IN THE SUPREME COURT OF THE STATE OF NEVADA

WYETH RANCH COMMUNITY ASSOCIATION, Appellant, vs. MARCHAI B.T, A NEVADA BUSINESS TRUST, Respondent.	**Supreme Court Case No. 83069** District Court Case No. A680461

APPELLANT, WYETH RANCH COMMUNITY ASSOCIATION'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The Undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

Lipson Neilson P.C. states that it has no parent corporation and that no publicly held corporation owns 10% more of its stock.

Kaleb D. Anderson and David T. Ochoa are the attorneys who have appeared for Appellant in this case.

Appellant, Wyeth Ranch Anthem Community Association is a non-profit corporation and has no parent corporation and no publicly held corporation owns 10% or more of its stock.

DATED this 15th day of November, 2021.

LIPSON NEILSON P.C.

/s/ David Ochoa

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JURISDICTIONAL STATEMENT

On March 8, 2021, the District Court entered its final judgment after trial.[1] Notice of Entry of that order was filed on March 11, 2021.[2] Wyeth Ranch Community Association (the "HOA") is appealing the Order Denying its request for attorney fees, filed and served by the court on May 24, 2021, after the trial order.[3] The HOA filed its Notice of Appeal on June 11, 2021.[4]

ROUTING STATEMENT

This matter is presumptively retained by the Supreme Court under NRAP 17(a)(12) as a matter raising a principal question of statewide public importance in the application and review of offers of judgment.

STATEMENT OF ISSUES PRESENTED

1) Whether the district court erred or otherwise abused its discretion in finding that that the HOA's offer of Judgment had a potentially preclusive effect on Marchai B.T.'s claims against SFR.

2) Whether the district court erred or otherwise abused its discretion in analyzing the *Beattie* factors to deny the HOA's request for attorney fees based on its offer of judgment.

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[1] AA Vol. II 293-315
[2] AA Vol II 323-347
[3] AA Vol. III 486-491
[4] AA Vol. III 492-494

STATEMENT OF THE CASE

The case involves an HOA foreclosure on its assessment lien, with SFR being the purchaser at a foreclosure and Marchai B.T. ("Marchai") being the lender with an interest in a deed of trust. The district court previously granted Marchai summary judgment against SFR, which SFR successfully appealed in case no. 74416. This Court remanded the prior decision on the limited issue of the prior homeowners partial payments and the potential impact on the superpriority portion of the HOA's lien, pursuant to 9352 *Cranesbill Trust v. Wells Fargo Bank*, 136 Nev. Adv. Op. 8 (Mar. 5, 2020). After remand and before trial, the HOA served an Offer of Judgment on Marchai. At trial Marchai failed to prevail on any of its remaining claims against the HOA. The HOA sought attorney's fees based on the offer of judgment, which were denied. The HOA is now appealing the order denying its request for attorney's fees.

STANDARD OF REVIEW

The standard of review was recently reiterated by this court in *Capriati Constr. Corp., Inc. v. Bahram Yahyavi*, 2021 Nev. LEXIS 65, *8-9, 137 Nev. Adv. Rep. 69, stating:

> This court "review[s] an award of attorney fees for an abuse of discretion." *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015). In exercising that discretion, the district court must make findings under the *Beattie* and *Brunzell* factors. *See Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d

> 268, 274 (1983); *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). Under *Beattie*, the district court considers
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> > (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in [*9] 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.
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> 99 Nev. at 588-89, 668 P.2d at 274. Under *Brunzell*, the district court considers
>
> > (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.
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> 85 Nev. at 349, 455 P.2d at 33. **Insofar as an attorney-fees award invokes a question of law, we review it de novo**. *See In re Estate & Living Tr. of Miller*, 125 Nev. 550, 553, 216 P.3d 239, 241 (2009).

See also *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063, 2006 Nev. LEXIS 7, *14-15, 179 L.R.R.M. 2117, 152 Lab. Cas. (CCH) P60,152, 122 Nev. Adv. Rep. 9 (“Generally, we review decisions awarding or denying attorney fees for "a manifest abuse of discretion." But when the attorney fees matter implicates questions of law, the proper review is de novo.”).

