IN THE SUPREME COURT OF THE STATE OF NEVADA

WYNN LAS VEGAS, LLC d/b/a WYNN LAS VEGAS, *Appellant*, vs. YVONNE O'CONNELL, an individual, *Respondent*.	Supreme Court Case No.: 70583(L) *Consolidated with Case No.*: 71789 Eighth Jud. Dist. Ct. Case No.: A-12-655992-C
YVONNE O'CONNELL, an individual, *Appellant*, vs. WYNN LAS VEGAS, LLC d/b/a WYNN LAS VEGAS, *Respondent*.	Supreme Court Case No.: 71789

CROSS-APPELLANT/RESPONDENT O'CONNELL'S REPLY BRIEF IN SUPPORT OF CROSS-APPEAL

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed:

-Respondent/Appellant YVONNE O'CONNELL (collectively, "O'Connell") is an individual.

-O'Connell has been previously represented by the law firms Cap & Kudler, Naimi, Dilbeck & Johnson, Chtd., and the Law Office of Richard S. Johnson.

-O'Connell is currently represented by the NETTLES LAW FIRM which consists of attorneys Brian D. Nettles, Christian M. Morris, William R. Killip, Jr., Edward J. Wynder, and Jennifer Peterson.

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

DATED this 4th day of January, 2018.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Pertinent Facts in Support of Requested Fees and Costs

Cross-Appellant/Respondent/Plaintiff Yvonne O'Connell's (hereinafter "Plaintiff" or "Yvonne") original counsel, Donald Kudler, Esq., filed an Amended Complaint on March 20, 2012 and he withdrew on December 19, 2012. On May 14, 2013, J. Scott Dilbeck, Esq. and Richard S. Johnson, Esq. filed a Notice of Appearance on Yvonne's behalf and filed a Default against Cross-Respondent/Appellant/Defendant Wynn Las Vegas, LLC (hereinafter "Defendant" or "the Wynn") on June 25, 2013. Yvonne agreed to set aside the Default on July 24, 2013 and Wynn filed an Answer that day. On September 22, 2014, the parties filed a Stipulation and Order to Extend Discovery and Continue Trial as follows:

	Previous	**New Date**
Close of Discovery	12/12/2014	06/12/2015
Initial Expert Disclosure/Amendments	09/12/2014	03/12/2015
Rebuttal Expert Disclosure	10/14/2014	04/14/2015
Dispositive Motions	01/12/2015	07/16/2015

The district court continued trial to a stack beginning October 12, 2015.

Mr. Dilbeck and Mr. Johnson withdrew as Yvonne's counsel one month before the Initial Expert Disclosure deadline, on February 10, 2015. On February 18, 2015, Yvonne's current attorney, Christian Morris, Esq. of Nettles Law Firm, filed a Notice of Appearance and the parties agreed to continue the initial expert

deadline to April 13, 2015. Yvonne's counsel rapidly conducted all of the discovery that should have been conducted over the previous three years, obtaining medical records and disclosing Yvonne's treating physicians; retaining Gary Presswood, Ph.D. as her liability expert; listing Yvonne's treating physicians as her medical experts; conducting depositions; briefing and opposing motions, and in general cramming two years of litigation in the span of seven months in an attempt to rescue this case and achieve justice for Yvonne. On September 3, 2015, two months before trial commenced on November 4, 2015, Plaintiff served an OOJ on Defendant Wynn Las Vegas, LLC in the amount of $49,999.00, inclusive of fees and costs. 1 RA 035-37. Defendant rejected this OOJ and it is undisputed that it failed to obtain a more favorable jury verdict under NRCP 68, as the verdict was for $240,000 once the jury's assessment of 40% comparative fault was applied.

Yvonne filed an application for her attorneys' fees and case costs, requesting $26,579.38 in costs and $96,000.00 in attorney fees based on the 40% contingency fee agreement between Yvonne and her counsel. The district court refused to award ***any*** attorney fees because Yvonne requested them in the form of a contingency fee and did not submit hourly billing that explained exactly what work she performed. 4 RA 636-652. The only aspect of Yvonne's request for fees that the Wynn disputes in its cross-appellate response brief is the fact she requested a contingency fee and did not submit hourly billing. However, Nevada law allows

attorney fees to be awarded in a contingency fee format, thus the trial court's ruling was an abuse of discretion and warrants reversal.

