IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY JAMES RIVES, M.D.; and LAPAROSCOPIC SURGERY OF NEVADA, LLC, Appellants/Cross-Respondents, vs. TITINA FARRIS and PATRICK FARRIS, Respondents/Cross-Appellants.	Case No. 80271
BARRY JAMES RIVES, M.D.; and LAPAROSCOPIC SURGERY OF NEVADA, LLC, Appellants, vs. TITINA FARRIS and PATRICK FARRIS, Respondents.	Case No. 81052

APPELLANTS' APPENDIX
VOLUME 31

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CHRONOLOGICAL INDEX TO APPELLANTS' APPENDIX

[1] These additional documents were added after the first 29 volumes of the appendix were complete and already numbered (6,493 pages).

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DISTRICT COURT

CLARK COUNTY, NEVADA

TITINA FARRIS, ET AL., Plaintiffs, vs. BARRY RIVES, M.D., ET AL., Defendants.	CASE#: A-16-739464-C DEPT. XXXI

BEFORE THE HONORABLE JOANNA S. KISHNER
DISTRICT COURT JUDGE
TUESDAY, JANUARY 7, 2020

RECORDER'S TRANSCRIPT OF PENDING MOTIONS

APPEARANCES:

For the Plaintiffs: KIMBALL JONES, ESQ.
GEORGE F. HAND, ESQ.

For the Defendants: THOMAS J. DOYLE, ESQ.

RECORDED BY: SANDRA HARRELL, COURT RECORDER

Case Number: A-16-739464-C

Las Vegas, Nevada, Tuesday, January 7, 2020

[Case called at 11:57 a.m.]

THE COURT: Page 1, 739464, Farris v. Rives. Counsel, can I have your appearances on page 1, 739464.

MR. JONES: Yes, Your Honor. Kimball Jones for the Plaintiffs.

MR. HAND: George Hand for the Plaintiffs.

MR. DOYLE: Tom Doyle for the Defendants.

THE COURT: Okay. And are the other two --

UNIDENTIFIED SPEAKER: I apologize, Your Honor.

THE COURT: No worries. You're more than -- oh, you need a headset. Are we getting that for you?

UNIDENTIFIED SPEAKER: Your Marshal is getting one.

THE COURT: Yeah, okay. We're getting you taken care of.

So is anybody else making appearances or just observing? You're more than welcome, either which way. I just want to make sure I get everyone taken care of.

MR. DOYLE: Should we unpack?

THE COURT: Of course you may.

MR. DOYLE: Okay.

THE COURT: We're going to deal with this for about 10 to 15 minutes, and then we're going to figure out how much extra time we need.

UNIDENTIFIED SPEAKER: Thank you, Marshal.

THE COURT: And just a quick question. Counsel, everybody is also more than welcome to observe, I just need to know are either of the two other counsels, since you're behind the bar, I'm assuming you didn't wish to make appearances? You're just here to observe. Otherwise -- has everyone had an opportunity to make their appearance who wish to make their appearances?

MR. DOYLE: Yes.

MR. JONES: Yes, Your Honor.

THE COURT: Okay. Then we'll move forward. Okay.

So we have Plaintiffs' motion for fees and costs, Defendant's Barry Rives and Laparoscopic Surgery's motion to re-tax and settle Plaintiffs' costs. And we had the opposition to the fees contained within the fees motion.

So, excuse me, with regards to -- the Court was going to start with fees, and then go on to costs, okay, and then we may have to break this up. You have to come back either after lunch or pick another day. I appreciate you may have come from out of town, so I can add you to my afternoon. There are others that are coming in at 1:30. I could either do it before or after. We'll figure that out in a moment. You can appreciate this is what happens when we try and accommodate -- we're more than glad to accommodate with long schedules to make sure everyone gets taken care of when they get these set.

So going to fees first. I'm just going to let Plaintiffs set forth your argument and then let Defense respond.

MR. JONES: Absolutely, Your Honor. As we've outlined in

-- this case has been ongoing for some time. In June of this year, after expert disclosures in this case, the Plaintiffs submitted an offer of judgment to the Defense in the amount of $1 million. At the time that that was submitted, all parties were aware of their general strengths and weaknesses.

For example, the Defense was aware that their expert that they chose to bring to trial had offered the opinion of the use of LigaSure was somewhat contraindicated in this setting. They were also aware, for example, that Plaintiff had over $1 million in past medical specials and approximating $5 million in future medical specials. And so that information was all well known. The offer of judgment was submitted and was not accepted by the Defense.

The Defense demonstrated their knowledge of Rule 68 and how offers of judgment work when they submitted to the Plaintiffs an offer of judgment of waiver, which allowed the Plaintiffs to waive the attorney's fees that the Defendants had accrued to date and the costs that the Defendants had accrued to date at the time of their offer of judgment, which was well into the -- I think it was $170,000 combined. And my understanding is that the costs that were identified that were indicated that would be waived, and the Plaintiffs would not have to pay if they accepted Defendants offer of judgment, included the costs of their experts, not limited to $1500 per expert.

And so the Defense was very, very well aware of Rule 68, how offers of judgment work in Nevada at the time that they chose not to accept Plaintiffs' offer of judgment. The Doctor, of course, consented

to settle the case, and the Defense did not choose to settle the case despite the Doctor being willing and desiring for the case to be settled.

The attorney's fees that we're dealing with in this case, Your Honor, we've already dealt with the issue of the reduction of the verdict to the judgment in this case. And so everything I'm talking about will be at the rate of the judgment of $6,367,805.52 that was filed on November 14th, 2019. Obviously, that, the judgment and even more so, the verdict, is a significant multiplier above the offer of judgment that the Plaintiff offered.

The Plaintiff has argued and laid out both in our motion and in our reply, the contingency fees are properly awarded in this matter. And, fortunately, there was a case, the *O'Connell v. Wynn* case that came out in 2018, that addresses that issue and explains why that is appropriate. It is also -- it's a well-known reality in Clark County, Nevada, that plaintiff's attorneys typically take cases on contingency and the rates, in fact, are pretty well known. That they tend to be 33.3 percent prior to litigation, and they tend to go from 40 to 50 percent once litigation has commenced.

Now under -- in our motion we discussed the waiver. So -- well, first of all, on that amount, Your Honor, we've laid out that the amount that should be awarded 40 percent, which was our contingency fee, 40 percent of the judgment is $2,547,122.21 in attorney fees.

NRS 7.095, states that an attorney shall not contract for or collect a fee contingent on the amount or recovery for representing a person seeking damages in connection with an action for injury or death

against a provider of health care based upon professional negligence in excess of, and it lays out the parameters there, and we explained that in our motion. And we do understand that if the Court made a determination that this was an unwaivable statute for some reason, we believe that it is waivable, and it was waived, but if it was an unwaivable statute, the amount of the contingency fee in this case would be $1,026,835.83.

Now in this case, we've laid out, from a factual basis, that it was waived. So the Plaintiffs were very carefully explained NRS 7.095 prior to signing the retainer, and it was explained to them that plaintiffs' counsel could not afford and was unwilling to take cases at that reduced rate, and that the only way that we were able to would be if they waived and accepted a contingency of 33.3 and 40 percent. And the Plaintiffs -- we've attached their affidavit, and they both, being very well informed of the law, of their rights, waived -- knowingly, voluntarily, and intelligently waived and agreed to the contingency fee of 40 percent in a litigated matter.

Now, Your Honor, as we have gone through we talked about a number of the -- well, first before I get on to the sanctions area, I would like to talk about the *Brunzell* factors.

Your Honor, this was a challenging case. There's no question about it. The *Brunzell* and *Beattie* factors, though they very clearly support Plaintiffs' request for attorney's fees. And I think something that is very important, and we do address it in our reply, and it's very important to understand the whole proposition of Rule 68, and

the idea of offers of judgment.

The Defendants' opposition seems to take the approach that unless the Defendant has committed some egregious error in their decision to not accept an offer of judgment, unless it was beyond any possible rationale, then an offer of judgment would have essentially no effect. And, of course, that cuts directly against the policy of offers of judgment. An offer of judgment is something that if it's a reasonable offer of judgment, and it is not accepted, then the consequences thereof should follow.

And as I mentioned, Your Honor, in this case it was the same weaknesses that were demonstrated during the course of trial with Defendants' experts and the damages that Plaintiff had suffered were well known and largely not disputed, in terms of the damages.

And so, in any case, under *Brunzell*, there are the factors, quality of the advocate, the ability, the skill, the training, the education. And, Your Honor, I've laid that out in a declaration as best I could and, frankly, it feels very -- well, in some respects not impressive, in other respects, very -- like we're bragging a lot about ourselves.

But the reality is we have all been very well trained as lawyers, and we've gone to accredited institutions, and we have excelled in those institutions, and we've come here to practice law, and we have excelled in the practice of law. And we take our oath seriously as attorneys and do what we can for our clients within the rules, and within the rules both of, you know, procedural and substantive rules, but also within the Rules of Professional Conduct.

And I think that Your Honor had the opportunity to observe our behavior over the course of the case, and whether or not we had developed some qualities as attorneys, as advocates. And I do believe that we did demonstrate that we had the appropriate skill and background that applies for *Brunzell*, the care for the work to be done.

And, Your Honor, as we outlined, in my opinion this was particularly difficult. I thought that it was a very difficult trial. And part of it is just that the fight of uncovering biases and the issues that you deal with in a medical malpractice case. They get defensed about 80 percent of the time nationally. And so these cases tend to be difficult, and they require an enormous amount of planning, and strategizing, and work both before and during trial. The work actually performed by the attorneys. To the best we could, we applied the planning that we had into the trial itself.

And during trial, we worked 16, 18 hour days pretty consistently. And I mean, it's -- you know, it doesn't say it here in the affidavit, but there was more than one night where we literally fell asleep at the office in front of our computers working on something and went home and got a couple hours sleep before we came back. And so the work -- and we feel that the work that we did in preparation both before and during trial manifested itself during the case itself, and the result was we were successful, and we were able to get an award that was significantly higher, Your Honor, than the -- than what we had offered in our offer of judgment previously.

The *Beattie* factors is -- whether or not Defendants --

defenses were brought in good faith. Many of them were not, Your Honor. And part of this goes into a sanction. But, for example, the Defense undervalued the medical specials in this case in a severe way, because they thought they would be able to talk about insurance even though they had evidence that insurance was not applicable in this case, and they should have been aware.

They -- and so they had certain things where they -- and they thought, for example, that the *Center* case would in no way be referenced in this case, even though they hid -- and it was found through an evidentiary hearing that they intentionally were untruthful with respect to the *Center* matter, and it resulted in them having to -- having an adverse inference instruction.

And so these issues in the case that they -- some of the issues where they felt that they might have had a stronger case were illegitimate beliefs on their part, because they were based on misconduct. And that was an ongoing theme in the case. And so they over evaluated their position in a significant way, and it made it entirely unreasonable for them to -- and in bad faith for them to reject the offer.

The Plaintiffs' offer of judgment was in good faith. It was timed well. And I think something that was mentioned -- the Defense mentions that the amount is -- that the amount of the -- that it begins to run at the time of the offer of judgment, the amount of the fees. And if you look at the case that was previously referenced, *O'Connell*, I believe -- right, *O'Connell*, yes -- states -- it doesn't say anything like that, but we have -- let me be clear. It states that a contingency fee is appropriate, is

what the *O'Connell* case states.

And the Defense, one of their arguments is that the amount of the -- perhaps the amount of the contingency fee should be reduced based on when it was brought in the case. I'm not sure if that was the argument, but that's what I thought I might have picked up from their opposition. If that is the argument, I don't see any support for that case law. However, if that were to be the case, we've done an analysis on our time in this case, and I just mentioned in the reply that we estimated 80 percent of the hours in this case that were put in by the attorneys were after the offer of judgment, and 20 percent before. Just so that it's very clear on the record. Now we don't think that that necessarily -- well, for the Court to evaluate and determine that is our best estimate in terms of the time that we put in both before and after the offer of judgment.

The amount of attorney's fees requested are reasonable and justified. They are, Your Honor. We already have support for that from case law, and we've outlined exactly why we believe we should be paid what we have requested, and as we've gone through the contingency fee issue.

There's also the issue of Defendants' misconduct. And I'm not going to spend too much time on that. It's outlined very clearly within our motion. I'm just going to hit a couple of points very quickly from Defendants' opposition that I think are important.

Page 3 of Defendants' opposition, the declaration of Thomas Doyle, Esq., as point number 6 he states the jury was polled. The verdict was not unanimous. Now Mr. Doyle, of course, was in the hallway with

us as we talked to the jury, and they explained very clearly that not a single juror was for the Defense, not one. In fact, there was one juror who, right when they went in there, they said who are you for and one of them said, you know what, I've decided I can't participate. And they said, well -- and everybody said, for the Plaintiff. We think that that Plaintiff should win. That was stated basically at the beginning and that's what the juror -- they told Mr. Doyle this too.

And for Mr. Doyle to put it in his opposition, it gives the improper suggestion there that the verdict was split in his favor in some way. It was not. There was no one that thought the Defense had a credible argument, among the jury. There were seven for the Plaintiff, and there was one that abstained.

Talking about the areas of the collateral source issue, talking about insurance. Defendants' opposition says there's nothing more to add, so they've conceded that point.

Talking about the Chaney appearance at trial. Your Honor, it's well recorded where Mr. Doyle makes specific representations to the Court and Dr. Chaney says that those are just simply not true, within minutes of the representations being made to the Court.

Then we talk about Dr. Hurwitz and him having to come another day. And he points out that during cross-examination there were just a few -- a couple of sidebars for a limited amount of time, but there were 71 minutes in sidebars before that, largely due to Defendants behavior there -- Defense counsel's behavior.

The fourth area, Defendants' post -- the offers of proof. This

is a big deal here, Your Honor, and I think it's very telling if you look at the language of Mr. Isenberg when it comes to the offers of proof. Mr. Isenberg states over and over again that in this other case, this $50 million verdict, that they had presented the offers of proof, and he kept on trying to say it was very close to the time of closing arguments. But if you read in the only part where he really clarifies, it was clearly presented to the Court while evidence was still being put on. And that is a far different thing than what we have here. And that is the crux of the issue.

The Court and the parties must have an opportunity to deal with an offer of proof. An offer of proof made after the close of evidence is very clearly improper and must be stricken. And for Defense counsel to spend just pages trying to explain why presenting offers of proof, as they did in this case after the close of evidence, is remarkable.

Your Honor, and the one other thing that I would mention is the Court went to great effort to provide the parties with an opportunity to try to settle this case before trial and managed to obtain, within a matter of a couple of weeks, I believe, a settlement conference that our understanding was everyone was very in favor of it. And for the Defense to argue as though -- well, we go to the settlement conference, the Plaintiff restates the same offer, so the Defense can walk away at that time. The Defense gives no counteroffers, none, at the settlement conference. Absolutely none, and then -- even though the doctor has given his consent to settle.

And so when you talk about the efforts and the good faith

here, it's absurd. And the thing that is the most perhaps troubling to me, and the thing that really upsets me the most when I read through Defendants' opposition is the hypocrisy of Defendants' offer of judgment that outlines these expenses, these costs, these fees for the full amount that they think they should be -- and they offer a waiver to us for it, and then they come back here to the Court and suggest that they don't think any of that is applicable and that Rule 68 really doesn't have any teeth.

And so, Your Honor, with that I don't think I have anything else unless you have questions for me, Your Honor.

THE COURT: What are you referencing when you're saying their full offer with everything? Are you --

MR. JONES: When I say what?

THE COURT: When you're saying Defendants' offer with the full value, what are you referencing?

MR. JONES: Oh, so they made an offer of judgment --

THE COURT: Is it attached to any of the pleadings that the Court has? That's what I'm asking.

MR. JONES: Yeah, it's in Exhibit 2, our reply, Your Honor.

THE COURT: But there's no documentation attached to that offer. I thought you were stating -- I'm sorry. Your Exhibit 3 is Defendants' offer. I thought you were stating that they attached the documentation that supported those numbers.

MR. JONES: Oh, I apologize.

THE COURT: You just were referencing the numbers themselves?

MR. JONES: Yes, Your Honor.

THE COURT: Okay.

MR. JONES: Yes.

THE COURT: Thank you for that point of clarification. That's what -- I didn't see that there was any attachment. Okay. Thank you so much.

Okay. Here's the challenge I have. It's 12:17. I want to make sure everyone has a full opportunity to be heard. A good stopping point would be between the two arguments, versus -- my team has been going non-stop. So I can offer you a similar option. 1:30 is the other people coming in, right?

THE CLERK: Correct.

THE COURT: So I can put you after them at 2:00, if you want to come back later today, so we can get this taken care of. The challenge I have is, I know we were trying to accommodate people in different departments all morning, which meant -- well, we were ready to go at 8:30 --

MR. JONES: Absolutely.

THE COURT: -- to try and get things taken care of so that this would be a nice shorter and easier day. Life does not always work out that way when we try and accommodate all the time, but no worries. So --

MR. JONES: We'll make 2:00 work, Your Honor.

MR. DOYLE: That's fine. I'll just catch a later flight. I just assume get all this done.

THE COURT: I mean if you want it on a different day that's fine too. I will offer you this same --

MR. DOYLE: No, no. I have a binding arbitration here starting next Monday that goes -- and then I got a trial right after that. And so --

THE COURT: Okay. That's fine.

MR. DOYLE: Today is just as good as any other day.

THE COURT: I'm in between a trial that needed a blank day today or an off day today, so I'm between a trial, so I've got his afternoon. Okay. So the other one is at 1:30. I would estimate that they're going to take about 20 minutes or so, so that's why I say 2:00. If that works for everyone --

MR. JONES: Yes, Your Honor.

THE COURT: -- we'll see you back here at 2:00. Then the Defense will have an opportunity to respond. I will tell you I'm going to ask you all about *Capanna v. Orth*, so feel free to look it up over lunch. Thank you.

THE MARSHAL: Court is in recess.

[Recess at 12:20 p.m., recommencing at 2:31 p.m.]

THE COURT: Case 739464, Farris v. Rives. And that was on my 9:30 -- a continuation on my 9 -- I'm sorry, continuation of my 10:00 matter, page 1, 739464.

Counsel, since I've done intervening matters since we've seen you last, if you wouldn't mind, please do your appearances, and then I'm going to have counsel for Defense be able to present his

response. Go ahead.

MR. JONES: Yes, Your Honor. Kimball Jones for the Plaintiffs.

MR. HAND: George Hand for the Plaintiffs.

MR. DOYLE: Tom Doyle for the Defendants.

THE COURT: Okay. One second. Let me get away from 116 and back to med mal. Okay. Counsel for Defense.

And when I stated the comment about the case I'm going to ask, I'm going to wait until you get to responses. I just figured you both would possibly want to look at it. You don't need to -- unless Plaintiffs' counsel you wanted to add it to your concept now. The reason why the Court was asking about *Capanna* is because it really just addressed the timing and the analysis of the Court in *Capanna v. Orth*, about whether or not things should be -- it's not all or none, it can also be broken down, and I didn't see that fully discussed, so I wasn't sure if the parties wished the Court to be taking it into account, if that intentional, or inadvertent, or whatever.

So, counsel, for Defense do you mind if I let Plaintiff give a response there first, and then you have a chance to respond, or do you want to go straight into your response?

MR. DOYLE: Why don't we go straight into my response, and then come back to it.

THE COURT: Okay. Then we'll stay tuned to hear some reply.

MR. JONES: Absolutely, Your Honor.

THE COURT: Okay. Go ahead.

MR. DOYLE: Thank you, Your Honor. So addressing first the issue of fees, which I believe the Court wanted us to focus on first --

THE COURT: Yes.

MR. DOYLE: -- we have the Rule 68 offer of judgment, which was served on June 5th, 2019. The rule at that time, gave the Defendants 14 days to accept that offer of judgment, which would put us into the latter part of June.

And so in evaluating the offer of judgment and a request for attorney's fees, one has to look at the posture of this case as it existed in the second half of June of 2019, as well as the *Beattie* factors.

And focusing on what I believe are the three important *Beattie* factors, one was Defendants' defense brought in good faith. I believe the answer to that question is, yes. Was the decision to reject the offer grossly unreasonable or in bad faith? I believe the answer to that question was no. And then the third factor to focus on, the fees sought were reasonable and justified an amount. And the answer to that is no.

If you look at the status and posture of this case as of late, or the second half of June of this year, and Plaintiffs -- in Plaintiffs' reply, they seem to be amalgamating facts and circumstances that were not known as of June of '19, and were only known and became apparent later. But if we just focus on late June of 2019, the Defendants had three expert witnesses who had opined in their reports that Dr. Rives' care was within the standard of care. We had Dr. Juell, the general surgeon, we

had Dr. Bart Carter, a general surgeon, and we had Dr. Kim Erlich, an infectious disease specialist.

Plaintiffs at that point in time had Dr. Hurwitz, who had not yet been deposed and Dr. Hurwitz's report was somewhat vague, and his opinions were fleshed out at the time of his deposition, which took place much later, but in his report his opinions were vague to the extent that what he said was Doctor -- I'm paraphrasing, that Dr. Rives' intraoperative technique was negligent and his post-operative care was negligent, without providing any specific details, for example, about the interoperative technique, what technique, how, why, et cetera.

Then as of the second half of June of 2019, we had three expert witnesses on causation. We had Dr. Juell, Dr. Carter, and Dr. Erlich. Between the two of them -- I'm sorry, between the three of them there were two possible causation explanations for the sepsis. One was the pulmonary aspiration syndrome, and the other was that Dr. Rives, having created the two holes, that there was micro spillage of bacteria before he repaired those two holes, rather than having left behind some third undiscovered hole that had not been repaired. These were opinions that existed while the offer of judgment was still pending.

The association of Mr. Jones and Mr. Leavitt come after June of 2019. That happened in, I believe it was July 15. So at the time the offer of judgment expired, we had the three standard of care experts, we had the three causation experts, we had our damage experts, and we had no motion at that point in time for terminating sanctions. We had no inkling at that point in time that Carter was going to become an issue in

this case.

And for those --

THE COURT: Do you mean *Center* by chance?

MR. DOYLE: I'm sorry, what did I say?

THE COURT: Carter.

MR. DOYLE: Carter. I'm sorry, I misspoke. I meant *Center*.

THE COURT: Okay. I just want to make sure I was --

MR. DOYLE: No, no. Thank you.

We have -- at the point in time that the offer of judgment expired, we had no inkling that *Center* was going to become an issue in this case, and it was not until Mr. Jones and Mr. Leavitt associated in in mid-July, that we then later had the motion for terminating of sanctions and all of that.

So I think if you look at the totality of circumstances as they existed in the latter half of June, the Defense was brought in good faith. The decision to try this case was not grossly unreasonable, which I can't find a case that specifically defines grossly unreasonable for our purposes, but it would seem to be a rather high standard to satisfy and that the decision to try this case was not in bad faith.

And, you know, in terms of a medical malpractice case, unlike many other kinds of personal injury cases, you know, it's not the proverbial battle -- I mean, in a medical malpractice case it is the proverbial battle of the experts on standard of care and causation. And at the time the offer of judgment expired, we had very good standard of care and a causation defense.

Just to digress for a moment, there was a comment about the mandatory settlement conference, which really isn't relevant to the analysis because that came much later. And -- but to respond to what counsel had to say, at the settlement conference, yes, there was consent from Dr. Rives, and there was some authority to settle the case; however, we were told by the settlement conference judge that Plaintiffs, under no circumstances, would ever go below their demand of $1 million.

So to have responded to it at our -- in our judgment at the time seemed to be an exercise of futility. But, again, we're talking about events that occurred long, long after the offer of judgment had expired.

Then as to the amount of fees sought, we have -- it is a contingency fee. We have the 40 percent figure, and we have the NRS 7.095 figure. And 7.095, does not -- subpart 1 says, an attorney shall not contract for or collect. It doesn't say, shall not collect. It does not say an attorney shall not contract for absent, you know, a good faith waiver on the part of the -- you know, on the part of the client. It's rather clear in plain language that an attorney shall not contract for or collect a contingency fee that is contrary to 7.095. And in our papers, we addressed all the reasons for that statute as part of coded.

You can't waive a statute like this. Now whether it's an ethical issue or not, whether Plaintiffs would -- can privately agree with their attorneys to some other contingency fee other than what is required by statute, I'm not going to get into that and whether that's even ethical or whether you could do that without your client seeking

advice of independent counsel. But to ask the Defendant in a malpractice case to have to pay attorney's fees contrary to and more than what is allowed by statute that is not permissible and allowed.

THE COURT: Can I stop you for one second?

MR. DOYLE: Of course.

THE COURT: Because I need to get a --

MR. DOYLE: And can I grab --

THE COURT: Of course you may. It looks like you needed a drink anyway of water. Help yourself. And there's also more water there.

I need a point of clarification of the date of these declarations and when the 40 percent -- I'm sorry, when Patrick Farris -- when were the actual contracts signed --

MR. JONES: Your Honor, I'm not --

THE COURT: -- regarding the 40 percent because they're undated? The declarations that are attached to Exhibit 4 are undated.

MR. JONES: Oh, well, those declarations were certainly signed responsive to this.

THE COURT: Okay.

MR. JONES: The contracts were signed a long time ago, but --

THE COURT: I didn't -- okay. Because I was looking -- is the actual contract attached anywhere for the Court to see?

MR. JONES: It is -- not that I know of, Your Honor.

THE COURT: I didn't see it. That was my polite way of

saying I didn't see it.

MR. JONES: Oh, okay.

THE COURT: Because I wanted to know who it was with and when it was signed.

MR. JONES: So I -- yeah, so --

THE COURT: Was it with you?

MR. JONES: There was --

THE COURT: Was it with Big Horn --

MR. JONES: Yes. Yes.

THE COURT: -- or was it with Mr. Hand?

MR. JONES: Well, I think the active contract is probably with Big Horn.

THE COURT: Because that's why the Court has to ask that question because when --

MR. JONES: Right.

THE COURT: -- Big Horn came into the case.

MR. JONES: Right.

THE COURT: That's the reason why that date is an important date that this Court is going to need to clarify. Stay tuned, and I'll ask you. I just -- if it was an easy answer, I was going to segue in, but go ahead, counsel.

MR. DOYLE: I have no knowledge one way or the other. I would assume that Mr. Hand, when he initially was retained in this case, had a fee agreement with Plaintiffs, and whether that was the same or different fee agreement, I have no idea.

THE COURT: Right. This Court needs to know that.

MR. DOYLE: Yeah.

THE COURT: And so I'm giving them a stay tuned to find that out --

MR. DOYLE: Right.

THE COURT: -- while you're speaking because --

MR. DOYLE: Yeah, I have no idea or knowledge of that.

THE COURT: Okay. Sure. Go ahead, please. Continue. Thank you.

MR. DOYLE: The last point I wanted to make along the fee issue is if you look at 7.095, subpart 3, it talks about the amount that can be recovered, and recovered is defined as a net sum after deducting disbursements or costs.

So if the Court were to award attorney's fees based upon the offer of judgment, it's our position that those fees would need to be limited per 7.095, subpart 1. However, to determine what the actual number is, you would have to have the total amount of costs and disbursements, subtract that from the amount of the judgment, and then that is the number that you apply the percentages against.

THE COURT: So what's the number?

MR. DOYLE: That's what a net fee is.

THE COURT: So what are you saying their number is for attorney's fees under the statute?

