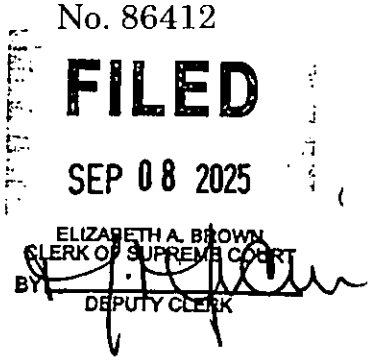
IN THE SUPREME COURT OF THE STATE OF NEVADA

LOUIS BELLOMO, AN INDIVIDUAL; AND SHAC, LLC, A/K/A SAPPHIRE LV GENTLEMAN'S CLUB, A DOMESTIC LIMITED-LIABILITY COMPANY,
Appellants,
vs.
THUNDER ROYBAL, AN INDIVIDUAL,
Respondent.

No. 86412



ORDER OF AFFIRMANCE

This is an appeal from a judgment on a jury verdict and orders denying a motion for a new trial, and awarding attorney fees, costs, and interest, in a negligence matter. Eighth Judicial District Court, Clark County; Michael A. Cherry, Senior Judge; Tara D. Clark Newberry, Judge.

Appellant Louis Bellomo ran over a bicyclist, respondent Thunder Roybal, who was riding his bike in a left turning lane on the road. After striking Roybal, Bellomo attempted to flee the scene but was stopped by witnesses. Roybal sustained injuries to his neck, shoulder, and spine, and underwent several surgeries in an effort to fully recover. At the time of the accident, Bellomo was driving a vehicle for his employer, appellant SHAC, LLC, a/k/a Sapphire LV Gentleman's Club. Following a ten-day jury trial, the jury rendered a verdict for Roybal in the amount of $14,126,607.74. Appellants now appeal, arguing a new trial is warranted because the jury's damage award is excessive and the record does not support the award. Appellants also contend that the district court erred in awarding attorney fees and that the amount awarded was unreasonable. We disagree and affirm.

The jury's damage award was not excessive and no new trial is warranted

Following the verdict, appellants moved for a new trial pursuant to NRCP 59, which the district court denied. "The decision to grant or deny a motion for new trial rests within the sound discretion of the trial court," *BMW v. Roth,* 127 Nev. 122, 133, 252 P.3d 649, 657 (2011) (internal quotation marks omitted), and this court reviews a district court's decision to grant or deny a motion for a new trial for an abuse of discretion. *Lioce v. Cohen,* 124 Nev. 1, 20, 174 P.3d 970, 982 (2008)). "While review for abuse of discretion is ordinarily deferential, deference is not owed to legal error." *BMW,* 127 Nev. at 133, 252 P.3d at 657 (quoting *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010)). Relevant to the instant matter, NRCP 59(a)(1)(F) requires a new trial when "excessive damages appear[ ] to have been given under the influence of passion or prejudice." *See Quigley v. Cent. Pac. R.R. Co.*, 11 Nev. 350, 372-73 (1876).

Objective criteria

Appellants contend that the damages award here is excessive and resulted from prejudice. They argue that the district court abused its discretion when it denied appellant's motion for a new trial after refusing to compare the verdict with objective criteria, such as verdicts in similar cases.

Here, the district court correctly analyzed appellants' motion for a new trial according to the enumerated conditions of NRCP 59(a)(1), which require a party seeking a new trial to show the presence of at least one of the conditions and that the condition(s) actually prejudiced the moving party. *See also Quigley*, 11 Nev. at 372-73. This is the proper analysis to address appellants' excessive damages challenge; thus, the

district court did not abuse its discretion in applying this standard to appellants' arguments.

