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IN THE COURT OF APPEALS OF THE STATE OF NEVADA

VIVIAN HARRISON,

Appellant,

v.

RAMPARTS INC. dba LUXOR HOTEL &
CASINO,

Respondent.

No. 80167-COA

APPELLANT'S MOTION TO REISSUE JULY 21, 2021
ORDER AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING AS A PUBLISHED OPINION

Appellant, Vivia Harrison (“Harrison”), by and through her counsel of record, hereby moves this Honorable Court pursuant to NRAP 36(f) to reissue the July 21, 2021 Order Affirming In Part, Reversing In Part, and Remanding (“Order”) as an Opinion, which is attached as **Exhibit 1**.

I. INTRODUCTION

On July 21, 2021, this Court issued its unpublished order affirming in part, reversing in part, and remanding in which it ordered the District Court’s order granting Respondent, Ramparts, Inc. dba Luxor Hotel and Casino (“Luxor”) motion for attorney’s fees and costs affirmed in part and reversed in part and remand this matter to the District Court for proceedings consistent with the Order. *Id.* at 8. Specifically, the Order affirmed in part the District Court’s order as it relates to the amount of attorney fees awarded. *Id.* The Order also reversed the District Court’s order in part as to the offset and remanded this case to the District Court in order to release the interpleaded funds to Harrison and her attorneys. *Id.* at 5-6.

This motion demonstrates that the Order should be published as an opinion because in compliance with NRAP 36(c)(1), this case presents issues of statewide public importance. Since nearly every litigation case filed in this State contemplates an award of costs, a published decision would benefit not only the parties to this litigation, but nearly every litigation case in Nevada. A published opinion would also provide guidance to the district courts and other lower courts on offsets where parties

do not have competing judgments against each other that are subject to offset. That is, the Court's Order makes very important distinctions to the holdings in *John W. Muije, Ltd. v. North Las Vegas Cab Company, Inc.*, 106 Nev. 664, 798 P.2d 559 (1990), which will now encourage the settlement of cases under similar circumstances to the instant case.

II. LEGAL ARGUMENT

A. STANDARDS FOR REISSUING AN ORDER AS AN OPINION.

NRAP 36(f) allows any interested party, including the parties to the litigation, to file a motion to reissue an order of this Court as opinion. NRAP 36(f)(3) outlines the criteria in NRAP 36(c)(1)(A)–(C) as the basis to file such a motion, which are: (A) Presents an issue of first impression; (B) Alters, modifies, or significantly clarifies a rule of law previously announced by either the Supreme Court or the Court of Appeals; or (C) involves an issue of public importance that has application beyond the parties. NRAP 36(f)(4) also states that “[p]ublication is disfavored if revisions to the text of the unpublished disposition will result in discussion of additional issues not included in the original decision.” In the instant case, the Court's Order can easily be converted into a published opinion without the need for extensive revisions.

B. THIS CASE PRESENTS ISSUES OF PUBLIC IMPORTANCE THAT HAS APPLICATION BEYOND THE PARTIES.

The Court's Order distinguishes *John W. Muije, Ltd. v. North Las Vegas Cab Company, Inc.*, 106 Nev. 664, 798 P.2d 559 (1990), which will now encourage the

settlement of cases under similar circumstances to the instant case. Specifically, this Court clarified, “But, unlike in *Muije*, there are not competing judgments that are mutually owed and mutually demandable.” Ord. at 5. The Order continued: “In other words, equitable offsets are only applicable where a debtor obtains a subsequent judgment against one of his or her creditors.” *Id.* (citing *Muije*, 106 Nev. at 666, 799 P.2d at 560). Ultimately, the Court concluded, “[W]e decline to extend *Muije* to include the instant matter and conclude that the district court erred in granting an offset where Luxor and Harrison did not have competing judgments against each other that were subject to offset.” *Id.* The Court’s footnote 3 also acknowledged competing public policy considerations of encouraging settlements versus not rewarding a party for pursuing a frivolous claim. *Id.* at 5-6 n.3. The Court’s statement of policy in this context is extremely important to guide district courts and other lower courts across Nevada. Essentially, parties to litigation will have certainty that settlement with an earlier defendant will not subject those settlement funds to an offset by a subsequent defendant. Unfortunately, this resolution of competing policies will escape widespread application unless the Court’s Order becomes precedent.

