

IN THE SUPREME COURT OF THE STATE OF NEVADA

TON VINH LEE, AN INDIVIDUAL,
Appellant/Cross-Respondent,

vs.

INGRID PATIN, AN INDIVIDUAL,
Respondent/Cross-Appellant,

and

PATIN LAW GROUP, PLLC, A
NEVADA PROFESSIONAL, PLLC,
Respondent.

No. 83213

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*RESPONDENTS' / CROSS-APPELLANTS' ANSWERING BRIEF ON APPEAL AND
OPENING BRIEF ON CROSS-APPEAL*

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons or 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. Ingrid Patin is an individual.
2. Patin Law Group, PLLC is a Nevada professional corporation and has no parent company or publicly held company that owns ten percent or more of its stock.
3. Nettles Morris Law Firm represented both Ingrid Patin and Patin Law Group, PLLC before the district court and this court.
4. Doyle Law Group represented Patin Law Group, PLLC before the district court.

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5. Claggett & Sykes Law Firm represents both Ingrid Patin and Patin Law Group, PLLC before this court.

Dated this 19th day of April 2022.

CLAGGETT & SYKES LAW FIRM

By /s/ Micah S. Echols
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JURISDICTIONAL STATEMENT

This court has jurisdiction over this appeal because it follows a final judgment entered in the underlying action. *See* NRAP 3A(b)(1). Respondents/Cross-Appellants Ingrid Patin, Esq. and Patin Law Group, PLLC (collectively, Patin) cross-appeal from a district court order granting in part and denying in part Patin’s motion for attorney fees and costs under NRCP 68(f) (1998) (providing that an “offeree shall pay the offeror’s post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney fees” when an “offeree rejects an offer and fails to obtain a more favorable judgment”). The district court entered an order denying Appellant Ton Vinh Lee, D.D.S.’s motion to reconsider or, alternatively, to alter or amend judgment on June 11, 2021. 9 AA 1495-96. Dr. Lee timely filed a notice of appeal in the district court on July 8, 2021. *See* NRAP 4(a)(1). 9 AA 1509-10. Patin timely filed a notice of appeal in the district court on July 22, 2021. *See* NRAP 4(a)(2). RA 1-2.

ROUTING STATEMENT

This court should assign Dr. Lee’s appeal and Patin’s cross-appeal to the Nevada Court of Appeals, as they both challenge post-

judgment orders from a tort case involving less than \$250,000. *See* NRAP 17(b)(5), (7). Dr. Lee's assertion that the instant appeals concern an issue of first impression involving common law lacks merit, *see* AOB viii, as this court has long recognized that NRCP 68 is in derogation of the common law, *see, e.g., Quinlan v. Camden USA, Inc.*, 126 Nev. 311, 314, 236 P.3d 613, 615 (2010). Accordingly, the instant appeals do not concern a question of first impression involving Nevada common law. *See* NRAP 17(a)(11). The instant appeals also do not concern a question of statewide importance, nor do they concern an issue involving inconsistencies in Nevada jurisprudence. *See* NRAP 17(a)(12).

ISSUES PRESENTED FOR REVIEW

Whether the district court properly granted Patin's motion for attorney fees as to Kerry Doyle, Esq. and attorney fees and costs as to Christian Morris, Esq. under NRCP 68 (1998).

Whether the district court abused its discretion in denying Patin's motion for attorney fees as to Micah Echols, Esq. under NRCP 68 (1998).

STATEMENT OF THE CASE

This is an appeal and cross-appeal from a district court order granting in part and denying in part Patin's request for attorney fees and costs under NRCP 68 (1998). During litigation, Ingrid Patin, Esq. and Patin Law Group, PLLC each served offers of judgment under NRCP 68 (1998) upon Dr. Lee, offering to pay Dr. Lee a total of \$2,000 in exchange for dismissal of both claims. 2 AA 289-94. Dr. Lee rejected both offers. 9 AA 1433. After prevailing on a motion for summary judgment, 7 AA 979-83, Patin moved the district court for an award of attorney fees and costs under NRCP 68 (1998), *id.* at 993-1002, 1024-36. The district court granted Patin's motion in part as to Doyle's attorney fees and Morris's attorney fees and costs and denied the motion in part as to Echols's attorney fees and costs. 9 AA 1369-84. Dr. Lee appeals. *Id.* at 1509-10. Patin cross-appeals. RA 1-2.

STATEMENT OF RELEVANT FACTS

I. The underlying defamation proceedings

After obtaining a jury verdict on behalf of her client against Dr. Lee's professional corporation and two dentists that practiced at Dr. Lee's professional corporation, Patin posted a summary of the jury

verdict on her website. 1 AA 9-10. Dr. Lee sued, alleging that Patin’s post was defamatory. *Id.* at 2-5, 151-55, 160-64.

In January 2017, Ingrid Patin, Esq., and Patin Law Group, PLLC each served offers of judgment under NRCP 68 (1998) upon Dr. Lee, offering to pay Dr. Lee a total of \$2,000 in exchange for dismissal of both claims.¹ 2 AA 289-94. Both offers were “inclusive of all accrued interest, costs, and attorney fees, and any other sums that could be claimed by [Patin] against [Dr. Lee].” *Id.* at 289, 292. Both offers expressly stated as follows:

Pursuant to Rule 68 of the N.R.C.P., this offer shall be open for a period of ten (10) days from the date of service of this Offer. In the event this Offer of Judgment is accepted by [Dr. Lee], [Patin] will elect to pay the amount offered here within a reasonable time and obtain a dismissal of the claim as provided by N.R.C.P. 68(d), rather than to allow judgment to be entered against [Patin].

