IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD
OF THE STATE OF CALIFORNIA,

Appellant/Cross-Respondent,

vs.

GILBERT P. HYATT,

Respondent/Cross-Appellant.

Supreme Court Case No. 53264

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

REGARDING COSTS

* * * * *

APPEAL FROM ORDER OF THE EIGHTH JUDICIAL DISTRICT COURT
STATE OF NEVADA, CLARK COUNTY
HONORABLE JESSIE WALSH, DISTRICT JUDGE

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I. INTRODUCTION

Hyatt's Supplemental Answering Brief presents yet another example of Hyatt's pattern of insisting that the rules and statutes governing proper procedures do not apply to him.[1] His Supplemental Answering Brief simply glosses over the district court's blatant disregard for the rules and statutes that are intended to provide litigants with a fair process for determining a reasonable award of costs. Contrary to Hyatt's rosy picture of the process by which the district court arrived at her decision on costs, there were errors at several critical points. These errors meant that the FTB was deprived of the opportunity to have the cost issues fully and fairly determined, and that Hyatt's cost award was excessive and unreasonable.[2]

II. LEGAL ARGUMENT

A. The District Court Misapplied Nevada Law and Adopted the Incorrect Procedure for Employing the Special Master Rendering the Court's Order Awarding Costs Void

The district court's patent refusal to hold a hearing on the FTB's objections to the special master's report constituted reversible error rendering the order on costs void. Not

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[1] In another example of Hyatt's refusal to comply with this court's rules, and particularly with NRAP 28(e) and 30, Hyatt's Answering Brief contains several citations that are not keyed to any appendix. Specifically, in footnotes 51, 56, 57, 58, 59, 60, 61, 63, and 64, Hyatt makes factual assertions that are not supported by any appendix citations. Pursuant to NRAP 28(e), "**[e]very** assertion in briefs regarding matters in the record **shall be supported** by a reference to the **page number and volume number** . . . of the **appendix** where the matter relied on is to be found." NRAP 28(e) (emphasis added). Additionally, in violation of NRAP 30, Hyatt's appendix contains a document which was never filed with the district court or part of the trial record. See 1 RCA 154-56. Because Hyatt continues to refuse to comply with the rules of this court (even though his counsel expressly certified that his brief was in compliance with NRAP 28(e)), at a minimum, the factual assertions made by Hyatt on pages 14-17 of his Answering Brief as well as the document contained in 1 RCA 154-56 must be stricken and disregarded by this court.

[2] At the outset, the FTB notes that nowhere in Hyatt's Answering Brief does he dispute the FTB's statement of issues, statement of the case, or statement of the facts. As such, pursuant to NRAP 28(b), Hyatt has admitted that the FTB's statement of issues, statement of the case, and statement of facts are accurate as represented in the FTB's Supplemental Opening Brief.

only did the district court refuse to consider the numerous and serious objections by the FTB to the various errors contained within the Special Master's final report, the district court refused to hold a hearing on the FTB's objections. The district court reasoned that because trial on the underlying claims had been by jury, "[t]he correct subsection is NRCP 53(e)(3)" and "there is no right to file an objection to the Special Master's final report." 26 ACA 6266. However, as a matter of law, both Nevada's statutory scheme regarding costs and case law from this court dictate that cost determinations are made **by the court, not the jury**.

1. NRS 18.110 Clearly Contemplates that Allowable Costs Are Determined by the Court After the Jury's Verdict and are not Matters for the Jury

Both the district court and Hyatt have clung to the unsupportable contention that NRCP 53(e)(3) applies to the proceedings regarding Hyatt's costs because "this case is a jury action." See Respondent's Supplemental Answering Brief Regarding Costs ("RABC") at 4:25-26; 26 ACA 6266. However, while Hyatt's underlying substantive claims were tried by a jury, the equitable issue of his costs was not, nor does the Nevada statute regarding costs provide for a jury trial on such costs. Because the district court failed to follow the required procedures for adopting a special master's report in a non-jury matter, its order on costs is void.

NRS 18.110 sets forth the procedure by which a party can claim costs. It states that "[t]he party in whose favor judgment is rendered, and who claims costs, must file with the clerk . . . a memorandum of the items of the costs in the action or proceeding . . ." The statute further provides that "[w]ithin 3 days after service of a copy of the memorandum, the adverse party may move the court . . to retax and settle the costs. . ." NRS 18.110(4). Finally, the statute specifically states that when a motion to retax has been filed, "upon hearing of the motion the **court or judge** shall settle the costs." Id. (emphasis added). Taking the language of the statute as a whole, it is clear that the statute contemplates that the determination of costs shall be made **by the court** after judgment has been rendered on the underlying substantive claims. Because the statute mandates that the issue of costs

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must be determined by the court, the district court's and Hyatt's contention that the determination of costs was a "jury action" is contrary to the law and simply makes no sense.

