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 REPLY BRIEF

McDONALD CARANO LLP
Pat Lundvall (NSBN 3761)
lundvall@mcdonaldcarano.com
Rory T. Kay (NSBN 12416)
rkay@mcdonaldcarano.com
2300 W. Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
Facsimile: (702) 873-9966

LEMONS, GRUNDY, & EISENBERG
Robert L. Eisenberg (NSBN 950)
rle@lge.net
6005 Plumas Street, Third Floor
Reno, Nevada 89519
Telephone: (775) 786-6868

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

Hyatt spends half his Answering Brief ("AB") relitigating the procedural history of this case under which he lost entirely. Once the Court accounts for an accurate recitation of that procedural history, the Court would need to be comfortable with the two principal arguments Hyatt asserts in trying to avoid reimbursing FTB's statutory costs or its NRCP 68 attorney's fees and costs. First, that this Court may defy the United States Supreme Court's express finding that FTB raised the issue of immunity from jurisdiction from day one and its consequent holding that FTB completely prevailed. Second, that Nevada litigants can convince district courts and juries to create reversible error and then rely on those legal errors—even when appellate courts correct them—to avoid paying mandatory statutory costs or attorney's fees or costs under NRCP 68(f)'s clear and unambiguous penalty for failing to beat an offer of judgment.

But Hyatt's positions are simply wrong, and the legal analysis is not as complicated as Hyatt makes it. The United States Supreme Court found that FTB challenged Nevada's jurisdiction from day one and directed Nevada courts on remand to hold "further proceedings not inconsistent with the opinion of this Court." Contrary to Hyatt's claim, FTB did not raise an eleventh-hour argument which caught Hyatt off-guard, but instead FTB was right all along, leading to FTB's complete victory.

Against mandatory language found in statute and court rule, the result of further proceedings is straightforward: FTB has a right to recover its litigation costs and its post-Offer attorney's fees. Under NRS 18.020's mandatory language, FTB is the prevailing party. Under NRCP 68's mandatory language, Hyatt failed to beat FTB's Offer, and FTB may enforce it. FTB requests that the Court reverse the district court on these legal issues.

ARGUMENT

A. This Court Reviews Legal Entitlement to Attorney's Fees and Costs Under a De Novo Standard.

1. Hyatt Conflates the Legal Entitlement to Fees and Costs with the Computation of Allowable Fees and Costs.

Hyatt cites *Bower v. Harrah's Laughlin, Inc.* and *Cadle Co. v. Woods & Erickson LLP* to argue the Court "generally" reviews an award of costs or attorney's fees for abuse of discretion. (AB at 23-24). But Hyatt's position misses the nuance of the Court's cases under NRS Chapter 18 and NRCP 68. As FTB's Opening Brief ("AOB") illustrated, determining whether to award attorney's fees or costs involves two threshold questions: (1) whether a statute, rule, or other ground entitles the moving party to recover fees or costs; and (2) if so, the amount of such fees or costs the trial court should award. (AOB at 17). On the second question, Hyatt is correct that the Court has reviewed this computation under an abuse of discretion standard. (*See id.* at 17-18). On the first question, however, the Court reviews legal

entitlement to fees or costs under a de novo standard because it involves statutory or rule interpretation. (*See id.* at 18).

For example, in *145 E. Harmon II TR. v. Residences at MGM Grand – Tower A Owners' Ass'n*, which Hyatt cites, the Court explained that the de novo standard is appropriate "when an attorney fees matter implicates a question of law." 136 Nev. Adv. Op. 14, 460 P.3d 455, 457 (2020). The Court used the de novo standard in interpreting "the meaning of prevailing party" under NRS 18.020 and applying that interpretation to determine who prevailed in the case. *Id.* By comparison, the Court explained that the abuse of discretion standard applies when the Court "review[s] the amount of fees awarded." *Id.*

2. FTB Asks This Court to Review FTB's Legal Entitlement to Fees and Costs, Which Is a Legal Question Subject to De Novo Review.

The analysis from *145 E. Harmon II* applies here. FTB challenges the district court's interpretation of "prevailing party" under NRS 18.020 and its interpretation of NRCP 68's mandatory language, both of which led the district court to find that FTB was not entitled to attorney's fees or costs. FTB does not challenge the computation of any such fees or costs, as the district court's errors on the first threshold question of legal entitlement prevented it from reaching the second threshold question of the amount of fees. (*See* AOB at 16).

As a result, because statutory or rule interpretation is a question of law,

especially where it involves a "mandatory or directory obligation on the district court," the standard of review is de novo. *Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 665, 310 P.3d 569, 572 (2013). This is even more true where, as here, the district court judge that evaluated FTB's Offer played no role in the trial twelve years ago and thus should be afforded no deference.

3. Even If the Abuse of Discretion Standard Applies, the District Court Abused Its Discretion by Ruling on the Entitlement to Fees and Costs with No Motion Pending and by Applying the Wrong Legal Standard.

