**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**



On Appeal from the Eighth Judicial District Court, Clark County
Case No. A382999
THE HONORABLE TIERRA JONES, District Judge, Department X

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# RESPONDENT'S BRIEF ON BEHALF OF GILBERT P. HYATT

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## NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(1), and must be disclosed:

Respondent Gilbert P. Hyatt is an individual.

The attorneys who have appeared on behalf on the respondent in this Court and in district court are:

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

Dated this 1st day of October, 2020.

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***/s/ Mark A. Hutchison***

By: _____

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Respondent Gilbert P. Hyatt (“Respondent” or “Hyatt”) submits his Respondent's Brief in response to Appellant Franchise Tax Board of the State of California’s (“Appellant” or “FTB”) Opening Brief (“OB”) in its appeal of the district court's order that found no prevailing party in the underlying action and therefore denied the FTB's request for an award of costs and motion for attorney's fees.

## 1. Introduction.

The central issue in this appeal is whether the district court erred in denying fees and costs to the FTB. And the answer is no. Rather, the district court correctly decided that "as a matter of law and equity, there was no prevailing party in this action and neither party is entitled to an award of costs or attorney's fees."[1] In appealing that order, the FTB floats the false narrative that it challenged the district court's jurisdiction from the outset of the case in 1998. The true procedural history of the case—as detailed here and in the district court's order[2]—is the very reason that the FTB cannot as a matter of law or equity be deemed a prevailing party. Because it is not a prevailing party, the FTB is not entitled to an award of costs or attorney's fees.

This case proceeded for almost 20 years based explicitly on the long-

[1] 10 AA 1560; 37 AA 5865-68.
[2] 10 AA 1552-59.

standing United States Supreme Court precedent, *Nevada v. Hall*, 440 U.S. 410 (1979). Relatively early in the case, the FTB sought and obtained United States Supreme Court review in 2002, but it *did not ask* that *Nevada v. Hall* be reversed.[3] Instead, the FTB argued for an exception to *Nevada v. Hall*, which was rejected by the United States Supreme Court.[4] That ruling reinforced that Nevada had jurisdiction over the FTB, based on *Nevada v. Hall*, and affirmed the Nevada Supreme Court's decision in 2002 allowing this case to proceed, relying on the *Nevada v. Hall* precedent.[5]

The case therefore proceeded through full discovery and a jury trial, and then years of appeal. After losing at trial, after the Nevada Supreme Court upheld the fraud and intentional infliction of emotion distress verdicts against the FTB, and after having exhausted all of its appeals in Nevada, the FTB again requested United States Supreme Court review in 2015—*17 years after the case was filed.* This time, for the first time, the FTB requested, but failed to obtain, reversal of *Nevada v. Hall*. The United States Supreme Court deadlocked, 4-4, resulting in the Nevada Supreme Court decision remaining in effect.[6] The FTB thereby received a

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[3] 8 RA 1774-1783.
[4] *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003) ("Hyatt I")
[5] *Franchise Tax Bd. of Cal. v. Eighth Judicial Dist. Ct.*, No. 35549, No. 36390, 2002 Nev. LEXIS 57, at *10 (Nev. Apr. 4, 2002) (unpublished disposition).
[6] *Nevada v. Hall. See Franchise Tax Bd. of Cal. v. Hyatt*, 136 S. Ct. 1277 (2016) ("Hyatt II").

second bite at the apple in again obtaining United States Supreme Court review. It then took a third bite in 2019, where the United States Supreme Court reversed the then 40-year old *Nevada v. Hall* precedent in a 5-4 vote.[7] This was *21 years after* Hyatt filed this case.

This shows the complexity and difficulties presented by Hyatt, far from a "complete victory" for FTB. This case was not a “slam dunk,” but instead equivalent to several marathons, with Hyatt winning the first three. Although the United States Supreme Court ultimately overturned its 40-year precedent, this ultimate outcome was not certain or predictable at any time, particularly at the time the FTB submitted its $110,000 offer of judgment prior to trial in 2007—*13 years ago*.

The correct standard of review in this appeal is abuse of discretion, not *de novo*. The FTB has not, and cannot, establish that the district court abused its discretion in ruling that there was no prevailing party in this two-plus decade case and that neither party was entitled to an award of costs or attorney's fees. But even if this Court were to apply a *de novo* standard of review, there is no basis for a *de novo* decision that FTB was the prevailing party entitled to costs and attorney’s fees. Such a decision in FTB’s favor would disregard and disagree with the district court’s well thought-out and considered findings that there was no prevailing party

[7] *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) (“Hyatt III”).

and that neither side was entitled to an award of costs or attorney's fees.

As the FTB acknowledges, based on decisions from this Court, there are circumstances in which the district court is well within its discretion in finding no prevailing party and not awarding costs under NRS 18.020. This is one of those cases. The FTB makes up out of thin air the concept of "complete victory" relative to awarding costs. None of the FTB-cited cases use that term or support that theory espoused throughout the FTB's opening brief. Nor did the FTB have a "complete victory" in this case. The 22-year procedural history of the case belies the FTB's assertion. And the district court most certainly did not find that the FTB had a "complete victory." The record shows the extensive briefing by the parties, the understanding of the issues by the district judge, and the district court's reasoned decision clearly within its discretion and not challengeable as an abuse thereof.

The district court's decision was also entirely consistent with federal law and decisions from other states that have held that the trial court has discretion to deny costs where there is no actual prevailing party. This includes denial as a matter of equity, where an unanticipated change-in-law *during the litigation* reversed the results of the case. This body of law is entirely consistent with the district court's finding that there was no prevailing party, and therefore no party is entitled to an award of costs or attorney's fees in this case.

Similarly, the district court also properly denied the FTB an award of costs and attorney's fees under NRCP 68 ("Rule 68"). The district court had discretion under established law to deny the FTB costs under Rule 68, applying the same *Beattie* factors used to determine whether attorney's fees should be awarded.[8] As the district court found, Hyatt brought this case and pursued it in good faith. At the time of the FTB's Rule 68 offer of judgment in 2007, *Nevada v. Hall* was still the long-standing, valid and existing precedent and had not been challenged by the FTB. Reliance on precedent is not unreasonable or in bad faith. Such reliance supports Hyatt's rejection of the $110,000 offer of judgment, especially where a jury returned a verdict at trial of almost $500,000,000, or close to 5,000 times more than the offer of judgment. The district court correctly so found.

In fact, Hyatt accepting such an offer would have been unreasonable, given the binding precedent of *Nevada v. Hall* at the time of the offer and at the time of the jury verdict at trial. Under Nevada law, the district court was well within its discretion in denying the FTB costs and attorney's fees under Rule 68. Although these factors are more frequently addressed in the context of attorney's fees,[9] this Court has more than once affirmed that *costs and fees* are subject to the discretion of the trial court and can be (and should be) denied when, as here, the offer of

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[8] *Beattie v. Thomas*, 99 Nev. 579, 588–89, 668 P.2d 268, 274 (1983).
[9] Costs are more typically addressed under NRS 18.020. As a result, most cases addressing Rule 68 address only attorney's fees.

judgment was not made in a good faith attempt to settle the case and was rejected in good faith based on the then-available facts and law applicable to the case.

Here, based on its timing and amount, the FTB's settlement offer was not a good faith attempt to settle the case. Hyatt in good faith rejected it. The offer was made in late 2007, after the case had been reviewed by the United States Supreme Court and twice by this Court, and the case was allowed to proceed to trial specifically based on *Nevada v. Hall*—with no hint or suggestion that the long-standing precedent would be overturned *twelve years in the future*. The amount offered, $110,000, was well below the costs alone each side had incurred at that time, and to say nothing of the attorney's fees expended, making the offer neither realistic nor in good faith to avoid the impending trial. As the district court found:

> Hyatt brought this action in good faith in reliance on the United States Supreme Court precedent Nevada v. Hall. During the last 21 years while relying on Nevada v. Hall, Hyatt prevailed in both the Nevada Supreme Court (2002) and the United States Supreme Court in 2003 (*Hyatt I*) and then obtained a large jury verdict and final judgment against the FTB (2008), which the Nevada Supreme Court affirmed in part (2014). The United States Supreme Court's reversal of its long-standing *Nevada v. Hall* precedent in *Hyatt III* in 2019 stripping this Court of jurisdiction over the FTB could not have been anticipated by Hyatt.
>
> Hyatt also had a good faith belief that he would prevail at trial on his claims and recover in excess of the $110,000 offer of judgment made by the FTB in 2007. Hyatt did obtain a verdict and final judgment well in excess of that amount. The damages limitation to Hyatt's claims was not decided and imposed until 2016 in *Hyatt II*. It was therefore

> not grossly unreasonable or in bad faith for Hyatt to not accept the FTB's offer of judgment of the $110,000 in 2007. . . . Further, as of 2007, this case had been reviewed by both the Nevada Supreme Court (2002) and the United States Supreme Court (2003), and the FTB had not argued that *Nevada v. Hall* was wrongly decided and should be reversed. The FTB did not assert that argument or seek that relief with the United States Supreme Court until 2015 after ruling by this Court and exhausting all appeals in the Nevada Supreme Court.[10]

Offers of judgment are to be used to foster settlement based on the facts and circumstances at the time made. It is not to be used as a tactical device for the purpose of recovering costs and fees to which the party would not otherwise be entitled. The reasonableness and good faith in making and rejecting the offer cannot be based on future, unknown and unexpected developments, particularly changes in long-standing United States Supreme Court precedent. The district court was well within its discretion in finding that it was not unreasonable or in bad faith for Hyatt to reject the offer of judgment.