Additionally, the district court awarded only $16,880.38 out of $26,579.38 in costs, arbitrarily disallowing $1,000.00 for Craig Tingey, M.D.'s preparation for his trial testimony; disallowing $3,699.00 for Gary Presswood, Ph.D. because the court struck him under NRS 50.275; and disallowing $5,000.00 for a half-day of Thomas Dunn, M.D.'s trial testimony because the court allowed Defendant to voir dire him outside the jury's presence during his allotted time for testimony and he had to return for a second day. These expert costs should have been awarded under an analysis of *Frazier* allowing costs above the statutory amount of $1,500.00 per expert and it was an abuse of discretion to preclude their recovery.

II. The District Court Abused its Discretion in Refusing to Award any Attorneys' Fees.

As stated in Yvonne's opening cross-appeal brief, the trial court must carefully evaluate the factors in *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983) in exercising its discretion to award up to the full amount of fees requested under NRCP 68. Of the *Beattie* factors, the Wynn's Answering Brief on Cross-Appeal takes issue with only the last factor: "whether the fees sought by the offeror are reasonable and justified in amount." *Beattie*, 99 Nev. at 588-89, 668 P.2d at 274. The Court must consider the following factors in determining a discretionary award of attorney's fees:

> (1) the qualities of the advocate: his ability, training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, intricacy, importance, the time and skill required, the responsibility imposed and the prominence and character of the parties when they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; and (4) the result: whether the attorney was successful and what benefits were derived.

Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

In Nevada, "the method upon which a reasonable fee is determined is subject to the discretion of the court," and "is tempered only by reason and fairness." *Shuette v. Beazer Homes Holdings Corp.*, 124 P.3d 530, 548-49 (Nev. 2005).

Here, the trial court's denial of all attorney fees whatsoever was unreasonable and unfair under this *Shuette* standard, and constitutes an abuse of discretion that disregards Nevada law allowing recovery of fees pursuant to a contingency fee arrangement. Both the trial court and the Wynn acknowledge and do not dispute the high quality level of Yvonne's counsel, the difficulty of the work involved in this slip-and-fall case, and the favorable result of a verdict five times the amount of her OOJ. 4 RA 636-652. Christian Morris, Esq., is a well-known and respected attorney in Las Vegas for her considerable personal injury trial experience both for plaintiffs and defense. Ms. Morris is a Governor for the Nevada Justice Association, and a frequent speaker at legal educational events. Ms. Morris was also the victorious trial counsel on a leading premises liability case, *Foster v. Costco*. Her professional ability is above reproach. Edward Wynder,

Esq., was recently accepted to the bar but has prior professional and legal experience. He has a post-graduate degree in public health, experience with administrative hearings, and graduated from law school with considerable experience and significant accolades. Brian Nettles, Esq., is a well-known and respected attorney in Nevada and nationally. He is the President of the Nevada Justice Association and has over a decade of personal injury trial experience and is active in industry groups at the State and national level.

Despite the high skill set of Plaintiff's counsel, both the trial court and the Wynn set these factors aside and refused to consider any attorney fee award in this case because Plaintiff requested her fees based on a contingency fee agreement rather than hourly bill amount. The trial court insisted on receiving "bills setting forth what tasks were performed and the associated hours for those tasks." 4 RA 636-652. The Wynn's response brief relies solely on the position that "a trial court must receive evidence of the actual time and attention dedicated by counsel," and cites to Georgia law in support, *Brandenburg v. All-Fleet Refinishing, Inc.*, 555 S.E.2d 508 (Ga. App. 2001) and *Georgia Dept. of Corrections v. Couch*, 759 S.E.2d 804 (Ga. 2014) ("*Couch*"). Georgia law, however, differs from Nevada law and expressly holds that an attorney seeking fees pursuant to contingency fee contract "must also introduce evidence of hours, rates, or some other indication of the value of the professional services actually rendered." *Couch*, 759 S.E.2d at 816

(citing *Brock Built, LLC v. Blake*, 316 Ga.App. 710, 714-715, 730 S.E.2d 180 (2012)). "A naked assertion that the fees are 'reasonable,' without any evidence of hours, rates, or other indication of the value of the professional services actually rendered is inadequate." *Id.* (citing *Brandenburg*, 252 Ga. App. at 43, 555 S.E.2d 508).