Moreover, the district court did not abuse its discretion in refusing to assess the damages award against objective criteria. We have previously doubted the value of utilizing objective criteria when assessing the adequacy of a pain and suffering damages award. *Brownfield v. F. W. Woolworth Co.*, 69 Nev. 294, 296, 248 P.2d 1078, 1079 (1952) (recognizing the "elements of pain and suffering are wholly subjective" and cannot "be calculated by reference to some objective standard"); *Miller v. Schnitzer*, 78 Nev. 301, 308-09, 371 P.2d 824, 828 (1962) (recognizing the doubtful value of comparing damage awards in similarly situated cases), *abrogated on other grounds by Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987). Moreover, *Wyeth* recognized that considering comparable verdicts to determine the appropriateness of compensatory damages would be an abuse of discretion. 126 Nev. at 472 n.10, 244 P.3d at 783 n.10. Therefore, we conclude the district court did not abuse its discretion in refusing to consider comparable verdicts or other objective criteria in its analysis.

Attorney misconduct

Next, appellants argue that improper comments made by Roybal's counsel during closing argument influenced the jury to issue an excessive damages award based on passion or prejudice. We review alleged attorney misconduct de novo while giving "deference to the district court's factual findings and application of the standards to the facts." *Lioce*, 124 Nev. at 20, 174 P.3d at 982.

At trial, appellants sought to limit their liability by arguing a comparative fault theory. To refute appellants' comparative fault arguments, Roybal, during closing argument, referenced the term

"discount" on multiple occasions. In the first two instances, Roybal represented to the jury that appellants sought a "discount" at trial. Roybal further insisted that appellants should be held accountable for their actions and not receive a "discount." Finally, Roybal argued that he was entitled to a specific amount of damages, and that appellants should not be given a "discount" for the pain they inflicted on him. Appellants contend that Roybal's "discount" argument improperly shifted the burden of proof for damages from the plaintiff to the defendant.

Because appellants argued for the comparative fault theory, we read Roybal's "discount" comments as disputing and attacking appellants' position at trial. In context, these comments cannot be reasonably interpreted as shifting the burden to appellants to disprove Roybal's damages. Therefore, this court is unconvinced that appellants' comments amounted to misconduct. Even if these comments amounted to error, we are not persuaded that the jury would have reached a different result, or that the alleged attorney misconduct influenced the jury to issue an award based on passion or prejudice. *Cox v. Copperfield*, 138 Nev. 235, 239, 507 P.3d 1216, 1222 (2022) (holding that entitlement to a new trial requires the movant establish grounds and prejudice).

Misleading testimony

Appellants also argue they were wrongly precluded from rebutting misleading testimony on two occasions, contributing to the jury returning an excessive verdict based on passion or prejudice.

First, appellants argue they were wrongly precluded from presenting evidence that Roybal applied for disability benefits prior to being run over. Appellants argued in their motion for a new trial that evidence of *Roybal's disability application* was improperly excluded, but on appeal, they argue that *testimony from Roybal's ex-wife* was improperly excluded.

Because appellants present inconsistent arguments before the district court and this court regarding what evidence was improperly excluded, we agree with Roybal's contention that this issue has been waived. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that issues not argued below are "deemed to have been waived and will not be considered on appeal").

Second, appellants complain they were precluded from arguing that Roybal's doctor was overly cautious for recommending a surgery that mitigated a risk which had only a 30% chance of materializing. At trial, Roybal's doctor testified why he decided to anchor Roybal's neck at a particular level during one of Roybal's surgeries. On appeal, appellants argue that the district court abused its discretion in precluding their argument that this procedure was unnecessary. Appellants argue that if the district court had permitted the jury to hear their argument, the past damages award would have been less and would have created a wider disparity between the past and future damages awarded. The district court recognized that appellants sought to present an argument which misstated Roybal's expert's testimony and that to make this argument, appellants would be required to call their own expert, which they failed to do. *See Wickliffe v. Sunrise Hosp., Inc.*, 104 Nev. 777, 781, 766 P.2d 1322, 1325 (1988) (recognizing evidence presented at trial must support proposed inferences in closing arguments). We agree and conclude the district court did not abuse its discretion in precluding this argument. Therefore, the past and future damages disparity as suggested by appellants is not so wide to suggest the jury issued an award based on passion or prejudice.

