IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ADMINISTRATION OF THE SSJ'S ISSUE TRUST,
IN THE MATTER OF THE ADMINISTRATION OF THE SAMUEL S. JAKSICK, JR. FAMILY TRUST.
TODD B. JAKSICK, INDIVIDUALLY AND AS CO-TRUSTEE OF THE SAMUEL S. JAKSICK, JR. FAMILY TRUST, AND AS TRUSTEE OF THE SSJ'S ISSUE TRUST; MICHAEL S. KIMMEL, INDIVIDUALLY AND AS CO-TRUSTEE OF THE SAMUEL S. JAKSICK, JR. FAMILY TRUST; KEVIN RILEY, INDIVIDUALLY AND AS FORMER TRUSTEE OF THE SAMUEL S. JAKSICK, JR. FAMILY TRUST, AND AS TRUSTEE OF THE WENDY A. JAKSICK 2012 BHC FAMILY TRUST; AND STANLEY JAKSICK, INDIVIDUALLY AND AS CO-TRUSTEE OF THE SAMUEL S. JAKSICK, JR. FAMILY TRUST, Appellants/Cross-Respondents, vs. WENDY JAKSICK, Respondent/Cross-Appellant.

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Case No. 81470

APPELLANTS' OPENING BRIEF

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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 Nevada Rules of Appellate Procedure ("NRAP") 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellants are all individuals appealing in the following capacities: Todd B. Jaksick as a former Co-Trustee of the Samuel S. Jaksick Jr. Family Trust and as a former Trustee of the SSJ's Issue Trust; Michael S. Kimmel individually and as a former Co-Trustee of the Samuel S. Jaksick Jr. Family Trust; and Kevin Riley, individually, as former Trustee of the Samuel S. Jaksick Jr. Family Trust, and as Trustee of the Wendy A. Jaksick 2012 BHC Family Trust. These parties were represented in the district court and in this appeal by Donald A. Lattin, Esq.; Carolyn K. Renner, Esq.; and Kristen D. Matteoni, Esq. of Maupin, Cox & LeGoy.

Dated this 13th day of April, 2021.

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TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE STATEMENT i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
JURISDICTIONAL STATEMENT vi
ROUTING STATEMENT vi
ISSUES PRESENTED vii
STATEMENT OF THE CASE 1
STATEMENT OF THE FACTS 3
I. Familial Background & the Family Trust 3
II. The Issue Trust 5
III. Trust Litigation 6
SUMMARY OF ARGUMENT 9
ARGUMENT 12
I. The $300,000 Attorneys' Fees Award to Wendy is Not Supported by Sufficient Findings or Substantial Evidence. 12
II. The District Court Erred by Denying Attorneys' Fees and Costs to Michael Kimmel and Kevin Riley. 17
A. Factual background 17
B. Kimmel and Riley are entitled to costs as prevailing parties under NRS 18.020. 20
C. Kimmel and Riley are entitled to attorneys' fees under NRS 18.010(2)(b) because Wendy's claims against them were harassing and maintained without reasonable grounds. 24
D. Kimmel and Riley are also entitled to attorneys' fees under NRCP 68. 27
1. Wendy's claims against Kimmel and Riley were not brought in good faith. 30
2. The Offers of Judgment were reasonable and in good faith in both timing and amount. 31
3. Wendy's decision to reject the Offers of Judgment and proceed to trial was grossly unreasonable and in bad faith. 33

4. The fees Kimmel and Riley sought are reasonable and justified in amount. 34
E. The district court never addressed Kimmel's and Riley's request for fees under NRS 7.085. 36
CONCLUSION 37
CERTIFICATE OF COMPLIANCE 39
CERTIFICATE OF SERVICE 41

TABLE OF AUTHORITIES

Cases

Albios v. Horizon Cmtys., Inc.,
122 Nev. 409, 132 P.3d 1022 (2006).....13
Allianz Ins. Co. v. Gagnon,
109 Nev. 990, 860 P.2d 720 (1993).....24
Barney v. Mt. Rose Heating & Air Conditioning,
124 Nev. 821, 192 P.3d 730 (2008).....13
Beattie v. Thomas,
99 Nev. 579, 668 P.2d 268 (1983)..... passim
Brunzell v. Golden Gate Nat'l Bank,
85 Nev. 345, 455 P.2d 31 (1969)..... passim
Byrne ex rel. UOFM Tr. v. Sunridge Builders, Inc.,
136 Nev. Adv. Op. 69, 475 P.3d 38 (2020)..... 29, 36
Chavez v. Sievers,
118 Nev. 288, 43 P.3d 1022 (2002).....28
Dillard Dep't Stores, Inc. v. Beckwith,
115 Nev. 372, 989 P.2d 882 (1999)..... 28, 33
Food Fair Props., Inc. v. Snellgrove,
292 So. 2d 66 (Fla. Dist. Ct. App. 1974).....22
Golightly & Vannah, PLLC v. TJ Allen, LLC,
132 Nev. 416, 373 P.3d 103 (2016).....20
In re DISH Network Derivative Litig.,
133 Nev. 438, 401 P.3d 1081 (2017).....20
Logan v. Abe,
131 Nev. 260, 350 P.3d 1139 (2015)..... 13, 14, 15
MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.,
134 Nev. 235, 416 P.3d 249 (2018).....13
Prestige of Beverly Hills, Inc. v. Weber,
No. 55837, 2012 WL 991696, 128 Nev. 927, 381 P.3d 652
(Nev. Sup. Ct. 2012) (unpublished disposition)..... 25, 27
Rodriguez v. Primadonna Co.,
125 Nev. 578, 216 P.3d 793 (2009).....24
Schouweiler v. Yancey Co.,
101 Nev. 827, 712 P.2d 786 (1985).....20
Schwartz v. Estate of Greenspun,
110 Nev. 1042, 881 P.2d 638 (1994).....20
Semenza v. Caughlin Crafted Homes,
111 Nev. 1089, 901 P.2d 684 (1995).....25

Shuette v. Beazer Homes Holdings Corp.,
121 Nev. 837, 124 P.3d 530 (2005)..... 10, 13, 14, 15
Stubbs v. Strickland,
129 Nev. 146, 297 P.3d 326 (2013).....36
Yamaha Motor Co., U.S.A. v. Arnoult,
114 Nev. 233, 955 P.2d 661 (1998).....28

Statutes

NRS 18.010(2) 38
NRS 18.010(2)(b)..... 24, 26, 27
NRS 18.020..... 20, 22, 23, 38
NRS 18.020(2) 21
NRS 18.020(3) 20
NRS 7.085..... 36, 37, 38
NRS 7.085(1) 36
NRS 7.185.....36

Other Authorities

20 Am. Jur. 2d *Costs* § 25 (2021).....21
Michael Paul Thomas, *Cal. Civ. Ctrm. Hbook. & Desktop Ref* (2021 ed.).....22

Rules

NRCP 68 ..... 27, 33, 38

JURISDICTIONAL STATEMENT

The Court has jurisdiction over this appeal under NRAP 3A(b)(1), which allows an appeal to be taken from a "final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered." The Orders and Judgments entered by the Second Judicial District Court subject to this appeal are: (1) Order After Equitable Trial, dated March 12, 2020; (2) Judgment, dated April 1, 2020; (3) Order Resolving Submitted Matters, dated June 10, 2020; and (4) Amended Judgment, dated July 8, 2020. All the foregoing Orders and Judgments are final judgments pursuant to Nevada Rules of Civil Procedure ("NRCP") 54(b). Appellants filed their Notice of Appeal on July 10, 2020, which was timely filed within the thirty (30) day time limit imposed by NRAP 4(a)(1).

