IN THE COURT OF APPEALS OF THE STATE OF NEVADA

O.P.H. OF LAS VEGAS, INC.,
Appellant,
vs.
DAVE SANDIN; AND SANDIN & CO.,
Respondents.

No. 76966-COA

ORDER OF AFFIRMANCE

O.P.H. of Las Vegas, Inc. (OPH) appeals from a final judgment in a tort action, challenging an order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

OPH, the owner-operator of an Original Pancake House restaurant, retained respondents, Dave Sandin and Sandin & Co. (collectively, Sandin) as its insurance broker. In 2011, following a recommendation from Sandin, OPH entered into a "Businessowners Protector Policy" with Oregon Mutual Insurance Company. In July 2012, OPH failed to pay its monthly premium to Oregon Mutual. In response, Oregon Mutual sent a notice to OPH stating that if OPH failed to pay the premium by August 15, it would cancel OPH's policy on August 16, 2012. OPH failed to pay the premium before the cancellation date indicated in the notice.[1] On August 17, 2012, OPH's restaurant burned to the ground as the result of a fire. OPH reported this loss to Sandin, who thereafter learned that Oregon Mutual had canceled the policy due to nonpayment. Oregon Mutual denied coverage for the loss caused by the fire.

[1]We do not recount the facts except as necessary to our disposition.

OPH filed a complaint against Sandin and Oregon Mutual, asserting claims against Sandin for fraud in the inducement, fraud, breach of fiduciary duty, and negligence.[2] Sandin filed a motion to dismiss, which the district court denied without prejudice, finding that OPH had met Nevada's notice pleading standard. Sandin thereafter served an offer of judgment in the amount of $2,000 pursuant to NRCP 68 and NRS 17.115 (2005).[3] Over two years of litigation followed. After the close of discovery, Sandin and Oregon Mutual filed motions for summary judgment, which the district court granted.

Thereafter, Sandin brought a motion for attorney fees and costs, seeking to recover their attorney fees as the prevailing party under NRCP 68 and NRS 17.115. Sandin requested a total of $140,857 in fees and $20,948.63 in costs. The district court orally granted the motion for costs in part—reducing the expert witness fee to the statutorily mandated $1,500—and took Sandin's motion for attorney fees under advisement.[4]

Meanwhile, OPH appealed the district court's order granting Sandin's and Oregon Mutual's motions for summary judgment.[5] After the supreme court affirmed summary judgment in favor of Sandin, Sandin filed

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[2]Oregon Mutual is not a party to this appeal.

[3]The Nevada Legislature repealed NRS 17.115 on October 1, 2015. 2015 Nev. Stat., ch. 442, § 41, at 2569.

[4]OPH does not appeal the district court's award of costs, which totaled $7,546.55 after the reduction in expert witness fees.

[5]The Nevada Supreme Court affirmed the ruling of the district court as to Sandin, but reversed and remanded the district court's grant of summary judgment as to Oregon Mutual. *See O.P.H. of Las Vegas, Inc. v. Or. Mut. Ins. Co.*, 133 Nev. 430, 401 P.3d 218 (2017).

a "Motion for Decision on Attorneys' Fees and Motion for Additional Attorneys' Fees and Costs Associated with Appeal," requesting additional fees in the amount of $18,395.42 and costs in the amount of $97.92. The district court held a hearing on Sandin's motion. After oral argument, the district court granted the motion, reducing the award by $32,000 to account for the time period the case was in arbitration but ultimately awarding Sandin $127,242 in fees and $7,546.55 in costs. OPH moved the district court to reconsider, arguing that the court misapplied the *Beattie* factors in its earlier order. The district court entered an order denying OPH's motion for reconsideration, and this appeal followed.

On appeal, OPH argues that the district court abused its discretion by failing to properly apply the factors set forth in *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983), when it awarded attorney fees to Sandin. Alternatively, OPH argues that the district court misapplied the factors in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), and that any award of fees is unreasonable. In response, Sandin argues that the district court did not abuse its discretion and properly awarded attorney fees under *Beattie* and *Brunzell*.[6]

Under NRS 17.115 and NRCP 68, a party may recover attorney fees and costs if the other party rejects an offer of judgment and fails to obtain a more favorable outcome. In *Beattie*, the Nevada Supreme Court set out

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[6]Sandin also presents a jurisdictional argument, alleging that OPH's notice of appeal is untimely. We reject this argument, as OPH timely filed its notice of appeal after final judgment was entered in this case on September 11, 2018. *See, e.g., Consol. Generator-Nev., Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) ("[S]ince [the appellant] is appealing from a final judgment the interlocutory orders entered prior to the final judgment may properly be heard by this court."). Therefore, this court has jurisdiction pursuant to NRAP 3A(b)(1).

four factors that must be considered when determining whether to award attorney fees and costs under NRCP 68:

> (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.

