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. A689461

APPELLANT'S REPLY BRIEF

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STANDARD OF REVIEW

Marchai disputes that a de novo standard of review should be applied to the question of law that permeates the District Court's attorney fee analysis. However, again in *Capriati Constr. Corp., Inc. v. Bahram Yahyavi*, 2021 Nev. LEXIS 65, *8-9, 137 Nev. Adv. Rep. 69, this Court stated:

> **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).

(Emphasis added). 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.") (Emphasis added). Marchai attempts to distinguish the above authority regarding reviewing questions of law de novo, by arguing that the only possible question of law has to be limited to whether NRCP 68 grants authority to the district court to award attorney's fees.[1] However, there is no basis for such a limitation. The district court's decision on the attorney fee award did invoke or implicate a question of law on election of

[1] *See* Answering Brief at 3 (stating: "Here, neither Marchai nor Wyeth Ranch disputed the district court's authority to award attorney's fees under NRCP 68.").

remedies, which formed the basis of the district court's decision on two of the four *Beattie* factors.

The HOA argued in its Opening Brief, that not much weight should be given to whether Marchai initially filed its claims in good faith because: the offer of judgment was made after the prior remand, and the claims were not maintained in good faith after that remand on the limited *Cranesbill* issue. Therefore, if the question of law on election of remedies was answered correctly to find the offer did not create a preclusive effect, the second and third Beattie factors would tip in the HOA's favor and toward an award of attorney's fees. While the HOA (Wyeth Ranch) is not disputing that the district court could have awarded it attorneys fees under NRCP 68, it is disputing the district court's denial of attorneys fees based on how the court answered a question of law related to election of remedies.

Here, the district court's analysis of a potential NRCP 68 attorney fee award and its review of the factors under *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), was based on a question of law related to election of remedies. The district court's incorrect analysis of that question of law led it to find that the HOA's offer of judgment was not reasonable in amount, and that Marchai's refusal to accept was reasonable; both decisions were based on a "potentially preclusive effect" when Marchai was in fact not precluded from resolving claims with the HOA and

proceeding with its claims against SFR.[2] This Court should find Marchai was not precluded from resolving with the HOA and continuing with its alternative claims against SFR, when it reviews the question of law on election of remedies. This court should additionally, find that because Marchai was not precluded from resolving with the HOA, that the offer was reasonable in amount, and the rejection was unreasonable. Further, the Court's review of the election of remedies question that impacts the attorney fee analysis should be reviewed de novo. *See Capriati Constr. Corp., Inc. v. Bahram Yahyavi,* and *Thomas v. City of N. Las Vegas.*

HOA'S RESPONSE TO MARCHAI'S STATEMENT OF THE ISSUES

Marchai presents in its Answering Brief that there are three issues to this appeal.[3] Marchai offers that the first two issues are related to the second and third *Beattie* factors on reasonableness of the offer, and reasonableness of rejection.[4] Marchai offers it was the court's discretion to find a preclusive effect, because of what it argues is a lack of controlling authority.[5] However, this is tied to Marchai not wanting this court to review the question of law de novo. Marchai's arguments ignore clear existing law that an offer of judgment is nothing more than a

[2] *See* Order Denying at AA Vol. III 487.
[3] *See* Answering Brief at 4.
[4] *Id*.
[5] *Id.*

compromise, not subject to admission as evidence or preclusive effect as a matter of law.

The real issue is does acceptance of the HOA's offer necessarily preclude Marchai from relief against SFR? The answer is an obvious no. This is a question of law. The relevant law supports finding that Marchai would not have been precluded from both accepting the HOA's offer and continuing with its claims against SFR.

Marchai's third issue has to do with the first *Beattie* factor and whether it brought its claims in good faith.[6] However, again Marchai asserts in this third issue that its NRS § 116.1113 claim was for excess proceeds, when it was about notice and *not* excess proceeds.[7] Further, even if Marchai actually had an excess proceeds claim the offer of judgment for $15,000 was still around fifty percent more than the excess proceeds alleged now.[8]

SUMMARY OF ARGUMENT

In Nevada both NRCP 68(d)(3) and NRS 17.117(8) state that: "[a]ny judgment entered under this [section/subsection] must be **expressly designated a compromise settlement.**" (Emphasis added). Here, the District Court reviewed a question of law on election of remedies and erred when it concluded that the offer

[6] *Id*.
[7] *Id.*
[8] *See* AA Vol. I 193 ("$10,038.62").

of judgment had a potentially preclusive effect on Marchai's claims. This was an error because the relevant case law discussed in the argument section below demonstrates a party can accept value in settlement without declaring it damages, and because an NRCP 68 judgment is designated a compromise settlement.