ROUTING STATEMENT

This case is presumptively retained for the Supreme Court to "hear and decide" because it raises "as a principal issue a question of statewide public importance." NRAP 17(a)(12). This case presents numerous questions as to the award and/or disallowance of significant attorneys' fees and costs in a highly contested trust and estate matter with a trust corpus above $5,430,000. The district court entered two Orders, a Judgment, and an Amended Judgment against the law

on this ground. Those decisions, and the ultimate questions presented, raise issues of great importance to the people of Nevada, particularly Trustees and beneficiaries of revocable living trusts. This statement is made pursuant to NRAP 28(a)(5).

ISSUES PRESENTED

1. Whether the district court abused its discretion by awarding $300,000 to Wendy Jaksick's attorneys for fees and costs.

2. Whether the district court abused its discretion by denying Michael Kimmel's request for fees and costs.

3. Whether the district court abused its discretion by denying Kevin Riley's request for fees and costs.

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STATEMENT OF THE CASE

This lawsuit concerns the trust estate and testamentary intent of decedent Samuel S. Jaksick, Jr. ("Sam"), as it pertains to his surviving children, Stanley S. Jaksick ("Stan"), Todd B. Jaksick ("Todd"), and Wendy Jaksick ("Wendy"). JT APP Vol. 12 at TJA 002096. Stan and Todd, along with appellant Michael Kimmel, Esq. ("Kimmel"), were at all relevant times the acting Co-Trustees of the Samuel S. Jaksick Jr. Family Trust (the "Family Trust"). JT APP Vol. 2 at TJA 000205-06. Todd is also the sole Trustee of the SSJ Issue Trust ("Issue Trust"). *Id.* Kevin Riley ("Riley"), long-time family accountant, is a former trustee of the Family Trust and a current trustee of the Wendy A. Jaksick 2012 BHC Family Trust (the "BHC Trust"), which is a subtrust created by Sam for Wendy's benefit. Wendy, due to her troubled personal and financial history, was never named a Trustee of any trust created by Sam for her or her family's benefit.

On August 2, 2017, Todd, Kimmel, and Riley (collectively, "Appellant Trustees") filed a petition seeking court approval of trust accountings and administrative actions to which Wendy had objected. JT APP Vol. 1-3 at TJA 000001-585. Wendy responded by filing a counter-petition against all Trustees including the Appellant Trustees and Stan. JT APP Vol. 4 at TJA 000632-71. Wendy

also filed claims against all of the named Trustees in their individual capacities. *Id.* Initially, Stan and Todd disagreed on certain trust administration issues, which resulted in them filing claims against each other. JT APP Vol. 5 at TJA 000832-47. However, these claims were dismissed and/or settled prior to trial. JT APP Vol. 12 at TJA 002098.

The case proceeded to a jury trial in February of 2019 on Wendy's legal claims whereby she demanded $80,000,000 in damages. *Id.* at TJA 002099. The jury found *against* Wendy on all of her legal claims except for one. JT APP Vol. 5 at TJA 000954-57. The jury found that Todd, as Trustee, breached his fiduciary duties to Wendy as Trustee of the Family Trust and the Issue Trust, awarding Wendy only $15,000 for such breaches. *Id.* The case then proceeded to a bench trial on the remaining equitable claims which were submitted on the briefs. JT APP Vol. 12 at TJA 002095. Following briefing, the district court entered an order finding in favor of Todd, Stan, Kimmel, and Riley, in all capacities, and against Wendy on every claim except one: the district court held that Wendy did not violate the no-contest provisions of the trusts. *Id.* at TJA 002105-14. The district court found Wendy was not a prevailing party but, confusingly, awarded her attorneys $300,000 in fees and

costs on the sole basis that she was awarded $15,000 by the jury for Todd's breaches of fiduciary duty.[1] *Id.* at TJA 002114-15.

Extensive post-trial motion work ensued, with all parties seeking to amend the judgment and obtain fees. The district court denied all of the Appellant Trustees' requests for fees and costs and refused to amend its findings that Wendy's counsel was somehow entitled to $300,000 in legal fees. JT APP Vol. 22 at TJA 0003639-46. All parties have since filed appeals.

STATEMENT OF THE FACTS

I. Familial Background & the Family Trust

Sam was a native Nevadan who amassed significant wealth, real estate, and other property rights throughout his lifetime. JT APP Vol. 2 at TJA 000207; Vol. 12 at TJA 002096. Sam had three children: Stan, Todd, and Wendy. JT APP Vol. 2 at TJA 000205. Sam engaged in extensive estate planning and established multiple trusts during his lifetime. JT APP Vol. 12 at TJA 002096-97. One such trust was the Family Trust, dated December 4, 2003, as restated on June 29, 2006, and as further

[1] Although not subject to Appellant Trustees' appeal, the district court also required Todd to repay twenty-five percent (25%) of *all* fees paid by any Trustee in defending this action, purportedly for these same breaches. JT APP Vol. 12 at TJA 002114-15. The district court later amended that judgment to exclude Stan's fees. JT APP Vol. 22 at TJA 003646.

amended on December 10, 2012. JT APP Vol. 2 at TJA 000205. Sam died on April 21, 2013. *Id.* As a result of his death, Todd, Stan, and Riley became the successor Co-Trustees of the Family Trust. *Id.* Due to licensing requirements by the Colorado Division of Gaming, Riley resigned as a Co-Trustee three (3) months later on July 31, 2013. *Id.* Todd and Stan then served as Co-Trustees of the Family Trust from July of 2013 to December of 2016. *Id.* On December 23, 2016, attorney Kimmel was appointed as the third Co-Trustee of the Family Trust. *Id.*

The Family Trust became irrevocable in its entirety upon the death of Sam and provided for the distribution of the trust estate in three (3) equal shares, with one (1) share for the benefit of Wendy and her children, one (1) share for the benefit of Todd and his children, and one (1) share for the benefit of Stan and his children. *Id.* While the trust estate had assets valued, as of Sam's date of death, of approximately $8.3 million, consisting entirely of Sam's separate property, the creditors' claims submitted against the Family Trust were in excess of $10.4 million. *Id.* As a result of the extensive and complex creditor issues involving the Family Trust, the Trustees considered various avenues, including bankruptcy. *Id.* at 000207. However, they ultimately elected to devote unmatched efforts to manage and administer the trust estate in an effort to reduce trust debt while at the same time attempting to preserve

value in the various trust assets for the ultimate benefit of Sam's lineal decedents. *Id.*

Their years-long efforts wielded impressive results, pulling the trusts out of millions in debt and even allowing for small distributions to some beneficiaries. *Id.* Wendy, largely spoiled her entire life, found these efforts insufficient, demanding her "share" *now*. JT APP Vol. 4 at TJA 000588. However, liquid assets did not exist from which to distribute Wendy's share to her and, at the commencement of litigation, the Family Trust was far from being in a position for final distribution. JT APP Vol. 2 at TJA 000215.