If the District Court’s ruling had been upheld by this Court, it would be devastating to parties in litigation because there could be no partial settlement of cases without risking an offset. The result would be that the majority of cases would either

completely settle or would not settle at all. Of course, a single defendant could “veto” a settlement in cases with multiple defendants. Therefore, because of the very important issues expressed in the Court’s Order, which are applicable to litigants and courts across the state, Harrison respectfully requests that this Court reissue its July 21, 2021 Order as an opinion.

III. CONCLUSION

Based upon the standards in NRAP 36, Harrison respectfully requests that this Court reissue its July 21, 2021 unpublished order as an opinion.

DATED this 17th day of August 2021.

CLAGGETT & SYKES LAW FIRM

By /s/ Micah S. Echols
Micah S. Echols, Esq.
Nevada Bar No. 8437
Attorneys for Appellant, Vivia Harrison

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT’S MOTION TO REISSUE JULY 21, 2021 ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING AS A PUBLISHED OPINION** was filed electronically with the Supreme Court of Nevada on the 17th day of August, 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.
Mark B. Bailus, Esq.

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

EXHIBIT 1

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IN THE COURT OF APPEALS OF THE STATE OF NEVADA

VIVIA HARRISON, AN INDIVIDUAL,
Appellant,
vs.
RAMPARTS, INC., D/B/A LUXOR
HOTEL & CASINO, A NEVADA
DOMESTIC CORPORATION,
Respondent.

No. 80167-COA

FILED

JUL 21 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING*

Vivia Harrison appeals from a district court order awarding attorney fees pursuant to an offset in a personal injury matter. Eighth Judicial District Court, Clark County; David M. Jones, Judge.

Harrison was operating a motorized scooter in a deli restaurant located inside the Luxor Hotel and Casino.¹ In order to make her way through the restaurant, members of her party moved tables to create a pathway. While negotiating the path cleared for her, one of her back tires rolled over the base of a table, causing her scooter to become unbalanced and tip over. She allegedly suffered serious personal injuries as a result, including a fractured hip and stroke.

Subsequently, Harrison filed a complaint against Ramparts Inc. (the Luxor) and Desert Medical, the entity that rented her the scooter. Approximately seven months after Harrison filed her second amended complaint, Luxor served Harrison with a \$1,000 offer of judgment, which Harrison rejected, and the matter proceeded to trial.

¹We do not recount the facts except as necessary to our disposition.

During trial, but before the jury reached its verdict, Harrison and Desert Medical entered into a high-low settlement agreement. Desert Medical agreed to pay Harrison the low settlement amount of \$150,000, even if the court entered judgment in its favor. After a nine-day trial, the jury returned a defense verdict for both Desert Medical and Luxor, finding that neither was negligent or otherwise liable for Harrison's injuries. Before the district court entered judgment in favor of Luxor and Desert Medical, Harrison's attorneys gave notice to both parties that they had placed an attorney's lien on the file.

After the district court entered judgment on the verdict, Luxor moved for attorney fees and costs pursuant to NRS Chapter 18 and NRCP 68, which the court granted in part, reducing the overall expert costs and attorney fees requested. Further, the district court offset Luxor's award of fees and costs from the settlement funds Desert Medical was obligated to pay Harrison under their high-low settlement agreement. The court concluded "that this total final judgment must first be offset from other settlement funds received by [Harrison] and [Harrison'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," citing to *John J. Muije, Ltd. v. A North Las Vegas Cab Co.*, 106 Nev. 664, 799 P.2d 559 (1990). The offset assured that Luxor would receive its award of attorney fees and costs before Harrison and her counsel received any of the remaining settlement funds from Desert Medical.

Harrison subsequently filed a motion to reconsider, arguing that the issue of offset was never properly before the court because Luxor failed to request offset in its motion for attorney fees and costs and only addressed the issue in its reply brief, and that the issue of offset was not discussed at

the initial hearing. Therefore, Harrison argued that she did not have the opportunity to challenge whether offset was appropriate under the facts and circumstances of this case. The district court denied Harrison's motion to reconsider.²

Because both Harrison and Luxor were attempting to collect the settlement funds of \$150,000 from Desert Medical, Desert Medical filed a motion to interplead the funds. The district court granted the motion, which was unopposed, and Desert Medical deposited the settlement funds with the court.