Indeed, this court has stated that the proper procedure for seeking costs related to litigation is to submit documentary evidence of the costs or fees "**to the trial court, generally in a post-trial motion.**" See Sandy Valley Associates v. Sky Ranch Estates Owners Ass'n, 117 Nev. 948, 956, 35 P.3d 964, 969 (2001) (emphasis added). The court then discussed the distinction between costs or fees sought pursuant to statute as a cost of litigation and those costs or fees requested as an element of damages. Id.; see also Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 861-62, 124 P.3d 530, 547 (2005). While Sandy Valley occurred in the context of attorneys fees being sought as a cost of litigation rather than as damages, the principle is the same, and both costs and attorneys fees are matters to be determined by the trial court.

Moreover, other courts have recognized based on comparable cost statutes that the determination of a reasonable award of costs is a matter to be decided by the trial court. See Jacob's Meadow Owner's Ass'n v. Plateau 44 II, LLC, 162 P.3d 1153, 1162 (Wash.Ct.App. 2007) (stating that determination of reasonable attorney's fees award as cost of action was matter determined by the trial court); Am. Commercial Colleges, Inc. v. Davis, 821 S.W.2d 450, 454 (Tex. App. 1991) (reversing jury's award of costs to prevailing party stating "the trial court is the proper authority to determine and award costs"); Feist v. Luzerne County Bd. of Assessment Appeals, 347 A.2d 772, 780 (Pa. Commw. Ct. 1975) (stating "awarding of costs is a matter which may be considered to be within the equitable powers of the Court").

The weight of authority on this issue, both within Nevada and in other states, mandates that cost determinations are to be made by the trial court rather than the jury. Indeed, this is the only conclusion that makes sense, especially in these circumstances where the jury had reached its verdict and was discharged more than a year before the special master completed his report and the district court issued its order awarding costs.

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Hence, Hyatt's contention that the cost matter was a "jury action" is baseless.

2. Because the Award of Costs was Required to be Determined by the Court, the District Court Should Have Applied the Procedure Set Forth in NRCP 53(e)(2) in Considering the Special Master's Report

The appointment of the special master in this case was for the sole purpose of resolving the issues relating to FTB's motion to retax costs, and did not involve any substantive determination regarding the underlying issues of liability that were made by the jury. See 21 ACA 5037-38. Because the determination of costs is a matter for the judge's determination according to the statute, the district court should have applied the non-jury trial procedure for the special master's proceedings.

Again, NRCP 53(e)(2) provides for the procedure to be applied by the district courts in employing a special master when an issue is to be ultimately determined by the trial court. It states:

> In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties . . . The court **after hearing** may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

NRCP 53(e)(2) (emphasis added). As this court has previously held, NRCP 53(e)(2) "provide[s] for a court hearing on all master's reports when objections have been filed." See Wagoner v. Tillinghast, 102 Nev. 385, 387, 724 P.2d 197, 198-99 (1986). Failure by the trial court to conduct the hearing provided for under NRCP 53(e)(2) constitutes reversible error, and renders the court's order awarding costs void. Id.

In this case, the district court clearly failed to conduct a hearing on the FTB's numerous and serious objections to the special master's report as she was required to do by NRCP 53(e)(2). See 26 ACA 6266-67. Rather, the court considered the report in chambers, summarily overruling the FTB's objections without making any specific findings of fact or conclusions of law. Id. Even though NRS 18.110 and mandatory authority from this court dictate that cost proceedings are matters for the court's determination, the district court flatly refused to apply the proper special master procedure

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for matters to be determined by the court.

Hyatt suggests in his Answering Brief that because the FTB did not object to the appointment of the special master, it somehow waived its right to object to the special master's final report and waived its right to any hearings on or meaningful review of the report by the district court. RABC 4. This argument is misguided for several reasons. First, Hyatt omits the fact that **neither** party requested the appointment of the special master. Rather, at the January 29, 2009 hearing on the FTB's motion to retax, the district court appointed the special master *sua sponte*, without any request by either party to do so. See 16 ACA 3979. Additionally, the FTB was never informed (and never had any reason to suspect) that if it agreed to the district court's appointment of the special master, it would be giving up the right to a hearing on objections to the special master's recommendations or that it would be giving up the right to meaningful judicial review of the master's report. See 16 ACA 3979-86. In fact, at the January 29, 2009 hearing, when counsel for FTB inquired as to whether the district court would "make [her] own independent determination" after reviewing the special master's report, the court assured the FTB that she would. See 16 ACA 3985:3-12. Hence, the FTB was assured that it would retain its right to object to the special master's report and to meaningful judicial review. Moreover, while the FTB did not object to the appointment of the special master, it did not have to in order to preserve its procedural rights that should have been guaranteed as a matter of Nevada law. Therefore, Hyatt's suggestion that the FTB's failure to object to the appointment of the special master constituted a waiver of the FTB's rights to the procedures required by NRS 18.110 and NRCP 53(e)(2) is groundless.

