

IN THE SUPREME COURT OF THE STATE OF NEVADA

WYETH RANCH COMMUNITY
ASSOCIATION,

Appellant,

vs.

MARCHAI, B.T., a Nevada business
trust,

Respondent.

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APPEAL

From the Eighth Judicial District Court
The Honorable Elizabeth Gonzalez

Respondent's Answering Brief

David J. Merrill
Nevada Bar No. 6060
David J. Merrill, P.C.
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
(702) 566-1935
david@djmerrillpc.com
Attorney for Respondent Marchai, B.T.

NRAP 26.1 Disclosure Statement

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

Marchai, B.T., is a Nevada business trust with no parent corporation, and no publicly-traded company owns 10% or more of an interest in Marchai.

Benjamin D. Petiprin of the Law Offices of Les Zieve initially represented Marchai in the district court. David J. Merrill of David J. Merrill, P.C. took over the representation in the district court and is representing Marchai in this appeal.

Dated this 14th day of January 2022.

David J. Merrill, P.C.

By: /s/ David J. Merrill
David J. Merrill
Nevada Bar No. 6060
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
(702) 566-1935
Attorney for Marchai, B.T.

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Routing Statement

Marchai has no preference whether the Nevada Supreme Court retains this case or assigns it to the Court of Appeals. Since it involves a post-judgment order in a civil case concerning the district court's exercise of its discretion when denying a motion for attorney's fees under N.R.C.P. 68, it is presumed that the Court of Appeals will hear the case. *See* NRAP 17(b)(7).

Wyeth Ranch Community Association claims this Court should retain the case because it raises a question of statewide public importance. (Appellant Wyeth Ranch Cmty. Ass'ns Opening Brief (AOB) at 1.) But it doesn't. Although this Court *can* decide a unique issue—whether acceptance of an offer of judgment from one defendant can preclude claims against another defendant—that decision is not necessary to determine this appeal because without controlling authority to guide the district court, it could not have abused its discretion. *See MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016) (recognizing that a district court abuses its discretion “when the district court bases its decision on a clearly erroneous factual determination or it disregards controlling law.”)

Standard of Review

This Court reviews a district court's decision to award attorney's fees under N.R.C.P. 68 for an abuse of discretion. *See Capriati Constr. Corp. v. Yahyavi*, 137 Nev. Adv Op. 69, 498 P.3d 226, 231 (2021).

To lessen its appellate burden, Wyeth Ranch invites this Court to apply the *de novo* standard of review. (AOB at 4.) Wyeth Ranch claims this Court must resolve a question of law "regarding election of remedies," and, thus, the *de novo* standard applies. (*Id.*) This Court should decline Wyeth Ranch's invitation.

The *de novo* standard of review applies when "an attorney-fees award invokes a question of law." *Capriati Constr.*, 137 Nev. Adv. Op. 69, 498 P.3d at 231. Typically, this Court applies a *de novo* standard of review when the district court's authority to award fees is questioned. *See, e.g., Capriati Constr.*, 137 Nev. Adv. Op. 69, 498 P.3d 226 (2021) (deciding whether a district court had the authority to award an entire contingency fee as a post-offer attorney fee); *In re Estate & Living Tr. v. Miller*, 125 Nev. 550, 216 P.3d 239 (2009) (deciding whether the district court had the authority to award attorney's fees incurred on appeal under N.R.C.P. 68); *Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 192 P.3d 730 (2008) (deciding whether the district court had the authority to award post-judgment attorney's fees under the mechanic's lien statute); *Thomas v. City of North Las*

Vegas, 122 Nev. 82, 127 P.3d 1057 (2006) (deciding whether the district court had the authority to award attorney’s fees under the substantial benefit doctrine); *Valley Elec. Ass’n v. Overfield*, 121 Nev. 7, 106 P.3d 1198 (2005) (deciding whether the district court had the authority to award attorney’s fees under NRS § 18.010 in a condemnation action); *Trs. of Plumbers & Pipefitters Union Local 525 Health & Welfare Trust Plan v. Devs. Surety & Indem. Co.*, 120 Nev. 56, 84 P.3d 59 (2004) (deciding whether the district court had the authority to award attorney’s fees above a bond’s penal limit). Once the issue concerning the district court’s authority is resolved, whether to award fees and the amount of fees rests within the district court’s discretion. *See Barney*, 124 Nev. at 828–29, 192 P.3d at 735 (applying the abuse of discretion standard after concluding the district court had the authority to award attorney’s fees).

Here, neither Marchai nor Wyeth Ranch disputed the district court’s authority to award attorney’s fees under N.R.C.P. 68. (2 Appellant’s App. of Docs. (AA) 353–59, 449–51.) Instead, as discussed more fully below, *see infra* §§ I–II, the district court concluded that Marchai reasonably and in good faith rejected Wyeth Ranch’s offer of judgment because of the potentially preclusive effect of an acceptance. Because the parties did not question the district court’s authority, and the impact of an accepted offer of judgment concerned the district court’s

application of discretion under *Beattie*, the manifest abuse of discretion standard applies. *See Barney*, 124 Nev. at 828–29, 192 P.3d at 735.

Statement of the Issues

- I. Whether the district court correctly exercised its discretion when it concluded that Wyeth Ranch’s offer of judgment was not reasonable or in good faith because of the lack of controlling authority concerning the effect acceptance of the offer may have on Marchai’s claim against SFR Investments Pool 1, LLC.
- II. Whether the district court correctly exercised its discretion when it concluded that Marchai reasonably rejected Wyeth Ranch’s offer and proceeded to trial in good faith because of the lack of controlling authority about whether Marchai’s acceptance of the offer could preclude its claims against SFR.
- III. Whether the district court correctly exercised its discretion when it concluded that Marchai brought its claims for excess proceeds under NRS § 116.1113, wrongful foreclosure, and intentional interference with contract in good faith since the court had not yet decided whether the homeowner’s payments satisfied the superpriority portion of the lien and SFR tried to shift

liability upon Wyeth Ranch by claiming it was a bona fide purchaser under NRS § 111.180.