Because of the change in law, and given the broad deference afforded to the district court in exercising discretion in awarding fees and costs, there is no legal basis to reverse the district court's decision that there was no prevailing party in this action and not awarding costs or attorney's fees to either side. The trial court's decision should be affirmed in its entirety.

[10] 10 AA 1559-60.

## 2. Statement Of The Issues.

1. What is the standard of review when a party challenges the district court's determination that there was no prevailing party in the action?

2. Given the extensive and complicated history of this case through multiple decisions of the district court, the Nevada Supreme Court, and the United States Supreme Court, which history reflects the difficult legal questions presented, and given the ultimate overturning of long-standing precedent, did the district court abuse its wide discretion in determining there was no prevailing party in this action?

3. Did the district court abuse its wide discretion in denying the FTB's request for costs and motion for attorney's fees under Rule 68?

## 3. Statement of the Case.

This case was filed in 1998. Before the case went to trial in 2008, Hyatt prevailed in the United States Supreme Court[11] and in the Nevada Supreme Court[12] on the issue of whether Nevada courts have jurisdiction over a California agency, based on *Nevada v. Hall*. The case therefore proceeded to a jury trial in Nevada district court. Hyatt prevailed at trial, and this Court affirmed part of the judgment

[11] *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003) ("Hyatt I").
[12] *Franchise Tax Bd. of Cal. v. Eighth Judicial Dist. Ct.*, No. 35549, No. 36390, 2002 Nev. LEXIS 57, at *10 (Nev. Apr. 4, 2002) (unpublished disposition).

in Hyatt's favor—including the jury's verdict that the FTB had committed fraud and intentionally inflicted emotional distress against Hyatt.[13] At that time, Hyatt clearly was the "prevailing party", and FTB had no claim for costs or attorney's fees.

Having exhausted its appeals in Nevada and lost virtually every phase of the case, the FTB again sought review by the United States Supreme Court—17 years after this case was filed—*asking for the first time* that the Court reverse its long-standing *Nevada v. Hall* precedent and retroactively strip this Court of jurisdiction.[14] After two reviews over a four-year period and a change in membership on the Court, the United States Supreme Court granted the FTB's request in 2019 and reversed *Nevada v. Hall*, depriving this Court for the first time of jurisdiction over the FTB.[15]

This Court then remanded the case to the district court to enter a final judgment *and determine whether there is a prevailing party*.[16] That is precisely what the district court did, and what this Court tasked it to do. In two separate

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[13] *Franchise Tax Bd. of Cal. v. Hyatt*, 130 Nev. 662, 710, 335 P.3d 125, 157 (2014).
[14] 13-14 RA 3181-3312.
[15] See *Franchise Tax Bd. of Cal. v. Hyatt*, 136 S. Ct. 1277 (2016) ("Hyatt II"); *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) ("Hyatt III").
[16] *Franchise Tax Board of State of California v. Hyatt*, 445 P.3d 1250 (Nev. 2019) (unpublished disposition) (a copy is at 17 RA 4027).

rulings, and after two separate rounds of briefing, the district court found that neither side was a prevailing party and that neither side was entitled to an award of attorney's fees or costs.[17] There is no legal basis to overturn the district court's ruling.

**4. Statement Of Facts.**

The district court's judgment sets forth a detailed procedural history of this case from its filing in 1998 through the United States Supreme Court's decision in *Hyatt III* in 2019 and then this Court's remand on the case to the district court, also in 2019, for the specific purpose of deciding whether there is a prevailing party.[18] The district court's eight-page procedural history is supported by a 94-exhibit, multi-volume appendix that was part of the district court record and not challenged by the FTB in the district court.[19]

Based in substantial part on the two-decade-plus procedural history of the case, the district court found there was no prevailing party entitled to an award of costs or attorney's fees. Hyatt sees no need here to repeat the entire procedural history of the case, with which this Court is all too familiar. Hyatt instead provides a summary of the material events from the case history that confirm that the district court was well within its discretion in finding there was no prevailing party and

[17] 10 AA 1560; 37 AA 5865-68.
[18] 10 AA 1552-59; *see also* 1 AA 1-2.
[19] 6 AA 719-29; 6 AA 754-61; 7 AA 1056-1059; 1-17 RA 2-4027.

denying the FTB costs and attorney's fees.

## A. Summary of 21-year case procedural history through *Hyatt III* (1998 to 2019).

### *(1) Case filing and initial appellate review (1998 to 2003).*

Hyatt filed this action on January 6, 1998, against the FTB, the California state agency responsible for assessing state income taxes.[20] Hyatt's suit was filed in Nevada, based on and consistent with the United States Supreme Court's holding in *Nevada v. Hall* that a state could not claim immunity in the courts of a sister state based on that state's own immunity laws. In *Nevada v. Hall*, the California court refused to limit the liability of a Nevada agency for tortious conduct committed in California, in accord with Nevada law.[21] The California court treated the Nevada agency as if it had no immunity in California. The United States Supreme Court affirmed the California court's award of full damages to the California resident against the Nevada agency.

Hyatt's complaint in this case sought full recovery of damages he incurred due to tortious actions of the FTB, which occurred in Nevada or were directed into Nevada while Hyatt was residing in Nevada. He sought damages from the FTB

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[20] 6 AA 761-78.

[21] *Hall v. Univ. of Nev.*, 141 Cal. Rptr. 439, 442 (Ct. App. 1977), *aff'd*, *Nevada v. Hall*, 440 U.S. 410 (1979), *rev'd*, *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019).

stemming from its bad faith and intentional misconduct.

The FTB first tried and failed to remove this case to federal court (1998).[22] The FTB then tried and failed to have the district court dismiss Hyatt's tort claims at the pleading stage (1999).[23] The FTB then sought and was denied summary judgment (2000), including on its failed argument that it was entitled to an exception to the *Nevada v. Hall* precedent.[24]

Having been denied summary judgment by the district court, the FTB filed a writ petition with this Court seeking review of the district court's denial of the FTB's summary judgment motion.[25] This Court accepted review (2000).[26] The FTB did not ask this Court to overrule or not recognize *Nevada v. Hall*.[27] Ultimately, this Court denied the FTB's petition concluding that: (1) Hyatt had sufficient evidence for his tort claims; (2) Nevada had jurisdiction to hear Hyatt's intentional tort claims against the FTB under *Nevada v. Hall;* and (3) Nevada would adjudicate those claims as a matter of comity because the State of Nevada allows its state agencies to be sued in Nevada's courts for intentional torts.[28]

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[22] 6 AA 780-84; 809-27.
[23] 2-3 RA 334-349; 351-697.
[24] 5-6 RA 1221-1281; 1283-1286.
[25] 4; 6 RA 901-942; 1291-1342.
[26] 7 RA 1494-1496.
[27] 8 RA 1794-1812; 1814-1827; 1829-1840; 1842; 1844-1868; 1870-1923; 1925-1950.
[28] 8 RA 1785-1792.