II. The Issue Trust

Sam established the Issue Trust, an irrevocable dynasty trust on February 21, 2007, to hold, protect, and preserve valuable family real estate for the use and enjoyment of multiple generations of the Jaksick family. JT APP Vol. 1 at TJA 000002-03. To that end, the SSJ's Issue Trust Agreement provides for the use of trust property by Sam's issue in the Trustee's discretion, but specifically prohibits the distribution of income or principal from the Issue Trust until the earlier of such time as all of Sam's issue are deceased or the expiration of Nevada's perpetuity

period (which is currently 365 years). *Id.* Todd has served as sole Trustee of the Issue Trust from its establishment in 2007. *Id.*

At the time of Sam's death, the Issue Trust consisted of certain Jaksick family real estate interests, both through direct ownership and ownership of a closely held entity, valued at approximately $1.3 million, along with a life insurance policy on Sam in the face amount of $6 million. *Id.* at 000002. Todd, as Trustee, worked diligently to manage and administer the trust estate in accordance with Sam's wishes to preserve valuable family properties for the ultimate enjoyment of Sam's family. *Id.* at 000003.

III. Trust Litigation

In response to family disputes, on August 2, 2017, Todd and Kimmel, as two of the three Co-Trustees of the Family Trust, and Todd as Trustee of the Issue Trust filed two separate petitions with the district court seeking to approve the respective accountings for the two trusts and seeking court approval of various actions taken by the Trustee(s) over the course of the trust administrations. JT APP Vols. 1-3 at TJA 000001-585. These two petitions formed the basis for the protracted litigation between the Jaksick family. *Id.* Stan responded to the filed petitions with various

objections and counterpetitions in both cases. JT APP Vol. 5 at TJA 000832-47. Wendy also filed her separate objections and counterpetitions in both cases. JT APP Vol. 4 at TJA 000586-614; TJA 000632-71. The cases were later consolidated. JT APP Vol. 4 at TJA 000629-31.

Shortly before trial commenced, Stan and Todd entered into a Settlement Agreement and Release, resolving their claims amongst each other. JT APP Vol. 12 at TJA 002098. The case then proceeded to a jury trial in February of 2019 on Wendy's legal claims against all parties for: (1) breach of fiduciary duties; (2) civil conspiracy; (3) aiding and abetting breach of fiduciary duty; and (4) fraud. JT APP Vol. 5 at TJA 000951-53. Following an eleven (11) day jury trial, the jury found *against* Wendy on all of her legal claims except for one. JT APP Vol. 5 at TJA 000954-57. The jury found that Todd, in his capacity as Trustee, breached his fiduciary duties to Wendy as Trustee of the Family Trust and the Issue Trust. *Id.* Despite Wendy's request for $80,000,000 in damages, the jury awarded her only $15,000. *Id.*

The case then continued to a bench trial on the following equitable claims submitted by the Appellant Trustees: (1) settlement and approval of trust accountings; (2) ratification and approval of the Agreements and Consents to

Proposed Action ("ACPAs"); (3) confirmation of Todd as Trustee of the Issue Trust; and (4) confirmation of Todd, Kimmel, and Stan as Co-Trustees of the Family Trust. *Id.* Wendy also asserted the following equitable claims: (1) failure to disclose and adequately account; (2) contest of the ACPAs; (3) contest of Indemnity Agreements issued to Todd and Stan by Sam; (4) declaratory judgment on the no-contest provisions of the trusts; (5) unjust enrichment and constructive trust; (6) removal of trustees and appointment of an independent successor trustee; (7) disgorgement of trustee fees; (8) injunction preventing the Trustees from using trust assets to defend this matter; and (9) attorney fees and costs. *Id*. The parties ultimately submitted all equitable claims on briefs. JT APP Vol. 12 at TJA 002095.

Following briefing, the district court entered an order finding in favor of Todd, Stan, Kimmel, and Riley, in all capacities, and against Wendy on all but one (1) claim. *Id.* at 002105-15. Because the accountings, ACPAs, and Indemnification Agreements had formed the basis of Wendy's legal claims at the jury trial, the district court found that the jury, in deciding against Wendy on all of her claims, implicitly rejected the factual basis for her equitable claims. *Id.* at 002096, 002100-01, 002106-14. Therefore, the district court (1) confirmed the accountings, (2) confirmed the ACPAs, (3) confirmed the Indemnification Agreements, (4) confirmed appellants as

trustees and/or co-trustees of the various trusts, (5) denied Wendy's claim for unjust enrichment, (6) denied Wendy's claim for a constructive trust, and (7) declined to remove the Trustees. *Id.* at 002105-15. The district court did, however, find that Wendy's challenges to the validity of the trusts were brought with a reasonable basis and that Wendy, therefore, did not violate the no-contest provisions of the trusts. *Id.* at 002108.

Although Wendy was wildly unsuccessful at trial, the district court awarded her attorneys' fees in the amount of $300,000, to be paid by the Trusts, because of the jury's determination that Todd breached his fiduciary duties. *Id.* at 002115. Significant post-trial motion work ensued, with all parties seeking to amend the judgment and obtain fees. The district court denied all of the Trustees' requests for fees and refused to amend its finding that Wendy was somehow entitled to $300,000 in legal fees. JT APP Vol.22 at TJA 003639-46. This appeal follows.

SUMMARY OF ARGUMENT

Despite the complexities of this litigation, Appellant Trustees are appealing only three narrow issues: (1) the award of $300,000 to Wendy's attorneys for fees and costs, (2) the denial of fees and costs to Kimmel, and (3) the denial of fees and costs to Riley. First, the failure to provide reasoning and findings relied upon in

making an award of attorneys' fee award is a manifest abuse of discretion entitling Appellants Trustees to reversal. *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 865, 124 P.3d 530, 549 (2005). Wendy lost on every single substantive claim in this litigation except one—the jury found that Todd, as Trustee, breached his fiduciaries duties as Trustee of the Family Trust and Issue Trust. JT APP Vol. 5 at TJA 000954-57; Vol. 12 at TJA 002114-15; Vol. 22 at TJA 003639-46. Wendy requested $80,000,000 in damages and the jury awarded her just $15,000. JT APP Vol. 5 at TJA 000954-57. The district court even made a direct finding that Wendy was not a prevailing party. JT APP Vol. 17 at TJA 002846-47.