MR. DOYLE: I don't know, because we have -- I mean, we have a number that they gave us in their memorandum of costs, but as

pointed out in -- I don't remember in which pleading it was, but as we pointed out there are probably costs and disbursements that were not included in the memorandum of costs because they're not recoverable. So until we know the actual number of 100 percent of the costs and disbursements incurred, we cannot then do the math to calculate the percentage.

Capanna, I read *Capanna* at lunchtime. Plaintiff in that case made a motion for attorney's fees under 18.0102, subpart B. I'm not sure where the Court wanted to go with the reference to *Capanna*. To my knowledge, there is no request for attorney's fees pursuant to that statute. I did read the part of the statute about apportionment between --

THE COURT: There's claims and defenses.

MR. DOYLE: Right.

THE COURT: Where the Court was going is just whether you all had a position on whether that applied. So only with the Rule 68, is really what the Court's concerned --

MR. DOYLE: No, I mean in my judgment, *Capanna* does not apply.

THE COURT: Okay.

MR. DOYLE: Because *Capanna* is talking about 18.010, which is not our case.

THE COURT: Okay. Okay. You get last word on the fees aspect.

MR. JONES: Thank you, Your Honor. To answer your question from earlier, I've just discussed with Mr. Hand, ours when we

came in the client signed a 40 percent fee agreement upon my involvement in the case. It was previously on a sliding scale under the statute with Mr. Hand. That's what he believes.

THE COURT: Okay. So then let me let you finish, or do you want me to tell you the Court's inclination before you finish?

MR. JONES: Go ahead, please, Your Honor.

THE COURT: Okay. I'll tell you the Court's inclination is your timing of your offer of judgment has to be triggered with what was the fee agreement in force and effect at the time of your offer of judgment. So if your firm and Big Horn, from you stated, did not come in until after the offer of judgment time period expired, the Court wouldn't be getting into the analysis of whether or not you could waive NRS 7.095. The Court would have to apply 7.095, because that was the fee agreement in place at the time of the offer of judgment and through the expiration of the offer of judgment.

That is an inclination based upon pure timing and statute, because I would have to take the fee agreement in place at the time. If you wish to address that, you can feel free to address that. I'm just trying to give you a heads-up, because I've got to look at this chronology.

MR. JONES: Your Honor, I won't even fight that issue, because I -- I mean, I understand where you're coming on that. I do understand it. I would like to --

THE COURT: Because you're asking to have --

MR. JONES: Yes.

THE COURT: -- counsel be responsible for something more than would have been in place if -- hypothetically, say the trial took place exactly 21 days, which is about the time you came in anyway.

MR. JONES: Right.

THE COURT: But hypothetically, you know, what I mean, then even say it was a one day trial, I'll make my example really easy right for my purposes, a one day trial was concluded, basically on the 21st day. The only thing I would be looking at, right, is the offer of judgment -- the expiration of the offer of judgment. So what was the fee agreement at that time? You can't hold the other side responsible for something more than you would have otherwise held your client's responsible for unless you can provide me some of authority that somehow changes that.

MR. JONES: No, Your Honor. And I can't.

THE COURT: Under a straight --

MR. JONES: Right.

THE COURT: Under a 68 analysis, not under sanction analysis. But I'm talking a 68 analysis, which is where you're currently explaining to the Court is my understanding.

MR. JONES: Right. Okay.

THE COURT: But that's an inclination. If you disagree, feel free to argue it, but --

MR. JONES: No. And, Your Honor, I appreciate that. I can -- I understand the Court's reasoning. I wish we had attached the contracts, because I can't -- I don't recall the exact language, but we

haven't done that. In any case, that's our best recollection, and we will live with our best recollection at this time.

THE COURT: And I appreciate as officers of the court, plus even if you hadn't -- since you haven't provided it to the Court, the Court doesn't have something to establish that you had the 40 percent at the time, and I've got an objection to something less. So I appreciate as officers of the Court you're going under 3.3A, and you're telling me I should be looking only at 7.095; is that correct?

MR. JONES: Your Honor, I believe that's correct with respect to the applicable fee agreement at the time of the offer of judgment.

THE COURT: Okay. Feel free to proceed. Okay.

MR. JONES: Thank you, Your Honor.

So Mr. Doyle, he spoke about Rule 68 and about whether or not the Defense was made in good faith. I want to talk about a couple of things. He emphasized that it has to be based on what was known in June of 2019, and I agree with that.

And so when you consider what was known in June of 2019, what the Defense knew. The Defense knew that it had already hidden evidence about the *Center* case, right. The Defense knew that it had improperly and falsely responded to written discovery. The Defense knew that its client had been dishonest in deposition when asked about his history and when asked about the *Center* case, right.

The Defense knew that they had failed to abide by expert disclosure rules with respect to most of their experts, by having them offer all these initial opinions when they were purely rebuttal experts,

but more troubling that with the one expert that they had had directly involved in the *Center* case, they acted as though, oh, goodness, he doesn't have a trial history. He doesn't have any testimony history. This guy in particular, the only one connected to *Center*.

Now the Court has already gone through and took the time to do an evidentiary hearing giving the parties all the time needed, all the time requested, to be able to establish their case on whether or not Defendants' tactic or failure to disclose was in fact intentional or whether it was some accident. And there was already a determination that it was intentional after the testimony and the cross-examination of Dr. Rives. It was very clear that the Defense knew -- that they knew or should have known, and they failed to disclose this information.

So what the Defense certainly knew in June of 2019, is that they had repeatedly committed misconduct in this case when it came to disclosing appropriate reasonable questions about Defendant's history of medical malpractice. The Defense acting today as though they didn't know at that time that it would come back to bite them, that they would be sanctioned for misconduct that they had been engaged in over the last year-and-a-half is troubling on its own, in addition to the issues with the misconduct itself. And, of course, Defense knew about all of these things.

The Defense knew, being very experienced, that you're not allowed to cumulatively stack experts with the same specialties on top of each other for your Defense, but yet they still disclosed two general surgeons who had identical opinions. Remarkably in June of 2019, what

they knew is they had two general surgeons who both miraculously came up with pulmonary aspiration syndrome as the only explanation -- and let's be clear. It wasn't until I deposed their infectious disease doctor in August, that they came around with the theory that there was possibly the -- some minimal leakage, right. That came out when I deposed their infectious disease doctor. Nowhere else did they ever have that before.

So pulmonary aspiration syndrome was their one and only causation defense in this case. And let's be clear what the Defense knew about that at the time. What they knew is they had two surgeons who were offering this opinion. They knew it was the exact same defense they had used in their prior case in April. They knew that these two -- that no treating physician shared their opinion, and they knew that these two experts with this pulmonary aspiration theory had not even seen the films yet. Had not even seen the films yet.

They had, based on records they did not diagnose a diagnosis, from doctors who did not diagnose after reviewing the films, they have experts saying that the films show something even when those experts have not even seen the films. So those are things that the Defense knew in June of 2019.

Some other things that the Defense knew in 2019, is that they had answered written discovery to the Plaintiffs where the Plaintiffs asked them, are there any photographs or video of this surgery. And the Defense knew that they had responded to that request with n/a, and they never fixed it, ever. In fact, later on when so much attention was paid to this written discovery that was totally improper, and they revised it and

supplemented, the Defense continued to stick with not applicable in response to that question.

And, Your Honor, it was not until literally the last witness, the Defendant himself, when he was called again during Defendants case-in-chief, that he testified to this jury that he had taken photographs of the surgery. There are issues, on issues, on issues about the bad faith defense that has occurred in this case that goes all the way through discovery, goes right through the trial every day.

Now bad faith, generally speaking, in most of the cases cited, certainly in *Yamaha*, it talks about specifically where you proffer a defense that is not -- you don't have a sufficient grounding to offer that sort of defense. But, Your Honor, certainly -- certainly, it is bad faith to support your defenses, liability defenses and causation defenses, by engaging in misconduct to hide the actual evidence on those points.

Now in this case, we've talked about the causation issues. The Defense knew they had no causation case. Everybody acknowledged that the Plaintiff had developed critical illness neuropathy, polyneuropathy, and that she walked into that hospital and couldn't walk out. Everybody knew that much. That wasn't even -- that was well known by everyone, but the Defense still wouldn't even give any portion of causation. They wouldn't actually admit it, and they tried to have people come up with little side opinions to essentially trick the jury that it was some other issue.

But at the end of the day, in the root of it all, critical illness polyneuropathy was obviously the cause, and that's what the experts

ultimately all had to acknowledge when they testified. There was not a good faith defense on causation, and there was not a good faith defense on liability either, Your Honor. In Dr. Juell's very first report or was it his second report, regardless, it was a report long before June of 2019, he says, your use of the LigaSure in this situation is somewhat contraindicated. That's what their expert said, who they brought to trial. That was in his report. The Defense came in with a flimsy defense on liability and a flimsy defense hoping -- on causation, hoping that it could get through because medical malpractice cases often do for the Defense.

Now I want to touch -- this very much touches on the issues, I think, in *Capanna*. While we have focused, definitely, on the offer of judgment, and I don't think I really have anything additional to say beyond what was already said on the offer of judgment. I think that that stands for what it stands for. I think it was made reasonably, and I think we have laid that out, and I have argued it to the extent that I need to.

The *Capanna* case is interesting, and we have pointed to this. The *Capanna* case is useful for a couple of reasons. I know that the Court -- and I'm going to talk about the second issue, which I think is what the Court was alluding to a moment ago. But, first, the *Capanna* case is one where attorney's fees were granted because the Defense was held in bad faith. And the attorney's fees were granted on that basis.

And in this case, that is certainly the case. And for all of the improper actions by the Defense, the violations of orders, the professional misconduct, everything that we have gone through, Your Honor, I would request that the Court grant the reasonable attorney's

fees, which would be the full amount of the attorney's fees in this case, alternatively, because of the flat out misconduct and bad faith defense that we have experienced in this case.

The *Capanna* case talks about 80 percent. It talks about how the Court in the -- and I actually didn't notice. I read that case many times and until Your Honor mentioned it, I noticed it today, this afternoon. It talks about 80 percent in the *Capanna* case, and it says how in that case it was appropriate for the Court, based on the misconduct or the bad faith defenses of the Defense, it was appropriate for the Court to grant the attorney's fees and in that case it was appropriate for the Court to reduce the attorney's fees from 100 percent down to 80 percent of the attorney fee, because 80 percent of the trial involved liability and 20 percent could, effectively, be limited to causation. And I thought that was interesting.

In this case, I have not been able to go through and chop down where you might be able to segment the case during trial. I know that we did have a meaningful meeting and tried to go over our hours to make a determination that it was approximately 80 percent of our attorney's time overall occurred after the time of the offer of judgment, versus prior to the offer of judgment.

And looking at that this afternoon, essentially, just kind of on the fly, the best I could say is I -- if the Court was inclined one way or the other in terms of causation, versus liability, and in terms of the specific essentially the sanction, the attorney's fees granted on the basis of a bad faith Defense, my inclination would be that there were very few experts.

On the Plaintiffs' side, we had Dr. Willer, we had Dr. Barchuk, we had the economist, and we had Dawn Cook who would have been restricted to damages only. We also had some before and after witnesses, some fact witnesses that probably would have fallen into those categories. Overall, each of those witnesses was pretty short, even Dr. Barchuk. I think that those witnesses were probably a couple of hours for Dr. Willer, and then the before and after witnesses, we're probably talking about 15 minutes. They went pretty quickly.

For the most part, the bulk of the testimony and the time at trial ultimately dealt with both, because the witnesses tended to have opinions on both sides of that. And so, what the percentage would be, I don't know. It would probably be a small percentage, Your Honor, that might fall into the category of purely causation, but I don't know what that percentage would be.

Did that answer your question at all, Your Honor, with respect to that or --

THE COURT: It did. It did.

MR. JONES: Okay.

THE COURT: I had one other question, but I was waiting until you were finished.

MR. JONES: Yes. Go ahead, Your Honor.

THE COURT: Okay. Page 14 of your brief --

MR. JONES: Yes.

THE COURT: -- where you had done an analysis under -- a fee cap under NRS 7.095. Is the $1,026,835.83 an 80 percent number or

is that a 100 percent number of your fees?

MR. JONES: It is a 100 percent number, Your Honor. The one million, twenty-six --

THE COURT: So would that -- so walk me through what the basis of that number is. Meaning, is it a cap number that doesn't -- it does not take in contingency, or is it -- walk me through how you got that number, and if it's 100 percent or if it's your 80 percent time of trial, post-offer or not --

MR. JONES: It's not.

THE COURT: -- so that I have an understanding.

MR. JONES: Your Honor, if you wanted to know what the 80 percent amount would be, it would be that number times point 8.

THE COURT: Okay.

MR. JONES: And so that is -- that number right there --

THE COURT: Have you done that math yet, or am I popping out a calculator?

MR. JONES: I have not, Your Honor, but --

THE COURT: Okay. Well, why don't you all agree on what, at least, that mathematical number is, so that -- if anybody needs an extra calculator? Well, you have your phones, right? Your phones have calculators. Hence, even mine.

MR. JONES: Yes, Your Honor. Here, I can --

MR. DOYLE: Well, I frankly didn't check Plaintiffs' math about the 40 percent, the 33 percent, et cetera, but --

THE COURT: So you had the chance to do so, fully if you

wish to do so in your opposition.

MR. JONES: Your Honor, my calculation is -- it is $821,468.66.

THE COURT: Well, I got 64 cents, but you got 66 cents?

MR. JONES: I have 66.4 cents when I just multiplied it by point 8.

THE COURT: Okay.

MR. JONES: So I just rounded down to 66.

THE COURT: Okay.

MR. DOYLE: I'm sorry, what was that number?

MR. JONES: 821,468.

MR. DOYLE: Point 66.

MR. JONES: Point 66.

THE COURT: Does your math come up with something different?

MR. DOYLE: No, that --

THE COURT: Okay.

MR. DOYLE: -- point 664, but that's the same.

THE COURT: Okay. So do you disagree with the point 66, two cents? Folks, are we --

MR. JONES: It was the same. We were --

THE COURT: Okay.

MR. JONES: -- he got the same calculation that I did.

THE COURT: Okay. So walk me through how you get to that number then. I understand the 80 percent aspect of it. So is that a

billable rate number or is it a straight 7.095 taking it -- just walk me through how you get there, please.

MR. JONES: Yes.

THE COURT: And then walk me through your *Brunzell*.

MR. JONES: Your Honor, it's a -- it is the -- under NRS 7.095, it is taking the breakdown there --

THE COURT: Uh-huh.

MR. JONES: -- and applying it to the judgment, which had been reduced from the verdict.

THE COURT: Okay.

MR. JONES: The 6,300,000 number.

THE COURT: Okay.

MR. JONES: And so we took that number and applying NRS 7.095, it comes to 1,026,835.83. And then if you take the 20 percent of the attorney time that preceded the offer of judgment, and so you give 80 percent of the time, that number comes to $821,468.66.

THE COURT: Okay.

MR. JONES: And, Your Honor, with respect to the --

THE COURT: Can I ask you another question --

MR. JONES: Yes.

THE COURT: -- on that, if you don't mind?

MR. JONES: Absolutely.

THE COURT: Fully appreciating -- I mean, even before our conference when she had *Beazer v. Schuette*, but it doesn't matter if now you have it in a personal injury context. Sorry, I know my CV world as

well, but, okay. You got *Beazer v. Schuette*, you got *O'Connell v. Wynn*, neither of which were medical practice, neither of which dealt with the NRS provision 7.095, and I'm not in any way going outside of what's in your pleadings, I'm merely going from the contingency factor to the statutory factor. I just want to make sure I'm taking into account that -- because it was argued that you can get contingency, which I'm not seeing anyone is disagreeing with, it's just that this particular case the fee agreement was a 7.095 fee agreement; is that correct or incorrect?

MR. JONES: To the best of our knowledge, Your Honor, that is correct.

MR. HAND: Right, Judge. It was sliding scale. I can confirm that.

THE COURT: Okay. So what I'm saying is you're not arguing -- I'm just trying to see, do I need to address the contingency factor analysis under *O'Connell* and *Beazer v. Schuette*, or it was a sliding scale? So you're saying it should be an NRS 7.095?

MR. JONES: That's right, Your Honor.

THE COURT: I gave you two options, so I just need to know which one you're agreeing to.

MR. JONES: Your Honor --

THE COURT: 7.095 --

MR. JONES: Your Honor, understanding that, yes.

THE COURT: -- or is *Beazer* and *O'Connell*? I'm just trying to say -- I'm not trying to reduce yours, I'm just trying to ask you which one you're contending, so I know which one I'm addressing, or if you're

saying I should be looking at it differently.

MR. JONES: I guess, I'm not 100 percent clear, Your Honor.

THE COURT: Sure. I understood -- after I asked the question about the sliding scale fee agreement, I understood that you were, in essence, waiving an argument for a higher number under contingency fee agreement and that instead you wanted this Court to evaluate the propriety of the $821,468.66? If you're asking from some alternative number, I need to know if you're asking me to evaluate two separate numbers or just that one number for reasonableness, and fairness, and looking after I go through the *Beattie* factors.

MR. JONES: Your Honor -- yeah, Your Honor, I don't want to state that we are waiving or anything. I mean, ultimately, our client is going to pay the contingency fee that she's going to pay based on the contract that we have in this case.

THE COURT: Uh-huh. Okay.

MR. JONES: And we believe that the full amount that we asked for, the 2.5 million is appropriate. Now, that said, I understand the Court's point of view on this, and I understand exactly where you're coming from, and understanding that I am happy to analyze only under 7.095, but I don't want to place a legal waiver or something like that.

THE COURT: Okay. Since we now heard 821,468.66, only on that sole number difference, counsel for Defense, since that's now a lower number, I'm not sure if you're going to argue that I should be considering a higher number, but I want to give you a chance since that's now a new number that you did not have a chance to respond to. Not

any new arguments that you get the last word on, but just that newer --

MR. DOYLE: Sure.

THE COURT: -- lower number.

MR. DOYLE: I mean this idea of apportionment, you know, 80 percent, 20 percent, it was raised for the first time today. It wasn't in anyone's papers, I hadn't --

THE COURT: It wasn't?

MR. DOYLE: -- I mean --

THE COURT: I thought it was in your --

MR. DOYLE: No, they asked for the full amount, and I --

THE COURT: Sure. Let me -- okay. Go ahead.

MR. DOYLE: You know, if it's -- I did a lot of reading last night and early this morning, but I don't recall in their briefs -- I would be happy to be corrected -- that they were -- you know, that they indicated that -- and it's certainly not in their declarations that 80 percent of the time in this case was spent after the offer of judgment and only 20 percent was spent beforehand. I've had no opportunity to ponder or request further clarification or information about that. So, I mean, that's really all I have to say about it.

The only other thought I had too is I'm unclear if Plaintiff now is also asking for attorney's fees under 18.010. I don't think so, but in case there's some lack of clarity, and they are, that their time to do so has passed.

THE COURT: Counsel, are you asking for 18.010? I didn't see it anywhere in your briefs. I only saw 18.02 all under costs.

MR. JONES: Yes, Your Honor, that's all.

THE COURT: Okay.

MR. JONES: And on page 6 of our reply, we do mention 20 percent of the work --

THE COURT: Yeah, I thought --

MR. JONES: -- was done prior.

THE COURT: Yeah.

MR. JONES: But we don't reduce it to a number such as the 800,000.

THE COURT: Which is why I asked, okay, because I remember seeing that. Okay. So just line 4 and 5. I know I saw it. Okay. Because addressing the arguments raised in the opposition with regards to the time after, I saw that issue in response to that, so -- the reduction.

Okay. All parties having -- gosh oh golly, let's see you had an infinite time before lunch hour and now you've had about a little less than an hour after the lunch hour. I think everyone has had a full opportunity to be heard on fees; is that correct?

MR. JONES: We have, Your Honor.

MR. DOYLE: Yes.

THE COURT: Okay. So now the Court's going to make a ruling. Okay. I'm going to break this up between fees, and then go to costs, because it's just going to make it cleaner.

The Court's going to find attorney's fees pursuant to NRCP 68. I mean, it just asks for a point of clarification, although I think the answer has been fully given. You both agree, do you not, that since the

offer of judgment was made in June of 2019, the March 2019 Nevada Rules of Civil Procedure are the applicable Rules of Civil Procedure that apply?

MR. DOYLE: Yes.

MR. JONES: Yes, Your Honor.

THE COURT: Okay. Since they were changed, intervening when the case was, but after the offer. Okay.

So the issue before the Court is whether pursuant to NRCP 68 and the applicable case law, Plaintiff is entitled to an award of fees. If so, the Court needs to determine whether the award of fees should be for the entirety of the work performed, or work performed on specific aspects of the case such as the liability or breaking it done to liability and/or damages, or one or the other.

Therefore, if fees are to be awarded, the Court needs to determine whether the fee award should be based on a contingency fee agreement entered in between the Plaintiffs and the combined counsel of the Hand firm and Big Horn Law, or whether the applicable fees should be based on NRS 7.095.

Okay. And to cite the Nevada Appellate Court in *O'Connell v. Wynn*, 134 Nev. Adv. Opp. 67 (2018), a party may seek attorney's fees when allowed by an agreement, rule, or statute. See, also, NRCP, obviously, 68. Neither of you had cited the newest statutory provision on offers of judgments, so the Court's not going to decide it. And then see, also, *RTTC Commissions LLC v Saratoga Flier*, 121 Nev. 38, 110 P.3d (2005), the Court may not award attorney's fees absent authority under

specific rule or statute.

Here NRCP 68, does establish rules regarding offers of judgment, and they interplay with the award of attorney's fees. NCRP provides that where a party makes an offer of judgment, that offer of judgment is rejected, then the offering party obtains a more favorable result, then the offering party can be entitled to reasonable attorney's fees.

Going directly to NRCP 68, at any time more than 21 days before a trial -- I'm going to stop for a quick second because this June offer is more than 21 days before trial. Both parties do agree on that. Right, I'm not hearing a dispute. It was more than 21 days. Any party may serve an offer in writing to allow judgment to be taken in accordance with these terms and conditions. The offer was in writing, that term is also met.

Unless otherwise specified, an offer made under this rule is an offer to resolve all claims in the action between the parties to the date of the offer, including costs, expenses, interest, and if the attorney's fees are permitted by law or contract, attorney's fees.

Okay. So in this case, it was all causes of action, and it was from the date of the offer. The Court's going to address the costs in a few moments, and interest, separately. There's nothing precluding attorney's fees, so attorney's fees could be done under an offer of judgment.

Sub B. Apportioned offer of judgment to more than one party may be conditioned upon the acceptance by all parties. You didn't

have it here because in this case you had it specifically by the terms of the offer. It was a joint offer as to all parties for all fees inclusive of interest. See offer of judgment that was attached to the Plaintiffs' motion for the specific terms.

Okay. So here it says an offer made to multiple defendants. An offer made to multiple defendants will invoke the penalties of this rule only if:

A) There is a single common theory of liability against all the offeree defendants, such as where liability of some is entirely derivative of the others or where the liability of all is derivative of common acts of another.

That does apply here, because you have the, basically, professional corporation and the underlying medical provider.

Or B) The same entity, person or group is authorized to decide whether to settle the claims against all the offerees.

Here you had that same situation because you have -- Dr. Rives said it was his sole professional corporation. He didn't have to rely on anyone else. So you have that.

So here's what you have. You have acceptance. Everybody agrees that there was no acceptance. So within 14 days there was not acceptance. So, therefore, penalties for rejection, subparagraph F. So, first it says it's considered withdrawn. Obviously, Sub E, talks about it's considered withdrawn.

So penalties for rejection. In general, the offeree rejects an offer and fails to obtain a more favorable judgment.

A) The offeree cannot recover any costs, expenses, or attorney's fees and may not recover for the period after the service of the offer before the judgment; and

B) The offeree must pay the offeror's post-offer costs and expenses, including a reasonable sum to cover the expenses incurred by the offeror for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case, applicable interest on the judgment from the time of the offer to the time of entry of judgment.

So I'm emphasizing that. It is from the time of the offer to the time of the entry of judgment is the applicable time frame pursuant specifically to the rules. So I'm going straight by the rule.

And reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer.

And actually incurred by other case law does include both contingency fees and actual billed hours, and also statutory provisions such as applicable here. If the offeror's attorney is collecting a contingent fee, it even says, the amount of the attorney's fees awarded to the party for whom the offer is made must be deducted from that contingent fee.

Okay. So here's where -- and then it says, how costs, expenses, interest, and attorney fees are considered. To invoke the penalties of this rule, the Court must determine if the offeree failed to obtain a more favorable judgment.

We both agree the offeree did fail. They obtained a more

favorable judgment. Obviously, a multi-million dollar judgment, over $1 million is more favorable.

The offer provided that costs, expenses, interest and, if the attorney's fees are permitted by law or contract, attorney's fees would be added by the Court. The Court must compare the amount of the offer with the principal amount of the judgment, without the inclusion of costs, expenses, interests, and if attorney's fees are permitted by law or contract, attorney's fees.

Well, here you don't have it by contract, so the Court looks at the basic million, offset it. Okay. You will have made it. It's still over $1million.

If the party made an offer in a set amount to be precluded -- well, we don't have to go to there.

So now the Court finds that NCRP 68, which the Court has set forth, and the Court -- all parties agree that NRCP 68 in effect as of March 2019, is the applicable because the offer occurred in June of 2019.

So in June of 2019, the specific date, once again -- I lost the specific date. On June 5th, 2019, Plaintiffs did a joint unapportioned offer of judgment to Defendant Barry Rives, M.D., and Defendant Laparoscopic Surgery of Nevada, LLC, in the amount of $1 million, as a full settlement of all claims in this case. The jury then awarded an amount in excess. The verdict was $13 million. And then the verdict -- the judgment on the verdict filed on November 14th, was $6,367,805.52. So as calculated on page 6 of the motion, which the Court has not independently checked the math, but it wasn't a different number stated

in Defendants' opposition, so the Court's just taking it straight from here, was $5,367,805.52, more than Plaintiffs offer of judgment.

So now the Court has to address the *Beattie* factors. So the offer was not accepted, there were no new offers served, so the Court does not have to address the issue of multiple offers in this case. The Court does have to address that in this particular case we have both a statutory provision 7.095. Without the Court reading it directly, I'm just going to incorporate 7.095, sets forth the amount of fees that can be awarded in a medical malpractice case.

The Court is going to find that 7.095 is applicable in this case for the following reasons.

1) It was the fee agreement in effect at the time of the offer of judgment. It was the fee agreement in effect at the time of the expiration of the offer of judgment.

So given that was the fee agreement in effect to the extent that the Plaintiffs subsequent to the expiration of the offer of judgment signed a different contingency fee agreement with additional counsel, i.e., the Big Horn Law firm joined as co-counsel with George Hand, that new contingency fee agreement would not be applicable in the instant case, because it was past in time by acknowledgment of Plaintiffs' counsel after the expiration of the offer of judgment.

So, therefore, the fee agreement in effect would be the applicable fee agreement. So, therefore, while contingency fees could be allowable, the Court need not address the contingency fee amount in this case, because that was not the fee agreement in effect at either the

time of the offer or the expiration of the offer. Similarly, the Court need not address on whether or not parties can waive 7.095 because that also would be inapplicable in this specific case, because at the time of the offer of judgment and expiration of the offer of judgment, the only fee agreement in effect was the 7.095, I'm calling it a sliding scale. So it would be NRS 7.095.

So now the Court is looking only at 7.095 and does not need to address a comparison between a contingency and hourly rate, et cetera. So now the Court has to determine whether or not under *Beattie v. Thomas,* are Plaintiffs entitled to their reasonable attorney's fees, according to applicable law. The Court is going to find yes, and I'm going to provide my analysis.