Based on the foregoing, we conclude the jury's verdict was not influenced by passion or prejudice. The record contains substantial

evidence to support the jury's award and no errors exist to suggest the jury was impassioned to award an excessive amount. Therefore, we hold that the district court did not abuse its discretion in denying appellants' motion for a new trial.

Reasonable attorney fees were properly awarded under NRCP 68

This court reviews a district court's award of attorney fees under an abuse of discretion standard. *Frantz v. Johnson*, 116 Nev. 455, 471, 999 P.2d 351, 361 (2000). To the extent an award is challenged based on statutory or contractual interpretation, those are questions of law reviewed de novo. *Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 825, 192 P.3d 730, 733 (2008) (statutory interpretation); *Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013) (contractual interpretation).

Appellants first argue the district court abused its discretion in awarding attorney fees under NRCP 68 because Roybal's offer of judgment was invalid. Appellants contend Roybal's offer of judgment was ambiguous because it was addressed to Bellomo but then referred to "[d]efendants" throughout the rest of the letter.

This court has recognized that NRCP 68 offers are "likened to contract offers." *Fleischer v. August*, 103 Nev. 242, 246, 737 P.2d 518, 521 (1987) (quoting *Boorstein v. City of New York*, 107 F.R.D. 31, 33 (S.D.N.Y. 1985)). Basic contract interpretation principles require an offer be definite and certain, "so that the parties can be unequivocally aware of what the defendant is willing to pay for his peace." *Stockton Kenworth, Inc. v. Mentzer Detroit Diesel, Inc.*, 101 Nev. 400, 404, 705 P.2d 145, 148 (1985). Arguably, a plain reading of Roybal's offer leaves a question as to the parties' intent because the offer was addressed only to Bellomo but referred to defendants throughout the rest of the offer. When interpreting a contract

"[a] court should ascertain the intention of the parties from the language employed as applied to the subject matter in view of the surrounding circumstances."[1] *Mohr Park Manor, Inc. v. Mohr*, 83 Nev. 107, 111, 424 P.2d 101, 105 (1967).

Roybal contends the extrinsic evidence in this case suggests appellants knew who the offer was for considering Roybal sent the offer to both defendants and the offer referenced both defendants. Additionally, Roybal's counsel at the time of the offer testified that both defendants were jointly represented by the same firm. Moreover, appellants concede they have a "unity of interest [because they] were being sued on the same core 'basis of liability.'" When considering the context in which the offer was delivered, we conclude the only reasonable reading of the offer is to include both defendants. *See Galardi*, 129 Nev. at 309, 301 P.3d at 366 (recognizing a finding of ambiguity requires a contract to be reasonably interpreted in more than one way). Therefore, Roybal's offer of judgment was valid.

Alternatively, appellants argue the district court erred in awarding attorney fees based on *Beattie v. Thomas*, 99 Nev. 579, 586, 668 P.2d 268, 272-73 (1983), and *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). Under NRCP 68, where an offeree fails to obtain a more favorable outcome following rejection of an offer of judgment, a district court may award attorney fees and, in doing so, must evaluate the factors set forth in *Beattie*. *See Capriati Constr. Corp. v.*

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[1]At appellants' urging, the district court held an evidentiary hearing to determine the parties' intent as to the offer of judgment. Roybal asserts that appellants cannot point to the evidentiary hearing itself to prove the offer was ambiguous and invalid when the appellants induced the court to hold the hearing in the first place. We agree.

Yahyavi, 137 Nev. 675, 681, 498 P.3d 226, 232 (2021). *Beattie* requires that courts consider

> (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 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. Appellants challenge whether the offer of judgment was reasonable in timing and amount and whether its subsequent rejection was made in bad faith.

