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IN THE SUPREME COURT OF THE STATE OF NEVADA

WYNN LAS VEGAS, LLC d/b/a WYNN LAS VEGAS,

Appellant,

v.

YVONNE O'CONNELL, AN INDIVIDUAL,

Respondent.

Supreme Court Case No. 70583

District Court Case No. A655992

JOINT MOTION TO CONTINUE DEADLINE FOR OPENING BRIEF

The underlying case involves Respondent Yvonne O'Connell's ("O'Connell") slip and fall accident at Appellant Wynn Las Vegas, LLC's ("Wynn") Las Vegas resort on February 8, 2010. The parties' jury trial went forward November 4, 2015, through November 15, 2015. At the conclusion of the trial, O'Connell was awarded damages for past and future pain and suffering in the total amount of $240,000.00. O'Connell was also awarded pre-judgment interest in the sum of $17,190.96, increasing the total judgment to $257,190.96. Following denial of Wynn's post-trial motions, Wynn filed its Notice of Appeal on June 8, 2016. The parties' completed their mandatory Supreme Court settlement conference on August 30, 2016. Pursuant to the Court's Order Reinstating Briefing, Wynn's Opening Brief is currently due December 5, 2016.

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Following judgment, O'Connell submitted a Motion to Tax Costs and for Fees and Post-Judgment Interest. Additionally, Wynn filed a Motion to Retax Costs. On November 9, 2016, the Court entered its Order "Partially Granting and Partially Denying Defendant's Motion to Retax Costs and Plaintiff's Motion to Tax Costs and for Fees, Costs and Post-Judgment Interest" (the "Costs and Fees Order"). (Ex. 1 hereto.) Notice of entry of the Costs and Fees Order was provided on November 10, 2015. (Ex. 2 hereto.)

O'Connell filed a Notice of Appeal of the Costs and Fees Order on November 17, 2016, and a Case Appeal Statement that same day. In light of O'Connell's appeal, the parties intend to move for a consolidation of these appeals and to request excusal from conducting any additional settlement conference through the mediation program. Therefore, for the sake of judicial efficiency, and to avoid duplication and incurrence of unnecessary fees and costs, the parties respectfully request that the deadline for the Opening Briefs in this appeal be continued for sixty (60) days. This extension should provide sufficient time for O'Connell to file her docketing statement and the parties to consolidate the appeals and propose a reasonable briefing schedule.

The parties jointly request this extension as they deem it the most efficient course in this appeal.

DATED this 21st day of November, 2016.

NETTLES LAW FIRM

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DATED this 21st day of November, 2016

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EXHIBIT 1

EXHIBIT 1

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d/b/a Wynn Las Vegas

DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, individually,

Plaintiff,

v.

WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company d/b/a WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X; inclusive,

Defendants.

Case No. A-12-655992-C
Dept. No. V

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING DEFENDANT'S MOTION TO RETAX COSTS AND PLAINTFF'S MOTION TO TAX COSTS AND FOR FEES, COSTS AND POST-JUDGMENT INTEREST

Dates and Times of Hearings: March 4, 2016 at 8:30 a.m. and August 12, 2016 at 9:00 a.m.

On March 4, 2016, the Court held a hearing on (1) Plaintiff Yvonne O'Connell's ("Plaintiff") Amended Application for Fees, Costs and Pre-Judgment Interest, amended and resubmitted as Plaintiff's Motion to Tax Costs and for Fees and Post-Judgment Interest (the "Amended Application for Fees") and on (2) Defendant Wynn Las Vegas, LLC's d/b/a Wynn Las Vegas ("Defendant") Motion to Re-tax Costs and Supplement to its Motion to Re-tax Costs (together "Motion to Re-tax"). Christian Morris, Esq. and Edward J. Wynder, Esq. of the Nettles Law Firm appeared on behalf of Plaintiff and Lawrence J. Semenza, III, Esq. and Christopher D. Kircher, Esq. of Lawrence J. Semenza, III, P.C. appeared on behalf of Defendant.

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Thereafter on August 12, 2016 the Court held a hearing on its request for additional briefing regarding deviating above NRS 18.005(5)'s expert witness statutory cap pursuant to the *Frazier v. Duke* factors. Jon Carlston, Esq. of the Nettles Law Firm appeared on behalf of Plaintiff and Lawrence J. Semenza, III, Esq. of Lawrence J. Semenza, III, P.C. appeared on behalf of Defendant.

The Court, having reviewed the records and pleadings on file, as well as the oral argument of counsel, hereby rules as follows:

I. FACTUAL BACKGROUND

This is a personal injury action resulting from Plaintiff's slip and fall at Defendant's casino. A jury trial was held and the jury found in favor of Plaintiff on November 16, 2015. The jury awarded Plaintiff $150,000 for past pain and suffering and $250,000 for future pain and suffering, finding her to be 40% at fault. Plaintiff's total award was $240,000. After the verdict was entered, Plaintiff filed her initial Application for Fees, Costs and Pre-Judgment Interest (the "Initial Application") on November 25, 2015, attaching a Memorandum of Costs as an exhibit. On December 7, 2015, Defendant filed its Opposition to the Initial Application and a Motion to Re-tax Costs. On December 21, 2015, Plaintiff filed an Amended Verified Memorandum of Costs and the above-described Amended Application for Fees. On December 28, 2015, Defendant filed its Supplement to its Motion to Re-tax Costs and Opposition to the Amended Application for Fees. On January 14, 2016, Plaintiff filed an Opposition to the Motion to Re-tax and Reply in support of her Amended Application for Fees.

On June 29, 2016 this Court issued a minute order for counsel to file supplemental briefs regarding the factors for awarding expert fees above $1,500 outlined in *Frazier v. Duke*, 357 P.3d 365, 131 Nev. Adv. Op. 64 (Nev. Ct. App. 2015).

II. DISCUSSION

A. Legal Standards and Applicable Statutes

Plaintiff moves for fees and costs under both NRCP 68 and NRS 18.010. NRCP 68(f) provides:

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> If the offeree [of an offer of judgment] rejects an offer and fails to obtain a more favorable judgment,
>
> (1) the offeree cannot recover any costs or attorney's fees and shall not recover interest for the period after the service of the offer and before the judgment; and
>
> (2) the offeree shall pay the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer. If the offeror's attorney is collecting a contingent fee, the amount of any attorney's fees awarded to the party for whom the offer is made must be deducted from that contingent fee.

NRS 17.115(4) similarly provides, in relevant part:

> Except as otherwise provided in this section, if a party who rejects an offer of judgment fails to obtain a more favorable judgment, the court:
>
> > (c) Shall order the party to pay the taxable costs incurred by the party who made the offer; and
> >
> > (d) May order the party to pay to the party who made the offer...(3) Reasonable attorney's fees incurred by the party who made the offer for the period from the date of service of the offer to the date of entry of the judgment. If the attorney of the party who made the offer is collecting a contingent fee, the amount of any attorney's fees awarded to the party pursuant to this subparagraph must be deducted from that contingent fee.

Additionally, NRS 18.010(2)(b) provides that fees may be awarded to the prevailing party "[w]ithout regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party."

NRS 18.110(1)-(2) provides that whenever a party claims costs, she must file a verified memorandum setting forth those costs within 5 days of entry of the judgment and that witness fees are recoverable costs, regardless of whether the witness was subpoenaed, if the witness testified at trial. NRS 18.110(4) allows the opposing party to file a motion to re-tax claimed costs within 3 days of service of a copy of the memorandum of costs.