### *(2) The FTB then obtained review, but was denied relief, by the United States Supreme Court in a 9-0 decision against the FTB (2002 to 2003).*

The FTB's first petition for review and its merits briefing to the United States Supreme Court neither asserted nor sought review on the issue of whether *Nevada v. Hall* was wrongly decided and should be reversed. Rather, the FTB argued that an exception to *Nevada v. Hall* should be established.[29] The United States Supreme Court agreed to review the case, but then issued a unanimous 9-0 decision denying the FTB's appeal, *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003) ("*Hyatt I*").[30] The decision cited *Nevada v. Hall*, rejected the FTB's asserted exception to *Nevada v. Hall*, and concluded that this Court had appropriately applied comity by allowing Hyatt's intentional tort claims to proceed in Nevada state court while dismissing Hyatt's negligence claim. *Id.*

### *(3) Return to the district court for completion of discovery and trial (2003 to 2008).*

After the United States Supreme Court and this Court's decisions favorable to Hyatt, the parties conducted additional discovery including on whether the FTB acted in bad faith by delaying and extending the audit and protest process in order

[29] 8 RA 1794-1812; 1829-1840; 1844-1868; 1925-1950.
[30] 8-9 RA 1952-1959; 1961.

to put pressure on Hyatt to settle the tax proceeding in California.[31] The district court denied the FTB's summary adjudication motion seeking to remove the bad faith delay issue from the case (2006).[32]

The FTB then made an offer of judgment for $110,000 (inclusive of costs) in late 2007.[33] Hyatt did not accept the offer, and as evidenced by the bill of costs he later filed, he had incurred millions of dollars in costs.[34]

The case proceeded to a four-month jury trial in 2008. The jury returned verdicts on August 6, 2008 (liability for and award of compensatory damages), on August 11, 2008 (liability for punitive damages), and on August 14, 2008 (award of punitive damages).[35] The jury awarded Hyatt compensatory damages of $85 million for emotional distress; compensatory damages of $52 million for invasion of privacy; attorney's fees and other professional fees as special damages of $1,085,281.56 on Hyatt's fraud claim; and punitive damages of $250 million.[36] A judgment was entered consistent with the jury's verdicts.[37] The district court later awarded Hyatt costs in the amount of $2,539,068.65.[38]

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[31] 9 RA 1963-2030; 2057-2062.
[32] 9 RA 2032-2055; 2108-2146; 2148-2151.
[33] 11 RA 2484-2487.
[34] 11 RA 2670-2673.
[35] 11 RA 2489-2490; 2492; 2494.
[36] *Id.*
[37] 11 RA 2496-2500.
[38] 11 RA 2670-2673.

### *(4) This Court affirmed the jury's verdict on Hyatt's fraud claim and intentional infliction of emotional distress claim (2009 to 2014).*

In the FTB's opening 100-plus-page brief filed with this Court on August 7, 2009, the FTB made a reference to *Nevada v. Hall*, but gave no emphasis to it. The FTB requested in a footnote that this Court evaluate the continuing viability of *Nevada v. Hall* stating in footnote 80 that "it is questionable whether there is still validity to" *Nevada v. Hall* and that this Court "may evaluate the continuing validity of an old United States Supreme Court opinion."[39] Hyatt filed a responding brief that focused on the issues raised by the FTB.[40] Therefore, Hyatt did not address the jurisdiction issue or the validity of *Nevada v. Hall*, because that issue had been addressed and decided years earlier when this Court and the United States Supreme Court each concluded that jurisdiction was proper and allowed the case to proceed to trial.

This Court conducted two oral arguments on the FTB's appeal.[41] The issue of reversing *Nevada v. Hall* was not raised in either argument by the parties or this Court. Instead, this Court affirmed the portion of the judgment in favor of Hyatt on his fraud claim and the award of $1,085,281.56, and reached specific

[39] 11 RA 2526-2668. The FTB's 145-page Reply Brief did not address the validity of *Nevada v. Hall*. 12-13 RA 2901-3086.
[40] 11-12 RA 2675-2899.
[41] 13 RA 3088-3125; 3127-3144.

conclusions as to the evidence that supported the fraud claim:

> FTB represented to Hyatt that it would protect his confidential information and treat him courteously. At trial, Hyatt presented evidence that FTB disclosed his social security number and home address to numerous people and entities and that FTB revealed to third parties that Hyatt was being audited. . . . Furthermore, Hyatt showed that FTB took 11 years to resolve Hyatt's protests of the two audits. Hyatt alleged that this delay resulted in $8,000 in interest per day accruing against him for the outstanding taxes owed to California. Also at trial, Hyatt presented evidence through Candace Les, a former FTB auditor and friend of the main auditor on Hyatt's audit, Sheila Cox, that Cox had made disparaging comments about Hyatt and his religion, that Cox essentially was intent on imposing an assessment against Hyatt, and that FTB promoted a culture in which tax assessments were the end goal whenever an audit was undertaken.
>
> The evidence presented sufficiently showed FTB's improper motives in conducting Hyatt's audits, and a reasonable mind could conclude that FTB made fraudulent representations, that it knew the representations were false, and that it intended for Hyatt to rely on the representations. . . . Based on this evidence, we conclude that substantial evidence supports each of the fraud elements.
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> *Hyatt*, 130 Nev. at 691–92.

This Court also affirmed the portion of the judgment in favor of Hyatt as to liability on his cause of action for intentional infliction of emotional distress ("IIED") citing similar facts as cited for affirming the fraud claim and ordering a new trial as to damages on that claim *Id*. at 697–98.

### *(5) The United States Supreme Court accepted review of the case a second time but did not reverse Nevada v. Hall (2015 to 2016).*

Having exhausted its appeals in Nevada, the FTB sought and received a second review by the United States Supreme Court in 2015. Unlike its positions and arguments in 2003, this time FTB sought reversal of *Nevada v. Hall*. The FTB also alternatively argued that the award of damages in favor of Hyatt must be limited to $50,000 per claim in accord with Nevada law limiting damages for claims made against Nevada state agencies.[42] Hyatt opposed the FTB on both grounds.[43]

The United States Supreme Court rendered a 4 to 4 decision (divided along political lines) on the FTB's request to reverse *Nevada v. Hall*. *See Franchise Tax Bd. of Cal. v. Hyatt*, 136 S. Ct. 1277 (2016) ("*Hyatt II*").[44] Relief was therefore denied as to that issue. A majority of the Court, however, granted the FTB's alternative request that, in accord with *Hyatt I*, the FTB must be treated the same as a Nevada state agency regarding damage limitations. The United States Supreme Court therefore ordered the case remanded to Nevada state court for further proceedings consistent with its ruling.

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[42] 14-15 RA 3181-3312; 3344-3359; 3361-3437; 3503-3512.
[43] 14-15 RA 3314-3342; 3439-3501.
[44] 15 RA 3533-3541.

### *(6) This Court applied damage limitations from Hyatt II (2017).*

At the FTB's request, this Court ordered the parties to submit briefs regarding how the damage limitation from *Hyatt II* should be applied in this case.[45] The FTB argued Hyatt was not entitled to any damages.[46] Hyatt argued that for each of the two claims on which he prevailed (fraud and IIED) he should be awarded $50,000 and the case be returned to the district court for entry of judgment and award of costs.[47] The issue of *Nevada v. Hall* was not addressed.

This Court ruled in favor of Hyatt and issued an opinion ordering that Hyatt recover $50,000 each for his fraud claim and for his IIED claim and remanded the case to the district court to decide the issue of costs. Again, the issue of *Nevada v. Hall* was not addressed. *See Franchise Tax Bd. of Cal. v. Hyatt*, 133 Nev. 826, 407 P.3d 717 (2017).[48]

### *(7) The FTB sought and obtained a third review of the case by the United States Supreme Court (2018).*

Although this Court's decision in 2017 had nothing to do with *Nevada v. Hall*, the FTB again petitioned the United States Supreme Court to review this case

[45] 15 RA 3543-3544.
[46] 15-16 RA 3546-3596; 3660-3697.
[47] 15 RA 3598-3658.
[48] 16 RA 3701-3737.

and reverse *Nevada v. Hall*.[49] Hyatt opposed the petition.[50] The United States Supreme Court again granted the FTB's petition on the issue of whether the Court should reverse its long-standing *Nevada v. Hall* precedent.[51]

### *(8) The United States Supreme Court reversed its long-standing Nevada v. Hall precedent (2019).*

After briefing and arguments by the parties,[52] the United States Supreme Court in a 5-4 decision (again along political lines after Justice Kavanaugh assumed Justice Scalia's seat) reversed *Nevada v. Hall* and remanded this case to Nevada state court for proceedings not inconsistent with the Court's opinion. *See Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) ("*Hyatt III*").[53]

## B. Procedural history post *Hyatt III* (2019 to 2020).

### *(1) This Court remanded the case to the district court (2019).*

The case returned to this Court after *Hyatt III*. This Court promptly remanded the case to the district court ordering:

> [W]e remand this matter to the district court with instructions that the Court vacate its judgment in favor of Hyatt and take any further necessary action consistent with this order and *Hyatt*, 587 U.S. ——, 139 S. Ct. 1485. Accordingly, we

[49] 16 RA 3739-3776; 3802-3816.
[50] 16 RA 3778-3800.
[51] 16 RA 3818-3826.
[52] 16-17 RA 3828-3888; 3890-3951; 3953-3981.
[53] 17 RA 4006-4025.

