

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.

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RESPONDENTS'/CROSS-APPELLANTS' REPLY 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 8th day of August 2022.

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ARGUMENT

Ingrid Patin and Patin Law Group, PLLC (collectively “Patin”) filed an opening brief on cross appeal, arguing that the district court misapplied the *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983), factors in denying Patin’s request for attorney fees for her appellate attorney, Micah S. Echols, Esq. See RAB at 32-35. Specifically, Patin argued that the district court misapplied the fourth *Beattie* factor, which requires the district court to weigh the *Brunzell v. Golden Gate Nat’l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), factors to determine whether a fee is reasonable. *Id.*

Dr. Lee filed an answering brief on cross-appeal. See ARB at 10. In so doing, Dr. Lee failed to address Patin’s proffered caselaw in support of her cross-appeal. See *id.* Accordingly, Dr. Lee confesses error, and this court should reverse the district court’s denial of attorney fees as to Echols. Even if this court were to entertain the merits notwithstanding Dr. Lee’s confession, the record before this court and Nevada caselaw clearly demonstrate that the district court misapplied the *Brunzell* factors as to Echols. Patin addresses each in turn.

I. *Dr. Lee confesses error regarding the district court’s misapplication of the Brunzell factors regarding Echols*

This court has long been concerned with improving appellate practice within Nevada, resolving “to end the lackadaisical practices of the past” and “enforce the Nevada Rules of Appellate Procedure.” *Smith v. Emery*, 109 Nev. 737, 743, 856 P.2d 1386, 1390 (1993). Despite this court’s declaration nearly 30 years ago, this court has nonetheless had to repeatedly remind attorneys to pursue appeals “with high standards of diligence, professionalism, and competence.” *Barry v. Lindner*, 119 Nev. 661, 671, 81 P.3d 537, 543 (2003); *see also Miller v. Wilfong*, 121 Nev. 619, 625, 119 P.3d 727, 731 (2005). Dr. Lee failed to heed this court’s repeated calls.

NRAP 31(d)(2) provides that this court may treat a respondent’s failure to file a brief “as a confession of error.” Indeed, this court has applied NRAP 31(d)(2) to instances where a party filed a brief but failed to address the opposing party’s dispositive arguments. *See Hopkins v. Cannon Cochran Mgmt. Servs., Inc.*, No. 82894, 2022 Nev. Unpub. LEXIS 218 at *7 n.2 (Nev. Mar. 18, 2022) (noting that the respondent’s failure to contest the merits of an appellant’s argument regarding a dispositive exception “may be a confession of error”); *First*

100, LLC v. TGC/Farkas Funding, LLC, No. 83177, 2022 Nev. Unpub. LEXIS 214 at *3-4 (Nev. Mar. 17, 2022) (suggesting a respondent's failure to contest appellant's arguments regarding an award of attorney fees was a confession of error); *Nicole v. Seterus, Inc.*, No. 79459, 2021 Nev. Unpub. LEXIS 377 at *1-2 (Nev. May 14, 2021) (suggesting that a respondent's failure to address appellant's argument that dismissal should have been without prejudice was a confession of error); *Michael Hohl Carson Valley v. Hellwinkel Fam. Ltd. P'ship*, No. 73285, 2019 Nev. Unpub. LEXIS 645 at *6 n.2 (Nev. June 7, 2019) (noting that respondent's failure to address appellant's argument regarding lost use damages could be a confession of error); *U.S. Home Corp. v. Lanier*, No. 68692, 2018 Nev. Unpub. LEXIS 1075 at *2 n.3 (Nev. Nov. 28, 2018) (noting that a respondent's failure to address appellant's choice of law contentions arguably constituted a confession of error); *Dezzani v. Kern & Assocs.*, 134 Nev. 61, 65, 412 P.3d 56, 60 (2018) (applying waiver where the appellants failed to address the respondent's statutory construction argument); *Nev. Checker Cab Corp. v. Eighth Jud. Dist. Ct.*, No. 66349, 2016 Nev. Unpub. LEXIS 497 at *4 n.3 (Nev. Feb. 3, 2016) (noting the petitioner's failure to address the real party in interest's argument regarding liability resulted in a confession

or error); *Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (holding that the appellant conceded an argument to the respondent by not addressing respondent’s argument regarding an award of costs); *Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (holding that respondent’s failure to address appellant’s argument regarding the applicable interest rate was “a confession of error”).

Here, Patin proffered an argument regarding the district court’s failure to properly apply the *Brunzell* factors regarding the result that Echols obtained. RAB at 32-35. In so doing, Patin analyzed the district court’s application of the *Brunzell* factors and proffered *In re Estate & Living Trust of Rose Miller*, 125 Nev. 550, 554-56, 216 P.3d 239, 243 (2009) and *Waste Management of Nevada v. West Taylor Street*, No. 80841, 2021 Nev. Unpub. LEXIS 80 at *4 (Nev. Feb. 4, 2021), in support of her appellate concerns. RAB at 32-35.