Statement of the Case

In August 2013, Wyeth Ranch foreclosed upon an association lien. (2AA304.) SFR submitted the winning bid of \$21,000 for a property with a fair market value of \$360,000. (2AA304–05.) In September 2013, Marchai, the beneficiary of a first deed of trust recorded against the property, sued for judicial foreclosure. (1AA1–7.)

In 2016, the district court (Honorable Linda Marie Bell) entered a Decision and Order on competing motions for summary judgment filed by SFR and Marchai. (Resp’ts App. (RA) 9–33.) The district court concluded that genuine issues of material fact precluded it from ruling that the homeowner, Cristela Perez, satisfied the superpriority portion of Wyeth Ranch’s lien through the \$3,390 in payments Perez made after Wyeth Ranch instituted an action to enforce its lien. (RA29.) After the district court entered its decision, it consolidated the action with an action brought by Marchai that asserted claims against Wyeth Ranch. (1AA29–42, 45–46.)

Despite previously denying summary judgment, in 2017, SFR again moved for summary judgment. (*See* 1AA78.) And so did Wyeth Ranch. (*See id.*) But this

time, the district court not only denied SFR and Wyeth Ranch's motions but also entered summary judgment for Marchai. (*See* 1AA91.) The district court concluded that Perez's payments satisfied the superpriority portion of Wyeth Ranch's lien. (1AA90.) SFR (but not Wyeth Ranch) appealed the decision. (1AA 110–12.)

This Court vacated the judgment and remanded. (1AA131.) This Court affirmed the district court's conclusion that the 2008 notice of delinquent assessment was the operative notice for calculating the superpriority portion of the lien but remanded based upon its decision in *9352 Cranesbill Trust v. Wells Fargo Bank, N.A.*, 136 Nev. 76, 459 P.3d 227 (2020) to determine whether Perez's payments satisfied the lien's superpriority portion. (1AA132–34.)

After remand, Wyeth Ranch again moved for summary judgment. (1AA164–78.) Marchai opposed, arguing that genuine issues of material fact precluded the district court from granting the motion. (1AA179–97.) The district court agreed with Marchai and denied Wyeth Ranch's motion, concluding that “Genuine issues of material fact concerning the application of payments before and after Wyeth Ranch's foreclosure preclude summary judgment.” (1AA231–32.)

While Wyeth Ranch's motion for summary judgment was pending, it served an offer of judgment upon Marchai agreeing to allow entry of judgment against Wyeth Ranch for \$15,000. (2AA432–34.)

Unhappy with the district court's denial of summary judgment, Wyeth Ranch moved for reconsideration. (2AA241–60.) Wyeth Ranch argued that Marchai did not plead a claim for damages for foreclosure proceeds paid to Wyeth Ranch. (2AA248–57.) Marchai opposed the motion, arguing that its complaint gave fair notice of a damages claim for proceeds improperly paid to Wyeth Ranch following the foreclosure *if* the district court concluded Perez's payments did not satisfy the superpriority portion of Wyeth Ranch's lien. (2AA261–73.) Again, the district court sided with Marchai. (2AA288–89.)

The district court held a one-day trial before the Honorable Elizabeth Gonzalez. (2AA293.) It ruled that Perez's payments satisfied the superpriority portion of Wyeth Ranch's lien, that Wyeth Ranch's foreclosure did not extinguish Marchai's deed of trust, and SFR took subject to Marchai's deed of trust. (2AA315.) Thus, the district court necessarily dismissed Marchai's alternative claims against Wyeth Ranch. (2A310–12.)

After the district court issued its ruling, Wyeth Ranch moved for attorney's fees. (2AA353–434.) Wyeth Ranch asserted two bases for its attorney's fees: (1) that it was a prevailing party entitled to fees under NRS § 116.4117; and (2) because Marchai did not accept its offer of judgment and did not recover more than \$15,000. (2AA354–57.) Marchai opposed the motion arguing that: (1) NRS §

116.4117 does not authorize an award of fees; and (2) the district court should exercise its discretion and deny an award of fees under Rule 68. (2AA445–55.) The district court agreed with Marchai and denied Wyeth Ranch’s motion. (3AA486–87.) Wyeth Ranch appealed only the district court’s denial of its motion for attorney’s fees. (3AA492–94.) And on appeal, Wyeth Ranch abandoned its argument for fees as the prevailing party and seeks to appeal only the district court’s decision denying fees under N.R.C.P. 68. (AOB at 9.)

Factual Background¹

In 2004, Perez purchased the property at 7119 Wolf Rivers Avenue, Las Vegas, Nevada 89131. (2AA295.) To acquire the property, Perez entered into two loans. (2AA295.) After purchasing the property, she refinanced her two loans by entering into one InterestFirst Adjustable Rate Note with CMG Mortgage, Inc. for \$442,000.00. (2AA295.) CMG Mortgage secured the note by recording a deed of trust against the property. (2AA296.) Eventually, the deed of trust was assigned to Marchai. (2AA296.)

¹ Because Wyeth Ranch appealed only the district court’s decision on attorney’s fees and not the judgment on the merits or the district court’s findings of fact and conclusions of law, and has not contested the district court’s factual findings, Marchai provides most of the facts for the record from the district court’s findings of fact and conclusions of law.

The property is in the Wyeth Ranch community, which collected association dues on each quarter's first day. (2AA296.) Wyeth Ranch had no general agreement with homeowners about applying payments. (2AA296.) It maintained two accounts for the property: an assessment account and a violation account. (2AA296.) But Wyeth Ranch did *not* maintain separate superpriority and subpriority accounts. (2AA296.)

