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 Mar 05 2021 11:36 p.m. Elizabeth A. Brown Clerk of Supreme Court Appeal from the Eighth Judicial District Court, the Honorable David M. Jones Presiding

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Appellant/Plaintiff Vivia Harrison ("Harrison") presents this Court with two issues: (1) whether the District Court erred by allowing Respondent/Defendant Ramparts, Inc. dba Luxor Hotel and Casino ("Luxor") to use a subsequent award of attorney fees and costs to "offset" a prior settlement between Harrison and Defendant Desert Medical Equipment ("Desert Medical") to which an attorney's lien had already attached; and (2) alternatively, whether the District Court erred by awarding attorney's fees to Luxor based upon a $1,000 offer of judgment according to the *Beattie*[1] and *Brunzell*[2] factors. Both of these issues are of statewide public importance and touch upon the State of Nevada's long held public policy of encouraging settlement between litigants without, "forcing litigants to forego legitimate claims." *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998) (citing *Beattie v. Thomas*, 99 Nev. 579, 588, 668 P.2d 268, 274 (1983)).

First, Harrison asks that this Court reverse that portion of the District Court's written order allowing Luxor to offset its award of attorney fees and costs against Harrison's separate settlement with Desert Medical. If the District Court's order is left to stand and Luxor's position is adopted by this Court, then all future third-party

[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).

settlements may be subject to potential offsets against subsequent awards for attorney's fees and costs simply because, "they both originated from the same litigation and are clearly related to the same incident, set of facts and/or causes of action." Respondent's Answering Brief ("RAB") 13. Such a position runs counter to Nevada public policy and is wholly unsupported by existing Nevada case law. As discussed below, the Nevada cases Luxor relies on, including *John W. Muije, Ltd. v. North Las Vegas Cab Company, Inc.*, 106 Nev. 664, 798 P.2d 559 (1990) and *Schouweiler v. Yancey Co.*, 101 Nev. 827, 712 P.2d 766 (1985), are factually distinct from this matter and, thus, inapplicable. Simply put, Luxor's position is one without a legal foundation to stand upon. It is also telling that Luxor largely ignores the distinctions presented in Harrison's opening brief and, instead, reasserts that *Muije* is controlling. *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."). Luxor's failure to respond constitutes a confession of error. *See* NRAP 31(d)(2); *Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) ("We elect to treat the Chronisters' failure to respond to

this argument in the three pages of argument in their answering brief as a confession of error.").

Although Harrison has no substantive challenge to Luxor's award of costs, by operation of law, if Harrison's attorney lien is superior to Luxor's subsequent order, Luxor's award of attorney fees, as well as costs, cannot be levied against the Desert Medical settlement funds. Similarly, if the Court determines that Luxor is no longer the prevailing party or the judgment is substantially modified, Luxor will not be entitled to an award of costs. *See Loomis v. Lange Fin. Corp.*, 109 Nev. 1121, 1129, 865 P.2d 1161, 1165–1166 (1993); 10 Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE, § 2668 at 213–214 (3d ed.) (stating that any costs awarded to a previously prevailing party are automatically vacated upon reversal or substantial modification of the underlying judgment).

Second, alternatively, Harrison asks that this Court reverse the District Court's award of attorney's fees and costs for failure to satisfy the *Beattie* and *Brunzell* factors. Luxor's offer of judgment for $1,000 was served early in the litigation. 2 AA 269–272. At that time, extensive discovery remained outstanding, including Harrison's deposition, the disclosure of relevant floor plans, and the depositions of Luxor's NRCP 30(b)(6) designees. 4 AA 565–567, 574–575. Further, Luxor failed to renew its offer of judgment at the conclusion of discovery,

or at any time prior to trial. *Id.* at 566, 568. All of this led the District Court to conclude that Luxor's offer of judgment was "unreasonable" and "ludicrous." *Id.* at 576–577. Nevertheless, the District Court ruled in Luxor's favor by focusing on other factors, including Harrison's actions after the close of discovery, i.e., well after the time to accept Luxor's offer of judgment had passed. *Id.* at 577. Luxor would have this Court examine solely the language in the District Court's written order, however, such a narrow scope of inquiry ignores glaring discrepancies between the District Court's statements during oral argument and the final written order. That is, Luxor cannot hide behind the very specific findings of the District Court, with vague statements in the subsequent written order. *See, e.g., Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001).