¹This court amended NRCP 68 in 2019. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civ. Proc.*, ADKT 522 (Ord. Amending the Rules of Civ. Proc., the Rules of App. Proc., & the Nev. Elec. Filing & Conversion Rules, Dec. 31, 2018). Given that amendments to court rules do not retroactively apply, NRCP 68 (1998) governs Patin’s offers of judgment. *See* NRS 2.120 (providing that court rules prospectively apply); *see also A Cab, LLC v. Murray*, 137 Nev., Adv. Op. 84, 501 P.3d 961, 969 n.9 (2021) (noting that NRCP 23(b) (2019) did not apply to a case that the plaintiffs filed in 2012).

Id. at 289-90, 293. Dr. Lee rejected both offers. 9 AA 1433.

Patin eventually moved for dismissal under NRS 41.660 (providing that a defendant may file a special motion to dismiss where a plaintiff brings an action against a defendant “based upon a good faith communication in furtherance of . . . the right to free speech in direct connection with an issue of public concern”). *Patin v. Ton Vinh Lee*, 134 Nev. 722, 723, 429 P.3d 1248, 1249 (2018). The district court denied the motion, and Patin appealed. *Id.* at 1249-50, 429 P.3d at 723-24. This court affirmed the district court’s denial, holding that Patin did not make her statement in furtherance of the right to free speech in direct connection with an issue of public concern under NRS 41.637 (defining the types of communications to which NRS 41.660 applies). *Id.* at 727, 429 P.3d at 1252.

Upon remand, and after she deposed Dr. Lee, Patin moved for summary judgment, arguing that the fair report privilege applied to Patin’s post, thereby precluding any defamation liability. 6 AA 801-22; 7 AA 975-76. The district court granted the motion, finding that Dr. Lee admitted that each line of Patin’s post was true, concluding that Patin’s post was a fair and impartial summary of the verdict she obtained, and

concluding that Dr. Lee failed to present a prima facie defamation case.

Id. at 979-83.

II. *Patin's motions for attorney fees and costs, subsequent motion practice, and hearing on the same*

A. *Motion practice*

Patin Law Group, PLLC moved for attorney fees under NRCP 68(f) (1998). 7 AA 993-1003. It argued that Dr. Lee rejected its offer to pay him \$1,000 in exchange for dismissal of the claims against it and that Dr. Lee failed to obtain a more favorable result. *Id.* at 996-97. It also argued that *In re Estate & Living Trust of Rose Miller*, 125 Nev. 550, 554-56, 216 P.3d 239, 243 (2009) (holding “that the fee-shifting provisions in NRCP 68 . . . apply to the judgment that determines the final outcome in the case”) provided a legal basis for it to recover appellate attorney fees. 7 AA 997. Patin Law Group, PLLC then analyzed the *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983) factors. 7 AA 997-1002. First, Patin Law Group, PLLC argued that Dr. Lee did not bring his claim in good faith, as he admitted in his deposition that each sentence in Patin’s post was true. *Id.* at 997-98. Second, it argued that it made its offer of judgment in good faith in both timing and amount. *Id.* at 998. Specifically, it made the offer nearly two years into the litigation, giving

Dr. Lee ample time to evaluate the merits of his claim. *Id.* Additionally, Dr. Lee's deposition demonstrated that he knew Patin's post was true, rendering the offer to settle the case for \$1,000 reasonable. *Id.* Third, Patin Law Group, PLLC argued that Dr. Lee's rejection of its offer was grossly unreasonable, as he knew Patin's post was true and as the offer was inclusive of Patin Law Group, PLLC's attorney fees, costs, and interest. *Id.* at 998-99. Finally, Patin Law Group, PLLC argued that its requested attorney fees were reasonable under *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). 7 AA 999-1002. Patin Law Group, PLLC requested \$10,200 in attorney fees for Doyle and \$62,500 for Echols. *Id.* at 1005, 1012-13.

Ingrid Patin, Esq. moved for costs under NRS 18.020(3) (providing that district courts must allow costs "to the prevailing party against any adverse party" that the district court renders judgment against "[i]n an action for the recovery of money or damages" exceeding \$2,500) and attorney fees under NRCP 68(f) (1998). 7 AA 1024-36. Regarding costs, she argued that she incurred \$11,683.77 in allowable costs under NRS 18.005 (defining recoverable costs). 7 AA 1029-30, 1050-51. Regarding attorney fees, she analyzed the *Beattie* and *Brunzell*

factors consistent with the argument that Patin Law Group, PLLC proffered. *Id.* at 1030-35. She requested a total of \$67,125 in attorney fees for Morris. *Id.* at 1035, 1039-44.

Dr. Lee opposed both motions. 9 AA 1292-305, 1307-18. As to Ingrid Patin, Esq.'s requested costs, Dr. Lee complained that the volume of pre-trial motion practice was excessive and that the district court should therefore exclude or limit her request. *Id.* at 1296-99. As to Ingrid Patin, Esq.'s requested attorney fees, Dr. Lee averred that he brought his claim in good faith, that her offer of judgment was unreasonable in both timing and amount, that his decision to reject the offer of judgment was not unreasonable or in bad faith, and that her requested attorney fees were unreasonable under three of the *Brunzell* factors—the character of the work done, the work the attorney performed, and the result. *Id.* at 1299-305. As to Patin Law Group, PLLC, Dr. Lee repeated his arguments that he brought his claim in good faith, that its offer of judgment was unreasonable in both timing and amount, that his decision to reject the offer of judgment was not unreasonable or in bad faith, and that its requested attorney fees were unreasonable under three of the *Brunzell* factors. *Id.* at 1312-18.