On January 1, 2008, Wyeth Ranch charged Perez a \$420 quarterly assessment. (2AA296.) Because Perez failed to pay the assessment within 30 days, on January 30, 2008, Perez became delinquent in the payment of her quarterly assessments. (2AA296.) On the first day of the next quarter, Wyeth Ranch charged Perez another \$420 quarterly assessment. (2AA296.) But, on April 16, 2008, Perez paid \$507.60. (2AA297.) Yvette Saucedo, the accounting director for Complete Association Management Company (CAMCO), Wyeth Ranch's community manager, testified that Wyeth Ranch applied Perez's payment first to the current quarter's (April 2008) association dues and the remainder to the oldest association dues (January 2008). (3AA539–40.)

But a report Wyeth Ranch produced contradicts Saucedo's testimony. (*Compare* 3AA540–44 *with* RA77.) The report, which Wyeth Ranch prepared in September 2008, shows that Wyeth Ranch applied Perez's payment first to January

2008's association dues (which the ledger does not show are due) and the remainder to April 2008's association dues. (RA77.) In other words, Wyeth Ranch first applied the payment to the oldest outstanding association dues. (*Id.*)

Because Perez did not pay the remainder of April's or July's dues, on September 30, 2008, Alessi & Koenig, LLC (an agent hired by Wyeth Ranch to collect assessments) instituted an action to enforce Wyeth Ranch's lien by sending Perez a Notice of Delinquent Assessment Lien. (2AA297.) According to the notice, Perez owed Wyeth Ranch \$1,425.17, including collection costs, attorney's fees, late fees, service charges, and interest. (2AA297.) Alessi recorded the notice. (2AA297.)

After Wyeth Ranch instituted an action to enforce its lien, Perez paid an additional \$3,390 towards her association dues. (2AA298-303.) Alessi deducted a total of \$1,008.25 in collection costs and disbursed the remainder (\$2,381.75) to Wyeth Ranch, who applied it to Perez's association dues. (*Id.*)

On August 28, 2013, Alessi conducted a foreclosure sale. (2AA304.) At the sale, SFR submitted the winning bid of \$21,000.00 for a property with a fair market value of \$360,000. (2AA304-05.)

At the time of the foreclosure, the assessment ledger shows that Perez owed Wyeth Ranch \$10,679.12, which included assessments, late fees, and interest.

(2AA305.) Wyeth Ranch received from the foreclosure proceeds payment in full (\$10,679.12) of all amounts owed on its assessment ledger. (2AA305.)

Summary of the Argument

I. Marchai's principal claim was for quiet title or declaratory relief against SFR. Marchai sought an order finding that Perez's payment satisfied the superpriority portion of Wyeth Ranch's lien and, thus, Marchai's deed of trust survived Wyeth Ranch's foreclosure. But Marchai had three alternative claims against Wyeth Ranch if the district court denied Marchai's claims against SFR: NRS § 116.1113, wrongful foreclosure, and intentional interference with contract.

The district court could find for Marchai on its claim under NRS § 116.1113 for excess proceeds, *only if* it concluded that Perez's payments did not satisfy the superpriority portion of the lien. If the district court concluded Perez's payments satisfied the superpriority part, then Wyeth Ranch foreclosed on a junior lien, and Marchai was not entitled to excess proceeds. Likewise, Marchai maintained a wrongful foreclosure and intentional interference claim because SFR tried to shift liability to Wyeth Ranch by claiming it was a bona fide purchaser. Hence, Marchai could *only* obtain a judgment against Wyeth Ranch *if it lost* its claims against SFR.

Against this backdrop, Wyeth Ranch served an offer of judgment that, if accepted, would give Marchai a judgment against Wyeth Ranch for \$15,000. But if

Marchai accepted the offer and obtained a judgment against Wyeth Ranch, could it proceed with its claim against SFR? How could the district court enter a judgment against Wyeth Ranch *and* a judgment against SFR if the claims underlying the two decisions are mutually exclusive? Marchai could locate no controlling authority directly on point. Because Marchai could not risk losing its claim against SFR in exchange for \$15,000, it rejected the offer.

After Marchai prevailed against SFR, the district court necessarily dismissed Marchai's alternative claims against Wyeth Ranch. And Wyeth Ranch moved for attorney's fees under N.R.C.P. 68. The district court weighed the *Beattie* factors, exercised its discretion, and denied Wyeth Ranch's motion.

The district court reasoned that because Marchai's acceptance of Wyeth Ranch's offer of judgment *might* preclude its claims against SFR, Wyeth Ranch's offer was not in good faith as to the timing or amount. The district court did not abuse its discretion because no controlling authority guided it or Marchai. And some Nevada law suggests that acceptance of the offer may have precluded Marchai's claims against SFR. Wyeth Ranch relies upon non-controlling cases that are inapposite as they involve settlements, not offers of judgment. And even some cases on which Wyeth Ranch relies recognize that a court cannot enter a judgment

awarding two conflicting remedies. Hence, the district court did not abuse its discretion when denying Wyeth Ranch's motion for attorney fees.

II. Wyeth Ranch also argues that the district court abused its discretion when it concluded Marchai reasonably rejected the offer of judgment and proceeded to trial in good faith. For the same reasons discussed above, the district court concluded that Marchai reasonably rejected the offer of judgment and proceeded to trial because of the potential preclusion of its claim against SFR. With no controlling authority to the contrary, the district court did not abuse its discretion when it denied Wyeth Ranch's motion for attorney's fees.

III. Wyeth Ranch contends that the district court should not have given the good faith of Marchai's claims much weight because when it served the offer of judgment, Marchai had no viable claims. Wyeth Ranch's contention lacks merit.

Marchai adequately pleaded and maintained a claim for excess proceeds from the foreclosure sale under NRS § 116.1113 if the district court concluded that Wyeth Ranch foreclosed a senior lien. Wyeth Ranch claims Marchai pleaded no such claim, but it waived this argument by stipulating in the joint pretrial memorandum that Marchai had a claim for excess proceeds. Wyeth Ranch also waived this argument because it did not appeal the merits of the district court's judgment. The judgment dismissed Marchai's claim under NRS § 116.1113 because

it concluded Wyeth Ranch foreclosed a junior lien, not because Marchai never pleaded the claim. But even if Wyeth Ranch did not waive the argument, the district court correctly concluded on summary judgment and again on a motion for reconsideration that Marchai pleaded a claim for excess proceeds under NRS § 116.1113.

