

IN THE SUPREME COURT OF THE STATE OF NEVADA
Docket No. 84707

GILBERT P. HYATT

Appellant.

v.

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FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA

Respondent.

On Appeal from the Eighth Judicial District Court, Clark County
Case No. A382999
The Honorable Tierra Jones, District Judge, Department X

APPELLANT'S OPENING BRIEF ON BEHALF OF GILBERT P. HYATT

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in Nevada Rule of Appellate Procedure (NRAP) 26.1(a) and must be disclosed. Gilbert P. Hyatt is an individual. Counsel and firms representing Hyatt in this appeal are the following:

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These representations are made so that the justices of this Court may evaluate possible disqualifications or recusals.

Dated this 10th day of October, 2022.

By: /s/ Joseph C. Reynolds
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JURISDICTIONAL STATEMENT

This is an appeal by Appellant Gilbert P. Hyatt (“Hyatt”) from a post-judgment order (the “Second Cost Order”) by the district court denying Hyatt’s motion to tax costs and awarding all costs requested by Respondent Franchise Tax Board of California (the “FTB”).¹ Appellate jurisdiction exists under NRAP 3A(b)(1) and 3A(b)(8).

The district court entered a judgment on February 21, 2020, and notice of entry of the Judgment was filed and served on February 26, 2020.² The district court then initially denied in total Respondent FTB’s motion for attorneys’ fees and costs on June 8, 2020 (the “First Cost Order”), finding there was no prevailing party in the action.³ The FTB appealed the First Cost Order, and this Court, on April 23, 2021, reversed in part that First Cost Order finding the FTB was the prevailing party and entitled to an award of mandatory statutory costs. This Court affirmed the district court’s denial of the FTB’s request for attorneys’ fees.⁴ The Court then remanded the case to the district court for proceedings consistent with the Court’s April 23, 2021, order.

¹ Appellant’s Appendix 9711-20 (hereinafter “AA”).

² AA 4739-48.

³ AA 8981-82, 9013-14, 9054-64.

⁴ AA 9075-83.

After further briefing from the parties, the district court entered its Second Cost Order on April 6, 2022, denying Hyatt's motion to tax costs and awarding the FTB all of its requested costs.⁵ Hyatt appealed the Second Cost Order on May 6, 2022.⁶ This appeal is therefore timely. *See* NRAP 4(a).

⁵AA 9711-20.

⁶ AA 9726-28.

ROUTING STATEMENT

This case involves the FTB, a State of California government agency. The case has been reviewed by this Court on four prior occasions with decisions issued in 2002, 2014, 2017, and 2021.⁷ The case has been reviewed by the United States Supreme Court three times, with decisions issued in 2003, 2016, and 2019.⁸ Prior review of this case has implicated constitutional issues. Based on this history, it is presumptively assigned to this Court. *See* NRAP 17(a).

⁷ *Franchise Tax Bd. of Cal. v. Eighth Judicial Dist. Ct.*, 2002 Nev. LEXIS 57 (Petition Granted In Part, Docket Nos. 35549 and 36390 (Nev. Apr. 4, 2002)); *Franchise Tax Bd. of Cal. v. Hyatt*, 130 Nev. 662 (2014); *Franchise Tax Bd. of Cal. v. Hyatt*, 133 Nev. 826, 407 P.3d 717 (2017); *Franchise Tax Bd. of Cal. v. Hyatt*, 2021 WL 1609315 (Order Affirming In Part, Reversing In Part and Remanding, Docket No. 80884 (April 23, 2021)).

⁸ *See Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 123 S. Ct. 1683 (2003) (“Hyatt I”); *Franchise Tax Bd. of Cal. v. Hyatt*, 578 U.S. 171, 136 S. Ct. 1277 (2016) (“Hyatt II”); *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. ___, 139 S. Ct. 1485 (2019) (“Hyatt III”).