In the *Beattie v. Thomas,* 99 Nev. 579, 588, 688 P.2d 268, 274 (1983) case, the Nevada Supreme Court set out four factors for the Court to consider when determining whether to grant fees pursuant to NRCP 68. Of course, the Court can also look at other discretionary factors, but the Court looks at these factors, specifically, as well. These factors are to be considered when either the Plaintiff or Defendant is seeking fees. See, also, *Yamaha Motor Co. U.S. v. Arnoult,* that's A-R-N-O-U-L-T, 114 Nev. 233, 955 P.2d 661 (1998), which decided, inter alia, that when the defendant is the offeree, the Court should consider the defendant's defense.

The *Beattie* Court held, in exercising its discretion in -- sorry, the *Beattie* Court held, quote, "In exercising its discretion regarding the allowance of fees and costs under NRCP 68 . . . the trial court must

carefully evaluate the following factors." Each of these factors was fully briefed by both Plaintiffs and Defendants.

1) Whether the Defendants' defenses were brought in good faith.

2) Whether the Plaintiff's offer of judgment was reasonable and in good faith in both its timing and amount.

3) Whether Defendants' decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and

4) Whether the fees sought by the offeror are reasonable and justified in amount.

After weighing the foregoing factors, the District Judge may, where warranted, award up to the full amount of the fees requested. You can also see -- that's straight from *Beattie*. See, also, *Frazier v. Drake*, 131 Nev. 632, 357 P.3d 365, Court of Appeals, 2015.

Quoting from *Frazier*, "ultimately the decision to award attorney's fees rests within the discretion -- excuse me, within the District Court's discretion and will review such decision for an abuse of discretion." Id, at 642, 357 P.2d 372.

In conducting the *Beattie* analysis, the Court must also be cognizant that, quote, "when it is determined that the first few *Beattie* factors weigh in favor of the party who rejected the offer of judgment, the reasonableness of the requested fees becomes irrelevant as the reasonableness of the fees alone cannot support an attorney's award -- attorney's fees award." That's *Frazier*, 131, at 644, 357 P.3d at 373.

In the present case, the Court does not find that Defendants --

so, one -- okay, the first prong of the *Beattie* tests, whether Defendants defenses were maintained in good faith or not. Okay. The Court does not find that Defendants' defenses were maintained in good faith. Once again, as the parties agreed, the Court has to look at what was known to the parties in June 2019. When I say known to the parties, it doesn't mean what -- I'm clearly saying that Defendants knew about the issues. Whether or not they thought that Plaintiff would find out about those issues, isn't what the Court should be looking at. It's what Defendants knew was the situation. And Defendants knew at that time the issues with the *Center* case. Defendants knew the issues of the falsification and the issues with regards to discovery, and with regards to the deposition, knew about all the issues with regards to witnesses, knew all the experts. Basically, the Court is incorporating the pleadings by Plaintiff in this matter.

In finding all of those, Defendants as of June, knew that if they proceeded to trial, while they may not have known the exact date, because that was about the time you all were trying to do a seventh stipulation, which never really got provided to the Court, but you knew several years already into this case, with what had already been done in this case, what were the issues. You knew also the damages already incurred by Plaintiff and the chance of a jury coming back because of the significance of the damages already the past medical specials, as well as some, even in a small fraction, of any future medicals or even without future medicals, even without pain and suffering, that the $1 million amount was consistent with what was even pretty much the medical

specials and everything done at that time.

So when I look at that first prong, that first prong goes in favor of Plaintiffs. So the fact that things had not been done too much in certain aspects of this case is really you all's own issue, but Defendant knew all these issues were out there. Whether they thought Plaintiff would find out about them was not a factor for this Court really to consider because hiding certain facts, and I'm not saying that they were hidden, I'm just saying failing to disclose or having issues outstanding that can arise are things that Defendants themselves would have been aware of.

So here -- also, I would just cite the first part of *Capanna v. Orth*, for that concept also, 134 Nev. Adv. Op. 108, 432 P.3d. 726, 734 (2008), where it is instructive because Orth prevailed on the underlying case asserted. Although, the Court is not taking the analysis under 18.010, just the concept about the analysis provided by the Court. And this is just a CEG, it's not a direct relevant, it's a CEG. So, for example, the failure to be maintained on reasonable grounds. So that's the first factor.

The second factor, Plaintiffs' offer of judgment was reasonable and in good faith in both its timing and amount. The Court finds that factor has been met. It was a few months before trial. At that juncture, you were in between exactly when you were going to go to trial, because you hadn't followed through on certain things, but you were enough into this case because remember this was a 2016 case, and this offer of judgment was June of 2019. Okay. He had already waived

the three year. He knew what was going on in the case. $1 million, no one can say that that's too low of an amount. It was reasonable in relationship to what was known about the past medical specials.

So if you look at it for the amount, yes, it meets the amount. If you look at it for timing, close to the proximity of the time for trial, which ended up being a few months later, but even if it had been more immediate, at that time, we weren't clear whether the trial was going to be -- basically, it could have been a couple of different times, but even if it was sooner, more it emphasizes the point why it's reasonable as to time, but even when the trial ended happening in October, it would be both a reasonable in timing and amount for a 2016 case with everything that had known in the case and the aspect of the case, and particularly because the number was so high, we also look at the amount, that that gave more than an opportunity.

So then you have the third factor. Defendants' decision to reject the offer and proceed to trial was grossly unreasonable and in bad faith. And here, the third *Beattie* factor that this Court must consider is whether Defendants' decision to reject the offer and proceed to trial was grossly unreasonable and in bad faith. *Beattie*, 99 at 588, 89, 668 P.2d at 274.

The second and third *Beattie* factors are interrelated because they both deal with the reasonableness of an offer and the rejection of an offer of judgment. As discussed, the underlying policy of an offer of judgment, quote, "is to save time and money for the court system, the parties, and the taxpayer. They reward a party who makes a reasonable

offer and punish the party who refuses to accept such an offer." *Dillard Department Stores, Inc. v. Beckwith*, 115 Nev. 372, 382, 989 P.2d 882 (1999), and that's citing, *Muije, M-U-I-J-E v. A North Las Vegas Cab Co.*, 106 Nev. 664, 799 P.2d 559 (1990).

In order for these purposes to be achieved, the offer of judgment must be reasonable in amount such that the refusal to accept it must be grossly unreasonable. *Beattie*, 99 Nev., at 588.

So, in the present case you have to look at proceeding to trial was grossly unreasonable and in bad faith. Well, at the time of June 2019, the Court disagrees with Defendants' position and agrees with Plaintiffs' position, is that Defendant knew where the liability aspects were. Knew that he had caused the holes, okay. Knew that there was the damage, knew about the foot drop, knew about the damages, knew about the rehabilitation.

Really the issue became the treating physicians all seem to agree, and they were supporting. They were not supporting the Defendants' positions with these alternative theories that were raised by some of the experts. And so at this juncture, the Court would find that -- had the liability issues. So then you have -- so that goes to liability, goes to causation.

The damages amount. Once again, I'm just going to go forward on the damages amount, separate and apart from the liability and causation, because the damages were pretty much known at this juncture, other than you wouldn't know what the pain and suffering amount was, but you knew what the caps were going to be under -- and

here you go the med mal, so you got a high limitation, but you already have your medical specials, okay. This was not a surprise. Medical specials had already pretty much been incurred.

And so, therefore, the Court would find, and in light of the other issues -- and when I use the term other issues here, I'm talking about the issues about the failures to appropriately respond to discovery, the inaccuracies, et cetera. All those were known by Defendants. While they may not have realized that Plaintiffs' counsel would find out about something new, all of those happened. So they knew that those could be not in the best interest of underlying Dr. Rives by going forward to trial where these could all be exposed. Also, he knew that some of the additional issues were not going to be supported as turned out to be the case. So everything pretty much was known.

So to move forward to trial, the Court used to find that Defendants' decision to reject the offer and proceed to trial was grossly unreasonable and in bad faith. See subsequent issues with regards, on the bad faith aspect, separate and apart from everything the Court has said about grossly unreasonable, the bad faith aspect would be independent because of the various, I will not call -- it's called zealous of advocacy in the sands of time, at various times, but the Court would find it improper tactics and the various issues which the Court has already addressed in several different evidentiary hearings.

So my analysis is two prong. It would fit both under grossly unreasonable and, alternatively, also it fits under bad faith. So you've got and/or bad faith there.

So then you go to four, the billed fee amount sought by Plaintiffs, is it reasonable as is or should it be reduced. In the fourth prong of the *Beattie* factors, it requires the Court to determine if Plaintiffs fees are a reasonable and justified amount. In order to evaluate the fourth prong of the *Beattie* factors, the Court has to take into account both the hourly rate and, in this case, the Court takes into account NRS 7.095. The Court has already given its analysis why although contingency fees could be applicable, would not be applicable in this instant case because of the fee agreements. So the Court's not going to give another analysis on the contingency fees, because I've already addressed that previously.

So the proposed method is the 7.095 method. In the 7.095 method, the Court looks at what was done, okay. The Court -- it would have been Defendants, if he had a disagreement on the underlying math or analysis to present it to the Court. That has not been presented to the Court. So what the Court has before it is that we have the -- let me switch back to --

MR. DOYLE: I'm sorry to interrupt, but we did raise the issue of the net amount.

THE COURT: Correct. The net amount, but not as to the math is what I was saying. He didn't raise -- so I'm looking at the 7.095 analysis. The Court's going straight from the statute. The statute, as read, does get you to the amount of -- just one second. Okay.

MR. JONES: I believe it was on page 14 of our motion, Your Honor.

THE COURT: Thank you. That's what I was looking to. Sorry. I'm dealing with a lot of documents to try and get this -- okay.

So the Court finds that the fee cap under NRS 7.095 would be appropriate. So A) it says 40 percent of the first 50,000 recovered; B) 33 and 1/3rd percent of the next 50,000 recovered; C) 25 percent of the next 500,000 recovered; and D) 15 percent of the amount of recovery that exceeds 600,000. So, therefore, based on the math provided on page 14 of the motion, since the math itself was not contested that would be 1,026,835.83.

So then the Court has to take into account what was the actual amount billed, which would be post-offer of judgment. Plaintiff has proposed that they did 80 percent of the work after the offer of judgment and 20 percent of the work before the offer of judgment. And here's what the Court has to look at in that regard.

I have to look at the time of trial, and what you all needed to do with trial, the amount of briefs that the Court received during the time of trial. And I also have to look at the fact that we have kind of a unique situation here where the fact that you all had all these stipulations to extend discovery and said how really, don't take this the wrong way, little work was really done, I'm not saying -- let's balance out because of what I'm saying with the reasonableness of what was known, versus what I'm about to say.

You all knew from -- you already had your experts, and everything done, but I look at the amount of time that you all have told me -- remember, you didn't take your depositions until August, et cetera,

while you had the expert reports. So what do I look at? I look at really a hearing that we had around this time frame, right, a couple of hearings of where you were with your extensions, and I balanced those out and truly 20 percent and 80 percent seems appropriate.

Well, this Court then has to look at should there need to be specific written documentation from an hourly rate to support that. *O'Connell v. Wynn* and *Beazer v. Schuette* says the answer is no, because if the Court can look generally to a contingency fee for the concept of evaluating fees, then the Court should be able to look to the concept of a similar concept when trying to evaluate the percentage of time utilized before trial -- excuse me, before an offer of judgment and after an offer of judgment, because if you're not required to have specific billing records for your overall time period under *Beazer v. Schuette* and, more recently, *O'Connell v. Wynn*, then the Court couldn't add on a factor to say, guess what, you have to specifically document your time pre-offer of judgment and post-offer of judgment by analysis, because it just doesn't work differently.

So when I look at that, is 20 percent pre-offer of judgment reasonable, versus 80 percent? Well, I know how many days you were here in trial, I know how much time was during trial, I know how much time you all have told me that you were spending, the number of briefs that came in, the amount of issues and different briefing that had to happen during the time of trial, and the time for some post-trial work. And I look at that significantly, even independently.

Even if it wasn't an 80/20 analysis, if I look at the attorney's

fee component that sought the 821,468.66, looking at that in comparison to the analysis under NRS 7.095, that's reasonable, because I am reducing the number under 7.095, which already implicit has its own reduction from a contingency factor. And I'm not saying I am, I'm saying that was your fee agreement, so your fee agreement reduced it. But then taking off another 20 percent, given what you all told me you had done thus far, although you had your expert reports, so you already had your information, and you already had your medical bills and everything, so you already had the information, you just hadn't done the depos and all the others, eighty percent of the work, it seems very usual, particularly since -- I mean, when Mr. Jones and Mr. Leavitt came in, they stated that amount and there were several discussions with you all during this time of trial about how much you had to do immediately before trial.

So if I take you at your words of what you said you were doing in those last couple months before trial, then I take it at your word when you said it back then as officers of the Court, I take you at your word for why the Court would find that a 20 percent reduction of the 1,026,835.83 to account for the time after the offer of judgment is an appropriate amount to take. So, therefore, the Court would find -- now I have to look before -- I'm looking at that amount just in general.

Now I have to look at the *Brunzell* factors. In looking at the *Brunzell* factors, as stated by *O'Connell v. Wynn*, the fourth prong of the *Beattie* factors require the Court to determine if Plaintiffs' fees are a reasonable and justified amount. In order to evaluate the fourth prong of

the *Beattie* factors, the Court has to take into account both the hourly rate -- well, here I did the contingency rate method by Plaintiff and the alternative calculation that result. In so doing, quote, "the analysis turns on the factors set forth in *Brunzell*." That's a citation from *O'Connell v. Wynn*, 134 Nev. Adv. Op. 67 (2008).

So now we look at the *Brunzell* factors. Plaintiffs' proposed alternative methods of calculating fees. And so, here I've got the alternative methods. I am not taking the contingency for the reasons previously stated, and I'm not going to repeat it here. So, 7.095 is the calculation done based on what the award was. The Court doesn't agree with the analysis provided by Defendant, that number should be reduced from the 1,026,835.83.

However, the Court does see that it needs to independently evaluate it by looking at your hourly rate to see would this be similar to what -- if you had charged an hourly rate because would that be a reasonableness fee. So that's why I would take into account your affidavit with your $500, et cetera, that we're taking into account.

So here, the attorney's fees -- well, they're less than your hourly rate, because you reduced them under 7.095, independently. So, therefore, the Court really doesn't have to get to doing an hour by hour comparison with regards to the $500 that was asserted in the affidavit. Instead what the Court does is that when I look at the amount of time that you were here in court, I look at 7.095, which allows us by statute the amount. And I take into account that even if I had looked at this from an hourly calculation, your hourly calculation would be higher, as you've

stated, than what is being sought under 7.095.

The Court would have to take into account that 821,468.66 is appropriate to be granted. And the Court takes note that in *Schuette v. Beazer Homes*, 121 Nev. 837, 124 P.3d 530 (2005), the Nevada Supreme Court held that in Nevada the method upon which a reasonable fee is determined is subject to the discretion of the Court, which is tempered only by reason and fairness. Accordingly, in 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, quote, "a lodestar amount or contingency fee."

We emphasize that whichever method is chosen as a starting point, however, the Court must continue its analysis by considering the requested amount in light of the factors enumerated by this Court in *Brunzell v. Golden Gate National Bank*, namely the advocates' professional qualities, the nature of the litigation, the work performed, and the result. In this manner, whichever method the Court ultimately uses, the result will prove reasonable as long as the Court provides sufficient reasoning and findings in support of its ultimate determinations.

So in this case, looking at the *Brunzell* factors, because even using the alternative average, you still use *Brunzell* factors. In order to determine whether a fee should be awarded under *Beattie*, as well as what the fee amount should be the Court, inter alia, applied the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d

31 (1969).

The *Brunzell* factors are: 1) The qualities of the advocate, his or her training, education, experience, professional standing, and skill; 2) The character of the work to be done, its difficulties, intricacy, its importance, time and skill required, responsibility imposed, and the prominence and character of the parties when they affect the importance of litigation; 3) The work actually performed by the lawyer, the skill, time, and attention given to the work; 4) The result, whether the attorney was successful and what benefits were derived. Id, at 349.

The Court addresses each of these factors.

The qualities of the advocate, his skill, ability, training, education, experience, professional standing, and skill. I didn't see this really was contested by Defendant because if you look at the educational basis, you look at the skills, you look at the trials, I'm really adopting the declarations by counsel in that regard instead of restating all your skills and abilities. You can incorporate that in your order, but those were all taken into account.

So here while I look at the aspect of the market rate, right, and I have to see, well, should I be considering *Marrocco v. Hill*, 291 FRD 586, which is a District of Nevada, non-binding 2013 case, about what the market would be. The Court would see that the market here in Nevada in these type of cases, when people take on medical malpractice cases because of their complexity and because it involves medical lingo and lots of other aspects that the rates stated, while this Court doesn't have to specifically evaluate, it would be reasonable under a *Brunzell* analysis

consistent with *Beazer v. Schuette*. So the Court will find that that is appropriately.

So then -- hold on one moment. So then I go to the second factor. The second factor. An award should be -- is reasonable based on the character of the work performed and result achieved. Okay. I'm kind of combining factors here. So you look at the character of the work. Well, if you look at the character of the work, well, basically you've got a -- that includes its difficulty, intricacy, importance, time, and skill. Well, you've got a medical malpractice case, so you not only have to be familiar with legal theories, et cetera, you have to know the intricacies of the medical causation, medical damages and all what that takes into account.

So the Court looks at the character of the work to be done was complex in this case. I mean, to explain the foot drop to ladies and gentlemen in lay terms to the jury, et cetera, to understand the nuances that happened, plus this particular case to have to address some other factors that came up throughout the trial that had to be addressed time and time again. We had the collateral source, you had the various doctor issues, and things like that, the character of the work. So you had a lot of briefs that had to be done on quick turnarounds, in less than 24 hours, because you all wanted to do briefs, which was fine. So the character of the work would meet the *Brunzell* factors.

Third, is the work actually performed by the lawyer, skill, time, and attention. Well, you all were here all day, and I got briefs on different times, so obviously there was work actually performed of a high

level skill, time, and attention, given the consistency of the length of the trial, et cetera, with all merit and meet it under *Brunzell*. The result. Well, the result obviously, multi-million dollar verdict is a very good result, so the attorney was definitely -- the attorneys were definitely successful.

So if you take all those factors, the *Brunzell* factors have been met in this case. If you look at the complexity of the different oral arguments, et cetera. So the question is, should things be reduced in any manner. The Court doesn't find that there should be a reduction in this particular case because the Court finds that really the 7.095 -- NRS 7.095, has an implicit reduction already built into it, and the Court finds that for the nature of this case and since we have NRS 7.095, there shouldn't be any further reduction.

Brunzell has been met. *Beattie* has been met. *O'Connell v. Wynn*, *Beazer v. Schuette* have all been analyzed and, therefore, the Court, consistent with applicable precedent, the Court would find that the attorney's fee award 821,468.66 is granted. Pursuant to NRCP 68, it is so ordered.

Now there was an additional request as a sanction component should the award be increased. Well, the Court would find that there was significant inappropriate conduct seen at various hearings, okay, where the Court has already made those determinations. The Court wouldn't find that the sanction to award fees in a higher amount would be appropriate here.

However, the Court would find even independent of this

whole *Brunzell*, and *Beattie*, and NR 68 analysis, the Court would find these fees and the reason why you're really up to 821,468.66, is a lot of these were Plaintiff having to respond to a lot of conduct by Defendant and Defense counsel that really were not the time in trial on the underlying merits of the case and so, therefore, the fees got higher in this case.

So the Court would say independently -- this is completely independently -- remember we saw the defending sanction component, that even separate and apart from the NRCP 68, the amounts of 821,468.66 would be appropriate and completely independent unless a secondary analysis, but completely independently tying up the loose end on the sanction component that that award, while seeming -- okay, 821,468.66, because of the additional time as a result of Defendant and Defense counsel's conduct without reiterating everything I've said in multiple hearings. See all the hearings, which already the Court's made its determination.

But like I said, that is a secondary independent determination, but is not a determination that the fees should be increased because of that. I just see that that would be an appropriate alternative determination. So that would take into account the various factors here.

And the Court does want to make one point with regards to some of these sanction concepts is the Court's really ruled on all of these other than I did have the affidavit of -- declaration or is it an affidavit -- of Mr. Isenberg, but that 2007 case in front of Judge Gonzalez is very

distinguishable. Those offers of proof were filed on May 1st and May 3rd, 2007, and the trial hadn't ended. Closing arguments had not begun, as even stated in his declaration. He said one to two days before closing arguments and that's a key factor.

The distinction here is those offers of proof were not filed until -- the earliest offer of proof -- let me pull that -- was November 1, after the 11:00 hour. Excuse me, 10:49 is the very first one. And in this case you had already started closing arguments. As of 9:28, Plaintiff had already started their closing arguments. Defense did their closing arguments at 10:56. And remember, the Court wasn't even made aware of these offers of proof.

That's a huge distinction is that these were not told to the Court, these were not brought into the Court before. Hey, let's hold off on closing arguments, because we have offers of proof, and we're going to have the parties do a discussion. These are closing arguments going forward. The Court had specifically asked, and I'm not going to reiterate everything that I said already at the hearing on 11/14, I believe it is, the date it was stricken. And if I'm misquoting the date, but I think I'm correct. Without reiterating -- I mean, there is a very large distinction because these were never stated in advance when the Court specifically asked the question the day before when you all were doing Rule 50 motions. The Court specifically asked before people commenced and before we had the jury brought in.

So here the Court asked -- and there was complete failure of candor to this Court to say something was coming. If something had

been told -- it wasn't the aspect of, quote, "asking permission." It was the fact that not even being put on notice that something was coming so that things could be handled. They were filed while people were in the middle of closing arguments, so there would be no way for Plaintiffs' counsel to even know what's going on because Plaintiffs' counsel is in the middle of doing his closing argument, and 10:56 is what the court recorder shows when Defense started. And these were continued to be filed during Defendants' closing argument.

So both the Court, Plaintiffs' counsel, and everyone was fully focused on all the closing arguments, so they are very, very distinguishable from the situation even to take into account Mr. Isenberg's declaration. And Mr. Isenberg's declaration doesn't say that he stated that that they could be filed after closing arguments commenced. In fact, he was very clear about stating a day or two beforehand.

And so that is a huge distinction not to really revisit where the Court was, but the Court -- since I didn't have the declaration -- the benefit of the declaration beforehand, I just wanted to address it today. Dr. Hurwitz and that Dr. Chaney has already been discussed. The post-offers were just discussed. The undisclosed, unauthenticated record issue, the Court addressed that in part. I will just leave it as the Court addressed that in part. We're not going any further in that regard. The Court's expressed its concerns on the analysis that was presented since it seemed inconsistent with Dr. Rives own testimony, but the Court's not going back there even with all of those.

That's why the Court finds, independent as a secondary alternative independent basis, the 821,468.66 would be an appropriate sanction, but does not find it should be something higher because the Court wouldn't find something higher, particularly since there's a statutory provision with regards to fees. That's the Court's analysis. It is so ordered with regards to fees.

We're going to need to take a brief break before we go to costs, because you can appreciate my team and probably you all want a brief break. Counsel, did you need something before we take a brief break?

MR. DOYLE: Could I just get a point of clarification?

THE COURT: Of course you can.

MR. DOYLE: When you were speaking about the *Beattie* factors --

THE COURT: Sure.

MR. DOYLE: -- number 1 and number 3, you were referring to -- you kept using the word Defendants. I just want to make sure that I'm clear that when you were using the word Defendants, you were referring to Dr. Rives and his professional corporation, not to include counsel. Did I understand that correctly?

THE COURT: The Court was taking the factors specifically at a *Beattie v. Thomas*, and utilizing it as utilized in *Beattie v. Thomas* as the defined defendants.

MR. DOYLE: Okay.

THE COURT: Okay. I do appreciate it. Anything else? Then

we're going to take a brief ten minute break, come back, and then we'll do costs for you. Okay.

MR. JONES: Yes, Your Honor.

THE MARSHAL: Court is in recess.

[Recess at 3:53 p.m., recommencing at 4:03 p.m.]

THE COURT: Okay. Back on the record. So, you folks want to discuss costs. Usually, the easiest way since there's both the memo of costs and retax costs, is really just to give you -- do you want each one a shot at the costs or how do you want to do it? The Court is going to be fine however you want to do it. So tell me what you would like to do.

MR. JONES: You know, Your Honor, I think what I would perhaps be the most comfortable with, if Defense could lay out their issues with it, and then I'm happy to do that. But I would like to go second just to -- if possible.

THE COURT: Does that work for you?

MR. DOYLE: Yeah, I'm fine with that.

THE COURT: Okay. So feel free to go in whatever order you want. Usually people start with -- well, usually we do the experts, because the experts are usually the biggest one, but I'm fine with whatever order you want. Just head me where you need me to be.

MR. DOYLE: I just have a few highlights, because I think everything has --

THE COURT: Okay. So --

MR. DOYLE: -- been discussed in some form or fashion.

THE COURT: Okay.

MR. DOYLE: But I'll begin with Dr. Stein. Dr. Stein, in his bill for October 17th to October 18th, which was during trial, he flew to Las Vegas Thursday evening from New York City. We have from Plaintiffs' memorandum of costs his airfare and his hotel bill, which added up to $777.90. And then there was a bill from Dr. Stein, four hours to prepare, $2,000, and his court appearance $7,000, but Dr. Stein did not appear at trial on that Friday morning of October 8th. You know, one could postulate why and have different reasons why Dr. Stein was not called to testify.

My thought was that if he had testified, he had standard of care and causation opinions. I think his standard of care opinions would have been precluded as cumulative, leaving his causation opinions. But, more importantly, we had disclosed Dr. Kim Erlich as a rebuttal expert to Dr. Stein and by calling Dr. Stein would have allowed us to call Dr. Erlich. By not calling Dr. Stein, we were not able to call Dr. Erlich and have -- and Dr. Erlich is one of the experts that talked about the micro spillage.

And the other thing about Dr. Hurwitz, is remember Dr. -- I'm sorry, the other thing about Dr. Stein is Dr. Hurwitz also came in from Orange County that morning, Friday morning, the 18th. He was on a 6:45 flight from Orange County and arrived in Las Vegas at 8:15. And I suspect that Plaintiffs figured that there was no way they could get those two expert witnesses on and off the stand in one day.

For Dr. Hurwitz, he came on October 18th. As I mentioned, in the -- you know, in the documents, in the memorandum of costs was his Southwest flight. The request in the memorandum of costs was $8,000

for his trial appearance fee. For some reason, in the opposition to our motion to retax, there was mention of an $11,000 figure, but all we have in Plaintiffs' memorandum of costs is the $8.000 figure.

And in the memorandum of costs, there is no request for a second day of Dr. Hurwitz's testimony. And even if there had been --

THE COURT: God bless you.

MR. DOYLE: -- a request for a second day for Dr. Hurwitz's testimony, because he was not able to finish by the end of the day on Friday, we would have objected to that, because he was here available in the morning, he was here all day to testify. Plaintiffs made a conscious decision, apparently, to go forward with their continued cross-examination of Dr. Rives, consuming the entire morning that Friday, which was a full day, calling. Dr. Hurwitz then at 1:30, perhaps for strategic reasons, figuring that they could finish the direct examination and put me in a time crunch for my cross, but that's just my own speculation.

So those are my thoughts about Dr. Stein and Dr. Hurwitz.