In summary, Harrison asks this Court to reject the arguments in Luxor's answering brief and 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. Finally, 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.

II. LEGAL ARGUMENT

A. THE DISTRICT COURT ERRED BY ALLOWING LUXOR TO USE A SUBSEQUENT AWARD OF ATTORNEY 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 fees and costs to "offset" a prior settlement between Harrison and Desert Medical to which an attorney's lien had already attached.

1. This Court's Decision in *Muije* Does Not Support the District Court's Order Offsetting Luxor's Award of Attorney's Fees and Costs Against Harrison's Prior Settlement with Desert Medical.

In its Answering Brief, Luxor relies heavily on this Court's decision in *John W. Muije, Ltd. v. North Las Vegas Cab Company, Inc.*, 106 Nev. 664, 798 P.2d 559 (1990). However, *Muije* is factually distinct from the present matter and does not stand for the proposition that an award of fees and costs may be offset against a prior third-party settlement.

In *Muije*, "Opal Jean Peregoy was injured when her car was hit from behind by a cab driven by an employee of A North Las Vegas Cab Company, Inc." *Muije*, 106 Nev. at 665, 798 P.2d at 559. Peregoy hired John W. Muije Ltd. and Cummings, Cummings & Dudenhefer ("Muije") to represent her in her personal injury case against A North Las Vegas Cab Company. *Id.* During the litigation, A North Las

Vegas Cab Company served Peregoy with two offers of judgment, "first for $200,000 and then for $250,000." *Id.* At trial, the jury awarded Peregoy $12,311.75. *Id.*, 106 Nev. at 665, 798 P.2d at 560. Prior to the verdict, Muije perfected his attorney's lien. *Id.* Thereafter, A North Las Vegas Cap Company filed a motion for attorney's fees and costs, which the District Court granted in the amount of $86,098.06. *Id.*

The issue in *Muije* was whether Muije's perfected attorney's lien on the verdict award had priority over A North Las Vegas Cab Company's claim to an offset in satisfaction of its fees and costs award. The Nevada Supreme Court held that A North Las Vegas Cab Company's offset was superior to Muije's attorney's lien. *Id.*, 106 Nev. at 667, 798 P.2d at 561.

In reaching its decision, this Court cited approvingly to *Salaman v. Bolt*, 74 Cal.App.3d 907, 141 Cal.Rptr. 841 (1977) for the proposition that "equity requires settlement of the net verdict ***between the two parties*** before attorneys' liens may attach." *Id.*, 106 Nev. at 666, 798 P.2d at 560 (emphasis added). As is clear from that language, the *Salaman* case is likewise factually distinct from the present matter. There, J. Franklin Salaman and Joseph Waldo Salaman ("the Salamans") sued their landlord, Albert D. Bolt ("Bolt"), for unlawful detainer. *Salaman*, 74 Cal.App.3d at 913, 141 Cal.Rptr. at 843. In that suit, judgment was entered in favor of Bolt and the court awarded Bolt a fees and cost award in the amount of $8,000. *Id.*

Subsequently, Bolt's attorney asserted a lien on Bolt's fees and costs award. *Id.*, 74 Cal.App.3d at 913, 141 Cal.Rptr. at 843–844. In a separate case, the Salamans obtained a default judgment against Bolt for $6,214.44. *Id.*, 74 Cal.App.3d at 914, 141 Cal.Rptr. at 844.

The issue on appeal was whether the trial court was correct in giving Bolt's counsel's attorney's lien priority and denying the Salamans' request to offset their judgment against Bolt's judgment. *Id*., 74 Cal.App.3d at 916, 141 Cal.Rptr. at 845. The court acknowledged that "[a]mong nonparty lien claimants, the basic rule is well established that they have priority according to the time of the orders creating their liens…." *Id*., 74 Cal.App.3d at 918, 141 Cal.Rptr. at 846. However, "as between a statutory lien and a right of equitable offset, things are not equal, and the offset is given an equitable preference." *Id.* Critically, the court defined "equitable offset" as "a means by which a debtor may satisfy in whole or in part a judgment or claim held against him out of a judgment or claim which he has subsequently acquired against his judgment creditor." *Id.*, 74 Cal.App.3d at 918, 141 Cal.Rptr. at 847. Thus, the court concluded that "the offset of judgment against judgment is a matter of right" and the attorney's lien would attach only to the excess amount. *Id.* 74 Cal.App.3d at 920, 141 Cal.Rptr. at 848.

