IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 80884

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA

Appellant,

v.

GILBERT P. HYATT

Respondent.

Appeal Regarding Judgment and Post-Judgment Orders
Eighth Judicial District Court
District Court Case No.: A382999

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment after a jury trial ("Judgment") and post-judgment orders. (10 AA 001552-61; 37 AA 005865-68). Appellate jurisdiction exists under NRAP 3A(b)(1) and 3A(b)(8). After remand from this Court, the district court entered the Judgment on February 21, 2020, and notice of entry of the Judgment was filed and served on February 26, 2020. (10 AA 001552-73). FTB also moved for its attorney's fees and costs, and the Court denied the same on June 8, 2020 ("Fees and Costs Order"). (37 AA 005865-98). Notice of entry of the Fees and Costs Order was filed and served on June 8, 2020. (37 AA 005867).

FTB timely appealed both the Judgment and the Fees and Costs Order. (37 AA 005750-62; 37 AA 005876-85). FTB filed its notice of appeal of the Judgment on March 20, 2020, and FTB filed a supplemental notice of appeal about the Fees and Costs Order on June 8, 2020. *See id*. This appeal is therefore timely. *See* NRAP 4(a).

ROUTING STATEMENT

This case involves FTB, a State of California government agency. The case has implicated constitutional issues and questions of first impression since the beginning of its procedural history. It has also been the subject of several appeals in front of this Court and the Supreme Court of the United States. As a result, it is presumptively assigned to this Court. *See* NRAP 17(a).

STATEMENT OF THE ISSUES

1. NRS 18.020 states that all statutory litigation costs "must be allowed of course to the prevailing party against any adverse party against whom judgment is rendered." FTB obtained a complete victory through the Judgment, which dismissed respondent Gilbert P. Hyatt's ("Hyatt") case and awarded him none of his requested relief. Even so, the district court refused to award FTB's costs because it found FTB was not the prevailing party. Did the district court err in doing so?

2. Alternatively, NRCP 68(f)(1)(B) covers offers of judgment and states that an offeree who rejects an offer and fails to obtain a more favorable judgment "must pay" the offeror's post-offer costs. FTB made a valid offer of judgment, which Hyatt rejected and did not beat through the Judgment. The district court still refused to award FTB's post-offer costs and expenses. Did the district court err in doing so?

3. NRCP 68(f)(1)(B) also provides that an offeree who rejects an offer and fails to obtain a more favorable judgment "must pay" the offeror's post-offer attorney's fees. Again, though FTB made a valid offer of judgment and Hyatt rejected and failed to beat the same, the district court refused to award FTB's post-offer attorney's fees. Did the district court err in doing so?

STATEMENT OF THE CASE

Woven throughout this entire case's fabric has been FTB's arguments that, as a State of California government agency, it was constitutionally immune from suit in Nevada and that Nevada courts had no jurisdiction over FTB. (35 AA 005525-29). Through two decades of litigation, as Hyatt continued to press legally deficient causes of action in multiple jurisdictions, FTB placed the sovereign immunity and jurisdiction arguments into nearly each of its pleadings, filings, and appellate briefs. (1 OA 00153-232; 2 OA 00464 - 3 OA 00512).[1] It did so at considerable time and expense to the State of California and its citizens, including through the historic Great Recession and unprecedented financial strain to California's budget. (35 AA 005542-43).

In FTB's most recent appeal, the Supreme Court of the United States fully accepted FTB's arguments, unraveling Hyatt's entire case in the process. (10 AA 001558-59). The Supreme Court of the United States found that states' immunity from suit was a fundamental aspect of sovereignty and that FTB has not waived such immunity. This gave FTB a complete and clean victory in the case. (10 AA 001559-

[1] As the Court is no doubt aware, the parties submitted voluminous appendices in the prior 2009 appeal bearing Nevada Supreme Court case number 53264. FTB's appendix alone totaled 93 volumes and over 23,000 pages. Rather than re-file the same appendices here at substantial cost and time to the Court and the parties, FTB at times refers to such prior appendices here as the "Original Appendix" and cited as __ OA __.

60).

Even so, after remand and instruction from this Court, the district court—without a motion pending and without a hearing—preemptively denied FTB its costs and attorney's fees. Though costs under NRS Chapter 18 are mandatory to the prevailing party, the district court found that FTB was not a prevailing party despite its complete victory in the case. To justify that conclusion, the district court misapplied an NRCP 68 analysis to an NRS Chapter 18 request.

Specifically, the district court *sua sponte* conflated prevailing party analysis under NRS Chapter 18 with offer of judgment analysis under NRCP 68(f). This also prompted the district court to find that FTB could not enforce its prior offer of judgment despite post-offer costs being mandatory under NRCP 68(f)(1)(B). It also denied FTB's post-offer attorney's fees under the same rule. The district court entered the Judgment on these bases. (10 AA 001552-61).

Trying to correct the district court's legal errors, FTB first filed a memorandum of costs, which Hyatt sought to re-tax. (10 AA 001574-85). FTB also filed a motion for post-offer costs and attorney's fees based on NRCP 68 and FTB's offer of judgment. (35 AA 005519-45). Still, the district court solidified its prior errors by entering the Fees and Costs Order, which left FTB and California citizens to bear all FTB's attorney's fees and costs despite FTB's complete victory over Hyatt's meritless case. (37 AA 005865-68).

FTB now appeals the Judgment and the Fees and Costs Order as to the district court's denial of FTB's attorney's fees and costs.

STATEMENT OF FACTS

A. Hyatt's Tax Dispute and His Attempts at Tax Avoidance.

Hyatt is a former 23-year resident of California who received hundreds of millions of dollars in fees related to technology patents he once owned and developed in California. (1 OA 00003). In 1992, Hyatt filed a California tax return stating he had stopped being a California resident and had become a Nevada resident on October 1, 1991. (1 OA 00004).

FTB, the State of California government agency responsible for collecting personal income tax, learned that Hyatt had not moved to Nevada on October 1, 1991, as he claimed. (1 OA 00160). For these reasons, FTB commenced an audit of Hyatt's 1991 return. *See id*. The audit concluded that Hyatt did not move to Nevada until April 1992, and that he remained a California resident until that time. (1 OA 00161-63). FTB accordingly determined that Hyatt owed around $1.8 million in unpaid California income tax for 1991, plus penalties and interest. *See id.* Because FTB determined that Hyatt resided in California for part of 1992 yet paid no California taxes, FTB also opened an audit for that year that concluded Hyatt owed another $6 million in taxes and interest, plus further penalties. *See id.* Disputes over these deficiency assessments between Hyatt and FTB over the audit

determinations' validity have gone on over two decades in California. (1 OA 00001).