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As a preliminary note, Defendant's first argument is that Plaintiff improperly and unilaterally filed the Amended Application for Fees after reading Defendant's Opposition, so the Court should only consider the Initial Application. Here, judgment was entered on December 15, 2015. Plaintiff filed the Initial Application well before this, on November 25, 2015. She also filed her Amended Application for Fees on December 21, 2015, which is within the time limit set forth in the rule (note that under EDCR 1.14(a), the period for filing is five *judicial* days from entry of judgment). However, Defendant's Motion to Re-tax Costs as to the Initial Application was due on December 2, 2015,[1] but it was not filed until December 7, 2015, and was thus untimely.[2] Defendant's Motion to Re-tax as to the Amended Verified Memorandum of Costs was timely, though. It is true that generally, supplemental briefing is allowed only by leave of court. *See* EDCR 2.20(i). However, given that Defendant's first Motion to Re-tax Costs was untimely, it would seem that it would be willing to waive its first argument in opposition to Plaintiff's Amended Application for Fees.

B. Analysis: Fees under NRCP 68

In order for the penalties associated with the rejection of an offer of judgment to apply, the offeree must not have obtained a more favorable judgment. NRCP 68(f); NRS 17.115(4). To determine whether the offeree of a lump-sum[3] offer of judgment obtained a more favorable judgment, the amount of the offer must be compared to the amount of the offeree's *pre*-offer, *taxable costs*. *McCrary v. Bianco*, 122 Nev. 102, 131 P.2d 573, 576, n. 10 (2006) (stating that NRCP 68(g) must be read in conformance with NRS 17.115(5)(b)). Here, Plaintiff offered to settle the case for $49,999.00 on September 3, 2015. The verdict was in favor of Plaintiff for a total of $240,000.00. It seems that this may be a more favorable judgment, although Plaintiff has neglected to specifically set forth her pre-offer taxable costs. On the other hand, Plaintiff's total

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[1] Plaintiff served the Initial Application on November 25, 2015.

[2] Defendant argues that Plaintiff never actually served the initial Memorandum of Costs, but this is disingenuous because Plaintiff did in fact serve her Initial Application that attached a Memorandum of Costs as an Exhibit.

[3] A lump-sum offer of judgment is one that includes all damages, legal costs, and attorneys' fees.

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claimed costs were $26,579.38 (whether pre- or post-offer) and that, together with the offer, amounts to $76,578.38. Plaintiff's jury recovery was well above this – $240,000.00 – so it appears that Plaintiff has met the threshold requirement to show entitlement to fees and costs under Rule 68.

The determination of whether to grant fees to a party under NRCP 68 rests in the sound discretion of the trial court. *Chavez v. Sievers*, 118 Nev. 288, 296, 43 P.3d 1022, 1027 (2002). Such a decision will not be disturbed unless it is arbitrary and capricious. *Schouweiler v. Yancey Co.*, 101 Nev. 827, 833, 712 P.2d 786, 790 (1985). District courts must consider several factors when making a fee determination under *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1963): (1) whether the plaintiff's claim was brought in good faith; (2) whether the offer was reasonable and in good faith in timing and amount; (3) whether the decision to reject the offer was grossly unreasonable or in bad faith; and (4) whether the sought fees are reasonable and justified. However, where the defendant is the offeree of an offer of judgment, the first factor changes to a consideration of whether the defendant's defenses were litigated in good faith. *See Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998).

As to the first factor, whether Defendant's defenses were litigated in good faith, Plaintiff argues that Defendant's defense that it had no notice of the liquid on the casino floor was in bad faith because it failed to make an inquiry into the last time the floor was checked before Plaintiff slipped. (Am. App. at 5-6.) Plaintiff also argues that Defendant's defense that there was no causation here was unreasonable because it relied upon expert testimony that lacked a basis in modern science. (*Id.* at 6.) Defendant's Motion to Re-tax and Opposition to the Amended Application for Fees does not address whether its defenses were maintained in good faith. However, Nevada case law has caused some confusion in differentiating between constructive notice and the "mode of operation approach," the latter of which is specifically discussed in cases decided subsequent to *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320. 322-33 (1993). This is not a case where the law is black and white. Based on that and the evidence presented at trial, it was not bad faith for Defendant to contend that it lacked notice of the condition on the floor and Plaintiff in fact so concedes.

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Furthermore, Plaintiff's evidence of constructive notice may have been enough to escape the granting of a Rule 50 motion, but it was by no means overwhelming. Additionally, Plaintiff's damages claims were reasonably disputed by expert testimony of a defense witness. That the jury was not persuaded by this expert does not translate to bad faith by the Defendant. Thus, the first factor therefore weighs in favor of the Defendant.

As to the second factor, Defendant argues that the offer was unreasonable in amount because Plaintiff had no basis for its offer and that due to Plaintiff's "gamesmanship," Defendant could not sufficiently evaluate the offer. (Opp. at 5-7.) Here, discovery closed on June 12, 2015. Plaintiff was unable to submit proof of special medical damages at the time of trial because the Court precluded them on the basis that they were not properly disclosed in discovery. This made it extremely difficult for the Defense to evaluate a potential value of the case. An offer made at a time when Plaintiff has not properly provided a calculation of damages is unreasonable. Thus, the second factor weighs in favor of Defendant.

In ascertaining whether Defendant's decision to reject the offer was grossly unreasonable or in bad faith, a pertinent consideration is whether enough information was available to determine the merits of the offer. *Trustees of the Carpenters for S. Nev. Health & Welfare Trust v. Better Building Co.*, 101 Nev. 742, 746, 710 P.2d 1379, 1382 (1985). Here, discovery closed on June 12, 2015. The offer of judgment was made three months later, on September 3, 2015. Given that at the time of the offer, Defendant had available all the materials obtained during discovery, including witness depositions, Defendant's decision to reject the offer was well-informed. Furthermore, the issues surrounding notice were not necessarily clear-cut, as evidenced by the parties' pre-trial and post-trial motions on that issue. Overall, it is unlikely that Defendant's rejection of the offer was grossly unreasonable or in bad faith, and in the end weighs in favor of Defendant.

With regard to the last *Beattie* factor, the Court must undergo an analysis of whether claimed fees were reasonable in light of the factors set forth in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 249, 455 P.2d 31, 33 (1969). Plaintiff has addressed some, but not all, of these factors. Plaintiff's counsel has set forth the qualities of the advocate(s) on this case and, of

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course, we know that a favorable result was obtained. However, Plaintiff has not provided any bills setting forth what tasks were performed and the associated hours for those tasks. This prevents the Court from determining whether the fees charged were reasonable in light of the tasks actually performed. Therefore, because Plaintiff has not carried her burden under *Brunzell*, this factor weighs in favor of Defendant. On the whole, all of the factors set forth in *Beattie* (as modified by *Yamaha*, *supra*) weigh in favor of Defendant in this case and Plaintiff's Amended Application for Fees should be **denied**.

C. Analysis: Award of Costs

Although NRCP 68 costs are only for post-offer costs, NRS 18.020(3) mandates awarding all costs to Plaintiff since she prevailed in seeking damages in an amount more than $2,500. NRS 18.110(1) requires the filing of a memorandum of costs by the party in whose favor judgment is rendered, including a verification of the party, the party's attorney, or an agent of the party's attorney that the costs are correct and were necessarily incurred.

The amount of awarded costs rests in the sole discretion of the trial court. *Bergmann v. Boyce,* 109 Nev. 670, 679, 856 P.2d 560, 565–66 (1993). The court also has "discretion when determining the reasonableness of the individual costs to be awarded." *U.S. Design & Constr. Corp. v. I.B.E.W. Local 357,* 118 Nev. 458, 463, 50 P.3d 170, 173 (2002). Claimed costs must be "actual and reasonable, rather than a reasonable estimate or calculation of such costs." *Bobby Berosini, Ltd. v. PETA,* 114 Nev. 1348, 1352, 971 P.2d 383, 385–86 (1998) (internal quotations omitted). The Supreme Court has also indicated that claimed costs must be supported by documentation and itemization. *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 971 P.2d 383 (1998). Defendant only challenges certain specific fees, each of which will be addressed in turn.

1. Expert Witness Fees

With regard to Mr. Presswood, his testimony was not used at trial because this Court ruled that his testimony would be unreliable. Since his testimony was clearly inadmissible under the *Hallmark* standard, as reflected in this Court's prior pre-trial ruling, his fees should not be awarded.

