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IN THE SUPREME COURT OF THE STATE OF NEVADA

TON VINH LEE,

Appellant,

v.

INGRID PATIN, an individual, and
PATIN LAW GROUP, PLLC, a Nevada
Professional LLC,

Respondents.

Supreme Court No. 83213
District Court Case No.: A-15-
723134-C

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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 Justices of this Court may evaluate possible disqualification or recusal.

1. Appellant Ton Vinh Lee is an individual and dentist licensed to practice in Nevada.

2. Appellant was represented in District Court by Resnick & Louis, P.C. and Bremer Whyte Brown & O'Meara LLP, and is represented in this Court by Resnick & Louis, P.C.

DATED this 16th day of December, 2021.

RESNICK & LOUIS, P.C.

/s/ Myraleigh A. McGill

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I. JURISDICTIONAL STATEMENT

Appellant Dr. Ton Vinh Lee has timely appealed the final order of the District Court on Respondent Ingrid Patin's Motion for Attorneys' Fees, Costs, and Interest and Respondent Patin Law Group, PLLC's Motion for Attorneys' Fees and Interest.

On April 23, 2021, the District Court entered its Decision and Order granting PLG's Motion for Attorneys Fees and Costs pursuant to NRCP 68 as to the \$10,600.00 in fees paid to PLG's attorney, Mr. Doyle, and denying the Motion as to the fees and costs paid to Mr. Echols. [9 AA 1367-1386] The District Court's April 23, 2021, Decision and Order also granted Ms. Patin's Motion for Attorneys Fees, Costs, and Interest pursuant to NRCP 68 as to Ms. Patin's attorney's fees paid to Ms. Morris in the amount of \$100,000.00, as well as costs in the amount of \$10,600.00 pursuant to NRCP 68 and NRS 18.005. [9 AA 1367-1386].

On May 7, 2021, Dr. Lee filed his Motion for Reconsideration of the Court's April 23, 2021 Order. Following oral argument on May 19, 2021, the District Court entered its Order Denying Dr. Lee's Motion for Reconsideration on June 11, 2021.

On July 8, 2021, Dr. Lee timely filed his Notice of Appeal and Case Appeal Statement. [9 AA 1503-1508]

On July 16, 2021, this Court entered its Exemption from Settlement Program and Notice to File Documents for this appeal.

Therefore, this Court has appellate jurisdiction over the issues presented in this appeal.

II. ROUTING STATEMENT

The Supreme Court should retain this appeal. This appeal falls into the categories outlined in NRAP 17(a)(11), which pertains to “[m]atters raising as a principal issue a question of first impression involving . . . common law.”

This appeal asks that the Court reverse the District Court’s Order granting the Respondents’ attorney’s fees and costs pursuant to NRCP 68.

The main issue in this appeal asks that the Court determine, as a matter of first impression, the proper application of NRCP 68(g) and NRS § 17.117(12) to offers of judgment that are inclusive of the offeror’s recoverable attorneys fees, costs, interest, and other expenses. In addition, this appeal asks that the Court determine, as a matter of first impression, whether an offer of judgment made in a negative amount can constitute a valid offer of judgment.

For these reasons, Dr. Lee asks that the Supreme Court retain this appeal based on NRAP 17(a)(11).

III. ISSUES ON APPEAL

- A. WHETHER THIS COURT SHOULD REVERSE THE DISTRICT COURT'S ORDER GRANTING RESPONDENTS' FEES AND COSTS PURSUANT TO NRCP 68 BECAUSE THE DISTRICT COURT DID NOT APPLY THE COMPLETE ANALYSIS REQUIRED BY NRCP 68(g) AND NRS § 17.117(12) WHEN FINDING THAT DR. LEE DID NOT OBTAIN A MORE FAVORABLE JUDGMENT THAN RESPONDENTS' OFFERS OF JUDGMENT**
- B. WHETHER THIS COURT SHOULD REVERSE THE DISTRICT COURT'S ORDERS GRANTING THE RESPONDENTS' ATTORNEYS' FEES AND COSTS PURSUANT TO NRCP 68 BECAUSE THE DISTRICT COURT DID NOT GIVE PROPER CONSIDERATION TO THE BEATTIE FACTORS**

IV. STATEMENT OF THE CASE

On appeal, Dr. Lee respectfully asserts that the District Court erred in granting Ms. Patin's Motion for Attorneys' Fees, Costs, and Interest, and PLG's Motion for Attorneys' Fees and Costs because the District Court did not apply the complete analysis required by NRCP 68(g) in determining that Dr. Lee failed to obtain a more favorable outcome than the Respondents' offers of judgment.