Appellant Gilbert P. Hyatt (“Appellant” or “Hyatt”) submits his opening brief appealing the district court’s post-judgment Second Cost Order awarding Respondent Franchise Tax Board of California (“Respondent” or the “FTB”) the entirety of its requested statutory costs in the amount of \$2,262,815.56.⁹

1. STATEMENT OF THE CASE.

The district court granted the entirety of FTB’s \$2,262,815.56 cost request without any explanation or apparent analysis, and without making any reductions in any of the 13 categories of costs sought by the FTB. Over 99% of the FTB’s requested costs were incurred before the FTB’s post-trial appeal that sought and obtained reversal of the long-standing United States Supreme Court precedent *Nevada v. Hall*.¹⁰ This new argument by the FTB was never asserted during the prior 17 years the case was pending, and was not asserted during this Court’s first

⁹ AA 9711-20.

¹⁰ *Nevada v. Hall*, 440 U.S. 410, 99 S. Ct. 1182 (1979), *overruled by Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) (“*Hyatt III*”). The FTB argued to the district court that “jurisdiction” was always at issue and presented in its earlier appeals. However, the FTB never presented or argued that *Nevada v. Hall* should be reversed; instead, the FTB deliberately and consciously asserted a jurisdiction argument that it should be granted an exception from the application of *Nevada v. Hall*. This is a critical distinction presented in this appeal.

review in 2002¹¹ nor during the United States Supreme Court's first review in 2003, *Hyatt I*.¹²

The district court granted the FTB's entire cost request for the 20-plus year litigation without addressing any specific category or amounts of FTB's requests and without analysis or explanation as to whether each category and requested amount was reasonable and necessary in accord with NRS 18.005. Additionally, in awarding the FTB every cost it requested, and giving no meaningful review of these requests, the district court contradicted its prior orders in the case. Specifically, in 2010, when Hyatt was the prevailing party, the district court denied to Hyatt a number of substantial costs requests with detailed explanations after a lengthy process including appointment of a Special Master to review all cost submissions.¹³ In 2022, the district court granted the FTB these same cost requests that had been denied to Hyatt with no analysis or explanation.

Hyatt therefore appeals the district court order on the basis that (i) the district court abused its discretion by failing to exercise any discretion and failing to conduct any meaningful review of the FTB's cost request, (ii) as a matter of law,

¹¹ *Franchise Tax Bd. of Cal. v. Eighth Judicial Dist. Ct.*, 2002 Nev. LEXIS 57 (Petition Granted In Part, Docket Nos. 35549 and 36390 (Nev. Apr. 4, 2002)) (copy at AA 2491-98).

¹² *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 123 S. Ct. 1683 (2003) (copy at AA 2658-65).

¹³ AA 9131-9157 (report); AA 9159-69 (statistical analysis).

the district court cannot contradict its prior orders in the case, and (iii) the cost award and the process under which it was issued violates Hyatt's due process rights.

Hyatt seeks reversal of the cost award and a determination either by this Court or via remand to the district court as to (i) which of the 13 categories and amounts of costs awarded under NRS 18.005 were reasonable and necessary, (ii) a determination that the district court must follow its prior decisions in the same case on the same issues, as a matter of law, and (iii) Hyatt's due process rights were violated with respect to the FTB's cost award.

In addition, and alternatively, certain of the costs awarded to the FTB lack justifying documentation required under NRS 18.005. Hyatt requests reversals of the costs awarded by the district court in those categories on this alternative ground.

2. STATEMENT OF THE ISSUES.

1. Did the district court abuse its discretion under NRS 18.020 and 18.005 by failing to exercise any discretion in awarding the FTB the entirety— every cent—of the \$2,262,815.56 in costs requested by the FTB?

2. Did the district court abuse its discretion under NRS 18.020 and 18.005 in finding without explanation or apparent analysis that \$2,051,081.24 in costs

incurred by the FTB *after* the decision in *Hyatt I* in April 2003 were necessary and reasonable?

3. Was the district court required to follow its earlier decisions and disallow more than \$700,000 in costs, when it had specifically denied these same costs to Hyatt in 2010?

4. Did the district court abuse its discretion in awarding the FTB the entirety of its requested \$242,254.67 in expert witness fees under NRS 18.005(5) without making any finding as to why the FTB was entitled to more than the \$1,500 per expert statutory fee for its five trial experts, given that the FTB lost at trial where those experts' work-product was unsuccessfully advanced?