> ORDER this matter REMANDED to the district court for proceedings consistent with this order.[54]

### *(2) The district court vacated the judgment and determined there was no prevailing party entitled to an award of costs or attorney's fees (2019 to 2020).*

On September 3, 2019, the district court vacated the prior judgment in favor of Hyatt and ordered both Hyatt and the FTB to submit briefing to address the form of judgment to be entered and which party, if either, is the prevailing party.[55] The parties submitted substantial briefing on the prevailing party issue and whether costs or attorney's fee should be awarded.[56]

The district court then ruled, as specified in its February 21, 2020 judgment as also extensively quoted above, "as a matter of law and equity, there was no prevailing party in this action and neither party is entitled to an award of costs or attorney's fees."[57]

### *(3) The FTB nonetheless sought for the second time an award of costs and attorney's fees, which the district court again denied (2020).*

Not satisfied with the district court's ruling and judgment that there was no prevailing party entitled to an award of costs or attorney's fees, on February 26,

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[54] 17 RA 4027.
[55] 1 RA 1.
[56] 1 AA 19-39; 6 AA 707-741.
[57] 10 AA 1560; 37 AA 5865-68.

2020, five days after the district court had entered judgment finding there was no prevailing party, the FTB filed a request for costs under NRS 18.020.[58] Then, on March 13, 2020, the FTB filed a motion for attorney's fees under Rule 68.[59] The parties again extensively briefed the same issues that were briefed in 2019 regarding prevailing party status and whether costs and fees should be awarded.[60]

On April 21, 2020, the district court conducted a hearing on the FTB requests. On April 23, 2020, the district court again found no prevailing party and denied the FTB's request for costs and motion for attorney's fees.[61]

The FTB has now appealed the district court's repeated findings of no prevailing party and denials of the FTB's request for an award of costs and attorney's fees.

## 5. Summary Of Argument.

The FTB misconstrues the law in regard to NRS 18.020. It cites no case, and there is no case, that uses or defines the term "complete victory" or requires an automatic finding of a prevailing party when a plaintiff does not obtain affirmative relief. To the contrary, this Court has affirmed district court findings of no prevailing party for purposes of NRS 18.020 based on specific factual

[58] 10 AA 1574-1585.
[59] 35 AA 5519-45.
[60] 35 AA 5508-18; 5723-49; 5763-93; 5796-5825.
[61] 17 RA 4033-4034. 37 AA 5865-68.

circumstances of each particular case, including when a change in law prevented that case from proceeding any farther. Therefore, the district court correctly exercised its discretion in finding no prevailing party under the specific facts and procedural history of this case.

The FTB also misconstrues the law by asserting that the district court has no discretion concerning requests for costs and fees under Rule 68, when a plaintiff does not obtain a monetary judgment in excess of the amount of the Rule 68 offer. To the contrary, this Court has repeatedly rendered decisions addressing the district court's discretion and obligation to weigh the *Beattie* factors in response to a request for costs and fees under Rule 68. Here, the discussion need go no further than reaffirming the FTB's 2007 offer of judgment was not made as a good-faith settlement offer with the reasonable expectation that it would resolve the case or at least lead to further settlement discussion.

Nonetheless, in addition, given the reaffirmation of *Nevada v. Hall* by this Court in 2002 and the United States Supreme Court in 2003, Hyatt acted with the utmost good faith in filing and pursuing the action until *Nevada v. Hall* was overturned 21 years after the case began. He also had a good faith belief that he would obtain a significantly better result at trial when he rejected the FTB's 2007 $110,000 offer of judgment, as evidenced by the substantial jury verdict the following year and this Court’s affirmance of his fraud claim and award of

damages of over $1 million, as well as affirmance of his intentional infliction of emotional distress claims (for which a new trial on damages only was ordered). The district court therefore did not abuse its discretion in rejecting the FTB's request for fees and costs under Rule 68.

## 6. Argument.

### A. The standard of review is abuse of discretion.

On the standard of review, the FTB cites inapplicable case law that merely addresses the general issue of statutory interpretation. (*See* FTB's Opening Brief 20-21.) The FTB ignores a rich and binding body of case law from this Court holding that abuse of discretion is the standard of review for a challenge to a district court order on prevailing party status under NRS 18.020 or denial of a motion for costs or attorney's fees under Rule 68.

#### *(1) NRS 18.020.*

This Court generally reviews a district court's decision on a prevailing party determination and award of costs or attorney's fees for an abuse of discretion. *See Bower v. Harrah's Laughlin, Inc*., 125 Nev. 470, 494-95, 215 P.3d 709, 727 (2009) ("We conclude that the district court abused its discretion in awarding Harrah's its costs as to all appellants except Garcia and Lewis because the award was based on the erroneous conclusion that Harrah's was the prevailing party."); *Cadle Co. v.*

*Woods & Erickson, LLP*, 131 Nev. 114, 120, 345 P.3d 1049, 1054 (2015) ("NRS 18.020 and NRS 18.050 give district courts wide, but not unlimited, discretion to award costs to prevailing parties. ... We will reverse a district court decision awarding costs if the district court has abused its discretion in so determining."). The FTB acknowledges that the district court has discretion in determining who or whether there is a prevailing party. (*See* FTB's Opening Brief 23, *citing Glenbrook Homeowners Ass'n v. Glenbrook Co.*, 111 Nev. 909, 922, 901 P.2d 132, 141 (1995) and *LVMPD v. Blackjack Bonding*, 131 Nev. 80, 90, 343 P.3d 608, 615 (2015).)

Where the *interpretation* of prevailing party status in a cost or fee-award statute is at issue, the Court will review the prevailing party interpretation *de novo*. *145 E. Harmon II Tr. v. Residences at MGM Grand - Tower A Owner's Ass'n*, 460 P.3d 455, 457 (Nev. 2020). Here, however, there is no interpretation of a statute at issue. The district court's determination that there was no prevailing party was not based on an interpretation of NRS 18.020. The decision was based on the district court's exercise of its discretion based on the unique and lengthy procedural and substantive history of this case.[62]

[62] The FTB did not cite the *145 E. Harmon II* case in its brief. 1 AA 19-39; 10 AA 1552-61; 37 AA 5865-68.

### *(2) Rule 68.*

A district court's application and weighing of the *Beattie* factors in determining whether to award costs or fees under Rule 68 has consistently been reviewed under the abuse-of-discretion standard. *Beattie*, 99 Nev. at 588-89. This Court gives significant deference to a district court's decision to deny costs and fees under Rule 68 when, as here, the *Beattie* factors weigh heavily in favor of the party that rejected the offer of judgment. *See Bidart v. American Title Insur. Co.*, 103 Nev. 175, 179, 734 P.2d 732, 735 (1987) (affirming denial of fee award under Rule 68 to prevailing defendant as offer was low based on damages sought and "discretion will not be disturbed absent clear abuse").

## B. The district court correctly determined that there was no prevailing party in this case entitled to a cost award under NRS 18.020.

### *(1) The district court did not abuse its discretion in finding that the FTB was not a prevailing party.*

The district court concluded that "there is no prevailing party in this action and neither party is entitled to an award of costs or attorney's fees."[63] In reaching this conclusion, the district court explained:

> Hyatt brought this action in good faith in reliance on the United States Supreme Court precedent Nevada v. Hall. During the last 21 years while relying on Nevada v. Hall, Hyatt prevailed in both the Nevada Supreme Court (*2002*)

[63] 10 AA 1560; 37 AA 5865-68.

> and the United States Supreme Court in 2003 (*Hyatt I*) and then obtained a large jury verdict and final judgment against the FTB (*2008*), which the Nevada Supreme Court affirmed in part (*2014*). The United States Supreme Court's reversal of its long-standing Nevada v. Hall precedent in *Hyatt III* in 2019 stripping this Court of jurisdiction over the FTB could not have been anticipated by Hyatt.[64]

This Court has confirmed that there may be no prevailing party, particularly where a change in the law after the filing of the case was case dispositive. *See Eberle v. State ex rel. Nell J. Redfield Trust*, 108 Nev. 587, 590, 836 P.2d 67, 69 (1992) (reversing finding of prevailing party and award of costs for expert witness fees against plaintiff/appellants because they "were . . . deprived by an act of the legislature of their opportunity to test the district court's purely legal conclusions in this court. In our opinion, under these peculiar circumstances, neither party prevailed in this action; the action was terminated by the legislature."); *see also Glenbrook Homeowners Ass'n.*, 111 Nev. at 922 (affirming district court's finding that "[b]ecause of the complicated factual setting and because of the multiplicity of issues, combined with the complexity of settlement negotiations in this case, it is not possible to say who prevailed at trial").[65]

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[64] 10 AA 159-60; 37 AA 5865-68.