We conclude that the district court did not abuse its discretion when it determined that the offer of judgment was reasonable. The offer was reasonable in amount because it contemplated Roybal's past and future medical expenses, attorney fees, and was within insurance policy limits. The offer was reasonable in timing because Roybal had already disclosed he would require future medical treatment from multiple healthcare providers. Therefore, substantial evidence demonstrates appellants had sufficient information to make an informed decision to accept or reject the offer of judgment. Substantial evidence also demonstrates that the rejection of the offer was made in bad faith because appellants had a relatively weak case and risked a jury awarding future pain and suffering damages at trial, instead of settling within its insurance policy limits. The district court, therefore, did not abuse its discretion as to its findings under the second and third *Beattie* factors.

The fourth *Beattie* factor requires courts to consider the reasonableness of the attorney fees and whether they are justified in amount. 99 Nev. at 588-89, 668 P.2d at 274. This fourth *Beattie* factor is

best resolved by considering the factors set out in *Brunzell*. *See Capriati*, 137 Nev. at 681, 498 P.3d at 232. Appellants challenge the district court's findings under the second and third *Brunzell* factors. The relevant *Brunzell* factors consider

> (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; . . .

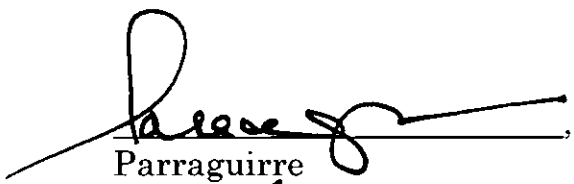
85 Nev. at 349, 455 P.2d at 33.

The district court did not abuse its discretion in determining that the attorney fees were reasonable. The district court recognized that Roybal's counsel reviewed over 161 sets of documents, reviewed 47 expert reports, deposed 20 witnesses, litigated 30 motions in limine, and successfully conducted a 10-day jury trial. Moreover, the record makes clear that the work performed was highly contentious and involved a high number of discovery disputes, evidentiary hearings, and dispositive motions. The character of the work performed in this case was difficult and intricate, and it required skill, time, and attention. The district court properly considered the required factors under *Beattie* and *Brunzell*, and its conclusion was supported by substantial evidence. *See MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. 235, 246, 416 P.3d 249, 259 (2018).

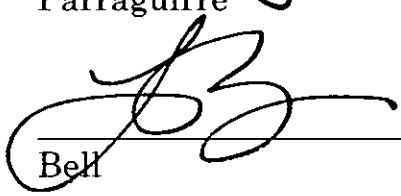
Finally, appellants challenge the district court's application of *Capriati Construction Corp. v. Yahyavi*, 137 Nev. 675, 498 P.3d 226 (2021). *Capriati* expressly held that contingency-fee attorneys may collect the entirety of their fee agreement under NRCP 68 if they satisfy the *Beattie* and *Brunzell* factors. 137 Nev. at 680-81, 498 P.3d at 231-32. As the district

court made appropriate findings under those factors and found the fees to be reasonable, we conclude the district court did not abuse its discretion in awarding Roybal attorney fees under NRCP 68. Further, we do not find appellants' arguments seeking to overturn *Capriati* persuasive. Accordingly, we

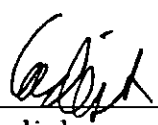
ORDER the judgment of the district court AFFIRMED.



_____, J.
Parraguirre



_____, J.
Bell



_____, J.
Cadish

_____, J.
Lee

HERNDON, C.J., with whom PICKERING and STIGLICH, JJ., agree, concurring in part and dissenting in part:

I agree with the decision to affirm the district court's order denying appellants' motion for a new trial. But I write separately to reiterate my disagreement with the majority's conclusion that the district court may properly award the entirety of a contingency fee agreement absent further evidence demonstrating such an award is reasonable and justified. *Compare Capriati Constr. Corp., Inc. v. Yahyavi*, 137 Nev. 675,

680, 498 P.3d 226, 231 (2021) (concluding "that a district court may award the entire contingency fee as post-offer attorney fees under NRCP 68 because the contingency fee does not vest until the client prevails"), *with id.* at 683, 498 P.3d at 233 (explaining why "it is unreasonable to require the offeree party to be responsible for the entirety of the contingency fee when NRCP 68 only permits recovery of fees incurred from the time of the offer" (internal quotation marks omitted) (Herndon, J., concurring in part and dissenting in part)).