Hyatt also suggests in his Answering Brief that because the FTB worked with the special master and had the opportunity to lodge objections with the special master, the FTB was not denied any due process and that the district court complied with "substance and intent of NRCP Rule 53." See RABC 5-7. However, Hyatt's argument misses the point. Under NRCP 53(e)(2), it was the **district court** that was required to **hold a hearing** on and thoroughly consider the FTB's objections to the special master's final report. The district

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court failed to do so. The mere fact that the FTB may or may not have had an opportunity to lodge objections with the special master is irrelevant because, pursuant to the rule, the FTB should have had its objections considered by the district court after a hearing on the special master's findings. Hence, regardless of how many meetings the parties had with the special master on the cost issue, the FTB was denied the opportunity to meaningfully object in the district court. As such, the district court's order awarding costs is void as a matter of settled Nevada law.

B. Hyatt Should not have been Allowed to Submit Additional Supplementary Documentation of Costs Outside of the Briefing Period Prescribed by NRS 18.110

Hyatt failed to provide supporting documentation for his claimed costs within the parameters of the briefing schedule prescribed by NRS 18.110. Even though Hyatt did not provide sufficient supporting documentation within the confines of the procedure dictated by NRS 18.110, Hyatt was permitted to "try again" despite his obvious lack of diligence and suspect documentation. The special master allowed Hyatt to submit supporting documentation for the bulk of his claimed costs, including over 700 additional pages of supplementary materials almost a year after the briefing on the FTB's motion to retax had been completed and submitted to the district court for decision. 17 ACA 4089 - 20 ACA 4779. Even though Hyatt was granted leave by the special master to file new "evidence" supporting his claimed costs, the FTB was never permitted a real opportunity before the district court to respond to this new evidence, as discussed in the foregoing. Because the district court simply rubber-stamped the special master's improper consideration of late-filed, suspect documentation in violation of the statutory procedures outlined in NRS 18.110, the district court abused her discretion and the cost award must be overturned.

1. NRS 18.110 Does Not Allow For Multiple Supplementations of Cost Documentation

NRS 18.110 provides for: (1) a memorandum of costs within 5 days after the entry of judgment; (2) a motion to retax costs within 3 days of service of the memorandum.

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Again, as costs statutes are a derogation of the common law, costs statutes must be narrowly and strictly construed. See Albios v. Horizon Communities, Inc., 122 Nev. 409, 132 P.3d 1022, 1036 (2006). There is simply no provision in NRS 18.110 or elsewhere that allows for additional documentation.

Hyatt attempts to divert the court's attention from the fact that he was improperly permitted multiple times to provide supplemental documentation of his purported costs well outside of the period prescribed by NRS 18.110.[3] In essence, Hyatt argues that he was properly allowed to submit supporting documentation of his claimed costs **at any time** after the FTB objected to his memorandum of costs in its motion to retax. See RABC 10. According to Hyatt's reasoning, even after he filed his opposition to the FTB's motion to retax, he was properly permitted to provide supporting documentation of his costs until there was sufficient documentation to support them, regardless of his lack of diligence and regardless of the fact that the FTB was given no meaningful opportunity to object. See id. This argument is as confused as it is baseless. The FTB is **not** contending, as Hyatt claims, that Hyatt's failure to include any invoices or billing statements in his initial Memorandum of Costs "absolutely precluded any award of costs to Hyatt. . ." RABC 8:20-21. Rather, the FTB asserts that the procedures adopted by the special master and rubber-stamped by the district court unfairly permitted Hyatt to submit additional suspect documentation well **after** his opposition to the FTB's motion to retax (and without explanation). This allowed Hyatt to recover a significant amount of costs (approximately $2.2 million) that were not documented or addressed during the briefing process prescribed by NRS 18.110. Compare 21 ACA 5226-35 with 20 ACA 4854-80. This, coupled with the district court's blind adherence to the "jury trial" procedures under NRCP 53(e)(3), meant that Hyatt was essentially granted leave to provide support for his costs at his convenience over the course of one year, and that when he did provide additional documentation, FTB was not

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[3] Moreover, as discussed in detail in Section II(A)(2), Hyatt was permitted to submit supplemental documentation on his costs more than 300 days after the initial motion to retax. However, the FTB was not permitted a meaningful opportunity to object to this supplemental documentation before the district court.

permitted any meaningful review of that documentation by the district court.