On November 19, 2020, Ms. Patin filed a Motion for Attorneys' Fees, Costs, and Interest pursuant to NRS 18.020(3) and NRCP 68. On November 19, 2020, PLG also filed a Motion for Attorney's Fees and Interest pursuant to NRCP 68.

On December 1, 2020, Dr. Lee filed his Opposition to Ms. Patin's Motion for Attorneys' Fees, Costs, and Interest, as well as his Opposition to PLG's Motion for Attorneys' Fees and Interest [9 AA 1292-1306, 9 AA 1307-1319]. Dr. Lee's Oppositions were filed on the grounds that the Respondents' January 2017 Offers of Judgment were not made in good faith and that a significant portion of the fees claimed by the Respondents were incurred because of several unreasonable dispositive motions filed by the Respondents.

On December 9, 2020, PLG filed its Supplement to its Motion for Attorneys' Fees and Interest to include the declarations and legal billing of its counsel [9 AA 1320-1323].

On February 3, 2021, Dr. Lee filed his Supplemental Opposition to Ms. Patin's Motion for Attorneys' Fees, Costs, and Interest, as well as his Supplemental Opposition to PLG's Motion for Attorneys' Fees and Interest. Dr. Lee's Supplemental Oppositions were filed on the grounds that both Respondents were precluded from an award of fees pursuant to NRCP 68 because the litigation resulted in a more favorable outcome for Dr. Lee than both of the Respondents' Offers of Judgment. [9 AA 1345-1351, 9 AA 1356-1362]

On April 23, 2021, the District Court entered its Decision and Order granting PLG's Motion for Attorneys Fees and Costs pursuant to NRCP 68 as to the \$10,600.00 in fees paid to PLG's attorney, Mr. Doyle, and denying the Motion as to the fees and costs paid to Mr. Echols [9 AA 1367-1386]. The District Court's April 23, 2021, Decision and Order also granted Ms. Patin's Motion for Attorney's Fees, Costs, and Interest pursuant to NRCP 68 as to Ms. Patin's attorney's fees paid to Ms. Morris in the amount of \$100,000.00, as well as costs in the amount of \$10,600.00 pursuant to NRCP 68 and NRS 18.005 [9 AA 1367-1386].

On May 7, 2021, Dr. Lee filed his Motion for Reconsideration of the District Court's April 23, 2021, Decision and Order on an Order Shortening Time on the grounds that the District Court erred in finding that Dr. Lee did not obtain a more favorable outcome than the Respondents' Offers of Judgment because the District

Court did not apply the complete analysis set forth in NRCP 68(g) [9 AA 1387-1392, 9 AA 1393-1403].

On May 17, 2021, Ms. Patin filed her Opposition to Dr. Lee's Motion for Reconsideration, which PLG joined on May 18, 2021.

The District Court denied Dr. Lee's Motion for Reconsideration after oral argument on May 19, 2021 [9 AA 1479]. On June 11, 2021, the District Court entered its Order Denying Dr. Lee's Motion for Reconsideration, finding Dr. Lee's arguments regarding NRCP 68(g) "interesting," but that no reconsideration was warranted [9 AA 1493-1502].

On July 8, 2021, Dr. Lee timely filed his Notice of Appeal and Case Appeal Statement [9 AA 1509-1511].

V. STATEMENT OF RELEVANT FACTS

Appellant Dr. Ton Vinh Lee is a dentist and dental practice owner. Respondent Ingrid Patin is a Nevada attorney and owner of Respondent Patin Law Group, PLLC ("PLG"). Although the relevant facts surrounding this litigation are fairly simple, the procedural history is long due to the eight dispositive motions filed by the Respondents [1 AA 006-017, 1 AA 046-062, 1 AA 129-137, 2 AA 165-182, 2 AA 295-309, 3 AA 390-411, 5 AA 720-726, 6 AA 801-823]. The District Court denied seven of these dispositive motions [1 AA 127-128, 1 AA 147-150, 1 AA 156-159, 2 AA 254-257, 5 AA 710-713, 5 AA 727-730].

On August 17, 2015, Dr. Lee filed his initial Complaint against both Respondents, asserting a single claim of defamation *per se* on the grounds that Respondents published a statement that, in its entirety, was false, defamatory, and imputed to Dr. Lee a lack of fitness in his profession as a dentist and a business owner (“Statement”) [1 AA 063-064].

