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, Respondent.	Case No. 80167 Electronically Filed Sep 01 2020 03:15 p.m. Elizabeth A. Brown Clerk of Supreme Court Appeal from the Eighth Judicial District Court, the Honorable David M. Jones Presiding

APPELLANT'S AMENDED OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are person and entities 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.

Vivia Harrison is an individual.

Vivia Harrison was represented in the District Court by Moss Berg Injury Lawyers and Parry & Pfau.

Vivia Harrison is represented in this Court by Claggett & Sykes Law Firm, Moss Berg Injury Lawyers, and Matt Pfau Law Group.

Dated this 31st day of August, 2020.

CLAGGETT & SYKES LAW FIRM

By /s/ Micah S. Echols
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I. JURISDICTIONAL STATEMENT

On December 3, 2019, Plaintiff/Appellant, Vivia Harrison ("Harrison"), timely appealed from the stipulation and order to dismiss Defendant Desert Medical Equipment ("Desert Medical"), only, which was noticed on December 5, 2019. 5 Appellant's Appendix ("AA") 750–772. This stipulated dismissal is the final, appealable order for which an appeal is authorized by NRAP 3A(b)(1). *See Lee v. GNLV Corp*., 116 Nev. 424, 426, 996 P.2d 416, 417 (2000). As this Court previously determined, Harrison's appeal from the final order allows this Court to review any interlocutory orders. *See Consolidated Generator-Nevada, Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998). The two interlocutory orders that Harrison identified in her notice of appeal are (1) the order granting Luxor's motion for attorney's fees and costs, as well as (2) the order denying Harrison's motion to reconsider the District Court's order granting an offset to Luxor. 5 AA 753–764. Therefore, this Court has appellate jurisdiction over all the issues presented in this appeal.

II. ROUTING STATEMENT

This case is presumptively assigned to the Court of Appeals based upon NRAP 17(b)(5), which presumes such assignments for an "[a]ppeal from a judgment, exclusive of interest, attorney fees, and costs, of $250,000 or less in a tort case . . . ." Similarly, NRAP 17(b)(7) presumptively assigns to the Court of Appeals

cases involving an appeal from post-judgment orders in civil cases. However, NRAP 17(a)(11) and (12), allow the Supreme Court to retain a case that involves issues of first impression or issues of statewide public importance. The main issue in this case deals with whether Luxor's subsequent award of attorney's fees and costs, which the District Court improperly treated as an "offset" against a prior settlement between Harrison and Defendant Desert Medical Equipment ("Desert Medical"). 4 AA 585–593; 5 AA 727–731.

In essence, the District Court relied upon *John W. Muije, Ltd. v. North Las Vegas Cab Company, Inc*., 106 Nev. 664, 798 P.2d 559 (1990) to apply Luxor's post-trial award of attorney's fees and costs, as an "offset," to Harrison's prior settlement with Desert Medical. 4 AA 585–593; 5 AA 727–731. Yet, the definition of "offset" does not contemplate Luxor's ability to attach the funds from Harrison's prior settlement with Desert Medical, BLACK'S LAW DICTIONARY, 1310 (11th ed. 2019), particularly because Harrison's attorneys had already asserted an attorney's lien on the separate settlement funds. 4 AA 675–682; *Golightly & Vannah, PLLC v. TJ Allen, LLC*, 132 Nev. 416, 420, 373 P.3d 103, 105 (2016). Since the Desert Medical settlement funds were attached prior to Luxor's award of attorney's fees and costs, the policies outlined in *Muije* do not apply to this case. Instead, this case presents issues that fit within the exceptions to *Muije*. In particular, if the District Court's orders are affirmed, they will discourage plaintiffs from settling with fewer

than all defendants in multi-defendant litigation because any settlement amounts recovered prior to trial will become vulnerable to an "offset" by any remaining defendant that later prevails and recovers an award of attorney's fees or costs. Due to the issues of first impression and statewide public importance, Harrison urges the Supreme Court to retain this appeal.

