

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

Electronically Filed
May 25 2020 04:30 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

BARRY RIVES, M.D.; and
LAPAROSCOPIC SURGERY OF
NEVADA, LLC,

Appellants/Cross-Respondents,

vs.

TITINA FARRIS and PATRICK FARRIS,

Respondents/Cross-Appellants.

No. 81052

DOCKETING STATEMENT

CIVIL APPEAL

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conference, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 26 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously,

they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District: Eighth

Department: 31

County: Clark

Judge: Hon. Joanna S. Kishner

District Ct. Case No.: A-16-739464-C

2. Attorneys filing this docketing statement:

Attorney: Robert L. Eisenberg, Esq.

Telephone: (775) 786-6868

Firm: Lemons, Grundy, & Eisenberg

Address: 6005 Plumas Street, Third Floor

Reno, Nevada 89519

Client(s) BARRY M. RIVES, M.D. AND LAPAROSCOPIC SURGERY OF

NEVADA, LLC

Attorney: Thomas J. Doyle, Esq.

Telephone: (916) 567-0400

Firm: Schuering Zimmerman & Doyle, LLP

Address: 400 University Avenue

Sacramento, California 95825-6502

Client(s): BARRY M. RIVES, M.D. AND LAPAROSCOPIC SURGERY OF

NEVADA, LLC

Attorney: Tara Clark Newberry, Esq.

Telephone: (702) 608-4232

Firm: Clark Newberry Law Firm

Address: 810 S. Durango Drive, Suite 102

Las Vegas, Nevada 89145

Client(s): BARRY M. RIVES, M.D. AND LAPAROSCOPIC SURGERY OF
NEVADA, LLC

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney: Kimball J. Jones, Esq.

Telephone: (702) 333-1111

Firm: Bighorn Law

Address: 716 S. Jones Blvd.

Las Vegas, Nevada 89107

Client(s): TITINA FARRIS AND PATRICK FARRIS

Attorney: George F. Hand, Esq.

Telephone: (702) 656-5814

Firm: Hand Page Sullivan Martin, LLC

Address: 3442 N. Buffalo Drive

Las Vegas, Nevada 89129

Client(s): TITINA FARRIS AND PATRICK FARRIS

Attorney: Micah S. Echols, Esq. Telephone: (702) 655-2346
Firm: Claggett & Sykes Law Firm
Address: 4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
Client(s): TITINA FARRIS AND PATRICK FARRIS

4. Nature of disposition below (check all that apply):

- | | |
|---|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | <input checked="" type="checkbox"/> Other disposition (specify): Post-judgment award of attorneys' fees and costs |

5. Does this appeal raise issues concerning any of the following? N/A

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

Rives v. Farris; No. 80271 (appeal from main judgment)

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

N/A

8. Nature of the action. Briefly describe the nature of the action and the result below: Medical malpractice; judgment for Plaintiffs (\$6,367,805.52) being appealed in No. 80271. This docket is the appeal from the award of attorneys' fees and costs.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Whether the district court erred in its awards of attorneys' fees and costs.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

No.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

- ☐ A substantial issue of first impression
- ☐ An issue of public policy
- ☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions
- ☐ A ballot question

If so, explain: _____

Although the main appeal (No. 80271) involves some of these issues, the present docket involving attorneys' fees and costs does not.

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This case should be retained by the Supreme Court, because No. 80271 involves a tort judgment of more than \$6 million, which exceeds the presumptive limit in NRAP 17(b)(5), and the present appeal docket will presumably be combined with No. 80271.

14. Trial. If this action proceeded to trial, how many days did the trial last?

14 days.

Was it a bench or jury trial? Jury.

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No.

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from: March 30, 2020.