THE COURT: So what amount do you think Dr. Stein and Dr. Hurwitz should get, if you don't mind, just so we --

MR. DOYLE: I think Dr. Stein, it would be appropriate to reimburse his time spent reviewing the case, preparing his report, preparing for his deposition. We, of course, paid for his time for the deposition, but not his fees and costs associated with coming here to trial.

THE COURT: Someone's phone is going off, in total vibrate a

lot. Just -- we've got a little bit of interference, if you can turn that off. Thank you. So, okay.

MR. DOYLE: So based upon the memorandum of costs that was submitted, there were $9,000 in fees, and there were $777.90 associated with the costs associated with Dr. Stein coming. I didn't total those two numbers, but it would be $9,777.90.

For Dr. Hurwitz, I'm not going to --

THE COURT: Sorry. So you think -- Plaintiffs said 9,000, and you're agreeing to 9,000. I'm just trying to --

MR. DOYLE: No, no.

THE COURT: -- what do you think the amount should be for Dr. Stein?

MR. DOYLE: I think the amount for Dr. Stein should be reduced.

THE COURT: To what?

MR. DOYLE: Well, I can't tell from their --

THE COURT: Okay.

MR. DOYLE: I can't tell exactly from their memorandum -- well, no, I can. Their memorandum of costs has different charges for Dr. Stein. For example, on page 2 of 8, there's a charge for $4,710. What I am objecting to is on page 3, towards the bottom, trial appearance for expert, Dr. Alan Stein, $9,000. And if you look at the invoice, which was attached, that was $7,000 for the court appearance and $2,000 for his -- for four hours of prep. And then his travel costs were not separately itemized, but you can find those receipts.

THE COURT: Okay.

MR. DOYLE: Unfortunately, Plaintiff didn't paginate their -- all the receipts and what not, they attached to the memorandum of costs, so I can't refer you to a page number, but I can -- you know, I have separately pulled the plane ticket and Golden Nugget bill.

As far as Dr. Hurwitz is concerned --

THE COURT: Sorry, counsel. So Dr. Stein --

MR. DOYLE: Yeah.

THE COURT: -- your total -- because if you're seeking to reduce, I'm just asking, you know --

MR. DOYLE: I'm seeking --

THE COURT: the reduced amounts.

MR. DOYLE: -- I'm seeking to reduce -- I'm seeking to eliminate the $9,000 for Dr. Stein that appears on page 3 of the memorandum of costs labeled trial appearance for expert Alan Stein.

THE COURT: So that means Dr. Stein would be -- are you asking the $1500 limitation or are you asking something higher than 1500 for him?

MR. DOYLE: Well, I'm asking that that not be considered for Dr. Stein at all.

THE COURT: Okay.

MR. DOYLE: The 1500 limit is coming -- maybe I'm doing this backwards.

THE COURT: Right. All I was trying to do is, I'm going to do a column --

MR. DOYLE: Okay.

THE COURT: -- of what Defendant is requesting on each of the people, what Plaintiff is, and then evaluate each of your analyses, right, on where the Court should be going so that --

MR. DOYLE: Let me --

THE COURT: Sure.

MR. DOYLE: -- let me back up for a second. Let me -- let's -- let me go to the expert witness fees, generally, which is 18.005. Plaintiffs are entitled to fees for not more than five expert witnesses and there's no discretion there. The statute says not more than $1500 per witness unless the Court allows a larger fee. It's our position that Plaintiffs would have to pick five of their expert witnesses amongst -- so we have Stein, Hurwitz, Willer, Barchuk, Cook, or Clauretie.

I don't think you can include this Dr. Daniel Feingold, who was paid $2,000 on October 8, 2018, because he never prepared a report, was not disclosed as an expert witness. And I don't think you can include -- there were some -- a couple of bills from National Medical Consultants, one for $1200 and another for $900. That was simply an invoice without any explanation.

So going back to Stein, Hurwitz, Willer, Barchuk, Cook, and Clauretie, I believe Plaintiffs have to pick five, and then we have the issue of whether one or more of them is entitled to a fee larger than $1500. And then, if the Court says yes as to Dr. Stein, then Dr. Stein's fee should be reduced by those numbers that I gave you for his appearance at trial where he traveled, billed for time, and didn't testify.

And then concerning Dr. Hurwitz, the memorandum of costs has just a single charge for his trial appearance of $8,000. The memorandum of costs did not have a charge for the second day of testimony when he returned or actually testified by video, so --

MR. JONES: Not to interrupt, but I do think we actually had a misunderstanding there. Dr. Hurwitz did not charge us for the second -- 11,000 is his total charge, is my understanding. And so, I apologize for the misunderstanding, because I can see where it was difficult to understand, or I think it was in error.

THE COURT: Okay. So it's 11K total?

MR. JONES: That's right, for Dr. Hurwitz.

THE COURT: Okay.

MR. DOYLE: Okay. Then I'm looking -- I mean I don't mean to quibble, but for Dr. Hurwitz on the memorandum of costs, on page 2, I see $1500, and then on page 4, I see $8,000. So I don't know where you get to $11,000.

THE COURT: Four plus eight doesn't equal 11, but they're asking for less.

MR. DOYLE: No, no, no.

THE COURT: Oh.

MR. DOYLE: The memorandum of costs has $9,500. They're asking for $11,000, apparently.

MR. JONES: My apologies. What I meant to -- my understanding was that the numbers he added up to were to 11, Your Honor. It's just that Dr. Hurwitz didn't charge us additionally for the

second day of testimony, which would have been $8,000 more. So that didn't happen. We weren't charged for it. He didn't charge us.

THE COURT: So is the total for Dr. Hurwitz $9500?

MR. JONES: For trial testimony is the 8,000, and then whatever other bills we included here.

MR. DOYLE: So Dr. Hurwitz total is $9,500, according to --

THE COURT: Okay.

MR. DOYLE: -- the memorandum of costs.

THE COURT: Okay.

MR. DOYLE: I mean, that's really all I had to say about the expert witness fees, in general.

THE COURT: So just Stein and Hurwitz. You said Stein, Hurwitz, and then you said national for the two charges. So I just want to -- I'm making sure I was getting all the ones that you were talking about for the --

MR. DOYLE: Right. Well, there's a $2,000 check or invoice, I forget which, to Dr. -- I think it's a check to Dr. Daniel Feingold, who apparently is a general surgeon here in town that was dated October 8th, 2018. And the reason it's confusing again, is because Plaintiffs attachment was quite thick, but not numbered, and Mr. Hand in his memorandum of costs lumped all the deposition expert witness fees into a single figure unlike Big Horn Law.

So you have to go through -- you have to go through the actual attachments, but there is this check from Mr. Hand to Daniel Feingold for $2,000, which apparently or presumably -- I know this is

confusing -- which is probably part of Mr. Hand's lump sum of expert witness fees of $58,000 and change, which is on page 5 of the memorandum.

What I'm saying is the $2,000 for Dr. Feingold should not be included. The $2100 to these unnamed NMC Consultants should not be included. Both of those numbers are in Mr. Hand's lump sum --

THE COURT: Okay.

MR. DOYLE: -- on page 5. That leaves us with Stein, Hurwitz, Willer, Barchuk, Cook, and Clauretie. That's more than the statutory allowed number of five, and we argue in our motion why they should not be entitled to more than $1500 in fees, but I'm going to leave it at that.

THE COURT: Okay.

MR. DOYLE: Just a couple other miscellaneous things I wanted to --

THE COURT: Sure.

MR. DOYLE: Sorry. Did you have --

THE COURT: No, go ahead. I said sure. Please go ahead.

MR. DOYLE: There was this illegible check for $2,000 that we pointed out in our motion. Again it's not --

THE COURT: Is that the Feingold check or is that a different check?

MR. DOYLE: This is a different check. It's --

THE COURT: So I wasn't clear if that was the Feingold check or another check.

MR. DOYLE: No, it's not the Feingold check, and I --

[Counsel confer]

MR. HAND: That's Dr. Carter's deposition fee.

MR. JONES: That's Dr. Carter's deposition fee.

MR. DOYLE: Oh, okay. Well, then never mind that.

THE COURT: Okay.

MR. DOYLE: It would have been helpful if they told us that in the reply, but -- or I mean, in the opposition, but -- okay.

Then, you know, videotape -- so in terms of the depositions videotaping attendance fee for the videographer, conference room fees, travel fees for the videographer totaling the $5,032.04, we don't believe those are appropriate.

THE COURT: Okay. Let me go to where that was. Hold on a second. You're not talking about page 11; you're talking about --

MR. DOYLE: In our motion, we itemized the charges.

THE COURT: Okay. So you're itemizing -- you're going both to 3, which is Dalos Legal Services, litigation services, NLV video -- I'm just trying to figure out which ones you're talking about. Sub E, right, --

MR. DOYLE: If you look --

THE COURT: -- starting on page 11?

MR. DOYLE: If you look at our motion --

THE COURT: Sure. I'm on your motion. I was on page 11 of your motion.

MR. DOYLE: Sorry.

THE COURT: Sub E is where I thought you were talking about, the miscellaneous costs for $9,856.

MR. DOYLE: No, if you look on -- bear with me.

THE COURT: Sure. No worries.

MR. DOYLE: Page 5 and 6 of our motion.

THE COURT: Sorry. Let me go back to page 5 and 6. Okay. Here we go. Okay.

MR. DOYLE: We don't believe those are appropriate and recoverable, and we explained that in our --

THE COURT: Sure.

MR. DOYLE: -- opposition. And then the LVLV, the $1200 to create a day in the life video. If you look at the invoice it appears -- and I forget which exhibit this was marked or was going to be marked as -- at the time of trial, but if you look at the invoice, we have three hours Shane Godfrey video of daily activities of Titina Farris and interviews of Skye, Patrick, and Lowell. Then we have processing. Then we have another three hours of daily activities Titina Farris and interviews of Titina and Addison. And then uploading and compressing.

And these were not used at trial. The reason probably being this was basically some videographer sat down and interviewed Mrs. Farris and these different family members, and their long conversations about her, and how she's doing, and the family, and all of that. So, I mean, they would have been hearsay and inadmissible in the first place, which I assume is why they weren't used at the time of trial. So that was our issue with the LVLV bill of $1200.

And then the Dalos, really the PowerPoint design, the $3,336.25. I just don't know what that was, what it was used for, or how

it was used. We mentioned that in our motion.

And then finally, I just wanted to highlight there was a charge $1,981.35 for litigation services with no explanation in the memorandum of costs, attachments, or in the opposition as to what that was. So those are my thoughts. And I'm sorry it was a little jumbled.

THE COURT: No worries. Okay. So this is withdrawn. So page 12, number 6, at line 24, illegible charge $2,000, that's withdrawn; is that right, because that was the Carter deposition?

MR. DOYLE: Yes, now that they've identified that. That takes care of that.

THE COURT: No worries. Then let me take care of the rest. Counsel for Plaintiffs.

MR. JONES: Yes. Well, let me -- I'll just -- to begin with -- would you prefer, Your Honor, that I go kind of big picture or that I attack these individual little critiques?

THE COURT: Well --

MR. JONES: Well, let me -- I guess, first of all, Your Honor, there was a statement made that I think fundamentally is an inappropriate statement where it said that it's not discretionary for the Court to determine whether more witnesses than five. Now, I don't think -- so I believe that was stated. I don't think that's the case. I think we're reading the statute, it's discretionary for the Court, in my reading, both as to the number of witnesses and to the amount per witness in terms of expert witnesses.

That I think is probably something that is important to

identify to the Court, if the Court views that differently, because then I would identify which expert, essentially, I would be requesting fees for.

THE COURT: Let's look exactly at *Frazier v. Drake*, right? Isn't that the best one to look at. *Frazier v.* --

MR. JONES: Yes, Your Honor. I have it right here.

THE COURT: I assume most people usually do. Okay. So I'll appreciate it's the Court of Appeals. It's not in any way been changed or modified. Actually -- well, there is subsequent case law. It's *Frazier v. Drake*, but it doesn't -- *Frazier v. Drake* is silent. It has not been changed, so. It's been affirmatively cited since then, but if you want me to walk through all the times it's been cited -- okay.

So let's go to *Frazier v. Drake*. *Frazier v. Drake* going to the -- okay. We might get to it quicker if I -- okay. Expert witness fees. Turning to the District Court's award of expert witness fees as costs to Drake pursuant to NRS 18.020(3) and NRS 18.005(5) -- and remember I also have to address it under the costs aspect of your NRCP 68. So I've got to look at it there as well.

The parties do not dispute that Drake is the prevailing party to recover costs focused on whether the amount of the expert fees was excessive in this regard. Okay. So the next line, in this regard NRS 18.005(5), provides that the recovery of, quote, "[r]easonable fees of not more than five expert witnesses in the amount of not more than 1500 for each witness, unless the Court allows a larger fee after determining that the circumstances surrounding the expert testimony were of such necessity as to require the larger fee."

A District Court's decision to award more than 1500 in expert witness fees is reviewed for an abuse of discretion. See *Gilman* -- and I'm not going to give the rest of the citation -- okay. I'm not going to go to the footnote. And then Drake sought fees for five expert witnesses, and then it goes to the amount. And then it says, although the District Court awarded fees for each expert, it reduced the award to 10,000 for the first four, while awarding 7400 for the fifth. In making this determination, while Drake had hired, blah, blah, blah, and then you go to your *Frazier v. Drake* analysis.

So are you aware of another case that says that you can get more than five expert witnesses -- fees for more than five expert --

MR. JONES: I'm not aware --

THE COURT: -- witnesses?

MR. JONES: I'm not aware of any case that -- does this directly on point say that you can't have more than five?

THE COURT: I --

MR. JONES: It just happens to be there were five.

THE COURT: Well, they read -- I read from *Frazier v. Drake*, which is consistent, which if you happen to want, I can have my law clerk grab the statute for the straight direct language. That's why I'm asking --

MR. JONES: Yeah. No, Your Honor, I'm not.

THE COURT: Part 5, says reasonable fees of not more than expert witnesses in the amount of not more than $1500 for each witness unless the Court allows a larger fee that allows discretion on a larger fee after determining that the circumstances surrounding the expert's

testimony were such a necessity as to require the larger fee.

The Court doesn't see that anybody has provided to this Court any citation that would allow in this case an aspect of having more than five expert witness fees to be considered.

MR. JONES: Okay.

THE COURT: In *Frazier*, whether or not the underlying base was requesting more, and then it reduced to five, it was not set forth in the court of appeals opinion, but since you all have not provided this Court any basis on how this Court would be able to give more than five, that's why this Court was asking the question if you think that you did provide a basis, please refer me to the -- to where it would be anywhere in the pleadings, because while reading a lot, and it's late in the day, I don't think I saw it, but if you think I missed it, feel free to head me that way.

MR. JONES: No, Your Honor. I mean, I do think it's an unfortunate reality. For example, if in -- to get -- to talk about damages, right. To have someone discuss damages with the jury, it is a three separate expert requirement, essentially, if you're going to do it the right way, because you need to have -- you need to have the doctor who verifies the medical damages, you need to have someone who is a life care planner. They're very rarely the same person. And then you need to have an economist who also is very rarely the same person.

And so it -- but it doesn't matter. If the Court is inclined to limit to five, then I will just state right now that the five, if such is the circumstance that the Plaintiffs would be requesting for would be Stein,

Hurwitz, Willer, Barchuk, and Cook.

THE COURT: Okay.

MR. JONES: Those would be the --

THE COURT: Your analysis on Stein since he was a non-testifying expert --

MR. JONES: Yes.

THE COURT: -- would be a different analysis than your testifying experts, right?

MR. JONES: Absolutely.

THE COURT: Okay.

MR. JONES: Well, and with Stein, Stein was intended to be a testifying expert. As the Court is aware -- so there are a couple of reasons why Stein didn't testify. As the Court is aware there were a number of witnesses and persons that got shuffled over the course of the case because of various delays that we had. Many of those delays, I think it's fair to say were not our fault. And we were doing our very best to try to push through.

Now a couple of things that happened that ultimately led us to not call Stein, number one, the Defense, prior to -- to be very clear in Dr. Erlich's report that he offered, he said nothing about this micro infection that Defense counsel is talking about right now.

THE COURT: God bless you. Uh-huh.

MR. JONES: That is not anywhere in any written report. During his deposition, he admitted that stool likely came out, perhaps in very small quantities, during the surgery. That was a brand new thing

that no one had ever placed in a report on the Defendants' side.

Now Dr. Stein had said that. And so Dr. Erlich stated that. The bottom line is when we came to trial there were a couple of things that happened. Number one, the Defense embraced that from one witness to the next and made statements for the jury to understand that there was at least some micro infection. And so that part of the case, we had every reason to believe we needed to establish that, except it became less important to establish it as the case went forward because the Defense embraced that position. And so I didn't need to bring in Stein to establish that point.

Unfortunately, before we were able to make that complete determination, Stein was already here ready to testify, had already prepared, was ready to go. We were bringing him over, and we thought, you know what, there's no way to fit in everybody that we have. The trial is going too long as it is. And so we decided we're just going to cut Stein. He'll be beneficial overall, but he was a person that we felt we didn't critically have to have in that moment based on what had transpired during trial that caused him to not be necessary for his trial testimony, but that doesn't mean he wasn't able to bill us for the amount that we had agreed to, and we scheduled him long in advance and there was not an opportunity for us to save money and have him not be here, and agree to his time.

And so legally we are obligated for that payment. And it's a payment that was definitely appropriate that we needed to have and that we absolutely would have needed to present but for Defendants change

of posture during the trial itself. And so because of that change in posture, Stein became unnecessary, but it was too late in the game for us to turn it around. So we believe that the entirety of what Stein is requesting should be paid. Or, I mean, it has been paid, but that it be -- that the Defendants pay for that.

Let's see, the -- and Stein -- to be clear, Stein was critical in the strategy of the case, Your Honor, to rebut the idea that this whole issue was caused not by an infection of the abdomen, but by this pneumonia -- pneumonitis condition. And so going into trial there had been no embrace of that dynamic of some abdominal condition possibly being part of the cause of the infection. And that became -- the Defense embraced that more and more as trial went on. They accepted that. And so that's why Stein wasn't needed. But if the Defense had not done exactly that, Stein was absolutely necessary for us to rebut this pneumonia analysis, because he's an infectious disease doctor to be clear, Your Honor.

THE COURT: Okay.

MR. JONES: Dr. Hurwitz, we've laid out his expenses. He's abundantly reasonable in his pricing. He did a couple of reports. I'm -- so I'm not -- I'm unclear from Defense counsel of these bills that are not marked. I think those are Dr. Hurwitz's reports, probably, because he has two reports that he authored, plus $8,000 for the day that he was here in trial. And so I believe that's what we're dealing with here. But Dr. Hurwitz pricing is very -- is --

THE COURT: But doesn't the Court need to have certainty of

what actually Dr. Hurwitz charged you? I mean, doesn't *Cadle v. Woods & Erickson, In re Dish Network,* and *Bobby Berosini* all require that this Court -- that you need to show me -- I hate to say it, show me the paper, okay, you know, that supports Dr. Hurwitz, so that I can -- you know, the Court can see what actually Dr. Hurwitz bills are and that they add up to what you're requesting to evaluate for reasonableness? I mean, I'm hearing what you're saying, but I don't --

MR. JONES: Yes, Your Honor. I understand. I understand what you're saying. In any case, Dr. Hurwitz 9500 isn't disputed. I don't think any of Plaintiffs' other experts were disputed. But in terms of talking about why their costs above $1500 is necessary --

THE COURT: Well, I won't -- I mean, I will tell you I usually make this offer anytime somebody raises the $1500. I would just say in every single case that you come before this department, and I can send an email out to all my colleagues that you will never ask for more than $1500 on any of your experts, so far nobody has ever taken me up on that, because everybody tells me that -- well, the statute is the statute. Real life reasonableness is people charge somewhere between, well, 5,000 at a low, sometimes 18-, 20,000 for a day at trial.

So does anybody wish me to have that agreement that I should send it around to all my colleagues that they'll never ask for more than 1500 on any of their cases?

MR. DOYLE: Thank you for the invitation, but I guess I would decline.

THE COURT: Okay.

MR. JONES: Thank you, Your Honor.
THE COURT: I mean --
MR. DOYLE: But it's Plaintiffs --
THE COURT: -- I'm not saying that --
MR. DOYLE: -- it's Plaintiff's burden of proof --
THE COURT: I'm not in any way saying it differently.
MR. DOYLE: Yeah.
THE COURT: It's just --
MR. JONES: Absolutely.
THE COURT: -- this issue comes up, and I say it equally to plaintiffs and defendants. It doesn't matter who. It's just so far when people -- everybody argues 1500, and then say, but we know that we've always asked for more in other cases. And so --
MR. JONES: Right.
THE COURT: -- if there's some new viewpoint that I'm not aware of that people want to stick 1500 for every single thing, feel free to enlighten me, and if not, I'll continue to hear the arguments for more than 1500. I'm more than glad to hear whatever you want to tell me. Go ahead.
MR. JONES: No, thank you, Your Honor. So Dr. Stein, he's -- you know he came from -- he came out of New York. He's an infectious disease specialist, and he produced a couple of reports in this case. He flew here for the purpose of testifying. As things had developed in the case and as time got -- as we were appearing to run out of time for the case, we decided to not have him testify and that was the --

THE COURT: But 24,000, ouch.

MR. JONES: What's that?

THE COURT: So he's your -- he's 24,000.

MR. JONES: Yes, he's very pricy.

THE COURT: Yeah.

MR. JONES: No, he was expensive, Your Honor. And --

THE COURT: So show me this -- can you show me where -- I will tell you I have difficulty with not having tabs in things, right, to kind of find which pieces of paper to what, because not being page numbered, not being tabbed, not being anything. So at a certain point, you have to show me where it is so that -- so can you show me this report for Dr. Stein? Where in your lovely several inches of documents is the Dr. Stein support?

MR. JONES: And when you -- are you talking about like --

THE COURT: The bills that he charged you. Your dominoes one was easy to see, because it was brightly colored but some of the other ones were not. You understand what I'm saying?

MR. JONES: Yes.

THE COURT: I mean, I flipped through -- there was a certain point of flipping through these page by page trying for me to figure out which one you were referencing without any specific reference paging that kind of became very challenging.

MR. JONES: Absolutely, Your Honor.

THE COURT: That's hint, hint, please put tabs, and page numbers, and things. The easier you make it for the Court, the easier

you make it for yourself.

MR. JONES: Thank you, Your Honor. I'll make sure to do that in the future. I apologize it wasn't done.

THE COURT: No worries. But you understand we're spending time now --

MR. JONES: I do.

THE COURT: -- trying to find which page in several inches of documents.

MR. JONES: Okay. So the invoice complained of is the $9,000 on page 3.

THE COURT: Page -- it's referenced on page 3, but where is the actual invoice itself, right? I was trying to find the invoice, God bless you, that got up to $24,710, because *Cadle v. Woods & Erickson*, tells me I have to have --

MR. JONES: Your Honor, I apologize. I don't have all the invoices. I don't have the invoices here. I'm not sure why, but I don't. I can --

THE COURT: Because there was a series of checks kind of three-quarters of the way through, but once again you probably -- remember the Court can only spend so much time trying to figure out what you're placing together, so that's why I was asking where they are.

MR. JONES: Your Honor, I'll --

THE COURT: Was he National Medical Consultants? I see something --

MR. JONES: So the bills -- all of the checks are from National

Medical Consultants and there should be an indicator there that said Stein. Both Drs. -- well, Drs. Willer, Hurwitz, and Stein --

THE COURT: Some of them testified. I think we found them through the group, but --

MR. JONES: Correct.

THE COURT: -- I mean I looked at one of these -- there's a bill for $5,175, National Medical Consultants, but the only thing it says is [indiscernible], okay, and it just says Farris. It's got a case number. It says expert invoices, but it doesn't tell me who it is apprised to, you know what I mean. So I saw some of these, but -- and then some says additional time on your client. I found one that said Stein. The only Stein I found was the $1,000 Stein, paid 11/29/2018, and that's -- but I will tell you after a certain point, literally, you can appreciate --

MR. JONES: Yes, Your Honor, I do. Now I -- we laid them out there, and I do understand that, Your Honor, the -- in the -- and I --

THE COURT: Are these grouped by experts? They didn't look like they were grouped by experts or anything --

MR. JONES: Well, often times what would happen, since we were paying for two or three experts at a time -- or two or three experts together, we would send -- there would be a single check that could be sent; isn't that right?

THE COURT: What I'm saying is they're not even with a re blank and blank, unless you tell me there, because I can't see it.

MR. JONES: Oh, the way that -- the way that they are placed there?

THE COURT: Let me say it differently. There's one invoice that does say additional time on your client to Titina Farris by Alan Stein, M.D., for preparation of a report, paid 11/29/18, check 3141, okay. Where that says $1,000. I looked on the next page, there's a check 3141, but that check is for $5,175. I'm sure you weren't asking the Court to go back and figure out what was the other 4,000, you know what I mean?

MR. JONES: No, Your Honor, I thought -- in our memo, I thought we broke it down though in such a way that it was --

THE COURT: But remember *Cadle v. Woods & Erickson* says that I got to have all the receipts. Remember, even in *Cadle* there was a small amount, I believe it was around $40, right, for remember even like xeroxing costs, it says you still need to have all of that. So you got to have the support for those amounts, and the support has to show that it equals the amounts.

And so without having it organized in any manner, how would this Court -- I'm in no way doubting you, it's just you're basically seven -- what is it, 1,000 pages probably in here -- 700 to 1000 pages. You're not asking the Court to go and find -- to check the boxes of where they are. That's why I'm asking.

[Plaintiffs' counsel confer]

MR. JONES: Your Honor, would it be okay if we took a very short recess, and I'll try to --

THE COURT: It's a quarter to five though --

MR. JONES: Oh, goodness.

THE COURT: Here's my question. Do you all want -- I have

the arguments from Defendants for reductions. Do you want Plaintiffs to provide Defendants and see if you still haven't -- I mean, your argument is two prong, right, that -- well, let me not phrase the argument for you.

Counsel for Defense, is your argument that the bills don't support these amounts or that these amounts are too high independently, or both?

MR. DOYLE: Both.

THE COURT: Okay.

MR. JONES: Your Honor, I would like to just say something about that right now.

THE COURT: Sure.

MR. JONES: That argument was not made by -- they didn't say that the bills don't support those amounts with respect to experts. What's happening right now is counsel is saying that, because he sees an opportunity, and I view that as -- well, I view that for what it is.

MR. DOYLE: Your Honor, I object to the -- can we have counsel stop the comments on my character and harassing.

MR. JONES: Where does it say, within the motion to retax costs --

MR. DOYLE: I was answering a question from the Court.

MR. JONES: Where does it say in the motion to retax costs that the cost that we say are there don't actually exist? There was thorough analysis of that there, and this was not claimed. What's happening right now -- he knows that the costs are there, because he analyzed them. And he stated to the Court the 2,000, the $1,200, the

$3,300, he stated to the Court the ones that he felt might be lacking or might be missing, but he certainly was able to go through and identify the costs were indeed there for these experts, and he knows that. And to say otherwise now is a lack of candor, and that's what it is, and I'll say what it is.

THE COURT: Keeping it neutral between the parties, when the Court reads -- it is Plaintiffs' burden to support the request for an expert fee in excess of 1500. There is currently no evidence before this Court sufficient to demonstrate the *Frazier* factors and whether the excess fees for Dr. Stein, Hurwitz, Willer, Barchuk, Cook, or Clauretie were reasonable and whether the circumstances surrounding the testimony was such a necessity that it should require the larger fees, whether that support -- whether he meant support in which way, the Court has to ask that question. I mean that's reading directly from his motion to retax.