Even if the abuse of discretion standard applies, FTB is still entitled to reversal because of the district court's procedural errors. At Hyatt's suggestion, and despite clear rules outlining how a party moves the district court for attorney's fees or costs, the district court ordered blind briefing on the issue of prevailing party analysis, and it did not allow FTB to file a reply brief. (1 AA 000014). The district court robbed itself of the opportunity to be fully informed, and it prejudged the issue of costs under NRS 18.020 and attorney's fees under NRCP 68 before FTB could file a memorandum of costs or otherwise move for its attorney's fees. (1 AA 000005-18).

A district court abuses its discretion when it fails to follow procedural rules ensuring due process or prejudges an issue without all relevant evidence before it. *See, e.g.*, *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007) (holding due process requires notice and a fair opportunity to be heard on the issues). Though

the district court later heard FTB's Memorandum and the Fees Motion, this could not cure the procedural prejudice to FTB: the district court had prejudged the issue on the blind briefing, as evidenced by the fact it employed the same faulty legal analysis even after FTB directed it to the error. (10 AA 001574-85; 35 AA 005519-45; 37 AA 005865-66). This was an abuse of discretion.

The district court also abused its discretion when it applied the wrong legal standard to evaluate FTB's attorney's fees and costs. A "district court abuses its discretion if it applies an incorrect legal standard." *Staccato v. Valley Hosp.*, 123 Nev. 526, 530, 170 P.3d 503, 506 (2007); *see also MDB Trucking, LLC v. Versa Products Company, Inc.*, 136 Nev. Adv. Op. 72, ___ P.3d ___ (Nov. 5, 2020) (holding there is no deference when evaluating whether the district court applied the proper legal standard). The district court conflated prevailing party analysis under NRS 18.020 with *Beattie* analysis under NRCP 68 in the order based on blind briefing and the later order denying FTB's Fees Motion. (10 AA 001559-60). The district court used the *Beattie* factors to determine which party prevailed under NRS 18.020, though they have no relevance to that analysis.

As a result, even if the abuse of discretion standard applied, the district court abused its discretion by ignoring procedural rules and applying the wrong legal standard in evaluating FTB's attorney's fees and costs.

B. The District Court Erred In Denying FTB's Costs Under NRS 18.020.

In a rare concession, Hyatt does not dispute that he outright lost once the United States Supreme Court held that FTB was immune from jurisdiction in Nevada. (*See* AB at 19-20). This makes the prevailing party analysis straightforward under NRS 18.020, as FTB achieved all its litigation objectives and Hyatt achieved none. *See LVMPD v. Blackjack Bonding*, 131 Nev. 80, 90, 343 P.3d 608, 615 (2015) (explaining a party prevails "if it succeeds on any significant issue in litigation" that achieves the party's litigation objective). FTB is the prevailing party because it obtained a complete victory.

Even so, Hyatt argues that FTB is not the prevailing party for two reasons. First, Hyatt cites several cases from other jurisdictions to claim that FTB was a fortuitous beneficiary of a last-minute change in law, and so FTB should not benefit here. (*See* AB at 26-27). Second, Hyatt twists this case's procedural history to suggest that the district court's and jury's errors, which appellate courts later corrected, somehow diminish FTB's status as the prevailing party. (*See id.* at 28-29). Neither position has merit.

1. FTB Was Not a Fortuitous Beneficiary, and So Hyatt's Cases Relying on That Theory Do Not Apply.

In making his fortuitous beneficiary argument, Hyatt cites one Nevada case, *Eberle v. State ex rel. Nell J. Redfield Trust*, for the proposition that a party may not

prevail where it benefits from a dispositive change in law. (*See* AB at 26). But Hyatt reads *Eberle* too broadly, as this Court stated the case involved "peculiar circumstances" rarely ever present. 108 Nev. 587, 590, 836 P.2d 67, 69-70 (1992). The *Eberle* court explained that the appellants lost because of "an [unrelated] act of the legislature" during the case. *Id.* Thus, neither party prevailed because "the action was terminated by the legislature" rather than a legal theory that appellants successfully asserted. *Id.*

Trying to broaden *Eberle*, Hyatt cites several cases from outside Nevada that discuss the fortuitous beneficiary theory, but they only confirm why the theory does not apply to FTB.[1] For example, in *Milton v. Shalala*, that court described the fortuitous beneficiary theory and noted that the "mere temporal coincidence" between a legislative act and its effects on an unrelated lawsuit were "too frail a link

---

[1] Hyatt cites the New York cases of *Wells v. East 10th St. Assocs.* and *Kralik v. 239 E. 79th St. Owners Corp.*, but those cases have no persuasive value. *See* 205 A.D.2d 431, 613 N.Y.S. 634 (N.Y. App. Div. 1994); *see also* 93 A.D.3d 569, 570, 940 N.Y.S.2d 488 (N.Y. App. Ct. 2012). *Wells* is a one-paragraph opinion where the change in law occurred because of different litigants. *See* 205 A.D.2d at 431. The party seeking attorney's fees and costs did not create the change in law but was rather a fortuitous beneficiary of another litigant's appellate efforts. *See id. Kralik* is another one-paragraph opinion that provides no background on the change in law, including whether it was caused by the legislative or judicial branch or whether the moving party created it. *See* 93 A.D.3d at 570.