17. Date written notice of entry of judgment or order was served: March 31, 2020.

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59): N/A

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing:

☐ NRCP 52(b) Date of filing:

☐ NRCP 59 Date of filing:

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. *See AA Primo Builders v. Washington, 126 Nev. ___, 245 P.3d 1190 (2010).*

(b) Date of entry of written order resolving tolling motion:

(c) Date written notice of entry of order resolving tolling motion was served:

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed: April 13, 2020

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

20. Specify statute or rule governing the time limit for filing the notice of appeal, *e.g.*, NRAP 4(a) or other

NRAP 4(a)(1)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

☐ NRAP 3A(b)(1)

☐ NRS 38.205

☐ NRAP 3A(b)(2)

☐ NRS 233B.150

☐ NRAP 3A(b)(3)

☐ NRS 703.376

☒ Other (specify) NRAP 3A(b)(8): Special order after final judgment

(b) Explain how each authority provides a basis for appeal from the judgment or order:

NRAP 3A(b)(8) provides an appeal may be taken from a special order after final judgment.

22. List all parties involved in the action or consolidated actions in the district court:

Parties:

(a) TITINA FARRIS

(b) PATRICK FARRIS

(c) BARRY RIVES, M.D.

(d) LAPAROSCOPIC SURGERY OF NEVADA, LLC

(e) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

N/A

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

TITINA AND PATRICK FARRIS: Complaint for medical malpractice; judgment on jury verdict November 14, 2019; award of fees and costs entered on March 30, 2020

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following: N/A

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)): N/A

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims.
- Any tolling motion(s) and order(s) resolving tolling motion(s).
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal.
- Any other order challenged on appeal.
- Notices of entry for each attached order.

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Name of appellants:

Barry M. Rives, M.D.

Laparoscopic Surgery of Nevada, LLC

Name of counsel of record:

ROBERT L. EISENBERG, ESQ.

Date: May 25, 2020

/s/ Robert L. Eisenberg

Signature of counsel of record

State and county where signed: Washoe County, Nevada

CERTIFICATE OF SERVICE

I certify that I am an employee of LEMONS, GRUNDY & EISENBERG and that on May 25, 2020, the foregoing *Docketing Statement, Civil Appeals* was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

George Hand

Kimball Jones

Jacob Leavitt

Thomas Doyle

Tara Clark Newberry

Dated May 25, 2020

LEMONS, GRUNDY & EISENBERG

/s/ Robert L. Eisenberg

Employee of Lemons, Grundy & Eisenberg

List of Documents attached:

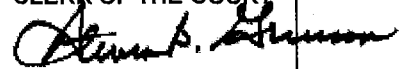
List of Documents attached:

As noted earlier, this docket only involves the post-judgment awards of attorneys' fees and costs. The main appeal from the judgment is No. 80271. The docketing statement in that docket provided the complaint, the judgment, and the notice of entry of the judgment. The following additional documents are being provided with this docketing statement:

1. Order on plaintiffs' motion for fees and costs and defendants' motion to retax and settle plaintiffs' costs, filed on March 30, 2020
2. Notice of entry of order, filed on March 31, 2020

ATTACHMENT “1”

ATTACHMENT “1”



1 **ORDR**
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3 Nevada Bar No. 12982
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5 Nevada Bar No. 12608
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20 *Attorneys for Plaintiffs*

21
22
23 **DISTRICT COURT**
24 **CLARK COUNTY, NEVADA**

25 TITINA FARRIS and PATRICK FARRIS,
26
27 Plaintiffs,

28 vs.