1. The Nevada Litigation Sought to Avoid Hyatt's California Tax Liability.

In January 1998, as California's administrative review of FTB's deficiency assessment was just beginning, Hyatt sued FTB in Nevada. (10 AA 001552-53). In a Nevada state court, Hyatt alleged that FTB committed several torts while auditing his tax returns. (10 AA 001552-53). Hyatt sought compensatory and punitive damages. (1 OA 00001-16). But Hyatt's lead claim was one that sought a declaratory judgment, asking a Nevada court to declare that he resided in Nevada during the periods relevant to FTB's audits. (1 OA 00009-12).

FTB began its defense of the Nevada litigation by asserting its immunity from the suit. (1 OA 00153-232). FTB moved for summary judgment, arguing that it was entitled to immunity from suit in Nevada. (2 OA 00464 - 3 OA 00512). The district court denied that motion, and FTB petitioned this Court for a writ of mandamus, arguing FTB was immune from suit in Nevada courts. (2 OA 00422-63). This Court rejected FTB's claim of complete immunity, which set up the first decision from the Supreme Court of the United States. *Franchise Tax Bd. of Cal. v. Hyatt ("Hyatt I")*, 538 U.S. 488 (2003) (allowing Hyatt's case to proceed without addressing FTB's constitutional immunity arguments).

2. In Addition to This Case, Hyatt Files a Second Lawsuit in Federal Court Seeking to Avoid His California Tax Liabilities.

Beyond the California tax proceedings and the case in front of the Nevada district court, Hyatt also sued FTB in the United States District Court for the Eastern District of California. *See Hyatt v. Chiang*, 2015 WL 545993 at *1 (E.D. Cal. Feb. 10, 2015). In that case, Hyatt claimed FTB's efforts in processing his California administrative tax appeal violated his constitutional rights under the due process and equal protection clauses. *See id.* He thus sought an injunction barring FTB from "continuing the investigation and administrative proceedings against him" and from "continuing to assess or threaten to assess [Hyatt], or collect or threaten to collect from [Hyatt], taxes, penalties, or interest." *Id.*

Much like the Nevada case, Hyatt went on the offensive seeking to interject another court's ruling, this time from a federal district court, into the California tax proceedings as a mechanism to avoid tax liability. *See id.* The district court in the federal case stated, "[i]t is evident that [Hyatt] seeks to void the tax or taxes assessed against him." *Id.* at *6. But the federal district court was unconvinced about Hyatt's claims, and so it dismissed the lawsuit against FTB. *See id.* Hyatt appealed to the United States Court of Appeals for the Ninth Circuit, but that court also remained unconvinced by Hyatt's arguments and instead affirmed the district court's dismissal

of his case. *See Hyatt v. Yee*, 871 F.3d 1067, 1078 (9th Cir. 2017).[2]

B. Hyatt's Multi-Faceted Litigation Strategy Against FTB Mirrored His Litigation in Other Forums.

Make no mistake, Hyatt is a sophisticated litigant with substantial experience not only litigating against FTB but against many other parties in multiple forums. Hyatt has frequently used the "win at any and all costs" litigation strategy he used against FTB. During the time he sued FTB in this case, Hyatt filed 32 separate lawsuits against other parties in federal courts alone. (36 AA 005679-81). He did so in forums including Nevada, Virginia, California, and the District of Columbia. (36 AA 005679-81). Hyatt has also litigated several appeals during the same time in the United States Court of Appeals for the Ninth Circuit, the United States Court of Appeals for the District of Columbia Circuit, and the United States Court of Appeals for the Federal Circuit. (36 AA 005682-84). And Hyatt also litigated appeals to the Supreme Court of the United States in many of those cases. (36 AA 005686-89).

A review of these cases' dockets reveals that Hyatt is a sophisticated party who spent millions of dollars litigating unrelated cases while at the same time

[2] FTB attached the Ninth Circuit briefings as an exhibit to its motion for attorney's fees and costs in front of the Nevada district court. (36 AA 005691-5722). Those briefs detail the time the tax proceedings have consumed since Hyatt first contested his tax liability to the State of California. (36 AA 005691-5722). FTB did not seek recovery of any attorney's fees incurred in Hyatt's California tax proceedings or its directly related litigation. (35 AA 005519-45).

spending additional millions suing FTB.

C. FTB Serves Hyatt With an Offer Of Judgment in the Nevada Litigation, But He Rejects It to Go to Trial.

After the Supreme Court of the United States' decision in *Hyatt I*, the parties engaged in massive discovery and pretrial proceedings. (35 AA 005527). Those efforts are well-documented in the docket entries for this case. (36 AA 005573-5639).

Nearly ten years after Hyatt sued and nearly twelve years before this appeal, FTB served an offer of judgment ("Offer") upon Hyatt under NRCP 68 and NRS 17.115 offering to settle for $110,000.00, "inclusive of all pre-offer, prejudgment interest, taxable costs and attorneys fees." (36 AA 005641-42). FTB made the Offer after discovery had closed. (35 AA 005527).

As discussed above, from this case's very beginning, FTB contended that it was immune from suit in Nevada courts and that Nevada could not exercise jurisdiction over FTB as a California agency. *See Hyatt I*, 538 U.S. at 492 (noting FTB's summary judgment motion "argued that the District Court lacked subject matter jurisdiction because principles of sovereign immunity, full faith and credit, choice of law, comity, and administrative exhaustion" required dismissal). Because of its belief that FTB was immune from suit in Nevada, FTB explicitly made the Offer case concluding of the Nevada litigation: "This Offer of Judgment shall apply to all claims asserted by Hyatt against FTB in the above referenced action and if

accepted, shall completely resolve this matter." (36 AA 005641-42). But Hyatt rejected the Offer. (35 AA 005527).

After Hyatt's rejection, the parties worked doggedly preparing the case for trial. *See id*. Between FTB's Offer and trial, Hyatt filed nearly 20 pretrial motions. *See id*. The trial itself began April 15, 2008 and lasted four months, covering over 75 trial days. *See id*. The trial included 58 witnesses and over 2,789 multi-page exhibits. *See id*. Ultimately, a jury found in Hyatt's favor on all claims tried and with interest and costs, the judgment was over $490 million in money damages, the majority coming from punitive damages. *See Franchise Tax Bd. of California v. Hyatt*, 130 Nev. 662, 674, 335 P.3d 125, 133-34 (2014).