Patin Law Group, PLLC then filed a supplement to its motion for attorney fees, adding a request for costs under NRS 18.010, updating the requested attorney fees for Echols, and providing documentary support for both requests. 9 AA 1320-32. In total, Patin Law Group, PLLC requested \$1,153.52 in costs and \$71,700 in attorney fees for Echols. *Id.* at 1327-32.

Ingrid Patin, Esq. replied in support of her motion for attorney fees and costs. *Id.* at 1333-37. She argued that the district court's grant of summary judgment in her favor demonstrated that Dr. Lee brought his defamation suit without a reasonable basis and to harass her. *Id.* at 1335. Thus, she argued that the district court should grant her requested costs under NRS 18.010. 9 AA 1335. Regarding the propriety of attorney fees, she reiterated the arguments that she proffered in her motion. *Id.* at 1335-37. Patin Law Group, PLLC also replied in support of its motion for attorney fees, repeating the arguments that Ingrid Patin, Esq. proffered in her reply in support. *Id.* at 1339-43.

Dr. Lee then filed a supplemental opposition to Patin's motions for attorney fees and costs. *Id.* at 1345-50, 1356-61. He purported to have paid over \$20,000 in attorney fees to his attorneys

when Patin served her offers of judgment. *Id.* at 1347-50, 1358-61. Misreading the plain language of the offers of judgment, *see* 2 AA 289-94, Dr. Lee erroneously asserted that the offers of judgment were inclusive of his attorney fees and incorrectly concluded that Patin's offers of judgment did not present a more favorable outcome to him, 9 AA at 1349-50, 1360-61.

B. *Hearing*

The district court presided over a hearing on, among other matters, the above motions. 9 AA 1451-78. While the parties mostly reiterated the arguments that they proffered in their motions, a few nonetheless merit this court's review. Ingrid Patin, Esq. noted that she had accrued \$41,375 in attorney fees and approximately \$1,100 in costs when she served her offer of judgment on Dr. Lee. *Id.* at 1460. She further stressed that Dr. Lee's deposition demonstrated that he knew that Patin's post was true, that he could not identify any other person that read Patin's post, and that he could not articulate any damages that Patin's post caused. *Id.* at 1460-61. Thus, Ingrid Patin, Esq. argued that Dr. Lee did not bring his defamation claim in good faith and likewise that his rejection of her offer of judgment was unreasonable. *Id.* at 1461. Ingrid Patin, Esq. also argued that Dr. Lee misread NRCP 68 (1998) and

her offer of judgment in claiming that the district court's grant of summary judgment in her favor was a more favorable result for Dr. Lee than her offer of judgment. *Id.* at 1462-63. Patin Law Group, PLLC endorsed Ingrid Patin, Esq.'s arguments. *Id.* at 1465.

In response, Dr. Lee again misrepresented the plain language of Patin's offers of judgment and again erroneously asserted that both offers of judgment were inclusive of his attorney fees. *Id.* at 1466. Without citing any supporting authority, Dr. Lee suggested that Patin's offers of judgment were "negative offers" because they did not account for his attorney fees. *Id.* at 1467. He then asserted that Patin's offers of judgment were therefore invalid. *Id.*

In response to the district court's question regarding whether it could recover attorney fees for its appeal even though it did not prevail, Patin Law Group, PLLC argued that *In re Estate & Living Trust of Rose Miller* expressly held that the district court had to analyze whether an award is appropriate under the final judgment. 9 AA 1472-73. Thus, that Patin did not prevail on the appeal was not dispositive to her motion for attorney fees and costs. *Id.* at 1473. Indeed, Patin Law Group, PLLC argued that, even though Patin did not prevail on the appeal, it

nonetheless focused their litigation strategy on the fair report privilege, which they ultimately prevailed on. *Id.*

In closing, Ingrid Patin, Esq. argued that her offer of judgment was valid. *Id.* at 1475. In response, Dr. Lee again erroneously asserted that Patin's offers of judgment were inclusive of his attorney fees. *Id.* at 1475. The district court orally ruled that Patin's offers of judgment were valid. *Id.* at 1476-77. It then took the *Beattie* and *Brunzell* analysis under submission. *Id.* at 1477-78.

C. *District court order granting in part and denying in part Patin's motions for attorney fees and costs*

The district court granted in part and denied in part Patin's motions for attorney fees and costs. *Id.* at 1369-84. Regarding the first *Beattie* factor, the district court found that Dr. Lee brought his defamation case in good faith. *Id.* at 1373. The district court noted that many of the legal issues present in the instant matter were complex, resulting in a published opinion from this court regarding issues of first impression. *Id.* Regarding the second *Beattie* factor, the district court found that Patin's offers of judgment were reasonable in both timing and amount. *Id.* at 1373-74. Citing the plain language of Patin's offers of judgment, the district court flatly rejected Dr. Lee's contention that

Patin's offers of judgment were inclusive of his attorney fees. *Id.* at 1374. Regarding the third *Beattie* factor, the district court found that Dr. Lee's decision to reject Patin's offers of judgment was unreasonable. *Id.* at 1374-75. The district court explained that Patin offered Dr. Lee "an early opportunity to take judgment against them." *Id.* at 1375. In rejecting the offer, Dr. Lee "accepted the risk that he would be responsible for attorney[] fees" and any other costs that Patin could claim against him. *Id.* at 1375.