Therefore, even if judgment was entered under NRCP 68 rather than a dismissal, the judgment would be designated a compromise settlement, and would not be (1) Evidence or (2) an election of remedies with a preclusive effect. Removing this preclusive effect (that does not actually exist) from the weighing of *Beattie* factors, tilts the decision in favor of awarding the HOA attorney's fees based on Marchai rejecting and offer of judgment that it failed to beat.

ARGUMENT

The District Court Erred in Denying the HOA's Motion for Fees That Was Based on Its Offer of Judgment, When It Made a Finding of a Preclusive Effect Where There Was None, Which Impacted Its Review and Weighing of the *Beattie v. Thomas* Factors.

There is no law to support the contention that a compromise in settlement can have a preclusive effect against a plaintiff as to another defendant. The HOA in it's Opening Brief at 16-17 argued:

> When reviewing [the Second Beattie] 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."[9] However, Marchai never put forth a valid argument on how settling with the HOA would prevent them from going forward on its quiet title claim, and there was no preclusive effect.

Marchai attempts to use the HOA's argument against it, by arguing because there is not controlling law the district court can act capriciously.[10] This court should not fall for that tactic. The reality is, and as the HOA argued in its Opening Brief as explained above, there is no law that supports the district court's finding of a preclusive effect. While there is not specific Nevada Supreme Court precedent on election of remedies, the relevant law all supports the HOA's position that Marchai could have accepted the offer, and dismissed its claims against the HOA or allowed judgment to be entered, and still have proceeded on its claims against SFR. Therefore, this Court should review that question of law de novo, consider the relevant law, and find in the HOA's favor.

I. Existing Law Establishes that Settlements are Not Preclusive Upon a Plaintiff.

This Court should adopt the rule in *Bocanegra v. Aetna Life Ins. Co.*, 605 S.W.2d 848, 853 (Tex. 1980) that "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

[9] AA Vol. III 486-491

[10] *See* Answering Brief at 15 ("or any disregard of controlling law.").

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.

In *Nationstar Mortg. LLC v. Curti Ranch Two Maint. Ass'n,* the United States District Court for the District of Nevada reviewing the issue and reviewing the cases of *Bank of Am., N.A. v. Berberich, and Nev. Ass'n Servs. v. Las Vegas Rental & Repair, LLC,* 2018 Nev. Unpub. LEXIS 1198, *5-6, 432 P.3d 744, 134 Nev. 911, 2018 WL 6829004, found it was not prohibited from deciding the quiet title issue that remained simply because the Lender had reached a settlement with the HOA. Further, that court distinguished this court's unpublished opinion in *Nev. Ass'n Servs. v. Las Vegas Rental & Repair, LLC*, 2018, (where this court prevented a double recovery where it was clear the lender was both getting the property and damages

against the HOA), by stating: "Here, the 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." In that way, the U.S. District Court, similar to the Court in *Bocanegra*, was finding that accepting something through settlement was not an election of remedies and it was not up to another party in the case to label the settlement as acceptance of damages.[11]

While there is not much case law on this election of remedies issue, the relevant law does *not* support finding a preclusive effect of the offer. This court should adopt the rule in *Bocanegra* to clarify the issue, and find the district court erred here when it ruled the offer had a preclusive effect.

II. In Nevada, an Offer of Judgment if Accepted is Nothing More than a Compromised Settlement.

Marchai argues the case law referenced by the HOA is related to settlements, not judgments.[12] However, Marchai fails to consider both NRCP 68(d)(3) and NRS 17.117(8) state that: "[a]ny judgment entered under this [section/subsection] must be **expressly designated a compromise settlement.**" (Emphasis added). Thus, in

[11] Marchai mistakenly argues that *Nationstar Mortg. LLC v. Curti Ranch Two Maint. Ass'n, and Nev. Ass'n Servs. v. Las Vegas Rental & Repair, LLC (Unpublished),* supports its position, when, as pointed out here, they do not. *See* Answering Brief at 18.

[12] *See* Answering Brief at 21.

all cases of acceptance, but important to the scenario of acceptance in this case, acceptance of an offer of judgment and entry of judgment thereon would be, a judgment that the offeror is willing to pay a certain amount and the offeree is willing to accept that amount as compromise to obtain resolution. It would *not* be a recognition of liability and a determination of damages. In many cases, the offeror/obligated party may prefer to take a dismissal rather than announce what it is paying to resolve claims, but again, that announcement is not one admitting liability and damages. Therefore, under the rule in *Bocanegra* **a compromise settlement** is not an election of remedies and does not create a preclusive effect. Neither Marchai or the district court cited any authority to support a finding of a preclusive effect or even a potential one.[13]

III. Federal Rule of Civil Procedure 68 is Not Analogues to Nevada's Rule of Civil Procedure 68.

Marchai relies on *Marek v. Chesny*, 473 U.S. 1, 6 (1985), in its Answering Brief to argue that "an offer of judgment is not a settlement offer", but "an offer to accept a judgment."[14] This argument by Marchai misses the mark.