99 Nev. at 588-89, 668 P.2d at 274. We review a district court's application of the *Beattie* factors for an abuse of discretion. *LaForge v. State, Univ. & Cmty. Coll. Sys. of Nev.*, 116 Nev. 415, 423, 997 P.2d 130, 136 (2000). "Such an abuse occurs when the court's evaluation of the *Beattie* factors is arbitrary or capricious." *Frazier v. Drake*, 131 Nev. 632, 642, 357 P.3d 365, 372 (Ct. App. 2015). "Although explicit findings with respect to [the *Beattie*] factors are preferred, the district court's failure to make explicit findings is not a per se abuse of discretion." *Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001) (citing *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1049, 881 P.2d 638, 642 (1994)). "If the record clearly reflects that the district court properly considered the *Beattie* factors, we will defer to its discretion." *Id.*

We conclude that the district court did not abuse its discretion when awarding attorney fees under NRCP 68. Although the district court's written order made no express findings as to the first and third *Beattie* factors, "[t]he district court need not . . . make explicit findings as to all of the factors where support for an implicit ruling regarding one or more of the factors is clear on the record." *See Schwartz*, 110 Nev. at 1049, 881 P.2d at 642. We conclude that support for an implicit ruling regarding all of the *Beattie* factors is clear on the record.

First, the district court expressly stated that when "[w]eighing all of the factors articulated in *Beattie* and *Brunzell*, an award of post appeal attorneys' fees and costs in favor of the Sandin Defendants is warranted." Second, the record in this case reveals that the district court considered and weighed all of the *Beattie* factors when deciding to award fees in favor of Sandin. In addition to reviewing three sets of moving papers on the application of the *Beattie* factors to this case, the district court also held two hearings on Sandin's motion for attorney fees, and one hearing on OPH's motion for reconsideration, where the district court discussed its reasoning under the *Beattie* factors.[7] Although the district court did not make express findings on each of the *Beattie* factors in its order, we conclude that the district court's lengthy consideration of the *Beattie* factors in the record is enough to demonstrate that it did not abuse its discretion in this instance. *See Schwartz*, 110 Nev. at 1049-50, 881 P.2d at 642-43 (concluding that the district court's review of written points and authorities addressing the *Beattie* factors, and "indicat[ing]" in its order that it had considered and applied the factors supported an award of attorney fees); *Tutor Perini Bldg.*

[7]Although we conclude that the district court did not abuse its discretion in weighing the *Beattie* factors, we take the opportunity to reiterate the supreme court's caution in *Schwartz*, and "we caution the trial bench to provide written support under the *Beattie* factors for awards of attorney's fees made pursuant to offers of judgment even where the award is less than the sum requested," as "[i]t is difficult at best for this court to review claims of error in the award of such fees where the courts have failed to memorialize, in succinct terms, the justification or rationale for the awards." *Schwartz*, 110 Nev. at 1050, 881 P.2d at 643.

Corp. v. Show Canada Indus., Docket No. 74299 (Order of Affirmance, May 29, 2019) (applying *Schwartz*).[8]

Next, we turn to whether the district court abused its discretion in applying the *Brunzell* factors, and whether the award of fees is unreasonable under *Brunzell*. The decision to award attorney fees is within