D. Later Appeals Ultimately Reduce Hyatt's Original Judgment to Nothing.

At each stage of appellate proceedings after the runaway jury award that Hyatt obtained at trial, FTB succeeded in slowly correcting the legal errors inherent in the award. That corrective appellate path first started with the reversal of several of Hyatt's causes of action, and it ultimately ended in the Supreme Court of the United States holding that Hyatt's entire case was legally inappropriate based on constitutional immunity principles.

FTB appealed Hyatt's jury award to this Court, which affirmed in part and reversed in part the judgment in Hyatt's favor. *See id.* In doing so, the Court noted that several of Hyatt's causes of action were flawed as a matter of law. *See id.* But

the Court again rejected FTB's immunity contentions, prompting FTB to appeal to the Supreme Court of the United States, which again granted certiorari on two questions. *See Franchise Tax Bd. of Cal. v. Hyatt* ("*Hyatt II"*), 136 S. Ct. 1277, 1280 (2016). Over 40 states filed amicus briefs at both the petition stage and merits stage in support of FTB, including the State of Nevada. *See id.*

The Supreme Court of the United States reached different results on the two questions presented. *See id.* On the first question, the *Hyatt II* court held that the Full Faith and Credit Clause does not "permit [] Nevada to award damages against California agencies under Nevada law that are greater than it could award against Nevada agencies in similar circumstances." *Id.* at 1281. "In light of the constitutional equality among the states," "Nevada has not offered 'sufficient policy considerations' to justify the application of a special rule of Nevada law that discriminates against its sister states." *Id.* at 1282. On the second question, the *Hyatt II* court divided equally on the issue of whether it should overrule *Nevada v. Hall*, 440 U.S. 410 (1979).[3] *Id.* at 1279. Notably, *Nevada v. Hall* addressed whether one state is immune from the jurisdiction of a sister state. *Id.*

On remand, and after supplemental briefing in which FTB challenged continuing hostile and discriminatory treatment in Nevada courts, this Court issued

[3] Though Justice Antonin Scalia attended oral argument during *Hyatt II*, he died before the written opinion issued, and so the *Hyatt II* opinion came out from only 8 justices, resulting in a 4-4 split on the issue of *Nevada v. Hall*.

a new decision. *See Franchise Tax Bd. of California v. Hyatt*, 133 Nev. 826, 407 P.3d 717 (2017) (further reducing the judgment to a fraction of the original judgment). From that decision, FTB once again petitioned the Supreme Court of the United States for certiorari, which it granted before issuing the opinion in *Franchise Tax Bd. of Calif. v. Hyatt* ("*Hyatt III*"), 587 U.S. at___, 139 S. Ct. at 1488 (2019). As before, multiple states supported FTB's petition with amicus briefs. *See id.*

Hyatt III outlined the long history of this case and its factual predicate before concluding that Hyatt had no right to assert claims against FTB in Nevada courts without the State of California's consent. *See id.* at 1492. The *Hyatt III* Court overruled *Nevada v. Hall* and stressed that "States' immunity from suit is a fundamental aspect of the sovereignty" that States enjoy in our constitutional system and that the United States Constitution "embeds interstate sovereign immunity within the constitutional design." *Id.* at 1493 and 1497. This echoed *Hyatt II*'s previous statement that haling FTB into state court in Nevada and applying special rules would "cause chaotic interference by some States into the internal, legislative affairs of others." *Hyatt II*, 578 U.S. at ___, 136 S. Ct. at 1282.

Hyatt III and its command that Nevada courts must dismiss Hyatt's action against FTB based on constitutional immunity principles led to a complete victory for FTB in the case, in which FTB achieved all its litigation objections while Hyatt achieved none. (10 AA 001552-61).

E. Despite FTB's Complete Victory in the Nevada Litigation, the District Court Misinterprets NRS 18.020 and NRCP 68 to Find That FTB Cannot Recover Its Costs or Attorney's Fees.

1. After Remand and With No Motion Pending, the District Court Sua Sponte Orders Blind Briefing at Hyatt's Urging and Enters A Judgment Pre-emptively in Hyatt's Favor on the Issues of Costs and Attorney's Fees.

After the remand from *Hyatt III* to this Court and ultimately the district court, the district court scheduled a status check based on this Court's remand order. (1 AA 000003-4). At that status check, Hyatt's counsel suggested that the district court—with no motion pending—could vacate the prior judgment without entering any new judgment and "simply say there is no prevailing party," at which point the district court and the parties would be "all done." (1 AA 000013). FTB objected, but the district court ordered blind briefing with no opportunity for FTB to file a reply brief on the issue of whether there was a prevailing party in the case. (1 AA 000014). This effectively robbed the district court of being fully informed by the parties on the issue of costs and attorney's fees before it ruled on the same. (1 AA 000005-18).

After Hyatt and FTB filed their blind briefs,[4] and with no hearing, the district

[4] Because the district court constrained its request to prevailing party status, which has nothing to do with enforcing offers of judgment under NRCP 68, FTB did not brief any issues related to its Offer and NRCP 68. (1 AA 000019-39).

court rejected Hyatt's invitation not to enter a judgment against him, and instead entered the Judgment, dismissing Hyatt's case and giving FTB a complete victory. (10 AA 001552-61) (Judgment reciting that "this case is dismissed and Hyatt [shall] take nothing from any of the causes of action he asserted in this action"). Even so, the district court preemptively denied FTB's costs and attorney's fees, though FTB had not yet filed a motion requesting them. *See id.*

a. The district court conflates the analysis of "prevailing party" under NRS Chapter 18 with the analysis of an offer of judgment under NRCP 68.

In the Judgment, the district court seized upon Hyatt's offer to pre-emptively decide the issues of attorney's fees and costs without any motion pending. In doing so, the district court conflated prevailing party analysis under NRS Chapter 18 with analysis of an offer of judgment under NRCP 68. (10 AA 001559-60). Though prevailing party analysis does not apply to NRCP 68, the district court analyzed the factors in *Beattie v. Thomas*, 99 Nev. 579, 668 P.3d 268 (1983), to conclude that FTB was not the prevailing party in this case.[5] *See id.*

For example, the district court analyzed the following, though such things have nothing to do with prevailing party analysis:

(1) Whether Hyatt brought his action in good faith;

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[5] As discussed in Part C(3) of the Argument, *infra*, the district court also improperly considered certain procedural facts irrelevant to analysis of the *Beattie* factors. (10 AA 001559-60).

(2) Whether Hyatt believed he would prevail at trial;

(3) Whether it was grossly unreasonable or in bad faith for Hyatt to reject FTB's Offer; and

(4) Whether FTB's Offer was reasonable in amount or timing.

