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Electronically Filed  
Jul 20 2022 03:32 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**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 COMBINED REPLY BRIEF ON APPEAL AND**  
**ANSWERING BRIEF ON CROSS-APPEAL**

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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 20th day of July, 2022.

**RESNICK & LOUIS, P.C.**

*/s/ Myraleigh A. McGill*

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## **I. INTRODUCTION**

The arguments presented in the Respondents' Answering Brief ("RAB") do not demonstrate that the District Court's award of fees and costs was not an abuse of discretion.

First, in their Answering Brief ("RAB"), Respondents do not dispute the District Court's April 23, 2021, Order regarding the **first Beattie factor** (that Dr. Lee brought this litigation in good faith) and the **third Beattie factor** (that Dr. Lee's decision to reject the Respondents' offers of judgment was not in bad faith or "grossly unreasonable"). 9 AA 1367-1386.

Respondents also do not dispute that the District Court found that their offers of judgment were reasonable in timing and amount because by their language, they "had signaled they intended to vigorously litigate the legal issues presented in the defamation case." 9 AA 1367-1386; see RAB at 31. As argued in Dr. Lee's Opening Brief, the basis of the District Court's determination regarding this **second Beattie factor** (the reasonableness of the timing and amount of Respondents' offers) contradicts the purpose of offers and judgment. The purpose of offers of judgment is to encourage settlement, and they are expressly not intended to unfairly force plaintiffs to forego legitimate claims. Morgan v. Demille, 106 Nev. 671, 674, 799 P.2d 561 (1990); Beattie v. Thomas, 99 Nev. 579, 588, 668 P.2d 268, 274 (1983); John J. Muije, Ltd., 106 Nev. 664, 667, 799 P.2d

559, 561 (1990). Although the District Court considered all four Beattie factors, the District Court's consideration of whether the offers of judgment were reasonable in timing and amount was demonstrably arbitrary and capricious as demonstrated by its April 23, 2021, Order.

As a result, the first three "good faith" Beattie factors weigh in favor of Dr. Lee, the District Court's consideration of the Beattie factors was arbitrary and capricious, and accordingly, its award of attorney fees, costs, and interest to both of Respondents constitute an abuse of discretion and should be reversed. See Frazier v. Drake, 131 Nev. 632, 644, 357 P.3d 365, 373, 131 Nev. Adv. Rep. 64 (2015).

In addition, even if this Court determines that NRCP 68 (2019) does not apply to the Respondents' offers of judgment and instead applies NRCP 68 (1998), both Respondents' offers of judgment are written as inclusive of interest, costs, and attorney fees incurred by Dr. Lee. As a result, Dr. Lee still received a more favorable judgment than both Respondents' offers of judgment, and the Court's award of Respondents' attorney fees, costs, and interest was also an abuse of discretion that should be reversed on these grounds.

Finally, for each of these foregoing reasons, PLG's Cross-Appeal regarding attorney fees as to Micah Echols, Esq. is also without merit.

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## II. LEGAL ARGUMENT

### A. Standard of Review

“An award of attorney's fees and costs pursuant to NRCP 68 is discretionary with the district court and its discretion will not be disturbed absent a clear abuse.” Kent v. Kent, 108 Nev. 398, 403, 835 P.2d 8, 11 (1992). Both NRCP 68 (1998) and NRCP (2019) contain the same language of NRCP 68(e) stating “[a]ny offeree who fails to accept the offer *may* be subject to the penalties of this rule.” (emphasis added).

District Courts have discretion to award attorney fees and costs where they have properly weighed the following Beattie factors:

(1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both 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, 99 Nev. at 588-9; see also Uniroyal Goodrich Tire Co. v. Mercer, 111 Nev. 318, 890 P.2d 785 (1995).

An abuse of discretion will be found where the District Court's evaluation of the Beattie factors was arbitrary or capricious. RTTC Communs., LLC v. The Saratoga Flier, Inc., 121 Nev. 34, 43, 110 P.3d 24, 29, 121 Nev. Adv. Rep. 6 (2005) (citing Uniroyal Goodrich Tire, 111 Nev. at 322-23, 890 P.2d at 789). Explicit findings regarding each Beattie factor are not required for the District

Court to adequately exercise its discretion. Certified Fire Prot. Inc. v. Precision Constr. Inc., 128 Nev. 371, 383, 283 P.3d 250, 258, 128 Nev. Adv. Rep. 35 (2012); see Wynn v. Smith, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001) ("Although explicit findings with respect to these factors are preferred, the district court's failure to make explicit findings is not a per se abuse of discretion."). However, whether the parties' actions were taken in good faith is central to the District Court's consideration of the Beattie factors.