On appeal, Harrison does not challenge the verdict in favor of Luxor. Rather, Harrison appeals from the order awarding attorney fees and costs to Luxor, including the priority status given to Luxor to obtain payment of its fees and costs from the settlement funds interpleaded by Desert Medical. Specifically, Harrison argues that the district court erred in offsetting the settlement funds in favor of Luxor, and abused its discretion in awarding attorney fees as well as the amount of fees it awarded.

With respect to offset, Luxor asserts that it was proper under *Muije*, and therefore, the district court did not err when it ordered Luxor's award of fees and costs to be offset from the Desert Medical settlement funds. Even in light of *Muije*, we agree with Harrison.

The "legal operation and effect of a judgment' is a question of law subject to de novo review." *Barbara Ann Hollier Tr. v. Shack*, 131 Nev. 582, 592, 356 P.3d 1085, 1091 (2015) (internal citation omitted) (quoting *Ormachea v. Ormachea*, 67 Nev. 273, 291, 217 P.2d 355, 364 (1950)).

²We note that although District Judge Nancy Allf signed the order denying reconsideration, District Judge David M. Jones heard and orally ruled on the matter and presided over the underlying proceedings.

In *Muije*, the plaintiff prevailed at trial, but the jury award in plaintiff's favor was less than the defendant's offer of judgment. 106 Nev. at 665, 799 P.2d at 559-60. Accordingly, the district court awarded the defendant attorney fees and costs, resulting in each party having a judgment against the other. *Id.* The district court determined that it would offset the amount of plaintiff's judgment from the amount she owed the defendant in attorney fees and costs, extinguishing plaintiff's recovery. *Id.* The plaintiff's attorney appealed, claiming that his attorney lien, which predated the award of fees and costs, was superior to that of the defendant's judgment and that the court should not have offset the two. *Id.*

On appeal, the Nevada Supreme Court concluded that an equitable offset "is 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.* at 666, 799 P.2d at 560 (internal quotation marks and citation omitted); *see also Pennington v. Campanella*, 180 So. 2d 882 (La. Ct. App. 1965) (providing that parties "cannot offset . . . debts which are not mutually owed and mutually demandable"). Thus, because the parties each had a judgment against the other, the *Muije* court affirmed the application of equitable offset in favor of the defendant, concluding that the attorney's lien attached to the net judgment, not the gross amount, which, after the offset, was zero. *Muije*, 106 Nev. at 666-67, 799 P.2d at 560-61.

Here, relying on *Muije*, the district court ordered that Luxor's judgment for attorney fees and costs "must first be offset from other settlement funds received by [Harrison] and [Harrison'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.” But, unlike in *Muije*, there are not competing judgments in this case that are mutually owed and mutually demandable. In other words, equitable offsets are only applicable where a debtor obtains a subsequent judgment against one of his or her creditors. *Muije*, 106 Nev. at 666, 799 P.2d at 560. Although Luxor had a collectable judgment against Harrison, Harrison did not have a collectable judgment against Luxor. Thus, there were no competing judgments to offset.

Moreover, the Desert Medical settlement funds were part of a settlement agreement between Harrison and Desert Medical, not Luxor, and the district court did not reduce the funds to judgment. Thus, Luxor was not entitled to make a claim to the settlement funds before distribution, as the funds from the high-low settlement were not a judgment subject to offset, but instead were funds to be distributed pursuant to a contract between the signatories, Harrison and Desert Medical. *Cf. Cunha v. Shapiro*, 837 N.Y.S.2d 160, 163 (App. Div. 2007) (collecting cases and noting that “cases are legion wherein courts have treated high-low agreements as settlements”); *see also Power Co. v. Henry*, 130 Nev. 182, 189, 321 P.3d 858, 863 (2014) (“A settlement agreement is a contract governed by general principles of contract law.”).