After Dr. Lee filed his initial Complaint, the Respondents filed and joined in a series of dispositive motions dated September 8, 2015, October 16, 2015, January 27, 2016, and May 24, 2016 [1 AA 006-014, 1 AA 046-062, 1 AA 129-137, 2 AA 165-182]. Respondents then filed their Answers and respective Counterclaim and Crossclaim in response to Dr. Lee’s April 11, 2016 Second Amended Complaint on October 7, 2016 and October 18, 2016 [1 AA 160-164, 2 AA 258-270, 2 AA 271-288].

After filing a total of four dispositive motions, on January 19, 2017, Ms. Patin served Dr. Lee with an Offer of Judgment in the amount of one thousand dollars (\$1,000.00), “*inclusive of all accrued interest, costs, and attorney fees, and any other sums that could be claimed by Defendant, INGRID PATIN, against Plaintiff, TON VINH LEE.*” [2 AA 289-291] (emphasis added).

On January 26, 2017, PLG served Dr. Lee with an Offer of Judgment in the amount of one thousand dollars (\$1,000.00), also “*inclusive of all accrued interest, costs, and attorney fees, and any other sums that could be claimed by*

Defendant, PATIN LAW GROUP, against Plaintiff, TON VINH LEE.” [2 AA 292-294] (emphasis added).

Respondents then filed additional dispositive motions on February 10, 2017, May 30, 2017, and July 15, 2019, each of which were denied [2 AA 295-309, 3 AA 390-411, 5 AA 720-726, 5 AA 710-713, 5 AA 714-719, 5 AA 727-730]. Due to the pendency and appeals of Respondents’ multiple dispositive motions, the Joint Case Conference Report was not filed, and discovery did not open, until October 11, 2019 [5 AA 731-750].

On August 7, 2020, Ms. Patin filed her Motion for Judgment on the Pleadings, or in the Alternative, Motion for Summary Judgment, which PLG also joined on August 10, 2020 [6 AA 801-823, 7 AA 975-976]. Ms. Patin’s August 7, 2020, motion was the eighth dispositive motion that she filed since Plaintiff filed this case in August 2015 [1 AA 006-017, 1 AA 046-062, 1 AA 129-137, 2 AA 165-182, 2 AA 295-309, 3 AA 390-411, 5 AA 720-726, 6 AA 801-823]. Following oral argument on September 15, 2020, the District Court granted Ms. Patin’s Motion for Summary Judgment. The District Court issued its Order Granting Defendant Patin’s Motion for Summary Judgment on October 30, 2020 [7 AA 977-992]. There was no monetary judgment in this matter, making the amount of the final judgment \$0.00.

The Respondents' motions for attorney fees, costs, and interest at issue in this appeal followed.

VI. SUMMARY OF ARGUMENT

This appeal asks the Court to reverse the District Court's orders granting Ms. Patin's attorneys fees and costs pursuant to NRCP 68 and PLG's attorneys fees pursuant to NRCP 68.

First, the District Court did not have discretion to award Respondents' attorney's fees and costs pursuant to NRCP 68 because Dr. Lee obtained a more favorable outcome by rejecting each of the Respondents' offers of judgment. The District Court did not apply the proper analysis required by NRCP 68(g) and NRS 17.117(12) when it granted the Respondents' attorney's fees and costs. Pursuant to NRCP 68(g) and NRS 17.117(12), the District Court was required to determine whether Dr. Lee obtained a more favorable judgment than the Respondents' offer by comparing 1) the outcome of the litigation, with (2) the amount of the offer of judgment, together with the pre-offer costs, expenses, interest, and attorney fees incurred by the offeree, Dr. Lee. Proper application of the analysis required by NRCP 68(g) and NRS 17.117(12) demonstrates that the Respondents' offers of judgment were invalid, or in the alternative, that Dr. Lee obtained a more favorable outcome by rejecting the Respondents' offers of judgment.