III. ISSUES ON APPEAL

A. WHETHER THE DISTRICT COURT ERRED BY ALLOWING LUXOR TO USE A SUBSEQUENT AWARD OF ATTORNEY'S FEES AND COSTS TO "OFFSET" A PRIOR SETTLEMENT BETWEEN HARRISON AND DESERT MEDICAL TO WHICH AN ATTORNEY'S LIEN HAD ALREADY ATTACHED.

B. WHETHER, ALTERNATIVELY, 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.

IV. STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

This is an appeal involving Harrison's personal injury lawsuit based upon injuries she sustained as the rented motorized scooter tipped over as she was navigating out of a restaurant owned by Luxor. Harrison assigns error to two issues found withing two orders involving the District Court's erroneous ruling that Luxor's subsequent order awarding $109,285.28 in attorney's fees and costs offset Harrison's prior settlement with Desert Medical for $150,000. 4 AA 579–584. Since the offset issue was never actually decided within the attorney fees and costs hearing (but included in the order), Harrison moved the District Court for

reconsideration, which the District Court denied without a hearing. 4 AA 579–584; 5 AA 727–731. First, Harrison asks 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 separate settlement with Desert Medical. 4 AA 584. Second, Harrison asks 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. Consistent with either of these requests, Harrison asks the Court to release the $150,000 Desert Medical settlement funds to her, which are currently interpled in the District Court. 5 AA 735–743. Specifically, Harrison asks for this relief based upon the following reasons:

First, the District Court erred by allowing Luxor to use a subsequent award of attorney's fees and costs to "offset" a prior settlement between Harrison and Desert Medical to which an attorney's lien had already attached. Luxor's claim for attorney's fees and costs against the separate Desert Medical settlement funds is not an "offset." *See, e.g., In re Ingersoll*, 90 B.R. 168, 171 (Bankr. W.D.N.C. 1987) ("[T]he debts are between different parties in different capacities and, thus, not subject to offset."); *Dewey v. Latson*, 6 Cal. 609, 612 (1856) ("[T]he amount due under the judgment, were in different rights and to different parties, and could not

[1] *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983).

[2] *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

be subjects of offset, one against the other."). Since 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. *See Brooksby v. Nev. State Bank*, 129 Nev. 771, 773, 312 P.3d 501, 502 (2013) ("Only property owned by the judgment debtor is subject to garnishment, and questions regarding title to that property as between the judgment creditor and a third party are properly determined by the court having jurisdiction.") (citing NRS 21.120; NRS 31.070). The policies outlined in *Muije* with regard to an offset involving only two parties are not present in the instant case. Notably, *Muije* recites, "The purpose of a lawsuit is to settle a dispute between two parties." *Id.*, 106 Nev. at 666, 799 P.2d at 560. It is also true that an offer of judgment cannot be transformed into a "vehicle to pressure offerees into foregoing legitimate claims in exchange for unreasonably low offers of judgment. . . ." *Frazier v. Drake*, 131 Nev. 632, 644, 357 P.3d 365, 373 (Ct. App. 2015). Therefore, Harrison first asks the Court to make the determination that Luxor's award of attorney fees and costs was not an offset against the Desert Medical settlement funds, such that the attorney's lien asserted by Harrison's attorneys against these settlement funds takes precedence.

Second, alternatively, 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. 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. *See Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998). The District Court's reliance upon Luxor's $1,000 offer of judgment to award attorney's fees unfairly required Harrison to forego legitimate claims. *See Frazier*, 131 Nev. at 644, 357 P.3d at 373. In fact, the District Court concluded that Luxor's $1,000 offer of judgment to Harrison was both "unreasonable" and "ludicrous." 4 AA 576–577. Yet, the District Court also did not weigh the *Brunzell* factors, but instead selected an arbitrary number based upon other factors. Indeed, the District Court awarded Luxor the sum of $69,688 in attorney fees without analyzing the *Brunzell* factors for determining the reasonableness of the requested attorney fees. *See Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864-65, 124 P.3d 530, 549 (2005). Therefore, if the Court determines that Luxor, indeed, has a right of offset against the Desert Medical settlement funds, the Court should reverse Luxor's award of attorney fees for failure to satisfy the *Beattie* and *Brunzell* factors.