As a result, neither case is analogous to FTB's complete victory, where FTB alone caused the change in law.

between bottom-line success and litigation." 17 F.3d 812, 814 (5th Cir. 1994) (quoting *Hendricks v. Bowen*, 847 F.2d. 1255 (7th Cir. 1988), for the statement that "[S]erendipity is not a reason for rewarding lawyers.").

Similarly, the court in *Petrone v. Sec'y of Health & Human Servs.* explained that winning "because Congress changed the law" is different from winning "in the courtroom." 936 F.2d 428, 430 (9th Cir. 1991); *see also Rose v. Montt Assets, Inc.*, 187 Misc. 2d 487, 498-99 (N.Y. App. Term 2000) (holding there was no prevailing party when a newly enacted statute "completely altered the landscape of the law" related to plaintiff's complaint). *Petrone* confirmed that prevailing party analysis rewards a litigant for asserting its own successful legal theories, not for relying on a serendipitous legislative change that has "no clear causal relationship" to the lawsuit. *Petrone*, 936 F.3d at 430.

Here, no serendipity or temporal coincidence occurred. Hyatt's case did not terminate because of an unrelated act of the Nevada Legislature or Congress. On the contrary, FTB advanced the immunity from jurisdiction issue for two decades at substantial expense to both California and Nevada, and it was FTB that prompted the United States Supreme Court, not any legislative body, to end this case in FTB's favor. *See Franchise Tax Bd. of Calif. v. Hyatt* ("*Hyatt III*"), 587 U.S. ___, ___, 139 S. Ct. 1485, 1491 n. 1 (2019) ("We also reject Hyatt's argument that the Board

waived its immunity. The Board has raised an immunity-based argument from this suit's inception, though it was initially based on the Full Faith and Credit Clause."). FTB created the change in law. It was not a mere fortuitous beneficiary of some outside act with no clear causal relationship to the lawsuit.

Finally, when the United States Supreme Court reversed *Nevada v. Hall*, FTB did not benefit from a change in an otherwise valid law. On the contrary, as the *Hyatt III* Court explained, the United States Supreme Court wrongly decided *Nevada v. Hall*, and the decision was "contrary to our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution." *See Hyatt III*, 587 U.S. at ___, 139 S. Ct. at 1492. As a result, the "historical record and precedent" was against Hyatt. *Id.* at ___, 139 S.Ct. at 1499. In dragging FTB into Nevada, Hyatt was relying on the United States Supreme Court's error that was "irreconcilable with our constitutional structure." *Id.* FTB corrected that error rather than merely fortuitously benefitting from someone else's efforts.

2. NRS 18.020's Mandatory Language Applies to FTB's Complete Victory, and Hyatt May Not Rely on the District Court's Original Legal Errors Which Were Later Corrected to Contend Otherwise.

Hyatt argues that "circumstances" prevent the Court from finding that FTB prevailed. (*See* AB at 28-29). Hyatt reiterates that the district court at first denied immunity to FTB, Hyatt then obtained a massive jury award, and this Court affirmed

some of the jury's damages award to Hyatt. (*See id.*). Though Hyatt lost after appellate courts reversed each of these things, he claims the Court would have to "disregard the 21-year unprecedented procedural history of this case" to find that FTB prevailed. (*See id.* at 29).

Hyatt should not be permitted to rely on the district court's and jury's legal errors to diminish FTB's complete victory in the case. NRS 18.020 does not reward the losing party for short-lived victories that an appellate court reverses on appeal. Nor does it require a moving party to raise the perfect argument at the perfect time to prevail. On the contrary, the statute focuses only on the case's last day and asks a simple question: which party prevailed by achieving its litigation objectives? *See Blackjack Bonding*, 131 Nev. at 90, 343 P.3d at 615 (confirming prevailing party analysis centers on which party wins the significant issues in the final judgment). The statute's mandatory language then requires the district court to award the prevailing party's costs. *See* NRS 18.020 ("Costs must be allowed of course to the prevailing party against any party **whom judgment is rendered**.") (emphasis added). Here, and as Hyatt admits, that party is FTB because it obtained a complete dismissal of Hyatt's case. (10 AA 001552-61) (Judgment reciting that **"this case is dismissed and Hyatt [shall] take nothing from any cause of action he asserted in this action"**) (emphasis added).

Hyatt's suggestion that prevailing party analysis includes quantitative review of error-filled judgments that an appellate court later corrects contradicts the spirit of appellate review. Litigants should expect that appellate courts will reverse errors and that early errors will be irrelevant when considering who prevails after remand. Adversaries should not receive a leg up because they hoodwinked a lower court or jury only to be reversed on appeal. Here, the only judgment that matters is the district court's final one based on the United States Supreme Court's inescapable conclusion. *See Hyatt III*, 587 U.S. at ___, 139 S. Ct. at 1493. The district court's judgment found that Hyatt take nothing "from any cause of action he asserted." (10 AA 001552-61). Any ruling before the final judgment is irrelevant to prevailing party analysis.