Next, the District Court also did not have discretion to award the Respondents' attorney's fees and costs pursuant to NRCP 68 because it did not give proper consideration to all of the factors required prior to exercising discretion in awarding fees and costs pursuant to NRCP 68. These factors include:

- (1) whether the plaintiff's claim was brought in good faith;
- (2) whether the defendant's 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, 668 P.2d 268 (1983). Specifically, the District Court did not properly consider whether the Respondents' offers of judgment were reasonable and made in good faith in their timing and amount. First, the District Court made no specific finding as to whether the offers of judgment were made in good faith. Next, the District Court's determination that the offers of judgment were reasonable in timing and amount was not based on a proper application of the analysis required by NRCP 68(g) and NRS § 17.117(12). In addition, the District Court's determination that the offers of judgment were reasonable in timing and amount was also based on a finding that the Respondents' offers of judgment were

signaling their intent to “vigorously litigate the legal issues presented in the defamation case.” [9 AA 1367-1386]. This finding contradicts the purpose of offers of judgment, which is to encourage settlement. Morgan v. Demille, 106 Nev. 671, 674, 799 P.2d 561, 674 (1990); Beattie, 99 Nev. at 588, 668 P.2d at 274; John J. Muije, Ltd. v. North Las Vegas Cab Co., 106 Nev. 664, 667, 799 P.2d 559, 561 (1990).

VII. LEGAL ARGUMENT

A. LEGAL STANDARD FOR AWARDS OF FEES AND COSTS PURSUANT TO OFFERS OF JUDGMENT

NRCP 68 governs offers of judgments in Nevada. In 2019, NRCP 68 was codified into statute as NRS § 17.117. 2019 Nev. AB 418.

If an offeree rejects an offer of judgment and fails to obtain a more favorable judgment, the offeree is precluded from recovering any of its post-offer fees, costs, expenses, or interest, and may be required to pay those incurred by the offeror. NRCP 68(f) provides the penalties for rejecting an offer of judgment:

(f) Penalties for Rejection of Offer.

(1) **In General.** If the offeree rejects an offer and fails to obtain a more favorable judgment:

(A) the offeree cannot recover any costs, expenses, or attorney fees and may not recover interest for the period after the service of the offer and before the judgment; and

(B) the offeree must pay the offeror’s post-offer costs and expenses, including a reasonable sum to cover any expenses incurred by the offeror for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case, applicable interest on the judgment from

the time of the offer to the time of entry of the judgment and reasonable attorney fees, if any be allowed, actually incurred by the offeror from the time of the offer. If the offeror's attorney is collecting a contingent fee, the amount of any attorney fees awarded to the party for whom the offer is made must be deducted from that contingent fee.

NRS § 17.117(10) contains substantially the same language.

Despite the language of NRCP 68 and NRS 17.117, Nevada Courts have found that awards of fees and costs pursuant to offers of judgment are still within the discretion of the Court. First, Nevada Courts have discretion to allow attorneys fees when the judgment obtained by the offeree is not more favorable than the offer. Armstrong v. Riggi, 92 Nev. 280, 281, 549 P.2d 753, 754 (1976); Schouweiler v. Yancey Co., 101 Nev. 827, 833, 712 P.2d 786, 790 (1985).

In addition, Nevada Courts have discretion to allow attorney fees under NRCP 68 after the court properly weighs the factors set forth in Beattie. 99 Nev. 579, 668 P.2d 268; see Bidart v. American Title Ins. Co., 103 Nev. 175, 734 P.2d 732 (1987). The Court in Beattie found that claims for attorney fees under NRCP 68 and NRS § 17.115 are fact intensive and require the Court to carefully evaluate the following factors: (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendant's 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. 99 Nev. at 588-89, 668 P.2d at 274.

B. STANDARD OF REVIEW

The Nevada Supreme Court reviews fees and costs awarded pursuant to offers of judgment under NRCP 68 and NRS § 17.115 for abuse of discretion. Wynn v. Smith, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001); LaForge v. State ex rel. Univ. & Cmty. College Sys., 116 Nev. 415, 423-4, 997 P.2d 130, 136 (2000); O'Connell v. Wynn Las Vegas, LLC, 134 Nev. 550, 554, 429 P.3d 664, 668 (2018). An award of attorney's fees based on NRCP 68 will not be disturbed absent clear abuse. Bidart v. American Title Ins. Co., 103 Nev. 175, 179, 734 P.2d 732, 735 (1987). A clear disregard of the guiding legal principles may constitute an abuse of discretion. Allianz Ins. Co. v. Gagnon, 109 Nev. 990, 993, 860 P.2d 720, 722-23 (1993).

C. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S ORDER GRANTING RESPONDENTS' ATTORNEYS' FEES AND COSTS PURSUANT TO NRCP 68 BECAUSE THE DISTRICT COURT DID NOT APPLY THE COMPLETE ANALYSIS REQUIRED BY NRCP 68(g) AND NRS § 17.117(12) WHEN FINDING THAT DR. LEE DID NOT OBTAIN A MORE FAVORABLE JUDGMENT THAN RESPONDENTS' OFFERS OF JUDGMENT

The District Court's Order granting the Respondents their attorneys fees and costs under NRCP 68 should be reversed because the District Court did not have discretion to award Respondents' attorneys fees and costs pursuant to NRCP 68.

See Armstrong, 92 Nev. at 281, 549 P.2d at 754; Schouweiler, 101 Nev. at 833, 712 P.2d at 790. The District Court did not apply the proper analysis required by NRCF 68(g) and NRS § 17.117(12) when it granted Respondents' attorneys fees and costs. However, proper application of the required analysis shows that the Respondents' offers of judgment were invalid, or in the alternative, that Dr. Lee obtained a more favorable outcome by rejecting each of the Respondents' offers of judgment.

In January 2017, each Respondent served Dr. Lee with an offer of judgment in the amount of \$1,000.00, which in both cases was:

. . . inclusive of all accrued interest, costs, and attorney fees, and any other sums that could be claimed by [Defendant] against Plaintiff, TON VINH LEE

[2 AA 292-294] (emphasis added); [7 AA 1101-1104] (emphasis added). Due to the offers being "inclusive" of such sums, the Respondents' offers precluded a separate award of attorneys fees.

Dr. Lee rejected the Respondents' offers of judgment. After prevailing in their Motion for Summary Judgment, the Respondents were not awarded a monetary judgment, making the judgment amount zero dollars (\$0.00) [7 AA 977-992]. Dr. Lee argued that in light of the \$0 judgment, he beat the Respondents' January 2017 offers of judgment because the Respondents' offers did not present

Dr. Lee with a more favorable outcome due to the amount that he had spent on attorneys fees alone [9 AA 1387-1392, 9 AA 1393-1403]. The District Court rejected this argument and found in favor of the Respondents, concluding that the Respondents' offers of judgment were only inclusive of the Respondents' attorneys fees and not those of Dr. Lee. [9 AA 1367-1386]

The District Court's April 23, 2021, Order granting the Respondents' fees, costs, and interest based on their January 2017 offers of judgment should be reversed because it failed to properly apply the analysis required by NRCP 68(g) for determining whether the offeree obtained a more favorable judgment than the offer. NRCP 68(g) sets forth how the Court must consider costs, expenses, interest, and attorney fees in deciding whether a more favorable judgment was obtained:

(g) How Costs, Expenses, Interest, and Attorney Fees Are Considered. To invoke the penalties of this rule, the court must determine if the offeree failed to obtain a more favorable judgment. If the offer provided that costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees, would be added by the court, the court must compare the amount of the offer with the principal amount of the judgment, without inclusion of costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees. **If a party made an offer in a set amount that precluded a separate award of costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees, the court must compare the amount of the offer, together with the offeree's pre-offer taxable costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees, with the principal amount of the judgment.**

(emphasis added). This same language has been codified in NRS § 17.117(12). Where statutory language is clear and unambiguous, courts should give statutes their plain meaning. Holiday v. Horst (In re Estate of Ella E. Horst Revocable Trust, 136 Nev. Adv. Rep. 90, 478 P.3d 861, 864 (2020); Contrevo v. Mercury Finance Co. (In re Contrevo), 123 Nev. 20, 22-3, 153 .3d 652, 653-4 (2007). As stated in NRCP 68(g), where the offeror's offer precludes a separate award of fees, costs, expenses, and interest, the Court must evaluate whether Dr. Lee obtained a more favorable judgment by comparing (1) the outcome of the litigation, with (2) the amount of the offer of judgment, together with the pre-offer costs, expenses, interest, and attorney fees incurred the offeree, Dr. Lee. However, despite the plain statutory and rule language, the District Court did not apply Dr. Lee's pre-offer attorney fees, costs, interest, and expenses to the amounts of the Respondents' offers when evaluating whether Dr. Lee obtained a more favorable outcome. See NRCP 68(g) and NRS § 17.117(12).

Applying the proper analysis required by NRCP 68(g) results in a different outcome than what was provided in the District Court's April 23, 2021, Order. Applying this analysis to each of the Respondents' offers of judgment results in negative offer amounts due to the amount of Dr. Lee's pre-offer fees, costs, expenses, and interest. First, was no monetary judgment in this matter, making the Respondents' judgment amount \$0.

