Exhibit 3

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CLERK OF THE COURT

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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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CLERK OF THE COURT

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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.

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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.

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:

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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

Exhibit 2

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CLERK OF THE COURT

ORDR

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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.

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

$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.

Lawrence J. Semenza, III, Esq., Bar No. 7174
Christopher D. Kircher, Esq., Bar No. 11176
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145

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

Approved as to Form And Content:

NETTLES LAW FIRM

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Christian M. Morris, Esq., Bar No. 11218
1389 Galleria Drive, Suite 200
Henderson, Nevada 89014

Attorneys for Plaintiff Yvonne O'Connell

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Telephone: (702) 835-6803

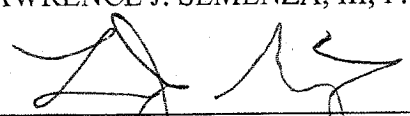
IT IS HEREBY ORDERED that Plaintiff's Amended Application for Fees and Defendant's Motion to Re-tax are both **GRANTED IN PART, DENIED IN PART.** The requested attorney's fees are denied and Plaintiff is not awarded any attorney's fees related to this matter. Plaintiff's requested costs in this matter 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:

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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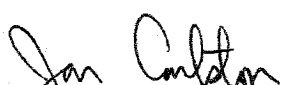

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Exhibit 1

Exhibit 1

Exhibit 1

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CLERK OF THE COURT

ACOM
DONALD C. KUDLER, ESQ.
Nevada Bar No. 005041
CAP & KUDLER
3202 W. Charleston Boulevard
Las Vegas, Nevada 89102
(702) 878-8778
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, an individual, Plaintiff, vs. 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

AMENDED COMPLAINT

Plaintiff YVONNE O'CONNELL, by and through her attorney of record, DONALD C. KUDLER, ESQ., of the law offices of CAP & KUDLER, and for her causes of action against Defendant WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company, doing business as WYNN LAS VEGAS, alleges as follows:

I.

At all times herein mentioned, Plaintiff, YVONNE O'CONNELL, was a resident of Las Vegas, Clark County, State of Nevada.

II.

At all times mentioned herein, Defendant, WYNN LAS VEGAS, LLC, is a Nevada Limited Liability Company, doing business as WYNN LAS VEGAS, and is authorized to do business in the State of Nevada.

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III.

The true names and capacities of the Defendants designated herein as a DOE or ROE CORPORATION are presently unknown to Plaintiff, who, therefore, sues said Defendants by said fictitious names. Defendants designated as DOES I through X and/or ROE CORPORATIONS I through X are the owners, agents, employers, employees, lessors, lessees, successors and/or predecessors in interest, contractors, subcontractors, assigns, distributors or manufacturers of materials or other individuals otherwise in possession and/or control of the business or premises herein alleged, including construction, maintenance, inspection, safety, design, supervision, hiring, training, and care of the business and premises as stated herein. Plaintiff is informed, believes and thereon alleges that each of the Defendants designated as a DOE or ROE CORPORATION is in some manner responsible for the events and happenings referred to herein and caused damages directly or proximately to Plaintiff as herein alleged. Plaintiff will ask leave of Court to amend her Amended Complaint to insert the true names and capacities are ascertained.

IV.

That on or about the 8th day of February, 2010, Plaintiff YVONNE O'CONNELL was a customer and invited guest of Defendant WYNN LAS VEGAS located at 3131 Las Vegas Boulevard South, Las Vegas, Nevada, for purposes of gambling and dining.

V.

The on or about the 8th day of February, 2010, Plaintiff YVONNE O'CONNELL was walking on the shadowed, multi-colored tile floor located near the south entrance of the casino when she suddenly and unexpectedly slipped and fell on a non-visible liquid substance present on the floor.

VI.

At said time and place, the Defendants, and each of them, negligently maintained and controlled said real property and premises and, further, negligently permitted a dangerous condition, not obvious or apparent to the Plaintiff, to exist thereon and further, did:

a. negligently cause a dangerous condition to exist to wit: allowed liquid to be present on the tile floor near the south entrance of the casino;

b. negligently allow said dangerous condition to remain in existence, as aforesaid, for an unreasonable length of time; and

c. negligently failed to warn the Plaintiff of the presence of said dangerous condition.

VII.

As a proximate result of the aforesaid negligence of the Defendants, and each of them, Plaintiff, YVONNE O'CONNELL, did slip and fall on the said dangerous condition on the premises of the Defendants, and each of them, thereby causing Plaintiff's body to twist and fall backward striking the raised planter and floor with her body, thereby sustaining the injuries and damages as hereinafter set forth.

VIII.

Prior to the fall of the Plaintiff, the dangerous condition of said premises was known by, or should have been known by, the Defendants, and each of them, in the exercise of reasonable care.

IX.

That by reason of the premises and as a direct and proximate result thereof, Plaintiff, YVONNE O'CONNELL, sustained injuries to her head, neck, back, bodily limbs, organs and systems all or some of which conditions may be permanent and disabling in nature, all to her general damage in a sum in excess of $10,000.00.