Turning to the *Brunzell* factors, the district court first noted that Dr. Lee did not challenge the qualities of the attorneys. *Id.* at 1376. Thus, the district court only addressed the remaining three *Brunzell* factors. *Id.* at 1376-81. Regarding Doyle, the district court found that his separate representation of Patin Law Group, PLLC was necessary given the separate interests of the law firm and Ingrid Patin, Esq. *Id.* at 1378. The district court also found that Doyle's fee request was reasonable under *Brunzell* and awarded \$10,200 in attorney fees under NRCP 68 (1998). *Id.*

Regarding Echols, the district court found that Patin Law Group, PLLC's decision to retain him was reasonable given the

complexity of NRS 41.660 special motion to dismiss jurisprudence. *Id.* at 1379-80. The district court also found that Echols sufficiently detailed his billing entries and that his hourly fee was reasonable. *Id.* Given that Patin did not prevail on her appeal, however, the district court declined to award any attorney fees for Echols. *Id.* at 1380.

Regarding Morris, the district court found that her billable rate was reasonable. *Id.* The district court further found that time Morris billed for the post-offer-of-judgment motion practice was reasonable and was not duplicative of any work that Doyle performed. *Id.* at 1380-81. In total, the district court found that Morris billed a total of 217 hours on the instant matter post offer of judgment. *Id.* at 1381. The district court rounded this number down to 200 billable hours and awarded Morris \$100,000 in attorney fees under NRCP 68 (1998). *Id.*

Turning to costs, the district court found that Morris's requested costs had sufficient documentary support. *Id.* at 1382. After deducting \$1,083.69 in pre-offer-of-judgment costs, the district court awarded Morris \$10,600 in costs under NRCP 68 (1998) and NRS 18.005. *Id.* at 1382, 1384. Citing a lack of documentary support under *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 120-21, 345 P.3d 1049, 1054

(2015) (holding that a party seeking costs must provide “evidence that the costs were reasonable, necessary, and actually incurred”), the district court declined to award any of Echols’s requested costs. 9 AA 1382.

III. *Dr. Lee’s motion to reconsider or, alternatively, to alter or amend judgment subsequent motion practice, and hearing on the same*

A. *Motion practice*

Dr. Lee filed a motion to reconsider or, alternatively, to alter or amend the district court’s order granting in part and denying in part Patin’s request for attorney fees and costs. *Id.* at 1393-402. He complained that the district court misapplied NRCP 68(g) (2019) and averred that it conducted an incomplete analysis as to whether he obtained a more favorable judgment than Patin’s offers of judgment would have provided. 9 AA 1400-01. He then asserted, without providing any authority, that Patin’s offers of judgment were invalid because the \$2,000 offers of judgment were less than the attorney fees he had accrued when Patin served them. *Id.* at 1401. Finally, he asserted that Patin’s offers of judgment did not present a more favorable outcome than the district court’s judgment. *Id.* at 1402.

Ingrid Patin, Esq. opposed. *Id.* at 1420-26. First, she argued that Dr. Lee failed to meet the standard for reconsideration. *Id.* at 1423.

She then argued that Dr. Lee was still misapplying NRCP 68 (1998). *Id.* at 1423-24. Finally, she argued that both offers of judgment were valid, noting that Dr. Lee proffered no authority in support of his contention and misrepresented this court's holding in *Edwards Indus., Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1034-35, 923 P.2d 569, 575 (1996) (holding that unapportioned joint offers of judgment are invalid). 9 AA 1425. Patin Law Group, PLLC joined Ingrid Patin, Esq.'s motion. *Id.* at 1449.

B. *Hearing on and denial of the motion*

The district court presided over a hearing on the motion. *Id.* at 1480-92. The district court first noted that Dr. Lee, despite titling his motion in part as one to alter or amend judgment, he did not actually request that the district court reduce its award of attorney fees and costs. *Id.* at 1482-83. Dr. Lee confirmed, stating that his position was that the district court erred in granting any attorney fees and costs. *Id.* at 1483. He then averred that NRCP 68 (2019) required the district court to consider his pre-offer attorney fees in determining whether he obtained a more favorable outcome than Patin's offers of judgment would have provided. 9 AA 1483-84. He again asserted, without proffering any supporting authority, that Patin's offers were not valid because he had

accrued more in attorney fees when she served them. *Id.* The district court noted that Dr. Lee's argument was "unusual." *Id.* at 1484. Ingrid Patin, Esq.'s oral argument was largely consistent with her briefing. *See id.* at 1484-85. The district court denied Dr. Lee's motion. *Id.* at 1495-96.

SUMMARY OF THE ARGUMENT

The district court acted within its sound discretion in granting Patin's request for attorney fees as to Doyle and in granting Patin's request for attorney fees and costs as to Morris. When Patin served her offers of judgment, NRCP 68 (1998) controlled. Under NRCP 68 (1998), Dr. Lee failed to obtain a more favorable outcome than he would have received by accepting Patin's offers of judgment. The district court was therefore well within its sound discretion in awarding Patin's requested attorney fees and costs, and substantial evidence supports the award.

Dr. Lee's reliance upon NRCP 68 (2019) is misplaced, as amendments to court rules do not retroactively apply. Even if this court were to assume that NRCP 68 (2019) applied, Dr. Lee still failed to obtain a more favorable outcome than he would have received by accepting Patin's offers of judgment. Accordingly, even if this court were to assume

that NRCP 68 (2019) controlled, the district court was well within its sound discretion in awarding Patin's requested attorney fees and costs.

Dr. Lee's reliance upon NRS 17.117 is similarly misplaced. First, Dr. Lee waived any reliance upon NRS 17.117 as he failed to raise it in the district court. Second, the Legislature enacted NRS 17.117 in 2019. This court presumes that statutes prospectively apply, and Dr. Lee makes no argument to the contrary. Accordingly, Dr. Lee's averments regarding NRS 17.117 are not properly before this court.