Under the final judgment, FTB won a complete victory and therefore achieved its litigation objections. FTB is the prevailing party under NRS 18.020. It has a right to recover its statutory costs.

C. The District Court Erred in Denying FTB's Post-Offer Costs and Attorney's Fees Under NRCP 68.

Hyatt's argument that the district court properly denied FTB's request for its post-Offer fees and costs[2] boils down to three things. (*See* AB at 31). First, Hyatt

[2] FTB does not seek a double recovery of its costs. (*See* AOB at 28 n. 7). Instead, FTB seeks all its costs under NRS 18.020, but if the Court determines FTB is not the prevailing party, FTB seeks its post-Offer costs under NRCP 68. (*See id.*).

contends that NRCP 68's language is discretionary and the rule requires subjective analysis even in cases like this involving a complete victory by the offeror. (*See id.* at 31-33). Second, Hyatt again reiterates that his early wins in the case, though later reversed on appeal, inform the *Beattie* analysis and support his rejection of FTB's Offer. (*See id.* at 34-40). Finally, relying on the doctrine of unclean hands, Hyatt contends that awarding FTB's post-Offer fees and costs would not vindicate NRCP 68's purposes. Hyatt is wrong.

1. Hyatt Denies NRCP 68's Mandatory Language and Ignores Standard Principles of Interpretation That Guide the Court's Analysis.

In contending NRCP 68's language is discretionary, Hyatt quotes NRCP 68(e)'s statement that any "offeree who fails to accept an offer *may* be subject to the penalties of this rule." (*See* AB at 32) (emphasis in brief). Hyatt reads this as nullifying the mandatory use of "must" in NRCP 68(f). (*See id.*). But the statement in NRCP 68(e) does not alter the mandatory language of the rule's penalty provision in NRCP 68(f). On the contrary, it merely confirms that rejecting an offer alone does not create a penalty on the offeree. NRCP 68(f) still requires that the offeree "fail[] to obtain a more favorable judgment," and so an offeree that rejects an offer may be subject to the rule's penalties only if it fails to beat the offer. Nothing in those provisions is contradictory.

Beyond this, Hyatt does not wrestle with NRCP 68's mandatory language or

the standard principles of interpretation that guide this analysis. (*See* AB at 26-27; *see also* AOB at 26-27). Instead, he jumps straight to *Beattie* and the Court's line of cases following that decision. (*See* AB at 33). This is analytically incorrect. The starting point when considering the proper interpretation of a statute or rule is always its plain language. *See Martinez Guzman v. Second Jud. Dist. Ct. in and for Cty. of Washoe*, 136 Nev. Adv. Op. 12, 460 P.3d 443, 447 (2020).

And it is clear from NRCP 68's plain language that the award of post-offer costs is mandatory when an offeree fails to beat an offer of judgment. *See* NRCP 68(f) ("If the offeree rejects an offer and fails to obtain a more favorable judgment, the offeree **must** pay the offeror's post-offer costs . . . .") (emphasis added). This interpretation also harmonizes NRCP 68 with its federal counterpart FRCP 68. *See Int'l Game Tech., Inc. v. Second Jud. Dist. Ct. of Nevada*, 122 Nev. 132, 153, 127 P.3d 1088, 1103 (2006) (holding a presumption arises that statutes or rules should be construed like their federal equivalents). FRCP 68 is mandatory in awarding costs and "leaves no room for the court's discretion." *United States v. Trident Seafoods Corp.*, 92 F.3d 855, 860 (9th Cir. 1996). So too is NRCP 68 based on its plain language, and the district court erred in exercising unavailable discretion to hold otherwise.

This is also true about attorney's fees under NRCP 68(f). FTB explained that,

under the series canon qualifier, the use of "must" in NRCP 68(f) modified all things that follow, including costs and attorney's fees. (*See* AOB at 29). FTB also showed how the phrase "if any be allowed" in NRCP 68(f) squares with the rule's purpose by allowing the Court to distinguish between mixed result cases and cases like this where there is a complete victory. (*See id.* at 30-31). The phrase also reminds litigants that *Brunzell* analysis remains even where an offeree is subject to NRCP 68's mandatory penalty. (*See id.*). Thus, in a complete victory case, FTB highlighted that entitlement to attorney's fees is mandatory under NRCP 68's language once an offeree fails to beat the offer, though the amount of such fees remains open to the district court's discretion under *Brunzell* analysis.

Hyatt, by contrast, provides no reason why the phrase "if any be allowed" nullifies NRCP 68(f)'s mandatory language of "must" or how such an interpretation would comply with Nevada law requiring the Court to give effect to all words in the rule. *See Albios v. Horizon Comm., Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006) (holding the Court construes "statutes such that no part of the statute is rendered nugatory or turned into mere surplusage."). Hyatt cannot provide a reason because none exists. NRCP 68(f) is mandatory in awarding FTB its post-Offer fees and costs.