In summary, Harrison asks 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 separate settlement with Desert Medical. 4 AA 584. Second, Harrison asks 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*

and *Brunzell* factors. Consistent with either of these requests, Harrison asks the Court to release the $150,000 Desert Medical settlement funds to her, which are currently interpled in the District Court. 5 AA 735–743.

V. STANDARDS OF REVIEW

A. STANDARDS FOR REVIEWING QUESTIONS OF LAW.

This Court reviews questions of law de novo. *See Birth Mother v. Adoptive Parents*, 118 Nev. 972, 974, 59 P.3d 1233, 1235 (2002). Statutory interpretation is a question of law that this Court reviews de novo. *Id.*

B. STANDARDS FOR DETERMINING COMPETING LEGAL RIGHTS WITHIN A JUDGMENT.

The "legal operation and effect of a judgment" is a question of law subject to de novo review. *See Barbara Ann Hollier Trust v. Shack*, 131 Nev. 582, 592, 356 P.3d 1085, 1091 (2015) (citing *Ormachea v. Ormachea*, 67 Nev. 273, 291, 217 P.2d 355, 364 (1950)). In *Shack*, this Court applied a de novo review to issues regarding offsets. *Id.*

C. STANDARDS FOR REVIEWING AWARDS OF ATTORNEY'S FEES.

Although a district court's decision regarding an award of attorney's fees is generally reviewed for an abuse of discretion, where the decision implicates a question of law, the appropriate standard of review is de novo. *See Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006).

VI. FACTUAL AND PROCEDURAL BACKGROUND

A. HARRISON'S COMPLAINT AND AMENDED COMPLAINT.

In 2016, Harrison filed a complaint and an amended complaint against Luxor and Desert Medical. 1 AA 1–9, 23–31. Harrison is a resident of Winston County, Alabama. *Id*. at 1, ¶ 1. Harrison was an invited guest of Luxor and was legally on the premises when the incident occurred. *Id*. at 2, ¶ 8. Harrison, on December 10, 2014, was operating a rented scooter, through Desert Medical. *Id*. at 2, ¶ 9. As Harrison was entering the Backstage Deli, the Backstage Deli employees, in an effort to accommodate the scooter's passageway, proceeded to move the dining tables and chairs. *Id.* at 3, ¶ 10. Harrison was operating the scooter over the base of the table ("Subject Table"), her scooter's front wheel gave way, and the scooter tipped over, to the right. *Id*. at 3, ¶ 11. Unaware of the present dangerous conditions, Harrison sustained serious injuries, including a stroke and a hip fracture. *Id*. at 3, ¶ 12. Luxor was in custody and control of the Backstage Deli restaurant furnishings, had a duty to maintain and inspect the tables, including the Subject Table on the Subject Premises for the care, safety and protection of those persons present on the Subject Premises, especially guests thereof, including Harrison. *Id*. at 3, ¶ 14. In the complaint, Harrison alleged claims for (1) negligence as to Luxor; (2) negligent

hiring, training, maintenance, and supervision as to Luxor; and (3) negligence as to Desert Medical.[3]

B. HARRISON'S ATTORNEYS INITIALLY ASSERT THEIR ATTORNEY'S LIEN.

On September 29, 2016, Harrison's attorneys initially asserted their initial attorney's lien. 4 AA 676–678. This notice was served by certified mail upon Harrison and the defense attorneys in the District Court litigation. *Id.*

C. LUXOR'S UNREASONABLE $1,000 OFFER OF JUDGMENT.

Luxor served an unreasonable offer of judgment for $1,000 to Harrison on March 23, 2017. 2 AA 269–272. This $1,000 offer of judgment was issued less than a year after the commencement of this litigation. 1 AA 1–9. Additionally, the jury trial did not begin until December 10, 2018, making Luxor's offer of judgment just a few months shy of two years prior to trial. 2 AA 213.