See id. These are the classic *Beattie* factors and have nothing to do with prevailing party analysis this Court has required under NRS Chapter 18.

b. The district court then enters the Judgment solidifying its legal errors by denying FTB's attorney's fees and costs.

Ultimately, after improper analyzing the *Beattie* factors after blind briefing putatively focused on whether a judgment should issue after vacating the original 2008 Judgment, the district court's conclusion that FTB did not prevail also led it to preemptively deny FTB's attorney's fees and costs. (10 AA 001560). Again, the district court did so with no request for attorney's fees and costs pending. *See id.*

2. After Entry of Judgment, FTB Moves to Recover Its Costs and Attorney's Fees to Correct the District Court's Procedural Errors on the Same Issues.

Shortly after the district court entered the Judgment denying FTB its attorney's fees and costs, FTB requested its costs by filing a memorandum of costs ("Memorandum") under NRS 18.110. (10 AA 001574-85). FTB also moved for its post-Offer attorney's fees and costs ("Fees Motion") under NRCP 54 and NRCP 68. (35 AA 005519-45).

Through FTB's Memorandum, FTB sought to recover all its costs under NRS

18.020 as the prevailing party in this case. (10 AA 001574-85). Alternatively, if the district court did not grant FTB all its costs under NRS 18.020, FTB also filed the Fees Motion seeking to recover its post-Offer costs under NRCP 68(f). (35 AA 005519-45).

On the issue of attorney's fees, FTB filed the Fees Motion seeking to recover its post-Offer attorney's fees under NRCP 68. (35 AA 005519-45). In the Fees Motion, FTB for the first time provided the district court with complete analysis under NRCP 68 of FTB's Offer and the *Beattie* factors. (35 AA 005533-36). Because of the vast nature of FTB's billing invoices and supporting documents, which Hyatt suggested would take "six months or longer" to review, FTB suggested a bifurcated approach to the Fees Motion and that FTB would provide such documents for the district court's review under *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.3d 31 (1969), upon the district court's request. (35 AA 005543-44).

The district court agreed and only considered whether FTB was legally entitled to such fees and costs. (37 AA 005865-68). It did not review the billing invoices or otherwise consider the amount of FTB's fees and costs. *See id.*

3. Despite the Benefit of Full Briefing and a Hearing, the District Court Made No Correction, Still Conflating NRCP 68 Analysis of FTB's Offer of Judgment with Prevailing Party Analysis Under NRS Chapter 18 and Enters the Costs and Attorney's Fees Order Based on These Errors.

The district court held a hearing on FTB's Fees Motion, though it did not ask any substantive questions during the same. (37 AA 005826-64). After the hearing, the district court entered the Fees and Costs Order, solidifying its prior legal errors on NRS Chapter 18 and NRCP 68. (37 AA 005865-68). The district court relied on its prior erroneous analysis about prevailing party status under NRS Chapter 18, and it purportedly again conducted *Beattie* analysis though it had prejudged the same in the Judgment. (37 AA 005865-66). As a result, the district court found that "neither party prevailed in this case and that neither party is entitled to attorney's fees or costs accordingly, under NRCP 68 or otherwise." (37 AA 005866).

SUMMARY OF THE ARGUMENT

In determining whether to award attorney's fees or costs, the trial court faces two fundamental questions: *first*, whether the moving party is legally entitled to recover such fees or costs under a statute, rule, or other grounds; and *second*, if so, the amount of such fees or costs the trial court should award to the moving party under *Brunzell* or *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 345 P.3d 1049 (2015), as supported by the moving party's evidence.

As to the second question, this Court has typically granted trial courts

considerable discretion. A trial court typically is most familiar with the case and is accordingly best positioned to wade through the moving party's supporting billing invoices to determine the reasonable, necessary, and actually incurred fees and costs to award.

As to the first question, however, NRS Chapter 18 and NRCP 68 remove such discretion through their use of mandatory language. NRS 18.020 states that "costs **must be allowed** of course to the prevailing party." NRS 18.020 (emphasis added). Additionally, NRCP 68 states that an offeree who rejects the moving party's offer of judgment and then fails to obtain more favorable judgment "**must pay** the offeror's post-offer costs and expenses . . . and reasonable attorney fees." NRCP 68(f)(1)(B) (emphasis added). The principles supporting the mandatory nature of both are strongest when the moving party achieves a complete victory, as FTB has done here.

Even so, the district court injected discretion where it did not belong in NRS 18.020 and NRCP 68. Though the Court's jurisprudence shows that a party like FTB that obtains a complete victory is automatically the prevailing party, the district court believed it had discretion to determine otherwise. Moreover, NRCP 68(f) provides a straightforward analysis of whether the offeree beat the offer of judgment; if not, it must pay the offeror's post-offer costs and attorney's fees. Still, the district court engaged in a discretionary analysis of NRCP 68 claiming FTB was not a

"prevailing party" even though it awarded FTB a complete victory in the Judgment and found that Hyatt did not beat FTB's Offer.

Making matters worse, the district court compounded its error of injecting discretion into mandatory language where it does not belong by conflating prevailing party analysis under NRS 18.020 with analysis under NRCP 68 about offers of judgment. NRS 18.020 and NRCP 68 proceed under different standards, with the former focusing on the prevailing party, while the latter focuses on a simple mathematical comparison of the offer to the judgment amount. The district court needed to independently evaluate FTB's legal entitlement to costs and attorney's fees under NRS 18.020 and NRCP 68. Instead, the district court mixed them together.

And in this case, the district court judge was new to the matter and had no role in the procedural decisions that pre-dated the ultimate judgment. This Court has better familiarity with the facts and underlying litigation than the district court judge, and so any discretionary review should be limited solely to the amount of attorney's fees and costs rather than FTB's legal entitlement to them.

Ultimately, the district court's legal errors led the district court to deny FTB's requests for costs and attorney's fees before even reaching the second question of analysis under *Brunzell* and *Cadle Co.* Thus, FTB asks the Court to reverse the district court on the issue of costs and attorney's fees under both NRS 18.020 and

NRCP 68. Moreover, because FTB achieved a complete victory and because NRS 18.020 and NRCP 68 are mandatory in that event, FTB requests that the Court find that FTB is legally entitled to recover its costs and attorney's fees under NRS 18.020 and NRCP 68 and remand for further proceedings under *Brunzell* and *Cadle Co.*

ARGUMENT

A. Standard of Review.

"Deciding whether a rule is intended to impose a mandatory or directory obligation [on the district court] is a question of statutory interpretation." *Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 665, 310 P.3d 569, 572 (2013). Such statutory construction "is a question of law" and thus the Court does "not defer to the district court's interpretation." *Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 1168, 14 P.3d 511, 514 (2000), *as amended* (Dec. 29, 2000). Instead, "[s]tatutory interpretation is . . . subject to a de novo review." *Loeb v. First Jud. Dist. Ct.*, 129 Nev. 595, 599, 309 P.3d 47, 50 (2013).