Similar to how this Court reviewed a question of law for contingency fees and its impact on the analysis of and offer of judgment in *Capriati Constr. Corp., Inc. v. Bahram Yahyavi*, 2021 Nev. LEXIS 65, *8-9, 137 Nev. Adv. Rep. 69, the fee analysis here is dependent on a question of law regarding election of remedies, and thus the standard of review is de novo.

STATEMENT OF FACTS

1. On or around October 19, 2005, Cristela Perez ("Borrower") obtained a loan to purchase the Property.[5]

2. The loan was secured by a deed of trust.[6]

3. In March 2013, the deed of trust was assigned to Plaintiff/Appellee Marchai.[7]

4. Sometime after purchasing the Property, Borrower defaulted on her quarterly homeowners' assessments.[8]

5. Borrower made partial payments on her account, but failed to bring her account current.[9]

[5] AA Vol. I 30
[6] AA Vol. I 32-33
[7] AA Vol. I 33
[8] *Id*.
[9] AA Vol. I 35

6. On August 28, 2013, the HOA, through Alessi, sold the Property to SFR Investment Pool 1 LLC ("SFR").[10]

7. It is undisputed that Borrower was in default at the time of the foreclosure sale.[11]

8. In the District Court's Order entered March 22, 2016, the Court found that Marchai failed to establish the sale was commercially unreasonable, violated the takings or due process clauses, or that the statute was unconstitutionally vague.[12]

9. In the District Court's Order entered January 24, 2017, the Court dismissed Marchai's Quiet Title Claim against the HOA.[13]

10. In the District Court's October 3, 2017 Order, the Court found that Notice was proper, however, found for Marchai based on a determination that Borrower's partial payments paid off the superpriority portion of the lien.[14]

11. On November 6, 2017, SFR filed its Case Appeal Statement and Notice of Appeal, appealing the determination on the application of Borrower's partial payments.[15]

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[10] *Id*.
[11] AA Vol. II 310 and 312
[12] AA Vol. I 81-82
[13] AA Vol. I 51-53
[14] AA Vol. I 78-92
[15] AA Vol. I 110-112 and AA Vol. I 113-117

12. Marchai did not appeal the earlier orders or the determination on notice from the October 3, 2017 Order.[16]

13. On March 18, 2020, this Court entered its Order Vacating Judgment and Remanding, in which it found and affirmed that the 2008 Notice of Delinquent Assessment was the operative notice to review superpriority and that a Borrower's payments could satisfy the superpriority portion of an HOA lien.[17] However, the Court remanded on finding that under *9352 Cranesbill Trust v. Wells Fargo Bank, N.A.,* 136 Nev., Adv. Op. 8 (Mar. 5, 2020), the facts surrounding the payments needed to be analyzed to determine if the payments actually satisfied the superpriority portion of the lien.[18]

14. The HOA's offer of judgment was made on October 29, 2020, for $15,000 after remand, but before trial.[19]

15. The remaining claims by Marchai against the HOA at that time were, tortious interference with contract, wrongful foreclosure, and breach of good faith under NRS 116.1113.[20]

[16] Id. and AA Vol. I 131-136
[17] AA Vol I 131-136
[18] *Id*.
[19] AA Vol. II 432-434
[20] AA Vol I. 29-42, AA Vol. I 78-92, and AA Vol. I 131-136

16. Marchai's remaining claims against the HOA were dismissed at trial and Marchai failed to beat the HOA's offer of judgment.[21]

17. The HOA requested attorney's fees based on the offer of judgment.[22]

18. Reviewing a question of law, the district court found that the HOA's offer of judgment had a potentially preclusive effect on Marchai's claims against SFR, and denied the HOA's request for attorney's fees.[23]

19. The HOA now challenges the district Court's denial of its request for attorney's fees, the Court's review of *Beattie* factors, and the related finding of a potential preclusive effect of the offer of judgment.