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[8]The dissent would reverse the award of attorney fees, concluding that the district court failed to make all of the appropriate *Beattie* findings. But individual findings are only a means to accomplish an end, not an end in and of themselves. Although preferred (*see supra* note 7), detailed findings are not necessary, particularly when, as here, the record as a whole supports the district court's award. *Schwartz*, 110 Nev. at 1050, 881 P.2d at 643. As a reminder, OPH missed its July 2012 payment, which means the last payment it could have made was the June 2012 payment, on or about June 26, approximately 50 days before the fire on August 17th. Thus, OPH, in spite of arguing that it did not receive notice that its policy was canceled, must have known that it had not paid its monthly July premium to ensure that its policy remained in effect, and certainly was aware of this before it filed suit. The dissent emphasizes that the district court had previously denied a motion to dismiss and argues that this should have been a factor that weighed in favor of OPH in denying Sandin's request for attorney fees based on Sandin serving the offer of judgment the day after the denial. But motions to dismiss under NRCP 12(b)(5) measure only the adequacy of the pleadings, assuming that all factual allegations set forth in it are accepted as true. Under NRCP 12(b)(5), the court must construe the pleadings liberally and draw every inference in favor of the nonmoving party, even if it is later determined that the allegations cannot be supported. Further, the district court ultimately granted summary judgment in Sandin's favor, which the supreme court affirmed on appeal. In considering whether to award Sandin attorney fees, the district court could have easily concluded that OPH's lawsuit against Sandin had little chance of success and further concluded that OPH should have accepted Sandin's offer of judgment in order to avoid a subsequent fee award, despite the fact that the offer was served at an early stage of the litigation and of nominal value. Therefore, it is not inconsistent for a court to conclude both that a complaint cannot be dismissed under the rigorous standards of NRCP 12(b)(5), and that the plaintiff should be responsible for attorney fees for having failed to accept an early offer of nominal value.

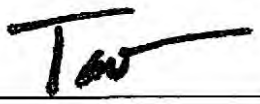
the sound discretion of the trial court, whose decision will not be disturbed on appeal absent a manifest abuse of that discretion. *Nelson v. Peckham Plaza P'ships*, 110 Nev. 23, 26, 866 P.2d 1138, 1139-40 (1994).

The fourth *Beattie* factor implicates *Brunzell*, and failure to consider the *Brunzell* factors within a *Beattie* analysis is an abuse of discretion. *See Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 81-82, 319 P.3d 606, 615-16 (2014) (concluding that the district court's failure to consider the *Brunzell* factors within its *Beattie* analysis constitutes an abuse of discretion). Under *Brunzell*, the district court must consider: (1) "the qualities of the advocate"; (2) "the character of the work to be done"; (3) "the work actually performed by the lawyer"; and (4) the result obtained. *Brunzell*, 85 Nev. at 349, 455 P.2d at 33. Similar to the *Beattie* factors, the district court need not make express findings for each *Brunzell* factor in its written order, although such written findings are preferred. Instead, "the district court need only demonstrate that it considered the required factors, and the award must be supported by substantial evidence." *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015).

In its order, the district court identified the *Brunzell* factors and, as noted above, ultimately found that when "[w]eighing all of the factors articulated in *Beattie* and *Brunzell*, an award of post appeal attorneys' fees and costs in favor of the Sandin Defendants is warranted." On the record, the district court expressly analyzed the *Brunzell* factors and after reducing the fees by $32,000 to compensate for the time the case was in arbitration, found that "[e]very other factor is fully satisfied under *Brunzell*." The record also reveals that the district court reviewed Sandin's billing records and specifically questioned counsel on some of the entries. As the record reflects that the district court considered the *Brunzell* factors, we conclude that the

district court did not abuse its discretion, and that the award of fees in the amount of $127,242 in favor of Sandin is supported by substantial evidence. Therefore, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Tao

_____, J.
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GIBBONS, C.J., dissenting:

This case presents the issue of whether a district court can accurately and fairly enter a large judgment for attorney fees against a losing party when the court does not make findings as to, or balance all of the factors identified in *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983). I conclude that it is not legally accurate, fair, or good policy to allow such a judgment to stand. Therefore, I would vacate the attorney fee award and remand for the district court to engage in the correct process and follow the well-established procedures.

I.

OPH, the owner-operator of an Original Pancake House restaurant, hired Dave Sandin and Sandin & Co. (hereinafter Sandin), as its insurance broker. In 2011, upon Sandin's recommendation, OPH purchased an insurance policy from Oregon Mutual Insurance Company. OPH, however, failed to pay Oregon Mutual its July 2012 premium. Oregon Mutual informed OPH that if it did not receive the premium payment by

August 15, it would cancel OPH's policy the following day. OPH did not pay the premium but claims it never received the cancellation notice. Tragically, on August 17, 2012, the day after Oregon Mutual canceled OPH's policy, the Original Pancake House burned down. OPH reported the fire to Sandin, who then contacted Oregon Mutual. OPH later claimed that is when it first learned that Oregon Mutual had canceled its policy due to nonpayment. Thus, OPH had no insurance coverage for its losses.