D. HARRISON'S HIGH-LOW SETTLEMENT WITH DESERT MEDICAL DURING THE JURY TRIAL.

During the jury trial, Harrison and Desert Medical entered into a high-low settlement agreement. 4 AA 701–708. The "low" amount of the settlement

[3] The other parties to the District Court proceedings, and their various claims, are irrelevant to the issues presented in this appeal. Although Desert Medical is not a party to this appeal, its settlement funds are relevant to the attorney's lien and offset issues presented to the Court.

agreement was $150,000, meaning that even with a defense verdict, Harrison would still recover this $150,000 amount. *Id.*

E. THE JURY'S VERDICT.

On December 20, 2018, the jury signed the verdict form in favor of Desert Medical and Luxor, while skipping over the portions of the verdict form that would have awarded Harrison relief. 2 AA 231–234. On January 16, 2019, Luxor filed judgment on the jury verdict, and the notice was filed the next day. 2 AA 231–241.

F. HARRISON'S ATTORNEYS ONCE AGAINST ASSERT THEIR ATTORNEY'S LIEN.

On January 8, 2019, prior to the entry of the judgment, Harrison's attorneys once again asserted their attorney's lien. 4 AA 680–682. This notice identified that Harrison's attorneys had incurred $169,246.73 in costs on her behalf during the course of this litigation. *Id.*

G. LUXOR'S MOTION FOR ATTORNEY'S FEES AND COSTS, AND THE DISTRICT COURT'S ORDER.

On January 17, 2019, Luxor filed its motion for fees and costs, but did not brief the attorney's lien offset issue until the reply brief. 2 AA 252–292; 4 AA 497–545. A hearing was held on February 27, 2019, where the District Court denied Luxor's request for attorney's fees from the time of the offer of judgment, stating that it was unreasonable. 4 AA 576–577. Of the $202,398 in attorney fees that Luxor requested, the District Court awarded only $69,688. *Id.* The District Court reasoned,

"You know, you say you have $420,00 in medical bills, so $1,000 isn't reasonable." 4 AA 576. But, the District Court treated the "ludicrous" $1,000 offer of judgment as continuing through trial, such that it later concluded: "But once all the facts were generated and all the parties knew exactly what the positions were going to be, that's when I consider what should've been done." 4 AA 577. As such, the District Court agreed with Harrison that at the time Luxor's offer of judgment was issued, it was ***unreasonable***. Yet, the District Court looked beyond the period when the offer of judgment could actually be accepted to weigh the *Beattie* and *Brunzell* factors.

H. ORDER GRANTING LUXOR'S MOTION FOR ATTORNEY'S FEES AND COSTS.

On March 18, 2019, the District Court signed Luxor's proposed order for $39,597.28 in costs and $69,688 in attorney's fees, for a total of $109,285.28, without entertaining a rebuttal argument from Harrison. 5 AA 753–760. Yet, Luxor inserted a paragraph into the District Court's order that was never ruled upon in the hearing: "[T]his total final judgment must first be offset from other settlement funds received by Plaintiff and Plaintiff's attorney as part of the trial judgment before any distribution and this total final judgment in favor of Luxor takes priority over any other lien including an attorney's lien. *John J. Muije, Ltd. V. North Las Vegas Cab Co.*, 106 Nev. 664, 799 P.2d 559, 560 (1990)." 4 AA 584.

I. HARRISON'S MOTION TO RECONSIDER THE DISTRICT COURT'S ORDER GRANTING LUXOR AN ATTORNEY'S LIEN OFFSET AND THE DENIAL ORDER.