Because offers of judgment are designed to encourage settlement and are not intended to unfairly force plaintiffs to forego legitimate claims, three of the four *Beattie* factors require an assessment of whether the parties' actions were undertaken in good faith. Specifically, the district court must determine whether the plaintiff's claims were brought in good faith, whether the defendant's offer was reasonable and in good faith in both timing and amount, and whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith. *Id.* The connection between the emphases that these three factors place on the parties' good-faith participation in this process and the underlying purposes of NRCF 68 and NRS 17.115 is clear. As the Nevada Supreme Court recognized, "[i]f the good faith of either party in litigating liability and/or damage issues is not taken into account, offers would have the effect of unfairly forcing litigants to forego legitimate claims."

Frazier v. Drake, 131 Nev. 632, 644, 357 P.3d 365, 373, 131 Nev. Adv. Rep. 64 (2015) (citing Yamaha Motor Co., 114 Nev. at 252, 955 P.2d at 673.) As a result, "where . . . the district court determines that the three good-faith *Beattie* factors weigh in favor of the party that rejected the offer of judgment, the reasonableness

of the fees requested by the offeror becomes irrelevant, and cannot, by itself, support a decision to award attorney fees to the offeror.” Id.

**B. Respondents Fail to Demonstrate that the District Court Properly Weighed the Second Beattie Factor Regarding the Reasonableness of the Offers’ Timing and Amount**

Despite Respondents’ arguments regarding NRCP 68 (1998) and NRS 17.117, the basis of the District Court’s finding that Respondents’ offers of judgment were reasonable in timing and amount is still incompatible with the purpose of offers of judgment, which is to encourage settlement. In their Answering Brief, Respondents do not dispute that the District Court found that their offers of judgment were reasonable in timing and amount because by their language, they “had signaled they intended to vigorously litigate the legal issues presented in the defamation case.” 9 AA 1367-1386; see RAB at 31. In considering the second Beattie factor regarding whether the offer was reasonable in timing and amount, the District Court stated:

Considering the entirety of the language of the offer, the Court finds that the Offers of Judgement were reasonable in timing and amount, as Defendants had signaled they intended to vigorously litigate the legal issues presented in the defamation case.

9 AA 1367-1386. As argued in Dr. Lee’s Opening Brief, this determination contradicts the purpose of offers of judgment, which is to encourage settlement. Morgan, 106 Nev. at 674, 799 P.2d at 674; 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 judgment are not intended to unfairly force plaintiffs to forego legitimate claims. Beattie, 99 Nev. at 588, 668 P.2d at 274.

The amount and timing of each of the Respondents' \$1,000.00 offers of judgement were unrealistic, unreasonable, and not a good faith effort to settle Dr. Lee's claims. The offers of judgment were served in January 2017, nearly two years after Dr. Lee filed his initial Complaint on August 17, 2015. By the time Respondents served their offers of judgment on Dr. Lee, Respondents had already filed four dispositive motions, each of which were denied by the District Court. 1 AA 127-128; 1 AA 147-150; 1 AA 156-159; 2 AA 254-257. At that point, discovery had not even opened. See 5 AA 731-750. As a result, Dr. Lee had already spent significant litigation costs, which by the time of the Respondents' offers of judgment, were primarily brought on by the Respondents' failed dispositive motions. Based on the status of the case at the time of the Respondents' offers of judgment, the idea that Dr. Lee would accept \$1,000.00 from each Respondent as settlement of his legitimate claims is unreasonable, and the amount and timing of the Respondents' offers of judgment cannot be construed as good faith efforts to settle the case.

In its evaluation of the Beattie factors, the District Court must determine "whether the defendant's offer was reasonable and in good faith in both timing and

amount” with respect to furthering settlement of the case, not unfairly forcing a plaintiff to forego a legitimate claim. Frazier, 131 Nev. at 644, 357 P.3d at 373, 131 Nev. Adv. Rep. 64. As a result, the District Court’s determination that the timing and amount of the Respondents’ offers were reasonable because they signaled the Respondents’ intent to “vigorously litigate” is contrary to the inquiry intended by the Beattie factors, and was arbitrary and capricious.

**C. The District Court’s Award of Fees, Costs, and Interest to the Respondents Was an Abuse of Discretion Because The Beattie Factors Concerning the Parties’ Good Faith Actions Weigh in Favor of Dr. Lee**

An award of fees to the offeror is not supported where the three good faith Beattie factors weigh in favor of the party rejecting the offer of judgment. Id.