In November 2012, OPH filed a complaint against Sandin and Oregon Mutual, asserting claims against Sandin for fraud in the inducement, fraud, breach of fiduciary duty, and negligence. In essence, OPH asserted that Sandin had assumed a duty through its course of conduct to notify OPH of the impending policy cancellation and that it failed to do so. In December 2012, Sandin filed a motion to dismiss under NRCP 12(b)(5), asserting no duty existed. The district court orally denied the motion to dismiss at the hearing on February 13, 2013, allowing all claims to proceed. The next day, Sandin served an offer of judgment for $2,000 on OPH, which was not accepted. OPH later served an offer of judgment on Sandin that exceeded $500,000, which also was not accepted. Over two years of extensive discovery followed the initial offer of judgment. After the close of discovery, Sandin and Oregon Mutual filed motions for summary judgment, which the district court granted.

In September 2015, Sandin brought a motion for attorney fees and costs, seeking to recover its attorney fees as the prevailing party under NRCP 68 and NRS 17.115. Sandin requested a total of $140,857 in fees and $20,948.63 in costs. The district court granted the motion for costs in part and took Sandin's motion for attorney fees under advisement. The district court expressed doubt at the hearing as to the reasonableness of the offer of

judgment; it noted that the $2,000 settlement offer likely would not have covered the initial litigation costs associated with successfully defending the motion to dismiss.

OPH appealed the district court's order granting Sandin's motion for summary judgment and the supreme court affirmed summary judgment in favor of Sandin. *See O.P.H. of Las Vegas, Inc. v. Or. Mut. Ins. Co.*, 133 Nev. 430, 401 P.3d 218 (2017) (reversing and remanding the grant of summary judgment as to Oregon Mutual). Sandin then filed a motion for a decision on the attorney fees and for additional attorney fees. The district court held a hearing on Sandin's motion in February 2018, three years to the month after denying the motion to dismiss. After oral argument, the district court granted the motion, ultimately awarding Sandin $127,242 in attorney fees. The court stated that the parties acted in good faith, and it was reasonable for OPH to proceed with the case. The district court, however, concluded that the settlement offer was also reasonable, and essentially, that OPH had a challenging case. The court did not directly address whether it was grossly unreasonable to reject the $2,000 settlement offer made three years before. The court then approved the fees.

The district court summarily concluded in the written order that the $2,000 offer was reasonable as to timing and amount. Also, that the amount of fees sought was mostly reasonable. The court did not address if the case was brought in good faith or if it was grossly unreasonable to reject the $2,000 offer. The court purported to have balanced all of the *Beattie* factors but did not explain what that meant.

OPH moved the district court to reconsider, arguing that the court misapplied the *Beattie* factors in its order. The district court stated at the hearing for reconsideration that OPH acted in good faith when pleading

the case, but also the district court had never said that it was in good faith not to accept the $2,000 offer. The court commented that not a lot of detail is needed when analyzing the *Beattie* factors. The court entered an order summarily denying OPH's motion for reconsideration, and this appeal followed.

On appeal, OPH argues that the district court abused its discretion by failing to apply all four factors set forth in *Beattie v. Thomas*. Additionally, OPH argues that the district court misapplied the factors in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), and that the amount of the awarded fees was unreasonable. I agree that the district court failed to apply the first and third *Beattie* factors, and failed to balance them against the second factor, and thus misapplied *Beattie*. Further, the court failed to make adequate findings as to the second *Beattie* factor. Therefore, the district court's judgment as to attorney fees should be vacated and the case remanded for the district court to analyze all of the factors, make proper findings, and engage in a balancing of the first three factors against each other to determine if attorney fees should be awarded under the facts of this case. Thus, it is not relevant whether the district court correctly applied the fourth *Beattie* factor using *Brunzell* to determine the reasonable amount of the attorney fees, and I only address the first three factors.

Under NRCP 68, a party may recover attorney fees and costs if the other party rejects an offer of judgment and fails to obtain a more favorable outcome. In 1983, the Nevada Supreme Court established four factors in *Beattie v. Thomas* that must be considered when determining whether it can award attorney fees under NRCP 68:

> (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 588-89, 668 P.2d at 274. This court considered the application of the *Beattie* factors in *Frazier v. Drake*, 131 Nev. 632, 357 P.3d 365 (Ct. App. 2015), and *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 429 P.3d 664 (Ct. App. 2018). In *Frazier*, we noted that "the first three factors all relate to the parties' motives in making or rejecting the offer and continuing the litigation, whereas the fourth factor relates to the amount of fees requested . . . [but] [n]one of these factors are outcome determinative . . . and thus, each should be given appropriate consideration." 131 Nev. at 642, 357 P.3d at 372 (internal citations omitted).