Therefore, we decline to extend *Muije* to include the instant matter and conclude that the district court erred in granting an offset where Luxor and Harrison did not have competing judgments against each other that were subject to offset. Accordingly, we reverse the district court’s order in part as to the offset.³ As to the Desert Medical settlement funds, we

³In doing so, we recognize that there are competing public policy considerations, encouraging settlement versus not rewarding a party for pursuing a frivolous claim. Nevertheless, we cannot agree that here a

remand this matter to the district court in order to release the interpleaded funds to Harrison and her attorneys.⁴

Next, we address whether the district court abused its discretion in awarding Luxor its fees and costs.⁵ Harrison argues that the district court abused its discretion in awarding Luxor its attorney fees as well as the amount it awarded pursuant to NRCP 68, by pointing out inconsistencies between the district court's statements at the hearing and those contained in its order. Luxor, on the other hand, argues that the district court considered each of the required *Beattie*⁶ factors in making its determination and therefore did not abuse its discretion in awarding attorney fees, nor the amount awarded. We agree with Luxor.

An award of attorney fees is generally reviewed for an abuse of discretion. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 80, 319 P.3d 606,

settlement is the same as a judgment for the purposes of offset when Luxor was not a part of such agreement, even in light of the public policy considerations enunciated in *Muije*.

⁴We do not reach the issue of whether Harrison's attorneys have perfected their liens, as the record is inadequate for this court to reach such a conclusion. See NRAP 30(b)(3); see also *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

Further, we recognize that any future contested distribution may well have to be made through a separately filed interpleader action with all creditors properly served. However, we believe that the burden to ensure a fair and ethical distribution of the funds is properly placed on Harrison's counsel, including the filing of a separate interpleader action if necessary. See RPC 1.15(b) (providing that "a lawyer shall promptly deliver to the client or *third person* any funds or other property that the client or third person is entitled to receive" (emphasis added)).

⁵We note that Harrison does not challenge Luxor's award of costs.

⁶*Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).

615 (2014). When deciding whether to award attorney fees under NRCP 68, the district court must weigh four factors in determining whether attorney fees are warranted. These factors include:

(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.

Beattie, 99 Nev. at 588-89, 668 P.2d at 274. Although it is preferable, express factual findings on each factor are *not necessary* for a court to properly exercise its discretion, rather "the district court need only demonstrate that it considered the required factors, and the award must be supported by substantial evidence." *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015). While all of these factors must be considered, not one is outcome derivative, "and thus, each should be given appropriate consideration." *Frazier v. Drake*, 131 Nev. 632, 642, 357 P.3d 365, 372 (Ct. App. 2015).

The district court's order made express findings pursuant to *Beattie*, including applying the *Brunzell*⁷ factors, and determined that overall the *Beattie* factors weighed in favor of awarding attorney fees, although the district court's ultimately reduced the total amount of fees awarded. The record demonstrates that the final amount of fees the district court awarded was supported by substantial evidence. Based on this record, we conclude that the district court did not abuse its discretion in analyzing

⁷*Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

and considering the *Beattie* factors as required, including the amount of fees awarded.⁸ Therefore, we affirm the district court's order in part as it relates to the amount of attorney fees awarded. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.⁹


_____, J.
Tao


_____, J.
Bulla

GIBBONS, C.J., concurring in part and dissenting in part:

This case presents the issue of whether a district court can accurately and fairly enter a large judgment for attorney fees against a losing party when the court makes unsupported or incomplete findings as to

⁸To the extent that Harrison argues the differences between the district court findings and its order, the order ultimately 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). Accordingly, differences between oral findings and the written findings do not render the written order invalid, as only the written order has a legal effect. *See id.* Therefore, because the order demonstrates that the court considered each factor and its decision is otherwise supported by substantial evidence, we conclude that the district court did not abuse its discretion in awarding Luxor its attorney fees. *See Logan*, 131 Nev. at 266-67, 350 P.3d at 1143.

⁹Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

the factors identified in *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983). I conclude that the district court's order is not legally sufficient. Therefore, I would vacate the attorney fee award and remand for the district court to engage in the correct process and follow the well-established procedures. Accordingly, the entirety of the district court order should be vacated because there is not a valid underlying basis to award attorney fees to the respondent. Regardless, I agree with the majority as to the remaining issues and concur with the portion of the Order reversing in part and remanding.

Vivia Harrison was allegedly injured in the Luxor Hotel & Casino while operating a motorized scooter. In February 2016, Harrison filed a complaint against Ramparts, Inc. (Luxor) and Desert Medical Equipment (Desert Medical), the company who rented her the scooter, asserting claims, as relevant here, for negligence. In March 2017, Luxor served an offer of judgment for \$1,000 on Harrison, which was not accepted and the case proceeded to trial in December 2018. During trial, Desert Medical offered Harrison a "high low" settlement offer of \$150,000 to \$750,000, which was accepted. The jury returned verdicts in favor of both defendants; therefore, Desert Medical's settlement offer was fixed at \$150,000.