So that's what the Court is looking at. So the Court views it -- it's raising the issue of anything above 1500, okay. When a person uses the word support, it can have a variety of different meanings. So for this Court to ask a point of whether that means which way the clarification is, that's a standard question that this Court would ask people because the term support can mean a lot of different things.

Does it mean the actual documentation support, or does it mean the reasonable and necessary? Because it's got reasonableness and necessity both in that next paragraph, so that I view, when reading this, wasn't completely clear. Same reason why I asked you questions to

clarify a point when there's words that can have multiple meanings, so that I understand, and I make sure I address all your arguments, just like I asked you before whether or not with the contingency argument, because I want to make sure I'm addressing everything and nobody feels that I have not addressed anything.

So that's my diligence to ensure that I'm covering everything when something hasn't been abundantly clear in a pleading.

MR. JONES: And, Your Honor, I understand exactly what you're saying. Reading what you just read is very clear to me what that's saying is it's saying that a question is a reasonableness of the necessity of the billing in excess, not that it exists or not.

And so, I didn't anticipate coming today that I was going to be going through beyond what the Defense has already outlined, specifically, and saying bill A is for this. I thought we did that in the memo of costs, and I thought to the degree that there's a doubt as to the existence of bills and their relationship to what we say they're related to, that that was something that would have been addressed, and I think it has been.

And so while we stand here today, I unfortunately don't have all the receipts with me, but I can tell you that we outlined appropriately the actual expenses with the exception that we thought that Dr. Hurwitz charged us a second day, and he didn't, outlined there.

And so I -- and the billing does connect to the experts, and we have it itemized, and we know how it does.

THE COURT: Okay. And I appreciate what you're saying, but

straight from *Cadle v. Woods & Erickson*, in *Bobby Berosini, Ltd.*, we explained that a party, quote, "must" -- I'm sorry, must, quote, "demonstrate how such [c]laim cost" necessary to and incurred in the present action. Citation omitted. Although costs memoranda were filed in that case, we were unsatisfied with the itemized memoranda and demanded further justifying documentation. It is clear then that, quote, "justifying documentation must mean something more than the memoranda of costs, or to retax and settle the cost upon a motion of the party pursuant to NRS 18.110, a District Court must have before it evidence that the costs were reasonable, necessary, and actually incurred.

So that's an affirmative obligation, the actual incurred portion, as well, right?

MR. JONES: Absolutely.

THE COURT: Okay. So then it says, without the evidence to determine the reasonable and necessary, the District Court may not award costs, and it cites the *Bobby Berosini and PETA* case. Here the District Court lacks sufficient justifying documentation to support the award of costs for photocopies, runner services, and deposition transcripts.

So when it goes to small things like that, okay, and it's not a photocopy. *Woods & Erickson* did not submit documentation about photocopies other than the affidavit that counsel is saying that each and every copy that was made was reasonable and necessary. In *PETA* we rejected the claim for photocopy costs because only the date and cost of

each copy was provided. Okay, we've also held that documentation substantiating the reason for each copy precisely was required under Nevada law. So --

MR. JONES: And, Your Honor --

THE COURT: -- it's that affirmative obligation that the Court also has. So even if it's, quote, "not completely clear in your opposition, the affirmative obligation for the party moving for the costs, as *Woods & Erickson* says, is this Court has to affirmatively ask for it. So that is why these questions -- and this is not the first time I've had to do it, and it's not the -- I like to go into looking about photocopying and runner costs, because I appreciate the time balance on that. I'm more than glad to do it, because I'm required to do it, and I want to make sure I fully and clearly take care of every single aspect of every single case, fairly and impartially, and give everyone the full opportunity to be heard. That's what *Cadle* says.

MR. JONES: I do understand.

THE COURT: *Cadle* says I need to have it. *Cadle* says it needs to be shown by the party moving for it. So --

MR. JONES: And, Your Honor, I believe we have fully done that in our memorandum --

THE COURT: Okay.

MR. JONES: -- but as you're asking me right now to tell you the page -- the pagination, I apologize, I just don't -- for some reason even though I --

THE COURT: Let me flip the question.

MR. JONES: Yeah.

THE COURT: Defense counsel, do you have any reason to believe since you said you looked through the documentation that their supporting documentation does not support the numbers or was that analysis you did? I'm --

MR. DOYLE: Ms. Clark Newberry did the motion to retax, so I should -- I can't --

THE COURT: Okay.

MR. DOYLE: -- I don't know if she prepared spreadsheets or something, but I don't have it -- all I have is the -- are the pleadings. And I did go through all of the attachments yesterday, but I only pulled out certain ones.

THE COURT: Okay. Is there any reason to believe that Plaintiffs did not attach the receipts that supported the numbers, and so we're really looking at whether the numbers are appropriate, or -- I'm just trying to see if this is an issue that I need to address, one way or another. If one of you have the better information on it, let's do it the most quick and efficient way, right. And if neither of you do, then I need to continue this so that we can get it done appropriately, because I'm not sure that either of you really want to have an appeal over ten bucks, right.

MR. JONES: We may have page numbers. Mr. Hand may have been able to identify the page numbers, if we need to go through it literally check by check. I think that he does have the page numbers now identified. But I --

THE COURT: And I will tell you I usually do the pages -- I mean, I usually do have things paginated with the page numbers to do it because of *Cadle*.

MR. JONES: Absolutely, Your Honor.

THE COURT: It's so clear in that regard because most people -- where it says photocopying and runners that most people don't like to address that, but if you would like to get the case changed so I don't have to ask for it, feel free to do so, but under current case law I've got to follow it, so.

MR. JONES: No, absolutely.

MR. HAND: Your Honor, perhaps we could continue, I guess, if -- I mean, I did see the time, and I can go through -- we can go through them.

[Plaintiffs' counsel confer]

THE COURT: Because you can appreciate what I have to evaluate. *Bergmann v. Boyce*, 119 Nev. 670, you know what I mean, just because someone doesn't testify does not preclude them from getting an expert witness fee, and also *Frazier v. Drake*, says so similarly, but I have to evaluate for one of the 12 *Frazier* factors, the person not testifying because this is the importance to the case.

And when you have someone like Dr. Stein with $24,710, which is a hefty number, I have to look through those *Frazier* factors, without looking to see which portions relate to testifying versus reports. That's pretty much not practical for the Court to be evaluating the factors that I need to under *Frazier* with regards to Dr. Stein. I mean, being

realistic on it, and now that I've said that, you know exactly where that was going.

With regards to Hurwitz, Hurwitz 11,000, if it's supported by documentation is appropriate. He testified for two days. He was important to your case. He was a key aspect of the case. The fact that he had to testify a second day, the Court finds partly is because of the issues raised by Defense counsel and at the amount of time you had to be at the bench, and so he could not get finished that day, and you all knew he needed to leave. So Hurwitz is fine.

MR. DOYLE: But --

THE COURT: Barchuk, is the 11,000 versus the 9500. But once again, I don't --

MR. JONES: Yeah.

THE COURT: -- I need to know if you've got 9500 versus 11,000. So both of those numbers seem reasonable for the amount of time that he was here, the nature of what he is, but once again it has to be supported under *Cadle*. So I can't even go to Barchuk, which is -- he would probably be the easiest of the ones -- well, Clauretie would have been the easiest one because you've got a box -- your check for him is 1500, not the 1925, but -- because Clauretie I found, 1575, a check, but I didn't see another, so then I've got 1925, but I don't know if you're using Clauretie or not. Do you see what I'm saying?

MR. JONES: I do.

THE COURT: I'm trying to get through things. Dawn Cook. Dawn Cook you've got some, because she was paid independently. I've

got a Dawn Cook, 13,950 towards the end of yours, which I saw, but I didn't see other Dawn Cooks. But once again I'm not sure that you're asking me to go page by page and find supporting documentation, which is why --

MR. JONES: No, Your Honor, but we should have. If --

THE COURT: So I've got 1350 for Dawn Cook, but I'm not sure you want to go for 1350. So that's where this quandary is, is --

MR. JONES: Your Honor, what I propose if the Court would be willing is for Plaintiffs -- let's do -- well, let's continue and with respect to experts only, I will list out their expenses, and I will make sure that it is very clear in a way that can't be misunderstood in terms of the actual payments to them.

THE COURT: Counsel, do you have an objection to them doing a supplemental that incorporates in a more cohesive manner the expert's attachments to the bills, as long as they were already incorporated in the document that was previously presented and does not increase the bills?

MR. DOYLE: I don't have any objection to that just so long as we have some opportunity to respond.

THE COURT: Okay.

MR. DOYLE: And perhaps submit it and not have to come back or something.

THE COURT: That can be -- as long as --

MR. DOYLE: Because I think this is the last thing we have left.

MR. JONES: And I'm happy for the Court to take it under advisement or come in for any questions the Court has. Whatever the Court would prefer.

THE COURT: The problem with that is -- okay. So let's go to the other -- let's step away from -- the problem is, is just submitting the bills does not give this Court the 12 prong *Frazier* analysis.

MR. JONES: Right.

THE COURT: I mean, what I normally get is Dr. X, here is our 12 prongs for Dr. X, right. And I'm not -- that's not a requirement, I'm just telling you because then the Court can look at it because I've got *Frazier v. Drake* that tells me what I need to look at, right. And so, there lies that challenge.

But let's quickly go to the other ones to see what we -- we were just talking about experts. I will tell you my inclination -- the ineligible charge was taken away, number 6, litigation services. Is that for -- is that for exhibits or what was that litigation services for?

MR. HAND: That was for deposition transcripts.

THE COURT: Okay. Do you have bill -- you have a bill for deposition transcripts?

MR. HAND: Yeah, it's in the --

THE COURT: Okay. If --

MR. DOYLE: We could -- I mean all we had was -- apparently all we had was Lit Services and an amount with no explanation what it was for.

MR. JONES: It was for the depositions of Erlich -- wasn't it --

there were a bunch --

[Plaintiffs counsel confer]

THE COURT: Okay. You're entitled to deposition charge and one copy.

MR. JONES: It was for the copy of Plaintiffs' experts.

MR. DOYLE: Well, I don't know that. I mean --

THE COURT: Okay. I was trying to -- it seems to me what I need to have is looking at the retaxing, right, put your documents that support your retaxing, and it looks like I'm going to have you come -- I'm not seeing how I can do this with you all just submitting it because the challenge I'm going to ask -- right, I'm going to ask you the *Frazier v. Drake* questions, and I'm going to see -- I mean, if you all agree to all these, I mean see what's left.

So do you want to take a --

MR. JONES: Your Honor, we'll go ahead if -- we'll go ahead and submit just a supplement that lays it out. Defense counsel can have the time that he needs and at his convenience and the Court's convenience.

THE COURT: Well, let's give you some deadlines so we're not leaving this out here, right. I mean it's a separate -- it's a separate -- okay. So how much time do you need to put your --

MR. DOYLE: So this will be a supplement to their opposition, it sounds like.

THE COURT: This will be a supplement to their opposition, and then you would have a supplemental reply, right. Okay. And,

counsel for Defense, if you want to do it by video conference, you can do it by video conference.

MR. DOYLE: Or Ms. Clark Newberry can come. I mean, we'll figure something out.

THE COURT: So how much time, Plaintiff, do you need to get together yours, because you really -- you're just collating documents, right, and then just putting it to there. So how much time do you need, and then how time do you need, Defense counsel, and then we'll pick a date for -- a new date, because it's 2 minutes of 5.

MR. JONES: Two weeks, Your Honor, if that's -- I can do less if needed, but two weeks would be good.

MR. DOYLE: And if we could have ten days after that.

THE COURT: Sure. Okay. So that gives us 24 days, so we'll be putting this out about 32 days. So, Madam Clerk, where does that put us at? It puts us in the first or second of February; does it not?

THE CLERK: That puts us in the first week of February.

THE COURT: Let's play it safe, so make sure -- remember seven days before, so I get my courtesy copies.

THE CLERK: Of course.

THE COURT: So let's do the math here. So you asked for -- okay. Today is the 7th. So you want until the 21st, counsel for Plaintiff; is that correct?

MR. JONES: Yes, Your Honor.

THE COURT: Okay. And then Defense counsel, ten days thereafter -- you want ten real days or ten court days?

MR. DOYLE: Ten real days is probably enough.

THE COURT: One will get you to the 31st of January and one will get you February 5th, so we're going to split the difference and say February 3rd.

MR. DOYLE: Thank you.

THE COURT: Okay. February 3rd, for Defendants. That means February 11th, okay. And if you get this done quicker -- I mean, you might want to talk among yourselves to see what you can get resolved and see what you really have teed up because if it's down to some small amounts that maybe all are stipulating to after you take a look at everything, who knows, maybe you can vacate it, because it doesn't look like you're looking at huge amounts here.

MR. JONES: Okay.,

MR. DOYLE: So February 11th, what time for the hearing?

THE COURT: February 11th, 9:30.

MR. DOYLE: Thank you. And then that takes care of everything.

THE COURT: So that's just leaving -- because interest was already taken care of in the judgment and that -- so that interest was already taken care of. We calculated the NRCP 68 issues. So it looks like we are down to just costs. It would be lovely to see you again. Is there anything else the Court can do other than wish you a nice evening?

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MR. DOYLE: Thank you, Your Honor.

MR. JONES: Thank you, Your Honor.

THE COURT: Thank you so much.

[Proceedings concluded at 5:01 p.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.

Jessica B. Cahill

Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708

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DISTRICT COURT

CLARK COUNTY, NEVADA

TITINA FARRIS, ET AL.,	CASE#: A-16-739464-C
Plaintiffs,	DEPT. XXXI
vs.	
BARRY RIVES, M.D., ET AL.,	
Defendants.	

BEFORE THE HONORABLE JOANNA S. KISHNER,
DISTRICT COURT JUDGE
TUESDAY, FEBRUARY 11, 2020

RECORDER'S TRANSCRIPT OF HEARING:
DEFENDANTS BARRY J. RIVES, M.D.'S AND LAPAROSCOPIC SURGERY OF NEVADA, LLC'S MOTION TO RE-TAX AND SETTLE PLAINTIFFS' COSTS

APPEARANCES:

For the Plaintiffs: GEORGE F. HAND, ESQ.

For the Defendants: THOMAS J. DOYLE, ESQ.

RECORDED BY: Sandra Harrell, Court Recorder

Las Vegas, Nevada, Tuesday, February 11, 2020

[Case called at 10:40 a.m.]

THE COURT: Tatina Farris versus Barry Rives, 739464. Appearances please.

MR. HAND: For the Plaintiffs', George Hand, bar number 8483.

MR. DOYLE: And Tom Doyle for the Defendants.

THE COURT: Okay, let's switch our big binders around -- one second. Okay so, you all were given the opportunity, based on from the last hearing, that you wanted to do some supplemental briefing on the charges for the experts. Court has had the benefit of that, so -- because this is a continued hearing, where would you all like to commence from? I mean, it's -- it was -- I had placed his motion for fees and costs and then I had a motion to re-tax.

So, what I really was going to do is let you each, kind of, set your peace once and then ruling, unless you all have come to an agreement in the intervening time.

MR. DOYLE: Or in the interest of time, if the Court has an inclination and wants to share that, and then we could just take up the Court's inclination.

THE COURT: I think you all have argued this enough that you really rather just, kind of, hear your combined synopsis of what your position is, because you can appreciate, it has somewhat evolved in the various pleadings that the Court has gotten over the last couple months.

And since the last hearing, where we even had some different people present. So, I'm going to give you each one shot to, just kind of, give your summation and then the Court is going to make a ruling.

Plaintiff, you filed your motion for fees and costs first. I think I should have you go first, and then have Defense respond and set forth their position on their motion to re-tax.

MR. HAND: Thank you, Your Honor. The support given for -- well -- this is a 3 week trial, quite complex, a lot of medical issues, required extensive expert testimony, review of the records, and I think the *Frazier v. Drake* factors have been met regarding the submitted expert stuff to -- for the reimbursement for Dr. Hurwitz, Dr. Willer, Dr. Barchuk, Dawn Cook, Dr. Stein.

Hurwitz, Willer, Barchuk and Cook all testified in the case. Their bills are what they are. Getting people, like a Dr. Barchuk, to come here, who did a comprehensive physical examination, report, and testified for -- I don't know -- two or three hours. His bill was $26,120.00. Hurwitz testified, I think, two days -- one day and then remote, $11,000.00.

Dr. Willer came from New York, testified. His bills were $17,245.00.

Dawn Cook, $23,957.00. She testified, did extensive life care plan. These people are necessary for this kind of case. There is no way to get around it. I know the statute says $1,500.00 per witness. It is -- I think this works outside of that, and the fees are -- meet the exception set forth in subsection 5, 18.005, subsection 5, in that the expert testimony

were of such necessities to require the larger fee.

The one witness, who didn't testify, Dr. Stein, was here ready to testify. We did not call him because the -- when we originally started the case, this Dr. Juell said, you know, this is a lung aspiration that started the sepsis, and that was maintained until Dr. Juell testified, and then he conceded there was leakage from the bowel causing sepsis. So, we decided we didn't need him, but he was here, ready to go. We submit, that's reasonable.

I don't know if I need to go through all the *Frazier v. Drake* factors, but I think we meet all of them in terms of what needs to be considered. The testimony of each witness was important. The Jury could not have understood the issues in the case. [Indiscernible] regard to factor number two, if we didn't have all these experts -- they weren't repetitive experts. They each handled a different field and different component of liability and damages. The work that they did was of high quality. They're highly qualified people and they cost money, and nobody can do a medical malpractice case for $1,500 per witness. It just isn't realistic.

THE COURT: I did offer you that for each side, remember? If you can hold it to every single case. No one has yet taken me up on that offer.

MR. HAND: Yeah, ha-ha.

THE COURT: Go ahead, sorry counsel.

MR. HAND: So, they did extensive reporting. They were, I believe, all deposed and spent time doing that, appearing for deposition,

spent time preparing for trial. They were good experts -- their education and training and their expertise, I think, was well established.

It was a, kind of a, rare condition that the Plaintiff suffered from -- the polyneuropathy of the feet caused by the sepsis. That was a diagnosis that needed expert support. It wasn't readily apparent until we had neurologists look at it to figure out what happened here to this lady.

So, the fees, you know, the Defendant's expert, Dr. Juell, charged $32,000. This is what they cost. We don't control that. So, I think the *Frazier* factors have been met. The expert's fees were reasonable and necessary to this case and should be awarded.

As to the other items, the deposition costs, we've supplemented our memorandum of cost -- they are all supported and they were required to prosecute this case.

THE COURT: Okay, got two questions for you.

MR. HAND: Yeah.

THE COURT: (1) Is it correct that you've reduced it now to the five experts?

MR. HAND: Yes.

THE COURT: Okay. So, no longer have the issue of more than five. Is that correct?

MR. HAND: No, we're not claiming more than five.

THE COURT: Okay. So that point (1). Question number 2 is Alan Stein. How do you get -- appreciate that he was ready to testify, but he actually didn't testify, and as you know, there is some Appellate authority about somebody not testifying, and how that could -- whether

that can or cannot exceed --

MR. HAND: Right.

THE COURT: -- under *Frazier v. Drake*, et cetera, the $1,500.

MR. HAND: I know. I understand that, and I'm willing to consider that. The thing is, it was really not known until -- that Dr. Juell testified, that it wasn't really needed to bring him on. And that's why we didn't do it. I'll accept your ruling on that if you feel that it's, you know, otherwise.

THE COURT: Okay. I appreciate it. Thank you so very much. Okay, counsel for Defense.

MR. DOYLE: Sure. Concerning the expert witnesses, I think we now have an understanding that it's five, not seven, which they claimed in the supplemental brief.

As to Dr. Stein, I would point out that Dr. Stein was scheduled to testify the first week of trial, before Dr. Juell testified, so how could Plaintiff have known what was going to happen with Dr. Juell. I submit to the Court that Dr. Stein, who traveled on Thursday, to testify on Friday, the same day as Dr. Hurwitz was scheduled to testify. And that morning, Friday morning, was consumed by cross examination of my client rather than putting on Dr. Hurwitz and/or Dr. Stein.

The reason not -- they didn't call Dr. Stein, was not because of something having to do with the defense case, but rather, we were -- we had a rebuttal expert witness, Dr. Erlich, in infectious diseases, in response to Dr. Stein, and I suspect Plaintiff did not want us to be able to call Dr. Erlich to rebut Dr. Stein. Hence, a decision was made not to call

him. And as the Court pointed out, he did not testify.

As to the other expert witnesses, Dawn Cook, a registered nurse, charging an hourly fee far in excess of the physicians in this case, the second most expensive expert witness in this case. You know, the *Frazier* factors would weigh against not allowing the full amount of what she charged.

Similarly, for Dr. Willer, a neurologist from New York -- why not a neurologist from Las Vegas or a neurologist from Orange County? Dr. Hurwitz, who came from Orange County, ended up billing substantially less than Dr. Willer. Similar argument for Dr. Barchuk.

In terms of the other miscellaneous costs, Your Honor, you know, we had the $5,032.04 for videotaping depositions, which were not used at trial. Attendance fees, courtroom -- or conference rooms and travel fees by the videographers, those, as we have pointed out, are not allowable costs. We have $350 for copies, faxes, et cetera -- we have the FedEx charge of $216.30; the video services for a day in a life video, which there was not a day in a life video at trial for $1,200; parking and Uber, $478.56.

Then we have this company, DALOS, for a power point and binders; binders $809.88; the power point $3,336.25. All of that adds up to $11,423.03, and I believe, based upon our initial papers and supplemental opposition, that none of those are allowable costs.

THE COURT: Okay -- um -- walk me through what you -- I appreciate you say Dawn Cook should be $1,500. What's your backup? Do you have a backup position with regards to Dawn Cook? Because,

you assert that her costs are not under the *Frazier* factors, that they're either local or they're larger than the medical providers, but then I didn't see a different analysis other than $1,500 -- I mean -- so what is the reasonableness, or you just choose not to -- and it's fine --

MR. DOYLE: [indiscernible]

THE COURT: -- there doesn't need to be an answer. I'm just --

MR. DOYLE: Well, I think the Court --

THE COURT: I think it's more than $1,500, but I'm trying to take into account your argument that you're saying, she charges too much, but I didn't see any analysis of what would be reasonable in light of *Frazier*, et cetera, of what she did.

And if you say it's somewhere in here, feel free to point it out to me, because you can appreciate, it's a lot of documents. I didn't recall seeing it when I re-read everything for today.

MR. DOYLE: Okay. I would love for the Court to order $1,500. I don't think the Court is going to do that, nor do I think that would be a reasonable amount for Dawn Cook.

The Court has the discretion to look at the totality of the circumstances and decide on a fee, and I would suggest that it's something in between that.

I mean, Dr. Willer -- I'm sorry -- Dr. Hurwitz was $11,000, let's say -- why would Dawn Cook be more than the standard of care expert witness in this case?

THE COURT: I appreciate it, thanks. Um, counsel for

Plaintiff, I'm going to ask you the same question on Dawn Cook, because in light of her hourly charge, in comparison to medical professionals -- now, I appreciate you're saying that she did a lot more, because she did life care plan and she coordinated with different doctors. But if I -- *Frazier* factor -- right -- similar related people who do these life care plans is -- if you had another -- a lot of people have had in other cases -- that number, kind of, stands out a bit.

MR. HAND: I understand that, Judge. It is -- it is expensive. There was that report that she did, was quite lengthy. It was probably 40 or 50 pages. The home visit to evaluate this person -- the research done to back up the costs of what she needed for future medical, and ADL needs. I think that's where the costs came from. I understand it is high and what others charge for that -- I would say it's higher than most people would charge, but it's not so much out of the realm that it's excessive, is my position. So --

THE COURT: Sorry, I'm trying to find -- if you all -- okay -- okay -- well -- okay, let's walk through your experts. Um, you reduced it to five, so the issue with regards to statutory provision, the Court need not address because now we have the five.

When we're looking at the five different experts, taking into account *Frazier v. Drake*, its progeny and other appropriate Appellate, both Court of Appeals and Supreme Court authority. Let's walk through each of the doctors.

Um, I'm going to tell you the Court is going to grant -- finds reasonable and appropriate, taking all -- do -- if you want me to list all

thirteen factors for each of the doctors, I'll be glad to do so, otherwise, I can say I'm incorporating the *Frazier* factors. Do you want me to list each of them?

MR. DOYLE: In the interest of time, we don't think that's necessary.

MR. HAND: Not necessary, Your Honor.

THE COURT: Okay. So, other than Stein and Cook, they're granted. The Court is going to find it's appropriate, meets all the *Frazier* factors.

Okay, so now I have to look at Stein and Cook. With regards to Stein, the Court finds it's appropriate and consistent with applicable case law, that since -- while I appreciate was here ready to testify -- the point is also well taken that it was going to be in Plaintiffs' case in chief, so the Court can't really take into account who Defendants' witnesses ended up testimony -- testimony ended up being -- so that -- Dr. Stein is limited to $1,500. So that's reduced to $1,500, consistent with applicable case law.

Now we get to Dawn Cook. Um, Dawn Cook, she charged $375 for work on life care plan; $650 for hours at deposition; and $3,000 per day for trial testimony. I've looked, both, at the amount of work that she has done -- I appreciate she charged Plaintiffs $23,960.03, but I don't see how that amount -- it's got to be reduced.

I don't see how under *Frazier* -- looking at -- even in this case, the medical professionals and the amount of work that they did, and the time they did it -- the hours they did -- that that amount comes out to be.

The $3,000 for trial testimony -- that's consistent and applicable, because people have a flat charge for the amount that -- time that they're going to be here, okay?

Um, I really am seeing -- I really was seeing reducing her number by looking at the amount of work she did, because I appreciate while it was long, a lot of her stuff was things that can be utilized in other life care plans, is the way I will phrase it. Okay so, while I appreciate she did a home visit, I'm taking into account the hours she would've spent in a home visit, the hours she would have spent, but she receives some of her information from Dr. Hurwitz and others in which she incorporated into life care plan, so she can't, kind of, re-charge Dr. Hurwitz's charging for that. She's charging for that, but she needed to be charging more at a rate that would include initial investigation. So, the Court was going to reduce the $23,960.03 to $13,960.03.

And the Court's analysis, in doing so, is taking into account her trial testimony time, taking into account her time that she would have spent specifically on this case, incorporating the work that she did prepare. The *Frazier* factors are met, other than the rate at which, I would say, that she was charging for her deposition, as well as the amount of time that she allocated to certain things that had to be reduced, and that's why the Court found it was appropriate to reduce it by $10,000, consistent with applicable case law.

Anybody have any questions with regards to the experts?

MR. DOYLE: No, Your Honor.

MR. HAND: No, Your Honor.

THE COURT: Okay. So now we're looking at the rest of the costs. I will tell you, the Court's inclination is to grant in part and deny in part with the rest of the costs.

The Court, while appreciates that you strategically decided not to do a day in the life video, but since it did not come before the Jury, the Court can't find that that would be an appropriate cost that had other independent -- I'm going to use the term, value, but that's really not my best word, it's just the word I can come up with right now, but it did not have any independent basis that would meet factors for a cost on the statutory basis or under an NRCP 68.

Okay, going -- remember my analysis on these, even though I'm saying it, one covers both. Because remember, we had the offer of judgment issue as well, so my analysis -- I am taking into account both statutory and rules. And if you want me to break down which one I'm doing on each, I'll be glad to do so. If you me just to summarize that I'm taking both standards into account, I will do so.