SUMMARY OF ARGUMENT

The HOA appeals the district court denial of attorney's fees that were requested based on an offer of judgment after all the claims against the HOA were dismissed at trial. The Court abused its discretion in its analysis of the *Beattie* factors. First, the court's finding that Marchai brought its claims in good faith should be given little weight because it originally brought claims against the HOA in 2016. Further, three of the claims were dismissed before a prior appeal in 2018, and after the 2018 appeal the case was remanded only on a limited *Cranesbill* issue. Although Marchai needed to proceed to trial against SFR, its claims against the HOA were not

[21] AA Vol. II 293-315 and AA Vol. II 432-434
[22] AA Vol. II 353-434
[23] AA Vol. III 486-491

maintained in good faith at that time given the limited *Cranesbill* issue. The HOA's offer of judgment was made after remand to avoid an unnecessary trial on the claims against it, and the request was only seeking fees from the time of the offer through trial. *See* AA Vol. II 353-434 (Motion, and Offer of Judgment at 432-434).

To the second *Beattie* factor, the limited *Cranesbill* issue made it obvious Marchai was not going to prevail on its claims against the HOA; therefore, also making the HOA's offer at that time reasonable in amount. Additionally, for the second and third *Beattie* factors the Court's decision was based on a finding of a potentially preclusive effect the offer of judgment may have for Marchai on its remaining claims against SFR. *See* AA Vol. III 486-491 (Order). However, no preclusive effect existed as the offer of judgment and potential settlement with the HOA was not an election of remedies that prevented Marchai from trying just its claims against SFR. *See Bocanegra v. Aetna Life Ins. Co.* ("One may . . . receive something by way of settlement, even of substantial value, under an uncertain claim without making an election of remedies which bars recovery against another person."). Therefore, the Court erred or otherwise abused its discretion by not finding the HOA's offer was reasonable in amount and timing given that it occurred after remand on the limited *Cransebill* issue, when an HOA can foreclose on either a lien with a superpriority amount or a lien with just a subpriority amount, and by finding a preclusive effect of the offer where there was none.

ARGUMENT

The District Court reviewed the HOA's request for fees after trial both as a prevailing party and also a request pursuant to a rejected offer of judgment. This appeal focuses on the court's denial of fees pursuant to the offer of judgment and the Court's review of the *Beattie* factors as discussed below. 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 plaintiffs 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 v. Thomas*, 99 Nev. 579 at 588, 668 P.2d 268 at 274 (1983).

The Court took the HOA's Motion for Fees and Costs under advisement without hearing. As to the request for fees pursuant to a rejected offer of judgment, the Court stated in the Order:

> The Court also declines to exercise its discretion to award attorney's fees to Wyeth Ranch under N.R.C.P. 68. After considering the factors under *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), the Court concludes Marchai brought its claims against Wyeth Ranch in good faith. Further, the Court concludes that Wyeth Ranch's offer of judgment was not reasonable in amount given the potentially preclusive effect of

> the offer of judgment. Moreover, Marchai reasonably refused to accept the offer of judgment given the potentially preclusive effect of acceptance given the broad language of Wyeth Ranch's offer of judgment.[24]

For the following reasons the Court erred or otherwise abused its discretion in denying the HOA fee's based on a rejected offer of judgment.

The District Court Erred or Otherwise Abused its Discretion in its Review of the *Beattie v. Thomas* Factors and Denying the HOA's Motion for Fees based on its Offer of Judgment.

1. The Court's conclusion that Marchai originally brought its claims in good faith should be given little weight given the timing of the offer of judgment.

As to the first *Beattie* factor the Court's Order states: "the Court concludes Marchai brought its claims against Wyeth Ranch in good faith."[25] That should have little to do with the analysis in awarding fees here. Marchai originally filed claims against the HOA in August of 2016 in case A-16-742327-C which was consolidated with A-13-689461.[26] Marchai's first three causes of action (including a Quiet Title claim) against the HOA were dismissed earlier in this case, and were not appealed by Marchai in the first appeal.[27] In the District Court's October 3, 2017 Order, the

[24] AA Vol. III 486-491
[25] Id., at 487
[26] AA Vol. I 29-42
[27] AA Vol. I 51-53

Court found that Notice was proper, however, found for Marchai based on a determination that Borrower's partial payments paid off the superpriority portion of the lien.[28] On November 6, 2017, SFR filed its Case Appeal Statement and Notice of Appeal, appealing the determination on the application of Borrower's partial payments leading to the first appeal.[29]

On March 18, 2020, this Court entered its Order Vacating Judgment and Remanding resolving the first appeal.[30] Within that Order, this Court found and affirmed that the 2008 Notice of Delinquent Assessment was the operative notice to review superpriority, and that a Borrower's payments could satisfy the superpriority portion of an HOA lien.[31] However, the Court remanded on finding that under *9352 Cranesbill Trust v. Wells Fargo Bank, N.A.,* 136 Nev., Adv. Op. 8 (Mar. 5, 2020), the facts surrounding the payments needed to be analyzed to determine if the payments actually satisfied the superpriority portion of the lien. Thus, the case was remanded on this limited *Cranesbill* issue.