As with statutes, "Nevada's Rules of Civil Procedure are subject to the same rules of interpretation as statutes." *Id.* And so interpretation of the Nevada Rules of Civil Procedure is similarly subject to a de novo review. *See id.*

Because this appeal implicates the district court's erroneous interpretation of NRS 18.020 and NRCP 68, these are legal question and thus subject to the de novo standard. *See id.* The Court does not defer to the district court's interpretation in

that case but must conduct its own inquiry. *Salas*, 116 Nev. at 1168, 14 P.3d at 514.

B. The District Court Erred in Denying FTB's Costs.

1. FTB Is Entitled to All Its Statutory Costs Under NRS Chapter 18.

NRS 18.020 provides four types of cases for which costs are recoverable, including those when the plaintiff seeks "recovery of more than $2,500." NRS 18.020(3). Hyatt sought recovery of substantial money damages far more than $2,500. (10 AA 001552-53). In such cases, the statute mandates that "[c]osts **must be allowed of course** to the prevailing party against any adverse party against whom judgment is rendered." NRS 18.020 (emphasis added).

This Court has explained that the use of "must" or "shall" in a statute is "regarded as mandatory." *Markowitz*, 129 Nev. at 665, 310 P.3d at 572 (finding "shall" is mandatory); *see also Smith v. Garside*, 81 Nev. 312, 314, 402 P.2d 246, 1246 (1965) (finding "must" is mandatory). And where such use is clear on the statute's face, the Court "will not look beyond the statute's plain language." *Washoe Med. Ct. v. Second Judicial Dist. Court of State of Nev. ex rel. Cty. of Washoe*, 122 Nev. 1298, 1302, 148 P.3d 790, 792-93 (2006); *see also Rural Tel. Co. v. Pub. Utilities Comm'n*, 133 Nev. 387, 389, 398 P.3d 909, 911 (2017) ("When the language of a statute is plain and unambiguous, the courts are not permitted to look beyond the statute itself when determining its meaning."). Thus, when the Nevada Legislature pairs mandatory language with clear statutory language, as it did in NRS

18.020, the statute "does not denote judicial discretion" to stray away from such language. *Washoe Med. Ct.*, 122 Nev. at 1303, 148 P.3d at 793.

And so when a party moving for costs under NRS 18.020 has won a complete victory in the case, thereby making it the prevailing party under any plain language meaning, the district court has no discretion to deny the moving party's legal entitlement to costs. Instead, the district court must proceed to analysis under *Cadle Co.* and determine the amount of costs the moving party should recover. In this case, however, the district court erred in both respects.

a. By its complete victory, FTB is the prevailing party.

In NRS Chapter 18, the Legislature uses the term "prevailing party" in several places. *See, e.g.*, NRS 18.005, 18.010, 18.020, 18.025, and 18.110. This Court has "broadly construed" the term to include "plaintiffs, counterclaimants, and defendants." *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005). A prevailing party "must win on at least one of its claims." *Golightly & Vannah, PLLC v. TJ Allen*, 132 Nev. 416, 422, 373 P.3d 103, 107 (2016). But because the term also applies to defendants who may not have an affirmative claim, the Court has also explained that a party prevails "if it succeeds on any significant issue in litigation" that achieves the party's litigation objective. *LVMPD v. Blackjack Bonding*, 131 Nev. 80, 90, 343 P.3d 608, 615 (2015).

Though the term gives the district court discretion to find multiple prevailing parties or no prevailing party in a mixed results case, no similar discretion exists when one party completely prevails in the lawsuit. *See Glenbrook Homeowners Ass'n v. Glenbrook Co.*, 111 Nev. 909, 922, 901 P.2d 132, 141 (1995) (affirming the district court's conclusion that there was no prevailing party where "[e]ach party won on some issues and lost on others"). This is because a party winning a complete victory by definition "succeeds on [a] significant issue in the litigation." *Blackjack Bonding*, 131 Nev. at 90, 343 P.3d at 615. Indeed, the complete victor succeeds on **all** significant issues and accomplishes **all** its litigation objectives.

FTB is the prevailing party, as it achieved a complete victory in the case, and so the district court had no discretion to determine otherwise. *See id.* FTB began the case by arguing that it was immune from suit in Nevada, and it ended the case with a complete victory in *Hyatt III*, which unraveled Hyatt's case by appropriately applying sovereign immunity to dismiss Hyatt's claims. *See Hyatt III*, 587 U.S. at___, 139 S. Ct. at 1499. Appropriately the district court entered the Judgment conforming to *Hyatt III*. (10 AA 001552-61). Though Hyatt spent two decades forcing FTB into Nevada courts to defend itself from his meritless claims, the end result was that Hyatt received no relief at all—not a single dollar—and FTB achieved all of its litigation objectives, namely, dismissal of Hyatt's entire case. (10 AA

001559). And so under NRS 18.020, FTB is the prevailing party.[6]

The Judgment and Fees and Costs Order show that, after Hyatt's misplaced suggestions at the status check, the district court became confused with the independent standards under NRS 18.020 and NRCP 68 and conflated them. (10 AA 001559-60; 37 AA 005865-66). This led the district court to conclude that FTB did not prevail based on its misguided use of the *Beattie* factors in determining prevailing party. (10 AA 001559-60). Understandably, as this Court is aware, although the case has a long and winding procedural history, the district court judge was brand new to the case after remand. Even so, NRS 18.020's plain language grants the district court no discretion in determining prevailing party here because it involves a complete victory by FTB. Similarly, because this is an issue of statutory interpretation, this Court gives no deference to the district court's incorrect analysis.

And so NRS 18.020's plain language and the Court's prior decisive case law about the term prevailing party provide only one conclusion: FTB is the prevailing party in this case. The district court erred in finding otherwise.

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[6] The District Court's Judgment states that "based on the orders of the United States Supreme Court and the Nevada Supreme Court, **this case is dismissed.**" (10 AA 001560) (emphasis added). The very next sentence states that "there is no prevailing party in this action." *Id*. These statements cannot be reconciled. If a plaintiff's case is entirely dismissed, the defendant has prevailed (regardless of the history of the litigation).

b. Because FTB is the prevailing party, FTB's costs are mandatory under NRS 18.020.