2. Hyatt's Reliance on Nevada and Out-Of-State Authorities is Misplaced Since None Allow for Multiple Supplementations of Cost Documentation

In support of his argument that a cost claimant has as many opportunities to submit supporting documents as it takes, Hyatt cites the following case law: Gibellini v. Klindt, 110 Nev. 1201, 885 P.2d 540 (1994); Women's Fed. Sav. & Loan Ass'n of Cleveland v. Nevada Nat. Bank, 108 F.R.D. 396, 398 (D. Nev. 1985); Finchum v. Ford Motor Co., 57 F.3d 526, 533-34 (7th Cir. 1995); Albios v. Horizon Communities, Inc., 122 Nev. 409, 132 P.3d 1022 (2006); and Bach v. County of Butte, 215 Cal. App. 3d 294, 263 Cal. Rptr. 565 (Cal. Ct. App. 1989). RABC 10-13. However, upon careful review, **none** of these cases stands for the proposition that a cost claimant can be permitted multiple opportunities to submit supporting documentation of costs outside of the statutorily-prescribed briefing schedule.

For example, in Albios, this court noted that both parties submitted memoranda of costs. Albios, 122 Nev. at 415. Both parties opposed the others' memoranda of costs (i.e. a motion to retax under NRS 18.110). Id. The district court then permitted both sides to respond to the others' oppositions, adding additional documentation. Id. At no point does Albios indicate that either party was permitted to continue to supplement their documentation two and three times over. More importantly, while Albios mentions in dicta that parties claiming costs were allowed to submit additional documentation in an opposition to a motion to retax, Albios certainly does not stand for the proposition that a cost claimant has any opportunity outside of the briefing on a motion to retax to continue to supplement his cost documentation.

Hyatt also cites Bach in an attempt to argue that the cost claimant has multiple opportunities to supplement his cost documentation. RABC 12-13. Notwithstanding the fact that Bach is based on California's statute outlining the procedure for claiming costs, Bach does not stand for the proposition that a cost claimant is allowed multiple

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opportunities to submit supporting documentation of costs. In Bach, the court noted that the California statute (as it existed at the time of Bach) provided that the party claiming costs could submit a verified memorandum of costs to the court. Bach, 215 Cal. App. 3d at 307. The statute also provided that a party objecting to the claimed costs could file a motion to retax. Id. The Bach court clarified that if a motion to retax costs was filed, the cost claimant would have **one** opportunity to submit supporting documentation: i.e. in an opposition to a motion to retax. Id. at 308. Bach did **not** involve a situation where, as here, the cost-claimant was given multiple opportunities to try and try again to submit documentation outside of the prescribed briefing schedule. As such, Hyatt's reliance on Bach for the proposition that he was properly allowed to submit supporting documentation multiple times outside of the briefing schedule mandated by NRS 18.110 is misplaced.

Because the district court failed to adhere to the procedures set forth in NRS 18.110 and awarded Hyatt nearly $2.6 million in costs despite Hyatt's repeated disregard for the settled rules and procedures, the district court's award of costs was an abuse of discretion.

C. The District Court Awarded Hyatt Expert Witness Costs that Were Neither Reasonable nor Necessary

In yet another distorted presentation and application of the relevant legal authority, Hyatt asserts that the district court did not abuse her discretion in issuing a blanket award for all expert witness fees because testimony from each of the five[4] experts was "necessary at trial." See RABC 13:16-17. With this argument, Hyatt glosses over and ignores this court's long-standing rule that cost statutes should be construed narrowly and that the discretion to award costs should be "sparingly exercised when considering whether or not to allow expenses not specifically allowed by statute or precedent." Bergmann v. Boyce,

[4] In his Answering Brief, Hyatt includes arguments regarding the necessity of the testimony of three additional experts: Mari J. Frank, Diane Turly and George Swarts. RABC 14-16. However, Hyatt was not awarded costs for these three additional expert witnesses because the statute limits the award of costs to a maximum of five experts. See 20 ACA 4867; NRS 18.005(5). As such, Hyatt's discussions regarding the necessity of the testimony of Frank, Turly and Swarts is irrelevant to the issues raised in this appeal and should be disregarded.

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109 Nev. 670, 679, 856 P.2d 560, 566 (1993). In Hyatt's view, the trial court has unfettered discretion to award costs related to a litigant's expert witnesses without fear of reprisal so long as the trial court concludes that the expert witness' testimony was "necessary at trial."

