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

NOTICE OF SUPPLEMENTAL AUTHORITIES AND MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

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INTRODUCTION

On the evening of November 30, 2022, this court scheduled oral argument in the instant matter for December 14, 2022 and directed the parties to "be prepared to address the offers of judgment underlying this appeal, AA 289-94, whether the[y] are ambiguous, and, if so, to discuss their proper interpretation." *Order Scheduling Oral Arg.* The parties did not raise these issues in the district court or in their briefs before this court. As such, Patin[1] provides this court with supplemental authorities according to NRAP 31(e). Patin also asks leave for the court to consider the included supplemental brief "in the interests of justice" and according to NRAP 2 ("On the court's own or a party's motion, the court may—to expedite its decision or for other good cause—suspend any provision of these Rules in a particular case and order proceedings as the court directs. . . ."). *Cf. Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("[I]t is our prerogative to consider issues a party raises in its reply brief, and we will address those issues if consideration of them is in the interests of justice.").

[1]This brief collectively refers to Ingrid Patin and Patin Law Group, PLLC as "Patin."

The parties would ordinarily not be able to raise new issues for the first time on appeal or for the first time in oral argument. *Old Aztec Mine v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."); *Polk v. State*, 126 Nev. 180, 184-86, 233 P.3d 357, 360-61 (2010) (granting the defendant's motion to strike the State's oral argument based upon issues raised at oral argument but not addressed in the appeal briefing). Since the court has raised the offer of judgment issues on its own accord, procedural due process dictates that Patin have an opportunity to respond. *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007) ("This court has recognized that procedural due process requires notice and an opportunity to be heard.") (internal quotations omitted). Therefore, Patin asks the court to consider her supplemental authorities, or alternatively, Patin's supplemental brief in resolving the offer of judgment issues, if necessary, to reach a disposition of this appeal. *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981) ("If a decision below is correct, it will not be disturbed on appeal even though the lower court relied upon wrong reasons.").

SUPPLEMENTAL AUTHORITIES

In Patin's answering brief, she argues that this court should apply the plain language of the offers of judgment and that any other construction would violate the letter and spirit of NRCP 68 (1998). RAB 10, 11, 12-13, 27. Due to the new issues raised by this court, Patin identifies the following supplemental authorities that support Patin's position in her answering brief.

Galardi v. Naples Polaris, LLC , 129 Nev. 306, 309, 301 P.3d 364, 366 (2013) ("[A]mbiguity does not arise simply because the parties disagree on how to interpret their contract.").

Fleischer v. August, 103 Nev. 242, 245, 737 P.2d 518, 520 (1987) (considering the totality of the circumstances, including the purpose of NRCP 68, when determining whether an offer of judgment was ambiguous).

Nev. State Educ. Ass'n v. Clark Cty. Educ. Ass'n, 137 Nev., Adv. Op. 8, 482 P.3d 665, 673 (2021) ("[An interpretation is not reasonable if it makes any contract provisions meaningless, or if it leads to an absurd result.").

Vegas United Inv. Series 105, Inc. v. Celtic Bank Corp., 135 Nev., Adv. Op. 61, 453 P.3d 1229, 1231-32 (2019) ("Contractual provisions should be harmonized whenever possible.").

11 William A. Lord, *Williston on Contracts* § 30:10 (4th ed. 2012) ("[P]articular words or phrases in a contract should generally not be considered in a vacuum and isolated from the context but rather in light of the entire contract and the intentions of the parties as so manifested.").

McCrary v. Bianco, 122 Nev. 102, 109, 131 P.3d 573, 577 (2006) ("[B]oth statutory and contractual fees are excluded from the comparison formula.").

Albios v. Horizon Cmtys., Inc., 122 Nev. 409, 426, 132 P.3d 1022, 1033 (2006) (allowing for purposes of comparison only, the prevailing party to add pre-offer interest and pre-offer costs to a judgment amount to determine whether the eventual judgment was more favorable than an offer of judgment that was inclusive or silent regarding costs and interest).