[65] This Court has also confirmed in unpublished opinions a district court's finding of no prevailing party and denial of costs or fees in cases involving unique circumstances. *See* e.g., *Meiri v. Hayashi*, No. 71120, 2018 Nev. Unpub. LEXIS 885, *6 (Sept. 28, 2018) (affirming in one matter that neither side was a "prevailing party" for costs and in another the denial of costs even when a party was "technically" prevailing).

Courts outside Nevada have ruled that a party who avoids defeat only by virtue of a change in law ought not to be deemed a prevailing party for purposes of awarding costs or fees. *See Rose v. Montt Assets, Inc.*, 187 Misc. 2d 497, 498–99 (N.Y. App. Term 2000) (noting the lower court's finding that "assumptions of the parties when the litigation began were revocably [*sic*] altered by a change in the law" and concluding that neither party was the prevailing party); *Wells v. East 10th St. Assocs.*, 205 A.D.2d 431, 432, 613 N.Y.S.2d 634 (N.Y. App. Div. 1994) (finding that "it would be manifestly unfair to require defendant to pay plaintiff's attorney's fees" because the landlord had prosecuted a valid claim under previously existing law); *Kralik v. 239 E. 79th St. Owners Corp.*, 93 A.D.3d 569, 570, 940 N.Y.S.2d 488 (N.Y. App. Ct. 2012) (affirming the lower court's order "because the cooperative's position was justified by the state of the law when the action was commenced" and "courts have discretion to deny such fees based on equitable considerations and fairness"); *see also Milton v Shalala*, 17 F.3d 812, 814 (5th Cir. 1994); *Petrone v. Sec'y of Health & Human Servs.*, 936 F.2d 428, 430 (9th Cir. 1991) (noting plaintiff "was a fortuitous beneficiary" of a congressional act) (quoting *Hendricks v. Bowen*, 847 F.2d 1255, 1259 (7th Cir.1988)).

Based on the unique circumstances of this case, the district court did not err and acted well within its discretion in finding there was no prevailing party entitled

to an award of statutory costs.

### *(2) Even under a de novo review, the district court's decision must be affirmed.*

The analysis is no different even if this Court were to consider a *de novo* review of the district court's decision as to whether the FTB was the prevailing party for the purpose of awarding costs under NRS 18.020. In *145 East Harmon II Tr. v. Residences at MGM Grand - Tower A Owner's Ass'n.*, , this Court applied a *de novo* review in affirming a district court's finding as to prevailing party status when the case was dismissed with prejudice. 460 P.3d 455, 458 (Nev. 2020). But in so holding, the Court reasoned that the "rule is not absolute, as there may be circumstances" when a defendant who obtains a dismissal "should not be considered a prevailing party." *Id.*, at 459. In short, the district court as well as this Court must consider the factual circumstances of the case in determining whether there is a prevailing party under NRS 18.020.

The circumstances here dictate that there was no prevailing party. To rule that FTB was the prevailing party, this Court would have to acknowledge and disregard that: (i) after considering the evidence presented in a four-month trial, the jury determined that the FTB committed fraud against Hyatt and intentionally inflicted emotional distress on him; (ii) after full briefing and arguments, this Court affirmed the jury's fraud determination and damages award of over $1 million as

well as its verdict that the FTB intentionally inflicted emotional distress on Hyatt; and (iii) after obtaining early review of this case by the United States Supreme Court, the FTB chose *not* to challenge the *Nevada v. Hall* precedent—waiting until 17 years after the case was filed and the fraud and intentional infliction of emotional distress judgment against it had been affirmed by this Court.

The FTB did not prevail in this action, consistent with the notion of awarding costs under NRS 18.020. Any other result would require this Court to disregard the 21-year unprecedented procedural history of this case as summarized above.

***(3) There is no basis in law or fact for the FTB's "complete victory" theory.***

The FTB nonetheless argues that the district court erred in finding there was no prevailing party for purposes of NRS 18.020 because "it [the FTB] achieved a complete victory in the case. . ." (FTB's Opening Brief at 22-24.) First, the FTB lost at virtually every phase of the case. It avoided the consequences of the Hyatt's judgment for fraud and intentional infliction of emotional distress only because of the 11th-hour reversal by the United States Supreme Court of the long-standing *Nevada v. Hall* precedent. This last-minute reversal is hardly a "complete victory".

None of the cases cited by the FTB support its "complete victory" theory for determining a prevailing party and awarding costs. The FTB cites most

prominently *Glenbrook*, 111 Nev. at 922, and *Blackjack Bonding*, 131 Nev. at 90. Neither case states or suggests the "compete victory" theory asserted by the FTB. *Glenbrook* was a mixed result case in which no prevailing party could be determined. *Blackjack Bonding* was very much the opposite of this case with no application here. It was a quick, straight-forward public records act request under NRS 239.011 in which the primary holding was that the requester was indisputably successful on its petition for requested records, and the district court therefore abused its discretion in finding the requester was not a prevailing party.

The FTB also cites *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005), merely for its definition of "prevailing party" as including "plaintiffs, counterclaimants, and defendants." It provides no legal support for the FTB's "complete victory" theory. Nor does the FTB's citation to *Golightly & Vannah, PLLC v. TJ Allen*, 132 Nev. 416, 422, 373 P.3d 103, 107 (2016), that holds a party must win at least one claim to be a prevailing party. *Vannah* does not hold that there *must* be a prevailing party, or that in unique or peculiar circumstances it is an abuse of discretion for the district court to find no prevailing party.

Finally, the FTB cites several cases addressing the statutory interpretation of the word "must" in arguing that NRS 18.020 states costs must be awarded to the prevailing party. (FTB's Opening Brief at 21, 25.) But the mandatory "must"

language in NRS 18.020 applies only when there is, in fact, a prevailing party. Here, the district court exercised its proper discretion to determine that there was no prevailing party, in fact. So there is no mandatory award under NRS 18.020. Rather, multiple cases shown above confirm that there are factual circumstances in which the district court is well within its discretion in finding there was no prevailing party for the purposes of NRS 18.020. As a result, the FTB's asserted "complete victory" theory is as legally unsound as it is factually untrue.

The district court correctly determined that there was no prevailing party and denied the FTB's request for costs under NRS 18.020. There is no legal basis to reverse the district court's decision.

### C. The district court properly exercised its discretion in denying the FTB costs and attorney's fees under Rule 68.

The FTB erroneously argues that an award of costs and fees is mandatory when a defendant obtains a result that is better than its Rule 68 offer.[66] The FTB

[66] Query whether the final result was better for the FTB. There is forever the stain that after extensive evidentiary presentation the jury determined that the FTB committed fraud while carrying out its legislatively authorized duties. Regardless of the later reversal on unrelated grounds, the jury verdict and affirmance by this Court of the FTB's fraudulent acts remain as an exposé of the FTB's action towards Hyatt. Consistent with the fraudulent finding against the FTB, the result of the California administrative process over Hyatt's residency favorable to Hyatt, and rejected the FTB's position, with a finding that Hyatt moved to Nevada precisely when he said he did. 17 RA 3983-3993; 3995-4004.

goes so far as to contend that it is only a matter of a "mathematical computation" for the district court to determine whether costs and fees must be awarded under Rule 68. (FTB's Opening Brief at 25-26.)[67] Both the language of the rule and case law refute the FTB's argument. The district court was therefore well within its discretion in finding that the *Beattie* factors strongly favor Hyatt and in denying the FTB's request for costs and fees under Rule 68.

### *(1) The district court correctly determined that the Beattie factors weigh heavily in favor of Hyatt and prohibit awarding costs and attorney's fees to FTB under Rule 68.*

Subsection (e) of Rule 68 explicitly states that "[a]ny offeree who fails to accept the offer *may* be subject to the penalties of this rule." (Emphasis added.) NRCP 68(f) (1) provides that, "[i]f the offeree rejects an offer and fails to obtain a more favorable judgment . . . (B) the offeree must pay the offeror's post-offer costs and expenses, including . . . reasonable attorney fees, *if any be allowed*, actually

[67] The FTB also cites a case that generally addresses the term "must" as not allowing for judicial discretion. But it has no application to Rule 68. *See* FTB Brief at 26, *citing Washoe Med. Ct. v. Second Judicial Dist. Court of State of Nev. ex rel. Cty. of Washoe*, 122 Nev. 1298, 1303, 148 P.3d 790, 793–94 (2006) (holding that under NRS 41A.071 a complaint alleging medical malpractice filed without an expert affidavit must be automatically dismissed). Unlike case law addressing NRCP 68, the jurisdictional requirement of an expert opinion specified in NRS 41A.071 has never been held as discretionary.

incurred by the offeror from the time of the offer."[68] (Emphasis added)

Further, this Court has repeatedly instructed that the district court must exercise its discretion in weighing the *Beattie* factors in determining whether to award costs and attorney's fees under Rule 68:

> [W]hile the purpose of NRCP 68 is to encourage settlement, it is not to force plaintiffs unfairly to forego legitimate claims. *In exercising its discretion regarding the allowance of fees and costs under NRCP 68* [citation omitted] the trial court must carefully evaluate the following factors: (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.