Do you wish me to break it down, and which is the statutory basis versus the rule basis? Counsel for Defense?

MR. DOYLE: The latter summary is fine.

MR. HAND: I'm agreeable to that.

THE COURT: Okay, so a summary. So, taking into account both different standards and looking at them -- okay -- under both -- that's -- was my analysis of the experts.

Going to the costs, like I said, reducing the $12,000 for the day-in-the-life video. It was not utilized as a video. While the Court could

see it potentially could fall into miscellaneous, the Court doesn't see there is appropriate for this case, because it was really not utilized.

The Court's -- with regards to the costs -- let me walk -- the $5,032.02, the Court is also going to reduce those costs, because what the Court didn't see in this case is, while you can have a video or you can have a deposition, it appears that here you've charged for the deposition, here, has not been presented that those videos were needed for this particular case. I appreciate that they potentially could have, but I -- hasn't been any analysis presented to this Court, in this particular case, that those videos were utilized or needed for this particular case, and that's the reason why the Court would reduce the $5,032.02.

The Court finds that the rest of the costs are appropriately supported under *Cadle v. Woods & Erickson*, *Bobby Berosini*, *In re Dish Network*, and would grant those. While the Court is cognizant that there is some Uber costs, et cetera, it would be appropriate, because it was a -- argued, as far as, that was a less cost, the alternative in order to get from point a to point b for various depositions, and the like, that needed to take place, that would be appropriate.

With regards to the FedEx costs -- because of the timing of certain things, that was a necessitated cost. And so, the Court would find that that's appropriate, and that's why the Court grants in parts and denies in parts.

The Court, to the extent that there were certain costs that were not contested, the Court is not analyzing those costs separately here in Court. However, the Court, in granting the rest of those costs,

would have found -- does find them appropriate, both under the statute and the rule from the Court's independent evaluation, as compared to what the Court would have to analyze when it is brought up by the opposing counsel for a reduction or taxing of costs. That is the Court's ruling, it is so Ordered. Does anyone have any questions or clarifications?

MR. DOYLE: No.

MR. HAND: Thank you, Your Honor.

THE COURT: So, a note also from -- no questions or clarifications?

MR. HAND: Do we have a net figure for the costs, or --

THE COURT: You're going to do the net figure. You're going to provide it, please, to Defense counsel, and if you all disagree on the math, then you're going to --

MR. HAND: Okay.

THE COURT: -- let the Court know, please, in like a red line document, on what you think your math is different. But I -- I thought probably you all could --

MR. HAND: We could work it out.

THE COURT: -- agree on your math. As since the pre judgment and post judgment interest wasn't contested, that's pursuant to statute, then the Court wasn't addressing that. Okay?

MR. DOYLE: Thank you.

MR. HAND: Thank you, Your Honor.

THE COURT: I appreciate it. Thank you so much for your

time.

[Hearing concluded at 11:00 a.m.]

* * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Sandra Harrell

Sandra Harrell
Court Recorder/Transcriber

Electronically Filed
3/30/2020 7:45 AM
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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

TITINA FARRIS and PATRICK FARRIS, Plaintiffs, vs. BARRY RIVES, M.D.; LAPAROSCOPIC SURGERY OF NEVADA LLC; DOES I-V, inclusive; and ROE CORPORATIONS I-V, inclusive, Defendants.	Case No.: A-16-739464-C Dept. No.: 31 **ORDER ON PLAINTIFFS' MOTION FOR FEES AND COSTS AND DEFENDANTS' MOTION TO RE-TAX AND SETTLE PLAINTIFFS' COSTS**

Plaintiffs' Motion for Fees and Costs having come on for hearing on the 7th day of January, 2020, at 10:00 a.m., KIMBALL JONES, ESQ., with the Law Offices of **BIGHORN LAW**, and GEORGE F. HAND, ESQ. with the Law Offices of **HAND & SULLIVAN, LLC**, appearing on behalf of Plaintiffs, and THOMAS J. DOYLE, ESQ., with the Law Offices of **SCHUERING ZIMMERMAN & DOYLE, LLP**, appearing on behalf of Defendants, and Defendants' Motion to

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Case Number: A-16-739464-C

Re-Tax and Settle Plaintiffs' Costs having come on for hearing on the 7th day of January, 2020, at 10:00 a.m. and February 11, 2020 at 9:30 a.m. with the Honorable Court having reviewed the pleadings and papers on file herein and with hearing the arguments of counsel:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs' Request for Attorneys' Fees

The Court finds that attorneys' fees are properly awarded to Plaintiffs in this matter for the reasons outlined in Plaintiffs' Motion, Reply, and supporting affidavits.

Under *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 955 P.2d 661 (1998), and *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), the Court considers the following factors in making an award of attorney fees to Plaintiffs based upon an offer of judgment: According to *Beattie*, the Court is required to consider: (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount. *Id.*, 99 Nev. at 588–589, 668 P.2d at 274.

Since Plaintiffs are the prevailing offerors, however, the analysis of the *Beattie* factors is reversed, such that the Court considers: (1) whether the defendant's claim or defense was brought in good faith; (2) whether the plaintiff's offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the defendant's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount. *See Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998).

With regard to the reasonableness of requested attorneys' fees, the Court considers the *Brunzell* factors: (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and

character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; and (4) the result: whether the attorney was successful and what benefits were derived. *See Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). If the record reflects that the court properly considered these factors, there is no abuse of discretion. *See Wynn v. Smith*, 117 Nev. 6, 13,16 P.3d 424, 428–429 (2001); *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983). Further, the Court retains the right to determine a reasonable amount of attorneys' fees. *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864–865, 124 P.3d 530, 548–549 (2005).

Beattie/Yahama Factors

1. **Whether the Defendants' Defenses Were Brought in Good Faith.**

Defendants' defenses, and refusal to pay the Offer of Judgment, were not brought in good faith based on the facts of this case. It was known by Defendants before the trial commenced and at the time of the NRS 41A.081 settlement conference that there were serious issues with the credibility ~~of counsel and Defendant Rives~~ concerning the *Center v. Rives* case. In fact, before the trial commenced, there were pending NRCP 37 motions before this Court. Despite the demonstrated misconduct by Defendants in discovery and depositions, Defendants still elected to risk going to trial. In fact, ~~it was a possibility that~~ terminating sanctions ~~may issue~~, based on the aforementioned conduct by Defendants. Moreover, given Defendants' (and Counsel's) knowledge of this misconduct, ~~they were also obliged to~~ consider and calculate the impact of the discovery and likely consequences of their misconduct.

Further, there were serious problems with Defendants' expert opinions. The defense liability expert, Dr. Brian Juell, opined at trial that the use of a LigaSure was relatively contraindicated and that it should not be used in the setting of the subject surgery if there was any other alternative, such as cold scissors. Then, it was established that Defendant Rives actually had cold scissors, but used the LigaSure anyway. The defense should have been aware of this weakness in their own case when they rejected Plaintiffs' offer.

Defendants also tried to put forth a defense that the sepsis of Plaintiff Titina Farris originated from "pulmonary aspiration syndrome." This defense was put forward, despite no other physician, treating Titina Farris during her hospitalization, ever diagnosing her with this condition. This ~~spurious~~ defense was clearly attempted to misdirect attention from Defendant Rives' failure to treat the sepsis originating from the holes in the bowel that he caused and failed to adequately ~~repair~~. Dr. Juell still tried to put forth this theory before the jury, even though it was shown at trial that he opined in his expert reports that Titina Farris had pulmonary aspiration syndrome without first reviewing the relevant films. Thus, this first *Beattie* factor weighs in Plaintiffs' favor.

2. Whether the Plaintiffs' Offer of Judgment Was Reasonable and in Good Faith in Both Its Timing and Amount.

Plaintiffs' Offer of Judgment was reasonable and was in good faith in timing and amount, and Defendants' decision to reject the offer was grossly unreasonable. Plaintiffs served their offer of judgment for $1,000,000 on June 5, 2019. At the time, expert reports had been exchanged, key witnesses were deposed, and medical records had been exchanged. Thus, Defendants were aware of all the supporting information for Plaintiffs' Offer of Judgment, including Plaintiffs' injuries, related medical specials, and pain and suffering. The amount of Plaintiffs' Offer of Judgment was less than Plaintiffs' disclosed past medical expenses ~~and was, therefore,~~ reasonable and in good faith. This second *Beattie* factor weighs in Plaintiffs' favor.

3. Whether the Defendants' Decision to Reject the Offer and Proceed to Trial Was Grossly Unreasonable or in Bad Faith.

In light of the severity of Plaintiffs' injuries and damages, as well as a very strong case of liability, presented at the time of their Offer of Judgment, it was grossly unreasonable and in bad faith for Defendants to reject the $1,000,000 offer and proceed to trial. At the time of Plaintiffs' Offer of Judgment, they had already disclosed over $4,000,000 in special damages. ~~Defendants simply undervalued this case, as evidenced by their zero offer of judgment.~~ The Court weighs this third *Beattie* factor in favor of Plaintiffs, despite Defendants' argument that its experts had differing opinions.

4. Whether the Fees Sought by the Offeror are Reasonable and Justified in Amount.

The amount of attorney's fees requested by Plaintiffs are reasonable and justified in amount based on the outcome at trial. Plaintiffs contracted to pay an attorney's fees in the amount of 40% of the gross recovery. That amount totals $2,547,122.21 (40% of $6,367,805.52). Even if attorneys' fees are calculated under NRS 7.095 on $6,367,805.52, that amount is $1,026,835.83. Although the Court of Appeals has approved a determination of attorney fees based upon a contingency fee agreement, this Court determines that NRS 7.095 is controlling in this matter. *See O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. Adv. Op. 7, 429 P.3d 664, 671–672 (Nev. App. 2018). Thus, the Court awards Plaintiffs the sum of $821,468.66 in attorney fees, as further elaborated based upon the *Brunzell* factors.

***Brunzell* Factors**

1. Qualities of the Advocates.

Mr. Jones is a managing partner with the Law Offices of BIGHORN LAW. He graduated Magna Cum Laude from Brigham Young University-Idaho in 2005 and graduated as the top student in economics that year. He graduated from Brigham Young University in 2008 and was awarded a Dean's Scholarship for academic merit all three years of law school. Mr. Jones was first admitted to practice law in Nevada in 2013, scoring in the 98th percentile nationally on the MBE. He has also passed the Idaho Bar Exam. Mr. Jones has prevailed in more than 95 percent of the arbitrations and trials he has litigated. Further, he has recovered more than $30,000,000 for clients through judgments and settlements in the last six years. Mr. Jones' usual and customary fee on an hourly basis is $500.00 an hour, which is at or below average for attorneys of his skill and experience who handle similar matters in Clark County, Nevada.

Likewise, Mr. Leavitt is a partner with Bighorn Law. He has been licensed to practice law since 2012 and has a billing rate of $500.00 per hour, a rate at or below average for attorneys of his skill and experience who handle similar matters in Clark County, Nevada. Mr. Leavitt graduated Cum Laude from the University of Las Vegas, Nevada in 2004. He attended Cooley Law School

on scholarship and graduated in the top 13% of his class. Mr. Leavitt completed an externship under retired Nevada Supreme Court Justice Michael Cherry and is admitted to practice in the Ninth Circuit Court of Appeals. Mr. Leavitt has conducted numerous trials and administrative proceedings.

Mr. Hand is a partner of Hand & Sullivan, LLC. He is licensed to practice law in Nevada and New York. He has been licensed to practice law in Nevada for sixteen years. Prior to that, he was licensed as an attorney in New York where he practiced in areas of personal injury, medical malpractice, and insurance defense litigation. He has conducted more than 125 jury and bench trials. Mr. Hand also served as a Deputy County Attorney for Nassau County, New York. Mr. Hand's billing rate is $500.00 per hour and he too asserted that it is at or below average for attorneys of his skill and experience who handle similar matters in Clark County, Nevada.

Additionally, the Court found this factor to be considered by the Court and was not contested by Defendants in written opposition or in argument.

Therefore, the qualities of the advocates who performed work in this matter are proven. Further, the market rate of $500.00 per hour is appropriate under *Marrocco v. Hill*, 291 F.R.D. 586 (D. Nev. 2013), for this type of case. give the was no objection to the rate and the award was pursuant to NRS 7.085 could be

2. Character of the Work to be Done.

Plaintiffs' Counsel was engaged in proving a complicated and complex Professional Negligence matter of medical malpractice, an area of law few practitioners of law engage in due to the complexity and stringent laws. In this case the legal work required retaining and questioning numerous experts and dealing with nuanced medical topics which not only increased the actual cost of litigating, but also consumed many hours of research and preparation. The nature of the work was time-consuming, complicated and difficult due to the nature of the area of law and medicine combined.

3. Work Actually Performed by the Lawyer.

Plaintiffs' Counsel engaged in multitudinous depositions, written discovery, and this work culminated in a three-week trial on the matter. Plaintiffs' Counsel worked extensively for the

entirety of trial and demonstrated substantial skill in the work performed. Coupled with the second factor, the character of the work, the work performed included long hours of trial and the long hours of preparation during the hours of the day while not in trial. Not only did the work require preparation for the substance of the trial, yet the numerous issues Defendants raised requiring many hearings outside the presence of the jury.

Albeit there are three attorneys on this matter, the substantive matter of the trial coupled with the many collateral issues required the presence and work of all in order to effectively try the case.

4. Result—whether the Attorney was Successful and what Benefits were Derived.

Plaintiffs were successful in their attempts before this Court. The jury returned a verdict of more than $13 million, and the Court Awarded a Judgment on the Verdict in favor of Plaintiffs and against Defendants in the amount of $6,367,805.52. Plaintiffs' Counsel was able to procure a highly favorable outcome for their clients.

Therefore, the Court found Attorneys' Fees in the amount of $821,468.66 are properly granted to Plaintiffs in this matter, pursuant to *Brunzell, Beattie, O'Connell*, NRCP 68, and NRS 7.095.

It is undisputed that Plaintiffs served an offer of judgment for $1,000,000 under NRCP 68 and that Defendants chose to let that offer expire. The offer was made several months after expert witness disclosures. It is undisputed that at the time of the offer Plaintiffs had already disclosed more than $4,000,000 in special damages. Moreover, Plaintiffs' experts had already outlined the breaches in the standard of care that the jury ultimately agreed were committed by Defendants. Ultimately, the Court finds that Defendants' decision to reject the offer was unreasonable. Under NRCP 68, attorney fees are properly awarded for Plaintiffs and against Defendants.

NRCP 68 (f) states: Penalties for Rejection of Offer

(1) In General. If the offeree rejects an offer and fails to obtain a more favorable judgment:

(A)the offeree cannot recover any costs, expenses, or attorney fees and may not recover interest for the period after the service of the offer and before the judgment; and

(B) the offeree must pay the offeror's post-offer costs and expenses, including a reasonable sum to cover any expenses incurred by the offeror for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney fees, if any be allowed, actually incurred by the offeror from the time of the offer.

Plaintiffs served an Offer of Judgment on June 5, 2019. Judgment in the amount of $6,367,805.52 was entered on November 14, 2019. Pursuant to NRCP 68(f)(1)(B) Defendants must pay applicable interest on the judgment from the time of the offer to the time of entry of the judgment in the amount of $202,269.96 (interest calculated at 5.50% prime plus 2% for a total of 7.5% from the date of the Offer of Judgment, June 5, 2019 to Entry of Judgment on November 14, 2019, for a total of 162 days = $1,248.58 per day) pursuant to NRS 17.130.

The Court then needs to analyze the attorney fees to be awarded. *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. Adv. Op. 7, 429 P. 3d 664 (Nev. App. 2018) demonstrates that attorney fees are appropriately awarded based on contingency fee agreements, which is the nature of the agreement between Plaintiffs and Counsel in this matter. Given the $6,565,830.84 judgment in this matter, Plaintiffs' attorney fees would be approximately $1,026,835.82 under the sliding scale of NRS 7.095. However, at the time of the offer of judgment in this matter, approximately twenty percent (20%) of the total attorney work had already been performed. As a result, the Court determined that the fee should be reduced by an additional 20% and that eighty percent (80%) of the projected contingent fee under the NRS 7.095 sliding scale, or $821,468.66, should be awarded. The Court further analyzed whether this number was unreasonable, given the hours likely expended by Plaintiffs' attorneys in this case multiplied by their reasonable billing rates. The Court determined that $821,468.66 was not unreasonable and was likely comparable to the amount that would be awarded had Plaintiffs' attorneys billed their time on an hourly basis. As NRS 7.095 already has a built-in reduction, and given the Court's decision to further reduce the fee to only the percentage of work done after the offer, no further reduction is warranted. Plaintiffs are awarded $821,468.66 in attorney fees.

Plaintiffs' Request for Additional Attorneys' Fees as a Sanction

The Court did find there was significant inappropriate conducted by Defendants and Defense Counsel. This misconduct was the basis of numerous hearings and was an ongoing problem during discovery and through the end of trial. The Court found this to be a substantive and compelling reason to consider striking Defendants' Answer and that the misconduct was certainly a proper basis to award substantial attorney fees to Plaintiffs and against Defendants. Sanctionable conduct in this case included, but is not limited to the following: (1) Defendants and their Counsel intentionally withholding evidence during discovery; (2) Defendants omitting relevant evidence that had been asked for regarding his medical malpractice history; (3) Defendant blurting out that Plaintiff's bills were paid through medical insurance to the jury; (4) Defendants' Counsel signing affidavits containing verifiably false information for procedural reasons prior to trial; (5) Defendants improperly filing numerous "offers of proof" after the close of evidence and without leave of the Court; and (6) Defendants violating Court orders during the course of trial on numerous occasions, including during the cross-examination of Dr. Michael Hurwitz. *See* NRCP 37; *Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 263 P.3d 224 (2011).

Nevertheless, the Court did not find it appropriate to award additional attorneys' fees above the $821,468.66 already awarded. However, the Court did find that independent of *Brunzell, Beattie, O'Connell*, NRCP 68 and NRS 7.095, $821,468.66 in attorney fees would be properly awarded to Plaintiffs as a sanction for inappropriate conduct by Defendants and Defense Counsel in this matter. Thus, the total award of $821,468.66 in Attorneys' Fees is granted, with these two independent grounds supporting the Court's finding for this award: (1) the analysis under *Brunzell, Beattie, O'Connell*, NRCP 68 and NRS 7.095 and (2) the misconduct of Defendants and their counsel.

THEREFORE, IT IS ORDERED that Plaintiffs' Request for Attorneys' Fees is GRANTED in the amount of Eight Hundred Twenty-One Thousand Four Hundred Sixty-Eight Dollars and Sixty-Six Cents ($821,468.66).

IT IS FURTHER ORDERED that Plaintiffs' Request for Costs and Defendants' Motion to Re-Tax such Costs is CONTINUED to February 11, 2020 at 9:30 a.m., for Supplemental Pleadings to be filed.

IT IS FURTHER ORDERED that the Supplemental Briefing Schedule SET as follows: Plaintiffs' Supplemental Opposition due January 21, 2020 and Defendants' Supplemental Reply due February 3, 2020.

Plaintiffs' Costs and Defendants' Motion to Re-Tax and Settle Plaintiffs' Costs

On November 19, 2019, Plaintiffs filed a Verified Memorandum of Costs and Disbursements in the total amount of $153,118.26. On November 22, 2019, Defendants filed a Motion to Re-Tax and Settle Plaintiffs' Costs. On January 21, 2020 Plaintiffs filed a Supplemental Verified Memorandum of Costs and Disbursements in the total amount of $153,118.26. On January 21, 2020, Plaintiffs filed a Supplemental Opposition to Defendants' Motion to Re-Tax and Settle Plaintiffs' Costs. On February 3, 2020 Defendants filed a Supplemental Reply to Plaintiffs' Opposition to Defendants' Motion to Re-Tax and Settle Plaintiffs' Costs. The matter having come on for hearing on February 11, 2020 at 9:30 a.m., the Court makes the following Findings of Facts and Conclusions of Law:

NRS 18.005(5) states, "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."

Plaintiffs' have submitted fees paid to experts as follows:

1.	Michael Hurwitz, M.D. (surgeon)	$ 11,000.00
2.	Justin Willer, M.D. (neurologist)	$ 17,245.00
3.	Alex Barchuck, M.D. (physical medicine and rehabilitaton)	$ 26,120.00
4.	Dawn Cook, R.N. (life care planning)	$ 23,960.03
5.	Alan Stein, M.D. (infectious diseases)	$ 19,710.00

6. Daniel Feingold, M.D. (surgeon) $ 2,000.00

7. Terence Clauretie, Ph.D. (economist) $ 3,500.00

The Court has analyzed the factors in *Frazier v Drake*, 131 Nev. 632 (2015) and has determined that the circumstances surrounding certain of the expert's testimony were necessary to require larger fees than $1,500.00 per expert. The Court is only considering the fees of experts Hurwitz, Willer, Barchuk, Cook, and Stein as NRS 18.005(5) limits recoverable expert fees to five experts. This was a medical malpractice case that took approximately three weeks to try. There were complex medical issues as to both the standard of care, proximate cause and damages that required medical expert review and testimony. Plaintiffs' experts Hurwitz, Willer, Barchuk, and Cook testified at trial. Plaintiffs' infectious disease expert Alan Stein, M.D. from New York was present in Las Vegas prepared to testify. Dr. Stein did not testify at the trial. The opinions of Plaintiffs' experts Hurwitz, Willer, Barchuk, Cook, and Stein aided the jury in deciding the case as each area of medical specialty in that each area of medical specialty was at issue during the trial. Plaintiffs' experts Hurwitz, Willer, Barchuk, Cook, and Stein were not repetitive of each other as they each addressed different medical issues and were of different specialties. The extent and nature of the work performed by the experts was of high quality. The various experts' education and training was significant and extensive. Experts Hurwitz, Willer, Barchuk, and Cook spent time preparing and testifying at trial. Experts Hurwitz, Willer, Barchuk, Cook, and Stein were also deposed in the case and prepared expert reports. The fees charged by these experts are similar to the experts in other malpractice cases in this venue. Dawn Cook was a local expert. Dr. Barchuk traveled from the Bay area. Dr. Willer and Dr. Stein traveled from the New York City area. Dr. Hurwitz traveled from Orange County, California. The fees charged by these experts are comparable to what a local expert would charge.

Pursuant to the factors in *Frazier v. Drake*, 131 Nev. 632, 650–51, 357 P.3d 365, 377–78 (Nev. App. 2015) the Court therefore awards the following expert fees:

Dr. Hurwitz: $ 11,000.00

Dr. Willer: $ 17,245.00

Dr. Barchuk: $ 26,120.00

Dawn Cook: $ 13,960.03

Dr. Stein: $ 1,500.00

Pursuant to the same *Frazier* factors, this Court does not find $19,710.00 for Plaintiffs' Expert Dr. Alan J. Stein is warranted, as Dr. Stein did not testify at trial in this matter and reduces the amount for Dr. Stein to $1,500.00. This Court further does not find that $23,960.03 for Plaintiffs' Expert Dawn Cook is warranted, as Ms. Cook billed for items that can be utilized in other life care plans and incorporated other number from other experts which Plaintiff was already charged for and, thus, not approving the double charging and reduces the amount for Ms. Cook to $13,960.03.

Pursuant to NRCP 68, Plaintiffs' request in the amount of $1,200.00 for the "Day In The Life Video," is not warranted, as Plaintiffs did not utilize this video during the trial in this matter.

As to Plaintiffs' request for costs for deposition testimony, the Court finds the video charge portion of these costs is not warranted, as the video portion of the deposition testimony was not utilized during the trial in this matter and, therefore, reduces said deposition testimony costs by $5,032.02.

Pursuant to *Cadle Co. v. Woods & Erickson, LLP*, 345 P.3d 1049 (2015) and *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352 (1998), Plaintiffs' remaining costs are warranted.

THEREFORE, IT IS ORDERED that Plaintiffs' Request for Attorneys' Fees is GRANTED in the amount of Eight Hundred Twenty-One Thousand Four Hundred Sixty-Eight Dollars and Sixty-Six Cents ($821,468.66).

IT IS FURTHER ORDERED that pursuant to NRCP 68(f)(1)(B), Defendants are to pay the applicable interest on the Judgment in the amount of $6,367,805.52 from the date of the Offer of Judgment on June 5, 2019 to entry of the Judgment on November 14, 2019 in the amount of $202,269.96;

IT IS FURTHER ORDERED that Plaintiffs' Request for Costs and Defendants' Motion to Retax Costs are each GRANTED IN PART AND DENIED IN PART.

IT IS FURTHER ORDERED that Plaintiffs' Costs request for Experts Dr. Michael Hurwitz, Dr. Justin Willer, Dr. Alex Barchuk, Dawn Cook, R.N. and Dr. Alan Stein are GRANTED in the total amount of $69,825.03.

IT IS FURTHER ORDERED that Plaintiffs' Costs request for Expert Dr. Alan J. Stein is reduced to $1,500.00.

IT IS FURTHER ORDERED that Plaintiffs' Costs request for Expert Dawn Cook is reduced to $13,960.03.

IT IS FURTHER ORDERED that Plaintiffs' Costs request for the "Day In The Life Video," in the amount of $1,200.00 is DENIED.

IT IS FURTHER ORDERED that Plaintiffs' Costs request for deposition testimony is reduced by $5,032.02.

IT IS FURTHER ORDERED that Plaintiffs' remaining Costs request in the amount of $44,851.21 is GRANTED.

IT IS FURTHER ORDERED that the total amount of Plaintiffs' Cost Award in this matter is $113,186.24.

THEREFORE, IT IS ORDERED that Plaintiffs' Costs are Re-Taxed in the amount of $113,186.24.

IT IS FURTHER ORDERED that interest on Plaintiffs' costs of $113,186.24 will accrue from November 14, 2019 (the date of entry of judgment) at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

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IT IS FURTHER ORDERED that interest on Plaintiffs' award of attorneys' fees of $821,468.66 will accrue from the date of entry of this order at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

DATED this 23 day of March, 2020.

JOANNA S. KISHNER
DISTRICT COURT JUDGE

Respectfully Submitted By:

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George F. Hand (8483)
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Approved as to Form and Content:

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

TITINA FARRIS and PATRICK FARRIS, Plaintiffs, vs. BARRY RIVES, M.D.; LAPAROSCOPIC SURGERY OF NEVADA LLC; DOES I-V, inclusive; and ROE CORPORATIONS I-V, inclusive, Defendants.	Case No.: A-16-739464-C Dept. No.: 31

NOTICE OF ENTRY OF ORDER ON PLAINTIFFS' MOTION FOR FEES AND COSTS AND DEFENDANTS' MOTION TO RE-TAX AND SETTLE PLAINTIFFS' COSTS

PLEASE TAKE NOTICE that an Order on Plaintiffs' Motion for Fees and Costs and Defendants' Motion to Re-Tax and Settle Plaintiffs' Costs heard on the 7th day of January, 2020 and on the 11th day of February, 2020 was entered in the above-entitled Court on the 30th day of March, 2020, a true and correct copy of which is attached hereto as Exhibit "A".

Case Number: A-16-739464-C

DATED the 31st day of March, 2020.

HAND & SULLIVAN, LLC

/s/ George F. Hand
George F. Hand, Esq.
Nevada State Bar No. 8483
3442 N. Buffalo Drive
Las Vegas, Nevada 89129
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I am employed in the County of Clark, State of Nevada. I am over the age of 18 and not a party to the within action. My business address is 3442 N. Buffalo Drive, Las Vegas, NV 89129.