Shelton v. Shelton, 119 Nev. 492, 497, 78 P.3d 507, 510 (2003) ("The best approach for interpreting an ambiguous contract is to delve

beyond its express terms and examine the circumstances surrounding the parties' agreement in order to determine the true mutual intentions of the parties.").

Prince v. Invensure Ins. Brokers, Inc., 232 Cal. Rptr. 3d 887, 893-94 (Ct. App. 2018) ("Permitting a rule of overly strict construction of the language of the offer, despite the parties' actual knowledge of the other's intent . . . would allow the party declining the [ ] settlement offer to assert a 'Gotcha!' defense to the statutory requirement to pay the offering party's postoffer costs.").

Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., 127 Nev. 331, 343, 255 P.3d 268, 276 (2011) ("Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge.").

ARGUMENT

I. *Any ambiguity in the offers of judgment does not change the outcome*

An offer of judgment is not ambiguous simply because the parties interpreted it differently. *See Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013) ("[A]mbiguity does not arise simply because the parties disagree on how to interpret their contract."). An offer is ambiguous only if there are two equally reasonable ways to

interpret it. *Id*. If there is only one reasonable way to interpret the offer, then there is no ambiguity. *Id*. (citing *Parman v. Petricciani*, 70 Nev. 427, 430-32, 272 P.2d 492, 493-94 (1954) (concluding that summary judgment was appropriate because the interpretation offered by one party was unreasonable and, therefore, the contract contained no ambiguity), *abrogated on other grounds by Wood v. Safeway, Inc*., 121 Nev. 724, 121 P.3d 1026 (2005)).

To determine whether an offer is ambiguous, this court must consider the language of the offer and the surrounding circumstances, while also considering the purposes of the relevant rules controlling offers of judgment. *See Fleischer v. August*, 103 Nev. 242, 245, 737 P.2d 518, 520 (1987) (considering the totality of the circumstances, including the purpose of NRCP 68, when determining whether an offer of judgment was ambiguous). All these factors weigh in favor of Patin's position and the enforcement of the offers of judgment against Dr. Lee.

Since the issues involving the offers of judgment were not briefed, Patin does not have notice of exactly which provisions within the offers may be ambiguous. To contemplate the issues before the court, Patin outlines some of the possible issues and their proper interpretation.

In both offers of judgment, the only potential ambiguity is in the first full paragraph of each offer. *See* 2 AA 289, 292. However, the second full paragraph of each offer clarifies any ambiguity:

> 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 Plaintiff, TON VINH LEE, Defendant, INGRID 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 Defendant, INGRID PATIN.

Id. at 289-90, 293.

These provisions, in both offers of judgment, state that Patin will pay the offered amounts ($1,000 for each offer) to Dr. Lee. Thus, there is no ambiguity in these provisions. Indeed, there is no other way to read these provisions.

With respect to the first full paragraph, the offers of judgment state the following:

> Pursuant to Rule 68 of the N.R.C.P., Defendant, INGRID PATIN, hereby offers to allow judgment to be taken in her favor, only, and against Plaintiff, TON VINH LEE, in the above-entitled matter in the total amount of ONE THOUSAND AND NO/l00THS 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, in the above-captioned action.

Id. at 289, 292.

If this court were to read these provisions on their face as ambiguous because it may be unclear whether Patin is willing to pay $1,000 (for each offer of judgment) or whether Patin's offer is to have her receive $1,000 (for each offer of judgment), the ambiguity is resolved when reading the second full paragraph. That is, when the first and second full paragraphs are read together, any ambiguity is resolved about Patin's offer to ***pay*** $1,000 for each offer. Importantly, if this court were to read the first full paragraph in isolation as Patin requesting that $1,000 be paid to her, it would make the second full paragraph meaningless, which is contrary to Nevada law. *See Nev. State Educ. Ass'n v. Clark Cty. Educ. Ass'n*, 137 Nev., Adv. Op. 8, 482 P.3d 665, 673 (2021) ("[An interpretation is not reasonable if it makes any contract provisions meaningless, or if it leads to an absurd result.") (citing *Washoe Cty. Sch. Dist. v. White*, 133 Nev. 301, 305, 396 P.3d 834, 839 (2017)); *Vegas United Inv. Series 105, Inc. v. Celtic Bank Corp.*, 135 Nev., Adv. Op. 61, 453 P.3d 1229, 1231-32 (2019) ("Contractual provisions should be harmonized whenever possible, and no provision should be rendered meaningless." (internal citations and