Despite the overwhelming evidence, and explicit findings from the district court that Wendy's allegations were often "harassing, vexatious, and without factual basis," the district court awarded Wendy's lawyers more than a quarter million dollars in fees and costs for this paltry outcome. JT APP Vol. 12 at TJA 002098. When requested to justify such an award in post-trial briefing, the district court stated that, "the fee award to Wendy's counsel cannot be viewed in isolation" and "is inseparable from this Court's entire analysis." JT APP Vol. 22 at TJA 003642-43. Such "rationale" forces Appellant Trustees to guess how the district court concluded

that $300,000 is appropriate under such facts. *See id.* Rather, such an award is not supported by substantial evidence and Appellant Trustees are entitled to reversal.

Second, Kimmel and Riley are statutorily entitled to costs as prevailing parties under NRS 18.020. The district court expressly found that Kimmel and Riley were prevailing parties yet allocated all costs to Todd—an abuse of discretion. Third, Kimmel and Riley are also entitled to attorneys' fees under NRS 18.010(2)(b) because Wendy's claims against them, particularly as individuals, were harassing and without reasonable grounds. Fourth, Kimmel and Riley are entitled to attorneys' fees under NRCP 68 because they made Offers of Judgment, which Wendy rejected, and the district court failed to conduct an independent analysis of the *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), factors as applied to Kimmel's and Riley's Offers of Judgment—instead looping their offers in with Todd's as an individual. Finally, the district court did not once address Kimmel's and Riley's request for fees under NRS 7.085. Wendy's attorneys maintained an action "not well-grounded in fact" and "unreasonably and vexatiously extended a civil action," requiring that said counsel personally pay the additional costs, expenses and attorneys' fees incurred because of such conduct. Failure to do so was and is an abuse of discretion.

ARGUMENT

I. The $300,000 Attorneys' Fees Award to Wendy is Not Supported by Sufficient Findings or Substantial Evidence.

In the Order After Equitable Trial, the district court ordered that, "[t]he Trusts shall pay a combined attorneys' fee of $300,000 to Wendy's attorneys *for prevailing in the claim against Todd for breach of fiduciary duties*." JT APP Vol. 12 at TJA 002115 (emphasis added). The district court subsequently entered Judgment on both the Jury Verdict and Equitable Claims finding in favor of Wendy's "counsel of record in the amount of $300,000 to be paid by the [Family Trust and Issue Trust]." JT APP Vol. 22 at TJA 003800. Following significant post-trial motion work, including a motion by the Appellant Trustees requesting the district court alter or amend the judgment to remove the $300,000 fee award due to Wendy and the district court's failure to analyze the *Brunzell* factors, the district court denied the Appellant Trustees' motion and affirmed its decision to award $300,000 in attorneys' fees to Wendy's counsel to be paid by the Family Trust and the Issue Trust. JT APP Vol. 12 at TJA 002094-115. As outlined below, the $300,000 fee award is not supported by sufficient reasoning or findings and the substantial evidence does not support such a determination.

In evaluating the reasonableness of a request for attorney fees, the district court is required to consider the factors set forth in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349-50, 455 P.2d 31, 33 (1969). *See Shuette*, 121 Nev. at 865, 124 P.3d at 549. The *Brunzell* factors include: "the advocate's professional qualities, the nature of the litigation, the work performed, and the result." *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 427, 132 P.3d 1022, 1034 (2006) (quoting *Shuette*, 121 Nev. at 865, 124 P.3d at 549); *Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 829, 192 P.3d 730, 736 (2008) (expanding upon the *Brunzell* factors). In awarding attorneys' fees, the district court is "to provide[ ] sufficient reasoning and findings in support of its ultimate determination." *Shuette*, 121 Nev. at 865, 124 P.3d at 549. Indeed, it is an abuse of discretion for a district court to award fees without consideration of the *Brunzell* factors. *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. 235, 245, 416 P.3d 249, 258-59 (2018); *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015).

"While it is preferable for a district court to expressly analyze each factor relating to an award of attorney fees, express findings on each factor are not necessary for a district court to properly exercise its discretion." *Logan*, 131 Nev. at 266, 350 P.3d at 1143 (internal citation omitted). Rather, a district court must

demonstrate that it considered the *Brunzell* factors, and the award must be supported by substantial evidence. *Id.* Here, in relation to NRCP 68 and Offers of Judgment made in this matter, the district court acknowledged the *Brunzell* factors in footnote 6 of its Order After Equitable Trial. JT APP Vol. 12 at TJA 002105. In response to the Appellant Trustees' Motion to Alter or Amend the Judgment, the district court went on to state in its Order Resolving Submitted Matters that:

> The trustees' motion is an example of the type of motion this Court expected when it entered its Order After Equitable Trial. This Court directly noted the fee award to Wendy's counsel cannot be viewed in isolation. As this Court signaled, the fee award is inseparable from this Court's entire analysis. The trustees essentially ask this Court to parse out the portion of the order they dislike while preserving the provisions granting the outcome they sought. To do so would render this Court's aggregate analysis incomplete. Thus, if this Court were to re-visit the fee award to Wendy's counsel it would be compelled to re-visit other provisions of the order.
>
> This Court did not recite the talismanic words typically associated with Brunzell because it was not awarding fees based upon a valuation of actual attorney time presented. Instead, it considered the dominant Brunzell factors (advocates' quality, character and complexity of work, actual work performed, and result) as part of this unique litigation. This Court is confident it could recite the factors and will do so if required upon remand. *Id.* at TJA 0003642-3643.

That this litigation is "unique" does not absolve the district court of its obligation to support an award of attorneys' fees with substantial evidence. *Logan*, 131 Nev. at 266, 350 P.3d at 1143; *Shuette*, 121 Nev. at 865, 124 P.3d at 549 (fee

award must be supported with "sufficient reasoning and findings"). Wendy broadly requested attorneys' fees in her "Brief of Opening Arguments in the Equitable Claims Trial" but provided no independent analysis of the *Brunzell* factors in support of her fee request. JT APP Vol. 8 at TJA 001462-65. The district court, while noting it considered the *Brunzell* factors, fails to demonstrate that it conducted a *sua sponte analysis* of these factors. *See gen.* JT APP Vol. 22 at TJA 003639-46. Rather, in justifying the fee award to Wendy for "prevailing in the claim against Todd for breach of fiduciary duties," the district court states only that, "the fee award to Wendy's counsel cannot be viewed in isolation," "is inseparable from this Court's entire analysis," and that to re-visit the fee award would compel the district court to re-visit other provisions of the order. JT APP Vol. 22 at TJA 003642-43. The district court then asserts it is "confident it could recite the [*Brunzell*] factors and will do so if required upon remand." *Id.* at 003643.