2. Hyatt Again Relies on the District Court's and Jury's Original Legal Errors to Distort Analysis Under *Beattie*.

Though NRCP 68's language is mandatory, the Court has historically injected some discretion into the rule on the issue of attorney's fees, and this departure from the plain language is most appropriate in mixed results cases. (*See* AOB at 34). Because this is not a mixed results case, the *Beattie* factors should not apply. Even so, Hyatt credits himself for the district court's legal errors and applies them to the *Beattie* analysis in a way that distorts FTB's Offer. This is improper.

a. Hyatt cannot rely on a reversed jury award and several errors by the district court to argue he acted in good faith.

Just as he did with the issue of costs under NRS 18.020, Hyatt relies on legal errors and factual misstatements to claim that he rejected FTB's Offer in good faith. (*See* AB at 34-39). First, Hyatt contends that FTB only raised the jurisdictional immunity issue late in the case through its challenge to *Nevada v. Hall*, and so Hyatt could not have predicted FTB's success on the issue when he was evaluating FTB's Offer. But this is a clear misstatement.

FTB accurately asserted the jurisdictional and immunity issues from the case's beginning. (10 AA 001552-60). Indeed, the United States Supreme Court in *Hyatt III* rejected this very same argument from Hyatt when he contended FTB waived the right to challenge *Nevada v. Hall* on appeal. *See Hyatt III*, 587 U.S. at ___, 139 S. Ct. at 1491 n. 1. Hyatt's theory that he was unaware FTB might

challenge jurisdiction and immunity through *Nevada v. Hall* contradicts the United States Supreme Court's finding. *See id.* When considering FTB's Offer, Hyatt knew that FTB's attack on Nevada's jurisdiction was central to the lawsuit. He must bear the consequences of improperly evaluating his risk under that argument.

Second, Hyatt claims that his case "grew stronger and stronger" during discovery and his rejection of FTB's Offer "was vindicated by the large jury verdict he received in 2008." (AB at 36). But Hyatt ignores that this Court and the United States Supreme Court reversed the district court's and jury's numerous prejudicial errors, and that after such reversals, even before *Hyatt III*, his case was a mere shell of what he improperly asserted in his pleadings. Hyatt is not allowed to rely on prejudicial legal errors to suggest he had a "strong" case when he rejected FTB's Offer.

Most of Hyatt's claims were legally untenable from the lawsuit's beginning. Hyatt's lead claim was for declaratory judgment, asking that a Nevada court declare he resided in Nevada during the periods relevant to FTB's audit. (1 OA 00009-12). He lost on this claim early when FTB challenged Nevada's jurisdiction to consider it. *See Franchise Tax Bd. of California v. Hyatt*, 133 Nev. 826, 829, 407 P.3d 717, 724 (2017) (noting the district court granted FTB summary judgment on the declaratory relief claim). Hyatt also alleged several intentional tort claims. (10 AA

0015552-53). But "[a]ll Hyatt's causes of action, except for his fraud and intentional infliction of emotional distress claims ["IIED"], fail[ed] as a matter of law." *See Hyatt*, 133 Nev. at 829, 407 P.3d at 724. And even for the fraud and IIED claims, this Court applied the statutory damages cap under NRS 41.035, limiting Hyatt's total recovery to $100,000. *See id.* at 852-53, 407 P.3d at 740.

Hyatt was not the victim of a last-minute change in law that occurred well after he rejected FTB's Offer. On the contrary, most of his causes of action and his damages theory failed as a matter of law well before he rejected FTB's Offer. That it took this Court and the United States Supreme Court to reverse the district court's and jury's errors on these causes of action does not change the fact that Hyatt never should have pleaded most of them. Hyatt's decision to reject FTB's Offer and maintain these legally defective claims was not good faith.[3]

---

[3] In footnotes 66 and 72, Hyatt implies that FTB's pursuit of Hyatt's unpaid income taxes was meritless and that after years of FTB's unwarranted delay, the California State Board of Equalization ("BOE") exonerated him of all tax liability because he had moved to Nevada. The very documents Hyatt presented to this Court reveal that Hyatt is wrong again. Judicial pleadings, government records, and other documents Hyatt provided show that he was complicit in, if not the primary cause of, the delays in having his tax appeal heard by the BOE. California's administrative decisions reveal that while the BOE found he terminated his California residency on October 20, 1991 (a month later than what he alleged in his First Amended Complaint in Nevada), the BOE also found that his contemporaneous patent licensing activities created a California business situs that generated substantial California-sourced income during 1991. (1 RA 000123; 17 RA 003983-93). This income justified FTB's assessments against [footnote continued on next page]

b. FTB made its Offer, which exceeded Hyatt's recovery, in good faith.

Hyatt claims that FTB's Offer was not in good faith and that FTB could not have reasonably expected Hyatt to accept the Offer before trial. (*See* AB at 39). Hyatt bases this on the purportedly "strong evidence Hyatt compiled against [FTB] through discovery [that he] would present to the jury." (*Id*. at 39-40). But given that FTB's Offer exceeded Hyatt's recovery, even before *Nevada v. Hall* was over-turned, Hyatt's position is illogical.