As discussed above, NRS 18.020 uses the language of "must" for the prevailing party's legal entitlement to recover its costs. This language is mandatory and allows no discretion for the district court. *See Washoe Med. Ct.*, 122 Nev. at 1303, 148 P.3d at 793. Indeed, in NRS 18.020, the Nevada Legislature went even further than its typical use of "must" by including the phrase "of course." This provides more emphasis to the mandatory nature of awarding costs to the prevailing party under NRS 18.020, as the use of "of course" cannot be surplusage. *See Albios v. Horizon Comm., Inc.*, 122 Nev. 409, 132 P.3d 1022 (2006) (holding that the Court construes "statutes such that no part of the statute is rendered nugatory or turned to mere surplusage.").

Because FTB was the prevailing party through its complete victory over Hyatt, NRS 18.020 made recovery of its costs mandatory. The district court had no discretion to stray away from NRS 18.020's mandatory nature, and it erred in doing so.

2. Further, and at a Minimum, FTB Is Entitled to Its Post-Offer Costs Under NRCP 68.

Like NRS 18.020, NRCP 68 includes the mandatory term of "must" in its plain language. *See* NRCP 68(f)(1)(B) (stating "the offeree must pay the offeror's post-offer costs and expenses"). But unlike NRS 18.020, NRCP 68 does not use prevailing party analysis to determine a moving party's entitlement to costs. Instead,

the costs provision in NRCP 68 merely involves a mathematical computation of whether an offeree rejected "an offer and fail[ed] to obtain a more favorable judgment." NRCP 68(f)(1). If so, the offeree **must** pay the offeror's post-offer costs. *See* NRCP 68(f)(1)(B) (emphasis added). There is no Nevada precedent authorizing the district court's rejection of the mandatory application of Rule 68's cost-shifting provision.

Here, the analysis is straightforward. FTB's Offer was valid and in the amount of $110,000.00. (37 AA 005641-42). Hyatt rejected it. (37 AA 005527). The district court's Judgment confirmed the same. (10 AA 001556). As a result, Hyatt did not obtain a more favorable judgment than FTB's Offer, and NRCP 68(f)'s plain language states that he must pay FTB's post-Offer costs. *See* NRS 68(f)(1)(B). It was error for the district court to conclude otherwise.

The district court's error flows again from its injection of discretion into a rule of civil procedure where no such discretion exists. The use of "must" eliminates any such discretion. *See Washoe Med. Ct.*, 122 Nev. at 1303, 148 P.3d at 793 (holding that the use of mandatory language "does not denote judicial discretion"). While the district court appears to have injected such discretion through its use of the *Beattie* factors, that analysis does not square with NRCP 68's plain language. The use of "must," especially in a case like this involving a clear and complete victory, obviates the need to use the *Beattie* factors.

Nor does the district court's analysis square with this Court's widely accepted principles of interpretation that a state statute or rule if procedure should be construed like its federal counterpart. *See Int'l Game Tech., Inc. v. Second Judicial Dist. Court of Nevada*, 122 Nev. 132, 153, 127 P.3d 1088, 1103 (2006) ("When the Legislature adopts a statute substantially similar to a federal statute, a presumption arises that the Legislature knew and intended to adopt the construction placed on the federal statute by federal courts."). This is because the Court "presumes that the Legislature enacts a statute with full knowledge of existing statutes related to the same subject." *Id.*

Here, although NRCP 68 is a rule of procedure enacted by this Court rather than a statute enacted by the Legislature, the same presumption of harmony arises. And NRCP 68's federal analog, FRCP 68, includes identical mandatory language: "If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." FRCP 68(d). Federal courts hold that this language is mandatory and does not allow for discretion on costs. *See United States v. Trident Seafoods Corp.*, 92 F.3d 855, 860 (9th Cir. 1996) ("The award is mandatory; Rule 68 leaves no room for the court's discretion."); *see also Adams v. Wolff*, 110 F.R.D. 291, 293 (D. Nev. 1986) ("Where a Rule 68 offer has been made and the judgment obtained by the plaintiff is not more favorable than the offer, it is mandatory that the plaintiff must pay the

offerors' costs incurred after making of the offer.").

Thus, NRCP 68's plain language and the presumption of harmony with FRCP 68 lead to only one ending point: costs are mandatory where an offeree rejects an offer and fails to obtain a more favorable judgment. Hyatt did just that, and so at minimum he must pay FTB's post-Offer costs.[7]

C. The District Court Erred in Denying FTB's Post-Offer Attorney's Fees Against the Plain Language of the Rule.

1. Attorney's Fees Are Mandatory Under NRCP 68(f)(1)(B) If the Offeree Fails to Obtain a More Favorable Judgment Than the Offer.

As with the cost component of NRCP 68(f), the rule's plain language similarly makes the offeror's post-offer attorney's fees mandatory. *See* NRCP 68(f)(1)(B) (explaining "the offeree must pay the offeror's post-offer . . . reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer."). Even so, the district court again exercised unavailable discretion to engage in *Beattie* analysis that would be more appropriate if this was a mixed results case. *See Washoe Med. Ct.*, 122 Nev. at 1303, 148 P.3d at 793 (holding that the use of mandatory language "does not denote judicial discretion"). But this is not a mixed results case. (10 AA 001559-60). FTB won completely, and it is entitled to its post-Offer attorney's fees as mandatory under the use of "must" in NRCP 68(f)(1)(B).

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[7] This, of course, is in the alternative to Hyatt's liability to pay all FTB's costs under NRS 18.020.

Perhaps the district court believed the word "must" in NRCP 68(f) only modified post-offer costs and expenses and not attorney's fees, but this interpretation would violate the series-qualifier canon. The canon presumes that "when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." Black's Law Dictionary (10th ed. 2014). Under this canon, the use of "must" in NRCP 68 modifies all things that follow (costs, expenses, expert witness fees, interest, and reasonable attorney fees), and so attorney's fees are mandatory.

The district court may have also given an improper meaning to the phrase "if any be allowed" in NRCP 68(f) as granting discretion to deny FTB's legal entitlement to attorney's fees. But in construing statutes or rules of civil procedure, courts must "select the construction that will best give effect" to the drafting intent. *Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 826-27, 192 P.3d 730, 734 (2008). This Court has noted that the intent of NRCP 68 is two-fold, each aimed at "saving time and money for the court system, the parties, and the taxpayer." *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. 235, 245, 416 P.3d 249, 258 (2018). NRCP 68 "reward[s] the party who makes a reasonable offer." *Id.* It also "punish[es] the party who refuses to accept such an offer." *Id.*

Thus, the language of "if any be allowed" near the rule's end does not create discretion when it does not exist because of mandatory language of "must" in the

rule's beginning. On the contrary, the phrase "if any be allowed" reminds the district court and the parties of NRCP 68's purposes and how a party can recover its attorney's fees under the rule. It does so in two ways.