The district court must do more than just recite the *Brunzell* factors—it must provide sufficient reasoning and findings to demonstrate that its decision is supported by substantial evidence. *Logan*, 131 Nev. at 266, 350 P.3d at 1143; *Shuette*, 121 Nev. at 865, 124 P.3d at 549. The Appellant Trustees are hamstringed in this appeal and forced to guess how the district court concluded that $300,000 is

an appropriate fee award when the district court stated its decision is based on the *entirety of the litigation*. This is further complicated by the unreasonableness of awarding Wendy's counsel more than a quarter of a million dollars for prevailing on two of thirty-one claims before the jury (and where the jury awarded a mere $15,000 in damages in response to a demand in excess of $80,000,000) and where they did not prevail on a single substantive claim before the judge in the equitable trial.

To place such a demand in perspective, Wendy and her counsel received 0.01875% of their damages request. They also failed to present *any* evidence of damages at trial and continued to pursue claims against the non-sibling Trustees in their individual capacities despite the clear lack of evidence to pursue such claims. The district court has asserted that it can recite the *Brunzell* factors in making a $300,000 fee award, but the failure to provide sufficient reasoning and findings relied upon, and support such a finding with substantial evidence, is a manifest abuse of discretion entitling Appellant Trustees to reversal of this award.

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II. The District Court Erred by Denying Attorneys' Fees and Costs to Michael Kimmel and Kevin Riley.

A. Factual background

This litigation commenced on August 2, 2017, with the Appellant Trustees' filing of Petitions seeking their confirmation as Trustees and approval of accountings and other trust administration actions. JT APP Vols. 1-3 at TJA 000001-585. Roughly nine (9) months later, on April 30, 2018, Kimmel and Riley, in their individual capacities, served separate $500 Offers of Judgment on Wendy pursuant to NRCP 68. JT APP Vol. 16 at TJA 002635-37; TJA 002470-72. Wendy rejected both offers. The consolidated cases then went to jury trial for eleven (11) days commencing on February 14, 2019, and on March 4, 2019, the jury returned their verdict, finding in favor of Kimmel *on all claims* made against him individually and as Co-Trustee of the Family Trust, and in favor of Riley *on all claims* against him individually, as Co-Trustee of the Family Trust, and as Trustee of the BHC Trust. JT APP Vol. 5 at TJA 000954-57.

On May 13, 2019, this case proceeded to a bench trial on the remaining equitable claims, which were ultimately submitted on the briefs on July 1, 2019. JT APP Vol. 12 at TJA 002095. Following supplemental briefing, the district court

entered its Order After Equitable Trial on March 12, 2020. *Id.* at 002094-118. The district court did not assign liability to Kimmel *on any claims* made against him individually or as Co-Trustee of the Family Trust, nor did it assign any liability to Riley *on any claims* made against him individually, as Co-Trustee of the Family Trust, or as Trustee of the BHC Trust. *See id.* In sum, neither the jury nor the district court found against Kimmel or Riley *on any claims* asserted against them individually or as a Trustee of any Trusts in this litigation. *Id.* The district court also expressly found that, "Trustees Michael Kimmel and former trustee Kevin Riley are prevailing parties." JT APP Vol. 17 at TJA 002847.

On April 9, 2020, Appellant Trustees filed two separate Motions for Attorneys' Fees and Costs pursuant to NRCP 68, NRS 18.010, NRS 18.020, NRS 18.005, and NRS 7.085—one on behalf of Kimmel and the other on behalf of Riley. JT APP Vols. 15-16 at TJA 002451-769. In allocating fees and costs as between parties, undersigned counsel clarified that the amount of fees allocated for the defense of Kimmel in his individual capacity and as Co-Trustee of the Family Trust is twenty-five percent (25%), based on his being one (1) of four (4) Co-Trustees and a current Co-Trustee of the Family Trust. JT APP Vol. 16 at TJA 002618-629. Similarly, the amount of fees and costs allocated for the defense of Riley in his

individual capacity and as Co-Trustee of the Family Trust and BHC Trust is twenty-five percent (25%) under the same rationale. JT APP Vol. 15 at TJA 002453-65.

No hearing or oral argument was held on these motions, and the district court subsequently issued its *Order Resolving Submitted Matters* whereby it denied Kimmel's and Riley's requests for fees and costs based on the rationale that:

> [The] proposed allocation does not accommodate the consistent and overwhelming observation this Court made throughout this proceeding: Mr. Lattin (and other attorneys associated with Mr. Lattin through the Law Firm of Maupin Cox & LeGoy) provided a single, common representation for similarly situated trustees. But Todd is at the core of the representation and Todd's fees and costs would be the same or only imperceptibly different if Messrs. Riley and Kimmel were not parties. Although prevailing parties, Messrs. Riley and Kimmel failed to make a reasonable showing of individuated costs. They have failed to clearly distinguish and articulate costs associated with their defense that do not overlap into the costs associated with Todd's defense. JT APP Vol. 22 at TJA 003641-42.

The district court's findings establish poor precedent by discouraging joint representation and encouraging harassing and vexatious litigation. It is undisputed that Kimmel and Riley were needlessly and mercilessly drug through years of litigation that exposed them to personal and professional liability. They were victorious and are statutorily entitled to costs as prevailing parties and are entitled to attorneys' fees pursuant to NRS 7.085, NRS 18.005, NRS 18.010(2)(b), NRS 18.020(3), and NRCP 68.

B. Kimmel and Riley are entitled to costs as prevailing parties under NRS 18.020.

Nevada law is clear that a prevailing party must be awarded costs. *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1050, 881 P.2d 638, 643 (1994) ("An award of costs to the prevailing party is mandated where, as here, damages were sought in an amount in excess of $2,500."). NRS 18.020 provides that "[c]osts *must* be allowed of course to the prevailing party against any adverse party against whom judgment is rendered . . . [i]n an action for the recovery of money or damages, where the plaintiff seeks to recover more than $2,500." NRS 18.020(3) (emphasis added). Such "costs are to be borne by any adverse party against whom judgment is rendered." *Schouweiler v. Yancey Co.*, 101 Nev. 827, 831-32, 712 P.2d 786, 789 (1985). "This court reviews a district court's decision awarding costs for an abuse of discretion." *In re DISH Network Derivative Litig.*, 133 Nev. 438, 450, 401 P.3d 1081, 1092 (2017).

A prevailing party is defined as a party that wins on at least one of its claims. *Golightly & Vannah, PLLC v. TJ Allen, LLC*, 132 Nev. 416, 422, 373 P.3d 103, 107 (2016). Kimmel and Riley are undeniably prevailing parties as both the jury and the district court found in favor of Kimmel and Riley and against Wendy *on all claims*

asserted against them. JT APP Vol. 5 at TJA 000954-954; JT APP Vol. 22 at TJA 003791-94. The district court plainly stated, "Trustees Michael Kimmel and former Trustee Kevin Riley *are prevailing parties*." JT APP Vol. 17 at TJA 002847 (emphasis added). As prevailing parties under NRS 18.020(2), the district court was statutorily required to award costs to Kimmel and Riley and the district court provided no legally sound basis for failing to do so.