The HOA's offer judgment was made on October 29, 2020, for $15,000 and must be reviewed in this context, where the case is being remanding on the limited *Cranesbill* issue and Marchai's Quiet Title claim against the HOA has already been

[28] AA Vol. I 78-92
[29] AA Vol. I 110-112 and AA Vol. I 113-117
[30] *Id*.
[31] *Id*.

dismissed and not appealed.[32] The remaining claims by Marchai against the HOA at that time were, tortious interference with contract, wrongful foreclosure, and breach of good faith under NRS 116.1113.[33]

As to tortious interference with contract by October of 2020, this court had previously decided *Bank of Am. v. Jessup*, 2020 Nev. Unpub. LEXIS 471, *5, 462 P.3d 255, (a May 2020 opinion) stating: "And foreclosing on a statutory lien that the Legislature has given priority over a first deed of trust does not demonstrate tortious interference with appellants' deed of trust. *See J.J. Indus., LLC v. Bennett*, 119 Nev. 269, 274, 1264, 71 P.3d 1264, 1267 (2003) (listing as one of the elements of a tortious interference claim "an intentional act[] intended or designed to disrupt the contractual relationship")." Given the limited *Cranesbill* issue, even if it was the case that a superpriority portion of the lien remained, the HOA foreclosing on it was not going to lead to a judgment in favor of Marchai on tortious interference because as this court recognized the statute and lending agreements contemplated that possibility. Further, the district court here eventually found, "the foreclosure was not intended to disrupt, nor did disrupt, the contract that contemplates the foreclosure."[34] It was true that the contract contemplated the foreclosure prior to the

[32] AA Vol. II 432-434
[33] *See* AA Vol. I 29-42, AA Vol. I 78-92, and AA Vol. I 131-136
[34] AA Vol. II 311-312

HOA's offer of judgment and it is true that the case law (*Bank of Am. v. Jessup*) reflected this prior to the HOA's offer of judgment.

As to Marchai last two claims of Wrongful Foreclosure and Breach of NRS 116.1113, these claims were pled as notice issues against the HOA. Marchai's complaint alleged:

> 36. Alessi & Koenig and Wyeth Ranch failed to identify any superpriority amount claimed by Wyeth Ranch and failed to describe the "deficiency in payment" required by NRS § 116.31162(1)(b)(l) in the notice of default.
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> 37. Alessi & Koenig and Wyeth Ranch failed to provide notice of any purported superpriority lien amount or the consequences for the failure to pay any purported superpriority lien amount.
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> 38. Alessi &Koenig and Wyeth Ranch failed to identify the amount of the alleged lien that was for late fees, interest, fines/violations, or collection fees/costs.
>
> 39. Alessi & Koenig and Wyeth Ranch failed to identify if Wyeth Ranch intended to foreclose upon the superpriority portion of its lien, if any, or on the sub-priority portion of its lien.
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> 40. Alessi & Koenig and Wyeth Ranch failed to specify in any of the recorded documents that Wyeth Ranch's foreclosure would extinguish Marchai's interest in the property.
>
> 41. Alessi & Koenig and Wyeth Ranch failed to market, sell, or auction the property for in a commercially reasonable manner.[35]

Marchai's Complaint only elaborated on its NRS 116.1113 by clarifying it was also in the form of wrongful foreclosure stating:

[35] AA Vol. I 29-42

> 80. Wyeth Ranch and Alessi & Koenig wrongfully foreclosed upon the property in violation of the Statute.[36]

The fact that the foreclosure was properly noticed had already been decided prior to the first appeal and the limited remand on the *Cranesbill* issue did not change that.[37] Therefore, the claims being lodged as notice issues were not going to lead to a judgment against the HOA on those claims after remand.