In insisting on hourly billing to support Plaintiff's counsel's fees and relying on Georgia law, the trial court and the Wynn completely forego Nevada case law that allows recovery of attorney fees by alternate means such as contingency fee agreements. "[I]n determining the amount of fees to award, the court is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount, including those based on a 'lodestar' amount or a contingency fee." *Shuette*, 124 P.3d at 549. It is important to recognize that Plaintiff's contingency fee agreement with her counsel set attorney's fees at 40% of all amounts recovered in this matter, as is the norm for personal injury cases. Therefore, calculation of attorney fees based on a contingency fee is indeed a "method rationally designed to calculate a reasonable amount [of fees]" in a personal injury case. *See Shuette*, 124 P.3d at 549. Nettles Law Firm, as most, if not all, personal injury lawyers do, represents clients for a contingency fee only, not on the basis of an hourly rate. This practice is not only commonplace, it is reasonable given the nature of the clients and requirements of winning such cases.

First, injured clients often come with few resources to pay hourly attorney fees. Many plaintiffs lack the financial resources to pay for a trial up front, and attorneys finance certain trial expenses involved in litigation to help clients get justice who could not otherwise pay for it. These cases often require substantial monetary expenditures and many hours of attorney and staff time as the cases are investigated, documented, negotiated, filed and prepared for trial. Second, the attorneys takes on the substantial risks associated with the client's right to terminate the firm even without cause; protracted delays, sometimes measured in years, before the case is resolved and before it is compensated; the expenditure of large sums of money for client costs; and the distinct possibility there will be no recovery and therefore no compensation for the attorneys. Third, personal injury litigation is difficult and time-consuming because plaintiffs bear the burden of proof and cases require considerable skill and effort in written discovery, depositions, oral argument, legal writing and analysis, knowledge of civil procedure and evidence, and trial work. Thus, the difficulty of proving personal injury cases and the risks taken on by the attorneys justify a 40 percent contingency.

Contrary to Defendant's reliance on Georgia law, there is no Nevada law mandating hourly billing submitted in support of a contingency fee, and if this Court looks at an outside jurisdiction for guidance, it should be one that Nevada

often looks to because of similarities, such as California, not a random state that happens to have law that supports Defendant's argument.

For example, this Court looked to California for the *Shuette* decision regarding recovery of contingency fees. This High Court stated *in dicta* that there was no preference of one approach of valuing reasonable attorney fees over another:

> Although these cases point out a number of jurisdictions in which the court is to start with the lodestar amount, many of those jurisdictions also permit the court to adjust the amount in consideration of contingency-fee-related factors. As those jurisdictions thereby recognize the potential reasonableness of contingency fee amounts, and since, in Nevada, the district court is already required to consider certain factors when determining reasonableness, we see no reason to require one approach over another.

Shuette, 124 P.3d at 549 n. 99 (citing *Lealao v. Beneficial California, Inc.*, 82 Cal.App.4th 19, 97 Cal. Rptr.2d 797, 821 (2000) and *Glendora Com. Redevel. Agency v. Demeter*, 155 Cal. App.3d 465, 202 Cal.Rptr. 389 (1984).

Thus, Yvonne's request to recover her attorney fees based on a contingency fee rather than an hourly rate holds just as much weight as a request for fees based on an hourly rate.

In *Glendora Comm. Redevelopment Agency*, the California Court of Appeal affirmed the trial court's determination that the attorney fees established by a contingency fee agreement were reasonable. Concluding that the trial "court was able to observe the conduct at the trial and related proceedings and in consideration

thereof determined that the contingency fee agreement, in light of all other factors, was reasonable," the Court affirmed an award of attorney fees in the amount of $734,395.76. 155 Cal.App. 3d at 480. The *Glendora* Court evaluated factors similar to the *Brunzell* factors required by this Court: (1) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly; (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment of the lawyer; (3)The amount involved and the results obtained; (4) The time limitations imposed by the client or by the circumstances; (5) The nature and length of the professional relationship with the client; (6) The experience, reputation, and ability of the lawyer or lawyers performing the service; (7) Whether the fee is fixed or contingent; (8) The time and labor required; (9) The informed consent of the client to the fee agreement. After considering these factors, the Court upheld an award of attorney's fees in the amount of the 40% contingency fee. *Id.* at 473-81.