Luxor cites to *Muije* and the "net verdict" language throughout its answering brief while completely ignoring that the case, and the cases cited therein, are

inapplicable to the present matter. *See, e.g.,* RAB 3, 10–11, 13, 15–16. As demonstrated above, *Muije* involved offsets between two parties, and did not contemplate offsets against third-party settlements. The reasoning and plain language of the case makes it clear that its holding is limited to situations involving a single pair of parties. *See, e.g., Muije*, 106 Nev. at 666, 798 P.2d at 560 ("equity requires settlement of the net verdict between the two parties before attorneys' liens may attach"). Similarly, in *Salman* the court defined "equitable offset" as, "a means by which a debtor may satisfy in whole or in part a judgment or claim held against him out of a judgment or claim which he has subsequently acquired against his judgment creditor." *Salaman*, 74 Cal.App.3d at 918, 141 Cal.Rptr. at 847. Neither decision permits Luxor to search outside the bounds of the judgment for property against which to offset its fee and cost award.

Instead of addressing the differences in *Muije* outlined in Harrison's opening brief, Luxor ignores them and, thus, tacitly concedes that the situation in the instant case involving a third party is inapposite. *See, e.g., In re Ingersoll*, 90 B.R. at 171 ("[T]he debts are between different parties in different capacities and, thus, not subject to offset."); *Dewey*, 6 Cal. at 612 ("[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."). Luxor also fails to address that the judgment is a separate and distinct order from a post-judgment fees order. *See Barbara Ann Hollier Trust*

v. Shack, 131 Nev. 582, 591, 356 P.3d 1085, 1091 (2015). Hence, Luxor's failure to respond constitutes a confession of error. *See* NRAP 31(d)(2); *Bates*, 100 Nev. at 682, 691 P.2d at 870 ("We elect to treat the Chronisters' failure to respond to this argument in the three pages of argument in their answering brief as a confession of error."). Simply put, *Muije* provides no support for Luxor's position that it should be entitled to an offset against Harrison's prior settlement with Desert Medical, arising out of a completely different order. Accordingly, this Court should reverse that portion of the District Court's order.

2. Nevada Law Does Not Provide That Luxor is Entitled to Offset its Subsequent Award of Attorney Fees and Costs Against Harrison's Prior Settlement with Desert Medical.

Next, Luxor argues that its award of fees and costs should be offset against Harrison's prior settlement with Desert Medical because "they both originated from the same case." RAB 11. In support of its assertion, Luxor cites to *Schouweiler v. Yancey Co.*, 101 Nev. 827, 712 P.2d 766 (1985). As with *Muije*, the facts in *Schouweiler* greatly differ from those in this present matter and at no point in the decision does this Court state that offsets are to be taken against third-party settlements.

In *Schouweiler*, a group of condominium owners brought suit against multiple defendants for negligent construction. *Schouweiler*, 101 Nev. at 829, 712 P.2d at 787. At trial, the homeowners prevailed against some defendants, while judgment

was entered in favor of the remaining defendants. *Id.* One issue on appeal was whether the homeowners could pass the prevailing defendants' costs through to the losing defendants pursuant to NRS 18.020. *Id.*, 101 Nev. at 831–832, 712 P.2d at 789. This Court reasoned that "[b]ecause the prevailing defendants…are allowed to tax their costs against Homeowners pursuant to NRS 18.020, these costs become costs incurred by Homeowners." *Id.*, 101 Nev. at 832, 712 P.2d at 789. This Court concluded "that the costs of the prevailing defendants may be recovered by Homeowners from the losing defendants pursuant to NRS 18.020." *Id.* Thus, the *Schouweiler* decision had nothing to do with offsetting fees and costs awards against third-party settlements. Instead, it briefly addressed the process of accounting for and assessing costs among parties within NRS 18.020. Luxor is incorrect in claiming that *Schouweiler* is "analogous" to this case. RAB 12.