Although the *Cranesbill* issue and application of payments and potential impact on the superpriority portion of the lien needed to be determined still, it was never disputed that an HOA assessment debt and HOA lien remained for the HOA to foreclose on.[38] The district court found "it is not disputed that a portion of the assessment lien remained after Perez's payments were applied, and Perez was in default at the time of the sale."[39] This was true at the trial, but it was also true prior to the first appeal, after remand, and at the time of the offer of judgment.[40] Marchai was never arguing that the entire lien had been paid, and thus it was not disputed that a lien remained for the HOA to foreclose on. Resolution of the *Cranesbill* issue as to whether the HOA foreclosed on a lien with both a superpriority and subpriority portion, or just a lien with only a subpriority amount, was not going to lead to

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[36] *Id*.
[37] *See* AA Vol. I 78-92, AA Vol. I 131-136, and AA Vol. II 306 at ¶ 123.
[38] AA Vol. II 310 and 312
[39] *Id*.
[40] Id., and *see* AA Vol. 1 29-42 generally.

judgment against the HOA for wrongful foreclosure, because the HOA can foreclosure on both a superpriority lien or a subpriority lien.[41]

The district court also found "it is irrelevant to the wrongful foreclosure claim whether the remaining portion was superpriority or subpriority, because the HOA never made an affirmative representation at the time of the sale that it was foreclosing on a superpriority portion of lien. Wyeth Ranch was not required to make an announcement regarding superpriority at the time of the foreclosure sale."[42] It was never alleged that the HOA informed Marchai at the time of the sale that they were making a superpriority foreclosure.[43] To the extent Marchai alleged the notices should have included such information, the notice issues had already been

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[41] *Cogburn St. Trust v. U.S. Bank N.A.*, 2019 Nev. Unpub. LEXIS 631, *4, 442 P.3d 138, 2019 WL 2339538, citing *SFR* (2014) and stating: "However, we conclude that the Bank's tender extinguished the HOA's superpriority lien. As a result, the HOA foreclosure sale necessarily only included the subpriority lien, and an HOA may nonjudicially foreclose on its subpriority lien. *See SFR* (2014), 130 Nev. at 751, 334 P.3d at 414-15. A valid foreclosure on a lien extinguishes all junior liens, but all senior liens remain. *See SFR* (2014), 130 Nev. at 747, 334 P.3d at 412; Restatement (Third) of Prop.: Mortgages § 7.1 (1997) ("A valid foreclosure of a mortgage terminates all interests in the foreclosed real estate that are junior to the mortgage being foreclosed and whose holders are properly joined or notified under applicable law."). An HOA's subpriority lien is junior to a first deed of trust. *SFR* (2014), 130 Nev. at 745, 334 P.3d at 411.

[42] AA Vol. II 312

[43] *Id.*

resolved.[44] Thus, by the time of the HOA's offer of judgment the notice issues had been resolved and it was already law that the HOA was not required to declare a superpriority sale.[45] The district court order here also noted that the notice issues had been resolved in the prior appeal stating: "here the notice requirements of Section 116.3116 through 116.31168 have already been reviewed on appeal, and the HOA has complied with the notice requirements. Similarly, it has already been determined on appeal that the HOA was not required to postpone the sale to provide Marchai additional time [to] pay."[46]

Given the limited *Cranesbill* issue Marchai should have realized it was not going to prevail on its remaining claims against the HOA and taken the offer of judgment seriously. Again, as to the first *Beattie* factor of whether the plaintiff's claim was brought in good faith, it should be given little weight here given the claims were initially brought in 2016, there was a prior appeal in 2018 with remand in 2020, and the claims were not maintained in good faith at that time after remand.

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[44] *See* AA Vol. I 78-92, AA Vol. I 110-112 and AA Vol. I 113-117, AA Vol. I 131-136, and specifically AA Vol. II 310 (. . . "the HOA has complied with the notice requirements.").
[45] Note this was a 2012 foreclosure and analyzed on the relevant version of NRS 116 at the time.
[46] AA Vol. II 310-311

2. The Court erred or otherwise abused its discretion when considering the second *Beattie* factor (of whether the defendant's offer of judgment was reasonable and in good faith in both its timing and amount), because the Court mistakenly found a potentially preclusive effect of the offer of judgment.