The assertion that all fees and costs in this matter are attributable to Todd is unfounded. 20 Am. Jur. 2d *Costs* § 25 (2021) ("Where only one of several defendants is found liable, it is error to tax that defendant for the entire costs of the proceeding . . . ."). Being sound fiduciaries tasked with not wasting the limited liquid resources of the trust estates, all the Trustees jointly hired undersigned counsel to represent them in all capacities. When it became apparent that personal sibling disputes between Todd and Stan prevented joint representation, Stan obtained separate individual and Trustee counsel, Todd obtained separate individual counsel, and undersigned counsel continued representing Todd as Co-Trustee of the Family Trust and as Trustee of the Issue Trust, Kimmel individually and as Co-Trustee of the Family Trust, and Riley, individually, as former Trustee of the Family Trust, and as Trustee of the BHC Trust.

Undeniably and necessarily, the representation of these parties overlapped. But to dismiss Kimmel and Riley as irrelevant after three years of highly contentious litigation, and to attribute *all* costs of the Trustees to Todd, violates NRS 18.020 and is an abuse of discretion. *See* Michael Paul Thomas, *Cal. Civ. Ctrm. Hbook. & Desktop Ref* § 41:14 Apportioning costs between prevailing co-parties (2021 ed.) ("When a prevailing party has incurred costs jointly with one or more other parties who are not prevailing parties for purposes of an award of costs, the judge must apportion the costs between the parties."); *Food Fair Props., Inc. v. Snellgrove*, 292 So. 2d 66, 66 (Fla. Dist. Ct. App. 1974).

The apportionment of cost amongst jointly represented parties is a matter of first impression in Nevada.[2] However, guidance can be taken from NRS 18.020 which *requires* that prevailing parties be awarded costs. NRS 18.020. The district court directly violated this statute by allocating the costs of Kimmel and Riley to Todd. Further, the rationale for refusing to award costs because Kimmel and Riley "failed to clearly distinguish and articulate costs associated with their defense that do not overlap into the costs associated with Todd's defense" is patently biased.

[2] Despite a diligent search, counsel has been unable to locate case law of other jurisdictions relevant to the facts at hand.

Kimmel and Riley never served as Trustees without Todd also serving as Trustee, nor did they interact with Wendy individually outside of their work with the respective Trusts.[3] Their joint defense of this litigation therefore resulted in overlapping costs.

In requesting costs, Appellant Trustees were mindful that Todd was the longest serving Trustee and, therefore, despite Maupin Cox & LeGoy ("MCL") representing Todd in only two capacities, and representing Kimmel and Riley in five combined capacities,[4] it allocated fifty percent (50%) of all costs to Todd. Such allocation is reasonable and to hold otherwise establishes a dangerous precedent against joint representation and encourages outrageous litigation fees and costs among multiple Trustees. The denial of costs to Kimmel and Riley therefore violates NRS 18.020 and principles of equity and fairness.

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[3] Kimmel knew all the Jaksick siblings as children but did not maintain contact with Wendy after high school.

[4] MCL represented Todd as Co-Trustee of the Family Trust and as Trustee of the Issue Trust. MCL represented Kimmel individually and as Co-Trustee of the Trust, and Kevin Riley, individually, as former Trustee of the Family Trust, and as Trustee of the BHC Trust.

C. Kimmel and Riley are entitled to attorneys' fees under NRS 18.010(2)(b) because Wendy's claims against them were harassing and maintained without reasonable grounds.

NRS 18.010(2)(b) allows a prevailing party to recover attorneys' fees when the district court finds that the opposing party's claims were "brought *or maintained* without reasonable ground or to harass the prevailing party." (emphasis added). In awarding such fees, "[t]he court *shall* liberally construe the provisions of [NRS 18.010(2)(b)] *in favor of awarding attorney's fees* in all appropriate situations," and "[i]t is the intent of the Legislature that the court award attorney's fees pursuant to [NRS 18.010(2)(b)] . . . in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses." NRS 18.010(2)(b) (emphasis added). "The decision whether to award attorney's fees is within the sound discretion of the district court. However, where a district court exercises its discretion in clear disregard of the guiding legal principles, this action may constitute an abuse of discretion." *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 995, 860 P.2d 720, 724 (1993) (internal citation omitted).

"For purposes of NRS 18.010(2)(b), a claim is frivolous or groundless if there is no credible evidence to support it." *Rodriguez v. Primadonna Co.*, 125 Nev. 578, 588, 216 P.3d 793, 800 (2009). "Such an analysis depends upon the actual

circumstances of the case . . . ." *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 687-88 (1995) (quoting *Bergmann v. Boyce*, 109 Nev. 670, 675, 856 P.2d 560, 563 (1993)). For example, in *Prestige of Beverly Hills, Inc. v. Weber*, No. 55837, 2012 WL 991696, 128 Nev. 927, 381 P.3d 652 (Nev. Sup. Ct. 2012) (unpublished disposition), this Court upheld the district court decision to award fees where many of the defendant's claims and positions were unreasonable from the outset, where some claims were "blatantly false" and frivolous, and where claims for trespass, negligence, and nuisance were wholly unsupported by the evidence and were therefore groundless. *Id.* The *Weber* Court held that the defendant maintained his claims without reasonable grounds and attorneys' fees were appropriate. *Id.*

Similarly, here, Wendy's claims against Kimmel as an individual and as Co-Trustee of the Family Trust, were brought without reasonable grounds and were intended to harass. *Id.* Wendy flat out admitted that Kimmel should not have been named individually in these lawsuits. JT APP Vol. 16 at TJA 002757-61. Moreover, her breach of fiduciary duty claims involved actions which occurred prior to Kimmel becoming Co-Trustee of the Family Trust. *Id.* at 002621; TJA 002762-69. In spite of the clear evidence of Kimmel's lack of involvement in the actions of which

Wendy complained, she proceeded against him in this litigation through the end of the trial, never dismissing him, individually or as Trustee, despite requests from counsel. *Id.* Wendy also never identified damages specifically resulting from any breach of Kimmel's fiduciary duty as a Co-Trustee, or from any action by him individually, further evidencing the groundlessness and frivolousness of her claims. *Id.* Rather, she crassly lumped together the conduct of all Trustees—primarily that of her brothers—and groundlessly sought to hold Kimmel liable for the same. As such, NRS 18.010(2)(b) applies, and Kimmel should be awarded attorneys' fees.

Perhaps even more egregious, despite counsel's requests, Wendy baselessly maintained claims against Riley—long-time family accountant and named Trustee of Wendy's BHC Trust. JT APP Vol. 15 at TJA 002452-55. First, Wendy *never* made a specific allegation that implicated Riley individually, yet she proceeded to trial against him in that capacity. *Id.* Second, Wendy's own accounting expert, Frank Campagna, testified during his deposition that Riley's accountings complied with Nevada law and Wendy thereafter did not call her expert to testify at trial. *Id.* at 002456. Third, Riley was only a Co-Trustee of the Family Trust for roughly *three (3) months* following Sam's passing, and none of Wendy's claims for breach of

fiduciary duty involved actions which occurred during Riley's short tenure as a Co-Trustee of the Family Trust. *Id.*

Most telling of all is the district court's own statement that, "Wendy was particularly personal in her allegations, the worst of which were *harassing, vexatious, and without factual basis*." JT APP Vol. 12 at TJA 002098. (emphasis added). The clear evidence demonstrated that Wendy's claims against Kimmel and Riley, particularly as individuals, were frivolous, blatantly false, and unsupported. *Weber*, 2012 WL 991696 at *8-9. Yet, Wendy simply lumped all of the actions of all Trustees together and forced Kimmel and Riley to endure years of needless stress and anxiety without cause. *Id.* The foregoing are clear examples of Wendy's bad faith litigation and the district court's failure to liberally construe NRS 18.010(2)(b) to punish and deter such vexatious claims is an abuse of discretion warranting reversal. *See* NRS 18.010(2)(b).