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Plaintiff seeks expert witness fees of $6,000 for Craig Tingey, M.D. and $10,000 for Thomas Dunn, M.D. NRS 18.005(5) provides for recovery of "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."

In order for an award of expert witness fees in excess of the statutory maximum to be proper, the fees must not only be reasonable, but also "the circumstances surrounding [each] expert's testimony [must be] of such necessity as to require the larger fee." *Frazier*, 357 P.3d at 374 (citing NRS 18.005(5); *Logan v. Abe*, 131 Nev. ---, ---, 350 P.3d 1139, 1144 (2015)). In crafting its decision, the Court of Appeals used the limited Nevada Supreme Court authority available as well as extra-jurisdictional authority, particularly from Idaho (which has a statute similar to NRS 18.005(5)), Louisiana, Connecticut, and Massachusetts.

Ultimately, the Nevada Court of Appeals set forth a nonexhaustive list of factors, some of which may not necessarily be pertinent to every request for expert witness fees in excess of $1,500. The factors in evaluating requests for awards over the statutory maximum include:

1. The importance of the expert's testimony to the party's case;
2. the degree to which the expert's opinion aided the trier of fact in deciding the case;
3. whether the expert's reports or testimony were repetitive of other expert witnesses;
4. the extent and nature of the work performed by the expert;
5. whether the expert had to conduct independent investigations or testing;
6. the amount of time the expert spent in court, preparing a report, and preparing for trial;
7. the expert's area of expertise;
8. the expert's education and training;
9. the fee actually charged to the party who retained the expert;
10. the fees traditionally charged by the expert on related matters;
11. comparable experts' fees charged in similar cases; and

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12. if an expert is retained from outside the area where the trial is held, the fees and costs that would have been incurred to hire a comparable expert where the trial was held.

Frazier, 357 P.3d at 377-78.

Plaintiff argues that pursuant to *Frazier*, this Court should award the entire $6,000 for Dr. Tingey's fee. (Pl. Supp. Brief at 3-4.) Additionally, Plaintiff argues that this Court should award at least $5,000 of Dr. Dunn's fee if not the entire amount. (Pl. Supp. Brief at 3-4.) In its brief, rather than discussing the *Frazier* factors in the brief itself, Defendant incorporated by reference its arguments set forth related to the "expert costs." Specifically, Defendant directs this Court to pages 10-13 of its Opposition to Plaintiff's Application for Fees, Costs and Pre-Judgment Interest and Motion to Retax Costs filed on December 7, 2016 as well as pages 7 and 8 of Defendant's Supplement to Motion to Retax Costs and Opposition to Plaintiff's Amended Application for Fees, Costs and Prejudgment Interest filed on December 28, 2016. In sum, Defendant argues there is not a sufficient basis to award Plaintiff expert costs for her treating physicians at all and especially not above the statutory maximum of $1,500. (Def. Supp. Brief at 4.)

The Importance of the expert's testimony

Plaintiff argues that Dr. Tingey testified primarily regarding Plaintiff's right knee and Dr. Dunn testified primarily regarding Plaintiff's spine. (Pl. Supp. Brief at 5.) Both parties agree that the doctors testified that the injuries to the right knee and cervical spine were caused by the slip and fall. However, the parties disagree as to how important that testimony was to Plaintiff's case. Plaintiff argues that the testimony "formed the lynchpin" of Plaintiff's causation argument. (Pl. Supp. Brief at 6.) Alternatively, Defendant argues that the doctors did not add anything substantive to trial, because the doctors based their opinions solely on Plaintiff's subjective physical complaints without reviewing her medical history. (Def. Opp. to Pl. Motion for Fees at 12.) Defendant further argues that the doctors' opinions were unreliable, repetitive and unnecessary because Plaintiff testified regarding her subjective complaints of pain and injury. (Def. Opposition at 12.) Finally, Defendant argues that experts are generally needed in personal injury cases to testify regarding the necessity of past or future medical treatment or the reasonableness of costs, and because Plaintiff did not seek these damages, the doctors' testimony

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was largely duplicative of Plaintiff's testimony and therefore unimportant in aiding the jury in deciding the case. (Def. Opposition at 12.)

Even though the doctors based their opinions on the subjective pain about which the Plaintiff testified at trial, the causation opinion was probably important to Plaintiff's case. Further, even though Plaintiff did not seek any medical special damages, but only pain and suffering, the doctors' testimony regarding causation was still important to Plaintiff's case, because the testimony relates to the causation element of Plaintiff's claim. **Therefore, the first factor favors the Plaintiff.**

Whether the expert's reports or testimony were repetitive of other expert witnesses

Defendant argues, as noted above, that the doctors' testimony was largely duplicative of Plaintiff's testimony. (Def. Opposition at 12.) However, this factor relates to whether the expert's testimony is repetitive of other experts. Here, Dr. Tingey testified regarding Plaintiff's knee and Dr. Dunn testified regarding Plaintiff's spine. (Pl. Supp. Brief at 7.) Each expert testified regarding different injuries resulting from the same slip and fall. **Therefore, the second factor favors the Plaintiff.**

The extent and nature of the work performed by the expert

Defendant argues that both Dr. Dunn and Dr. Tingey admitted they did not perform much work to prepare for trial. (Def. Opposition at 12.) However, Plaintiff believes this factor not only weighs in her favor, but should be given more weight than other factors. (Pl. Supp. Brief at 7.) Defendant argues that the doctors were treating physicians, not retained expert witnesses. (Def. Opposition at 12.) Additionally, Defendant argues that the doctors did not prepare a written expert report and were not deposed. (Def. Opposition at 12.) However, the Plaintiff is not asking for money for depositions or reports. Instead, with respect to Dr. Tingey, Plaintiff is asking for costs incurred for a telephone conference, file review and for his appearance and testimony at trial. (Pl. Supp. Brief at 3.) With respect to Dr. Dunn, Plaintiff seeks costs incurred for the file review and trial testimony. (Pl. Supp. Brief at 3.) Defendant merely argues that $16,000 is "simply absurd" for the work performed. (Def. Opposition at 12.) Alternatively, Plaintiff argues that Drs. Tingey and Dunn are orthopaedic doctors who routinely perform surgeries on sensitive

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areas of the body and are skilled professionals that perform work few others can perform. However, Plaintiff did not describe the extent of the doctors' work as treating physicians. The Court assumes that this is relevant to the fee that they can command as a result of having to leave their normal practice in order to attend court. Plaintiff notes that Dr. Tingey was part of a telephone conference, conducted a file review, and testified at trial. Additionally, Plaintiff noted that Dr. Dunn conducted a file review and testified at trial on two separate days.

While the Defendant argues the doctors did not perform some work associated with expert witnesses such as preparing a report, the doctors did review records and testified at trial. **Therefore, given that Drs. Tingey and Dunn spent time reviewing records for trial and actually testified, the third factor favors the Plaintiff.**

Whether the expert had to conduct independent investigations or testing

Defendant does not provide any additional argument with respect to this factor. Plaintiff argues that this factor is irrelevant to this case because Dr. Tingey and Dr. Dunn performed the work of any other treating physician. (Pl. Supp. Brief at 8.) However, this factor is not irrelevant as Plaintiff argues, but rather this factor simply does not favor Plaintiff's argument, because the doctors did not conduct and independent investigations or testing outside the ordinary course of treatment. **Therefore, this factor does not favor an increased fee because neither doctor performed work above and beyond that of a regular treating physician.**

The amount of time the expert spent in court, preparing a report, and preparing for trial

As stated above, Defendant argues that Dr. Tingey and Dr. Dunn did not prepare a report, did not spend much time preparing for trial, and did not even spend that much time testifying in court (Approximately 2-3 hours each). (Def. Opp. at 12.) Plaintiff argues that the fees are customary for each doctor's specialty and their testimony required time away from their practices, which does not address this factor. (Pl. Supp. Brief at 8.) Even though the doctors may not have spent a lot of time in court, the doctors still spent several hours testifying. While Dr. Dunn had to return for a second day, this was an accommodation by the court to the doctor's schedule. **Therefore, this factor favors the Plaintiff regarding Dr. Tingey, but the Defendant concerning Dr. Dunn's fees for 2 days.**

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The expert's area of expertise, education, and training

Defendant does not make any additional argument with respect to this factor. Plaintiff notes that Dr. Tingey is board certified in orthopaedic surgery who focuses on ailments affecting the shoulders, hips, and knees. (Pl. Supp. Brief at 8.) Dr. Tingey graduated from medical school in 1999. (Pl. Supp. Brief Exhibit 1.) He completed a General Surgery Internship at Loma Linda University School of Medicine following graduation. (Pl. Supp. Brief Exhibit 1.) Additionally, Dr. Tingey was an Orthopaedic Surgery Resident and Loma Linda from 2000-2004. (Pl. Supp. Brief Exhibit 1.)

