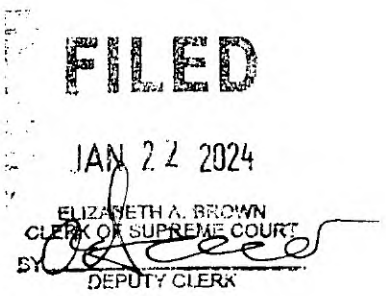
IN THE SUPREME COURT OF THE STATE OF NEVADA

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



ORDER OF AFFIRMANCE

This is an appeal from a district court order granting in part and denying in part a motion for attorney fees and costs. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

This case began when appellant, dentist Dr. Ton Vinh Lee, sued respondents, attorney Ingrid Patin and her law firm Patin Law Group, PLLC (collectively "Patin"), for defamation per se. Motion practice ensued. Relevant here, Patin made a special motion to dismiss under the anti-SLAPP statute. The district court denied the anti-SLAPP motion, and Patin appealed. Patin Law Group obtained appellate counsel, Micah Echols, for the appeal. We affirmed the district court's denial of the anti-SLAPP motion to dismiss. In 2017, during the pendency of that appeal, Ingrid Patin and Patin Law Group each conveyed $1,000 offers of judgment to Lee under NRCP 68. Lee allowed the offers to expire without accepting them.

Later, the district court granted summary judgment in Patin's favor. Patin then sought costs and attorney fees, citing NRCP 68. The

district court ultimately awarded costs and fees for Ingrid Patin and Patin Law Group's trial counsel, Christian Morris and Kerry Doyle, but denied costs and fees for Patin Law Group's appellate counsel, Micah Echols. In denying Echols's fees, the district court relied on the unsuccessful outcome of the anti-SLAPP appeal, despite finding that the remaining *Brunzell* factors favored an award. Both parties appeal; Lee challenges the award of costs and attorney fees under NRCP 68 and the *Beattie* factors, while Patin Law Group challenges the denial of attorney fees for Echols's work under the *Brunzell* factors.[1]

Standard of review

We review awards of attorney fees and costs for an abuse of discretion. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 80, 319 P.3d 606, 615 (2014); *Logan v. Abe*, 131 Nev. 260, 266, 267, 350 P.3d 1139, 1143, 1144 (2015). An abuse of discretion exists where the district court's decision is "arbitrary or capricious or if it exceeds the bounds of law or reason." *In re Eric A.L.*, 123 Nev. 26, 33, 153 P.3d 32, 36-37 (2007). Nevertheless, we will review the district court's application of the law governing those awards de novo. See *Logan*, 131 Nev. at 264, 350 P.3d at 1141.

[1]A panel of this court originally issued an order on this appeal. *Lee v. Patin*, No. 83213, 2023 WL 2436323 (Mar. 13, 2023) (Order of Reversal). That order was withdrawn when the en banc court granted reconsideration. *See Lee v. Patin*, No. 83213 (Aug. 28, 2023) (Order Granting En Banc Reconsideration) (Pickering, J., dissenting).

The district court did not err in awarding fees and costs under NRCP 68 for Morris and Doyle

Lee maintains that the offers of judgment—totaling $2,000—were effectively "in the negative" or invalid once his "well over $10,000 in attorney fees"—incurred by the time Patin conveyed these offers—was factored into the value of the offers. Based on this interpretation of the offers, Lee argues that he actually beat the $0 judgment obtained upon summary judgment and that Patin is therefore not entitled to fees or costs under NRCP 68(g). We disagree.

Generally, Rule 68 allows the offeror of the offer of judgment to seek a penalty of attorney fees and costs from the offeree if the offeree rejected the offer and failed to obtain a better result. 12 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3001 (3d ed. 2023). The dispute here centers on this comparison: whether "the offeree failed to obtain a more favorable judgment" as compared to the offer. NRCP 68(g). Where an offer precludes a separate award of costs, fees, and interest, the current version of NRCP 68 directs courts to factor in pre-offer costs, fees, and interest to determine whether the offeree beat an offer. *See* NRCP 68(g) (2019). This comparison between an inclusive offer and the judgment differed under the prior version of NRCP 68, which directed courts to factor in only pre-offer costs. NRCP 68(g) (1998). That prior version of NRCP 68 applies to the 2017 offers of judgment here. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018). But Lee has failed to cite or evidence any pre-offer costs incurred. He references only his pre-offer attorney fees. Therefore, Lee's negative- or invalid-offer theory falls short for failure to evidence those costs.