Luxor brought a motion for attorney fees and costs seeking \$255,558 as the prevailing party under NRCP 68. Luxor requested a total of \$202,398 in attorney fees and \$53,160 in costs. The district court granted

the motion for attorney fees and costs in part and awarded \$109,285.28, apportioning \$39,597.28 for costs and \$69,688 for attorney fees.¹⁰

The district court summarily concluded in the written order that the \$1,000 offer was reasonable. The court, however, did not apply or misstated the actual factors from *Beattie*. The court did not address if the case was *brought* in good faith; rather it stated the facts and allegations in the complaint were contrary to Harrison's own witnesses' testimony. The court did not specifically address if the offer was reasonable and in good faith as to timing and amount and if it was grossly unreasonable or in bad faith for Harrison to reject the \$1,000 offer. The court did not balance the *Beattie* factors but did determine that a partial award of attorney fees was proper.

Harrison moved the district court to reconsider. The court entered an order summarily denying Harrison's motion for reconsideration, and this appeal followed.

On appeal, Harrison argues that the district court abused its discretion by not correctly applying all four factors set forth in *Beattie*. Additionally, Harrison argues that the district court misapplied the factors in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), and that the amount of the awarded fees was unreasonable. I agree that the district court failed to apply correctly the first, second, and third *Beattie* factors, failed to balance them against each other, and thus misapplied *Beattie*. Further, the court failed to make adequate findings as to all three *Beattie* factors. Therefore, the district court's judgment as to

¹⁰While Luxor requested attorney fees as a prevailing party pursuant to both NRS 18.010(2)(b) and NRCP 68, the district court made none of the required findings under NRS 18.010(2)(b), and did not use this statute as the basis for its decision. The court instead only awarded attorney fees pursuant to NRCP 68.

attorney fees should be vacated and the case remanded for the district court to analyze all of the factors and make proper findings. Then it must engage in a balancing of the first three factors against each other, as well as the fourth factor, to determine if attorney fees should be awarded under the facts of this case. While the court did correctly apply the fourth *Beattie* factor using *Brunzell* to determine the reasonable amount of the attorney fees, such fact is not relevant when deciding if the first three factors of *Beattie* were satisfied. Therefore, I only address the first three factors.

Under NRCP 68, a party may recover attorney fees and costs if the other party rejects an offer of judgment and fails to obtain a more favorable outcome. In 1983, the Nevada Supreme Court established four factors in *Beattie v. Thomas* that must be considered when determining whether it can award attorney fees under NRCP 68:

(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.

Beattie, 99 Nev. at 588-89, 668 P.2d at 274. This court considered the application of the *Beattie* factors in *Frazier v. Drake*, 131 Nev. 632, 357 P.3d 365 (Ct. App. 2015), and *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 429 P.3d 664 (Ct. App. 2018). In *Frazier*, we noted that "the first three factors all relate to the parties' motives in making or rejecting the offer and continuing the litigation, whereas the fourth factor relates to the amount of fees requested . . . [but] [n]one of these factors are outcome determinative . . . and thus, each should be given appropriate consideration." 131 Nev. at 642, 357 P.3d at 372 (internal citations omitted).

Further, as it relates to the first three factors, we pointed out that the supreme court has recognized, “[i]f the good faith of either party in litigating liability and/or damage issues is not taken into account, offers would have the effect of unfairly forcing litigants to forego legitimate claims.” *Id.* at 643, 357 P.3d at 373 (alteration in original) (quoting *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998)). In addition to noting the public policy supporting the consideration of all of the *Beattie* factors, we recognized in *Frazier* that “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 fees requested by the offeror [the fourth *Beattie* factor] becomes irrelevant, and cannot, by itself, support a decision to award attorney fees to the offeror.” *Id.* at 644, 357 P.3d at 373.