Since Luxor inserted the offset language in the District Court's attorney's fees and costs order, Harrison moved the District Court for reconsideration. 4 AA 594–682. In her motion for reconsideration, Harrison outlined the reasons why the District Court's order awarding attorney's fees and costs to Luxor did not accurately represent the argument at the hearing. *Id.* Additionally, Harrison pointed out the distinctions in the instant case from *Muije*, such that it did not control the outcome of this issue. *Id.* Without a hearing, the District Court denied Harrison's motion for reconsideration. 5 AA 727–731.

J. DESERT MEDICAL INTERPLEADS THE SETTLEMENT FUNDS.

With competing claims to the $150,000 settlement funds, Desert Medical filed a motion to interplead. 4 AA 701–726. As the motion to interplead was unopposed, the settlement funds from Desert Medical are currently on deposit in the District Court. 5 AA 735–743.

VII. LEGAL ARGUMENT

A. THE DISTRICT COURT ERRED BY ALLOWING LUXOR TO USE A SUBSEQUENT AWARD OF ATTORNEY'S FEES AND COSTS TO "OFFSET" A PRIOR SETTLEMENT BETWEEN HARRISON AND DESERT MEDICAL TO WHICH AN ATTORNEY'S LIEN HAD ALREADY ATTACHED.

The District Court erred by allowing Luxor to use a subsequent award of attorney's fees and costs to "offset" a prior settlement between Harrison and Desert Medical to which an attorney's lien had already attached.

1. Luxor's Claim for Attorney's Fees and Costs Against the Separate Desert Medical Settlement Funds Is Not an "Offset."

Luxor's claim for attorney's fees and costs against the separate Desert Medical settlement funds is not an "offset." *See, e.g., In re Ingersoll*, 90 B.R. 168, 171 (Bankr. W.D.N.C. 1987) ("[T]he debts are between different parties in different capacities and, thus, not subject to offset."); *Dewey v. Latson*, 6 Cal. 609, 612 (1856) ("[T]he amount due under the judgment, were in different rights and to different parties, and could not be subjects of offset, one against the other."). Indeed, the definition of "offset" contemplates, "[s]omething (such as an amount or claim) that balances or compensates for something else." BLACK'S LAW DICTIONARY, 1310 (11th ed. 2019).

In *Muije*, this Court justified offsetting a plaintiff's jury verdict of $12,311.75 by a single defendant's award of attorney's fees of $86,098.06, for a net award to the defendant of $73,786.31. *Id.*, 106 Nev. at 665, 799 P.2d at 560. Since the instant

case is not truly an offset situation, *Muije* is inapposite in both its stated legal principles, as well as its underlying policies. Yet, *Muije* also confirms that third-party judgments, as in the instant case, are not superior to an attorney's lien. *Id.*, 106 Nev. at 667, 799 P.2d at 561 (citing *United States Fidelity & Guarantee v. Levy*, 77 F.2d 972 (5th Cir.1935) (attorney's lien is superior to offset from a claim arising out of a different matter from which the judgment arose); *Cetenko v. United California Bank*, 30 Cal.3d 528, 179 Cal.Rptr. 902, 638 P.2d 1299 (1982) (attorney's lien is superior to that of another creditor who obtained a lien on the same judgment); *Haupt v. Charlie's Kosher Market*, 17 Cal.2d 843, 112 P.2d 627 (1941) (attorney's lien is superior to that of third-party judgment creditor).