Indeed, Hyatt attempts to bolster the district court's outrageous award by arguing that the testimony of each of his eight experts (including the three for which he was not awarded costs) was "necessary to assist the jury . . ." See RABC 14-18. However, Hyatt has again missed the mark. The FTB is not contending that the experts' **testimony** was not necessary to Hyatt's case. Rather, the FTB is contending that the exorbitant **charges** racked up by Hyatt's various expert witnesses were neither reasonable nor necessary.

1. NRS 18.005(5) Requires the Trial Court to Determine whether Expert Costs in Excess of $1500 are Required and Reasonable Under the Circumstances

Contrary to Hyatt's distorted and expansive interpretation of NRS 18.005(5), the statute clearly states that a party is only entitled to:

> **reasonable** fees of not more than five expert witnesses in an amount of not more than $1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such **necessity** as to **require** the larger fee.

NRS 18.005(5) (emphasis added). Hence, in contrast to Hyatt's argument that the prevailing party can recover all costs associated with an expert witness when the expert's testimony was "necessary at trial," NRS 18.005(5) clearly requires the amount of expert witness **fees** (rather than the testimony itself) to be constrained by reason and strict necessity. In sum, the test is not whether the expert's testimony was necessary, but whether the surrounding circumstances **require** a larger fee and whether that larger fee is reasonable. See NRS 18.005(5). To the extent Hyatt attempts to argue that the some of the fees associated with the experts fall within the catch-all category of 18.005(17) (RABC 14-15), those costs must still be circumscribed by the boundaries of reason and necessity. See NRS 18.005(17); Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998).

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Applying the correct standards as dictated by Nevada law, it is clear that the district court's award of the entirety of Hyatt's claimed expert witness costs is infected with errors. First and most egregiously, the district court awarded Hyatt the entirety of the expert witness costs requested for Paul Schervish, including the cost of first class air fare and gourmet cigars.[5] 20 ACA 4866-67. Again, regardless of whether Mr. Schervish's testimony was helpful or assisted the jury, it is frankly outrageous to contend that Nevada's cost statute, strictly construed, was intended to force a litigant to pay for an expert witness' extravagances including town cars, limousines, expensive cigars, first class airfare and gourmet meals. There are simply no circumstances under which an expert witness would be **required** to incur such unreasonable costs. In fact, under **Nevada's** strict construction of NRS 18.005, it was a quantum leap under the circumstances of this case to jump from the proposition that an expert's testimony was useful, to the conclusion that **all** costs incurred by that expert, including those not specifically allowed for by the statute, must have been reasonable and necessary. This is exactly the leap that the special master made, and that the district court erroneously affirmed.

Second, the district court rubber-stamped the special master's decision to award Hyatt **all** $893,598.52 of the fees claimed for Malcolm Jumulet. 20 ACA 4866-67; 26 ACA 6264-67. As evidenced by the special master's final report, it is clear that the special master (and the district court) wrongly focused on the "usefulness and necessity" of Mr. Jumulet's **testimony**. 20 ACA 4866-67. Neither the special master nor the district court considered whether the costs incurred by 15 additional persons at Pricewaterhouse Cooper were **reasonable** or even **required** under the circumstances. Id. Instead, the special master found in conclusory fashion, and the district court agreed, that because Mr. Jumulet's testimony was "helpful," all of the costs related to 15 other persons on Mr. Jumulet's support staff were recoverable. Id. Based on the limiting nature and strict construction of Nevada's cost statute, this conclusion was plain error.

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[5] Notably, Hyatt never even addresses this particularly glaring fact in his Answering Brief.

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2. Hyatt's Citations to Out-Of-State Authorities are Both Distinguishable and Outright Misleading

In support of his argument that fees for expert witness assistants are allowable under Nevada law, Hyatt provides misleading citations to Moore v. W. Forge Corp., 192 P.3d 427 (Colo. Ct. App. 2007) and Ste. Marie v. E. R. Ass'n, 650 F.2d 395 (2d Cir. 1981). See RABC 14-15 n. 52. However, Moore is based on statutory language that is more permissive and inclusive than NRS 18.005 and Ste. Marie contains no holding as to the propriety of expert witness costs.

In Moore, the defendants obtained summary judgment in a wrongful death action and the trial court awarded the defendants' their costs for, *inter alia*, "reasonable fees for an expert witness' assistant." Moore, 192 P.3d at 439-40. However, the Moore court based its award of expert witness fees on a far more permissive Colorado statute than NRS 18.005. The award of expert assistant fees in Moore was based on Colo. Rev. Stat. §13-16-122. That statute provides a list of limited types of actions in which an expansive amount of costs can be awarded, including: costs incurred in an action for replevin, costs incurred in habeas actions or on writ petitions, costs incurred in bringing a successful motion to dismiss, and costs incurred in bringing a successful personal injury action. See Colo.Rev.Stat. §13-16-101-125. Colorado courts have recognized that in those limited circumstances, the expansive definition of costs provided in Colo. Rev. Stat. §13-16-122 applies and fees for expert witness assistance are recoverable. See Moore, 192 P.3d at 439-40.