However, the district court abused its discretion in denying Patin's request for attorney fees as to Echols. In so doing, the district court found the requested fees were unreasonable given that she did not prevail on her appeal. However, this court expressly held in *In re Estate & Living Trust of Rose Miller* that the fee-shifting provisions in NRCP 68 (1998) apply to the judgment that determines the final outcome of the case. Here, Patin ultimately prevailed on her motion for summary judgment. The district court therefore applied an incorrect legal standard, which constitutes an abuse of discretion.

ARGUMENT

I. *Standard of review*

This court generally reviews a district court's award of attorney fees and costs for an abuse of discretion. *Logan v. Abe*, 131 Nev. 260, 264, 350 P.3d 1139, 1141 (2015) (providing the standard of review for an award of costs); *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 82, 319 P.3d 606, 616 (2014) (providing the standard of review for an award of attorney fees). A district court abuses its discretion when it acts "in clear disregard of the guiding legal principles," *Gunderson*, 130 Nev. at 80, 319 P.3d at 615, or when there is no evidence supporting the decision, *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 493, 215 P.3d 709, 726 (2009). However, this court reviews whether the district court applied the correct legal standard in granting or denying an award of attorney fees de novo. *Gunderson*, 130 Nev. at 82, 319 P.3d at 616. Finally, "[t]his court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason." *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010).

II. *The district court acted within its sound discretion in awarding attorney fees as to Doyle and in awarding attorney fees and costs as to Morris*

A. *NRCP 68 (1998) governs Patin's offers of judgment*

Dr. Lee contends that the district court abused its discretion in awarding Patin attorney fees and costs because it did not apply NRCP 68(g) (2019) and NRS 17.117(12) to Patin's request. AOB 10-16. Given that Patin served her offers of judgment in 2017, and given that court rules and statutes prospectively apply, Dr. Lee's contention lacks merit.

This court recognizes that amendments to court rules prospectively apply. *See In re Newport Corp. S'holder Litig.*, No. 80636, 2022 Nev. Unpub. LEXIS 240 at *14-15 (Nev. Mar. 30, 2022) (declining to apply NRCP 16.1 (2019) to a disclosure that plaintiffs filed before that amended court rule became effective); *A Cab, LLC*, 137 Nev., Adv. Op. 84, 501 P.3d at 969 n.9 (noting that NRCP 23(b) (2019) did not apply to a case that the plaintiffs filed in 2012); *Franchise Tax Bd. of Cal. v. Hyatt*, No. 80884, 2021 Nev. Unpub. LEXIS 298 at *5-6 (Nev. Apr. 23, 2021) (applying the version of NRCP 68 in effect when the offeror served the offer of judgment); *Nev. Pay TV v. Eighth Jud. Dist. Ct.*, 102 Nev. 203, 205 n.2, 719 P.2d 797, 798 n.2 (1986) (nothing that NRS 2.120 precludes this court from retroactively applying amendments to court rules),

superseded by rule on other grounds as stated in State, Dep't of Motor Vehicles & Public Safety v. Eighth Jud. Dist. Ct., 113 Nev. 1338, 948 P.2d 261 (1997); *see also* NRS 2.120. Here, Patin served her offers of judgment in January 2017. 2 AA 289-94. This court's 2019 amendment to NRCP 68 took effect on March 1, 2019. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civ. Proc.*, ADKT 522 (Ord. Amending the Rules of Civ. Proc., the Rules of App. Proc., & the Nev. Elec. Filing & Conversion Rules, Dec. 31, 2018).

Dr. Lee made no argument before the district court regarding retroactive application in his oppositions to Patin's motions for attorney fees and costs, *see* 9 AA 1299-05, 1312-18, in his supplemental oppositions to the same, *see id.* at 1349-50, 1360-61, during the hearing on the same, *see id.* at 1451-78, in his motion to reconsider the district court order awarding Patin attorney fees and costs, *see id.* at 1399-402, and during the hearing on the same, *see id.* at 1480-92. Dr. Lee therefore waived any argument regarding retroactive application of NRCP 68 (2019). *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (holding that this court deems waived and will not consider an argument that the appellant did not "urge in the trial court"). Even if this court

were to assume that Dr. Lee made an argument regarding retroactive application of NRCP 68 (2019) in the district court, Dr. Lee nonetheless failed to make such an argument in his opening brief. *See* AOB 10-16. Accordingly, Dr. Lee again waived any argument regarding retroactive application of NRCP 68 (2019). *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (noting that an appellant waives arguments that he or she did not present in his or her opening brief).

Similarly, this court generally presumes that newly enacted or amended statutes “apply prospectively unless the Legislature clearly indicated that they should apply retroactively or the Legislature’s intent cannot otherwise be met.” *Valdez v. Emp’rs Ins. Co. of Nev.*, 123 Nev. 170, 179, 162 P.3d 148, 154 (2007). Such an approach is rooted in “fundamental notions of ‘fair notice, reasonable reliance, and settled expectations.’” *Pub. Emps.’ Benefits Program v. Las Vegas Metro. Police Dep’t*, 124 Nev. 138, 155, 179 P.3d 542, 553-54 (2008) (quoting *Immigr. & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 321 (2001)). Here, Patin served her offers of judgment in January 2017. 2 AA 289-94. The

Legislature enacted NRS 17.117 in 2019, and that statute became effective on October 1, 2019. *See* 2019 Nev. Stat., ch. 57, § 1, at 274-75.