To the second *Beattie* factor of whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount, it was made after remand when the remaining claims could be analyzed against the remaining *Cranesbill* issue. No reasonable scenario of possible outcomes on either way the *Cranesbill* issue was going to be decided was ever put forth by Marchai that would lead to a chance of prevailing on its remaining claims against the HOA. With almost certain probability Marchai was not going to prevail against the HOA and was going to get $0 in damages against the HOA. Thus, the HOA's offer of judgment of $15,000 after remand to avoid potentially greater costs in going to trial on these claims was reasonable and made in good faith in both timing and amount.[47]

When reviewing this factor the court found "[the HOA's] offer of judgment was not reasonable in amount given the potentially preclusive effect of the offer of judgment."[48] However, Marchai never put forth a valid argument on how settling

[47] The HOA did incur more than the offer of judgment in defending itself after the offer and through trial.
[48] AA Vol. III 486-491

with the HOA would prevent them from going forward on its quiet title claim, and there was no preclusive effect. Although SFR has argued in other cases that a lender's settlement with an HOA in these HOA foreclosures matters is an election of remedies, which prevents the lender from getting both damages and the property, this argument has been rejected. *See Bocanegra v. Aetna Life Ins. Co.*, 605 S.W.2d 848, 853 (Tex. 1980) ("One may . . . receive something by way of settlement, even of substantial value, under an uncertain claim without making an election of remedies which bars recovery against another person."). Other Judges in Clark County and also the United States District Court for the District of Nevada have rejected this election of remedies argument and thus the idea that lender settling with the HOA would have a preclusive effect on their remaining claims against the purchaser at the foreclosure auction. *See Nationstar Mortg. LLC v. Curti Ranch Two Maint. Ass'n*, No. 3:17-cv-00699-LRH-CLB, 2019 U.S. Dist. LEXIS 216752, 2019 WL 6877552, at *7 (D. Nev. 2019); *Bank of Am., N.A. v. Berberich*, No. 2:16-cv-00279-GMN-CWH, 2019 U.S. Dist. LEXIS 54951, 2019 WL 1442168, at *6 n.3 (D. Nev. 2019); *Nationstar Mortg. LLC v. Green Valley Southz Owners Ass'n No. 1*, No. 2:16-cv-00833-GMN-EJY, 2019 U.S. Dist. LEXIS 167980, *7, 2019 WL 4773777; and see *Alessi & Koenig v. Brandon*, 2019 Nev. Dist. LEXIS 393, *2.

Nothing preventing Marchai from accepting the offered amount and dismissing the claims against the HOA. Although Marchai had alternative claims

against SFR regarding the same issue, the dismissal is not an adjudication to the validity of the alternative claims, that would prevent Marchai from proceeding to argue its remaining alternative claim against SFR. *See Bocanegra v. Aetna Life Ins. Co.* The doctrine of election of remedies merely prevents parties from pursuing inconsistent remedies in litigation, which is not a bar to alternative claims, or thereafter deciding to forgo one of the claims. *See J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 289, 89 P.3d 1009, 1017 (2004) (recognizing that litigants may pursue alternative claims for relief and are not required to elect a remedy until after the verdict).

If Marchai accepted a settlement with the HOA for what would likely have been a confidential amount, and dismissed the claims against the HOA, it is not for the Court or SFR to presume or declare that any settlement must have been for damages on extinguishment of Marchai's deed of trust. *See Bocanegra v. Aetna Life Ins.* The offer of judgment includes language that: "[t]his offer is not to be construed in any way as an admission of liability by the HOA, but rather is made solely for the purpose of compromising a disputed claim."[49] An assumption that the HOA's payment is for damages is an assumption that the HOA is recognizing damages, something that is specifically excluded by the offer.[50] The offer of judgment here

[49] AA Vol. II 432-434
[50] *Id*.

allowed Marchai to resolve its claims with the HOA without any preclusive effect on its remaining claims, and the court's finding otherwise was a plain error. *See Bocanegra v. Aetna Life Ins. Co.* ("One may . . . receive something by way of settlement, even of substantial value, under an uncertain claim without making an election of remedies which bars recovery against another person.").