Dr. Dunn is a board certified orthopaedic surgeon specializing in spine surgery and disorders affecting the neck and back. (Pl. Supp. Brief Exhibit 2.) Plaintiff references the doctors' CV's for additional qualifications. Dr. Dunn graduated from Medical School in June of 1985 from the UC Irvine College of Medicine. (Pl. Supp. Brief Exhibit 2.) Upon graduation, Dr. Dunn completed a general surgery internship at the UC Irvine College of Medicine. (Pl. Supp. Brief Exhibit 2.) Dr. Dunn completed his residency at the UC Irvine School of Medicine and from 1991 to 1992 was a fellow at Rancho Los Amigos Hospital. (Pl. Supp. Brief Exhibit 2.)

The doctors seem to have the requisite education and experience that would justify an increased fee. Both Doctors graduated from Medical School over 15 years ago and are board certified surgeons. **Given the doctors' education and board certifications, this factor favors the Plaintiff.**

The fee actually charged to the party who retained the expert

Defendant does not make any additional argument with respect to this factor. Plaintiff notes that Dr. Tingey's fee of $6,000 was actually charged and paid, and Dr. Dunn's fee of $10,000 was actually charged and paid. (Pl. Supp. Brief at 9.) **Therefore, this factor favors the Plaintiff.**

Comparable experts' fees charged in similar cases

Defendant does not make any additional argument with respect to this factor. Plaintiff argues that a "flat-fee" for court appearances is common for medical experts in Las Vegas and cites to Dr. Victor Klausner's fee schedule, which uses a flat-fee structure at $2,500 per ½ day or

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$5,000 per day. Plaintiff also points to "routinely used orthopaedic defense expert" Dr. Serfustini as another example of an expert who uses a flat-fee structure for court appearances. Finally, Plaintiff points to Dr. Muir as an example of a spine surgeon who charges the same as Dr. Tingey and Dr. Dunn for court appearances. (Pl. Supp. Brief at 9.)

While Plaintiff argues Dr. Klausner's credentials are not as distinguished as Drs. Tingey and Dunn, this argument seems to ask the court to compare the qualifications of the experts rather than compare expert fees. A more compelling point regarding Dr. Klausner is that he charges $2,500 per half day and $5,000 per day (same as Dr. Dunn), and he is not a board certified surgeon, which suggests that Dr. Tingey and Dr. Dunn's fees are fair and reasonable. Dr. Muir is a spine surgeon. Dr. Muir charges the same amount as Dr. Dunn and Dr. Tingey for court appearances, and those three doctors are similar because they graduated from Medical School over 15 years ago and perform surgeries and treatments on sensitive areas of the human body. **Therefore, this factor favors the Plaintiff's request for excess fees above $1,500.00.**

Based upon the *Frazier* factors and the briefing by the Parties, the Court should award expert witness costs in excess of the NRS 18.005(5) statutory cap, $5,000 for Dr. Tingey's fees and $5,000 for Dr. Dunn's fees. Both doctors are similarly situated and testified for similar lengths of time. Dr. Dunn's fee of $10,000 was apparently charged because he testified on two separate days. This could have been avoided by better planning on the part of Plaintiff's trial counsel and the defense should not bear that extra expense.

Hence, as to the expert fees, Defendant's Motion to Re-tax should be **granted in part**.

2. Service Fees

NRS 18.005(7) allows recovery of service fees. Defendant next challenges the service fees claimed by Plaintiff in serving Yanet Elias, Corey Prowell, and Salvatore Risco. (Mot. to Re-tax Costs at 8-9.) Plaintiff acknowledges that all costs must be both reasonable and *necessary*. As to Yanet Elias and Corey Prowell, each was an employee of Defendant and Defendant points out that it had accepted service for those persons. Even with the agreement that service can be made upon counsel instead of the witness, however, does not eliminate the need to serve and the fees would be necessary and she should be **granted** those fees.

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As to Mr. Risco, Defendant argues that the service fees were unnecessary and unreasonable because Plaintiff's counsel had good communication with him. However, unlike the other two employee-witnesses, Mr. Risco was not a party to this case or an agent of a party to this case, so service of a subpoena upon him was necessary. Additionally, Plaintiff has outlined sufficient reasons for the amount of the claimed charge that show it to be reasonable and she should be **granted** those fees.

3. Jury Fees

NRS 18.005(3) specifically allows an award of jury fees as an element of costs. Defendant next argues it should not be responsible for the jury fees because Plaintiff failed to request a jury trial within the time allowed. (Mot. to Re-tax Costs at 9.) Defendant essentially only argues that because Plaintiff's demand for a jury trial was untimely and this should have been a bench trial, it should not have to pay for the jury fees. However, those arguments are premised on challenging this Court's grant of Plaintiff's request for a jury trial and the time for reconsidering that decision has long since passed. Moreover, both parties had prepared this entire case under the assumption that it was going to be tried by jury, so Defendant was not prejudiced by the Court's ruling in any event. Since the jury fees were actually incurred and reasonable, Defendant's Motion to Re-tax as to those fees should be denied, and Plaintiff should be **granted** the jury fees incurred.

4. Parking Fees

NRS 18.005(17) allows the court to award any other reasonable costs actually incurred. This would, of course, include costs incurred in parking for hearings and the like. Defendant argues that there were other free places Plaintiff could have parked. (Mot. to Re-tax Costs at 9.) This may or may not be true, but Defendant's argument is conclusory in any event. Because Plaintiff actually incurred the parking costs, they should be **granted**.

5. Skip Trace Fees

Defendant lastly argues that Plaintiff's request for skip trace/investigative fees for Terry Ruby were unreasonable and unnecessary. (Mot. to Re-tax Costs at 9.) Terry Ruby is a former

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employee of Defendant and was the first to respond to Plaintiff's fall. (Opp. at 8.) It is clear why Plaintiff would have a need to locate and depose Mr. Ruby. A $150.00 fee for that service is not unreasonable, given the extreme costs associated with reporting services like Accurint. Therefore, Defendant's Motion to Re-tax as to the skip trace fee should be denied, and Plaintiff should be **granted** that amount as a cost.

6. Remaining Fees

Defendant does not challenge the remaining requested fees. Plaintiff has attached back-up documentation for each claimed cost and they all seem to be reasonable and within the going market rate for each associated service. Plaintiff has therefore carried her burden under *Berosini* and the remaining costs requested should be awarded. Therefore, Plaintiff's Amended Application for Fees as to costs should be **granted** as to the remaining costs sought, as set forth herein.

Based on the foregoing, with good cause appearing:

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IT IS HEREBY ORDERED that Plaintiff's Amended Application for Fees and Defendant's Motion to Re-tax are both **GRANTED IN PART, DENIED IN PART.** The requested attorney's fees are denied and Plaintiff is not awarded any attorney's fees related to this matter. Plaintiff's requested costs in this matter is partially granted, but the amount of costs set forth in Plaintiff's Amended Verified Memorandum of Costs is reduced by $9,699.00 from the amount sought of $26,579.38. As a result, Plaintiff is granted costs in the total sum of $16,880.38.