As set forth above, in Yvonne's Cross-Appeal Opening Brief, and in the district court briefing, the *Brunzell* factors in this case are satisfied including the qualities of the attorney, the character and complex nature of the work to be done, the work actually performed, and the result obtained. The trial court and the Wynn take issue with not having hourly billing to prove the fees are reasonable and justified, which are based on the *Brunzell* factors, which are designed to prove

the quality and type of work in the case, but the trial court had firsthand knowledge of the quality and type of work in this case. The court recognized repeatedly that this was an extremely difficult case and Plaintiff's counsel achieved an excellent result, but instead of rewarding counsel's hard work and skill set, the court essentially chalked up the verdict luck by awarding zero attorney fees. This decision was unreasonable and an abuse of discretion, and Plaintiff respectfully requests this Court to reverse and remand the decision on the issue of fees and costs only because the *Brunzell* factors weigh in favor of finding an award of attorney fees to be reasonable and justified.

III. Plaintiff Concedes that the Contingency Fee Should be Reduced to her Post-Offer Fees.

Nettles Law Firm appeared in this case on February 18, 2015. The Amended Complaint was filed on March 20, 2012, but nothing had been done in this case except serving Plaintiff's Initial NRCP 16.1 Disclosures, which included a partial computation of damages and a partial list of witnesses, but no medical records. Nettles Law Firm rapidly conducted all of the discovery that should have been conducted over the previous three years, including but not limited to: propounding written discovery requests; responding to Defendant's written discovery requests; taking and defending multiple depositions, including those of Yvonne O'Connell, Defendant employees Corey Prowell and Yanet Elias, Yvonne's boyfriend Sal Risco, and filing a motion to reopen discovery for the

limited purpose of taking Defendant's NRCP 30(b)(6) deposition; obtaining medical records and disclosing Yvonne's treating physicians; disclosing Yvonne's treating physicians as her medical experts; retaining Gary Presswood, Ph.D. as her liability expert; obtaining various evidence to support Plaintiff's case, such as photographs and before-after damages witnesses; briefing and opposing motions, and in general cramming two years of litigation in the span of seven months in an attempt to rescue this case and achieve justice for Yvonne.

Thus, the total calculation of attorney fees in this case should begin on February 18, 2015 and continue to the present, and the post-OOJ fees should begin on September 3, 2015. The total contingency fee is $96,000 (40% * $240,000), divided across 27 months (September 2015 to December 2017), equals $3,555.56 per month. There were 7 months from February 2015 to September 2015, which equals $24,888.89, subtracted from $96,000.00 is $71,111.11, which is the total amount of attorney fees from the time the OOJ was served to present. Plaintiff respectfully requests $71,111.11 in attorney fees because the *Brunzell* factors weigh in favor of finding an award of attorney fees in this amount to be reasonable and justified.

IV. The District Court Abused its Discretion in Refusing to Award the Full Amount of Plaintiff's Expert Costs.

The Supreme Court reviews the district court's award of costs is reviewed for abuse of discretion. *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. ___, 345

P.3d 1049, 1054 (2015). Costs must be reasonable, necessary, and actually incurred. *Id.* To prove that costs were reasonable, necessary, and actually incurred, the party must file a serve a memorandum of costs verified under oath that the costs items are correct and were necessarily incurred in the action, as well as provide "justifying documentation" to support the costs. *Cadle*, 345 P.3d at 1054 (citing Nev. Rev. Stat. 18.110(1) and *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352 (1998)). Here, Plaintiff timely filed and served a verified Memorandum of Costs and Disbursements ("Memorandum"), which included (1) an affidavit from Plaintiff's counsel verifying that the costs were necessarily incurred and paid in the prosecution of this action; and (2) documents supporting these costs. 1 RA 038-116.

A prevailing party can recover more than $1,500 for expert witnesses if the court determines that the circumstances surrounding the expert's testimony necessitated the larger fee. Nev. Rev. Stat. 18.005(5). Pursuant to *Frazier*, the factors to consider in deciding whether to award more than the $1,500 NRS 18.005(5) statutory cap for expert fees are "the degree to which the expert's opinion aided the trier of fact;" "whether the expert's reports or testimony were repetitive of the other expert witnesses;" "whether the expert had to conduct independent investigations or testing;" "the amount of time the expert spent in court, preparing a report, and preparing for trial;" and "comparable experts' fees

charged in similar cases." *Frazier v. Drake*, 131 Nev. ___, 357 P.3d 365, 377-78 (Nev. App. 2015). The Nevada Court of Appeals emphasized in *Frazier* that "not all of these factors may be pertinent to every request for expert witness fees in excess of $1,500 per expert under NRS 18.050(5)." *Id.* at 378.