When FTB made its Offer, FTB analyzed these issues to determine the appropriate amount to offer Hyatt:

(1) Nevada's jurisdiction over FTB;

(2) The legal viability of Hyatt's tort claims; and

(3) The statutory damages cap that limited Hyatt's recovery per successful claim.

FTB's analysis showed that, even if FTB were wrong on the jurisdictional immunity

---

Hyatt for underpayment of taxes, a penalty, and interest. (*See id.*). Hyatt has also disclosed that he paid more than $11.3 million to FTB to satisfy the "small" assessments the BOE upheld. (1 RA 004028-32).

But more important, while Hyatt falsely claims victory in California and contends that the Court may consider the California administrative proceedings in evaluating prevailing party analysis and the *Beattie* factors, this is incorrect. (AB at 31 and 37). Both prevailing party and *Beattie* analyses only focus on the litigation in Nevada. They do not consider a litigant's parallel attacks in other jurisdictions.

issues, most of Hyatt's intentional torts failed as a matter of law and the statutory damages cap applied, thus limiting Hyatt's possible recovery at trial to $100,000.[4] This Court and the United States Supreme Court later confirmed that FTB was right on each issue, and as FTB predicted, its $110,000 Offer exceeded Hyatt's recovery (even before the United States Supreme Court ordered complete dismissal of Hyatt's case). *See Hyatt*, 133 Nev. at 829, 852-53, 407 P.3d at 724, 740.

Thus, it was not in bad faith for FTB to make the Offer based on its correct legal analysis of the case's major issues. On the contrary, NRCP 68 encourages the parties to evaluate their claims and defenses honestly and make offers of judgment based on the same. This saves time and money for all parties and the courts. *See Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 382, 989 P.2d 882, 888 (1999) (holding NRCP 68's purpose 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 an offer."). Hyatt and this Court cannot punish FTB under NRCP 68 because FTB, and not Hyatt, was right in evaluating key issues. FTB made several efforts to resolve this case in good faith. Hyatt rejected them. NRCP 68 rewards FTB with its attorney's fees and costs for the good

[4] This assumes Hyatt marshaled sufficient evidence during discovery to support his claims. FTB believed Hyatt had no such evidence.

faith Offer.

c. Even had the United States Supreme Court not reversed *Nevada v. Hall*, Hyatt still would not have beat FTB's Offer.

The core tenet of Hyatt's brief is that he should not suffer under NRCP 68(f) for the United States Supreme Court's reversal of *Nevada v. Hall*, which caused Hyatt's complete loss. (*See* AB at 34-35). But this overlooks the statutory damages cap at issue when FTB made its Offer. That cap prevented Hyatt from beating FTB's Offer even if the United States Supreme Court never overruled *Nevada v. Hall*.

Hyatt only had two tenable claims for fraud and IIED when he rejected FTB's Offer. *See Hyatt*, 133 Nev. at 829, 407 P.3d at 724. NRS 41.035's statutory damages cap limited his recovery to $50,000.00 per claim.[5] *See id.* at 852-53, 407 P.3d at 740. And so Hyatt could not recover more than $100,000 even if *Nevada v. Hall* remained good law. Hyatt's focus on the United States Supreme Court's reversal of *Nevada v. Hall* distracts from the key fact under NRCP 68: when he rejected FTB's

[5] After remand in 2016, Hyatt claims that he, rather than FTB, argued the $50,000 damages cap applied to each remaining claim and so this Court "ruled in favor of Hyatt" in applying that cap. (AB at 17). This is false. The Court directed supplemental briefing, and in that briefing, Hyatt argued that, in the "Court's discretion," a cap of $75,000 or $100,000 per claim applied. (15 RA 003618). No doubt Hyatt did so to beat FTB's Offer.

In response, FTB explained the $50,000 cap should apply because that version of the statute was in place at the time of Hyatt's alleged injuries. (16 RA 003686). The Court accepted FTB's argument and applied the $50,000 cap when it reissued its opinion. *See Hyatt*, 133 Nev. at 852-53, 407 P.3d at 740.

Offer, Nevada law prohibited Hyatt from recovering more than FTB's Offer. His rejection could not have been in good faith because of this.

Hyatt seeks to escape this roadblock by arguing that his litigation costs "easily would have exceeded $100,000 and thereby provided Hyatt a total recovery well in excess of the FTB's offer of judgment." (AB at 40 n. 77). But this again is Hyatt overlooking a party's legal entitlement to costs and assuming that the district court would later find he prevailed. Even with *Nevada v. Hall* as good law, Hyatt still lost most of his claims, and FTB also defeated his multi-million-dollar damages theory. *See Hyatt*, 133 Nev. at 829, 825-53, 407 P.3d at 724, 740. Thus, as Hyatt admits in his brief, such a mixed result would have allowed the district court to find that FTB was the prevailing party or that there was no prevailing party under NRS 18.020 for costs. (*See* AB at 21) ("[T]his Court has affirmed district court findings of no prevailing party for purposes of NRS 18.020 based on specific factual circumstances in each particular case . . .").