Next, the amount of each Respondent's offer of judgment was for \$1,000.00, inclusive of interest, costs, attorney fees, and expenses. [2 AA 292-294; 2 AA 289-291]. Each Respondent's \$1,000.00 offer of judgment (inclusive of interest, costs, attorney fees, and expenses) must then be considered with Dr. Lee's pre-offer interest, costs, attorney fees, and expenses. NRCP 68(g). Ms. Patin filed her Offer of Judgment on January 19, 2017, and PLG filed its offer of judgment on January 26, 2017. By March 17, 2016, Plaintiff had spent at least \$10,000.00 on attorney fees in this litigation. [9 AA 1345-1351] at p3, lines 19-24. As a result, Dr. Lee had spent well over \$10,000.00 in attorney fees alone by the time the Respondents served their offers of judgment. The pre-offer costs, expenses, interest, and attorney fees incurred by the offeree, Dr. Lee, far exceeded the Respondents' \$1,000.00 offers of judgment. As a result, the amount of each Respondents' offers of judgment, when considered with Dr. Lee's pre-offer costs, expenses, interest, and attorney fees, were in the negative. See NRCP 68(g) and NRS § 17.117(12).

The Respondents' negative offers of judgment present two issues. First, because the amounts the Respondents' offers of judgment were in the negative, they were invalid and improper. An offer of judgment in a negative amount cannot constitute a valid offer because it is not an offer at all. Nevada Courts have held that an invalid offer of judgment cannot serve as the basis for an award of attorney

fees. See Edwards Indus. Inc. v. DTE/BTE, Inc., 112 Nev. 1025, 1035, 923 P.2d 569, 575 (1996) (concluding that an invalid offer of judgment could not provide a proper basis for an award of attorney fees and costs). As a result, the Respondents never served Dr. Lee with a valid offer of judgment pursuant to NRCP 68 or NRS § 17.117, and Respondents are therefore not entitled to any award of fees and costs pursuant NRCP 68.

Next, even if the Respondents' negative offers of judgment are deemed valid, their offers of judgment still did not present a more favorable outcome for Dr. Lee based on the amount he had spent in attorney fees alone by the time of the Respondents' January 2017 offers of judgment. If Dr. Lee had accepted Appellants' offers of judgment, Dr. Lee would have received \$1,000.00 from each Respondent (which was specifically inclusive of Respondents' fees, costs, and interest), *less* Dr. Lee's own attorney fees, costs, and interest, which amounted to over \$10,000.00 by the time Respondents served their offers. Comparing the Respondents' negative offers of judgment with the \$0.00 judgment obtained by the Respondents shows that Dr. Lee obtained a more favorable outcome by rejecting the Respondents' offers of judgment. See NRCP 68(g) and NRS § 17.117(12).

Because the Respondents' offers of judgment were invalid and Dr. Lee obtained a more favorable outcome by rejecting the Respondents' offers of

judgment, the District Court did not have discretion to award Respondents any fees and costs pursuant NRCP 68 or NRS § 17.117. See Armstrong, 92 Nev. at 281, 549 P.2d at 754; Schouweiler, 101 Nev. at 833, 712 P.2d at 790. As a result, this Court should reverse the District Court's order granting Respondents' attorneys fees and costs.

D. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S ORDERS GRANTING THE RESPONDENTS' ATTORNEYS' FEES AND COSTS PURSUANT TO NRCP 68 BECAUSE THE DISTRICT COURT DID NOT GIVE PROPER CONSIDERATION TO THE BEATTIE FACTORS

The District Court's order granting the Respondents' request for attorneys fees, costs, and interest under NRCP 68 should also be reversed because the District Court did not give proper consideration to all of the Beattie factors, and as a result, did not have discretion to award Respondents' attorneys fees and costs pursuant to NRCP 68. See 99 Nev. at 588-89, 668 P.2d at 274. Specifically, the District Court did not properly consider whether the Respondents' offers of judgment were reasonable and made in good faith with respect to their timing and amount. On appeal, Dr. Lee argues that the Respondents' offers of judgment were unreasonable in timing and amount and were not brought in good faith.