Further, as it relates to the first three factors, we pointed out that the supreme court has 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." *Id.* at 643, 357 P.3d at 373 (alteration in original) (quoting *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998)). In addition to noting the public policy supporting the consideration of all of the *Beattie* factors, we recognized in *Frazier* that "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 [the fourth *Beattie* factor] becomes irrelevant, and cannot, by itself, support a decision to award attorney fees to the offeror." *Id.* at 644, 357 P.3d at 373.

A district court's application of the *Beattie* factors is reviewed for an abuse of discretion. *LaForge v. State, Univ. & Cmty. Coll. Sys. of Nev.*, 116 Nev. 415, 423, 997 P.2d 130, 136 (2000). "Such an abuse occurs when the court's evaluation of the *Beattie* factors is arbitrary or capricious." *Frazier*, 131 Nev. at 642, 357 P.3d at 372. "Claims for attorney fees under NRS 17.115 and NRCP 68 are fact intensive," and "[i]f the record clearly reflects that the district court properly considered the *Beattie* factors, we will defer to its discretion." *Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428-29 (2001). "[T]he district court's failure to make explicit findings is not a per se abuse of discretion." *Id.* at 13, 16 P.3d at 428.

I conclude that the district court abused its discretion when awarding attorney fees under NRCP 68 as the record does not clearly reflect that the district court properly considered the first three *Beattie* factors. Although the district court stated in its order that it considered "all of the factors articulated in *Beattie* and *Brunzell*, [and] an award of post appeal attorneys' fees and costs in favor of the Sandin Defendants is warranted," the order itself specifically fails to address the first and third *Beattie* factors, (*i.e.*, whether OPH's claims were brought in good faith, and whether OPH was grossly unreasonable or acting in bad faith in rejecting Sandin's offer). Further, despite this being a "fact intensive" inquiry, the court made no findings and provided no explanation as to how the $2,000 offer was reasonable in both timing and amount, and I must reiterate that OPH's business had just been destroyed. Without findings as to the first and third *Beattie* factors, and inadequate findings as to the second factor, it is impossible on the face of the order to understand how the court could have balanced all of the factors. The record on appeal should provide support to show the district court properly considered and balanced these factors, but it

does not. *See Wynn*, 117 Nev. at 13, 16 P.3d at 428-29 ("If the record clearly reflects that the district court properly considered the *Beattie* factors, we will defer to its discretion.").

Having reviewed the record on this matter, including the transcripts of the (1) November 17, 2015, (2) February 6, 2018, and (3) May 1, 2018 hearings, I conclude that the district court failed to properly consider or apply the first and third *Beattie* factors, and its legal conclusion as to the second factor is unsupported by the record. Specifically, at the November hearing—the hearing closest in time to the actual rejection of the offer—the court expressed the view that OPH was entitled to try and prove its case, implying either that OPH brought the case in good faith or it was not acting in a grossly unreasonable way by rejecting the offer. My conclusion is further supported by the fact that summary judgment was reversed as to Oregon Mutual because the notice of cancellation did not comply with NRS 687B.360, which tends to show that OPH's lawsuit was not brought in bad faith. *See O.P.H.*, 133 Nev. at 430, 401 P.3d at 218. In addition, the district court was quite skeptical as to the reasonableness of the offer by repeatedly, rhetorically questioning the amount of the $2,000 offered in light of the initial litigation costs already incurred. The court made no findings, but its response to the arguments at the hearing suggested that perhaps none of the first three factors in *Beattie* favored Sandin. The court said scantly anything that implied any of the factors favored Sandin. The court then, unfortunately, took the matter under advisement.

The second hearing was several years later after the supreme court affirmed summary judgment as to Sandin. *See O.P.H.*, 133 Nev. at 430, 401 P.3d at 218 (reversing the district court's grant of summary judgment in favor of Oregon Mutual but affirming as to Sandin). At this hearing the

district court again questioned whether $2,000 was a legitimate offer when $35,000 was spent defending Sandin during the arbitration process. The court further explicitly stated, "I thought pretty much everybody was operating in good faith here." "So I mean it wasn't unreasonable to proceed, but on the other hand, it was certainly a reasonable offer." The court further commented, "I think everybody realized it was a big claim." The court recognized that the discovery was handled properly and the depositions were needed. The court made no finding that it was grossly unreasonable to reject the offer. Therefore, factors one and two were considered in part, but in a cursory fashion, and factor three was not directly considered at all. Further, there was no attempt to make findings of fact using all the components of each factor, or to balance the factors and explain why factor two outweighed factors one and three.