*Beattie v. Thomas*, 99 Nev. 579, 588–89, 668 P.2d 268, 274 (1983) (emphasis added). In subsequent decisions, this Court reaffirmed the discretionary nature of an award of costs or fees under Rule 68. *See Kent v. Kent*, 108 Nev. 398, 403, 835 P.2d 8, 11 (1992) ("An award of attorney's fees and costs pursuant to NRCP 68 is discretionary with the district court and its discretion will not be disturbed absent a clear abuse [citation omitted]."); *Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev.

[68] Former NRS 17.115, in relevant part, provides: "[I]f a party who rejects an offer of judgment fails to obtain a more favorable judgment, the court . . . [s]hall order the party to pay the taxable costs incurred by the party who made the offer; and [m]ay order the party to pay to the party who made the offer . . . [r]easonable attorney's fees. . . ." NRS 17.115 (repealed 2015).

318, 322, 890 P.2d 785, 788 (1995) ("Pursuant to NRCP 68, the court *may* award attorney fees and costs to the offeror." (Emphasis added)); *see also Armstrong v. Riggi*, 92 Nev. 280, 282, 549 P.2d 753, 754 (1976) (holding that NRCP 68 vests the trial court with significant discretion).

All the *Beattie* factors strongly favor Hyatt, as the district court found. Hyatt acted in good faith in filing and pursuing the action and rejecting the FTB's offer of judgment in 2007. Nor did the FTB have a good faith belief in 2007 that Hyatt would accept the offer, that it would encourage settlement, or that it would not "force plaintiffs unfairly to forego legitimate claims."

### *(a) First Beattie factor: Hyatt filed and pursued the action in good faith.*

Hyatt filed the case in 1998 and pursued it through trial and appeal on the basis of the United States Supreme Court's decision in *Nevada v. Hall*. Twenty-one years later, the United States Supreme Court reversed its long-standing precedent. The only reason Hyatt does not have an affirmative judgment in his favor for the intentional misconduct of the FTB, as found by a jury and affirmed by this Court as to the fraud and IIED claims, is the 11th hour and unanticipated reversal of long-time legal precedent. As the district court correctly concluded, there is no argument that Hyatt filed or pursued his winning claims in bad faith.

Not only did a jury decide that the FTB engaged in bad faith and intentional misconduct directed at Hyatt, but the FTB also failed to mount a challenge to

*Nevada v. Hall* until after it had lost the case and exhausted all appeals in Nevada—17 years after the case had commenced. Most egregiously, the FTB could have pursued this argument in the first review of the case by the United States Supreme Court in 2002-2003. But the FTB chose not to do so. The FTB instead sought an exception to *Nevada v. Hall*, which was rejected in a 9-0 decision in *Hyatt I*.

As a result, as the district court correctly found:

> Hyatt brought this action in good faith in reliance on the United States Supreme Court precedent Nevada v. Hall. During the last 21 years while relying on Nevada v. Hall, Hyatt prevailed in both the Nevada Supreme Court (*2002*) and the United States Supreme Court in 2003 (*Hyatt I*) and then obtained a large jury verdict and final judgment against the FTB (*2008*), which the Nevada Supreme Court affirmed in part *(2014*). The United States Supreme Court's reversal of its long-standing Nevada v. Hall precedent in *Hyatt III* in 2019 stripping this Court of jurisdiction over the FTB could not have been anticipated by Hyatt.[69]

The first *Beattie* factor of whether Hyatt filed and pursued this case in good faith therefore weighs heavily in favor of Hyatt. The *Beattie* analysis should end there, because the first factor weighs so heavily that it should be dispositive of the issue of whether fees should be awarded to the FTB under Rule 68 (or the former NRS 17.115). A party cannot reasonably anticipate that the United States Supreme Court will reverse the long-time legal precedent on which the case is based, 21

[69] 10 AA 1559-60; 37 AA 5865-68.

years after the case is filed.

### *(b) Second Beattie factor: Hyatt's rejection of the FTB offer was not unreasonable or in bad faith.*

The merits of the case as of 2007 also strongly support Hyatt's rejection of the FTB's offer and underscore that the rejection was reasonable and not in bad faith. As the district court found:

> Hyatt also had a good faith belief that he would prevail at trial on his claims and recover in excess of the $110,000 offer of judgment made by the FTB in 2007. Hyatt did obtain a verdict and final judgment well in excess of that amount. The damages limitation to Hyatt's claims was not decided and imposed until 2016 in *Hyatt II*. It was therefore not grossly unreasonable or in bad faith for Hyatt to not accept the FTB's offer of judgment of the $110,000 in 2007.[70]

In this regard, not only did Hyatt have a good faith basis for filing the lawsuit, but as the evidence developed over the years while the case was pending, Hyatt's case grew stronger and stronger. Hyatt's view of the strength of his case in deciding to reject the FTB's offer of judgment in November 2007 was vindicated by the large jury verdict he received in 2008 following the four-month jury trial.

The strength of Hyatt's case and supporting evidence developed as of 2007, and then presented to the jury during the 2008 trial, was summarized in Hyatt's

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[70] *Id.*

briefing filed with this Court which affirmed key parts of the verdict. Hyatt cited to and incorporated that briefing in the district court.[71] Below is some of the key evidence contained in that briefing that demonstrates the district court correctly found in favor of Hyatt on the additional *Beattie* factor that Hyatt's rejection of the FTB's offer in 2007 was not unreasonable and not in bad faith:

> In 1990 Hyatt won a 20-year contest with the United States Patent Office, securing a patent for the single chip microprocessor that spawned the personal computer. He was called an American hero by some, the 20th Century's Thomas Edison by others.
>
> Hyatt moved to Nevada in September 1991.[72]

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[71] 12 RA 2875-2899.

[72] The date when Hyatt moved to Nevada was the primary subject of the residency audits conducted by the FTB and the subsequent decades-long administrative appeals in California relating to those audits. The FTB dragged out that process for over 20 years, seeking to collect tens of millions of dollars in taxes, penalties, and interest from Hyatt, based on his residency, and claiming he did not move to Nevada when he said he did and that he therefore owed California state income taxes as a California resident. Ultimately, after over 20 years, the California State Board of Equalization ("SBE") agreed with Hyatt, finding that Hyatt moved to Nevada in 1991, as Hyatt contended all along, and thereby reversed the FTB's erroneous audit conclusions on the residency issue. The FTB challenged the decision, but its request for a rehearing of the SBE's decision was rejected by the California Office of Tax Appeals. Therefore, as to the underlying reason for the FTB's tortious conduct against Hyatt in Nevada (its contention that Hyatt's move to Nevada was a sham to evade California taxes), the FTB was wrong: Hyatt moved to Nevada when he said he did. 17 RA 3983-3993; 3995-4004. The FTB's claim to be the "prevailing party" in the Nevada litigation is outrageously hypocritical. On the facts and the law in Nevada, the FTB lost, until a 40-year United States Supreme Court precedent was unexpectedly overturned; and on the residency facts and law in California, the FTB lost because it was determined that Hyatt was a resident of Nevada just as he said he was.

The FTB commenced an audit of Hyatt in 1993 solely on the basis that an FTB employee read an article estimating how much money Hyatt made from his patent royalties and that he had moved to Nevada.

The FTB audited Hyatt between 1993 and 1997, during which time the FTB's lead auditor repeatedly made anti-Semitic remarks against Hyatt; created a "fiction" about him; during the audit she rummaged through his trash and peeked in the windows at his Las Vegas house; after the audit she again visited his house to take a picture of her posing in front of it and called Hyatt's ex-wife to brag that Hyatt had been "convicted"; she also expressed to a co-worker that she hoped the audit advanced her career.

The FTB promised Hyatt strict confidentiality in regard to his personal and financial information, but then made massive public disclosures of the fact that Hyatt was under audit, of his social security number, and of his private address.