quotations omitted)); 11 William A. Lord, *Williston on Contracts* § 30:10 (4th ed. 2012) ("[P]articular words or phrases in a contract should generally not be considered in a vacuum and isolated from the context but rather in light of the entire contract and the intentions of the parties as so manifested."). Thus, when reading the first and second full paragraphs of the offers of judgment together, the court should conclude that there is no ambiguity in the offers of judgment, such that they should be enforced against Dr. Lee and in favor of Patin.

As outlined in the answering brief, the version of NRCP 68 that existed at the time Patin made her offers of judgment governs. RAB 4 n.1. Under NRCP 68(g) (1998) district courts do not consider the offeree's pre-offer attorney fees.[2] *See McCrary v. Bianco*, 122 Nev. 102, 109, 131 P.3d 573, 577 (2006) ("[B]oth statutory and contractual fees are excluded from the comparison formula."). In any event, Patin obtained a complete defense against Dr. Lee. Thus, Nevada law does not entitle him to add even pre-offer interest or pre-offer costs because he had no legal basis to recover interest or costs from Patin. *See, e.g., Albios v. Horizon*

[2]Even if NRCP 68(g) (2019) were applicable, no contract or law permits Dr. Lee to recover attorney fees against Patin. Thus, there would be no comparison of pre-offer attorney fees.

Cmtys., Inc., 122 Nev. 409, 426, 132 P.3d 1022, 1033 (2006) (allowing for purposes of comparison only, the prevailing party to add pre-offer interest and pre-offer costs to a judgment amount to determine whether the eventual judgment was more favorable than an offer of judgment that was inclusive or silent regarding costs and interest). Nor did Dr. Lee present any evidence of pre-offer costs or pre-offer interest.[3] Therefore, under any set of circumstances, the court should affirm the district court's enforcement of Patin's offers of judgment against Dr. Lee.

II. *Dr. Lee's stated understanding of the offers of judgment prevents him from now taking a contrary position*

If this court were to determine that the offers of judgment are ambiguous, then the court should consider the record evidence from the parties to discern their understanding of the offers when they were made. *See Fleischer*, 103 Nev. at 245, 737 P.2d at 520. Courts have likened offers made under NRCP 68 to contract offers. *Fleischer*, 103 Nev. at 246, 737 P.2d at 521. Nevada precedent establishes that courts should

[3]This court should note that Dr. Lee does not meaningfully challenge the statement from Patin's counsel that the plain language of the offers of judgment, 2 AA 289-294, only included Patin's fees, costs, and interest, 9 AA 1460, 1474-75.

consider extrinsic evidence of the parties' intent when a contract contains ambiguity:

> The best approach for interpreting an ambiguous contract is to delve beyond its express terms and examine the circumstances surrounding the parties' agreement in order to determine the true mutual intentions of the parties. This examination includes not only the circumstances surrounding the contract's execution, but also ***subsequent acts and declarations of the parties***.

Shelton v. Shelton, 119 Nev. 492, 497, 78 P.3d 507, 510 (2003) (emphasis added) (internal quotations omitted).