Also, Marchai adequately pleaded and maintained a claim for wrongful foreclosure and intentional interference with contract. SFR argued it was a bona fide purchaser under NRS § 111.180 and tried to shift liability to Wyeth Ranch. Although Marchai disagreed with SFR, it had to proceed with its wrongful foreclosure and intentional interference with contract claims against Wyeth Ranch if the district court ruled for SFR.

The district court did not abuse its discretion when it concluded that Marchai brought its claims in good faith. Thus, Marchai asks this Court to affirm the district court's order denying Wyeth Ranch's motion for attorney's fees.

Argument

When a party does not accept an offer of judgment and the offeree does not better the offer, district courts have the discretion to award attorney's fees. *See* N.R.C.P. 68; *see also Beattie v. Thomas*, 99 Nev. 579, 588–89, 668 P.2d 268, 274 (1983). But an award of attorney's fees under N.R.C.P. 68 is not mandatory. *See id.*

“[T]he purpose of NRCF 68 is to encourage settlement, it is not to force plaintiffs unfairly to forego legitimate claims.” *Id.* at 588, 668 P.2d at 274. Thus, before awarding fees, the district court must consider these four 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 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. at 588–89, 668 P.2d at 274. If the district court weighs the *Beattie* factors, this Court will not reverse “absent a clear abuse of discretion.” *Byrne as Tr. of the UOFM Tr. v. Sunridge Builders, Inc.*, 136 Nev. Adv. Op. 69, 475 P.3d 38, 43 (2020) (citing *LaForge v. State, Univ. & Cmty. Coll. Sys. of Nev.*, 116 Nev. 415, 423, 997 P.2d 130, 136 (2000)). Concerning an award of attorney’s fees, a district court abuses its discretion “when the district court bases its decision on a clearly erroneous factual determination or it disregards *controlling* law.” *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016) (emphasis added). Here, the district court considered each *Beattie* factor and exercised its discretion to deny Wyeth Ranch’s motion for attorney’s fees. And Wyeth Ranch has identified no clearly erroneous factual determination or any disregard of controlling law to support a conclusion that the district court abused its discretion.

Thus, Marchai asks this Court to affirm the district court's order denying Wyeth Ranch's motion for attorney's fees.

I. The district court did not abuse its discretion when it concluded that Wyeth Ranch's offer of judgment was not reasonable or in good faith as to both timing and amount because of uncertainty over the effect it may have on Marchai's claim against SFR.

The second *Beattie* factor obligates the district court to consider "whether the defendants' offer of judgment was reasonable and in good faith in both timing and amount." *Beattie*, 99 Nev. at 588–89, 668 P.2d at 274. Here, the district court concluded that Wyeth Ranch's offer was not reasonable or in good faith because of its potentially preclusive effect on Marchai's claim against SFR. The district court did not abuse its discretion.

An offer of judgment is *not* a settlement offer. *See Marek v. Chesny*, 473 U.S. 1, 6 (1985). Instead, it is an offer to accept a *judgment*. *See id.* (recognizing the distinction between a settlement offer and an offer of judgment). As the United States Supreme Court stated in *Marek v. Chesny*,

The critical feature of this portion of the Rule is that the offer be one that *allows judgment to be taken against the defendant* In other words, the drafters' concern was not so much with the particular components of the offers, but with the *judgments* to be allowed against defendants.

Id. (emphasis in original). Like any judgment, accepted offers of judgment “are enforceable under the power of the court.” 12 Charles Allen Wright & Arthur R. Miller, *Federal Practice and Procedure Civil* § 3002 (3d ed. 2021).

But what if a judgment entered under N.R.C.P. 68 against one defendant contradicted the plaintiff’s remaining claims against another defendant? Could the district court enter and enforce an N.R.C.P. 68 judgment against one defendant and still enter a judgment against another defendant when the grounds for the judgments are mutually exclusive? That was precisely the issue that confronted Marchai when Wyeth Ranch served its offer of judgment.

Here, Marchai had essentially two alternative claims against Wyeth Ranch. First, if Perez’s payments did not satisfy the superpriority portion of Wyeth Ranch’s lien and the foreclosure extinguished Marchai’s deed of trust, then Wyeth Ranch owed Marchai for excess proceeds it received through the foreclosure. Second, if Perez’s payments satisfied the superpriority portion of Wyeth Ranch’s lien, but the district court ruled SFR was a bona fide purchaser, then Wyeth Ranch wrongfully foreclosed on a senior lien and owed Marchai \$360,000, the property’s fair market value. If Marchai accepted Wyeth Ranch’s \$15,000 offer of judgment, and the district court entered judgment, SFR would argue that the judgment precluded Marchai from proceeding against SFR because the judgment signified

that either the homeowner did not satisfy the superpriority portion of the lien or SFR was a bona fide purchaser. *See, e.g., Nationstar Mortg. LLC v. Curti Ranch Two Maint. Ass'n, Inc.*, No. 3:17-CV-00699-LRH-(CLB), 2019 WL 6877552, at *7 (D. Nev. Dec. 16, 2019) (noting that SFR argued a lender's settlement with an association precluded its claim against SFR). Because accepting the offer of judgment might preclude Marchai's claim against SFR, the district court reasoned that the offer was neither reasonable nor in good faith. And the district court had Nevada authority to support its conclusion.

In *Nevada Association Services, Inc. v. Las Vegas Rental & Repair, LLC Series 78*, Nos. 73157, 73676, 2018 WL 6829004, at *2 (Nev. 2018) (Unpublished), this Court reversed the district court when it ruled that a first deed of trust survived an association's foreclosure yet awarded damages against the association's foreclosing agent for unjust enrichment and tortious interference. This Court reasoned that because the district court concluded the foreclosure did not extinguish the deed of trust, it could not award damages for extinguishing the deed of trust. *Id.* And in *Mendenhall v. Tassinari*, 133 Nev. 614, 619, 403 P.3d 364, 370 (2017), this Court concluded that a judgment entered following acceptance of an offer of judgment is a final judgment with preclusive effects.