On March 31, 2020, I served the within document(s) described as:

NOTICE OF ENTRY OF ORDER ON PLAINTIFFS' MOTION FOR FEES AND COSTS AND DEFENDANTS' MOTION TO RE-TAX AND SETTLE PLAINTIFFS' COSTS

on the interested parties in this action as stated on the below mailing list.

☐ (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed to Defendant's last-known address. I placed such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Las Vegas, Nevada. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ (BY ELECTRONIC SERVICE) By e-serving through Odyssey, pursuant to Administrative Order 14-2 mandatory electronic service, a true file stamped copy of the foregoing document(s) to the last known email address listed below of each Defendant which Plaintiff knows to be a valid email address for each Defendant.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Anna Grigoryan	*/s/ Anna Grigoryan*
(Type or print name)	(Signature)

Farris v. Rives, et al.

Court Case No.: A-16-739464-C

SERVICE LIST

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EXHIBIT "A"

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DISTRICT COURT

CLARK COUNTY, NEVADA

TITINA FARRIS and PATRICK FARRIS, Plaintiffs, vs. BARRY RIVES, M.D.; LAPAROSCOPIC SURGERY OF NEVADA LLC; DOES I-V, inclusive; and ROE CORPORATIONS I-V, inclusive, Defendants.	Case No.: A-16-739464-C Dept. No.: 31 **ORDER ON PLAINTIFFS' MOTION FOR FEES AND COSTS AND DEFENDANTS' MOTION TO RE-TAX AND SETTLE PLAINTIFFS' COSTS**

Plaintiffs' Motion for Fees and Costs having come on for hearing on the 7th day of January, 2020, at 10:00 a.m., KIMBALL JONES, ESQ., with the Law Offices of **BIGHORN LAW**, and GEORGE F. HAND, ESQ. with the Law Offices of **HAND & SULLIVAN, LLC**, appearing on behalf of Plaintiffs, and THOMAS J. DOYLE, ESQ., with the Law Offices of **SCHUERING ZIMMERMAN & DOYLE, LLP**, appearing on behalf of Defendants, and Defendants' Motion to

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Re-Tax and Settle Plaintiffs' Costs having come on for hearing on the 7th day of January, 2020, at 10:00 a.m. and February 11, 2020 at 9:30 a.m. with the Honorable Court having reviewed the pleadings and papers on file herein and with hearing the arguments of counsel:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs' Request for Attorneys' Fees

The Court finds that attorneys' fees are properly awarded to Plaintiffs in this matter for the reasons outlined in Plaintiffs' Motion, Reply, and supporting affidavits.

Under *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 955 P.2d 661 (1998), and *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), the Court considers the following factors in making an award of attorney fees to Plaintiffs based upon an offer of judgment: According to *Beattie*, the Court is required to consider: (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount. *Id.*, 99 Nev. at 588–589, 668 P.2d at 274.

Since Plaintiffs are the prevailing offerors, however, the analysis of the *Beattie* factors is reversed, such that the Court considers: (1) whether the defendant's claim or defense was brought in good faith; (2) whether the plaintiff's offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the defendant's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount. *See Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998).

With regard to the reasonableness of requested attorneys' fees, the Court considers the *Brunzell* factors: (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and

character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; and (4) the result: whether the attorney was successful and what benefits were derived. *See Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). If the record reflects that the court properly considered these factors, there is no abuse of discretion. *See Wynn v. Smith*, 117 Nev. 6, 13,16 P.3d 424, 428–429 (2001); *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983). Further, the Court retains the right to determine a reasonable amount of attorneys' fees. *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864–865, 124 P.3d 530, 548–549 (2005).

Beattie/Yahama Factors

1. Whether the Defendants' Defenses Were Brought in Good Faith.

Defendants' defenses, and refusal to pay the Offer of Judgment, were not brought in good faith based on the facts of this case. It was known by Defendants before the trial commenced and at the time of the NRS 41A.081 settlement conference that there were serious issues ~~with the~~ Regarding credibility ~~of counsel and Defendant Rives~~ including positions taken under oath and their knowledge concerning the *Center v. Rives* case. In fact, before the trial commenced, there were pending NRCP 37 motions before this Court. Despite the demonstrated misconduct by Defendants in discovery and depositions, Defendants still elected to risk going to trial. In fact, ~~it was a possibility that~~ there was a pending issue of terminating sanctions ~~may issue~~, based on the aforementioned conduct by Defendants. Moreover, given Defendants' (and Counsel's) knowledge of this misconduct, ~~they were also obliged to~~ as provided through evidence to the Court, Defendants Could consider and calculate the impact of the discovery and likely consequences of their misconduct.

Further, there were serious problems with Defendants' expert opinions. The defense liability expert, Dr. Brian Juell, opined at trial that the use of a LigaSure was relatively contraindicated and that it should not be used in the setting of the subject surgery if there was any other alternative, such as cold scissors. Then, it was established that Defendant Rives actually had cold scissors, but used the LigaSure anyway. The defense should have been aware of this weakness in their own case when they rejected Plaintiffs' offer.

Defendants also tried to put forth a defense that the sepsis of Plaintiff Titina Farris originated from "pulmonary aspiration syndrome." This defense was put forward, despite no other physician, treating Titina Farris during her hospitalization, ever diagnosing her with this condition. This ~~spurious~~ defense was clearly attempted to misdirect attention from Defendant Rives' failure to treat the sepsis originating from the holes in the bowel that he caused and failed to adequately ~~repair~~. Dr. Juell still tried to put forth this theory before the jury, even though it was shown at trial that he opined in his expert reports differently including that Titina Farris had pulmonary aspiration syndrome without first reviewing the relevant films. Thus, this first *Beattie* factor weighs in Plaintiffs' favor.

2. Whether the Plaintiffs' Offer of Judgment Was Reasonable and in Good Faith in Both Its Timing and Amount.

Plaintiffs' Offer of Judgment was reasonable and was in good faith in timing and amount, and Defendants' decision to reject the offer was grossly unreasonable. Plaintiffs served their offer of judgment for $1,000,000 on June 5, 2019. At the time, expert reports had been exchanged, key witnesses were deposed, and medical records had been exchanged. Thus, Defendants were aware of all the supporting information for Plaintiffs' Offer of Judgment, including Plaintiffs' injuries, related medical specials, and pain and suffering. The amount of Plaintiffs' Offer of Judgment was less than Plaintiffs' disclosed past medical expenses which was an additional factor showing it was ~~and was, therefore,~~ reasonable and in good faith. This second *Beattie* factor weighs in Plaintiffs' favor.

3. Whether the Defendants' Decision to Reject the Offer and Proceed to Trial Was Grossly Unreasonable or in Bad Faith.

In light of the severity of Plaintiffs' injuries and damages, as well as a very strong case of liability, presented at the time of their Offer of Judgment, it was grossly unreasonable and in bad faith for Defendants to reject the $1,000,000 offer and proceed to trial. At the time of Plaintiffs' Offer of Judgment, they had already disclosed over $4,000,000 in special damages. ~~Defendants simply undervalued this case, as evidenced by their zero offer of judgment.~~ The Court weighs this third *Beattie* factor in favor of Plaintiffs, despite Defendants' argument that its experts had differing opinions.

Defendants' were aware of the weakness and inconsistent positions of their expert at the time of the Offer.

4. Whether the Fees Sought by the Offeror are Reasonable and Justified in Amount.

The amount of attorney's fees requested by Plaintiffs are reasonable and justified in amount based on the outcome at trial. Plaintiffs contracted to pay an attorney's fees in the amount of 40% of the gross recovery. That amount totals $2,547,122.21 (40% of $6,367,805.52). Even if attorneys' fees are calculated under NRS 7.095 on $6,367,805.52, that amount is $1,026,835.83. Although the Court of Appeals has approved a determination of attorney fees based upon a contingency fee agreement, this Court determines that NRS 7.095 is controlling in this matter. *See O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. Adv. Op. 7, 429 P.3d 664, 671–672 (Nev. App. 2018). Thus, the Court awards Plaintiffs the sum of $821,468.66 in attorney fees, as further elaborated based upon the *Brunzell* factors.

***Brunzell* Factors**

1. Qualities of the Advocates.

Mr. Jones is a managing partner with the Law Offices of BIGHORN LAW. He graduated Magna Cum Laude from Brigham Young University-Idaho in 2005 and graduated as the top student in economics that year. He graduated from Brigham Young University in 2008 and was awarded a Dean's Scholarship for academic merit all three years of law school. Mr. Jones was first admitted to practice law in Nevada in 2013, scoring in the 98th percentile nationally on the MBE. He has also passed the Idaho Bar Exam. Mr. Jones has prevailed in more than 95 percent of the arbitrations and trials he has litigated. Further, he has recovered more than $30,000,000 for clients through judgments and settlements in the last six years. Mr. Jones' usual and customary fee on an hourly basis is $500.00 an hour, which is at or below average for attorneys of his skill and experience who handle similar matters in Clark County, Nevada.

Likewise, Mr. Leavitt is a partner with Bighorn Law. He has been licensed to practice law since 2012, ~~and has a~~ billing rate of $500.00 per hour, a rate at or below average for attorneys of his skill and experience who handle similar matters in Clark County, Nevada. Mr. Leavitt graduated Cum Laude from the University of Las Vegas, Nevada in 2004. He attended Cooley Law School

on scholarship and graduated in the top 13% of his class. Mr. Leavitt completed an externship under retired Nevada Supreme Court Justice Michael Cherry and is admitted to practice in the Ninth Circuit Court of Appeals. Mr. Leavitt has conducted numerous trials and administrative proceedings.

Mr. Hand is a partner of Hand & Sullivan, LLC. He is licensed to practice law in Nevada and New York. He has been licensed to practice law in Nevada for sixteen years. Prior to that, he was licensed as an attorney in New York where he practiced in areas of personal injury, medical malpractice, and insurance defense litigation. He has conducted more than 125 jury and bench trials. Mr. Hand also served as a Deputy County Attorney for Nassau County, New York. Mr. Hand's billing rate is $500.00 per hour and he too asserted that it is at or below average for attorneys of his skill and experience who handle similar matters in Clark County, Nevada.

Additionally, the Court found this factor to be considered by the Court and was not contested by Defendants in written opposition or in argument.

Therefore, the qualities of the advocates who performed work in this matter are proven. Further, the market rate of $500.00 per hour is appropriate under *Marrocco v. Hill*, 291 F.R.D. 586 (D. Nev. 2013), for this type of case. give the was no objection to the rate and the award was pursuant to NRS 7.095 could be

2. Character of the Work to be Done.

Plaintiffs' Counsel was engaged in proving a complicated and complex Professional Negligence matter of medical malpractice, an area of law few practitioners of law engage in due to the complexity and stringent laws. In this case the legal work required retaining and questioning numerous experts and dealing with nuanced medical topics which not only increased the actual cost of litigating, but also consumed many hours of research and preparation. The nature of the work was time-consuming, complicated and difficult due to the nature of the area of law and medicine combined.

3. Work Actually Performed by the Lawyer.

Plaintiffs' Counsel engaged in multitudinous depositions, written discovery, and this work culminated in a three-week trial on the matter. Plaintiffs' Counsel worked extensively for the

entirety of trial and demonstrated substantial skill in the work performed. Coupled with the second factor, the character of the work, the work performed included long hours of trial and the long hours of preparation during the hours of the day while not in trial. Not only did the work require preparation for the substance of the trial, yet the numerous issues Defendants raised requiring many hearings outside the presence of the jury.

Albeit there are three attorneys on this matter, the substantive matter of the trial coupled with the many collateral issues required the presence and work of all in order to effectively try the case.

4. Result—whether the Attorney was Successful and what Benefits were Derived.

Plaintiffs were successful in their attempts before this Court. The jury returned a verdict of more than $13 million, and the Court Awarded a Judgment on the Verdict in favor of Plaintiffs and against Defendants in the amount of $6,367,805.52. Plaintiffs' Counsel was able to procure a highly favorable outcome for their clients.

Therefore, the Court found Attorneys' Fees in the amount of $821,468.66 are properly granted to Plaintiffs in this matter, pursuant to *Brunzell, Beattie, O'Connell*, NRCP 68, and NRS 7.095.

It is undisputed that Plaintiffs served an offer of judgment for $1,000,000 under NRCP 68 and that Defendants chose to let that offer expire. The offer was made several months after expert witness disclosures. It is undisputed that at the time of the offer Plaintiffs had already disclosed more than $4,000,000 in special damages. Moreover, Plaintiffs' experts had already outlined the breaches in the standard of care that the jury ultimately agreed were committed by Defendants. Ultimately, the Court finds that Defendants' decision to reject the offer was unreasonable. Under NRCP 68, attorney fees are properly awarded for Plaintiffs and against Defendants.

NRCP 68 (f) states: Penalties for Rejection of Offer

(1) In General. If the offeree rejects an offer and fails to obtain a more favorable judgment:

(A)the offeree cannot recover any costs, expenses, or attorney fees and may not recover interest for the period after the service of the offer and before the judgment; and

(B) the offeree must pay the offeror's post-offer costs and expenses, including a reasonable sum to cover any expenses incurred by the offeror for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney fees, if any be allowed, actually incurred by the offeror from the time of the offer.

Plaintiffs served an Offer of Judgment on June 5, 2019. Judgment in the amount of $6,367,805.52 was entered on November 14, 2019. Pursuant to NRCP 68(f)(1)(B) Defendants must pay applicable interest on the judgment from the time of the offer to the time of entry of the judgment in the amount of $202,269.96 (interest calculated at 5.50% prime plus 2% for a total of 7.5% from the date of the Offer of Judgment, June 5, 2019 to Entry of Judgment on November 14, 2019, for a total of 162 days = $1,248.58 per day) pursuant to NRS 17.130.

The Court then needs to analyze the attorney fees to be awarded. *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. Adv. Op. 7, 429 P. 3d 664 (Nev. App. 2018) demonstrates that attorney fees are appropriately awarded based on contingency fee agreements, which is the nature of the agreement between Plaintiffs and Counsel in this matter. Given the $6,565,830.84 judgment in this matter, Plaintiffs' attorney fees would be approximately $1,026,835.82 under the sliding scale of NRS 7.095. However, at the time of the offer of judgment in this matter, approximately twenty percent (20%) of the total attorney work had already been performed. As a result, the Court determined that the fee should be reduced by an additional 20% and that eighty percent (80%) of the projected contingent fee under the NRS 7.095 sliding scale, or $821,468.66, should be awarded. The Court further analyzed whether this number was unreasonable, given the hours likely expended by Plaintiffs' attorneys in this case multiplied by their reasonable billing rates. The Court determined that $821,468.66 was not unreasonable and was likely comparable to the amount that would be awarded had Plaintiffs' attorneys billed their time on an hourly basis. As NRS 7.095 already has a built-in reduction, and given the Court's decision to further reduce the fee to only the percentage of work done after the offer, no further reduction is warranted. Plaintiffs are awarded $821,468.66 in attorney fees.

Plaintiffs' Request for Additional Attorneys' Fees as a Sanction

The Court did find there was significant inappropriate conducted by Defendants and Defense Counsel. This misconduct was the basis of numerous hearings and was an ongoing problem during discovery and through the end of trial. The Court found this to be a substantive and compelling reason to consider striking Defendants' Answer and that the misconduct was certainly a proper basis to award substantial attorney fees to Plaintiffs and against Defendants. Sanctionable conduct in this case included, but is not limited to the following: (1) Defendants and their Counsel intentionally withholding evidence during discovery; (2) Defendants omitting relevant evidence that had been asked for regarding his medical malpractice history; (3) Defendant blurting out that Plaintiff's bills were paid through medical insurance to the jury; (4) Defendants' Counsel signing affidavits containing verifiably false information for procedural reasons prior to trial; (5) Defendants improperly filing numerous "offers of proof" after the close of evidence and without leave of the Court; and (6) Defendants violating Court orders during the course of trial on numerous occasions, including during the cross-examination of Dr. Michael Hurwitz. *See* NRCP 37; *Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 263 P.3d 224 (2011).

Nevertheless, the Court did not find it appropriate to award additional attorneys' fees above the $821,468.66 already awarded. However, the Court did find that independent of *Brunzell, Beattie, O'Connell*, NRCP 68 and NRS 7.095, $821,468.66 in attorney fees would be properly awarded to Plaintiffs as a sanction for inappropriate conduct by Defendants and Defense Counsel in this matter. Thus, the total award of $821,468.66 in Attorneys' Fees is granted, with these two independent grounds supporting the Court's finding for this award: (1) the analysis under *Brunzell, Beattie, O'Connell*, NRCP 68 and NRS 7.095 and (2) the misconduct of Defendants and their counsel.

THEREFORE, IT IS ORDERED that Plaintiffs' Request for Attorneys' Fees is GRANTED in the amount of Eight Hundred Twenty-One Thousand Four Hundred Sixty-Eight Dollars and Sixty-Six Cents ($821,468.66).

IT IS FURTHER ORDERED that Plaintiffs' Request for Costs and Defendants' Motion to Re-Tax such Costs is CONTINUED to February 11, 2020 at 9:30 a.m., for Supplemental Pleadings to be filed.

IT IS FURTHER ORDERED that the Supplemental Briefing Schedule SET as follows: Plaintiffs' Supplemental Opposition due January 21, 2020 and Defendants' Supplemental Reply due February 3, 2020.

Plaintiffs' Costs and Defendants' Motion to Re-Tax and Settle Plaintiffs' Costs

On November 19, 2019, Plaintiffs filed a Verified Memorandum of Costs and Disbursements in the total amount of $153,118.26. On November 22, 2019, Defendants filed a Motion to Re-Tax and Settle Plaintiffs' Costs. On January 21, 2020 Plaintiffs filed a Supplemental Verified Memorandum of Costs and Disbursements in the total amount of $153,118.26. On January 21, 2020, Plaintiffs filed a Supplemental Opposition to Defendants' Motion to Re-Tax and Settle Plaintiffs' Costs. On February 3, 2020 Defendants filed a Supplemental Reply to Plaintiffs' Opposition to Defendants' Motion to Re-Tax and Settle Plaintiffs' Costs. The matter having come on for hearing on February 11, 2020 at 9:30 a.m., the Court makes the following Findings of Facts and Conclusions of Law:

NRS 18.005(5) states, "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."

Plaintiffs' have submitted fees paid to experts as follows:

1.	Michael Hurwitz, M.D. (surgeon)	$ 11,000.00
2.	Justin Willer, M.D. (neurologist)	$ 17,245.00
3.	Alex Barchuck, M.D. (physical medicine and rehabilitaton)	$ 26,120.00
4.	Dawn Cook, R.N. (life care planning)	$ 23,960.03
5.	Alan Stein, M.D. (infectious diseases)	$ 19,710.00

6. Daniel Feingold, M.D. (surgeon) $ 2,000.00

7. Terence Clauretie, Ph.D. (economist) $ 3,500.00

The Court has analyzed the factors in *Frazier v Drake*, 131 Nev. 632 (2015) and has determined that the circumstances surrounding certain of the expert's testimony were necessary to require larger fees than $1,500.00 per expert. The Court is only considering the fees of experts Hurwitz, Willer, Barchuk, Cook, and Stein as NRS 18.005(5) limits recoverable expert fees to five experts. This was a medical malpractice case that took approximately three weeks to try. There were complex medical issues as to both the standard of care, proximate cause and damages that required medical expert review and testimony. Plaintiffs' experts Hurwitz, Willer, Barchuk, and Cook testified at trial. Plaintiffs' infectious disease expert Alan Stein, M.D. from New York was present in Las Vegas prepared to testify. Dr. Stein did not testify at the trial. The opinions of Plaintiffs' experts Hurwitz, Willer, Barchuk, Cook, and Stein aided the jury in deciding the case as each area of medical specialty in that each area of medical specialty was at issue during the trial. Plaintiffs' experts Hurwitz, Willer, Barchuk, Cook, and Stein were not repetitive of each other as they each addressed different medical issues and were of different specialties. The extent and nature of the work performed by the experts was of high quality. The various experts' education and training was significant and extensive. Experts Hurwitz, Willer, Barchuk, and Cook spent time preparing and testifying at trial. Experts Hurwitz, Willer, Barchuk, Cook, and Stein were also deposed in the case and prepared expert reports. The fees charged by these experts are similar to the experts in other malpractice cases in this venue. Dawn Cook was a local expert. Dr. Barchuk traveled from the Bay area. Dr. Willer and Dr. Stein traveled from the New York City area. Dr. Hurwitz traveled from Orange County, California. The fees charged by these experts are comparable to what a local expert would charge.

Pursuant to the factors in *Frazier v. Drake*, 131 Nev. 632, 650–51, 357 P.3d 365, 377–78 (Nev. App. 2015) the Court therefore awards the following expert fees:

Dr. Hurwitz: $ 11,000.00

Dr. Willer: $ 17,245.00

Dr. Barchuk: $ 26,120.00

Dawn Cook: $ 13,960.03

Dr. Stein: $ 1,500.00

Pursuant to the same *Frazier* factors, this Court does not find $19,710.00 for Plaintiffs' Expert Dr. Alan J. Stein is warranted, as Dr. Stein did not testify at trial in this matter and reduces the amount for Dr. Stein to $1,500.00. This Court further does not find that $23,960.03 for Plaintiffs' Expert Dawn Cook is warranted, as Ms. Cook billed for items that can be utilized in other life care plans and incorporated other number from other experts which Plaintiff was already charged for and, thus, not approving the double charging and reduces the amount for Ms. Cook to $13,960.03.

Pursuant to NRCP 68, Plaintiffs' request in the amount of $1,200.00 for the "Day In The Life Video," is not warranted, as Plaintiffs did not utilize this video during the trial in this matter.

As to Plaintiffs' request for costs for deposition testimony, the Court finds the video charge portion of these costs is not warranted, as the video portion of the deposition testimony was not utilized during the trial in this matter and, therefore, reduces said deposition testimony costs by $5,032.02.

Pursuant to *Cadle Co. v. Woods & Erickson, LLP*, 345 P.3d 1049 (2015) and *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352 (1998), Plaintiffs' remaining costs are warranted.

THEREFORE, IT IS ORDERED that Plaintiffs' Request for Attorneys' Fees is GRANTED in the amount of Eight Hundred Twenty-One Thousand Four Hundred Sixty-Eight Dollars and Sixty-Six Cents ($821,468.66).

IT IS FURTHER ORDERED that pursuant to NRCP 68(f)(1)(B), Defendants are to pay the applicable interest on the Judgment in the amount of $6,367,805.52 from the date of the Offer of Judgment on June 5, 2019 to entry of the Judgment on November 14, 2019 in the amount of $202,269.96;

IT IS FURTHER ORDERED that Plaintiffs' Request for Costs and Defendants' Motion to Retax Costs are each GRANTED IN PART AND DENIED IN PART.

IT IS FURTHER ORDERED that Plaintiffs' Costs request for Experts Dr. Michael Hurwitz, Dr. Justin Willer, Dr. Alex Barchuk, Dawn Cook, R.N. and Dr. Alan Stein are GRANTED in the total amount of $69,825.03.

IT IS FURTHER ORDERED that Plaintiffs' Costs request for Expert Dr. Alan J. Stein is reduced to $1,500.00.

IT IS FURTHER ORDERED that Plaintiffs' Costs request for Expert Dawn Cook is reduced to $13,960.03.

IT IS FURTHER ORDERED that Plaintiffs' Costs request for the "Day In The Life Video," in the amount of $1,200.00 is DENIED.

IT IS FURTHER ORDERED that Plaintiffs' Costs request for deposition testimony is reduced by $5,032.02.

IT IS FURTHER ORDERED that Plaintiffs' remaining Costs request in the amount of $44,851.21 is GRANTED.

IT IS FURTHER ORDERED that the total amount of Plaintiffs' Cost Award in this matter is $113,186.24.

THEREFORE, IT IS ORDERED that Plaintiffs' Costs are Re-Taxed in the amount of $113,186.24.

IT IS FURTHER ORDERED that interest on Plaintiffs' costs of $113,186.24 will accrue from November 14, 2019 (the date of entry of judgment) at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

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IT IS FURTHER ORDERED that interest on Plaintiffs' award of attorneys' fees of $821,468.66 will accrue from the date of entry of this order at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

DATED this 23 day of March, 2020.

JOANNA S. KISHNER
DISTRICT COURT JUDGE

Respectfully Submitted By:

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JACOB G. LEAVITT, ESQ.
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Attorneys for Plaintiffs

Approved as to Form and Content:

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Attorneys for Defendants

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Attorneys for Defendants BARRY RIVES, M.D. and LAPAROSCOPIC SURGERY OF NEVADA, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

TITINA FARRIS and PATRICK FARRIS, Plaintiffs, vs. BARRY RIVES, M.D.; LAPAROSCOPIC SURGERY OF NEVADA, LLC, et al., Defendants.	CASE NO. A-16-739464-C DEPT. NO. 31 SUPPLEMENTAL AND/OR AMENDED NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Defendants Barry J. Rives, M.D. and Laparoscopic Surgery of Nevada, LLC appeal to the Nevada Supreme Court from the Judgment on Verdict, entered on November 14, 2019 (Exhibit 1), from the Order on Plaintiffs' Motion for Fees and Costs and Defendants' Motion to Retax and Settle Plaintiffs' Costs, entered

Case Number: A-16-739464-C

on March 30, 2020 (Exhibit 2), and from all other orders made final and appealable by the foregoing.

This notice is intended to supplement and/or amend the appeal already on file in this case, presently docketed in the Nevada Supreme Court as No. 80271.

Dated: April 13, 2020

SCHUERING ZIMMERMAN & DOYLE, LLP

By */s/ Thomas J. Doyle*

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Attorneys for Defendants BARRY RIVES, M.D. and LAPAROSCOPIC SURGERY OF NEVADA, LLC

EXHIBIT 1

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TITINA FARRIS and PATRICK FARRIS

DISTRICT COURT

CLARK COUNTY, NEVADA

TITINA FARRIS and PATRICK FARRIS, Plaintiffs, vs. BARRY RIVES, M.D., LAPAROSCOPIC SURGERY OF NEVADA LLC; DOES I-V, inclusive; and ROE CORPORATIONS I-V, inclusive, Defendants.	Case No.: A-16-739464-C Dept. No.: 31 **JUDGMENT ON VERDICT**

The above-entitled matter having come on for trial by jury on October 14, 2019, before the Honorable Joanna S. Kishner, District Court Judge, presiding. Plaintiffs TITINA FARRIS and PATRICK FARRIS ("Plaintiffs"), appeared in person with their counsel of record, KIMBALL JONES, ESQ. and JACOB LEAVITT, ESQ., of the law firm of Bighorn Law, and GEORGE HAND, ESQ., of the law firm of Hand & Sullivan, LLC. Defendants BARRY J. RIVES, M.D. and LAPARASCOPIC SURGERY OF NEVADA, LLC ("Defendants") appeared by and through their counsel of record, THOMAS DOYLE, ESQ., of the law firm of Schuering, Zimmerman & Doyle,

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Case Number: A-16-739464-C

LLP.

Testimony was taken, evidence was offered, introduced and admitted. Counsel argued the merits of their cases. The jury rendered a verdict in favor of Plaintiffs and against the Defendants as to claims concerning medical malpractice in the following amounts:

1. $1,063,006.94 for TITINA FARRIS' past medical and related expenses;
2. $4,663,473.00 for TITINA FARRIS' future medical and related expenses;
3. $1,571,000.00 for TITINA FARRIS' past physical and mental pain, suffering, anguish, disability and loss of enjoyment of life;
4. $4,786,000.00 for TITINA FARRIS' future physical and mental pain, suffering, anguish, disability and loss of enjoyment of life;
5. $821,000.00 for PATRICK' past loss of companionship, society, comfort and consortium; and
6. $736,000.00 for PATRICK' future loss of companionship, society, comfort and consortium.