Further, Luxor's legally unsupported and overly-broad formulation of the law would have disastrous public policy implications. First, Luxor's assertion of an offset against Harrison's settlement with Desert Medical simply because they "originated from the same litigation and are clearly related to the same incident, set of facts and/or causes of action" would mean that all future third-party settlements would potentially be subject to subsequent offsets. RAB 13. This would, presumably, include pre-trial settlements and even pre-litigation settlements arising from the same "set of facts." Luxor would, thus, grant nearly limitless reach in the

execution of a subsequent award of fees and costs. This result is, of course, absurd and arbitrary. *See* BLACK'S LAW DICTIONARY, 129 (11th ed. 2019) (defining "arbitrary" as "[d]epending on individual discretion; of, relating to, or involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures"). Moreover, Luxor's proposed rule would have a chilling effect on third-party settlements. Parties would no longer be incentivized to compromise and alleviate risk through settlement, but instead be confronted with the haunting possibility that any settlement fund would later be tapped into to satisfy a non-settling party's judgment.

Finally, Luxor's proposed rule would cause Nevada attorneys to think twice about taking on complex multi-party litigation on a contingency fee basis or fronting costs for clients. Such a deterrent would hinder access to justice. *See O'Connell v. Wynn Las Vegas, LLC*, 429 P.3d 664, 671 (Nev. Ct. App. 2018) ("[C]ontingency fees allow those who cannot afford an attorney who bills at an hourly rate to secure legal representation. Contingent fee agreements between attorneys and their clients . . . generally allow a client without financial means to obtain legal access to the civil justice system.") (citation and internal quotation marks omitted). Fee and cost agreements are struck at the early stages of the attorney-client relationship, and well before all facts of a case are fully developed. If forced to re-assess the risk of taking on these types of cases, attorneys may begin requiring that clients pay for costs up-

front and out-of-pocket. Such arrangements would be cost prohibitive for many. *Id.* For these reasons, Luxor's claim to an offset against Harrison's prior settlement with Desert Medical should be rejected, and this Court should reverse that portion of the District Court's order.

3. Harrison's Counsel's Perfected Attorney Lien Has Priority Over Luxor's Claim to Harrison's Prior Settlement with Desert Medical.

Here, 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; NRS 18.015(3) ("An attorney perfects a lien…by serving notice in writing, in person or by certified mail, return receipt requested, upon his or her client and, if applicable, upon the party against whom the client has a cause of action, claiming the lien and stating the amount of the lien."). Luxor does not dispute, and thus concedes, that Harrison's attorneys have a perfected attorney's lien according to *Golightly & Vannah, PLLC v. TJ Allen, LLC*, 132 Nev. 416, 420, 373 P.3d 103, 105 (2016), which is an authority that Luxor does not challenge. Instead, Luxor broadly relies upon *Muije*. RAB 15–16. As discussed above, *Muije* is distinguishable and, thus, should be given no weight in this matter, particularly because Luxor does not address the distinctions. Therefore, Luxor has no right within Nevada law to jump the line and assert an offset against Harrison's prior settlement with Desert Medical. Harrison's counsel's lien came first in time and should be given priority status.

4. Luxor Must Go Through Normal Execution Procedures Against Harrison's Prior Settlement with Desert Medical.

Without any legal footing to assert an offset against Harrison's prior settlement with Desert Medical, Luxor's only option for recovering its fees and costs was through normal execution procedures in order 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). According to NRS 21.120 and NRS 31.070, Luxor was required to serve a writ of garnishment upon Desert Medical. NRS 21.120 ("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."); NRS 31.070. Luxor has admittedly failed to satisfy these statutory requirements.