A district court’s application of the *Beattie* factors is reviewed for an abuse of discretion. *LaForge v. State, Univ. & Cmty. Coll. Sys. of Nev.*, 116 Nev. 415, 423, 997 P.2d 130, 136 (2000). “Such an abuse occurs when the court’s evaluation of the *Beattie* factors is arbitrary or capricious.” *Frazier*, 131 Nev. at 642, 357 P.3d at 372. “Claims for attorney fees under [] NRCP 68 are fact intensive,” and “[i]f the record clearly reflects that the district court properly considered the *Beattie* factors, we will defer to its discretion.” *Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428-29 (2001). “[T]he district court’s failure to make explicit findings is not a per se abuse of discretion.” *Id.* at 13, 16 P.3d at 428.

I conclude that the district court abused its discretion when awarding attorney fees under NRCP 68, as the record does not clearly reflect that the district court properly considered the first three *Beattie* factors. Although the district court enunciated the factors in its order, it only

summarily found that an award of attorney fees and costs was appropriate pursuant to the factors articulated in *Beattie* and *Brunzell*. The order itself fails to address the actual elements of the first three factors. Further, despite this being a fact-intensive inquiry, the court made no findings that the case was brought in bad faith, that the \$1,000 offer was reasonable and in good faith in both timing and amount, and it was grossly unreasonable or in bad faith for Harrison to reject the offer. Without specific findings as to the elements of first three *Beattie* factors, it is impossible on the face of the order to understand how the court could have balanced all of the factors. The record on appeal should provide support to show that the district court properly considered and balanced these factors, but it does not. *See Wynn*, 117 Nev. at 13, 16 P.3d at 428-29 ("If the record clearly reflects that the district court properly considered the *Beattie* factors, we will defer to its discretion.").

Specifically, as to the first factor, the court focused on evidence that was provided for the first time in discovery or at trial, not when Harrison filed suit, which is how good faith under this factor is assessed. As to the second factor, the court noted that discovery had not been completed and made no finding that the offer was reasonable and in good faith as to both timing and amount. As to the third factor, the court found that Harrison was aware of substantial defects in the case and still rejected the offer. Yet the court did not conclude that the rejection of a \$1,000 offer was grossly unreasonable or made in bad faith. On the contrary, the court recognized at the hearing that \$1,000 was not really intended to settle the case because it would not even cover the cost of filing of the case. Thus, the findings as to the first factor misapplied and misconstrued the rule, the findings as to the second factor were significantly incomplete and tended to

favor Harrison, and the findings as to the third factor omitted the key element of gross unreasonableness or bad faith. Finally, the court did not balance the factors and explain what factor may have been dispositive or outweighed any other factors.

My conclusion is further supported by the fact that Desert Medical offered to settle for \$150,000 to \$750,000 during trial. Because this offer was extended during trial, there is an inference that Harrison presented some credible evidence during trial, at least as to Desert Medical's negligence, and Luxor's \$1,000 offer made more than twenty months before trial was not reasonable in timing or amount, or was not rejected in bad faith or otherwise grossly unreasonable.

Here, the district court focused its attention on the fourth *Beattie* factor, the reasonableness of the amount of the requested attorney fees. This factor should not have been addressed until the first three factors were fully considered and balanced against each other to establish a legal basis to award attorney fees. *See Frazier*, 131 Nev. at 644, 357 P.3d at 373 (“[T]he fourth *Beattie* factor . . . does not have any direct connection with the questions of whether a good-faith attempt at settlement has been made or whether the offer is an attempt to force a plaintiff to forego legitimate claims.”).

It is important to note that the first three *Beattie* factors involve a qualitative analysis, not a quantitative analysis. Each factor mandates the district court to evaluate and measure something different, so the ultimate weight attached to each is case specific. Factor one focuses on the good faith of the plaintiff at the moment the complaint is filed. In this case, that was in February 2016. It does not matter under this factor that the complaint was ultimately found to be non-meritorious as to Luxor. *See*

Assurance Co. of Am. v. Nat'l Fire & Marine Ins. Co., No. 2:09–CV–1182, 2012 WL 6626809, *3 (D. Nev. Dec. 19, 2012) (“Plaintiffs, incorrectly in hindsight, believed they had a good chance of success on the merits and pursued the claims in good faith.”); *Max Baer Prod. Ltd. v. Riverwood Partners, LLC*, No. 3:09–CV–00512, 2012 WL 5944767, *3 (D. Nev. Nov. 26, 2012) (“Claims may be unmeritorious and still be brought in good faith.”). Cf. NRS 7.085 (providing that the court shall sanction an attorney that has brought a case not grounded in fact, not warranted by existing law, or that does not have a good faith argument for changing the law).