The Defendants requested that the jury be polled, and the Court found that seven (7) out of the eight (8) jurors were in agreement with the verdict.

NOW, THEREFORE, judgment upon the verdict is hereby entered in favor of the Plaintiffs and against the Defendants as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs shall have and recover against Defendants non-economic damages of $350,000.00 pursuant to NRS 41A.035, economic damages of $5,726,479.94, and the pre-judgment interest of $291,325.58, calculated as follows:

1. $1,063,006.94 for TITINA FARRIS' past medical and related expenses, plus prejudgment interest in the amount of $258,402.69 (interest calculated at 5.50% prime plus 2% for a total of 7.50% from date of service August 16, 2016 to November 12, 2019, for a total of 1,183 days = $218.43 per day) pursuant to NRS 17.130 for a total judgment of $1,321,409.63; with daily post-judgment interest accruing at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied;

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2. $4,663,473.00 for TITINA FARRIS' future medical and related expenses, plus post-judgment interest accruing at $958.25 per day (interest calculated at 5.50% prime plus 2% for a total of 7.50%) pursuant to NRS 17.130 from the time of entry of the judgment with daily post-judgment interest accruing at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied;

3. $43,225.00 for TITINA FARRIS' past physical and mental pain, suffering, anguish, disability and loss of enjoyment of life, plus prejudgment interest in the amount of $10,505.04 (interest calculated at 5.50% prime plus 2% for a total of 7.50% from date of service August 16, 2016 to November 12, 2019, for a total of 1,183 days = $8.88 per day) pursuant to NRS 17.130 for a total judgment of $53,730.04; with daily post-judgment interest accruing at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied;

4. $131,775.00 for TITINA FARRIS' future physical and mental pain, suffering, anguish, disability and loss of enjoyment of life, plus post-judgment interest accruing at $27.07 per day (interest calculated at 5.50% prime plus 2% for a total of 7.50%) pursuant to NRS 17.130 from the time of entry of the judgment with daily post-judgment interest accruing at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied;

5. $92,225.00 for PATRICK FARRIS' past loss of companionship, society, comfort and consortium, plus prejudgment interest in the amount of $22,417.85 (interest calculated at 5.50% prime plus 2% for a total of 7.50% from date of service August 16, 2016 to November 12, 2019, for a total of 1,183 days = $18.95 per day) pursuant to NRS 17.130 for a total judgment of $114,642.85; with daily post-judgment interest accruing at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied; and

6. $82,775.00 for PATRICK FARRIS' future loss of companionship, society, comfort and consortium, plus post-judgment interest accruing at $17.00 per day (interest calculated at 5.50% prime plus 2% for a total of 7.50%) pursuant to NRS 17.130 from the time of entry of the judgment with daily post-judgment interest accruing at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

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IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs TITINA FARRIS and PATRICK FARRIS has judgment against Defendants BARRY RIVES, M.D. and LAPAROSCOPIC SURGERY OF NEVADA LLC as follows:

Principal	$	6,076,479.94
Pre-Judgment Interest	$	291,325.58 (1,183 days @ 7.50%)
TOTAL JUDGMENT of:	**$**	**6,367,805.52**

Pursuant to NRS 17.130, the judgment shall continue to accrue daily post-judgment interest at $1,248.58 per day (interest calculated at 5.50% prime plus 2% for a total of 7.50%); daily post-judgment interest shall accrue at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

SO ORDERED this 12 day of November, 2019.

JOANNA S. KISHNER

HONORABLE JOANNA S. KISHNER
District Court Judge

Respectfully Submitted by:

Dated this 11th day of November, 2019.

BIGHORN LAW

By: George F. Hand (8483)
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Attorneys for Plaintiffs

Approved as to form and content:

Dated this 11th day of November, 2019.

SCHUERING ZIMMERMAN & DOYLE, LLP

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EXHIBIT 2

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DISTRICT COURT

CLARK COUNTY, NEVADA

TITINA FARRIS and PATRICK FARRIS, Plaintiffs, vs. BARRY RIVES, M.D.; LAPAROSCOPIC SURGERY OF NEVADA LLC; DOES I-V, inclusive; and ROE CORPORATIONS I-V, inclusive, Defendants.	Case No.: A-16-739464-C Dept. No.: 31 **ORDER ON PLAINTIFFS' MOTION FOR FEES AND COSTS AND DEFENDANTS' MOTION TO RE-TAX AND SETTLE PLAINTIFFS' COSTS**

Plaintiffs' Motion for Fees and Costs having come on for hearing on the 7th day of January, 2020, at 10:00 a.m., KIMBALL JONES, ESQ., with the Law Offices of **BIGHORN LAW**, and GEORGE F. HAND, ESQ. with the Law Offices of **HAND & SULLIVAN, LLC**, appearing on behalf of Plaintiffs, and THOMAS J. DOYLE, ESQ., with the Law Offices of **SCHUERING ZIMMERMAN & DOYLE, LLP**, appearing on behalf of Defendants, and Defendants' Motion to

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Case Number: A-16-739464-C

Re-Tax and Settle Plaintiffs' Costs having come on for hearing on the 7th day of January, 2020, at 10:00 a.m. and February 11, 2020 at 9:30 a.m. with the Honorable Court having reviewed the pleadings and papers on file herein and with hearing the arguments of counsel:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs' Request for Attorneys' Fees

The Court finds that attorneys' fees are properly awarded to Plaintiffs in this matter for the reasons outlined in Plaintiffs' Motion, Reply, and supporting affidavits.

Under *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 955 P.2d 661 (1998), and *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), the Court considers the following factors in making an award of attorney fees to Plaintiffs based upon an offer of judgment: According to *Beattie*, the Court is required to consider: (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount. *Id.*, 99 Nev. at 588–589, 668 P.2d at 274.

Since Plaintiffs are the prevailing offerors, however, the analysis of the *Beattie* factors is reversed, such that the Court considers: (1) whether the defendant's claim or defense was brought in good faith; (2) whether the plaintiff's offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the defendant's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount. *See Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998).

With regard to the reasonableness of requested attorneys' fees, the Court considers the *Brunzell* factors: (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and

character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; and (4) the result: whether the attorney was successful and what benefits were derived. *See Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). If the record reflects that the court properly considered these factors, there is no abuse of discretion. *See Wynn v. Smith*, 117 Nev. 6, 13,16 P.3d 424, 428–429 (2001); *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983). Further, the Court retains the right to determine a reasonable amount of attorneys' fees. *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864–865, 124 P.3d 530, 548–549 (2005).

Beattie/Yahama Factors

1. Whether the Defendants' Defenses Were Brought in Good Faith.

Defendants' defenses, and refusal to pay the Offer of Judgment, were not brought in good faith based on the facts of this case. It was known by Defendants before the trial commenced and at the time of the NRS 41A.081 settlement conference that there were serious issues with the credibility of ~~counsel and Defendant Rives~~ concerning the *Center v. Rives* case. In fact, before the trial commenced, there were pending NRCP 37 motions before this Court. Despite the demonstrated misconduct by Defendants in discovery and depositions, Defendants still elected to risk going to trial. In fact, ~~it was a possibility that~~ terminating sanctions ~~may issue~~, based on the aforementioned conduct by Defendants. Moreover, given Defendants' (and Counsel's) knowledge of this misconduct, ~~they were also obliged to~~ consider and calculate the impact of the discovery and likely consequences of their misconduct.

Further, there were serious problems with Defendants' expert opinions. The defense liability expert, Dr. Brian Juell, opined at trial that the use of a LigaSure was relatively contraindicated and that it should not be used in the setting of the subject surgery if there was any other alternative, such as cold scissors. Then, it was established that Defendant Rives actually had cold scissors, but used the LigaSure anyway. The defense should have been aware of this weakness in their own case when they rejected Plaintiffs' offer.

Defendants also tried to put forth a defense that the sepsis of Plaintiff Titina Farris originated from "pulmonary aspiration syndrome." This defense was put forward, despite no other physician, treating Titina Farris during her hospitalization, ever diagnosing her with this condition. This ~~spurious~~ defense was clearly attempted to misdirect attention from Defendant Rives' failure to treat the sepsis originating from the holes in the bowel that he caused and failed to adequately ~~repair~~. Dr. Juell still tried to put forth this theory before the jury, even though it was shown at trial that he opined in his expert reports that Titina Farris had pulmonary aspiration syndrome without first reviewing the relevant films. Thus, this first *Beattie* factor weighs in Plaintiffs' favor.

2. Whether the Plaintiffs' Offer of Judgment Was Reasonable and in Good Faith in Both Its Timing and Amount.

Plaintiffs' Offer of Judgment was reasonable and was in good faith in timing and amount, and Defendants' decision to reject the offer was grossly unreasonable. Plaintiffs served their offer of judgment for $1,000,000 on June 5, 2019. At the time, expert reports had been exchanged, key witnesses were deposed, and medical records had been exchanged. Thus, Defendants were aware of all the supporting information for Plaintiffs' Offer of Judgment, including Plaintiffs' injuries, related medical specials, and pain and suffering. The amount of Plaintiffs' Offer of Judgment was less than Plaintiffs' disclosed past medical expenses ~~and was, therefore,~~ reasonable and in good faith. This second *Beattie* factor weighs in Plaintiffs' favor.

3. Whether the Defendants' Decision to Reject the Offer and Proceed to Trial Was Grossly Unreasonable or in Bad Faith.

In light of the severity of Plaintiffs' injuries and damages, as well as a very strong case of liability, presented at the time of their Offer of Judgment, it was grossly unreasonable and in bad faith for Defendants to reject the $1,000,000 offer and proceed to trial. At the time of Plaintiffs' Offer of Judgment, they had already disclosed over $4,000,000 in special damages. ~~Defendants simply undervalued this case, as evidenced by their zero offer of judgment.~~ The Court weighs this third *Beattie* factor in favor of Plaintiffs, despite Defendants' argument that its experts had differing opinions.

4. **Whether the Fees Sought by the Offeror are Reasonable and Justified in Amount.**

The amount of attorney's fees requested by Plaintiffs are reasonable and justified in amount based on the outcome at trial. Plaintiffs contracted to pay an attorney's fees in the amount of 40% of the gross recovery. That amount totals $2,547,122.21 (40% of $6,367,805.52). Even if attorneys' fees are calculated under NRS 7.095 on $6,367,805.52, that amount is $1,026,835.83. Although the Court of Appeals has approved a determination of attorney fees based upon a contingency fee agreement, this Court determines that NRS 7.095 is controlling in this matter. *See O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. Adv. Op. 7, 429 P.3d 664, 671–672 (Nev. App. 2018). Thus, the Court awards Plaintiffs the sum of $821,468.66 in attorney fees, as further elaborated based upon the *Brunzell* factors.

***Brunzell* Factors**

1. **Qualities of the Advocates.**

Mr. Jones is a managing partner with the Law Offices of BIGHORN LAW. He graduated Magna Cum Laude from Brigham Young University-Idaho in 2005 and graduated as the top student in economics that year. He graduated from Brigham Young University in 2008 and was awarded a Dean's Scholarship for academic merit all three years of law school. Mr. Jones was first admitted to practice law in Nevada in 2013, scoring in the 98th percentile nationally on the MBE. He has also passed the Idaho Bar Exam. Mr. Jones has prevailed in more than 95 percent of the arbitrations and trials he has litigated. Further, he has recovered more than $30,000,000 for clients through judgments and settlements in the last six years. Mr. Jones' usual and customary fee on an hourly basis is $500.00 an hour, which is at or below average for attorneys of his skill and experience who handle similar matters in Clark County, Nevada.

Likewise, Mr. Leavitt is a partner with Bighorn Law. He has been licensed to practice law since 2012 and has a billing rate of $500.00 per hour, a rate at or below average for attorneys of his skill and experience who handle similar matters in Clark County, Nevada. Mr. Leavitt graduated Cum Laude from the University of Las Vegas, Nevada in 2004. He attended Cooley Law School

on scholarship and graduated in the top 13% of his class. Mr. Leavitt completed an externship under retired Nevada Supreme Court Justice Michael Cherry and is admitted to practice in the Ninth Circuit Court of Appeals. Mr. Leavitt has conducted numerous trials and administrative proceedings.

Mr. Hand is a partner of Hand & Sullivan, LLC. He is licensed to practice law in Nevada and New York. He has been licensed to practice law in Nevada for sixteen years. Prior to that, he was licensed as an attorney in New York where he practiced in areas of personal injury, medical malpractice, and insurance defense litigation. He has conducted more than 125 jury and bench trials. Mr. Hand also served as a Deputy County Attorney for Nassau County, New York. Mr. Hand's billing rate is $500.00 per hour and he too asserted that it is at or below average for attorneys of his skill and experience who handle similar matters in Clark County, Nevada.

Additionally, the Court found this factor to be considered by the Court and was not contested by Defendants in written opposition or in argument.

Therefore, the qualities of the advocates who performed work in this matter are proven. Further, the market rate of $500.00 per hour is appropriate under *Marrocco v. Hill*, 291 F.R.D. 586 (D. Nev. 2013), for this type of case. give the was no objection to the rate and the award was pursuant to NRS 7.085 could be

2. Character of the Work to be Done.

Plaintiffs' Counsel was engaged in proving a complicated and complex Professional Negligence matter of medical malpractice, an area of law few practitioners of law engage in due to the complexity and stringent laws. In this case the legal work required retaining and questioning numerous experts and dealing with nuanced medical topics which not only increased the actual cost of litigating, but also consumed many hours of research and preparation. The nature of the work was time-consuming, complicated and difficult due to the nature of the area of law and medicine combined.

3. Work Actually Performed by the Lawyer.

Plaintiffs' Counsel engaged in multitudinous depositions, written discovery, and this work culminated in a three-week trial on the matter. Plaintiffs' Counsel worked extensively for the

entirety of trial and demonstrated substantial skill in the work performed. Coupled with the second factor, the character of the work, the work performed included long hours of trial and the long hours of preparation during the hours of the day while not in trial. Not only did the work require preparation for the substance of the trial, yet the numerous issues Defendants raised requiring many hearings outside the presence of the jury.

Albeit there are three attorneys on this matter, the substantive matter of the trial coupled with the many collateral issues required the presence and work of all in order to effectively try the case.

4. Result—whether the Attorney was Successful and what Benefits were Derived.

Plaintiffs were successful in their attempts before this Court. The jury returned a verdict of more than $13 million, and the Court Awarded a Judgment on the Verdict in favor of Plaintiffs and against Defendants in the amount of $6,367,805.52. Plaintiffs' Counsel was able to procure a highly favorable outcome for their clients.

Therefore, the Court found Attorneys' Fees in the amount of $821,468.66 are properly granted to Plaintiffs in this matter, pursuant to *Brunzell, Beattie, O'Connell*, NRCP 68, and NRS 7.095.

It is undisputed that Plaintiffs served an offer of judgment for $1,000,000 under NRCP 68 and that Defendants chose to let that offer expire. The offer was made several months after expert witness disclosures. It is undisputed that at the time of the offer Plaintiffs had already disclosed more than $4,000,000 in special damages. Moreover, Plaintiffs' experts had already outlined the breaches in the standard of care that the jury ultimately agreed were committed by Defendants. Ultimately, the Court finds that Defendants' decision to reject the offer was unreasonable. Under NRCP 68, attorney fees are properly awarded for Plaintiffs and against Defendants.

NRCP 68 (f) states: Penalties for Rejection of Offer

(1) In General. If the offeree rejects an offer and fails to obtain a more favorable judgment:

(A)the offeree cannot recover any costs, expenses, or attorney fees and may not recover interest for the period after the service of the offer and before the judgment; and

(B) the offeree must pay the offeror's post-offer costs and expenses, including a reasonable sum to cover any expenses incurred by the offeror for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney fees, if any be allowed, actually incurred by the offeror from the time of the offer.

Plaintiffs served an Offer of Judgment on June 5, 2019. Judgment in the amount of $6,367,805.52 was entered on November 14, 2019. Pursuant to NRCP 68(f)(1)(B) Defendants must pay applicable interest on the judgment from the time of the offer to the time of entry of the judgment in the amount of $202,269.96 (interest calculated at 5.50% prime plus 2% for a total of 7.5% from the date of the Offer of Judgment, June 5, 2019 to Entry of Judgment on November 14, 2019, for a total of 162 days = $1,248.58 per day) pursuant to NRS 17.130.

The Court then needs to analyze the attorney fees to be awarded. *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. Adv. Op. 7, 429 P. 3d 664 (Nev. App. 2018) demonstrates that attorney fees are appropriately awarded based on contingency fee agreements, which is the nature of the agreement between Plaintiffs and Counsel in this matter. Given the $6,565,830.84 judgment in this matter, Plaintiffs' attorney fees would be approximately $1,026,835.82 under the sliding scale of NRS 7.095. However, at the time of the offer of judgment in this matter, approximately twenty percent (20%) of the total attorney work had already been performed. As a result, the Court determined that the fee should be reduced by an additional 20% and that eighty percent (80%) of the projected contingent fee under the NRS 7.095 sliding scale, or $821,468.66, should be awarded. The Court further analyzed whether this number was unreasonable, given the hours likely expended by Plaintiffs' attorneys in this case multiplied by their reasonable billing rates. The Court determined that $821,468.66 was not unreasonable and was likely comparable to the amount that would be awarded had Plaintiffs' attorneys billed their time on an hourly basis. As NRS 7.095 already has a built-in reduction, and given the Court's decision to further reduce the fee to only the percentage of work done after the offer, no further reduction is warranted. Plaintiffs are awarded $821,468.66 in attorney fees.

Plaintiffs' Request for Additional Attorneys' Fees as a Sanction

The Court did find there was significant inappropriate conducted by Defendants and Defense Counsel. This misconduct was the basis of numerous hearings and was an ongoing problem during discovery and through the end of trial. The Court found this to be a substantive and compelling reason to consider striking Defendants' Answer and that the misconduct was certainly a proper basis to award substantial attorney fees to Plaintiffs and against Defendants. Sanctionable conduct in this case included, but is not limited to the following: (1) Defendants and their Counsel intentionally withholding evidence during discovery; (2) Defendants omitting relevant evidence that had been asked for regarding his medical malpractice history; (3) Defendant blurting out that Plaintiff's bills were paid through medical insurance to the jury; (4) Defendants' Counsel signing affidavits containing verifiably false information for procedural reasons prior to trial; (5) Defendants improperly filing numerous "offers of proof" after the close of evidence and without leave of the Court; and (6) Defendants violating Court orders during the course of trial on numerous occasions, including during the cross-examination of Dr. Michael Hurwitz. *See* NRCP 37; *Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 263 P.3d 224 (2011).

Nevertheless, the Court did not find it appropriate to award additional attorneys' fees above the $821,468.66 already awarded. However, the Court did find that independent of *Brunzell, Beattie, O'Connell*, NRCP 68 and NRS 7.095, $821,468.66 in attorney fees would be properly awarded to Plaintiffs as a sanction for inappropriate conduct by Defendants and Defense Counsel in this matter. Thus, the total award of $821,468.66 in Attorneys' Fees is granted, with these two independent grounds supporting the Court's finding for this award: (1) the analysis under *Brunzell, Beattie, O'Connell*, NRCP 68 and NRS 7.095 and (2) the misconduct of Defendants and their counsel.

THEREFORE, IT IS ORDERED that Plaintiffs' Request for Attorneys' Fees is GRANTED in the amount of Eight Hundred Twenty-One Thousand Four Hundred Sixty-Eight Dollars and Sixty-Six Cents ($821,468.66).

IT IS FURTHER ORDERED that Plaintiffs' Request for Costs and Defendants' Motion to Re-Tax such Costs is CONTINUED to February 11, 2020 at 9:30 a.m., for Supplemental Pleadings to be filed.

IT IS FURTHER ORDERED that the Supplemental Briefing Schedule SET as follows: Plaintiffs' Supplemental Opposition due January 21, 2020 and Defendants' Supplemental Reply due February 3, 2020.

Plaintiffs' Costs and Defendants' Motion to Re-Tax and Settle Plaintiffs' Costs

On November 19, 2019, Plaintiffs filed a Verified Memorandum of Costs and Disbursements in the total amount of $153,118.26. On November 22, 2019, Defendants filed a Motion to Re-Tax and Settle Plaintiffs' Costs. On January 21, 2020 Plaintiffs filed a Supplemental Verified Memorandum of Costs and Disbursements in the total amount of $153,118.26. On January 21, 2020, Plaintiffs filed a Supplemental Opposition to Defendants' Motion to Re-Tax and Settle Plaintiffs' Costs. On February 3, 2020 Defendants filed a Supplemental Reply to Plaintiffs' Opposition to Defendants' Motion to Re-Tax and Settle Plaintiffs' Costs. The matter having come on for hearing on February 11, 2020 at 9:30 a.m., the Court makes the following Findings of Facts and Conclusions of Law:

NRS 18.005(5) states, "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."

Plaintiffs' have submitted fees paid to experts as follows:

1.	Michael Hurwitz, M.D. (surgeon)	$ 11,000.00
2.	Justin Willer, M.D. (neurologist)	$ 17,245.00
3.	Alex Barchuck, M.D. (physical medicine and rehabilitaton)	$ 26,120.00
4.	Dawn Cook, R.N. (life care planning)	$ 23,960.03
5.	Alan Stein, M.D. (infectious diseases)	$ 19,710.00

6. Daniel Feingold, M.D. (surgeon) $ 2,000.00

7. Terence Clauretie, Ph.D. (economist) $ 3,500.00

The Court has analyzed the factors in *Frazier v Drake*, 131 Nev. 632 (2015) and has determined that the circumstances surrounding certain of the expert's testimony were necessary to require larger fees than $1,500.00 per expert. The Court is only considering the fees of experts Hurwitz, Willer, Barchuk, Cook, and Stein as NRS 18.005(5) limits recoverable expert fees to five experts. This was a medical malpractice case that took approximately three weeks to try. There were complex medical issues as to both the standard of care, proximate cause and damages that required medical expert review and testimony. Plaintiffs' experts Hurwitz, Willer, Barchuk, and Cook testified at trial. Plaintiffs' infectious disease expert Alan Stein, M.D. from New York was present in Las Vegas prepared to testify. Dr. Stein did not testify at the trial. The opinions of Plaintiffs' experts Hurwitz, Willer, Barchuk, Cook, and Stein aided the jury in deciding the case as each area of medical specialty in that each area of medical specialty was at issue during the trial. Plaintiffs' experts Hurwitz, Willer, Barchuk, Cook, and Stein were not repetitive of each other as they each addressed different medical issues and were of different specialties. The extent and nature of the work performed by the experts was of high quality. The various experts' education and training was significant and extensive. Experts Hurwitz, Willer, Barchuk, and Cook spent time preparing and testifying at trial. Experts Hurwitz, Willer, Barchuk, Cook, and Stein were also deposed in the case and prepared expert reports. The fees charged by these experts are similar to the experts in other malpractice cases in this venue. Dawn Cook was a local expert. Dr. Barchuk traveled from the Bay area. Dr. Willer and Dr. Stein traveled from the New York City area. Dr. Hurwitz traveled from Orange County, California. The fees charged by these experts are comparable to what a local expert would charge.

Pursuant to the factors in *Frazier v. Drake*, 131 Nev. 632, 650–51, 357 P.3d 365, 377–78 (Nev. App. 2015) the Court therefore awards the following expert fees:

Dr. Hurwitz: $ 11,000.00

Dr. Willer: $ 17,245.00

Dr. Barchuk: $ 26,120.00

Dawn Cook: $ 13,960.03

Dr. Stein: $ 1,500.00

Pursuant to the same *Frazier* factors, this Court does not find $19,710.00 for Plaintiffs' Expert Dr. Alan J. Stein is warranted, as Dr. Stein did not testify at trial in this matter and reduces the amount for Dr. Stein to $1,500.00. This Court further does not find that $23,960.03 for Plaintiffs' Expert Dawn Cook is warranted, as Ms. Cook billed for items that can be utilized in other life care plans and incorporated other number from other experts which Plaintiff was already charged for and, thus, not approving the double charging and reduces the amount for Ms. Cook to $13,960.03.

Pursuant to NRCP 68, Plaintiffs' request in the amount of $1,200.00 for the "Day In The Life Video," is not warranted, as Plaintiffs did not utilize this video during the trial in this matter.

As to Plaintiffs' request for costs for deposition testimony, the Court finds the video charge portion of these costs is not warranted, as the video portion of the deposition testimony was not utilized during the trial in this matter and, therefore, reduces said deposition testimony costs by $5,032.02.

Pursuant to *Cadle Co. v. Woods & Erickson, LLP*, 345 P.3d 1049 (2015) and *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352 (1998), Plaintiffs' remaining costs are warranted.

THEREFORE, IT IS ORDERED that Plaintiffs' Request for Attorneys' Fees is GRANTED in the amount of Eight Hundred Twenty-One Thousand Four Hundred Sixty-Eight Dollars and Sixty-Six Cents ($821,468.66).

IT IS FURTHER ORDERED that pursuant to NRCP 68(f)(1)(B), Defendants are to pay the applicable interest on the Judgment in the amount of $6,367,805.52 from the date of the Offer of Judgment on June 5, 2019 to entry of the Judgment on November 14, 2019 in the amount of $202,269.96;

IT IS FURTHER ORDERED that Plaintiffs' Request for Costs and Defendants' Motion to Retax Costs are each GRANTED IN PART AND DENIED IN PART.

IT IS FURTHER ORDERED that Plaintiffs' Costs request for Experts Dr. Michael Hurwitz, Dr. Justin Willer, Dr. Alex Barchuk, Dawn Cook, R.N. and Dr. Alan Stein are GRANTED in the total amount of $69,825.03.

IT IS FURTHER ORDERED that Plaintiffs' Costs request for Expert Dr. Alan J. Stein is reduced to $1,500.00.

IT IS FURTHER ORDERED that Plaintiffs' Costs request for Expert Dawn Cook is reduced to $13,960.03.

IT IS FURTHER ORDERED that Plaintiffs' Costs request for the "Day In The Life Video," in the amount of $1,200.00 is DENIED.

IT IS FURTHER ORDERED that Plaintiffs' Costs request for deposition testimony is reduced by $5,032.02.

IT IS FURTHER ORDERED that Plaintiffs' remaining Costs request in the amount of $44,851.21 is GRANTED.

IT IS FURTHER ORDERED that the total amount of Plaintiffs' Cost Award in this matter is $113,186.24.

THEREFORE, IT IS ORDERED that Plaintiffs' Costs are Re-Taxed in the amount of $113,186.24.

IT IS FURTHER ORDERED that interest on Plaintiffs' costs of $113,186.24 will accrue from November 14, 2019 (the date of entry of judgment) at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

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IT IS FURTHER ORDERED that interest on Plaintiffs' award of attorneys' fees of $821,468.66 will accrue from the date of entry of this order at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

DATED this 23 day of March, 2020.

JOANNA S. KISHNER

DISTRICT COURT JUDGE

Respectfully Submitted By:

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on the 13th day of April, 2020, service of a true and correct copy of the foregoing:

SUPPLEMENTAL AND/OR AMENDED NOTICE OF APPEAL

was served as indicated below:

☒ served on all parties electronically pursuant to mandatory NEFCR 4(b);

☐ served on all parties electronically pursuant to mandatory NEFCR 4(b) , exhibits to follow by U.S. Mail;

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