The May reconsideration hearing was almost three months later. The district court again recognized that OPH's case was pleaded in good faith. Therefore, it confirmed it had impliedly found factor one favored OPH. It did not discuss factor two at this hearing. The court did not a make a finding as to factor three, but did misstate it when it commented repeatedly that it never said it was reasonable to reject the $2,000 offer or that it was in good faith to reject it (factor three is whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith). Ironically, the court commented that not a lot of detail is required under the *Beattie* factors.

Therefore, a careful review of the three hearings reveals that the district court considered the three factors only in the broadest sense. The court impliedly found factor one favors OPH even though that finding did not make its way into the written orders; factor two was not analyzed as to both

timing and amount, and the only finding was the legal conclusion that $2,000 was reasonable and in good faith; factor three was misstated and never analyzed or applied at all. Finally, no balancing occurred during the hearings or in the written orders. Only a bare conclusion was announced. The court focused its attention on the fourth *Beattie* factor, which should not have been addressed until the first three factors were fully considered and balanced against each other. *See Frazier*, 131 Nev. at 644, 357 P.3d at 373 ("[T]he fourth *Beattie* factor . . . does not have any direct connection with the questions of whether a good-faith attempt at settlement has been made or whether the offer is an attempt to force a plaintiff to forego legitimate claims.").

It is important to note that the first three *Beattie* factors involve a qualitative analysis, not a quantitative analysis. Each factor mandates the district court to evaluate and measure something different. Factor one focuses on the good faith of the plaintiff at the moment the complaint is filed. In this case, that was three months after OPH suffered a catastrophic loss and claimed it did not receive notice of the impending policy cancellation from either Sandin or Oregon Mutual. Further, OPH advanced a recognized legal theory. It does not matter that the complaint was ultimately found to be non-meritorious as to Sandin. *See Assurance Co. of Am. v. Nat'l Fire & Marine Ins. Co.*, No. 2:09–CV–1182, 2012 WL 6626809, *3 (D. Nev. Dec. 19, 2012) ("Plaintiffs, incorrectly in hindsight, believed they had a good chance of success on the merits and pursued the claims in good faith."); *Max Baer Prod. Ltd. v. Riverwood Partners, LLC*, No. 3:09–CV–00512, 2012 WL 5944767, *3 (D. Nev. Nov. 26, 2012) ("Claims may be unmeritorious and still be brought in good faith."). Therefore, it is easy to see why the district court commented at the hearings that OPH acted in good faith. However, it is puzzling that

the district court did not include that finding in its written order. *Cf.* NRS 7.085 (providing that the court shall sanction an attorney that has brought a case not grounded in fact, not warranted by existing law, or that does not have a good faith argument for changing the law).

The second factor has multiple components. First, the defendants have to act in good faith, and then second, they must make a reasonable offer, both in its (1) timing and (2) amount. Sandin concedes in its answering brief that the issue of timing under factor two is a fact intensive inquiry that must be analyzed on a case-by-case basis. The district court made a comment that both parties acted in good faith, but how was that determined at the threshold when applying factor two? Was it in good faith to make a token offer the day after Sandin lost the motion to dismiss? Was it in good faith to offer an amount that would not cover the initial litigation costs OPH incurred defending Sandin's failed motion? Was Sandin merely attempting to create the foundation to file a motion for attorney fees years later and not really trying to settle the case? *See Frazier*, 131 Nev. at 644, 357 P.3d at 373 ("[W]hether a good-faith attempt at settlement has been made or whether the offer is an attempt to force a plaintiff to forego legitimate claims.").

The district court did not address these threshold questions. It certainly did not conduct a fact intensive inquiry or make such findings. Nevertheless, assuming the court truly found good faith by Sandin, reasonableness had to be determined. The court provided no explanation as to why the timing was reasonable. On the contrary, the court stated the discovery and depositions were needed (two years of discovery and 16 depositions, 12 of which were conducted out-of-state), probably because OPH's theory of the case depended upon establishing "a course of conduct."

