that the alleged "dangerous condition" was location of the tables and chairs, this condition was created by Plaintiff and Mr. Sawamoto, not Luxor. There simply are no facts to support a negligence claim against Luxor.
>
> During the February 21, 2017 telephone conference, Luxor respectfully requested a voluntary dismissal of the complaint against Luxor and, in exchange, Luxor would agree to waive attorney's fees and costs. You rejected this proposal.
>
> ***Based on the lack of evidence and valid claims against my client,*** please find enclosed an offer of judgment to Plaintiff for $1,000.00. (Emphasis added.)

As evident from the forgoing, it was reasonable for Luxor to believe Harrison's claims were weak and lacked merit. *See Beach v. Wal-Mart Stores, Inc.,* 958 F. Supp. 2d. 1165, 1171 (Holding defendant's offer was reasonable even though Plaintiff's alleged damages exceeded the offer's amount "given the weakness defendant perceived in plaintiff's case."); *Max Bear Productions, Ltd., v. Riverwood Partners, LLC,* No. 3:09-cv-00512-RCJ-RAM, 2012 WL 5944767, 2012 U.S. Dist. LEXIS

2789609 (D. Nev. Nov. 26, 2012). ("The token $1,000 offer may appear to have been made simply for the procedural purpose of preserving rights to fees . . . should Defendant win a judgment. However, the weakness of Plaintiff's case made this token offer reasonable"); *Kalenowsky v. Canyon Capital Funding Corp.*, No. 3:11-cv-00797-RCJ-VPC, 2013 WL 5741083, 2012 U.S. DIST LEXIS 151629 (D. Nev. Oct. 22, 2013). (While the token $1,000 offer may appear to have been made simply for the procedural purpose of preserving rights to fees under state law, the obvious weakness of Plaintiff's case made the offer reasonable.); *Arrowood*, 58 So. 3d. at 289-90 (holding a court must consider an offeror's subjective belief that an offer is reasonable and not just focus upon the objective factors).

Applying the forgoing, Luxor's $1,000 offer of judgement was reasonable when made given the weakness Luxor perceived in Harrison's case.

6. The District Court's Reliance Upon Luxor's Reasonable $1,000 Offer of Judgment to Award Attorney's Fees Did Not Require Harrison to Forego Legitimate Claims

Contrary to Harrison's assertions in her opening brief (at 22), the District Court's reliance upon Luxor's reasonable $1,000 offer of judgment to award attorney's fees did not require Harrison to "forego legitimate claims." Such is incorrect. Harrison's lawsuit against Luxor was never about damages. It was about liability. 4 AA 501. Query: Was Luxor responsible for the Harrison's injuries because she drove her scooter into a table at the Deli inside the Luxor. The answer

was a resounding "No." Luxor informed Harrison of that position early in the litigation. *Id.* On February 21, 2017, Luxor's counsel discussed the allegations in the complaint, how the allegations in the complaint were inaccurate and/or false and further, did not support a negligence claim against Luxor. *Id.* In fact, a video of the area and the subject incident revealed that Harrison had already entered the Deli, without incident and, she was exiting the Deli when the incident occurred.
1 AA 510. The video also clearly revealed that Harrison's friends and Mr. Sawamoto [5] moved the tables in the Deli to accommodate Harrison. *Id.* Harrison's counsel was advised of these facts in a letter dated March 24, 23, 2017. Thus, if it is Harrison's contention that the alleged "dangerous condition" was location of the tables and chairs, this condition was created by Harrison's family and Mr. Sawamoto, not Luxor. 1 AA510-511. There simply were no facts to support a negligence claim against Luxor, a fact now proven by the trial.

At this point, Luxor also served a reasonable $1,000 offer of judgement due to the weakness of Harrison's case and a lack of any valid claims. At the time of the offer of judgement, Harrison had sufficient information available to settle the case. Notwithstanding, Harrison rejected Luxor's offer and maintained the lawsuit. Here,

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[5] It is of import to note, Pride Mobility filed a third-party complaint against Third-Party Defendant Stan Sawamoto ("Sawamoto"). 1 AA 119-131. Pride Mobility stipulated to the dismissal of its claims against Sawamoto prior to trial. 2 AA 215-223.

and contrary to Harrison's assertions, acceptance of Luxor's reasonable offer of judgment would not have required Harrison to "forgo legitimate claims' but rather, would have resolved what can only be termed as specious claims against Luxor prior.