D. Kimmel and Riley are also entitled to attorneys' fees under NRCP 68.

NRCP 68 governs offers of judgment and provides that the district court may award attorney's fees and costs to a party who makes an offer of judgment when the offeree rejects the offer and the judgment ultimately obtained is less favorable than

the offer. *See Chavez v. Sievers*, 118 Nev. 288, 296, 43 P.3d 1022, 1027 (2002). Whether to award costs and attorney fees pursuant to NRCP 68 lies within the district court's discretion. *Id.* at 296, 43 P.3d at 1027. When exercising this discretion, the district court is required to evaluate the *Beattie v. Thomas* factors including:

> (1) whether the plaintiff's claim was brought in good faith;
> (2) whether the defendant's 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. (citing Beattie, 99 Nev. at 588, 668 P.2d at 274). No one *Beattie* factor is determinative. *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252 n.16, 955 P.2d 661, 673 n.16 (1998).

"The purpose of NRS 17.115 and NRCP 68 is to save time and money for the court system, the parties and the taxpayers. They 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). A proper evaluation of the *Beattie* factors will not be disturbed on appeal absent an

abuse of discretion. *Byrne ex rel. UOFM Tr. v. Sunridge Builders, Inc.*, 136 Nev. Adv. Op. 69, 475 P.3d 38, 43 (2020).

Here, Kimmel and Riley obtained more favorable judgments than their offers. JT APP Vol. 16 at TJA 002635-37; TJA 002470-72. Approximately nine (9) months into litigation, Kimmel and Riley made Offers of Judgment to Wendy for $500 each. *Id.* Wendy rejected these offers and both the jury and the district court subsequently found in favor of Kimmel and Riley at trial and awarded Wendy nothing for her claims against them individually or as Trustees. JT APP Vol. 5 at TJA 000954; JT APP Vol. 13 at TJA 002220-54. However, when asked to award fees and costs, the district court conducted *no* analysis of Kimmel's and Riley's Offers of Judgment. JT APP Vol. 12 at TJA 002094-118. Rather, the district court conducted a four (4) page analysis of *Todd's Offers of Judgment*—one for $25,000 individually and one for $25,000 as Trustee of the Issue Trust. *Id.* at 2111-15. Shockingly, Riley's name is not even mentioned in the district court's Order After Equitable Trial. *See gen. id.*

Following post-trial motion work, in its subsequent Order Resolving Submitted Matters, the district court finally acknowledged Kimmel's and Riley's Offers of Judgment by finding:

> This Court incorporates by reference its previous order analyzing offers of judgment and summarily concludes the $500 offers of judgment are

> not a basis to shift fees to Wendy. Among other reasons, the offers of judgment were presumably made in Messrs. Riley and Kimmel's individual capacities. Messrs. Riley and Kimmel have made no reasonable showing that they incurred fees in their individual capacities, but instead, all fees and costs were incurred in the common defense of all trustees. JT APP Vol. 22 at TJA 003642.

This limited rationale highlights that the district court failed to consider the *Beattie* factors *as to Kimmel and Riley* in their differing capacities and, even stating *arguendo* that it did, misapplied these factors as to them. Rather, the district court did as Wendy has so frequently done in this case and simply lumped all parties, in all capacities, together in denying fees.

1. Wendy's claims against Kimmel and Riley were not brought in good faith.

The district court's analysis of the *Beattie* factors as to Todd individually does not apply to Kimmel and Riley. The district court found that "Wendy believed in good faith that she suffered damages from Todd's individual and fiduciary misconduct" and that Wendy's cause "to pursue Todd individually diminished" as the case wore on. JT APP Vol. 12 at TJA 0002112. Given that the district court ultimately found that Wendy's claims against *Todd individually* (whom this case is purported to have centered around) were maintained in bad faith, it is unfathomable how the allegations against Kimmel and Riley were not also found to have been brought in bad faith.

Wendy expressly stated in her deposition that she had no basis to name Kimmel as an individual and she alleged not a single factual allegation against Riley individually. She further could not communicate what Kimmel or Riley purportedly did as a Co-Trustees of the Family Trust that resulted in a breach of either's fiduciary duties to her. Indeed, all of the actions of which Wendy complained as to the Family Trust occurred well before Kimmel became Co-Trustee and when Riley was not acting as Trustee. Given all of this evidence, Wendy had no basis to name Kimmel or Riley in their individual capacities. She did so in bad faith, and she persisted in the litigation against them despite efforts by counsel to have them dismissed. The district court failed to conduct an independent bad faith analysis of the *Beattie* factors as applied to Kimmel's and Riley's Offers of Judgment, which is a clear abuse of discretion.

2. The Offers of Judgment were reasonable and in good faith in both timing and amount.

Riley served as Co-Trustee of the Family Trust for only three months after Sam's death in April 2013 and Kimmel did not begin serving as Co-Trustee of the Family Trust until January 2017. This litigation began in August 2017. The Offers of Judgment were served on April 30, 2018, offering to take judgment against each

of Kimmel and Riley in the amount of $500. When the Offers of Judgment were served, Wendy knew that neither of Kimmel nor Riley were involved in any of the instances of which she complained—individually or as a Trustees. She went so far as to admit that Kimmel should not be named individually in this case and could not articulate why Riley was named individually. Despite this, Wendy rejected the Offers of Judgment, which were both reasonable in time and amount.

The reasonableness of the offers is highlighted by the district court's order in which it found that Todd's individual $25,000 Offer of Judgment was "reflective of the circumstances and was made with a good-faith intention to settle the claims." JT APP Vol. 12 at TJA 0002113-14. Kimmel's and Riley's Offers should be deemed similarly reasonable as neither man *had any contact with Wendy individually*. This reasonableness is further highlighted by the district court's own analysis whereby Riley is not even mentioned in the Order After Equitable Trial and Kimmel's name is noted but three (3) times in more than twenty (20) substantive pages of analysis. It had been apparent from the onset that Wendy had no claim against Kimmel or Riley individually.

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3. Wendy's decision to reject the Offers of Judgment and proceed to trial was grossly unreasonable and in bad faith.

Applying the third *Beattie* factor to Todd's Offer of Judgment, the district court found that Wendy's

> decision to reject Todd's individual offer is less reasonable, yet this Court cannot conclude her rejection was grossly unreasonable or made in bad faith. Her decision was simply unwise in retrospect and she cannot now be relieved of its consequences. This third factor . . . is neutral regarding Todd's personal liability." JT APP Vol. 12 at TJA 002114.