The second factor has multiple components. The defendant has to act in good faith and must make a reasonable offer, both in its timing *and* in amount. Luxor acknowledges as much in its answering brief. However, was it in good faith to make an offer before discovery was completed? Was it in good faith to offer a token amount? Was Luxor merely attempting to create the foundation to file a motion for attorney fees years later while not really trying to settle the case? See *Frazier*, 131 Nev. at 644, 357 P.3d at 373 (“[W]hether a good-faith attempt at settlement has been made or whether the offer is an attempt to force a plaintiff to forego legitimate claims.”).

The district court did not address these good faith threshold questions. The court made no finding that the timing was reasonable. Indeed, the court suggested it might not have been because only “some discovery was conducted” at that point. Consequently, the district court should have explained why these circumstances satisfied the burden that was on Luxor to show reasonableness as to timing.

Assuming the court could find timing reasonable, the court would then need to evaluate the amount offered and find that it was also reasonable. However, the court expressed doubt at the February hearing

about the reasonableness of the amount, and that, as a former trial attorney, “\$1,000 offers of judgment [were viewed as] just ludicrous.”

Therefore, making findings as to all components of factor two was crucial in light of the burden being on Luxor to establish good faith, and reasonableness as to timing *and* amount. This \$1,000 offer of judgment might seem reasonable in hindsight, but an inquiry into good faith and reasonableness as to timing and amount was still necessary and conspicuously lacking from the district court’s order.¹¹

It was especially important in this case, since the facts and comments from the district court as to the second *Beattie* factor seemed to point in the opposite direction as to the result ultimately reached. We should not now countenance the use of unexplained and incomplete findings to be decisive. *See Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015) (providing that we do not defer “to findings so conclusory they may mask legal error”).

I now turn to the failure to apply the elements of factor three. While factors one and two require objective and subjective analysis as to good faith, and factor two additionally looks to reasonableness, factor three is different. It requires an objective and subjective analysis of the plaintiff’s

¹¹In contrast, in *Tutor Perini Building Corp. v. Show Canada*, Docket No. 74299 (Order of Affirmance, May 29, 2019), the offer of judgment from the respondent was for \$950,000; the verdict was for \$908,892 and \$601,960 in prejudgment interest was also awarded to the respondent. The supreme court upheld the award of attorney fees to the respondent in part due to the finding of the district court that Perini engaged in fraudulent activity, and because only one factor had deficient findings, but the record supported the overall conclusion as to that factor. Therefore, the dollar amounts and the unique circumstances of that case justified an affirmance even though the district court did not make explicit findings as to all of the *Beattie* factors.

reaction to the offer during the ten-day period immediately following the communication of the offer, as the offer expires at that point.¹² The district court must determine whether the decision to reject the offer and proceed to trial was *grossly* unreasonable or in bad faith. Therefore, even if the offer was determined to be reasonable under the second factor, that standard no longer applies when considering the third factor. Luxor had to show it was grossly unreasonable or in bad faith for Harrison to fail to accept the offer during the ten-day period following March 23, 2017.

As previously discussed, discovery had not been completed. Luxor knew Harrison was seeking a large amount in damages. Luxor was only offering \$1,000, and Desert Medical ultimately offered up to \$750,000. The circumstances as they existed on March 23, 2017, must be understood when evaluating whether Harrison acted in bad faith in rejecting the offer. Further, the circumstantial setting provides context when judging whether it was grossly unreasonable to reject the offer. *See, e.g., Yamaha*, 114 Nev. at 252, 955 P.2d at 673 (explaining that “offers [should not] have the effect of unfairly forcing litigants to forego legitimate claims,” and remanding for the court to reweigh all four *Beattie* factors).

¹²The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018) (“[T]his amendment to the [NRCP] shall be effective prospectively on March 1, 2019, as to all pending cases and cases initiated after that date.”). As is pertinent here, the claim, offer of judgment, trial, and motion for attorney fees were all initiated prior to March 1, 2019. Therefore, I use the version of the NRCP in effect at that time.