The purpose of offers of judgment is to encourage the reasonable settlement of lawsuits before trial. Morgan, 106 Nev. at 674, 799 P.2d 561; Beattie, 99 Nev. at 588, 668 P.2d at 274; John J. Muije, Ltd., 106 Nev. at 667, 799 P.2d at 561. Offers

of judgement are not intended to force plaintiffs to forgo legitimate claims. Beattie, 99 Nev. at 588, 668 P.2d at 274. As a result, offers of judgment must be calculated to encourage settlement in order to be considered reasonable. To further these purposes, Nevada Courts must properly weigh all of the Beattie factors prior to exercising its discretion to allow attorney fees pursuant to offers of judgment. 99 Nev. 579 (1983); see also Bidart, 103 Nev. 175, 734 P.2d 732; Uniroyal Goodrich Tire Co. v. Mercer, 111 Nev. 318, 890 P.2d 785 (1995). The Court in Beattie found that claims for attorney fees under NRCP 68 and NRS § 17.115 are fact intensive and require the Court to carefully evaluate the following factors:

- (1) whether the plaintiff's claim was brought in good faith;
- (2) whether the defendant's 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.

99 Nev. at 588-89, 668 P.2d at 274. Further, the Supreme Court has cautioned district courts to provide written support under the Beattie factors for awards of attorney fees made pursuant to offers of judgment. Uniroyal, 111 Nev. at 324, 890

P.2d at 789; see Schwartz v. Estate of Greenspun, 110 Nev. 1042, 881 P.2d 638 (1994).

As an initial matter, the District Court’s April 21, 2021 Order granting the Respondents’ attorneys fees and costs did address the Beattie factors. The District Court’s discussion of the Beattie factors concluded that (1) Dr. Lee brought the underlying litigation in good faith, (2) that the Respondents’ offers of judgment were reasonable in timing and amount, (3) that his decision to reject the Respondents’ offers of judgment was not in bad faith or “grossly unreasonable,” and (4) that certain of the Respondents’ claimed attorneys fees and costs were justified. [9 AA 1367-1386].

In determining that the Respondents’ offers of judgment were *reasonable* in timing and amount, the District Court stated that the language of the Respondents’ offers of judgment “were not inclusive of [Dr. Lee’s] attorneys fees, but of the [Respondents’] attorneys fees and ‘any other sums that could be claimed by [Respondent] . . . against [Dr. Lee].’” [9 AA 1367-1386]. The District Court further reasoned that the “[Respondents] had signaled they intended to vigorously litigate the legal issues presented in the defamation case.” [9 AA 1367-1386]. Although the District Court discussed the Beattie factors in its order granting the Respondents’ attorneys fees and costs, the District Court still failed to give proper

consideration as to whether the Respondents' offers of judgment were reasonable and in good faith in their timing and amount.

First, the District Court made no specific finding that the amount of the Respondents' offers of judgment were made in good faith. [9 AA 1367-1386].

Next, the Respondents' offers of judgment were unreasonable and brought in bad faith with respect to their amount. As discussed above, the District Court's determination that the Respondents' offers of judgment were reasonable in timing and amount was not based on a proper application of the analysis required by NRCP 68(g) and NRS § 17.117(12). Applying the proper statutory analysis to the amount of the Respondents' offers and Dr. Lee's pre-offer fees, costs, and interest results in negative offer of judgment amounts by the Respondents. An offer of judgment in a negative amount cannot be considered a reasonable, good faith offer because it is not an offer at all. In addition, Nevada Courts have concluded that invalid offers of judgment cannot serve as the basis for awards of attorneys fees. See Edwards, 112 Nev. at 1035, 923 P.2d at 575.

In addition, the Respondents' offers of judgment were also unreasonable and brought in bad faith with respect to their timing. By the time the Respondents served Dr. Lee with their offers of judgment in January 2017, the District Court had already denied the Respondents' October 16, 2015, Special Motion to Dismiss and their May 24, 2016 Renewed Special Motion to Dismiss. [1 AA 147-150] and

[2 AA 254-257]. It is important to note that both of these Motions were denied based on the same facts available to the District Court at the time of the January 2017, offers of judgment, and no new facts had been introduced to the record. [1 AA 147-150, 2 AA 254-257] The District Court's Orders denying these Special Motions to Dismiss contained the following language:

. . . even if NRS 41.637(3) or (4) did apply to complained-of communication, this Court cannot find at this juncture that the Plaintiff hasn't put forth prima facie evidence demonstrating a probability of prevailing on this claim. **This is particularly true because the truth or falsity of an allegedly defamatory statement is an issue for the jury to determine.** Posadas v. City of Reno, 109 Nev. 448, 453 (1993). Further, because if found to be defamatory and the statement is such that would tend to injure the Plaintiff in his business or profession, then it will be deemed defamation per se and damages will be presumed. Nevada Ind. Broadcasting v. Allen, 99 Nev. 404, 409 (1983).