X.

That by reason of the premises and as a direct and proximate result of the aforementioned negligence of the Defendant, and each of them, Plaintiff, YVONNE O'CONNELL, was required to and did receive medical and other treatment for her injuries received in an expense all to her damage in a sum in excess of $10,000.00. That said services, care and treatment are continuing and shall continue in the future, all to her damage in a presently unascertainable amount, and Plaintiff will amend her Amended Complaint accordingly when same shall be ascertained.

XI.

That prior to the injuries complained of herein, Plaintiff, YVONNE O'CONNELL, was an able-bodied person, healthy and coordinated, without limitations, who exercised daily and would

swing dance four to six hours weekly, and was physically capable of engaging in all other activities for which she was otherwise suited.

XII.

That is has become necessary for Plaintiff to retain the services of an attorney to prosecute this action and, therefore, Plaintiff should be awarded reasonable attorney's fee incurred in this matter.

WHEREFORE, Plaintiff YVONNE O'CONNELL, expressly reserving her right to amend her Amended Complaint prior to or at the time of trial of this action to insert those items of damages not yet fully ascertainable, prays judgment as follows:

1. For general damages sustained by Plaintiff in an amount in excess of $10,000.00;

2. For costs of medical care and treatment and other expenses incurred thereto when same are fully ascertained;

3. For attorney's fees and costs of suit incurred herein; and

4. For such other and further relief as the Court may deem just and proper in the premises.

DATED this 20th day of March, 2012.

CAP & KUDLER

DONALD C. KUDLER, ESQ.
Nevada Bar No. 005041
3202 W. Charleston Boulevard
Las Vegas, Nevada 89102
Attorney for Plaintiff

IN THE SUPREME COURT OF THE STATE OF NEVADA

WYNN LAS VEGAS, LLC d/b/a WYNN LAS *Appellant*, vs. YVONNE O'CONNELL, an individual, *Respondent*.	Supreme Court Case No.: 71789 Eighth Jud. Dist. Ct. Case No. A-12-655992-C **DOCKETING STATEMENT**

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See* KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810

P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eighth Department V
   County Clark Judge Carolyn Ellsworth
   District Ct. Docket No. A-12-655992-C

2. **Attorney filing this docketing statement:**

   Attorney Christian M. Morris, Esq. Telephone 702-434-8282
   Firm The Nettles Law Firm
   Address 1389 Galleria Drive, Suite 200, Henderson, NV 89014

   Client Yvonne O'Connell ("Appellant" or "Plaintiff")

   If this is a joint statement by multiple appellants, add the names and address of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. **Attorney(s) representing respondent(s):**

   Attorney Lawrence J. Semenza, III, Esq. Telephone 702-9973800
   Firm Lawrence J. Semenza, III, P.C.
   Address 10161 Park Run Drive, Suite 150, Las Vegas, Nevada 89145
   Client Wynn Las Vegas, LLC d/b/a Wynn Las Vegas

4. **Nature of disposition below (check all that apply):**

☐ Judgment after bench trial	☐ Dismissal
☒ Judgment after jury verdict	☐ Lack of Jurisdiction
☐ Summary judgment	☐ Failure to state a claim
☐ Default judgment	☐ Failure to prosecute
☐ Grant/Denial of NRCP 60(b) relief	☒ Other (specify) Post-trial motion for attorneys' fees and costs
☐ Grant/Denial of injunction	☐ Divorce decree:
☐ Grant/Denial of declaratory relief	☐ Original ☐ Modification
☐ Review of agency determination	☐ Other disposition (specify)

5. **Does this appeal raise issues concerning any of the following:** N/A.

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. **Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

Wynn Las Vegas, LLC d/b/a Wynn Las Vegas v. Yvonne O'Connell
Supreme Court No. 70583.

7. **Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.*, bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

None.

8. **Nature of the action.** Briefly describe the nature of the action and the result below:

This is a personal injury action – premise liability, slip and fall. On February 8, 2010, while visiting the Wynn Hotel & Casino ("Defendant") as a guest/patron, Plaintiff YVONNE O'CONNELL ("Plaintiff") slipped and fell inside the casino on a "green, sticky, syrup-like" substance on the floor approximately seven feet long of unknown origin. Plaintiff sustained injuries as a result of her fall.

In November 2015 this case was tried as a jury trial. The jury awarded Plaintiff damages in the amount of $400,000 consisting of $150,000 in past pain and suffering and $250,000 in future pain and suffering, however the jury found her 40% comparatively negligent thus reducing this award down to net $240,000 ($400,000 reduced by 40%). Plaintiff was also awarded $17,190.96 in pre-judgment interest for a total award of $257,190.96 ($240,000 plus $17,190.96). Defendant has already appealed the jury's verdict – *see* Nevada Supreme Court Case No. 70583 referenced below.