Instead, Luxor makes two arguments against this proposed procedure for its recovery. First, Luxor argues that Harrison waived this argument by failing to raise it in the District Court. RAB 16–17. This, of course, ignores the fact that Luxor waited to request an offset until its Reply in Support of Luxor's Motion for

Attorney's Fees and Costs, thus denying Harrison the opportunity to respond. 4 AA 499. Additionally, the offset issue was not mentioned by the District Court during oral argument on Luxor's Motion for Attorney's Fees and Costs. 4 AA 547–578. Accordingly, the first opportunity for Harrison to address the offset issue was in her Motion to Reconsider the Court's Order Granting Luxor an Attorney Lien Offset. 4 AA 594–682. Luxor's decision to improperly raise issues for the first time in its Reply should not be held against Harrison. But, fortunately, Nevada law provides Harrison with a remedy because issues raised for the first time on reconsideration are properly preserved for appellate review under the circumstances of his case. *See Arnold v. Kip*, 123 Nev. 410, 416–417, 168 P.3d 1050, 1054 (2007). And, even if this issue was not raised below, constitutional issues, such as procedural due process, can be raised for the first time on appeal. *See Levingston v. Washoe County*, 112 Nev. 479, 482, 916 P.2d 163, 166 (1996) ("[I]ssues of a constitutional nature may be addressed when raised for the first time on appeal.").

Second, Luxor claims Harrison has been afforded "due process" in the District Court through the underlying interpleader action. RAB 17; 4 AA 701–726. However, while an interpleader action may be utilized to determine competing interests in funds, it does not allow an interested party to simply ignore statutory requirements for perfection of its interest. *See, e.g., Golightly & Vannah, PLLC v. TJ Allen, LLC*, 132 Nev. 416, 373 P.3d 103 (2016) (affirming a district court's

decision to order a pro-rata distribution because counsel failed to perfect its lien in accordance with NRS 18.015). And, under Luxor's strained argument, Harrison would have been deprived of an opportunity to be heard on her dispute with Luxor. In essence, Luxor's argument attempts to place Harrison in a legal no-man's land, being deprived of procedural due process, which is defined as "notice and an opportunity to be heard." *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007) (citing *Maiola v. State*, 120 Nev. 671, 675, 99 P.3d 227, 229 (2004); *see also Browning v. Dixon*, 114 Nev. 213, 217, 954 P.2d 741, 743 (1998)). Thus, Luxor must still comply with all applicable statutory requirements, including those found within NRS 21.120 and NRS 31.070, as its award of fees and costs is against Harrison, alone. This approach is both consistent with the law and protects the rights and interests of all interested parties, including Harrison.

B. ALTERNATIVELY, THE DISTRICT COURT ERRED BY AWARDING ATTORNEY 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 fees to Luxor based upon a $1,000 offer of judgment according to the *Beattie* and *Brunzell* factors.

1. The District Court Erred in Applying the *Beattie* Factors.

This Court has explained that "while the purpose of NRCP 68 is to encourage settlement, it is not to force plaintiffs to forego legitimate claims." *Beattie v.*

Thomas, 99 Nev. 579, 588, 668 P.2d 268, 274 (1983). To that end, "[i]n exercising its discretion regarding the allowance of fees and costs under NRCP 68…the trial court must carefully evaluate the following 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 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." *Id.*, 99 Nev. at 588–589, 668 P.2d at 274. Here, the District Court erred in applying the *Beattie* factors.

A review of the record and, specifically, the District Court's statements during the hearing on Luxor's Motion for Attorney's Fees and Costs reveals: (1) Harrison brought her claims against Luxor in good faith; (2) Luxor's early offer of judgment in the amount of $1,000 was unreasonable in both timing and amount; and (3) Harrison's decision to reject Luxor's $1,000 offer of judgment was not unreasonable or in bad faith. *See* 4 AA 547–578. "Because offers of judgment are designed to encourage settlement and are not intended to unfairly force plaintiffs to forego legitimate claims, three of the four *Beattie* factors require an assessment of whether the parties' actions were undertaken in good faith." *Frazier v. Drake*, 131 Nev. 632, 642, 357 P.3d 365, 373 (Ct. App. 2015). Thus, "where…the district court determines that the three good-faith *Beattie* factors weigh in favor of the party that

rejected the offer of judgment, the reasonableness of the fee requested by the offeror becomes irrelevant, and cannot, by itself, support a decision to award attorney fees to the offeror." *Id.*, 131 Nev. at 644, 357 P.3d at 373. A fee award based solely upon the supposed reasonableness of the fee request is a "legal error" and is, "a clear abuse of discretion." *Id.*, 131 Nev. at 644, 357 P.3d at 373.