With knowledge that the District Court had twice held that "the truth or falsity of an allegedly defamatory statement is an issue for the jury to determine," both Respondents still served Dr. Lee with their negative offers of judgment just short of four months after the District Court's September 29, 2016, Order containing the cited language.

The purpose of offers of judgment is to encourage the reasonable settlement of lawsuits before trial, and it is not intended to force plaintiffs to forgo legitimate claims. Beattie, 99 Nev. at 588, 668 P.2d at 274. The District Court's finding that the Respondents were signaling their intent to "vigorously litigate the legal issues

presented in the defamation case” through their offers of judgment does not make the Respondents’ negative offers of judgment reasonable in amount or timing. See [9 AA 1367-1386, p6]. Instead, the negative amount and the timing of the Respondents’ offers of judgment only signals that the offers of judgment were not actually good faith offers to resolve the litigation. Because the negative amount and the timing of the Respondents’ offers of judgment could not be interpreted to further any reasonable settlement, these offers present as tactics aimed at intimidating Dr. Lee into foregoing his legitimate defamation *per se* claim with the threat of the Respondents’ intent to “vigorously litigate the legal issues presented in the defamation case.” [9 AA 1367-1386, p6]. As a result, the District Court erred in finding that the Respondents’ offers of judgment were reasonable in timing and amount. Further, the District Court’s finding frustrates the purpose of the rules governing offers of judgment. See Beattie, 99 Nev. at 588, 668 P.2d at 274; Morgan, 106 Nev. at 674, 799 P.2d at 674; John J. Muije, Ltd., 106 Nev. at 667, 799 P.2d at 561.

Because the District Court’s discussion of whether the Respondents’ offers of judgment were reasonable and made in good faith with respect to their timing and amount is based on (1) an incorrect application of NRCP 68(f), and (2) a frustration of the purpose of offers of judgment, the District Court failed to properly apply the Beattie factors in granting Respondents’ attorneys fees and costs

and was therefore without discretion to award such fees and costs. A clear disregard of guiding legal principles may constitute an abuse of discretion. Allianz Ins. Co. v. Gagnon, 109 Nev. at 993, 860 P.2d at 722-23. As a result, the District Court's order granting the Respondents' attorneys fees and costs should be reversed.

VIII. CONCLUSION

In summary, the District Court's order granting the Respondents' attorneys fees and costs pursuant to NRCP 68 should be reversed. Nevada Courts have discretion to allow attorneys fees when the judgment obtained by the offeree is not more favorable than the offer, and after the Court properly weighs the factors set forth in Beattie. Armstrong v. Riggi, 92 Nev. 280, 281, 549 P.2d 753, 754 (1976); Schouweiler v. Yancey Co., 101 Nev. 827, 833, 712 P.2d 786, 790 (1985); Beattie, 99 Nev. 579, 668 P.2d 268; Bidart v. American Title Ins. Co., 103 Nev. 175, 734 P.2d 732 (1987). Here, the District Court did not have discretion to award Respondents' attorneys fees and costs pursuant to NRCP 68. First, the District Court did not apply the analysis required by NRCP 68(g) and NRS § 17.117(12) for determining whether an offeree obtained a more favorable judgment than the offer, and as a result, improperly concluded that Dr. Lee did not obtain a more favorable outcome by rejecting the Respondents' offers. In addition, the District Court did not give proper consideration to the factors required by Beattie for

determining whether to allow attorneys fees and costs pursuant to NRCP 68 and improperly found that the Respondents' offers of judgment were reasonable in timing and amount.

DATED this 15th day of December, 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

2. I further certify that this opening 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 point or more, consists of no more than 30 pages and contains no more than 14,000 words.

3. I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the

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requirements of the Nevada Rules of Appellate Procedure.

DATED this 16th day of December, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing **APPELLANT'S OPENING BRIEF** was served this 16th day of December, 2021, by:

[X] BY ELECTRONIC SERVICE: by transmitting via the Court's electronic filing services the document(s) listed above to the Counsel set forth on the service list on this date as follows:

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