The FTB suggested to Hyatt's tax attorney that absent a settlement of the tax issues there would be a further "in-depth investigation and exploration of unresolved fact questions" which Hyatt and his tax attorney understood to be a less than subtle threat; and then when Hyatt did not settle the tax issues at the outset, the FTB delayed the protest phase of the audit for over 10 years before issuing a final decision and letting Hyatt appeal that decision to the more independent California State Board of Equalization.[73]

Hyatt and multiple other witnesses provided first hand testimony of the extreme emotional distress and change in personality and physical condition suffered by Hyatt during the 10 plus years that the FTB kept open the protest phase of the audit.

[73] *See* above footnote regarding the results of the administrative appeal as decided in Hyatt's favor by the California State Board of Equalization.

> FTB auditors were evaluated in a manner that drove them to make assessments without regard to the collectability of the assessments and were rewarded for making high dollar assessments such as Hyatt's case given his extreme income.[74]

These facts established, as the district court found, that it was not unreasonable or in bad faith for Hyatt to reject the FTB's offer of judgment in 2007.

### *(c) Third Beattie factor: FTB's offer was not a good-faith attempt to settle the case nor could the FTB have had a reasonable expectation of its offer being accepted.*

Based on the same facts described above, the FTB could not and did not have a reasonable expectation that Hyatt would accept its $110,000 offer of judgment when it was served in 2007—nine years after the case was filed in 1998. Not only was *Nevada v. Hall* an unchallenged United States Supreme Court precedent, the United States Supreme Court and this Court had each reviewed the case and affirmed that it could proceed to trial based on *Nevada v. Hall*. The FTB knew that $110,000 would not even approach out-of-pocket costs already incurred in 2007 and to-be-incurred through the multiple appeals, extensive motion practice, extensive discovery disputes, and ultimate discovery allowed over FTB's constant objections.[75] The FTB was also well aware of the strong evidence Hyatt had

[74] 12 RA 2875-2899.
[75] 11 RA 2670-2673.

compiled against it through discovery and would present to the jury, having lost numerous discovery and dispositive motions, including summary judgment motions in 2000 and 2006.[76]

The FTB's 2007 offer of $110,000 was therefore not reasonable in the amount or its timing, and certainly was not offered with the expectation that Hyatt would accept it or that it would lead to further settlement discussions. Indeed, the FTB's filings for fees and costs now at issue in this appeal are devoid of any statement, verified or unverified, that it had an expectation that Hyatt would accept the offer or that it would lead to further settlement discussions. This *Beattie* factor therefore also weighs heavily in Hyatt's favor.

In sum, as the district court correctly concluded, the three *Beattie* factors determinative of whether attorney's fees should be awarded all favor Hyatt and required the district court reject the FTB request for costs and fees under Rule 68.[77] There is no legal basis for this Court to reverse that decision.

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[76] 6 RA 1283-1286; 9 RA 2148-2151

[77] The FTB may argue that even if *Nevada v. Hall* were not overturned in *Hyatt III*, under *Hyatt II* the judgment in favor of Hyatt would have been only $100,000 and thus less than the $110,000 offer of judgment made by the FTB in 2007. This is false. This Court's decision in 2016 awarding Hyatt $50,000 for each of his two winning claims also would have entitled Hyatt to an award of costs as the prevailing party. These costs easily would have exceeded $10,000 and thereby provided Hyatt a total recovery well in excess of the FTB's offer of judgment, which was inclusive of costs. The cost award in Hyatt's favor in 2010 exceeded $2 million. 11 RA 2670-2673.

### *(2) There is no basis to reconsider this Court's well-established doctrine from Beattie that an offer of judgment must be made with a good-faith intent to settle the case.*

The district court's discretion is intended to ensure that offers under Rule 68 are made as a good faith attempt to settle the litigation, and not simply as a means to later seek an otherwise unobtainable award of costs or fees. *See Frazier v. Drake*, 131 Nev. 632, 642–43, 357 P.3d 365 (2015) ("Specifically, the district court must determine whether the plaintiff's claims were brought in good faith, whether the defendant's offer was reasonable and in good faith in both timing and amount, and whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith. [Citation omitted.] The connection between the emphases that these three factors place on the parties' good-faith participation in this process and the underlying purposes of NRCP 68 and NRS 17.115 is clear.") (*citing Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998)). As this Court recognized, "[i]f the good faith of either party in litigating liability and/or damage issues is not taken into account, offers would have the effect of unfairly forcing litigants to forego legitimate claims." *Id.*; *see also Certified Fire Prot., Inc. v. Precision Constr., Inc.*, 128 Nev. 371, 383, 283 P.3d 250, 258 (2012) (holding that the district court did not abuse its discretion in denying an award under Rule 68 where the offer was "unreasonable in amount" and that "there is no bright-line rule that qualifies an offer of judgment as *per se*

reasonable in amount; instead, the district court is vested with discretion to consider the adequacy of the offer and the propriety of granting attorney fees").

The purpose of Rule 68 is "to save time and money for the court system, the parties and the taxpayers . . . [and to] reward a party who makes a reasonable offer and punish the party who refuses to accept such an offer." *Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 382, 989 P.2d 882, 888 (1999) (*citing John W. Muije, Ltd. v. A North Las Vegas Cab Co.*, 106 Nev. 664, 667, 799 P.2d 559, 561 (1990)).

This Court has repeatedly held that attorney's fees should be denied under NRCP 68 where the action was brought in good faith, the offer of judgment was not reasonable, and the rejection of the offer of judgment was not grossly unreasonable or in bad faith. *See Frazier v. Drake*, 131 Nev. at 642–43 (reversing award of attorney's fees where first three *Beattie* factors establish good faith of the losing plaintiff); *see also Ozawa v. Vision Airlines, Inc*., 125 Nev. 556, 562, 216 P.3d 788, 792–93 (2009) (affirming district court denial of attorney's fees based on finding that plaintiff's claims were brought in good faith and that his rejection of $2,500 offer of judgment was in good faith and not grossly unreasonable); *Sands Expo & Convention Ctr., Inc. v. Bonvouloir*, 385 P.3d 62 (Table), 2016 WL 5867493, at *1 (Nev. Oct. 6, 2016) (unpublished disposition) ("[T]here is no assertion that [plaintiff's] claim was brought in bad faith, and her decision to reject

the $12,000 all-inclusive offer in the face of extensive anticipated damages and on-going discovery does not appear grossly unreasonable"); *Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLP*, 583 F.3d 1232, 1239 (9th Cir. 2009)(applying Nevada law and affirming denial of attorney's fee award where plaintiff recovered less than the offer of judgment citing "complexity of the claims, the novelty of the legal questions presented, and the amount requested").[78]

Contrary to the FTB's argument advocating that the Court do away with the *Beattie* factors and the trial court's discretion to deny an award under Rule 68 (FTB's Opening Brief at 32-33), other jurisdictions just as vigorously enforce the good faith requirement for an offer of judgment—and cite *Beattie* in so doing. *See Beal v. McGuire*, 216 P.3d 1154, 1177-78 (Alaska 2009)(citing *Beattie* and holding that "[e]ven though a purpose of Rule 68 is to encourage settlement and avoid protracted litigation, offers of judgment made without any chance or expectation of eliciting acceptance or negotiation do not accomplish the purposes behind the

[78] The federal district court in Nevada has similarly interpreted the good faith element when applying NRCP 68, as opposed to the federal counterpart that has no such limitation. *Gresham v. Petro Stopping Ctrs., LP*, No. 3:09-cv-00034-RCJ-VPC, 2012 U.S. Dist. LEXIS 150009, at *15-16 (D. Nev. Oct. 18, 2012)(denying an award under Rule 68 as not offered as a good faith attempt to settle the matter based on the timing of the offer); *TDN Money Sys. v. Everi Payments, Inc.*, No. 2:15-CV-2197 JCM (NJK), 2018 U.S. Dist. LEXIS 137304, at *12-15 (D. Nev. Aug. 13, 2018) ("Because the offers of judgment were not reasonable under the *Beattie* factors, the court holds that Everi is not entitled to an award of attorney's fees and non-taxable costs").

rule."); *see also Warr v. Williamson*, 359 Ark. 234, 239–40, 195 S.W.3d 903, 906–07 (2004) ("'Offers of judgment made pursuant to Rule 68 are effective only if they are bona fide offers.' [T]he settled meaning of bona fide is synonymous with its literal translation, 'good faith,' and is so familiar that the average person could not be misled.'") (quoting *4000 Asher, Inc. v. State*, 290 Ark. 8, 14, 716 S.W.2d 190 (1986)); *James v. Wash Depot Holdings, Inc.*, 489 F. Supp. 2d 1336, 1340–41 (S.D. Fla. 2007) ("Because the Court finds that the Defendants' offer of judgment was unreasonable and not in good faith, an award of fees to the Defendants is inappropriate under the facts and circumstances of this case.").