Again, this rationale simply does not apply to Kimmel and Riley. Todd and Wendy have a lifetime of personal experiences and relationships that resulted in this litigation. Kimmel and Riley did not interact with Wendy as individuals, nor did Wendy ever make an allegation against them as individuals even though she sued them as individuals.

The purpose of NRCP 68 is to save time and money for the court system, the parties, and the taxpayers. *Dillard Dep't Stores, Inc.*, 115 Nev. at 382, 989 P.2d at 888. Wendy had no regard for Kimmel's or Riley's time, the assets of the Trust estates, or the taxpayers' dollars, as evidenced by her utter refusal to even consider attempts to settle this matter or dismiss Kimmel and Riley individually. As such, Kimmel and Riley should be rewarded for making a reasonable offer, and Wendy

should bear the burden of their post-offer attorneys' fees for refusing to even consider the Offers of Judgment.

4. The fees Kimmel and Riley sought are reasonable and justified in amount.

Regarding the fourth *Beattie* factor, in determining whether the fees sought by Kimmel and Riley are reasonable and justified, the proper factors the district court is to consider in determining the amount of a fee award include: (1) the qualities of the advocate—his ability, training, education, experience, professional standing and skill; (2) the character of the work to be done—its difficulty, intricacy, importance, the time and skill required, the responsibility imposed and the prominence and character of the parties when they affect the importance of litigation; (3) the work actually performed by the lawyer—the skill, time, and attention given to the work; and (4) the result—whether the attorney was successful and what benefits were derived. *Brunzell*, 85 Nev. at 349, 455 P.2d at 34. Good judgment would dictate that each of these factors be given consideration and that no one element should predominate or be given undue weight. *Id.* at 349-50, 455 P.2d at 34.

In analyzing the fourth *Beattie* factor as applied to Todd's Offers of Judgment, the district court stated that:

> Todd's individual and trustee attorneys are experienced in law and trial. They have exemplary records of service in our legal community and they obtained a positive outcome for their clients. After considering each of the Brunzell factors, this Court finds the fees sought by Todd individually from the date of the offer are reasonable in light of his experienced and effective attorneys, duration and scope of litigation, and the result obtained. However, the aggregate fees this Court expects Todd to seek as trustee of the Issue Trust are not justified when the offered $25,000 is compared to the jury verdict. Shifting substantial attorneys' fees to Wendy is unjustified in this instance. Regarding Todd's individual fees, the amounts are reasonable and justified when charged against Wendy. This factor is neutral with respect to the Issue Trustee offer and favors Todd with respect to his individual offer of judgment. JT APP Vol. 12 at TJA 002114.

Applying this rationale here, it is illogical that Todd's individual fees were found reasonable, but Kimmel's and Riley's were not. The district court states in its subsequent order that "no reasonable showing" of fees incurred in their individual capacities was demonstrated, "but instead, all fees and costs were incurred in the common defense of all trustees." JT APP Vol. 22 at TJA 003642. However, there was no request for a further break down of fees or a hearing on how such fees might be broken down.

An alternate question must certainly be posed: had Kimmel and Riley obtained separate individual counsel, would that counsel not assuredly be entitled to fees? The district court's blanket statements do not obviate the requirement to evaluate *Beattie* as to Kimmel and Riley. The baseless dismissal of these two parties

is an abuse of discretion and should be reversed. *Byrne ex rel. UOFM Tr.*, 136 Nev. Adv. Op. 69, 475 P.3d 38.

E. The district court never addressed Kimmel's and Riley's request for fees under NRS 7.085.

NRS 7.085 provides that if the Court finds that an attorney has "filed maintained or defended a civil action" and "such action or defense is not well-grounded in fact," or the attorney "unreasonably and vexatiously extended a civil action," the Court "shall require the attorney personally to pay the additional costs, expenses and attorney's fees reasonably incurred because of such conduct." This Court reviews orders refusing to award attorney fees or issue sanctions under NRS 7.085(1) for an abuse of discretion. *Stubbs v. Strickland*, 129 Nev. 146, 152, 297 P.3d 326, 330 (2013).

The district court did not address Kimmel or Riley's request for fees under NRS 7.185. There is a single mention that Kimmel and Riley "seek fees and costs against Wendy individually pursuant to NRS 7.085 . . .", but no further analysis. Yet, the record is clear that Wendy's attorneys sued Kimmel and Riley, individually, without reasonable basis to do so. As set forth above, Kimmel's involvement, based merely on the timing of his commencement as Co-Trustee, was readily known by

counsel at the initiation of the litigation. There was no evidence of any wrongdoing on Kimmel's part from the very start, and, as the litigation progressed, no evidence was discovered to warrant maintaining the litigation against Kimmel and counsel refused to dismiss him despite repeated requests.

Similarly for Riley, while Wendy may have justifiably needed to conduct discovery or determine certain facts at the onset of litigation, it was grossly apparent by the time the offer of judgment was served that Riley had no interaction with the Jaksick siblings, particularly Wendy, on an individual level. Wendy could not identify an allegation against Riley individually, and did not dismiss Riley from the case even when her own accounting expert admitted the financial reports complied with Nevada law. Notably, Wendy also did not verify her allegations against Kimmel or Riley by signing the Counter-Petition, but, rather, her attorney signed. Based on these collective facts, it was an abuse of discretion to fail to award fees under NRS 7.085.

CONCLUSION

Based on the foregoing, Appellant Trustees respectfully request that this Court reverse the award of $300,000 to Wendy's attorneys for fees and costs because such award is not supported by substantial evidence. They further request that this Court

find the district court abused its discretion by failing to award costs to Kimmel and Riley as prevailing parties under NRS 18.020. Finally, they request that this Court reverse the district court's denial of attorneys' fees to Kimmel and Riley under NRS 18.010(2) or, alternatively, under NRCP 68 or NRS 7.085.

Dated this 13th day of April, 2021.

MAUPIN, COX & LeGOY

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this opening brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the typestyle requirements of NRAP 32(a)(6) because this opening brief has been prepared in a proportionally spaced font using Microsoft Word 2016 in 14-point Times New Roman font.

2. I further certify this opening brief complies with the page-volume limitations of NRAP 32(a)(7) because, excluding the parts exempted by NRAP 32(a)(7)(A)(ii), it is proportionally spaces, has a typeface of 14 points, and contains 8,436 words.

3. Finally, I hereby certify that I have read this entire opening 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 opening 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 and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

4. I understand that I may be subject to sanctions in the even the accompanying opening brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 13th day of April, 2021.

MAUPIN, COX & LeGOY

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(b), I hereby certify that I am an employee of Maupin, Cox & LeGoy, and that on this day, I served, or caused to be served, a true and correct copy of the foregoing document by electronic service, via the Court's electronic notification system, to:

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Dated this 13th day of April, 2021.

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