3. The Court erred or otherwise abused its discretion in its review of the third *Beattie* Factor, when it mistakenly found that Marchai's rejection of the offer was reasonable because of a potentially preclusive effect of acceptance.

To the third *Beattie* factor of whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith, as discussed above Plaintiff had almost no chance of prevailing on its claims against the HOA. Further, as also discussed above, there was no preclusive effect, and it was a mistake for the court to find Marchai could rely on this preclusive effect that did not exist.

The reality is Marchai either kept the HOA in the case to just take their chances or even worse in a hope that it would impact the HOA's testimony at trial. Both of these are grossly unreasonable or in bad faith, a risk that leans toward awarding the HOA fees.

Related to the *Cranesbill* issue on how the prior owner's partial payments were applied the HOA's community management testimony was consistent in

stating they did not believe they would apply the borrower's payments to the oldest debts first as if they did not apply them to the current owing assessment first, it would lead to them charging the owner at that time (the prior owner) additional late fees.[51] Marchai's counsel repeatedly manipulated that just because there was an issue of material fact that needed to be tried (but only on its claims against SFR), and the fact that the HOA's management company needing to be a witness at trial, into a justification of maintaining claims against the HOA, when the two are not correlated.[52]

In its review of awarding fees as a prevailing party, not as part of the analysis on awarding fees pursuant to the offer of the judgment, the court stated: "the Court declines to exercise its discretion to award attorney's fees because of issues related to the inconsistent evidence Wyeth Ranch presented about applying the homeowner's payments." [53] If this Court reviews the trial transcript it will observe there were multiple payments by the prior owner, but only a single document that makes it look like a single payment was applied to the oldest amount first.[54] When the HOA's community management was asked about this, she testified the form being referenced was not common, and could not be sure why the form was used.[55].

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[51] See Testimony at AA Vol. III 540-554 and 594-602
[52] See AA Vol. I 179-197 generally, and AA Vol. II 261-273 generally.
[53] AA Vol. III 486-491
[54] See Testimony at AA Vol. III 540-554 and 594-602
[55] *Id*.

Additionally, she testified that as a matter of process it did not make sense for the HOA to apply payments to the oldest payments first, if management was not instructed by the owner, because they would have to charge the owner additional late fees that way.[56] The HOA witness explaining why the single form should not be relied on by the court as the HOA's process in applying payments and explaining why the witnesses believes payments would have been applied to the newer assessments first and why the policy would benefit the homeowner, is not the same as the HOA witness just taking inconsistent positions or changing their testimony.[57]

Further, just because the HOA would have been a necessary witness to resolve the *Cranesbill* issue and Quiet Title between Marchai and SFR, the testimony did not change that Marchai no-longer had valid claims against the HOA. The Court apparently bought into Marchai's assertion that if the HOA just testified in its favor that its claims against the HOA would be moot.[58] However, maintaining claims because you don't like the testimony and how they impact other claims is bad faith. Although the Court only references what it calls "inconsistent evidence" in its analysis on prevailing party and not on the offer of judgment analysis, this appears to have swayed the court's analysis on whether Marchai maintains its claims in good or bad faith.

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[56] *Id*.
[57] *Id*.
[58] See AA Vol. II 261-273 generally, and see specifically 262 and 271-272

Although Marchai could proceed on the *Cranesbill* issue, and could call the HOA as a witness, it did not have a valid chance of succeeding on its remaining claims against the HOA. The HOA witness's valid testimony on the *Cranesbill* issue and on the decision of Quiet Title between Marchai and SFR should not prevent an award of attorney fees against Marchai. There is no finding that HOA's witness testimony was intentionally misleading, or that it was anything other than the court just believed both that she was mistaken on how homeowner payments were applied and that the single form that did not address all of the payments must have been the key to the actual way the HOA applied all its payments.[59] Marchai maintaining its claims against the HOA was grossly unreasonable or in bad faith, as they were maintained simply to take the risk or otherwise to manipulate testimony in its favor.