DATED this 31st day of October, 2016.

EIGHTH JUDICIAL DISTRICT COURT JUDGE

Respectfully Submitted By:

LAWRENCE J. SEMENZA, III, P.C.

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Attorneys for Defendant Wynn Las Vegas LLC d/b/a Wynn Las Vegas

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IT IS HEREBY ORDERED that Plaintiff's Amended Application for Fees and Defendant's Motion to Re-tax are both **GRANTED IN PART, DENIED IN PART.** The requested attorney's fees are denied and Plaintiff is not awarded any attorney's fees related to this matter. Plaintiff's requested costs in this matter is partially granted, but the amount of costs set forth in Plaintiff's Amended Verified Memorandum of Costs is reduced by $9,699.00 from the amount sought of $26,579.38. As a result, Plaintiff is granted costs in the total sum of $16,880.38.

DATED this ___ day of _____, 2016.

EIGHTH JUDICIAL DISTRICT COURT JUDGE

Respectfully Submitted By:

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EXHIBIT 2

EXHIBIT 2

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DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, individually, Plaintiff, v. WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company, doing business as WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X; inclusive; Defendants.	Case No. A-12-655992-C Dept. No. V **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that an Order was entered by the Court on November 9, 2016, a true and complete copy of which is attached hereto.

DATED this 10th day of November, 2016.

LAWRENCE J. SEMENZA, III, P.C.

/s/ Christopher D. Kircher
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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b) and NEFCR 9, I certify that I am an employee of Lawrence J. Semenza, III, P.C., and that on this 10th day of November, 2016 I caused to be sent through electronic transmission via Wiznet's online system, a true copy of the foregoing **NOTICE OF ENTRY OF ORDER** to the following registered e-mail addresses:

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DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, individually,

Plaintiff,

v.

WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company d/b/a WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X; inclusive,

Defendants.

Case No. A-12-655992-C
Dept. No. V

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING DEFENDANT'S MOTION TO RETAX COSTS AND PLAINTFF'S MOTION TO TAX COSTS AND FOR FEES, COSTS AND POST-JUDGMENT INTEREST

Dates and Times of Hearings: March 4, 2016 at 8:30 a.m. and August 12, 2016 at 9:00 a.m.

On March 4, 2016, the Court held a hearing on (1) Plaintiff Yvonne O'Connell's ("Plaintiff") Amended Application for Fees, Costs and Pre-Judgment Interest, amended and resubmitted as Plaintiff's Motion to Tax Costs and for Fees and Post-Judgment Interest (the "Amended Application for Fees") and on (2) Defendant Wynn Las Vegas, LLC's d/b/a Wynn Las Vegas ("Defendant") Motion to Re-tax Costs and Supplement to its Motion to Re-tax Costs (together "Motion to Re-tax"). Christian Morris, Esq. and Edward J. Wynder, Esq. of the Nettles Law Firm appeared on behalf of Plaintiff and Lawrence J. Semenza, III, Esq. and Christopher D. Kircher, Esq. of Lawrence J. Semenza, III, P.C. appeared on behalf of Defendant.

Thereafter on August 12, 2016 the Court held a hearing on its request for additional briefing regarding deviating above NRS 18.005(5)'s expert witness statutory cap pursuant to the *Frazier v. Duke* factors. Jon Carlston, Esq. of the Nettles Law Firm appeared on behalf of Plaintiff and Lawrence J. Semenza, III, Esq. of Lawrence J. Semenza, III, P.C. appeared on behalf of Defendant.

The Court, having reviewed the records and pleadings on file, as well as the oral argument of counsel, hereby rules as follows:

I. FACTUAL BACKGROUND

This is a personal injury action resulting from Plaintiff's slip and fall at Defendant's casino. A jury trial was held and the jury found in favor of Plaintiff on November 16, 2015. The jury awarded Plaintiff $150,000 for past pain and suffering and $250,000 for future pain and suffering, finding her to be 40% at fault. Plaintiff's total award was $240,000. After the verdict was entered, Plaintiff filed her initial Application for Fees, Costs and Pre-Judgment Interest (the "Initial Application") on November 25, 2015, attaching a Memorandum of Costs as an exhibit. On December 7, 2015, Defendant filed its Opposition to the Initial Application and a Motion to Re-tax Costs. On December 21, 2015, Plaintiff filed an Amended Verified Memorandum of Costs and the above-described Amended Application for Fees. On December 28, 2015, Defendant filed its Supplement to its Motion to Re-tax Costs and Opposition to the Amended Application for Fees. On January 14, 2016, Plaintiff filed an Opposition to the Motion to Re-tax and Reply in support of her Amended Application for Fees.

On June 29, 2016 this Court issued a minute order for counsel to file supplemental briefs regarding the factors for awarding expert fees above $1,500 outlined in *Frazier v. Duke*, 357 P.3d 365, 131 Nev. Adv. Op. 64 (Nev. Ct. App. 2015).

II. DISCUSSION

A. Legal Standards and Applicable Statutes

Plaintiff moves for fees and costs under both NRCP 68 and NRS 18.010. NRCP 68(f) provides:

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> If the offeree [of an offer of judgment] rejects an offer and fails to obtain a more favorable judgment,
>
> (1) the offeree cannot recover any costs or attorney's fees and shall not recover interest for the period after the service of the offer and before the judgment; and
>
> (2) the offeree shall pay the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer. If the offeror's attorney is collecting a contingent fee, the amount of any attorney's fees awarded to the party for whom the offer is made must be deducted from that contingent fee.

NRS 17.115(4) similarly provides, in relevant part:

> Except as otherwise provided in this section, if a party who rejects an offer of judgment fails to obtain a more favorable judgment, the court:
>
> > (c) Shall order the party to pay the taxable costs incurred by the party who made the offer; and
> >
> > (d) May order the party to pay to the party who made the offer...(3) Reasonable attorney's fees incurred by the party who made the offer for the period from the date of service of the offer to the date of entry of the judgment. If the attorney of the party who made the offer is collecting a contingent fee, the amount of any attorney's fees awarded to the party pursuant to this subparagraph must be deducted from that contingent fee.

Additionally, NRS 18.010(2)(b) provides that fees may be awarded to the prevailing party "[w]ithout regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party."

NRS 18.110(1)-(2) provides that whenever a party claims costs, she must file a verified memorandum setting forth those costs within 5 days of entry of the judgment and that witness fees are recoverable costs, regardless of whether the witness was subpoenaed, if the witness testified at trial. NRS 18.110(4) allows the opposing party to file a motion to re-tax claimed costs within 3 days of service of a copy of the memorandum of costs.

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As a preliminary note, Defendant's first argument is that Plaintiff improperly and unilaterally filed the Amended Application for Fees after reading Defendant's Opposition, so the Court should only consider the Initial Application. Here, judgment was entered on December 15, 2015. Plaintiff filed the Initial Application well before this, on November 25, 2015. She also filed her Amended Application for Fees on December 21, 2015, which is within the time limit set forth in the rule (note that under EDCR 1.14(a), the period for filing is five *judicial* days from entry of judgment). However, Defendant's Motion to Re-tax Costs as to the Initial Application was due on December 2, 2015,[1] but it was not filed until December 7, 2015, and was thus untimely.[2] Defendant's Motion to Re-tax as to the Amended Verified Memorandum of Costs was timely, though. It is true that generally, supplemental briefing is allowed only by leave of court. *See* EDCR 2.20(i). However, given that Defendant's first Motion to Re-tax Costs was untimely, it would seem that it would be willing to waive its first argument in opposition to Plaintiff's Amended Application for Fees.