In Frazier, the Court of Appeals reversed the District Court’s award of attorney fees to Drake, the offeror, pursuant to NRCp 68. The Court of Appeals found that the District Court’s consideration of the Beattie factors was arbitrary and capricious because the District Court determined that the first three good faith Beattie factors weighed in favor of Frazier and Keys. Specifically, the District Court found that 1) Frazier’s and Key’s claims were brought in good faith, 2) Drake’s offers of judgment were not reasonable or made in good faith in timing or amount, and 3) that Frazier’s and Key’s decisions to reject the offers of judgment were not grossly unreasonable or brought in bad faith. The only Beattie factor that the District Court found in favor of Drake was the reasonableness of the amount of

requested attorney fees. As a result, the Court of Appeals reversed the District Court's award of attorney fees to Drake. Id.

Here, the three Beattie factors concerning the good faith conduct of the parties weighs in favor of Dr. Lee. The District Court determined that Dr. Lee brought his claim in good faith (first Beattie factor) and that Dr. Lee's decision to reject the Respondents' offers of judgment was not in bad faith or grossly unreasonable (third Beattie factor). See also 9 AA 1367-1386. These findings are not disputed by the Respondents.

As discussed in the section above, the basis of the District Court's determination regarding the second Beattie factor concerning the reasonableness of the offers' timing and amount was in direct contradiction of the purpose of offers of judgment. The District Court did not consider whether the offer's timing and amount constituted good faith efforts to settle the case, and instead determined that the offers signaled the Respondents' intent to vigorously litigate the case. Accordingly, the District Court's determination regarding this second Beattie factor was arbitrary and capricious.

In light of the District Court's arbitrary and capricious review of the Beattie factors, and because all three of the good faith Beattie factors actually weigh in favor of Dr. Lee, the District Court's award of fees, costs, and interest to both Respondents was an abuse of discretion and should be reversed.

**D. Dr. Lee Received A More Favorable Judgment Regardless of Which Version of NRCP 68 is Applied**

Respondents' argument regarding the prior and current versions of NRCP 68 also does not impact the ultimate conclusion of Dr. Lee's argument. Even if this Court determines that NRCP 68 (2019) does not apply to the Respondents' offers of judgment and instead applies NRCP 68 (1998), both Respondents' offers of judgment are written as inclusive of interest, costs, and attorney fees incurred by Dr. Lee.

Each of the Respondents' offers of judgment were 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 [Respondent], against Plaintiff, TON VINH LEE.*" 2 AA 289-291; 2 AA 292-294. The "accrued interest, costs, and attorney fees" referenced in the offers should be construed as those recoverable by Dr. Lee and separate from the final, additional category of "any other sums that could be claimed by [Respondent], against Plaintiff, TON VINH LEE." Interpreting the "accrued interest, costs, and attorney fees" as those incurred by Respondents would render the remaining language redundant.

As argued in Dr. Lee's Opening Brief, Dr. Lee had already incurred at least \$10,000.00 on attorney fees alone by the time Respondents served their offers of judgment. 9 AA 1345-1351 at 3:19-24. Regardless of the version of NRCP 68 applied by this Court, Dr. Lee still received a higher award and a more favorable

judgment than the Respondents' offers of judgment. As a result, the District Court abused its discretion in awarding the Respondents' attorney fees, costs, and interest.

**E. The District Court Did Not Abuse Its Discretion in Denying Patin Law Group's Attorney Fees as to Micah Echols, Esq. Under NRCP 68**

The sole issue raised in Patin Law Group's Cross-Appeal is the District Court's denial of Patin Law Group's attorney fees as to Micah Echols, Esq. under NRCP 68. The only basis for PLG's Cross-Appeal for attorney fees with respect to Mr. Echols is the alleged reasonableness of the amount of Mr. Echols' fees. PLG does not dispute the District Court's consideration of the other three Beattie factors with respect to Mr. Echols' fees. Nevada Courts have found awards of attorney fees that are based on the reasonableness of the fees alone to be arbitrary and capricious and an abuse of discretion. Frazier, 131 Nev. at 644, 357 P.3d at 373, 131 Nev. Adv. Rep. 64. As a result, PLG's cross-appeal has no merit and its requested relief should not be granted.

**III. CONCLUSION**

Based on the foregoing, this Court should find that the District Court's review of the Beattie factors with respect to both Respondents' offers of judgment were arbitrary and capricious in their failure to properly consider whether the offers of judgment were good faith efforts to settle the case. As a result, the District

Court's award of fees, costs, and interest to both Respondents was an abuse of discretion and should be reversed.

DATED this 20th day of July, 2022.

**RESNICK & LOUIS, P.C.**

*/s/ Myraleigh A. McGill*

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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 requirements of the Nevada Rules of Appellate Procedure.

DATED this 20th day of July, 2022.

**RESNICK & LOUIS, P.C.**

*/s/ Myraleigh A. McGill*

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