After trial, Plaintiff filed motions/applications seeking costs in the amount of $26,579.38 and attorneys' fees in the amount of $96,000 (40% of the jury's net $240,000 verdict pursuant to a contingency fee agreement) as the prevailing

party and pursuant to NRCP 68 / NRS 17.115's offer of judgment provisions. After a full briefing and hearings held on March 4, 2016, and August 12, 2016, regarding Plaintiff's requests and Defendant's motion to retax, the district court awarded Plaintiff $16,880.38 in costs and zero ($0.00) in attorneys' fees.

9. **Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

    1. Whether the district court abused its discretion or made an error of law in not awarding Appellant/Plaintiff any of her requested attorneys' fees despite prevailing at trial and besting an Offer of Judgment in the amount of $49,999.00 made on September 3, 2015, pursuant to NRCP 68 / NRS 17.115.

    2. Awarding attorneys' fees in a post-trial proceeding based upon contingency fee agreements.

    3. Whether the district court abused its discretion or made an error of law in only awarding Appellant/Plaintiff $16,880.38 of her $26,579.38 in requested cost award thereby retaxing her requested costs by $9,699.00, specifically as to the requested expert witness fees.

10. **Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceeding presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

    Appellant is not aware of any other similar proceedings currently pending before this Court.

11. **Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

    ☒ N/A
    ☐ Yes
    ☐ No
    If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

- ☐ Reversal of well-settled Nevada precedent (identify the case(s))
- ☐ An issue arising under the United States and/or Nevada Constitutions
- ☐ A substantial issue of first impression
- ☐ An issue of public policy
- ☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions
- ☐ A ballot question

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

Pursuant to NRAP 17(b)(2) – "appeal from a judgment, exclusive of interest, attorney fees, and costs, of $250,000 or less in a tort case" – this appeal is presumptively assigned to the Court of Appeals. Appellant submits the Court of Appeals should decide this appeal as well as the related/sister appeal, Wynn Las Vegas, LLC d/b/a Wynn Las Vegas v. Yvonne O'Connell, case no. 70583. (Counsel for the parties in these appeals intend to consolidate them).

14. Trial. If this action proceeded to trial, how many days did the trial last? This case was tried over a course of seven (7) days, some partial and some full. Was it a bench or jury trial? Jury

15. Judicial disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal. If so, which Justice? No.

TIMELINESS OF NOTICE ON APPEAL

16. Date of entry of written judgment or order appealed from November 9, 2016

17. Date written notice of entry of judgment or order served November 10, 2016

Was service by:
☐ Delivery
☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

N/A.

19. Date notice of appeal filed November 17, 2016.

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal: N/A.

20. Specify statute or rule governing the time limit for filing the notice of appeal, *e.g.*, NRAP 4(a) or other

NRAP 4(a)(1)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

☐ NRAP 3A(b)(1)	☐ NRS 155.190
☐ NRAP 3A(b)(2)	☐ NRS 38.205
☐ NRAP 3A(b)(3)	☐ NRS 703.376
☒ Other (specify)	NRAP 3A(b)(8) – special order entered after final judgment.

(b) Explain how each authority provides a basis for appeal from the judgment or order:

Post-trial motions/applications for attorneys' fees and costs are appealable as a special order entered after final judgment pursuant to NRAP 3A(b)(8).

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Plaintiff: Apellant Yvonne O'Connell
Defendant: Respondent Wynn Las Vegas, LLC d/b/a Wynn Las Vegas

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other: N/A.

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims or third-party claims, and the date of formal disposition of each claim.

Appellant made a claim for Negligence due to a slip and fall on Respondent's property.

This claim was resolved with a judgment following a jury verdict entered on December 15, 2015.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes
☐ No

25. If you answered "No" to question 23, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b):

☐ Yes
☒ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment:

☐ Yes
☒ No

26. If you answered "No" to any part of question 23, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):

The "Order Partially Granting and Partially Denying Respondent's Motion to Retax Costs and Plaintiff's Motion to Tax Costs and for Fees, Costs and Post-Judgment Interest" is separately appealable pursuant to NRAP 3A(b)(8).

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

Exhibit	Document Description
1	Amended Complaint filed March 20, 2012
2	Order Partially Granting and Partially Denying Respondent's Motion to Retax Costs and Plaintiff's Motion to Tax Costs and for Fees, Costs and Post-Judgment Interest filed on November 9, 2016
3	Notice of Entry of Order Partially Granting and Partially Denying Respondent's Motion to Retax Costs and Plaintiff's Motion to Tax Costs and for Fees, Costs and Post-Judgment

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Yvonne O'Connell
Name of appellant

12/15/16
Date

Nevada, County of Clark
State and county where signed

Christian M. Morris, Esq.
Name of counsel of record

Signature of counsel of record

CERTIFICATE OF SERVICE

I certify that on the 16 day of December, 2016, I served a copy of this completed docketing statement upon all counsel of record:

☒ By Electronic Service in accordance with the Master Service List:

Lawrence J. Semenza, III, Esq.
Christopher D. Kircher, Esq.
Jarrod L. Rickard, Esq.
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Dated this 16 day of December, 2016.

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