B. Analysis: Fees under NRCP 68

In order for the penalties associated with the rejection of an offer of judgment to apply, the offeree must not have obtained a more favorable judgment. NRCP 68(f); NRS 17.115(4). To determine whether the offeree of a lump-sum[3] offer of judgment obtained a more favorable judgment, the amount of the offer must be compared to the amount of the offeree's *pre*-offer, *taxable costs*. *McCrary v. Bianco*, 122 Nev. 102, 131 P.2d 573, 576, n. 10 (2006) (stating that NRCP 68(g) must be read in conformance with NRS 17.115(5)(b)). Here, Plaintiff offered to settle the case for $49,999.00 on September 3, 2015. The verdict was in favor of Plaintiff for a total of $240,000.00. It seems that this may be a more favorable judgment, although Plaintiff has neglected to specifically set forth her pre-offer taxable costs. On the other hand, Plaintiff's total

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[1] Plaintiff served the Initial Application on November 25, 2015.

[2] Defendant argues that Plaintiff never actually served the initial Memorandum of Costs, but this is disingenuous because Plaintiff did in fact serve her Initial Application that attached a Memorandum of Costs as an Exhibit.

[3] A lump-sum offer of judgment is one that includes all damages, legal costs, and attorneys' fees.

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claimed costs were $26,579.38 (whether pre- or post-offer) and that, together with the offer, amounts to $76,578.38. Plaintiff's jury recovery was well above this – $240,000.00 – so it appears that Plaintiff has met the threshold requirement to show entitlement to fees and costs under Rule 68.

The determination of whether to grant fees to a party under NRCP 68 rests in the sound discretion of the trial court. *Chavez v. Sievers*, 118 Nev. 288, 296, 43 P.3d 1022, 1027 (2002). Such a decision will not be disturbed unless it is arbitrary and capricious. *Schouweiler v. Yancey Co.*, 101 Nev. 827, 833, 712 P.2d 786, 790 (1985). District courts must consider several factors when making a fee determination under *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1963): (1) whether the plaintiff's claim was brought in good faith; (2) whether the offer was reasonable and in good faith in timing and amount; (3) whether the decision to reject the offer was grossly unreasonable or in bad faith; and (4) whether the sought fees are reasonable and justified. However, where the defendant is the offeree of an offer of judgment, the first factor changes to a consideration of whether the defendant's defenses were litigated in good faith. *See Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998).

As to the first factor, whether Defendant's defenses were litigated in good faith, Plaintiff argues that Defendant's defense that it had no notice of the liquid on the casino floor was in bad faith because it failed to make an inquiry into the last time the floor was checked before Plaintiff slipped. (Am. App. at 5-6.) Plaintiff also argues that Defendant's defense that there was no causation here was unreasonable because it relied upon expert testimony that lacked a basis in modern science. (*Id.* at 6.) Defendant's Motion to Re-tax and Opposition to the Amended Application for Fees does not address whether its defenses were maintained in good faith. However, Nevada case law has caused some confusion in differentiating between constructive notice and the "mode of operation approach," the latter of which is specifically discussed in cases decided subsequent to *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320. 322-33 (1993). This is not a case where the law is black and white. Based on that and the evidence presented at trial, it was not bad faith for Defendant to contend that it lacked notice of the condition on the floor and Plaintiff in fact so concedes.

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Furthermore, Plaintiff's evidence of constructive notice may have been enough to escape the granting of a Rule 50 motion, but it was by no means overwhelming. Additionally, Plaintiff's damages claims were reasonably disputed by expert testimony of a defense witness. That the jury was not persuaded by this expert does not translate to bad faith by the Defendant. Thus, the first factor therefore weighs in favor of the Defendant.

As to the second factor, Defendant argues that the offer was unreasonable in amount because Plaintiff had no basis for its offer and that due to Plaintiff's "gamesmanship," Defendant could not sufficiently evaluate the offer. (Opp. at 5-7.) Here, discovery closed on June 12, 2015. Plaintiff was unable to submit proof of special medical damages at the time of trial because the Court precluded them on the basis that they were not properly disclosed in discovery. This made it extremely difficult for the Defense to evaluate a potential value of the case. An offer made at a time when Plaintiff has not properly provided a calculation of damages is unreasonable. Thus, the second factor weighs in favor of Defendant.

In ascertaining whether Defendant's decision to reject the offer was grossly unreasonable or in bad faith, a pertinent consideration is whether enough information was available to determine the merits of the offer. *Trustees of the Carpenters for S. Nev. Health & Welfare Trust v. Better Building Co.*, 101 Nev. 742, 746, 710 P.2d 1379, 1382 (1985). Here, discovery closed on June 12, 2015. The offer of judgment was made three months later, on September 3, 2015. Given that at the time of the offer, Defendant had available all the materials obtained during discovery, including witness depositions, Defendant's decision to reject the offer was well-informed. Furthermore, the issues surrounding notice were not necessarily clear-cut, as evidenced by the parties' pre-trial and post-trial motions on that issue. Overall, it is unlikely that Defendant's rejection of the offer was grossly unreasonable or in bad faith, and in the end weighs in favor of Defendant.

With regard to the last *Beattie* factor, the Court must undergo an analysis of whether claimed fees were reasonable in light of the factors set forth in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 249, 455 P.2d 31, 33 (1969). Plaintiff has addressed some, but not all, of these factors. Plaintiff's counsel has set forth the qualities of the advocate(s) on this case and, of

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course, we know that a favorable result was obtained. However, Plaintiff has not provided any bills setting forth what tasks were performed and the associated hours for those tasks. This prevents the Court from determining whether the fees charged were reasonable in light of the tasks actually performed. Therefore, because Plaintiff has not carried her burden under *Brunzell*, this factor weighs in favor of Defendant. On the whole, all of the factors set forth in *Beattie* (as modified by *Yamaha*, *supra*) weigh in favor of Defendant in this case and Plaintiff's Amended Application for Fees should be **denied**.

C. Analysis: Award of Costs

Although NRCP 68 costs are only for post-offer costs, NRS 18.020(3) mandates awarding all costs to Plaintiff since she prevailed in seeking damages in an amount more than $2,500. NRS 18.110(1) requires the filing of a memorandum of costs by the party in whose favor judgment is rendered, including a verification of the party, the party's attorney, or an agent of the party's attorney that the costs are correct and were necessarily incurred.

The amount of awarded costs rests in the sole discretion of the trial court. *Bergmann v. Boyce,* 109 Nev. 670, 679, 856 P.2d 560, 565–66 (1993). The court also has "discretion when determining the reasonableness of the individual costs to be awarded." *U.S. Design & Constr. Corp. v. I.B.E.W. Local 357,* 118 Nev. 458, 463, 50 P.3d 170, 173 (2002). Claimed costs must be "actual and reasonable, rather than a reasonable estimate or calculation of such costs." *Bobby Berosini, Ltd. v. PETA,* 114 Nev. 1348, 1352, 971 P.2d 383, 385–86 (1998) (internal quotations omitted). The Supreme Court has also indicated that claimed costs must be supported by documentation and itemization. *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 971 P.2d 383 (1998). Defendant only challenges certain specific fees, each of which will be addressed in turn.

1. Expert Witness Fees

With regard to Mr. Presswood, his testimony was not used at trial because this Court ruled that his testimony would be unreliable. Since his testimony was clearly inadmissible under the *Hallmark* standard, as reflected in this Court's prior pre-trial ruling, his fees should not be awarded.

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Plaintiff seeks expert witness fees of $6,000 for Craig Tingey, M.D. and $10,000 for Thomas Dunn, M.D. NRS 18.005(5) provides for recovery of "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."

In order for an award of expert witness fees in excess of the statutory maximum to be proper, the fees must not only be reasonable, but also "the circumstances surrounding [each] expert's testimony [must be] of such necessity as to require the larger fee." *Frazier*, 357 P.3d at 374 (citing NRS 18.005(5); *Logan v. Abe*, 131 Nev. ---, ---, 350 P.3d 1139, 1144 (2015)). In crafting its decision, the Court of Appeals used the limited Nevada Supreme Court authority available as well as extra-jurisdictional authority, particularly from Idaho (which has a statute similar to NRS 18.005(5)), Louisiana, Connecticut, and Massachusetts.