In fact, this court has expressly endorsed the practice of considering extrinsic evidence to determine the understanding of the parties when interpreting offers of judgment. *Fleischer*, 103 Nev. at 246, 737 P.2d at 521. In *Fleischer*, the parties disputed whether an offer to resolve a case for $50,000 included certain costs, or whether those costs would be added on top. 103 Nev. at 245, 737 P.2d at 520. This court noted that the text of the offer did not expressly state whether the figure already included costs, and suggested that the offer was "poorly worded." *Id.* Instead of simply resting on the text of the offer, or construing the "poorly worded" offer against the offeror, the court looked to extrinsic evidence as to what the parties intended. *Id.* Specifically, the court

explained that the offeree ***knew*** the figure already included costs because that point had been clarified in a subsequent phone call. *Id.*

A contrary ruling, which looks solely to the language of the offer in the light most favorable to the offeree, would allow an offeree to "game the system" by rejecting an offer, then claiming the offer was ambiguous after an unfavorable verdict because a ***hypothetical*** person might not have understood it—even if the offeree knew the offeror's intent. *Prince v. Invensure Ins. Brokers, Inc.*, 232 Cal. Rptr. 3d 887, 893-94 (Ct. App. 2018) ("Permitting a rule of overly strict construction of the language of the offer, despite the parties' actual knowledge of the other's intent . . . would allow the party declining the [ ] settlement offer to assert a 'Gotcha!' defense to the statutory requirement to pay the offering party's postoffer costs."); *see also Boorstein v. City of New York*, 107 F.R.D. 31, 35 (S.D.N.Y. 1985). Such a ruling would undermine NRCP 68 by providing an incentive for parties to reject reasonable settlement offers, while avoiding the penalty provisions of NRCP 68(f).

The record before this court demonstrates that Dr. Lee consistently treated Patin's offers of judgment as offering him $1,000 for each offer, such that any resulting ambiguity in Patin's offers of judgment

would still be enforced against Dr. Lee.

For example, in opposing Patin's motions for attorney fees, he argued that the $1,000 amounts from Patin's offers of judgment were improper as to both timing and amount in the district court's analysis of the factors under *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983). 9 AA 1295, 1301, 1310, 1314-15. Within these arguments, Dr. Lee characterized Patin's offers of judgment as Patin offering to pay Dr. $1,000 for each offer. *Id.*

Dr. Lee filed supplemental oppositions attempting to argue that the attorney fees he allegedly spent on his own attorney should offset Patin's two offers of judgment, which would be improper under *Albios*. Patin has already addressed this issue in her answering brief. RAB 28 n.28. But, Patin brings up this point again to illustrate that Dr. Lee consistently treated Patin's offers of judgment as offering to pay him $1,000 for each offer. 9 AA 1349, 1360.

Dr. Lee's counsel repeated these same characterizations of Patin's offers of judgment in the hearing. *See id.* at 1468, 1475-76. Based upon the uniform understanding of all parties, the district court also accepted this characterization. *Id.* at 1477. Even Dr. Lee's sworn

declaration acknowledged that Patin's offers of judgment intended to offer him $1,000 for each offer. *Id.* at 1347, 1358.

Dr. Lee even went so far as to file motions to reconsider in the district court to repeat his offset argument and, once again, acknowledged, "If Plaintiff had accepted Defendants' offers of judgment, Plaintiff would have received $1,000.00 for each Defendant . . . ." *Id.* at 1402.

If the court reaches the issue of considering extrinsic evidence to resolve any ambiguity, in accordance with *Fleischer*, *Shelton*, and other authorities, Dr. Lee has repeatedly agreed that Patin's offers of judgment were offers to pay him $1,000 for each offer. Thus, the court should enforce the offers of judgment against Dr. Lee and in favor of Patin. Having taken these positions, Dr. Lee is bound by his position as a judicial admission. *See Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127 Nev. 331, 343, 255 P.3d 268, 276 (2011) ("Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge.") (internal quotations omitted).

CONCLUSION

Due to the new issues raised by this court in its November 30, 2022 order regarding Patin's offers of judgment, Patin asks the court to take into account her supplemental authorities, at a minimum. Patin also asks the court to grant leave and consider her supplemental brief on these same issues.

Dated this 9th day of December 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 2,967 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 9th day of December 2022.

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I hereby certify that I electronically filed the foregoing *NOTICE OF SUPPLEMENTAL AUTHORITIES AND MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF* with the Supreme Court of Nevada on the 9th day of December 2022. I shall make electronic service of the foregoing document in accordance with the Master Service List as follows:

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