In its answering brief, Luxor insists that this Court disregard the District Court's oral pronouncements during argument and instead focus its inquiry on the District Court's written order, alone. RAB 22–23. In making this argument, Luxor completely ignores the fact that the instant case is on all fours with *Frazier*. In any event, the oral pronouncements of the District Court, as well as the written order, are taken into account when analyzing whether a District Court properly considered all of the *Beattie* factors. *See, e.g., Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998) ("The written order formally awarding Arnoult's fees and the oral pronouncements of the district court demonstrate that all of the factors were considered."). As such, it is critical to note the disparity between the District Court's statements during argument and the Luxor-prepared written order. Notably, *Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001) was designed to allow the Court to support a vague fees order with supporting information in the record, not manipulate contrary detailed findings with a vague order in an attempt to cure an invalid order. Luxor's citation to *Rust v. Clark County Sch. Dist.*, 103 Nev.

686, 747 P.2d 1380 (1987) is also problematic because if the District Court allegedly changed its reasoning from its detailed findings that violated *Frazier* to a vague order that supposedly complies with *Beattie*, there was no notice and an opportunity to be heard and, thus, a lack of procedural due process. *See Callie*, 123 Nev. at 183, 160 P.3d at 879.

Moreover, it is clear from the District Court's statements and lines of inquiry during the argument that Luxor's early $1,000 offer of judgment was unreasonable as to both amount and timing. In its answering brief, Luxor argues that its nominal offer of judgment was reasonable because "it was reasonable for Luxor to believe Harrison's claims were weak and lacked merit." RAB 25. But the offer of judgment must have been reasonable as to amount *and* timing. *See Beattie v. Thomas*, 99 Nev. 579, 588–589, 668 P.2d 268, 274 (1983). And, the proper *Beattie* analysis must be in the context when the offer of judgment could still be accepted, not the procedural posture years later when the parties were in trial. *See Taylor v. Kilroy*, 2019 WL 3195458, Dkt. No. 75131, at *3 (Nev. 2019) (unpublished) (consideration of defendant's rejection of offer was "based on the information known to the parties at the time the offer was made"); *Cripps v. DiGregorio*, 824 A.2d 1104, 1108 (N.J. Super. 2003) (court cannot evaluate offer of judgment "through the eyes of 20/20 hindsight"). Luxor completely neglects to address the critical discovery that remained outstanding at the time it served its offer of judgment, as well its failure to

renew its offer of judgment after additional discovery had been completed. Thus, the District Court erred in applying the *Beattie* factors and the District Court's order awarding Luxor fees should be vacated.

2. The District Court Erred by Improperly Applying the *Brunzell* Factors.

The fourth *Beattie* factor directs courts to assess "whether the fees sought by the offeror are reasonable and justified in amount." *Beattie*, 99 Nev. at 588–589, 668 P.2d at 274. To accomplish that, courts are to "continue its analysis by considering the requested amount in light of the factors enumerated by this court in *Brunzell v. Golden Gate National Bank*, namely, the advocate's professional qualities, the nature of the litigation, the work performed, and the result." *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 865, 124 P.3d 540, 549 (2005) (citing *Brunzell v. Thomas*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969)).

Rather than consider and apply the *Brunzell* factors, the District Court instead based its fee award on other considerations that took place years after the time expired to accept the offer of judgment. 4 AA 577. Luxor argues in its answering brief that the District Court, did, in fact, analyze the *Brunzell* factors based on the language of the written order. RAB 28–29. However, again, the language in the written order runs counter to the District Court's reasoning at argument, and represents a deprivation of Harrison's procedural due process. 4 AA 577. Therefore,

because the District Court erred in applying the *Brunzell* factors, this Court should vacate Luxor's award of attorney fees on this alternative basis.

III. CONCLUSION

In summary, Harrison asks this Court to reject the arguments in Luxor's answering brief and 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. Finally, 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 5th day of March 2021.

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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:

proportionally spaced, has a typeface of 14 points or more and contains 5,798 words; or

does not exceed 15 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 5th day of March 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT'S REPLY BRIEF** was filed electronically with the Nevada Supreme Court on the 5th day of March 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Boyd B. Moss, Esq.
Matthew G. Pfau, Esq.
Loren S. Young, 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