Lee's argument fails even if the court factored in attorney fees as permitted under the current version of NRCP 68. Courts applying this 2019 Rule import only those attorney fees that the offeree would be entitled to at the end of litigation, i.e., those authorized by "law or contract," into the comparison. *See* NRCP 68(g) (2019) (providing that the court would only factor in those attorney fees "permitted by law or contract" when comparing inclusive offers to the amount of the judgment); *see also U.S. Design & Const. Corp. v. Int'l Bhd. of Elec. Workers*, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002) (providing generally that litigants in Nevada can only obtain those attorney fees authorized by "statute, rule, or contract"). Otherwise, the court is not comparing "apples to apples" as required in evaluating inclusive offers against the judgment obtained. *See In the Matter of the Repeal of Nevada Rule of Civil Procedure 68*, ADKT No. 0151 (Committee Notes to Proposed Rule, Mar. 25, 1998) (stating that the prior version of NRCP 68 permitted unfair comparison of "apples and oranges" when evaluating inclusive offers against judgments obtained). Lee points to no underlying contract or statute supporting his argument that his fees should have been considered, and even conceded at oral argument that the anti-SLAPP statutes did not authorize an attorney fee award here.

Accordingly, we conclude that the district court properly applied NRCP 68's penalty provision. The facts here indicate that Lee could have accepted the offers, ended litigation, and left with an extra $2,000. He chose to forego that option at the risk of obtaining a less favorable outcome. Because Lee has failed to evidence his costs or provide legal argument or support for his attorney fees, we have no basis to conclude that his choice

played out in his favor. Thus, he did not obtain a more favorable judgment under NRCP 68.[2]

The district court did not err in applying the Beattie factors for Morris and Doyle

Lee argues that the district court committed reversible error in applying the *Beattie* factors. He specifically challenges the district court's conclusion that the offers of judgment were reasonable and made in good faith with respect to their timing and amount, pointing to (1) the district court's failure to make a specific finding that the amount of the offers were made in good faith, (2) his negative-offer theory, (3) the fact that the offers were made two years into the case after many unsuccessful dispositive motions, and (4) the district court's recognition that the offers "signaled" Patin's intent "to vigorously litigate the legal issues." This final point, according to Lee, reveals that Patin's offers were improperly designed to force him to forego a legitimate claim. Again, we disagree.

In determining whether to exercise its discretion to award attorney fees under NRCP 68, the district court must evaluate the four *Beattie* factors. *Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001). These factors include (1) "whether the plaintiff's claim was brought in good faith"; (2) "whether the defendant's offer of judgment was reasonable and in good faith in both its timing and amount"; (3) "whether the plaintiff's

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[2]Although Lee also argues that the district court erred under NRS 17.117, we note that he did not make this argument below, and we would reach the same conclusion under that statute regardless. *See Old Aztec Mine, Inc. 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.").

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 v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983). We consistently defer to the district court's "discretion concerning the propriety of granting attorney fees," if "the record clearly reflects that the district court properly considered the *Beattie* factors." *See N. Las Vegas Infrastructure Inv. & Constr., LLC v. City of N. Las Vegas*, 139 Nev., Adv. Op. 5, 525 P.3d 836, 842 (2023) (quoting *Wynn*, 117 Nev. at 13, 16 P.3d at 428-29) (internal quotation marks omitted).