Notwithstanding Moore and Colo. Rev. Stat. §13-16-122, Colorado courts have recognized that **in all other situations** where costs are sought pursuant to Colo. Rev. Stat. §13-33-102, and specifically where the prevailing party at trial seeks to recover expert witness fees, the more-restrictive cost statute does not permit an award of fees for an expert witness' assistant. See W. Fire Truck, Inc. v. Emergency One, Inc., 134 P.3d 570, 578 (Colo. Ct. App. 2006) (holding trial court erred by including expert witness' assistant's fees in the award of costs as they were not specifically authorized by Colo. Rev. Stat. §13-33-

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102); Perkins v. Flatiron Structures Co., 849 P.2d 832, 836 (Colo. Ct. App. 1992) (holding fees for the expert's assistant should not have been allowed because those fees were not authorized by Colo. Rev. Stat. §13-33-102). Hence, because the language of NRS 18.005 is far more akin to the restrictive language provided in Colo. Rev. Stat. §13-33-102, Hyatt's reliance on Moore for the proposition that expert witness assistant's fees are always permissible in other jurisdictions is misplaced.

Hyatt also includes a misleading citation to Ste. Marie v. E. R. Ass'n, 650 F.2d 395 (2d Cir. 1981), claiming that the Second Circuit approved of the trial court's award of costs related to a statistical expert's assistants. See RABC 14-15 n. 52. However, upon further review, Ste. Marie contains no such holding. To the contrary, Ste. Marie involved a claim for disparate impact discrimination based on detailed statistical evidence. Ste. Marie, 650 F.2d at 397. The trial court ultimately entered judgment against the defendants on the issue of liability, which included an award of costs for "a statistical expert and his assistants." Id. On appeal, the Second Circuit reversed the trial court's judgment on liability and remanded the case to the trial court. Importantly, the Second Circuit explicitly noted that it was **not** issuing an opinion as to the propriety of the trial court's cost award. Id. at 408. Hence, Hyatt cannot cite Ste. Marie for the proposition that expert witness assistant fees were properly awarded. The Second Circuit's decision rendered the issue moot, and the court explicitly deferred considering the cost issue until the underlying liability issues were determined. Id. Therefore, Hyatt's citation to Ste. Marie in support of his expert assistant argument is at best misleading and at worst patently false.

Hyatt's twisted version of the facts and misleading legal citations cannot avoid the inescapable conclusion that the district court clearly failed to exercise reason and restraint in analyzing the costs related to Hyatt's expert witnesses. Instead of carefully reviewing the special master's findings and the actual bases for Hyatt's claimed costs, the district court hastily issued a blanket award for all of the claimed costs associated with these experts. As a result of these failures, the district court abused her discretion.

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D. The District Court Awarded Hyatt The Full Amount of His Claimed Technology Support Costs Without Regard to Reason or Necessity

Without inquiring into the reasonableness or necessity of Hyatt's claimed "technology" costs, the special master and the district court awarded Hyatt **all** of the nearly $500,000 for technology and technology consultant services. 20 ACA 4879; 26 ACA 6266-67. In support of this unprecedented award, the special master merely stated, in conclusory fashion and without any explanation, that such costs were "reasonable and necessary in this action given the length of the trial time and information provided to the court and jury." 20 ACA 4879. However, again, upon closer inspection, it is clear that the special master and the district court overlooked the fact that even though the technology services provided to Hyatt may have made his presentation at trial more convenient, most if not all of the costs associated with the technology consultant services were neither reasonable nor necessary.

1. NRS 18.005(17) Requires that Unenumerated Costs Must be Reasonable and Necessary

Again, NRS 18.005(17) provides that "costs" may include "[a]ny other **reasonable and necessary** expense incurred in connection with the action . . ." Where certain fees are not specifically recoverable under NRS 18.005, a district court may award costs for additional items pursuant to NRS 18.005(17) "on the condition that such fees are reasonable, necessary and incurred in the action." Berosini, 114 Nev. at 1352. Hence, if the district court awards a party costs under NRS 18.005(17), the costs awarded must be both reasonable and necessary, not for the party's convenience. The district court entirely failed to consider reason or necessity when she awarded Hyatt all of his claimed costs for technology services, including the nearly $40,000 in travel expenses for out-of-state vendors and over $47,000 for equipment rentals. See 20 ACA 4879; 26 ACA 6264-6267. As discussed in detail in the FTB's Supplemental Opening Brief Regarding Costs ("AOBC"), technology costs themselves are of questionable necessity. See AOBC 24-27. However, even if, as Hyatt suggests, some technology services were "necessary" in this

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case (which they were not), there are no circumstances in which the inflated fees, travel expenses and equipment rentals incurred by the out-of-state technology consultants would be reasonable. See AOBC 23-24.