First, the "if any be allowed" language encourages the district court to distinguish between cases when there is a mixed result and cases when there is a complete victory. The purposes of the rule—to reward an offeror's reasonable offer and to punish the offeree's rejection of the same—are strongest where there is a complete victory. In such cases, the "if any be allowed" language remains passive. An offeror such as FTB that obtains a complete victory after making an offer of judgment is entitled to NRCP 68's relief. That offeror has incurred the expense of taking the matter to trial because the offeree rejected an offer exceeding the zero that the offeree obtained at trial.[8]

On the other hand, in mixed result cases, the phrase "if any be allowed" reminds the district court that the interplay between the rule's purposes and the partial victories for the offeror and offeree is harder. In these mixed result cases, the "reward" to the offeror and the "punishment" to the offeree is often unclear or difficult to determine. Thus, the district court may have discretion to utilize the *Beattie* factors to help weigh the mixed results case.

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[8] And sometimes, as in this case, the offeror not only bears the expense of trial but also appeals after the trial. (37 AA 005527-29).

Second, the phrase "if any be allowed" is also reasonably construed as a reference to the second question involved in awarding attorney's fees: the amount of such fees or costs that the district court should award to the moving party under *Brunzell*. The phrase "if any be allowed" does not reference a moving party's legal entitlement to fees because NRCP 68's mandatory use of "must" already establishes such entitlement. Instead, the phrase "if any be allowed" conveys that *Brunzell* still requires (a) the moving party to produce evidence of its billing invoices; and (2) the district court to determine the amount of fees justified as reasonable, necessary, and actually incurred. In other words, the phrase "if any be allowed" reminds the district court and the moving party that there remains analysis under *Brunzell* of the amount of fees even where an offeree fails to beat an offer of judgment.

And so the district court's conclusion that it had discretion to deny FTB's post-Offer fees under NRCP 68 is unsupported by the rule's mandatory language and its purposes. This case involves a complete victory for FTB, and that victory cost the State of California and its taxpayers a great deal of money after Hyatt rejected FTB's Offer. In that event, there is no discretion for the district court. NRCP 68 required it to enforce FTB's Offer consistent with the purpose of the rule. The Court should reward FTB for its attempt to resolve this matter back in 2007, and it should punish Hyatt for his rejection of the same.

2. The Modern Trend in Other Jurisdictions Is That Attorney's Fees Are Mandatory Where an Offeree Fails to Obtain a More Favorable Judgment Especially When The Offeree Recovers Nothing.

FRCP 68 does not include attorney's fees, and so the Court cannot glean any guidance from its federal counterparts. *See Int'l Game Tech., Inc.*, 122 Nev. at 153, 127 P.3d at 1103. Even so, 46 states now have a rule of civil procedure or statute providing for offers of judgment, with many allowing for recovery of attorney's fees along with costs. The modern trend in those jurisdictions that allow attorney's fees is toward making them mandatory when an offeree fails to obtain a more favorable judgment.

For example, Alaska follows a modified version of FRCP 68 that allows for both attorney's fees and costs. *See* Alaska R. Civ. P. 68(b)-(c). When an offeree fails to beat an offer of judgment, Rule 68(c) of the Alaska Rules of Civil Procedure deems the offeror the prevailing party, and it is mandatory that the offeror recover its attorney's fees as the prevailing party under Rule 82. *See* Alaska R. Civ. P. 68(c) (stating offeror "shall be considered the prevailing party for purposes of an award of attorney's fees under Civil Rule 82."); *see also* Alaska R. Civ. P. 82(a) ("[T]he prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.").

Florida, Georgia, and New Jersey similarly follow suit. In Florida, offers of judgment fall under Florida Statute § 768.79, which provides an offeror "shall be

entitled to recover reasonable costs and attorney's fees" if the offeror obtains a complete victory. Fla. Stat. § 768.79(1). Georgia's law states that a "defendant shall be entitled to recover reasonable attorney's fees and expenses of litigation" when it "makes an offer of settlement which is rejected by the plaintiff" and the plaintiff fails to beat the offer after trial. O.C.G.A. § 9-11-68. New Jersey's offers of judgments fall under New Jersey Court Rules, and Rule 4:58-2 states that an offeror "shall be allowed . . . a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance" of an offer of judgment. N.J. Ct. R. 4:58-2(a)(3). Each of these states makes the award of attorney's fees mandatory if an offeree rejects an offer and fails to beat it at trial.

Thus, the mandatory nature of NRCP 68(f) about post-offer attorney's fees does not stand alone. On the contrary, several states have offer of judgment statutes that include mandatory language and treat the legal entitlement to attorney's fees in such situations no different than costs. Those fees are mandatory if an offeree fails to beat the offer of judgment at trial.

3. Even If Attorney's Fees Are Not Mandatory Under NRCP 68(f) When an Offeree Fails to Obtain a More Favorable Judgment, the *Beattie* Factors Favor Enforcing FTB's Offer of Judgment.

Despite the mandatory nature of NRCP 68(f)'s plain language, the Court has historically injected some nature of discretion into the rule on the issue of attorney's fees. *See, e.g.*, *Armstrong v. Riggi*, 92 Nev. 280, 281, 549 P.2d 753, 754 (1976)

(stating NRCP 68 "invests the court with discretion to allow such fees when the judgment obtained by the offeree is not more favorable than the offer.").[9] As discussed above, this departure from the rule's plain language is most appropriate in mixed results cases, and the Court has applied it through use of the *Beattie* factors. *See Beattie*, 99 Nev. 579, 668 P.2d 268 (1983). *Beattie* considers NRCP 68's dual purposes—to reward a successful offer and to punish an offeree for rejecting the same—and weighs four factors covering good faith and reasonableness because of those purposes. *See* 99 Nev. at 588-89, 668 P.2d at 274.

Though this case involves FTB's complete victory and so the *Beattie* factors should not apply, the factors still favor FTB. Even so, the district court improperly considered certain procedural facts irrelevant to the *Beattie* factors to conclude otherwise. For example, the district court put great weight on the fact that Hyatt obtained a legally erroneous victory at trial that marginally survived on appeal until *Hyatt III*. (10 AA 001559-60). But a false victory is irrelevant to analysis under NRCP 68. As an Arizona appellate court eloquently phrased it in construing Arizona's offer of judgment rule, an offeree's loss at the very end of the case is no less damning under the rule than a loss at the case's beginning:

Ultimately, it is solely within the purview of the parties to prudently

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[9] *Armstrong*'s holding on this ground is tenuous. As the *Armstrong* court noted, the version of NRCP 68 in place when the Court decided *Armstrong* included the mandatory term "shall" about an offeree's liability for attorney's fees and costs. *See* 92 Nev. at 281 n. 1, 549 P2d at 754.