The district court's application of *Beattie* belies Lee's contentions. First, Lee's objection to the district court's failure to make a specific finding that the offers were made in good faith fails, as he does not dispute that the district court addressed each of the *Beattie* factors. Our caselaw does not require a written finding on each factor where, as here, the record clearly shows that the district court considered each factor. *See id.* Second, as discussed above, his argument that the offers lacked good faith or reasonableness because they were negative or invalid is both unsupported and unpersuasive. Third, we cannot say that the district court's finding as to the timing of the offers was erroneous, as they were made during the pendency of an appeal that could have ended the case. Finally, while any intent to "vigorously litigate" the case might amount to the alleged bad faith, this observation can also indicate that Patin felt strongly about their case and were willing to pay $2,000 to end litigation that they intended to vigorously litigate otherwise. Under our deferential review, we thus cannot say that the district court abused its discretion in

applying this *Beattie* factor. We therefore affirm the district court's award of attorney fees incurred by Morris and Doyle.[3]

The district court did not abuse its discretion in applying the Brunzell result factor as to fees incurred by appellate counsel

On cross appeal, Patin Law Group argues that the district court "acted contrary" to NRCP 68 jurisprudence in denying an award for Echols's fees based on the result factor outlined in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969). It contends that *In re Estate & Living Trust of Rose Miller*, 125 Nev. 550, 216 P.3d 239 (2009), proves that this result factor looks to the final judgment—not an intervening appeal preceding that judgment—in the NRCP 68 context. We disagree.

Because the fourth *Beattie* factor centers on the reasonableness of the attorney-fees award, 99 Nev. at 588-89, 668 P.2d at 274, district courts must assess the four factors *Brunzell* deemed "helpful in establishing the value of counsel services," 85 Nev. at 349, 455 P.2d at 33; *Logan*, 131 Nev. at 266, 350 P.3d at 1143. One of these factors looks to "the result: whether the attorney was successful and what benefits were derived." *See Brunzell*, 85 Nev. at 349, 455 P.2d at 33. Our review of a district court's *Brunzell* analysis, like that under *Beattie*, defers to the district court's

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[3]Although the dissent concludes that reversal is warranted under the *Beattie* factors due to the offers' internal contradictions, Lee never raised this argument below or on appeal and we therefore decline to address it sua sponte. *See Old Aztec Mine, Inc.*, 97 Nev. at 52, 623 P.2d at 983 (declining to address argument not raised below); *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 & n.3, 252 P.3d 668, 672 & n.3 (2011) (declining to consider issue not raised in the opening brief, even if raised in the reply brief, as such arguments are deemed waived); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to consider claims that are not cogently argued and lack supporting authority).

discretion. *See Logan*, 131 Nev. at 266, 350 P.3d at 1143; *see also N. Las Vegas Infrastructure*, 139 Nev., Adv. Op. 5, 525 P.3d at 842.

Here, we do not discern anything that would warrant finding an abuse of this discretion. Though the district court's decision turned largely on one of the four *Brunzell* factors, it is undisputed that the district court addressed each of the factors in making its decision. Thus, just as Lee cannot overcome the district court's comprehensive assessment under *Beattie*, Patin Law Group cannot overcome the district court's comprehensive assessment under *Brunzell*. *See Logan*, 131 Nev. at 266, 350 P.3d at 1143 (affirming fee award because substantial evidence favored an award, and "the district court demonstrated that it considered the *Brunzell* factors").

Patin Law Group's reliance on *Rose Miller* does not change the outcome. *Rose Miller's* discussion about the word "judgment" in the NRCP 68 context as connoting a "final judgment" informed which judgment the court should look to for the purposes of NRCP 68(f)'s applicability. *See* 125 Nev. at 553, 216 P.3d at 242. It did not inform the relevant result for the purposes of the *Brunzell* reasonableness analysis. In fact, nowhere in *Rose Miller* did the court assess which judgment the district court should assess in evaluating *Brunzell's* result factor.[4] *See generally id.* Rather, this court

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[4]The same is true of *Waste Management of Nevada, Inc. v. West Taylor Street, LLC*, No. 80841, 2021 WL 409460, at *2 (Feb. 4, 2021) (Order of Reversal and Remand), which relied on *Rose Miller's* holding concerning "final judgment after appeal" in evaluating the first and third *Beattie* factors. Relatedly, because Lee still responded to the cross-appeal, we decline Patin Law Group's invitation to treat Lee's failure to specifically address these cases or the district court's *Brunzell* analysis as a confession of error. *See Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984).

directed the district court to address the reasonableness of the award on remand. *Id.* at 556, 216 P.3d at 243. We accordingly conclude that Patin Law Group's cross appeal fails in view of the lack of evidence and authority indicative of an abuse of discretion.[5] Therefore, we

ORDER the judgment of the district court AFFIRMED.[6]

_____, C.J.
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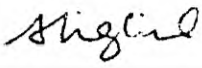

_____, J.
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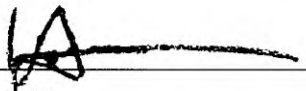

_____, J.
Herndon

_____, J.
Parraguirre

_____, J.
Bell

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[5]This decision should not be construed to mean that a litigant could never obtain fees despite an unfavorable outcome of proceedings during the course of a case under the result factor. Instead, we simply conclude under the facts and circumstances here, and the district court's analysis, that there was no abuse of discretion.