Although *Nevada Association Services* did not involve an offer of judgment, the principle still holds that a district court cannot enter two contradictory decisions. *See* 2018 WL 6829004, at *2. Yet, that is precisely what Wyeth Ranch tried to force upon Marchai. Wyeth Ranch's offer compelled Marchai to choose between \$15,000 and potentially relinquishing its primary claim against SFR or rejecting the offer and facing the prospect of paying Wyeth Ranch's attorney's fees if it succeeded against SFR. Forcing Marchai to make this decision is antithetical to N.R.C.P. 68. *See Beattie*, 99 Nev. at 588, 668 P.2d at 274 (“[T]he purpose of NRCP 68 is to encourage settlement, it is not to force plaintiffs unfairly to forego legitimate claims.”)

Although this Court may conclude that a party can accept an offer of judgment without fear of precluding claims against a remaining defendant, without controlling authority to guide Marchai or the district court, the district court could not abuse its discretion.² *See Byrne as Tr. of the UOFM Tr. v. Sunridge Builders, Inc.*,

² Wyeth Ranch also argues that because the offer recited that Wyeth Ranch did not admit liability, Marchai could accept the offer and neither the district court nor SFR could presume the settlement must have been for damages on extinguishment of Marchai's deed of trust. (*See* AOB at 19.) But Wyeth Ranch cited no controlling authority to support its contention. (*See id.*) And the offer's language provides little comfort to Marchai. The fact remained that Marchai could obtain a judgment against Wyeth Ranch *only if* it failed to prevail on its claims

136 Nev. Adv. Op. 69, 475 P.3d 38, 43 (2020) (reversing the district court’s award of attorney’s fees as an abuse of discretion where the case involved unresolved legal issues); *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016) (stating that a district court can abuse its discretion when it disregards *controlling law*).

Wyeth Ranch recognizes that when a lender settles with an association, SFR argues that the settlement precludes the lender’s claims against SFR. (AOB at 18.) Yet, Wyeth Ranch (relying principally upon Texas law and unreported lower court cases in Nevada) argues that Marchai could freely accept the offer of judgment without fear of losing its claim. (AOB at 17–20.) But Wyeth Ranch cited no controlling authority, and the authority on which Wyeth Ranch relies is inapposite.

A. Wyeth Ranch’s reliance upon non-controlling case law cannot demonstrate an abuse of discretion by the district court.

With no controlling authority stating otherwise, the district court could not abuse its discretion when it concluded the offer was unreasonable. *See Byrne*, 136 Nev. Adv. Op. 69, 475 P.3d at 43 (reversing the district court’s award of attorney’s fees as an abuse of discretion where the case involved unresolved legal issues); *MB*

against SFR. Marchai could not accept a \$15,000 offer of judgment and risk losing its deed of trust.

Am., 132 Nev. at 88, 367 P.3d at 1292 (stating that a district court can abuse its discretion when it disregards *controlling law*).

B. The non-controlling authority on which Wyeth Ranch relies is inapposite because it relies upon settlements, not judgments, and even the cases Wyeth Ranch cites recognize that a district court cannot order two inconsistent remedies.

Second, the non-controlling authority on which Wyeth Ranch relies is inapposite. For example, Wyeth Ranch argues that the Texas Supreme Court concluded that a party could accept payment by settlement “under an uncertain claim” without barring recovery against another defendant. (*See* AOB at 18 (quoting *Bocanegra v. Aetna Life Ins. Co.*, 605 S.W.2d 848, 853 (Tex. 1980)). But, as Wyeth Ranch notes, *Bocanegra* involved a *settlement*, not a *judgment*. *See id.* Settlements rarely involve an entry of judgment (other than dismissal). Wright & Miller, *supra*, § 3002. But acceptance of an offer of judgment may result in an enforceable judgment. *Id.* And in this case, it would have required the district court to enter two conflicting judgments.

Wyeth Ranch also relies upon the United States District Court’s opinions in *Nationstar Mortgage, LLC v. Curti Ranch Two Maintenance Association, Inc.*, No. 3:17-CV-00699-LRH-(CLB), 2019 WL 6877552, at *7 (D. Nev. Dec. 16, 2019), *Bank of America, N.A. v. Berberich*, No. 2:16-CV-00279-GMN-(CWH), 2019 WL

1442168, at *6 n.3 (D. Nev. Mar. 29, 2019), and *Nationstar Mortgage LLC v. Green Valley South Owners Association No. 1*, No. 2:16-CV-00883-GMN-(EJY), 2019 WL 4773777, at *5 (D. Nev. Sept. 30, 2019).³ But, like *Bocanegra*, *Curti Ranch*, *Berberich*, and *Green Valley*, each involved a settlement, not a judgment. See *Curti Ranch*, 2019 WL 6877552, at *7; *Berberich*, 2019 WL 1442168, at *6 n.3; *Green Valley*, 2019 WL 4773777, at *5. Enforcement by the court through execution distinguishes offers of judgment from mere settlements. See *Wright & Miller*, *supra*, § 3002.⁴

In addition, *Curti Ranch* and *Berberich* recognized that the settlement did not preclude the lender's claims against the third-party purchaser because the court

³ Wyeth Ranch also cites (AOB at 18) an Eighth Judicial District Court case, *Alessi & Koenig v. Triplett*, No. A-13-688278-C, 2019 Nev. Dist. LEXIS 393 (Nev. Dist. Ct. Apr. 3, 2019), but that opinion concerns the denial of a motion for reconsideration and has no relevant discussion of the issues before this Court. See *id.*