Muije notes that "other jurisdictions have held that an offset is part of the trial judgment, and thus it takes priority over an attorney's lien." *Id.*, 106 Nev. at 666, 799 P.2d at 560. However, Harrison's attorneys asserted their attorney's lien against the settlement funds on two occasions prior to the judgment on jury verdict. 4 AA 676–678, 680–682. Thus, Luxor does not dispute that Harrison's attorneys properly asserted their attorney's lien. *Golightly & Vannah, PLLC v. TJ Allen, LLC*, 132 Nev. 416, 420, 373 P.3d 103, 105 (2016). Additionally, Nevada law defines proceedings involving attorney fees and costs resulting in "[a] special order entered after final judgment," NRAP 3A(b)(8), and is substantively appealable on its own." *Barbara Ann Hollier Trust v. Shack*, 131 Nev. 582, 591, 356 P.3d 1085, 1091 (2015). Thus,

since Harrison's attorneys asserted an attorney's lien against the Desert Medical settlement funds, and Luxor has no right to assert an offset against the third-party funds, the Court should conclude that Luxor has no offset against these settlement funds.

2. Since 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.

Since 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. *See Brooksby v. Nev. State Bank*, 129 Nev. 771, 773, 312 P.3d 501, 502 (2013) ("Only property owned by the judgment debtor is subject to garnishment, and questions regarding title to that property as between the judgment creditor and a third party are properly determined by the court having jurisdiction.") (citing NRS 21.120; NRS 31.070).

NRS 21.120, Garnishment in aid of execution; notice of writ of garnishment; third-party claims, in its entirety, states:

> 1. If personal property, including debts or credits due or to become due, is not in the possession or control of the debtor, the sheriff, upon instructions from the creditor and without requiring an order of court, ***shall serve a writ of garnishment in aid of execution upon the party in whose possession or control the property is found***. Notice of the writ of garnishment must be served upon the judgment debtor in the same manner and form and within the time prescribed in NRS 21.075 and 21.076 for property levied upon by writ of execution.

> 2. If any property levied upon by writ of execution or by writ of garnishment in aid of execution is claimed by a third person as his or her property, the same rules prevail as to the contents and making of the claim, as to the holding of the property and as to a hearing to determine title thereto, as in the case of a claim after levy under writ of attachment, as provided for by law.

(emphasis added).

Hence, under NRS 21.120, Luxor was required to file a writ of execution against the third-party Desert Medical settlement funds. NRS 31.070 contains similar requirements which Luxor also failed to satisfy. According to NRS 0.025(1)(d), the term "shall" "imposes a duty to act." The use of the word "shall" in the statute divests this Court of judicial discretion. *See id.*; *see also Otak Nevada, LLC v. District Court*, 127 Nev. 593, 598, 260 P.3d 408, 411 (2011) (explaining that when a statutory phrase is clear and unambiguous, this court must give effect to that clear meaning and will not consider sources beyond the language of the statute to interpret it). This Court has explained that, when used in a statute, the word "shall" imposes a duty on a party to act and prohibits judicial discretion and, consequently, mandates the result set forth by the statute. *Id.*; *see also Johanson v. Dist. Ct.*, 124 Nev. 245, 249–250, 182 P.3d 94, 97 (2008) (explaining that "shall" is mandatory and does not denote judicial discretion) (citing *Washoe Med. Ctr. v. Dist. Ct.*, 122 Nev. 1298, 1303, 148 P.3d 790, 793 (2006)). Notably, Luxor's award of attorney fees and costs is against Harrison only. 4 AA 579–584. Accordingly, Luxor had no legal ability to simply assert its award against the third-party settlement funds

outside of NRS 21.120 and NRS 31.070. The record is devoid of any such filings by Luxor. 5 AA 778–789.

3. The Policies Outlined in *Muije* With Regard to an Offset Involving Only Two Parties Are Not Present in the Instant Case.

The policies outlined in *Muije* with regard to an offset involving only two parties are not present in the instant case. Notably, *Muije* recites, "The purpose of a lawsuit is to settle a dispute between two parties." *Id.*, 106 Nev. at 666, 799 P.2d at 560. It is also true that an offer of judgment cannot be transformed into a "vehicle to pressure offerees into foregoing legitimate claims in exchange for unreasonably low offers of judgment. . ." *Frazier v. Drake*, 131 Nev. 632, 644, 357 P.3d 365, 373 (Ct. App. 2015). In the instant case, Harrison did settle with Desert Medical. 4 AA 701–708. Certainly, *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. Instead, the policy of *Muije* involving only a single plaintiff and a single defendant in a true offset situation must be tempered to the situation in the instant case, which is akin to *Frazier*, which if affirmed would have the effect of unfairly depriving Harrison of her legitimate claims.