Ultimately, the Nevada Court of Appeals set forth a nonexhaustive list of factors, some of which may not necessarily be pertinent to every request for expert witness fees in excess of $1,500. The factors in evaluating requests for awards over the statutory maximum include:

1. The importance of the expert's testimony to the party's case;
2. the degree to which the expert's opinion aided the trier of fact in deciding the case;
3. whether the expert's reports or testimony were repetitive of other expert witnesses;
4. the extent and nature of the work performed by the expert;
5. whether the expert had to conduct independent investigations or testing;
6. the amount of time the expert spent in court, preparing a report, and preparing for trial;
7. the expert's area of expertise;
8. the expert's education and training;
9. the fee actually charged to the party who retained the expert;
10. the fees traditionally charged by the expert on related matters;
11. comparable experts' fees charged in similar cases; and

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12. if an expert is retained from outside the area where the trial is held, the fees and costs that would have been incurred to hire a comparable expert where the trial was held.

Frazier, 357 P.3d at 377-78.

Plaintiff argues that pursuant to *Frazier*, this Court should award the entire $6,000 for Dr. Tingey's fee. (Pl. Supp. Brief at 3-4.) Additionally, Plaintiff argues that this Court should award at least $5,000 of Dr. Dunn's fee if not the entire amount. (Pl. Supp. Brief at 3-4.) In its brief, rather than discussing the *Frazier* factors in the brief itself, Defendant incorporated by reference its arguments set forth related to the "expert costs." Specifically, Defendant directs this Court to pages 10-13 of its Opposition to Plaintiff's Application for Fees, Costs and Pre-Judgment Interest and Motion to Retax Costs filed on December 7, 2016 as well as pages 7 and 8 of Defendant's Supplement to Motion to Retax Costs and Opposition to Plaintiff's Amended Application for Fees, Costs and Prejudgment Interest filed on December 28, 2016. In sum, Defendant argues there is not a sufficient basis to award Plaintiff expert costs for her treating physicians at all and especially not above the statutory maximum of $1,500. (Def. Supp. Brief at 4.)

The Importance of the expert's testimony

Plaintiff argues that Dr. Tingey testified primarily regarding Plaintiff's right knee and Dr. Dunn testified primarily regarding Plaintiff's spine. (Pl. Supp. Brief at 5.) Both parties agree that the doctors testified that the injuries to the right knee and cervical spine were caused by the slip and fall. However, the parties disagree as to how important that testimony was to Plaintiff's case. Plaintiff argues that the testimony "formed the lynchpin" of Plaintiff's causation argument. (Pl. Supp. Brief at 6.) Alternatively, Defendant argues that the doctors did not add anything substantive to trial, because the doctors based their opinions solely on Plaintiff's subjective physical complaints without reviewing her medical history. (Def. Opp. to Pl. Motion for Fees at 12.) Defendant further argues that the doctors' opinions were unreliable, repetitive and unnecessary because Plaintiff testified regarding her subjective complaints of pain and injury. (Def. Opposition at 12.) Finally, Defendant argues that experts are generally needed in personal injury cases to testify regarding the necessity of past or future medical treatment or the reasonableness of costs, and because Plaintiff did not seek these damages, the doctors' testimony

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was largely duplicative of Plaintiff's testimony and therefore unimportant in aiding the jury in deciding the case. (Def. Opposition at 12.)

Even though the doctors based their opinions on the subjective pain about which the Plaintiff testified at trial, the causation opinion was probably important to Plaintiff's case. Further, even though Plaintiff did not seek any medical special damages, but only pain and suffering, the doctors' testimony regarding causation was still important to Plaintiff's case, because the testimony relates to the causation element of Plaintiff's claim. **Therefore, the first factor favors the Plaintiff.**

Whether the expert's reports or testimony were repetitive of other expert witnesses

Defendant argues, as noted above, that the doctors' testimony was largely duplicative of Plaintiff's testimony. (Def. Opposition at 12.) However, this factor relates to whether the expert's testimony is repetitive of other experts. Here, Dr. Tingey testified regarding Plaintiff's knee and Dr. Dunn testified regarding Plaintiff's spine. (Pl. Supp. Brief at 7.) Each expert testified regarding different injuries resulting from the same slip and fall. **Therefore, the second factor favors the Plaintiff.**

The extent and nature of the work performed by the expert

Defendant argues that both Dr. Dunn and Dr. Tingey admitted they did not perform much work to prepare for trial. (Def. Opposition at 12.) However, Plaintiff believes this factor not only weighs in her favor, but should be given more weight than other factors. (Pl. Supp. Brief at 7.) Defendant argues that the doctors were treating physicians, not retained expert witnesses. (Def. Opposition at 12.) Additionally, Defendant argues that the doctors did not prepare a written expert report and were not deposed. (Def. Opposition at 12.) However, the Plaintiff is not asking for money for depositions or reports. Instead, with respect to Dr. Tingey, Plaintiff is asking for costs incurred for a telephone conference, file review and for his appearance and testimony at trial. (Pl. Supp. Brief at 3.) With respect to Dr. Dunn, Plaintiff seeks costs incurred for the file review and trial testimony. (Pl. Supp. Brief at 3.) Defendant merely argues that $16,000 is "simply absurd" for the work performed. (Def. Opposition at 12.) Alternatively, Plaintiff argues that Drs. Tingey and Dunn are orthopaedic doctors who routinely perform surgeries on sensitive

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areas of the body and are skilled professionals that perform work few others can perform. However, Plaintiff did not describe the extent of the doctors' work as treating physicians. The Court assumes that this is relevant to the fee that they can command as a result of having to leave their normal practice in order to attend court. Plaintiff notes that Dr. Tingey was part of a telephone conference, conducted a file review, and testified at trial. Additionally, Plaintiff noted that Dr. Dunn conducted a file review and testified at trial on two separate days.

While the Defendant argues the doctors did not perform some work associated with expert witnesses such as preparing a report, the doctors did review records and testified at trial. **Therefore, given that Drs. Tingey and Dunn spent time reviewing records for trial and actually testified, the third factor favors the Plaintiff.**

Whether the expert had to conduct independent investigations or testing

Defendant does not provide any additional argument with respect to this factor. Plaintiff argues that this factor is irrelevant to this case because Dr. Tingey and Dr. Dunn performed the work of any other treating physician. (Pl. Supp. Brief at 8.) However, this factor is not irrelevant as Plaintiff argues, but rather this factor simply does not favor Plaintiff's argument, because the doctors did not conduct and independent investigations or testing outside the ordinary course of treatment. **Therefore, this factor does not favor an increased fee because neither doctor performed work above and beyond that of a regular treating physician.**

The amount of time the expert spent in court, preparing a report, and preparing for trial

As stated above, Defendant argues that Dr. Tingey and Dr. Dunn did not prepare a report, did not spend much time preparing for trial, and did not even spend that much time testifying in court (Approximately 2-3 hours each). (Def. Opp. at 12.) Plaintiff argues that the fees are customary for each doctor's specialty and their testimony required time away from their practices, which does not address this factor. (Pl. Supp. Brief at 8.) Even though the doctors may not have spent a lot of time in court, the doctors still spent several hours testifying. While Dr. Dunn had to return for a second day, this was an accommodation by the court to the doctor's schedule. **Therefore, this factor favors the Plaintiff regarding Dr. Tingey, but the Defendant concerning Dr. Dunn's fees for 2 days.**

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The expert's area of expertise, education, and training

Defendant does not make any additional argument with respect to this factor. Plaintiff notes that Dr. Tingey is board certified in orthopaedic surgery who focuses on ailments affecting the shoulders, hips, and knees. (Pl. Supp. Brief at 8.) Dr. Tingey graduated from medical school in 1999. (Pl. Supp. Brief Exhibit 1.) He completed a General Surgery Internship at Loma Linda University School of Medicine following graduation. (Pl. Supp. Brief Exhibit 1.) Additionally, Dr. Tingey was an Orthopaedic Surgery Resident and Loma Linda from 2000-2004. (Pl. Supp. Brief Exhibit 1.)