In this case, Roybal filed the underlying complaint in July 2018. Roybal made an offer of judgment of $1 million dollars in March 2019, which included attorney fees, costs, and accrued interest. Bellomo rejected this reasonable offer and, in doing so, opened himself up to the punitive provisions of NRCP 68. In other words, Bellomo risked being on the hook for Roybal's attorney fees accrued after the rejected $1 million offer of judgment. *See* NRCP 68(f)(1)(B) (allowing for the recovery of fees incurred "from the time of the offer"). In May 2022, the risk became reality for Bellomo after the jury returned the verdict in the amount of $14,216,607.74. Having well exceeded the offer of judgment, Roybal moved for attorney fees, costs, and interest. *See* NRCP 68(f)(1) (providing penalties "[i]f the offeree rejects an offer and fails to obtain a more favorable judgment"). And the district court awarded Roybal $7,923,304.85 in attorney fees (the entire 50% contingency fee) and $327,076.50 in costs for a total exceeding eight million dollars.

Relying on *Capriati*, the majority concludes "that contingency-fee attorneys may collect the entirety of their fee agreement under NRCP 68 if they satisfy the *Beattie* and *Brunzell* factors." Majority order at 9. In *Capriati*, the majority concluded "a district court may award the entire

contingency fee as post-offer attorney fees under NRCP 68 because the contingency fee does not vest until the client prevails." *Id.* at 680, 498 P.3d at 232. I disagree with that conclusion for three reasons. First, this reasoning elides the fourth *Beattie* factor by allowing the district court to simply award Royal about $8 million dollars (50% of the final judgment) without objectively considering the relationship between the work performed and the reasonableness of the amount. *See id.* (Herndon, J., concurring in part and dissenting in part) ("The fourth *Beattie* factor specifically requires the district court to consider whether the attorney fees sought 'are reasonable and justified in amount.'" (quoting *Beattie v. Thomas*, 99 Nev. 579, 589, 668 P.2d 268, 274 (1983)). Second, awarding 100% of the contingency fees earned from the beginning to the end of the case is inconsistent with the plain text of NRCP 68(f)(2)(B), which limits the penalty for rejecting an offer of judgment to the "reasonable attorney fees, if any be allowed, *actually incurred* by the offeror *from the time of the offer*." Finally, I believe it is "unfair to require the offeree party to pay the entirety of the contingency fee when the offeree was unaware of the private contingency-fee agreement when he or she rejected the offer of judgment." *Id.* at 682-83, 498 P.3d at 233 (Herndon, J., concurring in part and dissenting in part). Because I maintain that *Capriati* was wrongly decided, *see Stocks v. Stocks*, 64 Nev. 431, 438, 183 P.2d 617, 620 (1947) (recognizing that this court will "depart from the doctrine of stare decisis where such departure is necessary to avoid the perpetuation of error" (internal quotation marks omitted)), I believe the district court's award was inaccurate and warrants reversal. Thus, I would remand the matter back to the district court to determine what portion of the fees were reasonably

incurred post-offer, i.e., after Bellomo rejected the March 2019 offer of judgment. I therefore respectfully dissent.

_____, C.J.
Herndon

We concur:

_____, J.
Pickering

_____, J.
Stiglich

cc: Chief Judge, Eighth Judicial District Court
Hon. Michael A. Cherry, Senior Justice
Hon. Tara D. Clark Newberry, District Judge
Persi J. Mishel, Settlement Judge
Womble Bond Dickinson LLP/Las Vegas
Snell & Wilmer, LLP/Las Vegas
Winner & Booze
Benson & Bingham
Claggett & Sykes Law Firm
Pisanelli Bice, PLLC
Holland & Hart LLP/Las Vegas
Matthew L. Sharp, Ltd.
The Powell Law Firm
Eighth District Court Clerk