Dr. Lee made no argument before the district court regarding the application of NRS 17.117 to Patin's motions for attorney fees and costs nor did he make any argument regarding that statute's retroactive application in his oppositions to Patin's motions for attorney fees and costs, *see* 9 AA 1299-05, 1312-18, in his supplemental oppositions to the same, *see id.* at 1349-50, 1360-61, during the hearing on the same, *see id.* at 1451-78, in his motion to reconsider the district court order awarding Patin attorney fees and costs, *see id.* at 1399-402, and during the hearing on the same, *see id.* at 1480-92. Dr. Lee therefore waived any argument regarding NRS 17.117 and its retroactive application. *See Old Aztec Mine, Inc.*, 97 Nev. at 52, 623 P.2d at 983. Even if this court were to assume that Dr. Lee made an argument regarding retroactive application of NRS 17.117 in the district court, Dr. Lee nonetheless failed to make such an argument in his opening brief. *See* AOB 10-16. Accordingly, Dr. Lee again waived any argument regarding retroactive application of NRS 17.117. *See Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3.

Having demonstrated that Dr. Lee waived any reliance upon NRCP 68 (2019) and NRS 17.117, Patin now provides the court rule governing her offers of judgment. NRCP 68 (1998) provided, in relevant part:

(f) Penalties for Rejection of Offer. If the offeree rejects an offer and fails to obtain a more favorable judgment,

(1) the offeree cannot recover any costs or attorney's fees and shall not recover interest for the period after the service of the offer and before the judgment; and

(2) the offeree shall pay the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney's fees, if any 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's fees awarded to the party for whom the offer is made must be deducted from that contingent fee.

(g) How Costs Are Considered. To invoke the penalties of this rule, the court must determine if the offeree failed to obtain a more favorable judgment. Where the offer provided that costs 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. Where a defendant made an offer in a set amount which precluded a separate award of costs, the court must compare the amount of the offer together with the offeree's pre-offer taxable costs with the principal amount of the judgment.

B. *Dr. Lee fails to cogently argue his negative offer theory*

Dr. Lee contends that Patin's offers of judgment were not valid offers because her offer to settle the instant matter for \$2,000 was less than Dr. Lee's accrued attorney fees of \$20,000. AOB 14. First, Patin notes that NRCP 68(g) (1998) does not contemplate attorney fees in considering costs. The record before this court demonstrates that Dr. Lee did not argue before the district court that his pre-offer taxable costs exceeded Patin's offers of judgment. *See* 9 AA 1299-05, 1312-18, 1349-50, 1360-61, 1451-78, 1399-402, 1480-92. Nor does he make such an argument in his opening brief. *See* AOB 14. Accordingly, Dr. Lee waived any argument regarding the same. *See Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3; *Old Aztec Mine, Inc.*, 97 Nev. at 52, 623 P.2d at 983.

Even if this court were to assume that Dr. Lee made such an argument, the record before this court demonstrates that Dr. Lee did not provide any evidence regarding his pre-offer taxable costs to the district court. Indeed, Dr. Lee only proffered one declaration, which he attached to his supplemental oppositions to both of Patin's motions for attorney fees and costs. *See* 9 AA 1347-48, 1358-59. The declaration makes no mention of any pre-offer taxable costs. *See id.* This court recognizes that "appellants are responsible for making an adequate appellate record."

Cuzze v. Univ. & Cmty. Coll. Sys., 123 Nev. 598, 603, 172 P.3d 131, 135 (2007); *see also* NRAP 30(b)(3) (providing that an appellant’s appendix must include any portion of the record that is necessary for this court’s determination of the issues on appeal). Given that Dr. Lee failed to proffer any evidence regarding his pre-offer taxable costs, this court “necessarily presume[s]” that the missing evidence supported the district court’s decision. *Cuzze*, 123 Nev. at 603, 172 P.3d at 135.

Even if this court were to assume that he did not waive any arguments regarding costs, and even if this court were to assume that he proffered evidence of the same, Dr. Lee nonetheless fails to cogently argue his negative offer theory. Indeed, Dr. Lee proffers a mere two sentences in support of this appellate contention, suggesting that, “because the amounts [of] [Patin’s] 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.” AOB 14. Dr. Lee cited no caselaw from any jurisdiction that supports this contention.² *See id.* Dr. Lee also did not cite to any

²Dr. Lee offers *Edwards Industries, Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 923 P.2d 569 (1996). There, this court held that an unapportioned joint offer of judgment was improper under the then-

language in the controlling court rule or any drafter's notes regarding the same in support of this contention. *See id.* This court has repeatedly stated that it expects counsel to pursue appellate relief "with high standards of diligence, professionalism, and competence." *Miller v. Wilfong*, 121 Nev. 619, 625, 119 P.3d 727, 731 (2005) (quoting *Barry v. Lindner*, 119 Nev. 661, 671-72, 81 P.3d 537, 543-44 (2003)). In failing to cite any authority or engage in any meaningful attempt to analyze the plain language of NRCP 68 or its drafter's notes, Dr. Lee has submitted a deficient contention that lacks any cogent basis. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). This court need not consider this claim. *See id.*

C. *Dr. Lee did not obtain a more favorable judgment than Patin's offers of judgment*

Here, Patin served two offers of judgment, offering to pay Dr. Lee a total of \$2,000 "inclusive of all accrued interest, costs, and attorney fees, and any other sums that could be claimed by [Patin] against [Dr. Lee]" to settle the instant matter. 2 AA 289-94. Dr. Lee rejected both

controlling version of NRCP 68. *Id.* at 1034, 923 P.2d at 575. Accordingly, *Edwards Industries, Inc.* is factually inapposite, and Dr. Lee's reliance on the same lacks merit.

offers. 9 AA 1433. The district court ultimately granted summary judgment in Patin's favor. 7 AA 979-83. The record before this court does not contain any evidence regarding Dr. Lee's pre-offer taxable costs. *See* 9 AA 1347-48, 1358-59. Accordingly, Dr. Lee could have settled the instant matter and received \$2,000. He rejected such an offer and ultimately lost his defamation lawsuit on summary judgment, receiving no damages whatsoever. He clearly failed to obtain a better judgment than what Patin offered under NRCP 68(f) (1998).³ The district court correctly found the same, 9 AA 1369-84, and the record before this court supports the district court's findings, 2 AA 289-94; 7 AA 979-83; 9 AA 1347-48, 1358-59, 1433.