[6]Insofar as the parties have raised any other arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for their requested relief or need not be reached given the disposition of this appeal.

PICKERING, J., with whom LEE, J. agrees, concurring in part and dissenting in part:

To award fees based on an unaccepted offer of judgment under NRCP 68, the district court must "carefully evaluate" the following four 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 v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983). The offers of judgment in this case defy proper *Beattie* analysis because they are internally contradictory. In their first paragraph, the offers give Patin the win: they propose that the plaintiff, Lee, pay the defendants, Patin and her firm, $2,000 and that Patin take judgment against Lee on Lee's defamation complaint. In their second paragraph, the offers have *Patin* paying *Lee* $2,000 and Lee not suffering judgment against him but simply dismissing his complaint.[7]

The differences matter under *Beattie*, especially as to factors (2) (was the defendant's offer reasonable and in good faith?) and (3) (was the plaintiff's decision to reject the offer grossly unreasonable or in bad faith?). When Patin made the offers, Lee had defeated a series of motions and special motions to dismiss. It was not reasonable at that point in the

[7]The full text of the Patin defendants' operatively identical offers is reprinted in the panel majority's original order of reversal. *Lee v. Patin*, No. 83213, 2023 WL 2436323 (Nev. Mar. 9, 2023) (Order of Reversal).

litigation to expect Lee to pay Patin $2000 plus give the Patin defendants judgment in their favor and against Lee on his defamation complaint. The first paragraph's terms thus do not support an award of fees and costs under *Beattie*. The second paragraph, by contrast, offers Lee a $2000 recovery and lets both sides walk away, with neither suffering an adverse judgment. While not generous, this is at least in the *Beattie* ballpark.

We review a district court's decision to grant or deny fees and costs based on an unaccepted offer of judgment deferentially, for an abuse of discretion. *See Clarke v. Serv. Emp. Int'l Union*, 137 Nev. 460, 467, 495 P.3d 462, 469 (2021). But as the majority correctly notes, such deference is only due "if the record clearly reflects that the district court properly considered the *Beattie* factors." Maj. order, *supra*, at 6 (internal quotation omitted). To properly consider the *Beattie* factors, the district court must read the offer of judgment, so it knows who has offered to pay whom what, and on what terms. *See Beattie*, 99 Nev. at 588-89, 668 P.2d at 274. The record does not support that this occurred. While the district court references *Beattie*, it does not acknowledge the contradictions between the offers' first and second paragraphs and misses the fact that, if the settlement terms in the first paragraph control, the offers do not pass *Beattie* muster. *See also Pombo v. Nev. Apartment Ass'n*, 113 Nev. 559, 562, 938 P.2d 725, 727 (1997) (holding that "[a]n offer of judgment must be *unconditional and for a definite amount* in order to be valid for purposes of NRCP 68") (emphasis added).

Like a statute or other legal text, the words used in a written offer of judgment control its analysis. In my view, it was an abuse of discretion amounting to plain error for the district court to enforce the internally inconsistent offers of judgment in this case. *See Bradley v.*

Romeo, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986) ("The ability of this court to consider relevant issues sua sponte in order to prevent plain error is well established."). For these reasons, while I agree with the majority's affirmance as to the Patin cross-appeal, I otherwise respectfully dissent.

Pickering, J.

Pickering

I concur:

Lee, J.

Lee

cc: Hon. Gloria Sturman, District Judge
Gordon Rees Scully Mansukhani LLP/Las Vegas
Resnick & Louis, P.C./Las Vegas
Claggett & Sykes Law Firm
Christian Morris Trial Attorneys
Doyle Law Office, PLLC
Eighth District Court Clerk