Luxor contends that failing to accept the offer was grossly unreasonable because either the case was brought in bad faith or it had no merit and Harrison knew as much. In essence, failing to accept *any* offer, even prior to the completion of discovery, was grossly unreasonable. However, the district court never made an oral or written finding or legal conclusion as to the elements of this factor. The very brief apparent reference to factor three in the order was that “[Harrison] was aware of substantial defects in the case and still rejected Luxor’s offer of judgment.” Such a factual determination supports a conclusion that Harrison acted unreasonably. The supreme court in *Beattie*, however, has stated that plaintiff must have acted in a grossly unreasonable way, or in bad faith—a much higher level of culpability than unreasonableness. Here, the district court never made a factual finding or a legal conclusion that it was grossly unreasonable for Harrison to reject the \$1,000 offer in April 2017.

To show Harrison’s decision was grossly unreasonable, Luxor needed to overcome this very high hurdle. See *Assurance Co. of Am.*, 2012 WL 6626809 at 3. The amount of damages the plaintiff seeks and the need for discovery is a consideration in deciding whether it is grossly unreasonable to reject an offer. See *Sands Expo & Convention Ctr., Inc. v. Bonvoulair*, Docket No. 67091 (Order of Affirmance, October 6, 2016) (“[The] decision to reject the . . . offer in the face of extensive anticipated damages and on-going discovery does not appear grossly unreasonable.”). In addition, as Harrison argues, and as stated earlier in this dissent when discussing the *Frazier* case, the policy behind offers of judgment is not to coerce plaintiffs into accepting token or low-ball offers when there is a viable case with potentially large damages. The district court needed to carefully analyze and explain why it was nonetheless in bad faith or grossly unreasonable to

reject such an offer at that stage of the litigation. *See id.* at 643, 357 P.3d at 373.


Looking at the three factors as a whole, the district court impliedly found factor one favored Luxor but viewed the situation as it existed later in the proceedings, not when the complaint was filed, as required by *Beattie*. As to factor two, the court stated that discovery had not been completed and never concluded that the offer was brought in good faith and that it was reasonable as to timing or amount. As to factor three, the court failed to determine if the rejection of the \$1,000 offer was grossly unreasonable or in bad faith.

Finally, it was critically important for the district court to make findings and legal conclusions to explain why a factor may outweigh another factor or is otherwise given more weight, because no single factor is determinative. *See Yamaha*, 114 Nev. at 252 n.16, 955 P.2d at 673 n.16 (“The district court is reminded that no one factor under *Beattie* is determinative, and that it has broad discretion to grant the request *so long as all appropriate factors are considered.*” (emphasis added)). Merely “considering” the factors is not enough, as that is only part of the process. *See State Drywall, Inc. v. Rhodes Design & Dev.*, 122 Nev. 111, 119 n.18, 127 P.3d 1082, 1088 n.18 (2006) (holding the district court did not properly consider the *Beattie* factors where the record did not reflect “what, if any, analysis was made,” and recognizing that the record must reflect this analysis for the decision to be upheld).

Therefore, I conclude that the district court abused its discretion by failing to properly consider and apply the first, second and third *Beattie* factors, and explain their interplay with each other, which itself was not supported by any findings, and then determine and balance factor four, if

the first three factors supported the discretionary award of attorney fees. A remand to apply the elements of each factor is necessary. Public policy also supports this conclusion, as litigants should not be coerced into settling cases because of the fear of large awards of attorney fees, which the court might determine months or years later, in hindsight, should be awarded because a token offer was reasonable. Further, cautioning the district courts to correctly apply *Beattie* has not been sufficient, as this case illustrates.¹³ Allowing a court to impose a large five-figure judgment against a party for attorney fees in a summary proceeding, when the court itself does not fully follow the correct procedure, is incompatible with justice. Making appropriate findings alleviates any such concern.

Therefore, I concur in part and dissent in part and would vacate the attorney fee award and remand this case to the district court to make findings as to each *Beattie* factor and then balance them to determine if a judgment for attorney fees should be entered.


_____, C.J.
Gibbons

¹³See *Schwartz v. Estate of Greenspun*, wherein the supreme court stated in 1994 that it “caution[ed] the trial bench to provide written support under the *Beattie* factors for awards of attorney’s fees made pursuant to offers of judgment even where the award is less than the sum requested,” as “[i]t is difficult at best for this court to review claims of error in the award of such fees where the courts have failed to memorialize, in succinct terms, the justification or rationale for the awards.” 110 Nev. 1042, 1050, 881 P.2d 638, 643 (1994).

cc: Hon. David M. Jones, District Judge
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