⁴ Wyeth Ranch's refusal to recognize the distinction between a settlement and an offer of judgment permeates its brief and clouds its analysis. For example, Wyeth Ranch claims Marchai could accept the offer of judgment and dismiss its claims against Wyeth Ranch. (AOB at 18 & 19.) But after acceptance of an offer of judgment, dismissal is appropriate only when the offeror pays the amount due within 21 days. See N.R.C.P. 68(d)(2). Hence, Wyeth Ranch, not Marchai, controlled the dismissal. See *id.* Further, Wyeth Ranch claimed the "settlement . . . would likely have been a confidential amount." (AOB at 19.) Again, this would rely upon Wyeth Ranch paying the offered amount within 21 days and securing a dismissal. See *id.*

awarded only one remedy (a declaration that the deed of trust survived the foreclosure) and did not award damages. *See Curti Ranch*, 2019 WL 6877552 at *7; *Berberich*, 2019 WL 1442168, at *6, n.3. As Judge Hicks stated in *Curti Ranch*,

[T]he court is only awarding one remedy: it declares that the first deed of trust, of which Nationstar is the record beneficiary, remains on the property. It has not awarded any damages. Nationstar's choice to settle its claims separately with Curti Ranch does not affect this ruling.

2019 WL 6877552 at *7. But suppose Marchai accepted Wyeth Ranch's offer. In that case, it may have resulted in *two* remedies: a compromise judgment against Wyeth Ranch for damages under N.R.C.P. 68 (which the district court could enter only if the foreclosure extinguished Marchai's deed of trust) and a judgment against SFR (which the district court could only enter if the foreclosure did *not* extinguish Marchai's deed of trust). Hence, *Curti Ranch* and *Berberich* are inapposite.

With no controlling case law on point, and the non-controlling case law suggesting the acceptance of an offer of judgment may have precluded Marchai's claims against SFR, the district court did not (and could not) abuse its discretion when it concluded Wyeth Ranch unreasonably offered a \$15,000 judgment. *See Byrne*, 136 Nev. Adv. Op. 69, 475 P.3d at 43; *MB Am.*, 132 Nev. at 88, 367 P.3d at 1292. Thus, Marchai asks this Court to affirm the district court's order denying Wyeth Ranch's motion for attorney's fees.

II. The district court did not manifestly abuse its discretion when it correctly analyzed the third *Beattie* factor and concluded that Marchai reasonably rejected the offer and proceeded to trial in good faith.

The third *Beattie* factor compels the district court to weigh “whether the plaintiff’s decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith.” *Beattie*, 99 Nev. at 588–89, 668 P.2d at 274. The district court considered this factor and concluded that because accepting Wyeth Ranch’s offer might preclude Marchai’s claims against SFR, Marchai reasonably rejected the offer and proceeded to trial in good faith. The district court did not abuse its discretion.

As argued above, Marchai did not accept Wyeth Ranch’s offer because it could not (for \$15,000) risk having the judgment preclude Marchai’s claims against SFR, on which Marchai ultimately prevailed. *See supra*, § I. Even if this Court concludes that Marchai could safely accept the offer of judgment without explicit, controlling case law to guide Marchai, its rejection was reasonable. The district court’s decision was not an abuse of discretion. *See Byrne*, 136 Nev. Adv. Op. 69, 475 P.3d at 43; *MB Am.*, 132 Nev. at 88, 367 P.3d at 1292. Because Marchai’s decision to reject Wyeth Ranch’s offer was reasonable and in good faith, Marchai asks this Court to affirm the district court’s decision order denying Wyeth Ranch’s motion for attorney’s fees. *See Bidart v. Am. Title Ins. Co.*, 103 Nev. 175, 179, 734

P.2d 732, 735 (1987) (affirming the district court’s decision to refuse to award attorney’s fees when the offeree reasonably rejected an offer of judgment).

To criticize the district court’s decision to deny Wyeth Ranch’s request for attorney’s fees under N.R.C.P. 68, Wyeth Ranch discusses the district court’s justification for declining to award attorney’s fees as a prevailing party, which Wyeth Ranch has not challenged on appeal and thus has waived. (AOB at 21–22.) *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (“Issues not raised in an appellant’s opening brief are deemed waived.”) (citing *Bongiovi v. Sullivan*, 122 Nev. 556, 570 n.5, 138 P.3d 433, 444, n.5 (2006)).

Further, Wyeth Ranch criticizes the district court for concluding that its witness provided “inconsistent evidence” and somehow extrapolates that into an accusation that Marchai kept Wyeth Ranch in the case in bad faith. (AOB at 22.) Wyeth Ranch’s argument is nonsense.

The district court correctly concluded that Saucedo provided inconsistent evidence. Saucedo testified that Wyeth Ranch applied payments first to the current quarter’s association dues and the remainder to the oldest association dues. But she could identify no written policy or procedure or any document that substantiated her testimony. On the contrary, a document *prepared by Wyeth Ranch* and used by Alessi & Koenig to prepare the notice of delinquent assessment lien (which

perfects the superpriority lien) indisputably demonstrated that Wyeth Ranch applied payments first to the oldest association dues. Unsurprisingly, the district court believed the document rather than Saucedo's uncorroborated testimony.

The district court did not abuse its discretion when it decided that Marchai rejected Wyeth Ranch's offer in good faith. *See Bidart*, 103 Nev. at 179, 734 P.2d at 735. Thus, Marchai asks this Court to affirm the district court's order denying Wyeth Ranch's motion for attorney's fees.

III. The district court properly weighed the first *Beattie* factor and concluded that Marchai brought its claims in good faith.