It is further evident that Marchai claims were maintained in bad faith by its attempts to alter its claims after the close of discovery through an Opposition to the HOA's motion for summary judgment. In its Opposition for the first time Marchai attempted to argue its claims involved excess proceeds.[60] Although the Court did not rule on excess proceeds in the order denying the HOA's motion for summary

[59] See AA Vol. II 293-315 generally and specifically 297
[60] AA Vol. I 179-197

judgment[61] or grant the HOA's motion for reconsideration[62] on this point, the Court did find the following in the trial order:

> 162. Plaintiff never mentions in its Complaint a misapplication of proceeds, excess proceeds, or NRS 116.31164(3)(c)'s payment breakdown.
>
> 163. An interpleader action was filed by A&K (A-13-690586-C) regarding excess proceeds. It would be unduly prejudicial to direct a misapplication of proceeds claim against the HOA after A&K has filed bankruptcy and preventing the HOA from seeking any redress it may have against A&K, if A&K misapplied the proceeds from the sale.
>
> 164. Plaintiff did not file an unjust enrichment claim or establish at trial that Wyeth Ranch was unjustly enriched.

Marchai did not have valid claims remaining against the HOA, and this excess proceed issue was never validly raised, and the amount mentioned for the first time in Marchai's Opposition to the HOA's Motion for summary judgment (filed after the offer of judgment) was around $10,000, still less than the $15,000 offer of judgment.[63] This did not appear to factor into the court's determination on fees in analyzing the reasonableness of amount in the second *Beattie* factor, nor should it, as it was not a claim in this case as the trial order points out in sections 162 to 164 quoted above. However, it should be emphasized that if it was not a claim in this case that the other claims Marchai had after remand did not have a reasonable chance

[61] AA Vol. I 231-234
[62] AA Vol. II 288-292
[63] AA Vol. I 193

of success, yet Marchai denied the offer of judgment and decided to take the HOA to trial anyway.

The Court's finding that Marchai's rejection of the offer of judgment was reasonable because of preclusive effect[64] was plain error as no preclusive effect existed; and to the extent the denial of fees may have been impacted because Marchai did not like the HOA witnesses' testimony it would also be plain error.

"The purpose of an offer of Judgment is to encourage the settlement of lawsuits before trial." *Morgan v. Demille*, 106 Nev. 671, 799 P.2d 561 (1990). Potentially costly consequences of rejecting an offer of judgment make a party carefully consider the offer as compared to the claim. *Nava v. Second Judicial Dist. Court*, 118 Nev. 396, 398, 46 P.3d 60, 61, 2002. When an error is made or discretion is abused in not awarding fees and costs after a rejected offer of judgment, the public policy behind having the rule is impacted.

CONCLUSION

The first *Beattie* Factor should be given little weight given the timing of the offer of judgment and the HOA was only seeking fees after the offer. The Court mistakenly found the second and third *Beattie* factors in favor of Marchai based on a potentially preclusive effect of the offer of judgment that did not exist. Marchai

[64] AA Vol. III 486-491

could have settled with the HOA and dismissed the claims against the HOA and still proceeded with its claims against SFR, and nothing in the offer of judgment prevented that scenario.

Marchai no longer had viable claims against the HOA, and the HOA offered $15,000 to be dismissed from the case and the burden of trial and potentially greater fees and costs. The HOA did exceed over $15,000 in fees and costs to defend themselves at trial, and Marchai's claims were dismissed and Marchai did not receive any damages against the HOA. Public Policy behind the offer of judgment rule favors granting the HOA fees in this case. Marchai understood it could accept $15,000 and dismiss its claims against the HOA. Marchai took a risk in not accepting the offer of judgment and that risk should have consequences. Nevada law on offers of Judgment provides that consequence. This Court should find clear error or an abuse of discretion in the denial of the HOA's Motion for attorney's fees.

DATED this 15th day of November, 2021.

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CERTIFICATE OF COMPLIANCE

1. The undersigned 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:

2. This Brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-Point font.

3. The undersigned 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 contains 6110 words.

4. Finally, the undersigned hereby certify that they have read this appellate brief, and to the best of their knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. The undersigned 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. The undersigned understand that they 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.

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November, 2021, electronic service of the foregoing **APPELLANT, WYETH RANCH COMMUNITY ASSOCIATION'S OPENING BRIEF** was made pursuant to NRAP 25(d) to the following parties:

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