29 BARRY RIVES, M.D.; LAPAROSCOPIC
30 SURGERY OF NEVADA LLC; DOES I-V,
31 inclusive; and ROE CORPORATIONS I-V,
32 inclusive,

33 Defendants.

Case No.: A-16-739464-C

Dept. No.: 31

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

34 Plaintiffs' Motion for Fees and Costs having come on for hearing on the 7th day of January,
35 2020, at 10:00 a.m., KIMBALL JONES, ESQ., with the Law Offices of **BIGHORN LAW**, and
36 GEORGE F. HAND, ESQ. with the Law Offices of **HAND & SULLIVAN, LLC**, appearing on
37 behalf of Plaintiffs, and THOMAS J. DOYLE, ESQ., with the Law Offices of **SCHUERING**
38 **ZIMMERMAN & DOYLE, LLP**, appearing on behalf of Defendants, and Defendants' Motion to

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs' Request for Attorneys' Fees

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

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

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

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

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

Beattie/Yahama Factors

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

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

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

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

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

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

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

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

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

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

Brunzell Factors

1. Qualities of the Advocates.

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

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

That
contingency
fee is
standard
in the
community
and
thus
reasonable

while fees were provided pursuant to NRS 7.095
He assented that his
is at or below average

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

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

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

Therefore, the qualities of the advocates who performed work in this matter are proven. ^{give the was no objection to the rate and the award was paid to} Further, the market rate of \$500.00 per hour ^{could be} is appropriate under *Marrocco v. Hill*, 291 F.R.D. 586 (D. Nev. 2013), for this type of case. NRS 710.95

2. Character of the Work to be Done.

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

3. Work Actually Performed by the Lawyer.

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

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

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

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

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

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

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

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

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

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

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

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

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

Plaintiffs' Request for Additional Attorneys' Fees as a Sanction

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

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

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

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

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

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

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

NRS 18.005(5) states, "Reasonable fees of not more than five expert witnesses in an amount of not more than \$1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee."

Plaintiffs' have submitted fees paid to experts as follows:

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

- | | | |
|----|--------------------------------------|-------------|
| 6. | Daniel Feingold, M.D. (surgeon) | \$ 2,000.00 |
| 7. | Terence Clauretie, Ph.D. (economist) | \$ 3,500.00 |

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

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

- | | |
|--------------|--------------|
| Dr. Hurwitz: | \$ 11,000.00 |
| Dr. Willer: | \$ 17,245.00 |

Dr. Barchuk: \$ 26,120.00

Dawn Cook: \$ 13,960.03

Dr. Stein: \$ 1,500.00

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DATED this 23 day of March, 2020.


JOANNA S. KISHNER
DISTRICT COURT JUDGE

Respectfully Submitted By:

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12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 TITINA FARRIS and PATRICK FARRIS,

15 Plaintiffs,

16 vs.

17 BARRY RIVES, M.D.; LAPAROSCOPIC
18 SURGERY OF NEVADA LLC; DOES I-V,
inclusive; and ROE CORPORATIONS I-V,
inclusive,

19 Defendants.
20

Case No.: A-16-739464-C

Dept. No.: 31

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

23 PLEASE TAKE NOTICE that an Order on Plaintiffs' Motion for Fees and Costs and
24 Defendants' Motion to Re-Tax and Settle Plaintiffs' Costs heard on the 7th day of January, 2020
25 and on the 11th day of February, 2020 was entered in the above-entitled Court on the 30th day of
26 March, 2020, a true and correct copy of which is attached hereto as Exhibit "A".
27
28

1 DATED the 31st day of March, 2020.

2 **HAND & SULLIVAN, LLC**

3 /s/ George F. Hand
4 George F. Hand, Esq.
5 Nevada State Bar No. 8483
6 3442 N. Buffalo Drive
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8 *Attorneys for Plaintiffs*
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CERTIFICATE OF SERVICE

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

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

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

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

- ☐ (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed to Defendant's last-known address. I placed such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Las Vegas, Nevada. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- ☒ (BY ELECTRONIC SERVICE) By e-serving through Odyssey, pursuant to Administrative Order 14-2 mandatory electronic service, a true file stamped copy of the foregoing document(s) to the last known email address listed below of each Defendant which Plaintiff knows to be a valid email address for each Defendant.

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

Anna Grigoryan
(Type or print name)

/s/ Anna Grigoryan
(Signature)

Farris v. Rives, et al.

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

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