Dr. Lee does not address Patin’s argument regarding the district court’s misapplication of the *Brunzell* factors. ARB at 10. Dr. Lee does not address any of the district court’s findings of fact or conclusions of law regarding the same. *Id.* Dr. Lee does not address *In re Estate & Living Trust of Rose Miller* or *Waste Management of Nevada*.

ARB at 10. Dr. Lee does not argue that the district court's piecemeal approach in determining the result that Echols helped Patin obtain is consistent with *In re Estate & Living Trust of Rose Miller* or *Waste Management of Nevada*. ARB at 10.

Rather, Dr. Lee states that Patin did not dispute the district court's consideration of the first three *Beattie* factors, asserting that Patin's failure to dispute the district court's consideration of the first three *Beattie* factors renders her appellate concern on cross-appeal meritless. *Id.* Dr. Lee's contention strains the bounds of credulity. Patin did not dispute the district court's consideration of the first three *Beattie* factors because the district court ultimately concluded that the first three *Beattie* factors weighed in favor of awarding attorney fees to Patin for beating the offers of judgment. *See* 9 AA 1434-37 (finding that Dr. Lee did not bring his defamation suit in bad faith, that Patin's offers of judgment were reasonable in timing and amount, and that Dr. Lee's decision to reject Patin's offers of judgment was unreasonable). Thus, Patin argued in support of the district court's application of the first three *Beattie* factors. *See* RAB at 29-32. The dispositive question in Patin's cross-appeal is whether the district court erred in basing its decision

regarding attorney fees as to Echols upon Patin's unsuccessful appeal rather than Patin's eventual victory on summary judgment, which Dr. Lee did not address.¹

Dr. Lee's paltry five sentence answer to Patin's cross-appeal is well beneath the "high standards of diligence, professionalism, and competence" that this court expects from appellate practitioners. *Barry*, 119 Nev. at 671, 81 P.3d at 543; *see also Miller*, 121 Nev. at 625, 119 P.3d at 731. Dr. Lee's decision to not address Patin's argument on cross-appeal was not inadvertent, the argument that Dr. Lee chose not to address was consequential, and Dr. Lee had representation through legal counsel. *See Hewitt v. State*, 113 Nev. 387, 392, 936 P.2d 330, 333 (1997) (declining to apply confession of error where the state failed to address meritless issues that the defendant raised for the first time on appeal), *overruled on other grounds by Martinez v. State*, 115 Nev. 9, 11-12, 974

¹Dr. Lee cites *Frazier v. Drake*, 131 Nev. 632, 641-44, 357 P.3d 365, 371-73 (Ct. App. 2015), for the proposition that a district court abuses its discretion where the first three *Beattie* factors weigh against an award of attorney fees for beating an offer of judgment and it nonetheless awards attorney fees under the fourth *Beattie* factor. RAB at 10. While Dr. Lee's statement is correct, *Frazier* is factually inapposite to the instant matter, as the district court found that two of the first three *Beattie* factors weighed in favor of awarding attorney fees. 9 AA 1434-37.

P.2d 133, 134-35 (1999); *State ex rel. Welfare Div. v. Hudson*, 97 Nev. 386, 388, 632 P.2d 1148, 1149 (1981) (declining to apply confession of error where the respondent did not have legal counsel), *superseded by statute on other grounds as recognized in Smith v. Cnty. of San Diego*, 109 Nev. 302, 303, 849 P.2d 286, 287 (1993). Accordingly, the record before this court and Nevada jurisprudence clearly demonstrate that Dr. Lee has confessed error regarding the district court's misapplication of the *Brunzell* factors. Patin respectfully urges this court to reverse the district court's order denying attorney fees as to Echols and remand the matter for the district court to apply the correct legal standard under *In re Estate & Living Trust of Rose Miller*.

II. *Alternatively, Nevada caselaw clearly demonstrates that the district court misapplied the Brunzell factors regarding Echols*

Should this court exercise its discretion and entertain the merits of Patin's cross-appeal notwithstanding Dr. Lee's confession of error, the record before this court and Nevada jurisprudence demonstrate that the district court erred in denying attorney fees as to Echols.

In resolving a motion for attorney fees under NRCP 68, district courts must weigh the *Beattie* factors. *Capriati Constr. Corp., Inc. v. Bahram Yahyavi*, 137 Nev., Adv. Op. 69, 498 P.3d 226, 231 (2021).

The first three *Beattie* factors require the district court to consider whether the plaintiff brought his or her claim in good faith, “whether the defendants’ offer of judgment was reasonable and in good faith in both its timing and amount,” and “whether the plaintiff’s decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith.” *Beattie*, 99 Nev. at 588-89, 668 P.2d at 274. The fourth *Beattie* factor requires the district court to weigh the *Brunzell* factors. *Capriati Constr. Corp.*, 137 Nev., Adv. Op. 69, 498 P.3d at 231. The *Brunzell* factors require the district court to consider the lawyer’s qualities, “the character of the work,” the work the lawyer performed, and the result for the client. *Brunzell*, 85 Nev. at 349, 455 P.2d at 33.