³Even if this court were to assume that NRCP 68 (2019) governed Patin's offers of judgment, Dr. Lee still failed to obtain a better judgment than what Patin offered. Had Dr. Lee accepted Patin's offers of judgment, he would have received \$2,000 from Patin and paid \$20,000 in attorney fees to his attorney. *See* 2 AA 289-94; 9 AA 1347-48, 1358-59. In that scenario, Dr. Lee would have lost \$18,000 total in pursuing his defamation claim. In rejecting Patin's offers of judgment, he received no money from Patin and paid at least \$20,000 in attorney fees to his attorney. *See* 7 AA 979-83; 9 AA 1347-48, 1358-59. Dr. Lee therefore lost at least \$20,000 total in pursuing his defamation claim. Any suggestion by Dr. Lee that losing \$18,000 is not better than losing at least \$20,000 strains the bounds of credulity.

D. *The district court properly considered the Beattie factors, and substantial evidence supports its award*

Dr. Lee finally complains that the district court misapplied the *Beattie* factors in awarding Patin attorney fees as to Doyle and attorney fees and costs as to Morris. AOB 16-21. Dr. Lee acknowledges that the district court addressed all the *Beattie* factors. *Id.* at 18. However, he contends that the district court failed to appropriately consider whether Patin's offers were reasonable and in good faith in both timing and amount.⁴ *Id.* at 19-22. First, Dr. Lee complains that the district court "made no specific finding that the amount of [Patin's] offers of judgment were made in good faith." *Id.* at 19. Second, erroneously relying on NRCP 68 (2019) and NRS 17.117, Dr. Lee complains that Patin's offers were unreasonable and brought in bad faith regarding their amounts. *Id.* at 19. Finally, Dr. Lee complains that Patin's offers of judgment were unreasonable and brought in bad faith regarding their timing. *Id.* at 19-22. All three of Dr. Lee's complaints lack merit.

⁴Dr. Lee does not challenge the district court's findings of fact or conclusions of law regarding the remaining *Beattie* factors. *See* AOB 19-22. He has therefore waived any challenge to the same. *See Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3.

The district court's order expressly stated that Patin's offers were reasonable regarding the amounts. 9 AA 1435. Indeed, the district court expressly noted the amounts of Patin's offers of judgment and that they were inclusive of attorney fees and any other recoverable costs. *Id.* at 1436. Accordingly, the express language of the district court's order belies Dr. Lee's argument on this ground.⁵

As Patin argued above, *see* Argument § II(A), NRCP 68 (2019) and NRS 17.117 do not retroactively apply to Patin's offers of judgment. Dr. Lee further waived any arguments to the contrary. *See* Argument § II(A). Accordingly, Dr. Lee's reliance on both in challenging the district court's order is procedurally improper and otherwise lacks merit.

⁵Even if this court were to assume that the district court's order is ambiguous as to whether Patin's offers of judgment were reasonable regarding their amounts, this court may consult the record before it to construe its meaning. *See Holt v. Reg'l Tr. Servs. Corp.*, 127 Nev. 886, 895, 266 P.3d 602, 608 (2011). At the hearing on Dr. Lee's motion to reconsider or, alternatively, to alter or amend judgment, the district court elaborated on its findings regarding the amount of Patin's offers of judgment. 9 AA 1489. The court stated that both offers covered the costs that Dr. Lee incurred in filing his defamation claim. *Id.* Accordingly, the record before this court clearly demonstrates that the district court properly considered whether Patin's offers of judgment were reasonable regarding their amounts.

Dr. Lee's remaining complaint is that the district court erred in finding that Patin's offers of judgment were reasonable and brought in good faith regarding their timing. AOB 18-22. He contends that the district court's finding was erroneous because the district court previously denied two of Patin's NRS 41.660 special motions to dismiss. *Id.* at 20.

During the hearing on Patin's motions for attorney fees and costs, the district court stated that Patin's offers of judgment were reasonable regarding their timing. 9 AA 1477. The court noted that if Patin had prevailed on her appeal, the resulting order would have ended the instant matter. *Id.* Thus, the district court found that Patin's offers of judgment provided Dr. Lee an opportunity "to get out of the case with no further litigation." *Id.* In its order, the district court expressly found that Patin made her offers of judgment during the pendency of her appeal challenging its denial of her special motions to dismiss. *Id.* at 1435. The district court also found that Patin singled her intention "to vigorously litigate the legal issues" that Dr. Lee's defamation case presented. *Id.* at 1436. Given that substantial evidence supports its findings, the district court acted within its sound discretion in finding that Patin's offers of

judgment were reasonable regarding their timing. *See Logan*, 131 Nev. at 265, 350 P.3d at 1143 (noting that this court affirms a district court's award of attorney fees that substantial evidence supports).