> evaluate their causes of action and defenses and the potential risks and benefits of proceeding to trial . . . The offeror should not be punished for investing in the necessary calculation to determine, correctly, the existence and extent of his financial exposure at trial. Nor should the offeree benefit from his failure to properly value a case or be permitted, after the verdict is returned, to argue either what was "reasonable" so as to justify his refusal to accept the offer or, alternatively, to make some belated and collateral assertion of what the jury should have awarded.

Stafford v. Burns, 241 Ariz. 474, 485, 389 P.3d 76, 87 (Ct. App. 2017). Hyatt was the master of his case, and he failed to accurately evaluate his potential risks in unjustifiably dragging FTB into Nevada courts. (10 AA 001559-60). On the other side of the coin, FTB, through substantial time, cost, and hardship, accurately asserted the jurisdictional and immunity issues from the case's beginning, and it maintained this argument in the face of several legal errors that required multiple appeals to correct. (10 AA 001552-60). Hyatt cannot punish FTB under NRCP 68 for FTB's correct evaluation of his case. On the contrary, even under the *Beattie* factors, FTB may enforce its Offer.

Hyatt's runaway and legally incorrect jury award similarly enamored the district court when it applied the *Beattie* factors. (10 AA 001556). The district court found that Hyatt had a good faith belief he would prevail at trial and that "a verdict and final judgment well in excess" of FTB's Offer justified the same. (10 AA 001559). In doing so, the district court noted the inflated amounts that the jury awarded to Hyatt. (10 AA 001559-60). But a jury's unsupported and erroneous

award has no relevance to NRCP 68 or *Beattie* analysis. *See, e.g.*, *Metzler v. BCI Coca-Cola Bottling Co. of Los Angeles*, 230 Ariz. 26, 28, 279 P.3d 1188, 1190 (Ct. App. 2012) ("[W]hether Rule 68 sanctions apply depends on the court's judgment, not on the jury's verdict."). The jury's huge award was a result of the trial judge's multiple prejudicial errors involving admissibility of evidence, jury instructions, and other serious matters, almost all of which were induced by Hyatt and his attorneys. This Court reversed all but a small fraction of the jury's award, and the Court immediately corrected the jury award on appeal for several of Hyatt's causes of action, finding that Hyatt maintained them with no justification. *See Franchise Tax Bd. of California*, 130 Nev. at 681-690, 335 P.3d at 139-144 (dismissing Hyatt's claims for abuse of process, breach of confidential relationship, and three invasion of privacy causes of action).

Neither Hyatt nor the district court can rely on an invalidated jury award to frame FTB's Offer or Hyatt's reasonable trial expectations under *Beattie*. On the contrary, the only reasonable expectation is the one justified by the law, and here, the Supreme Court of the United States found that Hyatt had no case based on the same immunity principles FTB had advanced since the case's start. Hyatt alone had the responsibility to evaluate his "causes of action . . . and the potential risks and benefits of proceeding to trial." *Stafford*, 241 Ariz. at 485, 389 P.3d at 87. He failed in that respect, and NRCP 68 holds him accountable for this failure by awarding

FTB its post-Offer attorney's fees. *See* NRCP 68(f).

Beattie does not change that result. FTB made the Offer in 2007, but Hyatt continued to pursue his baseless claims for another 12 years until *Hyatt III* confirmed that FTB had been correct all along. (37 AA 005527-29). In those 12 years, a large portion of which occurred during the Great Recession and severe financial stress to the State of California's budget, FTB incurred fees climbing the appellate mountain to correct prior legal errors while Hyatt continually refused FTB's settlement overtures even after FTB's Offer. *See id.* Hyatt directly attacked California's sovereignty by dragging FTB into Nevada and asking the district court to declare that Hyatt was a Nevada resident for tax purposes. *See id.* He did so despite a California administrative tax structure that allowed Hyatt a straightforward, far less costly method to challenge his California tax liability. *See id.*[10]

In that event, and as vindicated by the Supreme Court of the United States, it was FTB, not Hyatt, who acted reasonable and in good faith in making the Offer and trying to resolve this case before trial despite holding a winning hand. NRCP 68 rewards FTB for its efforts with its post-Offer attorney's fees. *See MEI-GSR*

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[10] He also did so despite a statutory damages cap that limited him to $50,000 per cause of action. *See* 133 Nev. Adv. Op. 102, 407 P.3d at 725 n. 2. Thus, even had *Hyatt III* not outright dismissed Hyatt's case, Hyatt's only two legally viable claims still would not have exceeded FTB's Offer in the amount of $110,000.00. (37 AA 005535).

Holdings, LLC, 134 Nev. at 245, 416 P.3d at 258 (holding NRCP 68 "reward[s] the party who makes a reasonable offer."). *Beattie* supports the same.

CONCLUSION

The district court erred denying FTB's costs and its post-Offer attorney's fees. By conflating prevailing party analysis under NRS Chapter 18 with offer of judgment analysis under NRCP 68, the district court wandered off the correct analytical path. This also caused the district court to inject discretion into NRS 18.020 and NRCP 68(f) despite the mandatory language in each.

Simply put, this case was a complete victory for FTB—a dismissal of Hyatt's lawsuit in its entirety. In that case, NRS 18.020 mandates that FTB is the prevailing party and that the district court "must" award FTB its costs. Similarly, because Hyatt failed to obtain a judgment more favorable than FTB's Offer, NRCP 68(f) identically mandates that Hyatt "must pay" FTB's post-Offer attorney's fees and costs.

As a result, FTB asks that the Court reverse the district court on the issue of attorney's fees and costs and find that FTB is entitled to recover its costs under NRS 18.020 and/or NRCP 68 and its post-Offer attorney's fees under NRCP 68. FTB also requests that the Court remand the matter to the district court with narrow instructions to conduct the required *Brunzell* and *Cadle Co.* analysis to determine the amount of costs and fees to award FTB.

Dated this 31st day of July, 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 9,541 words.

Under NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion about matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions if this brief does not conform to the requirements of the Nevada Rules of Appellate Procedure.

Dated this 31st day of July, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP, and on the 31st day of July, 2020, a copy of the foregoing document was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system:

/s/ Beau Nelson
An Employee of McDonald Carano LLP