For NRCP 68 analysis, Hyatt cannot assume or speculate he was the prevailing party and thus entitled to costs. On the contrary, even if *Nevada v. Hall* was good law, FTB defeated almost all of Hyatt's case. Hyatt's costs are irrelevant to NRCP 68 analysis because he was not the prevailing party and thus not legally entitled to them.

3. *Beattie*'s Subjective "Good Faith" Standard Gave the Trial Court Too Much Discretion Under NRCP 68's Mandatory Language.

The *Beattie* factors as currently written, which inject discretion into NRCP 68's mandatory language, do not suit the rule's purpose of encouraging settlement or rewarding a successful offeror. As Hyatt highlights, the first, second, and third *Beattie* factors require the trial court to evaluate the parties' "good faith." (AB at 34-39). "[G]ood faith" is a subjective standard based on "a state of mind." Black's Law Dictionary (11th ed. 2019) (further explaining "good faith is an elusive idea"); *see also id.* (defining "bad faith" as "dishonesty of belief, purpose, or motive").

Such subjective standards in *Beattie* require trial courts to guess about the parties' intent, an endeavor this Court has described in other circumstances as providing insufficient guidance to trial courts to reach predictable and consistent decisions. *See, e.g.*, *Sw. Gas Corp. v. Vargas*, 111 Nev. 1064, 1077, 901 P.2d 693, 701 (1995) (describing "good faith" in the context of employment discrimination as a "subjective" test); *see also Thomas v. Eighth Judicial Dist. Ct. in & for Cty. of Clark*, 133 Nev. 468, 473, 402 P.3d 619, 625 (2017) ("[P]roving specific intent to provoke a mistrial must necessarily involve a subjective inquiry [into a prosecutor's bad faith] and is too difficult to determine."). Here, the judge that evaluated FTB's Offer played no role in the trial twelve years ago and had less familiarity with Hyatt's case than this Court. Yet *Beattie*'s current subjective "good faith" standard required

it to divine the parties' motives in 1998 (when Hyatt sued) and in 2007 (when FTB made its Offer). (36 AA 005641-42). This was an impossible task in this case. This is an impossible task in most cases.

The use of a subjective "good faith" standard also places too high a burden on offerors. *Beattie*'s factors require the offeror to prove the offeree's subjective bad faith,[6] but it is unclear how that "reward[s] a party who makes a reasonable offer" or promotes settlement under NRCP 68. *Dillard Dep't Stores*, 115 Nev. at 382, 989 P.2d at 888. On the contrary, the subjective standards place another evidentiary hurdle in front of an offeror who already succeeded in the case. The offeror must then prove the offeree's malicious state of mind. That penalizes rather than rewards a successful offeror.

Finally, *Beattie*'s use of subjective standards typically favors individual litigants over corporate or institutional litigants. *See, e.g. Byrne as Trustee of UOFM Trust v. Sunridge Builders, Inc.*, 136 Nev. Adv. Op. 69, __ P.3d __ (Oct. 29, 2020) (applying *Beattie* factors to offers of judgment under NRS 40.652). This violates the maxim that "no class of persons shall be denied the same protection of the law

[6] The third *Beattie* factor also allows an offeror to show that an offeree's decision to reject the offer was "grossly unreasonable," but this too is an unfairly high standard and the Court has never defined what "grossly unreasonable" means. *See* Black's Law Dictionary (11th ed. 2019) (defining "absurdity" as "the quality, state, or condition of being grossly unreasonable").

which is enjoyed by other classes in like circumstances." *Allen v. State*, 100 Nev. 130, 135, 676 P.2d 792, 795 (1984). Hyatt is not an unsophisticated litigant with limited resources. (AOB at 8-9). Quite the opposite, he spent millions of dollars litigating this case and others in multiple forums. (*See id.*). Just as the district court did here, the subjective inquiry into a litigant's state of mind allows district courts to treat individual litigants like Hyatt more favorably than corporate or institutional litigants without any measurable or objective form of review.

And so if the Court applies *Beattie* to this case despite NRCP 68's mandatory language, the Court should modify the first three factors in *Beattie* to reflect an objective standard based on reasonableness rather than the current highly subjective standard based on "good faith."[7] Modifying the standard will afford district courts greater guidance in evaluating offers based on the law and evidence rather than trying to divine the parties' subjective motives and will provide greater predictive appellate review.

4. NRCP 68's Purposes Support Awarding FTB's Fees and Costs.

The parties agree that NRCP 68 has dual purposes: (1) to reward a successful

[7] *Beattie*'s second and third factors already do this in some respect by looking at whether an offer "was reasonable" in timing and amount and whether an offeree's rejection was "grossly unreasonable." 99 Nev. 579, 588-89, 668 P.3d 268, 274 (1983). But the second factor also requires an offeror to prove its subjective "good faith" in making the offer, and the third factor also examines the offeree's bad faith. *See id.*

offer and punish an offeree for rejecting the same; and (2) to save time and money for the court system, the parties, and the taxpayer by encouraging settlement rather than protracted litigation. (*See* AOB at 29; *see also* AB at 42). They disagree, however, on how those purposes inform NRCP 68 analysis here.