Therefore, Harrison first asks the Court to make the determination that Luxor's award of attorney fees and costs was not an offset against the Desert Medical

settlement funds, such that the attorney's lien asserted by Harrison's attorneys against these settlement funds takes precedence.

B. ALTERNATIVELY, 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.

Alternatively, 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.

1. 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.

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. *See Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998). When determining whether to award attorney's fees based upon an offer of judgment, a court must evaluate "(1) whether the plaintiff's claim was brought in good faith; (2) whether the defendant[']s 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 and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount." *Frazier*, 131 Nev. at 642, 357 P.3d at 372.

Frazier further prohibited the practice that "penalized [plaintiffs] for rejecting offers of judgment the court deemed unreasonable and not made in good faith and

opting to pursue claims the court found to have been brought in good faith, while simultaneously determining that [plaintiffs'] decisions to reject [defendant's] offers were neither unreasonable nor made in bad faith." *Id.*, 131 Nev. at 643, 357 P.3d at 373. In the instant case, the District Court's ruling on attorney fees closely tracks the prohibitions in *Frazier*.

Counsel for Luxor: At trial they only asked for pain and suffering. So if you take that into consideration, and the evidence that shows liability was not going to lie with Luxor, $1,000 based upon zero medical bills is not unreasonable. It is a reasonable offer.

THE COURT: For a fractured bone[?]

4 AA 562.

The Court continued in actually agreeing with Harrison on the *Beattie* factors:

THE COURT: When were the 30B(6) depositions completed? I know we had some issues with those.

Counsel for Harrison: The offer of judgment was presented on March 23rd --

THE COURT: I know it's March for the offer –

Counsel for Harrison: 20- -- yeah. And December 20th is when the 30B(6)s were done.

THE COURT: That's what I thought --

* * *

THE COURT: Okay. Let's deal with the delay on the 30B(6)s. If I recall, the [indiscernible] fell on Luxor because they didn't have someone or they couldn't produce someone or there's all those issues going back and forth as to the delay in getting the 30B(6)s done.

4 AA 567, 569.

Yet, the District Court placed an affirmative duty on Harrison to issue her own settlement offer to Luxor, which is outside the scope of the *Beattie* factors.

THE COURT: After the 30B(6), after discovery was completed, did you attempt to resolve the matter by sending them an offer of judgment, or asking or making a demand?

4 AA 568.

The Court also questioned counsel for Luxor that it did not follow its own safety plan. 4 AA 570–571. In speaking to counsel for Luxor, the Court questioned its ability to award fees under the scenario of this case:

THE COURT: That's what my problem is, Counsel, is you sit here and talk about developing of evidence, you don't even know what the Plaintiff was going to say and you shoot over a $1,000 OJ. So if your own logic is, we did it based upon the facts, the primary fact finder or the primary fact witness on the Plaintiff's side would've been the Plaintiff.

Counsel for Luxor: Exactly.

THE COURT: So you didn't have those facts. You didn't even know what she was going to say when you made an offer judgment of $1,000.

4 AA 574–575.

The Court then gave zero credence to Luxor's $1,000 offer of judgment:

THE COURT: Okay. This is what I'm going to do, Counsel. In regards to the offer of judgments, when I get numbers like this -- and I understand, because it's always this turmoil. You know, you say you have $420,000 in medical bills, so $1,000 isn't reasonable. But 420,000 in medical bills, $200,000 might not be reasonable, $300,000 might not be reasonable. All 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. There's no way we could settle it. We got more than that in just our initial costs.