2. Hyatt's Various Out-Of-State Legal Authorities Actually Support the FTB's Assertion that Technology Costs are Neither Reasonable nor Necessary

Hyatt directs this court to several out-of-state authorities, claiming that they demonstrate that the "modern trend" is that courts generally award costs for graphics and technology. See RABC 19-20. However, again, Hyatt has provided a few misleading quotations and wholly distorted the actual holdings of the cases he cites. For example, Hyatt cites Sci. Applications Internat. Corp. v. Superior Court, 39 Cal. App. 4th 1095, 46 Cal. Rptr. 2d 332 (Cal. Ct. App. 1995), to support his argument that "modern" courts generally award all costs associated with technology in the courtroom. See RABC 19. However, the court in Science Applications reduced the trial court's exorbitant technology cost award by over two-thirds. Science Applications, 39 Cal. App. 4th at 1104. Specifically, the appellate court flatly rejected the trial court's awarded costs of: (1) $47,481 for production of discs containing trail exhibits; (2) $9,915 for a graphics communication system and equipment rental and $11,983 for an on-site technician to facilitate the presentation of materials to the jury; (3) $35,652 to have videotape depositions edited for effective presentation to the jury; (4) $200,000 for a document control and database for internal case management during discovery and trial. Id.

The court in Science Applications reasoned that the document control and database charge was the prevailing party's expenditure for an outside firm to keep track of the voluminous records in the case was neither reasonable nor necessary to the litigation. Id. The court stated that "the expense is the cost of hiring assistants to help counsel organize documents and access them . . . at trial – in other words, the cost of a 'high tech' paralegal." Id. Similarly, for the equipment rental and technicians that were present in trial to assist with the presentation, the court stated these were "method[s] of accessing information – a high-powered way of retrieving documents – more than anything else." Id.

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Finally, when addressing the coordination and editing of the video-taped testimony during trial, the court made the following statement:

> The fact that the State took a state-of-the-art approach to the testimony does not make it allowable. To the contrary, the existence of the alternative but mundane method of reading aloud strongly suggests the editing 'was not reasonably necessary to the conduct of the litigation,' however 'convenient or beneficial' it may have been.

Id. (emphasis added). Hence, Science Applications actually stands for the proposition that technology costs, including the costs of hiring consultants to assist with a "high tech" trial presentation, are neither reasonable nor necessary costs recoverable by the prevailing party as they are simply a more-expensive method of accessing and presenting information.

Similarly, Hyatt cites to a New York case, DiBella v. Hopkins, 407 F. Supp. 2d 537 (S.D.N.Y. 2005) for support of the proposition that computers, computer graphics and other technological advancements should be recovered by the prevailing party. See RABC 18. However, Hyatt's reliance on this case is also misplaced. Because New York courts have specifically found exhibits, including demonstrative aids and computer graphics to fall under the language of New York's cost statute, parties in New York need not prove that the costs were "necessary" as required by the clear language of the Nevada statute. The court in Dibella was only called upon to determine that the costs were "reasonable and the devices aid[ed] in the efficient and effective presentation of evidence." DiBella, 407 F.Supp.2d at 540. Even so, the court in Dibella only awarded the prevailing party approximately one-fifth of the claimed technology costs ($10,000 awarded versus $56,100 claimed). Id. Hence, even in a jurisdiction where technology costs are specifically allowed by statute, the DiBella court reduced the prevailing party's claimed technology costs significantly to a more reasonable figure.[6] Id.

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[6] Hyatt also cites Asyst Technologies v. Emtrak Inc., C 98-20451 JF(HRL), 2009 WL 668727 (N.D. Cal. Mar. 13, 2009) and Farberware Licensing Co. LLC v. Meyer Mktg. Co., Ltd., 09 CIV. 2570 (HB), 2009 WL 5173787 (S.D.N.Y. Dec. 30, 2009) in support of his argument that costs for high-tech consultant fees are always allowable. See RABC 19-20. However, these cases are limited to their facts and are based on local rules and statutes that allow recovery for the cost of exhibits or demonstratives used at trial. Asyst, 2009 WL