Regarding the first three *Beattie* factors, the district court found that Dr. Lee did not bring his defamation suit in bad faith, that Patin’s offers of judgment were reasonable in timing and amount, and that Dr. Lee’s decision to reject Patin’s offers of judgment was unreasonable. 9 AA 1434-37. Accordingly, two of the three *Beattie* factors weighed in favor of awarding attorney fees as to Echols.

Regarding the *Brunzell* factors, the district court found that Echols’s hourly fee was not unreasonable given his specialization in

appellate practice. *Id.* at 1441-42. The district court also found that the work itself was “sophisticated and complex,” containing “a question of first impression” under Nevada law. *Id.* at 1441. Thus, the district court found that Patin’s decision to retain Echols was not unreasonable. *Id.* at 1442. The district court further reviewed the work that Echols performed, finding that Echols’s billing records were sufficiently detailed for it to determine what tasks he performed. *Id.* at 1441. Accordingly, the first three *Brunzell* factors weighed in favor of awarding attorney fees as to Echols.

The sole basis for the district court’s denial of attorney fees as to Echols was that Patin’s appeal of the district court’s denial of her anti-SLAPP special motion to dismiss was unsuccessful. *Id.* at 1442. Indeed, the district court explicitly stated that it could not “overcome the fact that the ‘result’ of the appeal was not in [Patin’s] favor.” *Id.* In so doing, the district court committed legal error, as it acted contrary to *In re Estate & Living Trust of Rose Miller*.

In *In re Estate & Living Trust of Rose Miller*, this court considered how Nevada’s offer of judgment jurisprudence applied to a judgment that a party obtained after an appeal. 125 Nev. at 552, 216

P.3d at 241. There, the plaintiffs sued to invalidate an estate plan revision, alleging that the defendant exercised undue influence over the testator. *Id.* The defendant made an offer of judgment of \$12,500 to both plaintiffs, which they rejected. *Id.* The jury found in favor of the plaintiffs, but this court reversed, ruling that substantial evidence did not support the jury's verdict and that the defendant deserved judgment as a matter of law. *Id.* Accordingly, the plaintiffs failed to beat the defendant's offers of judgment. *Id.* The defendant then moved for attorney fees and costs under NRCP 68 (governing offers of judgment), which the district court denied upon reconsideration, concluding that "offer of judgment rules do not apply to judgments won by appellate reversal." *Id.*

On appeal, this court began by expressly stating that a "judgment" under NRCP 68 "connotes a final judgment." *Id.* at 553, 216 P.3d at 242. Indeed, this court explained that trials and appeals "are naturally related" and final judgments may turn on resolution of an appeal. *Id.* Therefore, district courts must look to "the final judgment in the case" when resolving a request for attorney fees under NRCP 68, as NRCP 68's "cost-shifting provisions apply to judgments rendered on and

after an appeal.” *Id.* at 554, 216 P.3d at 242. Furthermore, NRCP 68’s cost-shifting provisions include fees that a party incurred “on and after appeal.” *Id.* at 555, 216 P.3d at 243. Accordingly, this court reversed the district court’s denial of the defendant’s motion for attorney fees and costs.

Here, Patin prevailed on her motions for summary judgment against Dr. Lee, 7 AA 979-83, beating her offers of judgment, 2 AA 289-94. Thus, the district court’s order granting Patin’s motions for summary judgment was the final judgment that this court’s precedent required the district court to consider in resolving Patin’s request for attorney fees as to Echols. Rather than cabin its analysis to the final judgment, the district court’s analysis turned on Patin’s unsuccessful appeal of the district court’s denial of her anti-SLAPP special motion to dismiss. 9 AA 1442. In other words, *Rose Miller* directed courts to consider the ultimate judgment in the case in determining whether an offer of judgment was more favorable. But, the District Court employed an erroneous analysis by considering the various segments of the litigation and excluding the prior appeal from an available recovery of attorney fees. Applying the District Court’s erroneous analysis to the facts of *Rose Miller*, this would

be akin to eliminating the defendant's ability to recover all attorney fees leading up to the judgment on the jury verdict because the defendant did not prevail at trial. However, the proper analysis under *Rose Miller* is to look at the eventual final judgment, which in this case is summary judgment in favor of Patin. Given that the district court's erroneous consideration of Patin's unsuccessful appeal was the sole basis for the district court's denial of Patin's requested attorney fees as to Echols, Patin urges this court to reverse the district court's erroneous denial and remand the matter for the district court to apply to appropriate legal standard.

CONCLUSION

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 reverse the district court's denial of attorney fees as to Echols and

remand the matter for the district court to apply the proper legal analysis.

Dated this 8th day of August 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 2,555 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 8th day of August 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *RESPONDENTS'/CROSS-APPELLANTS' REPLY BRIEF ON CROSS-APPEAL* with the Supreme Court of Nevada on the 8th day of August 2022. I shall make electronic service of the foregoing document in accordance with the Master Service List as follows:

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