Therefore, at the moment the offer of judgment was made, the district court would have to note that not only had no discovery been conducted, the court had not even filed its written order denying the motion to dismiss. Of course, no answer to the complaint had been filed by Sandin nor had all affirmative defenses been officially presented. I must observe, too, that Sandin never refiled the motion to dismiss even though it was denied without prejudice, and waited to file for summary judgment until after discovery was completed. Both actions imply the facts had to be determined before a ruling could be made on the merits of the case, or possibly even that the information was needed for meaningful settlement discussions.

Thus, the district court should have explained why these circumstances satisfied the burden that was on Sandin to show reasonableness as to timing. Assuming the court could do so and find the timing was reasonable, the court would then need to evaluate the amount offered, and find that it was also reasonable. However, the court stated at the February hearing that, "I think everybody realized that it was a big claim." Therefore, the only way the court could conceivably conclude that $2,000 was a reasonable settlement offer, was to find that the case was frivolous as Sandin now argues. Yet, the court had denied the motion to dismiss the day before the offer was made when the case was only three months old, and commented at the November and February hearings that OPH was entitled to try the case and it was not unreasonable to proceed.

Therefore, making findings as to all components of factor two was crucial in light of the burden being on Sandin to establish good faith, and reasonableness as to timing *and* amount. This process was admitted by Sandin to be a fact intensive one under the law. This $2,000 offer of judgment

cried out for a probing inquiry as to its good faith and reasonableness as to timing and amount. This case is unlike the case cited as an example by the majority, and epitomizes the rule that cases should be evaluated individually as their own unique factual situations.[9] *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken *in connection with the case in which those expressions are used.*" (emphasis added) (quoting *Cohens v. Virginia*, 19 U.S. 264, 399-400 (1821))).

It was especially important in this case, since the facts and comments from the district court seemed to point in the opposite direction as to the result ultimately reached. We should not now countenance the use of the one unexplained finding (as to factor two) to be decisive. *See Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015) (providing that we do not defer "to findings so conclusory they may mask legal error").

I now turn to the failure to apply factor three, which is decisive. Factor one requires an objective and subjective analysis of the situation at the moment the complaint is filed (good faith). Factor two, likewise, requires an objective and subjective analysis of the situation at the moment the offer of judgment is made (good faith and reasonableness). Factor three is

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[9]In *Tutor Perini Building Corp. v. Show Canada*, Docket No. 74299 (Order of Affirmance, May 29, 2019), the offer of judgment from the respondent was for $950,000; the verdict was for $908,892 and $601,960 in prejudgment interest was also awarded to the respondent. The supreme court upheld the award of attorney fees to the respondent in part due to the finding of the district court that Perini engaged in fraudulent activity, and because only one factor had deficient findings, but the record supported the overall conclusion as to that factor. Therefore, the dollar amounts and the unique circumstances of that case justified an affirmance even though the district court did not make explicit findings as to all of the *Beattie* factors.

different. It requires an objective and subjective analysis of the plaintiff's reaction to the offer, for the ten-day period immediately following the communication of the offer, as the offer expires at that point. The district court must determine whether the decision to reject the offer and proceed to trial was *grossly* unreasonable or in bad faith. Therefore, even if the offer was determined to be reasonable under the second factor, that standard no longer applies when considering the third factor. Sandin had to show it was grossly unreasonable for OPH to fail to accept the offer during the ten-day period following February 14, 2013.

As previously discussed, the case at that time was barely three months old, and OPH had just prevailed on a motion to dismiss. OPH was probably still reeling from the shocking and complete loss of its business and the discovery that its claim for insurance coverage was denied. No discovery had been conducted and no further pleadings had yet been filed. OPH knew it was seeking over *one-half million* dollars in damages. Sandin was only offering $2,000. The circumstances as they existed in February 2013 must be understood when evaluating whether OPH acted in bad faith in not accepting the offer. Further, the setting provides context when judging whether it was grossly unreasonable to reject the offer. *See, e.g., Yamaha*, 114 Nev. at 252, 955 P.2d at 673 (explaining that "offers [should not] have the effect of unfairly forcing litigants to forego legitimate claims," and remanding for the court to reweigh all four *Beattie* factors).

Sandin contends that failing to accept the offer was grossly unreasonable because either the case was brought in bad faith or it had no merit. In essence, failing to accept *any* offer was grossly unreasonable. However, the district court never made an oral or written finding or legal conclusion as to this factor. The very brief apparent references to factor three

at the February and May hearings show that the court either misunderstood it, or refused to apply it. Further, the direct comments the court did make, as previously discussed, reveal that the case was brought in good faith and it was reasonable to proceed to trial. At the reconsideration hearing in May, the court attempted to backtrack and recharacterize its previous comments. Regardless, the district court never made a factual finding or a legal conclusion that it was grossly unreasonable for OPH to reject the $2,000 offer in February 2013.