In her opening brief (at 23), Harrison then argues that "[a]t the conclusion of the hearing, the District Court simply reached the amount of $69,688, which was the District Court's 'total.'" 4 AA 577. But none of the *Brunzell* factors were even mentioned, let alone considered." Such is incorrect. Harrison's argument relies solely on the District Court's oral pronouncement. 4 AA 577. Unfortunately for Harrison, the District Court's oral pronouncement is of no solace. Thus, "[a]n oral pronouncement of judgment is not valid for any purpose; therefore, only a written judgment has any effect, and only a written judgment may be under the foregoing authority, the oral pronouncement of judgment made by the District Court is invalid for the purpose of determining the award of attorneys' fees and costs. The judgment entered in the lower court supersedes any oral ruling made by the District Court.

Here, the District Court's written order provides that "... this Court finds that Luxor's motion fully addressed and satisfied the factors enumerated in *Brunzell* namely, the advocate's professional qualities, the nature of the litigation, the work performed, and the result." 4 AA 583. The written order further provided that "[t]he Court finds that Luxor is entitled to recover attorney's fees pursuant to the *Brunzell* factors, however, the Court exercises its discretion to reduce the amount of fees based

on the foregoing facts and findings." *Id.* As evident from the forgoing, the District Court did analyze the *Brunzell* factors in awarding attorney's fees to Luxor in the sum of $69,688. *See Beattie*, 99 Nev. at 589. As such, the written order defeats Harrison's argument as the oral pronouncement is "ineffective for any purpose." *See Rust v. Clark Cnty. Sch. Dist., 103 Nev. 689* ("[a]n oral pronouncement of judgment is not valid for any purpose; therefore only a written judgment has any effect.")

In her opening brief (at 23), Harrison also argues that "the District Court also did not weigh *Brunzell* factors, but instead selected an arbitrary number based on other factors." Luxor disagrees. The $69,688 the District Court awarded Luxor was not an "arbitrary number." Rather, the $69,688 in attorney's fees is in accord with Harrison's position in the lower court as to what amount the District Court should award in attorney's fees. 3 AA 491-492. Specifically, Harrison argued that "[i]f they (sic) court were to grant Defendants any fees in this case they should be limited to the time spent during the 9 days of trial." 3 AA 492. As was permissible under the *Beattie* and *Brunzell* factors, the District Court found that Luxor's attorney's fees were "reasonable" and "utilized its discretion to award a portion of Luxor's attorney's fees for the month of December that would include trial preparation." 4 AA 583. As such, the District Court's award of $69,688 in fees to Luxor was for the December, 2018, nine (9) day trial and trial preparation related thereto. Harrison should not now be heard to complain that the $69,688 is an "arbitrary number" when the District

Court did essentially what Harrison urged should be awarded if the District Court were going to award attorney' fees to Luxor. 3 AA 491-492.

V.

CONCLUSION

In conclusion, Luxor asks this Court to affirm the orders awarding attorney's fees and costs to Luxor in the amount of $109,285.28 and further, that said award must be offset from other funds received by Harrison prior to satisfaction of all liens, including Harrison's counsel attorney's lien.

DATED this 23 day of December, 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011 in 14-point Times New Roman font.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

proportionally spaced, has a typeface of 14 points or more and contains 7,610 words; or

does not exceed 30 pages.

Finally, I hereby certify that I have read this 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 NRAP 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.

DATED this 23 day of December, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of December, 2020, I served a copy of this **RESPONDENT'S ANSWERING BRIEF**, upon all counsel of record:

X By electronic service in accordance with the Master Service List to the following:

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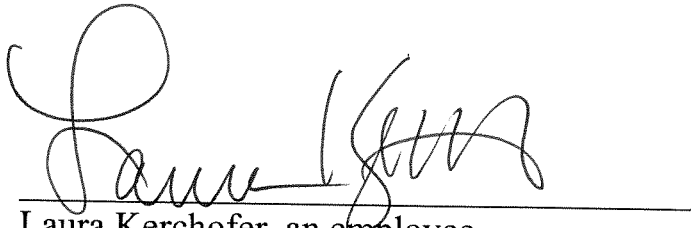

Laura Kerchofer, an employee
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