FTB made the Offer to end this case before an expensive, lengthy trial and anticipated appeals. (*See* AOB at 10). It did so because of its good faith analysis of the parties' claims and defenses and its determination that Hyatt could not recover more than FTB's Offer. *See* Part(C)(2)(b), *supra*. This is what NRCP 68 encourages: settlement of claims before trial at an amount reasonably reflecting what the offeree is likely to recover after trial and any appeals. Had Hyatt accepted FTB's Offer, Hyatt would have recovered more than he did, and he would have saved the parties' attorneys, several courts, and the taxpayers of California, Nevada, and every other State time and money.

Even so, Hyatt argues enforcing NRCP 68 would "reward" FTB "with a windfall" for seeking reversal of *Nevada v. Hall*. This does not square with the United States Supreme Court's finding in *Hyatt III* that FTB challenged jurisdictional immunity from the case's beginning. *See Hyatt III*, 587 U.S. at ___, 139 S. Ct. at 1491 n. 1. FTB did not sit on its hands as Hyatt accuses it of doing. (*See* AB at 35). Rather, at massive expense to California's taxpayers, FTB tried to

resolve this case at every stage and through multiple courts based on its immunity in Nevada. That FTB was finally successful in doing so on appeal does not skirt NRCP 68's purposes. Hyatt's "windfall" theory is akin to arguing that the Court should penalize FTB for the district court's and jury's numerous errors. It was not FTB's mistakes that caused this litigation to stretch over multiple decades. On the contrary, it was Hyatt's rejection of FTB's Offer and the district court's and jury's later errors that forced FTB to repeatedly seek appellate review to obtain justice.

Hyatt also contends the Court can avoid NRCP 68's mandatory language by applying the doctrine of unclean hands. (*See* AB at 44-49). In support, Hyatt cites several cases from other jurisdictions based on judgments finding the party moving for attorney's fees and costs had unclean hands. (*See id.*). But his theory is defective in two respects.

First, Hyatt does not cite a single case from Nevada holding that the doctrine of unclean hands applies to NRCP 68. That is unsurprising given NRCP 68 presents a mandatory and simple analytical structure: did the offeree beat the offer of judgment? *See* NRCP 68(f)(1). If not, the offeror has a right to recover its post-offer attorney's fees and costs. *See id.* NRCP 68(f) presumes the parties have evaluated the equities of their case and properly valued them in making or rejecting an offer.

Second, Hyatt arguing FTB has unclean hands puts the cart before the horse. Without jurisdiction, any jury verdict or a judgment based on the same is void and has no effect. *See Landreth v. Malik*, 127 Nev. 175, 179, 251 P.33d 163, 166 (2011) ("[I]f the district court lacks subject matter jurisdiction, the judgment is rendered void."). Here, the United States Supreme Court held that Nevada courts lack jurisdiction over FTB, and so there has been no finding that FTB has unclean hands. *See Hyatt III*, 587 U.S. at ___, 139 S. Ct. at 1493.

CONCLUSION

Despite Hyatt's attempted briefing sleight of hand, the analysis under NRS 18.020 and NRCP 68 is uncomplicated in complete victory cases like this one. Under NRS 18.020, the prevailing party has a right to recover its costs, and a party prevails if it achieves its litigation objectives. Under NRCP 68, an offeree must pay the offeror's post-offer attorney's fees and costs when the offeree rejects the offer and fails to obtain a more favorable judgment.

Through the district court's final judgment, which completely dismissed Hyatt's case and awarded him nothing, only FTB achieved its litigation objectives, and Hyatt failed to obtain a judgment more favorable than FTB's Offer. FTB is the prevailing party entitled to recover its litigation costs under NRS 18.020. Hyatt is liable for FTB's post-Offer fees (and costs if necessary) under NRCP 68. FTB

respectfully requests that the Court reverse the district court on these issues, and remand for a determination of the amount of FTB's costs and attorney's fees.

Dated this 16th day of November, 2020.

McDONALD CARANO LLP

By: /s/ Pat Lundvall

Pat Lundvall (NSBN 3761)
Rory T. Kay (NSBN 12416)
2300 W. Sahara Ave., 12th Floor
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
Facsimile: (702) 873-9966
lundvall@mcdonaldcarano.com
rkay@mcdonaldcarano.com

Attorneys for Appellant

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 6,902 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 16th day of November, 2020.

McDONALD CARANO LLP

By: /s/ Pat Lundvall

Pat Lundvall (NSBN 3761)
Rory T. Kay (NSBN 12416)
2300 W. Sahara Ave., 12th Floor
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
Facsimile: (702) 873-9966
lundvall@mcdonaldcarano.com
rkay@mcdonaldcarano.com

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP, and on the 16th day of November, 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