To show OPH's decision was grossly unreasonable, Sandin needed to overcome a very high hurdle. *See Assurance Co. of Am., supra* at 3. The amount of damages the plaintiff seeks and the need for discovery is a consideration in deciding whether it is grossly unreasonable to reject an offer. *See Sands Expo & Convention Ctr., Inc. v. Bonvouloir,* Docket No. 67091 (Order of Affirmance, October 6, 2016) ("[The] decision to reject the . . . offer in the face of extensive anticipated damages and on-going discovery does not appear grossly unreasonable."). In addition, as OPH argues, and as stated earlier in this dissent when discussing the *Frazier* case, the policy behind offers of judgment is not to coerce plaintiffs into accepting token or low-ball offers when there is a viable case with potentially large damages. The district court needed to carefully analyze and explain why it was nonetheless in bad faith or grossly unreasonable to reject such an offer at the outset of the litigation. *See id.* at 643, 357 P.3d at 373.

Looking at the three factors as a whole, the district court impliedly found factor one favored OPH, and failed to determine the applicability of factor three, which factor appears to strongly favor OPH. The finding as to factor two favoring Sandin is plagued by the lack of the required fact intensive consideration, and appears to mask legal error. The most

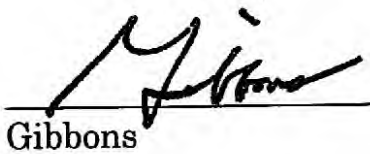
charitable characterization of the ruling as to factor two is that it supports Sandin's position at a superficial level. Since the court only made findings as to the two factors that were in favor of Sandin (factor two and the irrelevant factor four), and not as to the two that were apparently in favor of OPH (one and three), it could not have balanced the factors. If it had made the findings, then two factors likely favored OPH and one marginally favored Sandin.

It was critically important for the court to make findings and legal conclusions to explain why the one factor outweighed the other two, and was decisive in its decision, because no single factor is determinative. *See Yamaha*, 114 Nev. at 252 n.16, 955 P.2d at 673 n.16 ("The district court is reminded that no one factor under *Beattie* is determinative, and that it has broad discretion to grant the request *so long as all appropriate factors are considered.*" (emphasis added)). Nevertheless, merely "considering" the factors is not enough, as that is only part of the process. *See State Drywall, Inc. v. Rhodes Design & Dev.*, 122 Nev. 111, 119 n.18, 127 P.3d 1082, 1088 n.18 (2006) (holding the district court did not properly consider the *Beattie* factors where the record did not reflect "what, if any, analysis was made," and recognizing that the record must reflect this analysis for the decision to be upheld).

Therefore, I conclude that the district court abused its discretion by failing to properly consider and apply the first and third *Beattie* factors, and explain their interplay with the second *Beattie* factor, which itself was not supported by sufficient findings. A remand to properly apply the factors is necessary, particularly when the district court was under the misimpression that *Beattie* does not require much in the way of findings. Public policy also supports this conclusion, as litigants should not be coerced

into settling cases of arguable merit because of the fear of large awards of attorney fees, which the court might determine years later, in hindsight, should be awarded, because a token offer was reasonable. Further, cautioning the district courts to correctly apply *Beattie* has not been sufficient as this OPH case illustrates.[10] Allowing a court to impose a six-figure judgment against a party in a summary proceeding when the court itself does not follow the law is incompatible with justice.

Therefore, I dissent and would vacate the attorney fee award and remand this case to the district court to make findings as to each *Beattie* factor and then balance them to determine if a judgment for attorney fees should be entered.



_____, C.J.
Gibbons

cc: Hon. Gloria Sturman, District Judge
Dickinson Wright PLLC
Hutchison & Steffen, LLC/Las Vegas
Eighth District Court Clerk

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[10]*See Schwartz v. Estate of Greenspun*, wherein the supreme court stated in 1994 that it "caution[ed] the trial bench to provide written support under the *Beattie* factors for awards of attorney's fees made pursuant to offers of judgment even where the award is less than the sum requested," as "[i]t is difficult at best for this court to review claims of error in the award of such fees where the courts have failed to memorialize, in succinct terms, the justification or rationale for the awards." 110 Nev. 1042, 1050, 881 P.2d 638, 643 (1994).