Here, the district court awarded only $16,880.38 out of $26,579.38 in costs, arbitrarily disallowing $1,000.00 for Craig Tingey, M.D.'s preparation for his trial testimony; disallowing $3,699.00 for Gary Presswood, Ph.D. because the court struck him under NRS 50.275; and disallowing $5,000.00 for a half-day of Thomas Dunn, M.D.'s trial testimony because the court allowed Defendant to voir dire him outside the jury's presence during his allotted time for testimony and he had to return for a second day.

Under a *Frazier* analysis, the above-stated expert costs should have been awarded even though they are above the statutory amount of $1,500.00 per expert and it was an abuse of discretion to preclude their recovery. First, Dr. Dunn and Dr. Tingey both greatly aided the trier of fact because both of them testified about medical causation of Yvonne's injuries to a reasonable degree of medical probability, as required under Nevada law. *See Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 157 (2005) and *Williams v. Eighth Jud. Dist. Ct.*, 127 Nev. 518, 262 P.3d 360, 362-63 (2011); *Frazier*, 357 P.3d at 377 ("the degree to which the expert's opinion aided the trier of fact"). Dr. Presswood was excluded under

NRS 50.275 after Defendant filed a motion in limine to exclude him, so he did not aid the trier of fact, but this is not dispositive of whether his costs should be awarded because the *Frazier* factors are a balancing test, not requirements.

Second, none of these experts were repetitive of each other: Dr. Tingey is an orthopedic joint surgeon who testified about Yvonne's injuries to her right knee; Dr. Dunn is an orthopedic spine surgeon who testified about Yvonne's injuries to her spine; and Dr. Presswood is an engineer who tested the coefficient of friction of the Wynn's flooring and was going to offer liability opinions, but the trial court struck him as an expert pursuant to NRS 50.275. *See Frazier*, 357 P.3d at 377 ("whether the expert's reports or testimony were repetitive of the other expert witnesses").

Third, Dr. Presswood conducted independent testing of the Wynn's flooring, but Dr. Tingey and Dr. Dunn did not conduct any separate testing. *See Frazier*, 357 P.3d at 377 ("whether the expert had to conduct independent investigations or testing"). They did conduct independent investigations in the form of reviewing records to prepare for trial, and saw Yvonne during the course of treatment for longer than the 10 to 30 minutes that defense experts typically see a plaintiff for an NRCP 35 examination. Nevada law allows for treating physicians to act as non-retained expert witnesses, and precluding recovery of their expert costs under *Frazier* because they did not perform some type of testing separate from their

medical treatment would prejudice plaintiffs in nearly every personal injury case because of how frequently they use treating physicians as experts and the expense of retaining expert witnesses in addition to paying for medical treatment. The Nevada Appellate Court doubtfully intended this *Frazier* factor to be construed in this manner as it conflicts with the spirit and intent of allowing physicians to act as non-retained experts.

Fourth, Dr. Presswood prepared a report but did not prepare for trial or spend any time in court; Dr. Tingey spent approximately one hour preparing for trial, which the trial court did not award in costs ($1,000), did not prepare a report, and spent approximately two and one half hours (2 ½) in court; and Dr. Dunn's preparation fee was embodied in the fee charged for court, did not prepare a report, and spent a few hours in court over the course of two days. *See Frazier*, 357 P.3d at 377-78 ("the amount of time the expert spent in court, preparing a report, and preparing for trial"). The trial court did not award $5,000 for the second day Dr. Dunn had to appear in court, which was unreasonable because (1) experts and other witnesses often have to come back for a second day of testimony due to the circumstances of trial and unknown occurrences and timeframes, and this does not render Dr. Dunn's costs unreasonable or unnecessary; and (2) the reason Dr. Dunn had to return a second day is because the first day was consumed by Defendant's voir dire of him. Defendants elected not to take the deposition of Dr. Dunn during

discovery and filed a motion to exclude treating physician expert witnesses, which the trial court denied but allowed Defendant to voir dire Drs. Tingey and Dunn outside the presence of the jury prior to their direct examination. 1 RA 117-118; *see also* 1 RA 120 – 2 RA 260. Dr. Dunn accommodated all parties involved by graciously agreeing to put whatever commitments, revenue producing or otherwise, he may have had aside and return to court on Thursday, November 12, 2015, to complete his testimony, including Defendant's entire cross-examination. 2 RA 261 – 3 RA 593.