The first *Beattie* factor requires the district court to consider "whether the plaintiff's claim was brought in good faith." *Beattie v. Thomas*, 99 Nev. 579, 588–89, 668 P.2d 268, 274 (1983). The district court considered this factor and concluded that Marchai brought its claims in good faith. Because Wyeth Ranch cannot show the district court manifestly abused its discretion, this Court should affirm. *See Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 562, 216 P.3d 788, 792 (2009) (affirming a district court's decision to decline to award attorney's fees under N.R.C.P. 68 when the plaintiff brought its claims in good faith); *see also Nev. Ass'n Servs., Inc. v. Las Vegas Rental & Repair, LLC Series 78*, Nos. 73157, 73676, 2018 WL 6829004, at *2 (Nev. Dec. 27, 2018) (Unpublished) (vacating an award of

attorney's fees against a lender under N.R.C.P. 68 because the lender maintained its claims in good faith).

Wyeth Ranch claims that Marchai had "almost no chance of prevailing on its claims," "no-longer {sic} had valid claims against the HOA," and then resorts to ad hominem attacks claiming that Marchai's counsel "manipulated" the district court and kept Wyeth Ranch in the case solely to pressure its witness to testify a certain way. (*See* AOB at 20–23.) Wyeth Ranch's arguments lack merit.

As Wyeth Ranch notes, when it served the offer of judgment, Marchai had three claims against Wyeth Ranch: violation of NRS § 116.1113, wrongful foreclosure, and intentional interference with contract. (AOB at 12.) Marchai kept Wyeth Ranch in the case for two reasons: (1) if the district court ruled that Perez's payments did not satisfy the superpriority portion of the lien, then Wyeth Ranch owed Marchai for excess proceeds it misapplied following the foreclosure under its bad faith claim; and (2) if the district court bought into SFR's novel theory that NRS § 111.180 changed bona fide purchaser law and SFR was a bona fide purchaser, then Wyeth Ranch owed March \$360,000 for a wrongful foreclosure or intentional interference with contract by improperly foreclosing upon a senior lien.

A. Marchai adequately pleaded and maintained a claim under NRS § 116.1113 for excess proceeds.

Marchai's NRS § 116.1113 claim included an alternative claim to excess proceeds from the foreclosure sale if the district court concluded Perez's payments did not satisfy the superpriority portion of the lien. In *Bank of America, N.A. v. Thomas Jessup, LLC Series VII*, No. 73785, 2020 WL 2306320, at *2 (Nev. May 7, 2020) (Unpublished)—a case cited by Wyeth Ranch—this Court concluded that a claim under NRS § 116.1113 includes a claim for excess proceeds from the foreclosure sale.

But Wyeth Ranch argues that Marchai did not plead a claim under NRS 116.1113 for excess proceeds. Wyeth Ranch's argument fails because: (1) Wyeth Ranch agreed in the joint pretrial memorandum that Marchai claimed excess proceeds; (2) the district court denied Wyeth Ranch's argument on summary judgment and reconsideration, and Wyeth Ranch waived that argument by not contesting that decision in its notice of appeal; and (3) Marchai's pleadings support its excess proceeds claim.

First, Wyeth Ranch waived its argument that Marchai's NRS § 116.1113 claim did not include a request for excess proceeds by stipulating to it in the joint pretrial memorandum. The joint pretrial memorandum must include "A brief statement of each principal issue of law which may be contested at the time of trial.

This statement shall include with respect to each principal issue of law the position of each party.” EDCR 2.67(8). And the joint-pretrial memorandum supersedes the pleadings. *Recontrust Co., N.A. v. Zhang*, 130 Nev. 1, 7, 317 P.3d 814, 818 (2014) (quoting *Walters v. Nev. Title Guar. Co.*, 81 Nev. 231, 234, 401 P.2d 251, 253 (1965)).

Here, the joint pretrial memorandum stated: “if the Court concludes that Perez did not satisfy the lien’s superpriority part, then Wyeth Ranch did not act in good faith when it accepted the proceeds of the foreclosure to which it was not entitled.” (RA44.) Wyeth Ranch asserted no objection or reservation to this description of Marchai’s bad faith claim. (*Id.*) Thus, Wyeth Ranch waived its argument by agreeing to the joint pretrial memorandum with no objection or reservation. *See Recontrust Co.* 130 Nev. at 7, 317 P.3d at 818.

Second, Wyeth Ranch waived its argument that Marchai did not plead an excess-proceeds claim by failing to appeal the district court’s decision on that issue. The district court denied Wyeth Ranch’s motion for summary judgment and its motion for reconsideration, in which it argued that Marchai did not plead an excess-proceeds claim. And the district court’s findings of fact and conclusions of law dismissed Marchai’s excess proceeds claim because it concluded that Wyeth

Ranch foreclosed upon a subpriority lien. (2AA311.) Specifically, the district court stated:

169. Because Wyeth Ranch foreclosed upon a subpriority lien, Marchai has no claim against Wyeth Ranch for breach of its obligations under NRS § 116.1113.

170. Marchai's claim under NRS § 116.1113 is dismissed.⁵

⁵ Wyeth Ranch's brief ignores Paragraphs 169 and 170 of the findings of fact and conclusions of law and instead fixates on Paragraphs 162 through 164. (AOB 24.) But those paragraphs are mere dictum. *See St. James Village, Inc. v. Cunningham*, 125 Nev. 211, 216, 210 P.3d 190, 194 (2009) ("A statement in a case is dictum when it is 'unnecessary to a determination of the questions involved.'") (quoting *Stanley v. Levy & Zentner Co.*, 60 Nev. 432, 448, 112 P.2d 1047, 1054 (1941)).

The district court's findings of fact and conclusions of law state that Marchai did not "mention" a misapplication of proceeds, excess proceeds, or the payment breakdown in its complaint and did not bring an unjust enrichment claim. (*See* AOB at 24.) This is true. But that does not mean that Marchai did not *plead an NRS § 116.1113* claim for excess proceeds even though it did not expressly use the terms "misapplication of proceeds" or "excess proceeds." *See Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995) (footnote omitted) (citing *Swartz v. Adams*, 93 Nev. 240, 245, 563 P.2d 74, 77 (1977) ("A plaintiff who fails to use the precise legalese in describing his grievance but who sets forth the facts which support his complaint thus satisfies the requisites of notice pleading."))