Accordingly, the district court properly weighed the *Beattie* factors, concluding that Dr. Lee brought his defamation claim in good faith, that Patin's offers of judgment were reasonable in timing and amount, that Dr. Lee's rejection of the same was unreasonable, and that Patin's requested attorney fees as to Doyle and Morris were reasonable under the *Brunzell* factors. 9 AA 1435-43.

III. *The district court abused its discretion in denying attorney fees as to Echols*

While it acted within its sound discretion in granting Patin's motions for attorney fees as to Doyle and attorney fees and costs as to Morris, the district court applied an incorrect legal standard in denying Patin Law Group, PLLC's motion for attorney fees as to Echols. The district court found that Echols's billing records were sufficiently detailed. *Id.* at 1441. The district court further found that Echols's hourly fee was reasonable. *Id.* at 1441-42. The district court also found that Patin Law Group, PLLC's decision to retain appellate counsel was reasonable given the presence of an issue of first impression and the

otherwise “sophisticated and complex” nature of NRS 41.660 special motion to dismiss litigation. *Id.* at 1441-42. However, the district court ultimately concluded that it could not award Patin Law Group, PLLC attorney fees as to Echols because Patin did not prevail on the appeal challenging the district court’s denial of her special motion to dismiss. *Id.* at 1442. In so doing, the district court acted contrary to this court’s NRCP 68 jurisprudence.

In *In re Estate & Living Trust of Rose Miller*, this court considered whether a district court abused its discretion in denying a request for attorney fees under NRCP 68. 125 Nev. at 552, 216 P.3d at 241. There, the plaintiff challenged an estate plan revision. *Id.* The plaintiff served separate offers of judgment on the two defendants, which they rejected. *Id.* The matter proceeded to trial, and the jury returned a verdict for the defendants. *Id.* This court reversed the jury’s verdict and ordered the district court to enter judgment as a matter of law in favor of the plaintiff. *Id.* The plaintiff then moved for attorney fees and costs under NRCP 68. *Id.* The district court ultimately denied the motion, concluding that NRCP 68 does not “apply to judgments won by appellate reversal.” *Id.*

This court reversed. *Id.* at 554, 216 P.3d at 243. First, this court explained “that the word ‘judgment’ in [NRCp 68] connotes a final judgment.” *Id.* at 553, 216 P.3d at 242. Nevada statutes and the Nevada Rules of Appellate Procedure supported such a conclusion. *See id.* (citing NRS 17.160 and NRAP 36(a)). The public policy of promoting settlements also supported such a conclusion, as the opportunity for “settlement does not end in district court but continues until the case is resolved.” *In re Estate & Living Tr. of Rose Miller*, 125 Nev. at 553, 216 P.3d at 242. Accordingly, this court held that district courts must look to “the final judgment in the case” when determining whether the judgment that the offeree obtained is more or less favorable than what the offeror offered.⁶ *Id.*

Here, the district court clearly acted contrary to *In re Estate & Living Trust of Rose Miller* in denying Patin Law Group, PLLC’s request for attorney fees as to Echols. Rather than look to its order granting summary judgment in favor of Patin in determining whether to

⁶This court recently cited *In re Estate & Living Trust of Rose Miller* to stand for the proposition “that NRCp 68 applies to the final judgment after appeal.” *See Waste Mgmt. of Nev. v. W. Taylor St.*, No. 80841, 2021 Nev. Unpub. LEXIS 80 at *4 (Nev. Feb. 4, 2021).

award attorney fees as to Echols, the district court looked to this court's opinion denying Patin's appeal of the district court's order denying her NRS 41.660 special motion to dismiss. 9 AA 1440-42. In so doing, the district court misapplied the *Beattie* and *Brunzell* factors, which constitutes an abuse of discretion. *Gunderson*, 130 Nev. at 80, 319 P.3d at 615.

Accordingly, Patin Law Group, PLLC respectfully urges this court to reverse the district court's denial of its request for attorney fees as to Echols and remand the matter to the district court. On remand, Patin Law Group, PLLC respectfully urges this court to instruct the district court to perform the proper *Brunzell* analysis under the final *Beattie* factor in resolving Patin Law Group, PLLC's requested attorney fees as to Echols.

CONCLUSION

The district court acted within its sound discretion in granting Patin's requested attorney fees as to Doyle and requested attorney fees and costs as to Morris. Dr. Lee's assertions to the contrary lack merit, as he either waived them, failed to cogently argue them, or the weight of authority rebuts them. However, the district court applied an incorrect

legal standard in denying Patin Law Group, PLLC's requested attorney fees as to Echols. Nevada caselaw instructs district courts to look to the final judgment in determining the propriety of a request for attorney fees under NRCP 68. The district court ignored this court's precedent and instead used an improper piecemeal analysis. Accordingly, Patin urges this court to affirm the district court's award of attorney fees as to Doyle, affirm the district court's award of attorney fees and costs as to Morris, and reverse and remand the district court's denial of attorney fees as to Echols.

Dated this 19th day of April 2022.

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CERTIFICATE OF COMPLIANCE

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 I prepared this brief in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook font.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of brief that NRAP 32(a)(7)(C) exempts, it is either:

☒ Proportionally spaced, has a typeface of 14 points or more and contains 7,698 words; or

☐ Does not exceed _____ pages.

Finally, 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 a reference to the page and volume number, if any, of the transcript or appendix to support every assertion in the brief regarding matters in the record.

I understand that I may be subject to sanctions if the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 19th day of April 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *RESPONDENTS'/CROSS-APPELLANTS' ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL* with the Supreme Court of Nevada on the 19th day of April 2022. I shall make electronic service of the foregoing document in accordance with the Master Service List as follows:

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