Allowing voir dire of an expert under these circumstances – when a party makes a strategic decision during discovery not to take physician/expert depositions and then file a motion in limine to exclude them – at the expense of the Plaintiff rather than Defendant, and on the court's time, is unusual. Dr. Dunn had not planned nor reserved a second day of testimony, but fortunately he accommodated Plaintiff and cleared his schedule so he could come in to testify a second day. This second day of testimony was the reason for Dr. Dunn's increased costs of $10,000 instead of $5,000. Judge Ellsworth did not award costs for the second day, and Defendant argues against such an award even though they were the reason that Plaintiff incurred twice as many expert fees. Not only were they allowed to essentially take Dr. Dunn's deposition during trial, but the court's refusal to grant Plaintiff her full costs for Dr. Dunn's presence at trial means that Plaintiff

bore Defendants' costs for their deposition/voir dire of Dr. Dunn. This was unreasonable and an abuse of discretion because Dr. Dunn's testimony was reasonable and necessarily incurred.

Additionally, the district court adjusted Dr. Tingey's costs downward from $6,000 to $5,000 because she did not think there were many records to review:

> THE COURT: Well, the reason I adjusted Dr. Tingey's fee downward from the original six was because I recall how – I mean, the medical record of both of these physicians, which were obtained late by the defense as you've pointed out, was not very, you know, exhaustive or expansive. I mean, there were only a few documents, really. So to say – to talk to you on the phone and review those records, a thousand dollars, I just couldn't see that because there just weren't that many records. Now, I can't remember how many pages. It was not more than – I thought like total 12 between both doctors. I mean, it was really not very much in the way of records.

4 RA 628-635. The trial court's opinion of how long an expert should take to prepare for trial is not a valid reason not to award his preparation cost, especially when it is for the relatively low amount of $1,000 for one hour of preparation.

Fifth, all of these experts' fees are comparable to experts' fees charged in similar cases: Dr. Tingey and Dr. Dunn each charge $5,000 flat rate for a half-day in trial, and Dr. Presswood charges $300 per hour to prepare his expert report. 1 RA 027, 084; *see Frazier*, 357 P.3d at 378 ("comparable experts' fees charged in similar cases"). All of these experts have doctorate degrees in some form, are highly skilled in their fields, and are in high demand as both doctors and forensic experts. Similarly, routinely used orthopedic defense expert Dr. Anthony B.

Serfustini, M.D., uses a similar flat-fee structure at $4,000 per half day for court appearances, and orthopedic surgeon Dr. William S. Muir, M.D., charges the same as Drs. Tingey and Dunn for court appearances, $5,000 per half day. 3 RA 594; 4 RA 619. Thus, Yvonne's expert fees are justified, reasonable, and comparable to similar experts in similar cases.

Most courts recognize that the $1,500.00 guideline in NRS 18.005(5) is outdated, as it was implemented in the 1980s, and that expert fees are routinely beyond this low threshold, particularly in the medical field. Requiring a party to employ the testimony and opinions of medical experts to substantiate their evidentiary burden in an injury case, but affording them payment for barely over one hour of a necessary expert's time is, of course, unreasonable. Thus, it is necessary to reimburse expert fees beyond $1,500. Here, the trial court awarded some of Yvonne's expert fees but not all of them. In precluding recovery for certain costs, the court did not analyze whether they were reasonable, necessary, and actually incurred, the court appeared to simply arbitrarily cut them off. *See Cadle*, 345 P.3d at 1054 (citing Nev. Rev. Stat. 18.110(1) and *Bobby Berosini, Ltd.*, 114 Nev. at 1352). This is not permitted under Nevada law and thus demonstrates an abuse of discretion. Plaintiff respectfully requests her full costs in the form of an additional $1,000.00 for Craig Tingey, M.D.'s preparation for his

trial testimony; $5,000.00 for Dr. Dunn appearing for a second day of court; and $3,699.00 for Dr. Presswood.

V. Conclusion

Based upon the foregoing reasons, Plaintiff respectfully request that this Court affirm the judgment entered without remittitur, and that the case be remanded with instructions for the district court to provide an award of attorneys' fees and full costs.

DATED this 4th day of January, 2018.

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AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding documents does not contain the social security number of any person.

NRAP 28.2 AND 32(a)(9) CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[x] Proportionately spaced, has a typeface of 14 points or more, and contains approximately 5,566 words; or

[ ] Does not exceed 15 pages.

3. Finally, I hereby certify that I have read this appellate brief and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a

reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 4th day of January, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing **CROSS-APPELLANT/RESPONDENT O'CONNELL'S REPLY BRIEF IN SUPPORT OF CROSS-APPEAL** was filed electronically with the Nevada Court of Appeals on the 4th day of January, 2018. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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