To start, what is being reviewed in *Marek v. Chesny* is whether the federal version FRCP 68 required an offer to break out perceived damages and costs,

[13] *See* Answering Brief generally, footnote 3 supra, and *see* order denying at AA Vol. III 487.
[14] Answering Brief at 16.

specifying a specific amount for each category in the offer.[15] The Court in *Marek v. Chesney* found a single lump sum that did not specify particular components of the offer was allowed.[16] It was in this context that the court stated "[i]n other words, the drafters' concerns was not so much with the particular components of the offers, but with the judgments to be allowed against defendants."[17] In that context *Marek v. Chesny* would actually support that an offer of judgment does not have to assume liability or acknowledge damages, as it is not necessarily specifying any portion as damages.

Next, although both NRCP 68 and FRCP 68 are intended to encourage settlement,[18] they are substantially different, which is obvious from a comparison of their language. *Compare* NRCP 68 and FRCP 68. In fact, NRCP 68 is different from most jurisdictions.[19] Again, a specifically important difference that Marchai

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[15] *Marek v. Chesny* at 5.
[16] *Id.,* at 6.
[17] *Id.*
[18] *See Beattie v. Thomas*, 99 Nev. 579, 588, 668 P.2d 268, 274, 1983 Nev. LEXIS 507, *15 (Nev. August 31, 1983), stating: "[] the purpose of NRCP 68 is to encourage settlement. . ." and *see Marek v. Chesny*, 473 U.S. 1, 5, 105 S. Ct. 3012, 3014, 87 L. Ed. 2d 1, 6-7, 1985 U.S. LEXIS 81, *8, 53 U.S.L.W. 4903, 38 Fair Empl. Prac. Cas. (BNA) 124, 37 Empl. Prac. Dec. (CCH) P35,396, 1 Fed. R. Serv. 3d (Callaghan) 1297; stating "The plain purpose of [FRCP] 68 is to encourage settlement and avoid litigation." (citing: Advisory Committee Note on Rules of Civil Procedure, Report of Proposed Amendments, 5 F.R.D. 433, 483, n. 1 (1946), 28 U. S. C. App., p. 637; *Delta Air Lines, Inc*. v. *August*, 450 U.S. 346, 352 (1981)).

[19] ARTICLE: A Proposal to Clarify Rule 68 of the Nevada Rules of Civil Procedure Regarding Offers of Judgment, 7 Nev. L.J. 382, 382-383.

does not address is that in Nevada both NRCP 68(d)(3) and NRS 17.117(8) state that: "[a]ny judgment entered under this [section/subsection] must be **expressly designated a compromise settlement.**" (Emphasis added). Therefore, what is being purchased is settlement and release from liability, without a requirement to acknowledge liability or declare damages. *See Hall v. Enter. Leasing Co.*, 137 P.3d 1104, 1109 (Nev. 2006) (acceptance of offer of judgment extinguishes the offeror's legal liability to the offeree), and *see Bocanegra (*obtaining value through settlement without making an election of remedies*).*

IV. Nevada's Public Policy Favoring Settlements Permeates Through Its Law and Demonstrates a Settlement Could Not Negatively Affect Marchai's Claims Against SFR.

Under NRS 48.105(1)(b) "evidence of : accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of a claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible." Therefore, where even a another party to the case or third-party is aware of a judgment taken in accordance with the offer of judgment rules, it is **a compromise settlement** and not admissible evidence of a liability, even if they wanted to make an election of remedies argument based on the judgment. The proffered argument for a preclusive

effect or election of remedies is, that SFR would argue that the judgment against the HOA is Marchai choosing monetary damages rather than return of the property. For the reasons argued above, the election of remedies argument should fail, making the conclusion of the argument incorrect. Further, the judgment should not even be admissible evidence under NRS 48.105(1)(b) to make the election of remedies argument to begin with, because the judgment is required to be designated **a compromise settlement** under NRCP 68(d)(3) and NRS 17.117(8), and is not proof of liability and cannot be used as evidence to prove liability (monetary damages).