Dr. Dunn is a board certified orthopaedic surgeon specializing in spine surgery and disorders affecting the neck and back. (Pl. Supp. Brief Exhibit 2.) Plaintiff references the doctors' CV's for additional qualifications. Dr. Dunn graduated from Medical School in June of 1985 from the UC Irvine College of Medicine. (Pl. Supp. Brief Exhibit 2.) Upon graduation, Dr. Dunn completed a general surgery internship at the UC Irvine College of Medicine. (Pl. Supp. Brief Exhibit 2.) Dr. Dunn completed his residency at the UC Irvine School of Medicine and from 1991 to 1992 was a fellow at Rancho Los Amigos Hospital. (Pl. Supp. Brief Exhibit 2.)

The doctors seem to have the requisite education and experience that would justify an increased fee. Both Doctors graduated from Medical School over 15 years ago and are board certified surgeons. **Given the doctors' education and board certifications, this factor favors the Plaintiff.**

The fee actually charged to the party who retained the experi

Defendant does not make any additional argument with respect to this factor. Plaintiff notes that Dr. Tingey's fee of $6,000 was actually charged and paid, and Dr. Dunn's fee of $10,000 was actually charged and paid. (Pl. Supp. Brief at 9.) **Therefore, this factor favors the Plaintiff.**

Comparable experts' fees charged in similar cases

Defendant does not make any additional argument with respect to this factor. Plaintiff argues that a "flat-fee" for court appearances is common for medical experts in Las Vegas and cites to Dr. Victor Klausner's fee schedule, which uses a flat-fee structure at $2,500 per ½ day or

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$5,000 per day. Plaintiff also points to "routinely used orthopaedic defense expert" Dr. Serfustini as another example of an expert who uses a flat-fee structure for court appearances. Finally, Plaintiff points to Dr. Muir as an example of a spine surgeon who charges the same as Dr. Tingey and Dr. Dunn for court appearances. (Pl. Supp. Brief at 9.)

While Plaintiff argues Dr. Klausner's credentials are not as distinguished as Drs. Tingey and Dunn, this argument seems to ask the court to compare the qualifications of the experts rather than compare expert fees. A more compelling point regarding Dr. Klausner is that he charges $2,500 per half day and $5,000 per day (same as Dr. Dunn), and he is not a board certified surgeon, which suggests that Dr. Tingey and Dr. Dunn's fees are fair and reasonable. Dr. Muir is a spine surgeon. Dr. Muir charges the same amount as Dr. Dunn and Dr. Tingey for court appearances, and those three doctors are similar because they graduated from Medical School over 15 years ago and perform surgeries and treatments on sensitive areas of the human body. **Therefore, this factor favors the Plaintiff's request for excess fees above $1,500.00.**

Based upon the *Frazier* factors and the briefing by the Parties, the Court should award expert witness costs in excess of the NRS 18.005(5) statutory cap, $5,000 for Dr. Tingey's fees and $5,000 for Dr. Dunn's fees. Both doctors are similarly situated and testified for similar lengths of time. Dr. Dunn's fee of $10,000 was apparently charged because he testified on two separate days. This could have been avoided by better planning on the part of Plaintiff's trial counsel and the defense should not bear that extra expense.

Hence, as to the expert fees, Defendant's Motion to Re-tax should be **granted in part**.

2. Service Fees

NRS 18.005(7) allows recovery of service fees. Defendant next challenges the service fees claimed by Plaintiff in serving Yanet Elias, Corey Prowell, and Salvatore Risco. (Mot. to Re-tax Costs at 8-9.) Plaintiff acknowledges that all costs must be both reasonable and *necessary*. As to Yanet Elias and Corey Prowell, each was an employee of Defendant and Defendant points out that it had accepted service for those persons. Even with the agreement that service can be made upon counsel instead of the witness, however, does not eliminate the need to serve and the fees would be necessary and she should be **granted** those fees.

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As to Mr. Risco, Defendant argues that the service fees were unnecessary and unreasonable because Plaintiff's counsel had good communication with him. However, unlike the other two employee-witnesses, Mr. Risco was not a party to this case or an agent of a party to this case, so service of a subpoena upon him was necessary. Additionally, Plaintiff has outlined sufficient reasons for the amount of the claimed charge that show it to be reasonable and she should be **granted** those fees.

3. Jury Fees

NRS 18.005(3) specifically allows an award of jury fees as an element of costs. Defendant next argues it should not be responsible for the jury fees because Plaintiff failed to request a jury trial within the time allowed. (Mot. to Re-tax Costs at 9.) Defendant essentially only argues that because Plaintiff's demand for a jury trial was untimely and this should have been a bench trial, it should not have to pay for the jury fees. However, those arguments are premised on challenging this Court's grant of Plaintiff's request for a jury trial and the time for reconsidering that decision has long since passed. Moreover, both parties had prepared this entire case under the assumption that it was going to be tried by jury, so Defendant was not prejudiced by the Court's ruling in any event. Since the jury fees were actually incurred and reasonable, Defendant's Motion to Re-tax as to those fees should be denied, and Plaintiff should be **granted** the jury fees incurred.

4. Parking Fees

NRS 18.005(17) allows the court to award any other reasonable costs actually incurred. This would, of course, include costs incurred in parking for hearings and the like. Defendant argues that there were other free places Plaintiff could have parked. (Mot. to Re-tax Costs at 9.) This may or may not be true, but Defendant's argument is conclusory in any event. Because Plaintiff actually incurred the parking costs, they should be **granted**.

5. Skip Trace Fees

Defendant lastly argues that Plaintiff's request for skip trace/investigative fees for Terry Ruby were unreasonable and unnecessary. (Mot. to Re-tax Costs at 9.) Terry Ruby is a former

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employee of Defendant and was the first to respond to Plaintiff's fall. (Opp. at 8.) It is clear why Plaintiff would have a need to locate and depose Mr. Ruby. A $150.00 fee for that service is not unreasonable, given the extreme costs associated with reporting services like Accurint. Therefore, Defendant's Motion to Re-tax as to the skip trace fee should be denied, and Plaintiff should be **granted** that amount as a cost.

6. Remaining Fees

Defendant does not challenge the remaining requested fees. Plaintiff has attached back-up documentation for each claimed cost and they all seem to be reasonable and within the going market rate for each associated service. Plaintiff has therefore carried her burden under *Berosini* and the remaining costs requested should be awarded. Therefore, Plaintiff's Amended Application for Fees as to costs should be **granted** as to the remaining costs sought, as set forth herein.

Based on the foregoing, with good cause appearing:

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IT IS HEREBY ORDERED that Plaintiff's Amended Application for Fees and Defendant's Motion to Re-tax are both **GRANTED IN PART, DENIED IN PART.** The requested attorney's fees are denied and Plaintiff is not awarded any attorney's fees related to this matter. Plaintiff's requested costs in this matter is partially granted, but the amount of costs set forth in Plaintiff's Amended Verified Memorandum of Costs is reduced by $9,699.00 from the amount sought of $26,579.38. As a result, Plaintiff is granted costs in the total sum of $16,880.38.

DATED this 31st day of October, 2016.

Eighth Judicial District Court Judge

Respectfully Submitted By:

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IT IS HEREBY ORDERED that Plaintiff's Amended Application for Fees and Defendant's Motion to Re-tax are both **GRANTED IN PART, DENIED IN PART.** The requested attorney's fees are denied and Plaintiff is not awarded any attorney's fees related to this matter. Plaintiff's requested costs in this matter is partially granted, but the amount of costs set forth in Plaintiff's Amended Verified Memorandum of Costs is reduced by $9,699.00 from the amount sought of $26,579.38. As a result, Plaintiff is granted costs in the total sum of $16,880.38.

DATED this ___ day of _____, 2016.

_____
EIGHTH JUDICIAL DISTRICT COURT JUDGE

Respectfully Submitted By:

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