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Hyatt's own cited authority actually contradicts his argument that the costs of his high-tech trial presentation were reasonable and necessary. The court in Science Applications, relying upon a similar California cost statute, disallowed most of the prevailing party's claimed "technology" costs, including those similar to what Hyatt has claimed for the services of the two outside vendors, ZMF and Tsongas. Even if these vendors made Hyatt's presentation "state-of-the art" and more efficient during trial, there were certainly alternative methods of presentation and even alternative in-state vendors that would have eliminated most if not all of these costs. As a policy matter, while modern technology may bring with it more efficient and dazzling methods of trial presentation, routinely awarding staggering costs for high-powered technology will result in most parties being unable to litigate. As the court in Science Applications stated succinctly, "[i]f a party litigant chooses unwisely to expend monies in trial presentation . . . utilizing advanced methods of information storage, retrieval and display, when more conventional if less impressive methods are available, the party must stand his own costs." Science Applications, 39 Cal. App. 4th at 1105.

Similarly here, the FTB should not be forced to bear the cost of Hyatt's choice to use the most high-tech and expensive mode of trial presentation when more conventional and less-expensive methods were certainly available. Because the special master and the district court clearly failed to even analyze whether Hyatt's claimed costs for ZMF and Tsongas were reasonable and necessary as required by NRS 18.005(17), the district court's award of the entirety of Hyatt's claimed technology costs was a clear abuse of discretion.

668727 at *2 (cost award based on Local Rule 54-3(d)(5) allowing for recovery of cost of "charts, diagrams, videotapes and other visual aids"); Farberware, 2009 WL 5173787 at *8 (cost award based on Lanham Act, 28 U.S.C. §1920). Moreover, both of these cases involved patent litigation which, if presented to a jury, often requires a visual diagram of the technology in dispute. Additionally, while the court in Farberware concluded that the visual diagrams were helpful to the jury, the court refused to award the prevailing party all of its claimed costs and reduced those costs by more than 50%. Farberware, 2009 WL 5173787 at *8 (refusing to award costs for IT trial specialists' fees and reducing cost award for trial graphics equipment and trial consultants). Therefore, Hyatt's reliance on Asyst and Farberware is also misplaced.

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E. The Case Law Regarding Costs Militates that Cost Statutes Must be Strictly Construed, and that Cost Awards Must be Grounded in Reason and Necessity

In a final and sweeping mischaracterization of the various cases regarding costs cited by the parties in this case, Hyatt makes the blanket assertion that all cost awards are within the trial court's unbounded discretion. See RABC 20-27. However, like most of Hyatt's representations, his characterization of the case law on point is neither helpful nor accurate.

To the extent any general, overarching principles can be gleaned from the extensive case law provided by the FTB in its opening brief, it is that costs statutes must be strictly construed as they are a derogation of the common law. See Albios, 122 Nev. at 431. Additionally, the trial court must carefully and fairly consider the evidence submitted in support of a prevailing party's claimed costs rather than simply delegating the matter without meaningful review. See, e.g., Wagoner, 102 Nev. at 385 (holding court's entry of judgment without notice or hearing after special master's final report was void); Vill. Builders 96, L.P. v. U.S. Laboratories, Inc., 121 Nev. 261, 277-78, 112 P.3d 1082 (2005) (stating party seeking costs must provide justifying documentation for each cost "because such documentation is precisely what is required under Nevada law to ensure that the costs awarded are those costs actually incurred").

Moreover, while trial courts do have some discretion in determining the appropriate amount of costs, that discretion is not boundless and does not mean that the prevailing party receives a blank check for all costs he has chosen to incur during the litigation. See, e.g., Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 235, 85 S. Ct. 411, 13 L. Ed. 2d 248 (1964) disapproved of by Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987) (holding items proposed by the prevailing party as costs should always be given careful scrutiny as the trial court does not have "unfettered discretion to tax costs for every expense a winning litigant has seen fit to incur"); Berosini, 114 Nev. at 1352-53. (holding district court abused its discretion where it awarded costs to prevailing party without regard to reasonableness or necessity).

The district court applied none of these well-settled principles in determining Hyatt's cost award. As a result of the district court's failures, the FTB has been ordered to pay Hyatt a ridiculous amount of costs, the vast majority of which would never pass the scrutiny of reason and fairness.

III. CONCLUSION

For the reasons stated within, FTB respectfully requests that the court void the district court's order awarding costs in the amount of $2,539,068.65, or in the alternative, for the court to disallow $1,250,781.96 in expert witness fees, and $499,459.54 for technology services.

Dated this 12th day of October, 2010.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellant's supplemental opening brief regarding costs, 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 N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

Pursuant to N.R.A.P. 25, I hereby certify that I am an employee of McDonald Carano Wilson LLP and that on this date I served true copies of the foregoing APPELLANT'S SUPPLEMENTAL REPLY BRIEF REGARDING COSTS of by depositing said copies with Federal Express for overnight delivery upon the following:

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