4 AA 576–577.

Despite weighing the *Beattie* factors in favor of Harrison, the District Court, nevertheless, concluded:

THE COURT: But once all the facts were generated and all the parties knew exactly what the positions were going to be, that's when I consider what should've been done. As a result therein, I'm going to allow the fees that were

incurred in December. My total is $69,688. Counsel for the Defendant, go ahead and prepare the order.

4 AA 577.

In essence, the District Court could not weigh the *Beattie* factors against Harrison, yet awarded attorney fees against her. This course of action is exactly what *Frazier* prohibits. Therefore, the Court should reverse the award of attorney fees to Luxor.

2. The District Court's Reliance Upon Luxor's $1,000 Offer of Judgment to Award Attorney's Fees Unfairly Required Harrison to Forego Legitimate Claims.

The District Court's reliance upon Luxor's $1,000 offer of judgment to award attorney's fees unfairly required Harrison to forego legitimate claims. *See Frazier*, 131 Nev. at 644, 357 P.3d at 373. In fact, the District Court concluded that Luxor's $1,000 offer of judgment to Harrison was both "unreasonable" and "ludicrous." 4 AA 576–577. As outlined in this exchange, the District Court recognized that the $1,000 offer was not reasonable, yet the District Court, nevertheless again violated *Frazier* by requiring Harrison to forego $420,000 in medical bills for a mere $1,000, which, as the District Court recognized, does not even cover the initial costs. 4 AA 576–577.

Although the *Beattie* factors must be weighed at the time the offer of judgment was issued, the District Court stated on the record that prior to trial, Harrison then

had the information available to her to settle the case. 4 AA 577. But, Luxor's $1,000 offer of judgment was just a few months shy of being two years prior to trial. So, by the District Court's own tacit admission, Luxor's offer of judgment is not enforceable—at the time it was issued—and cannot be the basis for an award of attorney fees and costs under the *Beattie* factors. *Frazier*, 131 Nev. at 642, 357 P.3d at 372.

3. The District Court Also Did Not Weigh the *Brunzell* Factors, But Instead Selected an Arbitrary Number Based Upon Other Factors.

The District Court also did not weigh the *Brunzell* factors, but instead selected an arbitrary number based upon other factors. Indeed, the District Court awarded Luxor the sum of $69,688 in attorney fees without analyzing the *Brunzell* factors for determining the reasonableness of the requested attorney fees. *See Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864–865, 124 P.3d 530, 549 (2005).

At 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. This failure, too, requires that the District Court's award of attorney fees to be vacated. *See Shuette*, 121 Nev. at 865, 124 P.3d at 549 ("[T]he court ***must*** continue its analysis by considering the requested amount in light of the factors enumerated by this court in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969),

namely, the advocate's professional qualities, the nature of the litigation, the work performed, and the result. In this manner, whichever method the court ultimately uses, the result will prove reasonable as long as the court provides sufficient reasoning and findings in support of its ultimate determination.") (emphasis added). Therefore, if the Court determines that Luxor, indeed, has a right of offset against the Desert Medical settlement funds, the Court should reverse Luxor's award of attorney fees for failure to satisfy the *Beattie* and *Brunzell* factors.

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VIII. CONCLUSION

In summary, Harrison asks 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 separate settlement with Desert Medical. 4 AA 584. Second, Harrison asks 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* and *Brunzell* factors. Consistent with either of these requests, Harrison asks the Court to release the $150,000 Desert Medical settlement funds to her, which are currently interpled in the District Court. 5 AA 735–743.

Dated this 31st day of August, 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 2010 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:

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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 31st day of August, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing: **APPELLANT'S AMENDED OPENING BRIEF** was filed electronically with the Nevada Supreme Court on the 31st day of August, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Boyd B. Moss, Esq.
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I further certify that I served a copy of this document by first class mail with sufficient postage prepaid to the following address:

N/A

/s/ Anna Gresl
Anna Gresl, an employee of
Claggett & Sykes Law Firm