Therefore, reviewing the election of remedies issue and the impact of judgment under NRCP 68, a compromised settlement, it does not have a preclusive effect.

V. Adding "Potentially" to the Non-Existent Preclusive Effect has no Significance.

If there is no legal preclusive effect, calling it a **potentially** preclusive effect is a distinction without a difference. The decision does not go through the analysis on why it is potentially preclusive.[20] The district court could have meant potentially preclusive in the context that it is not yet determined whether a dismissal would be entered or a judgment. However, as argued above, calling the offer potentially preclusive in that context ignores that an NRCP 68 judgment is required to be

[20] AA Vol. III 487.

designated a compromise settlement, and while assumed preclusive by the district court in this scenario, it would not be preclusive.

Once it is acknowledged that the argument, that a NRCP 68 judgment has a preclusive effect, is legally inaccurate, the addition of "potentially" amounts to an argument that SFR could make an election of remedies argument and a court could get it wrong. Whether the district court believed the potentially preclusive effect was future legal error on the election of remedies issue, or believed the potential judgment had a preclusive effect (actual legal error), neither are valid reasons to find the HOA's offer unreasonable, or to find Marchai's rejection reasonable. If future legal inaccuracy became the basis to start measuring reasonableness in *Beattie* factors, any Plaintiff could reject any offer of judgment despite the merit of their claims, arguing an unquantified potential to still prevail.

Therefore, in addition to there not being a preclusive effect, this Court should not find the HOA's offer unreasonable, or Marchai's rejection reasonable, based on this unidentified and unquantified potential.

VI. Once the Mistaken Preclusive Effect is Removed, Weighing the *Beattie* Factors Tips in the HOA's Favor.

Acceptance of the offer of judgment here, was a way for Marchai to reach a compromise settlement with the HOA, without declaring an election of remedies and still pursuing its other claims against SFR. That is true even if a judgment under

NRCP 68 is entered. For this Court to reverse, it does not have to find that Marchai was required to ask the HOA to confirm a dismissal rather than allow judgment to be entered, because the alternative judgment also did not have a preclusive effect when entered under NRCP 68. However, does anyone really believe the HOA would have said no to a dismissal being entered? Understandably, it can be difficult to separate out when offers of judgment should be discussed, but when the other side makes a mistake in law about why it is rejecting it, the sanctions of the rule should apply. Marchai chose not to seek a dismissal of the claims with the HOA, and chose to believe a NRCP 68 judgment had a preclusive effect when it does not. The district court finding a potentially preclusive effect impacted the *Beattie* factors, was an error.

Once the mistaken preclusive effect is removed, weighing the *Beattie* factors has to tip in the HOA's favor. 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 (specific to notice[21] *not* excess proceeds).[22] For the reasons argued in the opening brief these claims were no longer viable against the HOA after remand on *Cranesbill*.[23] The HOA offered $15,000, real money (or more than a modest amount), in an attempt to avoid having to pay

[21] *See* Argument in Opening Brief from 13-16.
[22] *See* AA Vol. I 29-42, AA Vol. I 78-92, and AA Vol. I 131-136
[23] *See* Opening Brief from 10-16.

even more real money in defending itself at trial, even against claims that lacked merit at that point. *See Nelson v. Anderson*, 72 Cal. App. 4th 111, 134 (Cal. Ct. App. 1999) (noting that even a modest offer may be reasonable if an action is completely lacking in merit). Marchai argues throughout its Answering Brief that it had an excess proceeds claim in an attempt to further impact the weighing of the *Beattie* factors.[24] However, as argued in the Opening Brief, Marchai did not have an excess proceeds claim, and the district court made specific findings to that effect.[25]

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. It did not exist because a party can accept even substantial value in settlement and not make an election of remedies. *Bocanegra.*

Whether an acceptance of an offer of judgment here, led to dismissal of the claims against the HOA or a judgment against the HOA, an election of remedies would not have occurred because even a judgment under NRCP is required to be

[24] See Answering Brief, generally
[25] *See* Argument in Opening Brief at 24 and *see* trial order at AA Vol. II 311, ¶¶ 162 -164.

designated as a compromise settlement under NRCP 68(d)(3). This decision would further the purpose of NRCP 68 to promote settlement. When the error of a potentially preclusive effect is removed from the weighing of *Beattie* factors, they weigh in the HOA's favor and granting of attorney's fees. This Court should remand with a direction to enter an order of attorney's fees.

DATED this 14th day of February, 2022.

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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 3383 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 14th day of February, 2022, electronic service of the foregoing **APPELLANT'S REPLY BRIEF** was made pursuant to NRAP 25(d) to the following parties:

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