Also, the district court is correct, Marchai didn't plead an unjust enrichment claim. Instead, it pleaded a claim under NRS § 116.1113, which included a claim for excess proceeds. And the district court dismissed that claim because Wyeth Ranch foreclosed upon a subpriority lien. (2AA311.)

And finally, the district court's discussion about it being unduly prejudicial to allow excess proceeds since Alessi & Koenig filed bankruptcy is irrelevant. (*See* 2AA311.) Marchai had no entitlement to excess proceeds because (as the district

(*Id.*) Wyeth Ranch’s notice of appeal contests only the order denying its motion for attorney’s fees, not the findings of fact or conclusions of law. Because Wyeth Ranch did not appeal that determination, it cannot challenge it in this Court. *See Charmicor, Inc. v. Bradshaw Fin. Co.*, 92 Nev. 310, 313, 550 P.2d 413, 415 (1976) (“Only parts of the judgment which are included in the notice of appeal will be considered by the appellate court.”) (quoting *Reno Newspapers v. Bibb*, 76 Nev. 332, 335, 353 P.2d 458, 459 (1960)). But even if this Court considers Wyeth Ranch’s arguments, they still lack merit.

The Nevada Rules of Civil Procedure require a complaint to contain a “short and plain statement of the claim showing that the pleader is entitled to relief” and “a demand for the relief sought.” N.R.C.P. 8(a)(2)–(3). Because Nevada is a notice-pleading jurisdiction, district courts must liberally construe the pleadings “to allow issues that are fairly noticed to the adverse party.” *Nev. State Bank v. Jamison Fam. P’ship*, 106 Nev. 792, 801 P.2d 1377 (1990). “‘Notice pleading’ requires plaintiffs to set forth facts which support a legal theory, but does not require the legal theory relied upon to be correctly identified.” *Liston v. Las Vegas Metro. Police Dep’t*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995) (footnote

court concluded) Wyeth Ranch foreclosed a subpriority lien. Thus, this statement is dictum. *See St. James Village*, 125 Nev. at 216, 210 P.3d at 194.

omitted) (citing *Swartz v. Adams*, 93 Nev. 240, 245, 563 P.2d 74, 77 (1977).) “A plaintiff who fails to use the precise legalese in describing his grievance but who sets forth the facts which support his complaint thus satisfies the requisites of notice pleading.” *Id.*

Here, Marchai pleaded a bad faith claim as its fourth claim for relief. (1AA39.) That claim relies on the allegations of paragraph 69(e), which alleges that “Perez paid more than nine months of association dues following Wyeth Ranch’s institution of an action to enforce its lien.” (1AA38.) And Marchai requested “any and all damages flowing from” the foreclosure. (1AA39.) Also, the complaint alleges that SFR paid \$21,000 at the foreclosure sale. (1AA35.) Hence, Wyeth Ranch had fair notice that how it applied payments (before or after the foreclosure) was at issue. *See Liston*, 111 Nev. at 1578–79, 908 P.2d at 723 (reversing the district court’s order to exclude the testimony of a constructive discharge when the plaintiff pleaded facts to support a constructive discharge claim even though he did not use the terms “constructive discharge.”).

Thus, Wyeth Ranch’s claim that Marchai had no claim for excess proceeds when it served the offer of judgment lacks merit.

B. Marchai brought and properly maintained claims for wrongful foreclosure and intentional interference with contract because of SFR’s novel argument that it is a bona fide purchaser under NRS § 111.180.

SFR argued through the trial that even if Perez paid the superpriority portion of Wyeth Ranch’s lien, the foreclosure still extinguished Marchai’s deed of trust because SFR was a bona fide purchaser. (RA72–76.) Although this Court rejected SFR’s bona fide purchaser argument in *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. 604, 427 P.3d 113 (2018) (*Diamond Spur*), SFR argued that NRS § 111.180’s enactment—which occurred before the foreclosure in this case but after the foreclosure in *Diamond Spur*—changed Nevada’s bona fide purchaser law. (RA74.) SFR argued that even if Perez’s payments satisfied the superpriority portion of the lien, as a bona fide purchaser under NRS § 111.180, Marchai’s remedy lay against Wyeth Ranch. (RA73.) Marchai disagreed with this argument, and, ultimately, the district court rejected it. But, as argued above, had the district court agreed with SFR, Marchai’s acceptance of a \$15,000 offer of judgment might preclude its \$360,000 wrongful foreclosure and intentional interference with contract claims.

Conclusion

The district court carefully considered each of the *Beattie* factors and exercised its discretion to decline an award of attorney’s fees under N.R.C.P. 68

because Wyeth Ranch's offer was not reasonable or in good faith, Marchai reasonably and in good faith rejected the offer, and Marchai brought its claims in good faith. Thus, Marchai asks this Court to affirm the district court's order denying Wyeth Ranch's motion for attorney's fees.

Dated this 14th day of January 2022.

David J. Merrill, P.C.

By: /s/ David J. Merrill
David J. Merrill
Nevada Bar No. 6060
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
(702) 566-1935
Attorney for Marchai, B.T.

Certificate of Compliance

1. I 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 365 in 14-point Equity font with headings in 16-point Concourse font.

2. 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 proportionally spaced, has a typeface of 14-points or more and contains 7,609 words.

3. Finally, I certify that I have read this appellate 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 14th day of January 2022.

David J. Merrill, P.C.

By: /s/ David J. Merrill
David J. Merrill
Nevada Bar No. 6060
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
(702) 566-1935
Attorney for Marchai, B.T.

Certificate of Service

I certify that I filed the Respondent's Answering Brief electronically with the Nevada Supreme Court on the 14th day of January 2022, and each of the registered users of the Court's electronic filing system shall receive notice.

Dated this 14th day of January 2022.

David J. Merrill, P.C.

By: /s/ David J. Merrill
David J. Merrill
Nevada Bar No. 6060
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
(702) 566-1935
Attorney for Marchai, B.T.