There is no reason for the Court to consider overruling or modifying its seminal holding in *Beattie* and its long progeny that require offers of judgment be good-faith attempts to settle the case.

### D. This district court order may also be affirmed as a matter of equity, based on the FTB's unclean hands consistent with federal law and other states that recognize this discretion when addressing a cost award.

In addition to and consistent with the *Beattie* factors weighing against any award of attorney's fees to the FTB, the district court's denial of the FTB's cost and fee requests should be affirmed as a matter of equity. Given the unique procedures, facts, circumstances, and the reversal of long-standing precedent, this Court should consider the equities presented in this case. Other courts have denied costs and fees based on the equity of the factual circumstances of a case. *See*

*Anderson v. Melwani*, 179 F.3d 763, 766-67 (9th Cir. 1999)(affirming denial of a fee request finding it would be "inequitable and unreasonable" under the circumstances of the case); *A.V. DeBlasio Constr., Inc. v. Mountain States Constr. Co.*, 588 F.2d 259, 263 (9th Cir. 1978) (an award of fees would be "inequitable and unreasonable"); *see also McDonald's Corp. v. Watson*, 69 F.3d 36, 45–46 (5th Cir. 1995); *Loman Dev. Co., Inc. v. Daytona Hotel and Motel Suppliers, Inc.*, 817 F.2d 1533, 1537 n.7 (11th Cir. 1987); *C.J.C., Inc. v. W. States Mech. Contractors, Inc.*, 834 F.2d 1533, 1548 (10th Cir. 1987).

Courts have refused to award costs and attorney's fees where it would be patently unjust based on a party's unclean hands, and this factor is present in this case as well. *See United States Dept. of Labor v. Rapid Robert's Inc.*, 130 F.3d 345, 349 (8th Cir. 1997) (reversing award of fees when it was patently unjust, given the special circumstances of the case); *Smith v. Se. Pa. Transp. Auth.*, 47 F.3d 97, 99 (3d Cir. 1995) (per curiam) (recognizing this factor) ("[T]he denial of costs to the prevailing party . . . is in the nature of a penalty for some defection on his part in the course of the litigation.")

Here, the FTB's adjudicated bad faith and intentional misconduct leave it with unclean hands and ineligible to receive an award of attorney's fees in this action. Further, FTB sat on its hands and did not seek reversal of *Nevada v. Hall* during the United States Supreme Court's first review of the case between 2002

and 2003. The FTB cannot be rewarded with a windfall for waiting 17 years after the case commenced, until it lost the case and exhausted its appeals in Nevada, before seeking reversal of *Nevada v. Hall.*

For the same reasons addressed above for denying the FTB attorney's fees under NRCP 68, any request the FTB makes for costs should likewise be denied. Hyatt filed and pursued the case in the good faith belief that the State of Nevada had jurisdiction over the FTB under *Nevada v. Hall.* He similarly rejected the FTB's offer of judgment in 2007, on the basis that *Nevada v. Hall* was still valid precedent that the State of Nevada had jurisdiction, and on the basis that pretrial discovery confirmed that FTB had committed fraud and other intentional torts. Nor was FTB's offer in 2007 of $110,000 (inclusive of costs) made with a good faith, reasonable belief that Hyatt would accept it to resolve the litigation. The jury's verdict in 2008 and resulting judgment awarding Hyatt nearly one-half billion dollars confirmed Hyatt's good faith belief that his case was worth substantially more than what the FTB offered.

Federal courts and many states that have adopted the federal rules of civil procedure give the trial court discretion to deny statutory costs to a prevailing party when the equities dictate no award should be made, given the unclean hands of the purported prevailing party or other basis that militate against awarding any costs. Although Nevada has not adopted the federal rules in their entirety, Hyatt

respectfully asserts that, based on the points raised above, this Court can apply a similar standard to the resolution of this appeal. For example, Rule 54 of Federal Rules of Civil Procedure ("FRCP 54") provides that "[u]nless a federal statute, these rules, or *a court order provides otherwise*, costs—other than attorney's fees—should be allowed to the prevailing party." FRCP 54(d)(1) (emphasis added).

The provision "a court order provides otherwise" has been interpreted to allow the trial court to deny costs to a party even when it is technically deemed the prevailing party, and the same concept applies to the district court's authority to issue the orders it did in this case, based on the facts and circumstances reflecting equitable considerations. *See Bush v. Remington Rand, Inc.*, 213 F.2d 456, 466 (2nd Cir. 1954) (FRCP 54(d)(1) providing the court power to deny a prevailing party all or part of requested costs); *ADM Corp. v. Speedmaster Packaging Corp*., 525 F.2d 662, 665 (3d Cir. 1975) ("[T]he denial of costs to the prevailing party . . . is in the nature of a penalty for some defection on his part in the course of the litigation.") (quoting *Chicago Sugar Co. v. American Sugar Refining Co.*, 179 F.2d 1, 11 (7th Cir. 1949), *cert. denied*, 338 U.S. 948 (1950)); *Mansourian v. Bd. of Regents of Univ. of Cal. at Davis*, 566 F. Supp. 2d 1168, 1171–72 (E.D. Cal. 2008) (denying costs to prevailing defendant government entity on the basis that it would be inequitable because plaintiff was seeking vindication of an important right,

pursued litigation in good faith, and presented issues that were close and difficult for court to adjudicate); *see also* 6 Moore's Federal Practice s ¶ 54.70(5) (1976) and cases cited therein (discussing Rule 54(d)'s language "[u]nless otherwise specifically provided").

Similarly, states have adopted the language from FRCP 54(d)(1) or otherwise recognized that courts have discretion to deny an award of costs to a party that may have prevailed when it would be inequitable to award costs. *See City of Birmingham v. City of Fairfield*, 396 So. 2d 692, 696–97 (Ala. 1981); *Owen Jones & Sons, Inc. v. C. R. Lewis Co.*, 497 P.2d 312, 313–14 (Alaska 1972); *Rossmiller v. Romero*, 625 P.2d 1029, 1030 (Colo. 1981); *Barry v. Quality Steel Products, Inc*., 280 Conn. 1, 24, 905 A.2d 55, 69 (2006); Del. Ct. Ch. R. 54(d); *Abreu v. Raymond*, 56 Haw. 613, 614, 546 P.2d 1013, 1014 (1976); *Klinke v. Mitsubishi Motors Corp*, 219 Mich. App. 500, 518, 556 N.W.2d 528, 537–38 (1996); *Vance v. Roedersheimer*, 64 Ohio St. 3d 552, 555, 597 N.E.2d 153, 156 (1992) (interpreting OH ST RCP Rule 54(S)); *Hashimoto v. Marathon Pipe Line Co*., 767 P.2d 158, 168 (Wyo. 1989).

Here, the FTB's adjudicated bad faith and intentional misconduct reflect its unclean hands. Its dogged but unfounded pursuit of taxes based on residency in California raises similar equitable circumstances that are inconsistent with any assertion that the tax proceedings were pursued for more than 20 years impartially

and in good faith, without any personal prejudices against Hyatt. Further, the FTB sat on its hands and did not seek reversal of *Nevada v. Hall* during the United States Supreme Court's first review of the case between 2002 and 2003. The FTB cannot be rewarded with a windfall for waiting 17 years after the case commenced, until it lost the case and exhausted its appeals in Nevada, before seeking reversal of *Nevada v. Hall*. Nevada law should, if it does not already, recognize and apply the same level of discretion recognized by other state and federal courts and authorize denial of an award of costs to a party that may technically have prevailing party status but for which countervailing equitable reasons and unique facts and circumstances dictate that no award of costs should be made.

**7. Conclusion.**

The district court conducted a thorough review of the factual circumstances and long history of this case. Based on that thorough review and Hyatt's good faith reliance on *Nevada v. Hall* for 21 years until it was unexpectedly reversed by the United States Supreme Court, the district court correctly exercised its discretion and found there was no prevailing party in this action and denied the FTB's requests for costs and attorney's fees under NRS 18.020 and Rule 68. The FTB has not established, and cannot establish, that the district court abused its discretion in so ruling. Even under a *de novo* standard of review, this Court can reach the same decision as the district court. There is no legal basis to reverse the district court's

decision. The FTB's appeal should be denied.

Dated this 1st day of October, 2020.

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1. I 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 11,296 words.

3. Finally, I certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event the

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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## CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of HUTCHISON & STEFFEN, LLC, and that on this 1st day of October, 2020, I caused the above and foregoing document entitled **RESPONDENT'S BRIEF ON BEHALF OF GILBERT P. HYATT** to be served by the method(s) indicated below:

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