5. Did the district court abuse its discretion in awarding the FTB the entirety of its requested \$225,431.41 in costs for travel and lodging for depositions under NRS 18.005(15), given that the FTB did not submit documentation tying these expenses to counsel travel for depositions that were necessary to the FTB's defense?

6. Did the district court abuse its discretion in awarding the FTB the entirety of its requested photocopy costs under NRS 18.005(12), telecopy costs under NRS 18.005(11), long-distance costs under NRS 18.005(13), and postage under NRS 18.005(14), given that the FTB did not submit documentation tying these expenses to actions that were necessary to the FTB's defense?

7. Did the district court violate Hyatt’s due process rights set forth Article 1, Section 8, Subsection 2 of the Nevada Constitution and the Fourteenth Amendment of the United States Constitution by depriving him of his property and liberty through application of NRS 18.020 to award all costs requested by the FTB without any analysis or explanation?

3. INTRODUCTION.

This Court is very familiar with the 20-plus year procedural history of this case, having itself reviewed the case on at least four prior occasions, resulting in three reviews by the United States Supreme Court.¹⁴ The FTB sat on its hands from the outset of the case, including early United States Supreme Court review, and did not seek the jurisdictional relief upon which it prevailed in 2019—*i.e.* reversal of the long-standing United States Supreme Court precedent, *Nevada v. Hall*, 440 U.S. 410 (1979)—until it had definitively lost in Nevada and had

¹⁴ *Franchise Tax Bd. of Cal. v. Eighth Judicial Dist. Ct.*, 2002 Nev. LEXIS 57 (Petition Granted In Part, Docket Nos. 35549 and 36390 (Nev. Apr. 4, 2002)); *Franchise Tax Bd. of Cal. v. Hyatt*, 130 Nev. 662, 395 P.3d 125 (2014); *Franchise Tax Board of State of California v. Hyatt*, 133 Nev. 826, 407 P.3d 717 (2017); *Franchise Tax Bd. of Cal. v. Hyatt*, 2021 WL 1609315 (Order Affirming In Part, Reversing In Part and Remanding, Docket No. 80884 (April 23, 2021)); *Franchise Tax Board of Cal. v. Hyatt*, 538 U.S. 488, 123 S. Ct. 1683 (2003) (“*Hyatt I*”); *Franchise Tax Bd. of Cal. v. Hyatt*, 578 U.S. 171, 136 S. Ct. 1277 (2016) (“*Hyatt II*”); *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) (“*Hyatt III*”). (Copies of these decisions are at AA 2491-2498, 2658-2665, 3852-85, 4239-47, 4407-43, 4712-4731.).

exhausted all appeals in this Court. Only then, via a second and then third bite of the proverbial apple in the form of United States Supreme Court review, did the FTB seek reversal of the very precedent upon which this 20-plus year litigation had proceeded. By then, the FTB and Hyatt had each incurred millions of dollars in costs.

The FTB, however, could have sought reversal of *Nevada v. Hall* in 2002, when it first requested and obtained review by the United States Supreme Court. But the FTB decided as a matter of strategy not to do so.¹⁵ In fact, FTB counsel was asked twice by the United States Supreme Court at oral argument in 2003 whether the FTB wanted the Court to overrule *Nevada v. Hall*, and each time the FTB said NO. At the outset of the oral argument, Justice Ginsburg inquired:

QUESTION: Mr. Leatherwood, may I ask you a threshold question? Some of your friends in this case have invited an overruling of Nevada against Hall. Of course, California was favored by that decision. Do you join in the plea to overrule Nevada v. Hall, or do you say this case is different because it involves four sovereign functions?

MR. LEATHERWOOD: Justice Ginsberg, ***we do not join in the chorus to overrule Nevada v. Hall.*** This case is different. This case goes to footnote 24 of Nevada v. Hall. ***It's our feeling that Nevada v. Hall is good law*** in the sense it does --

¹⁵ For *Hyatt I*, the FTB's *certiorari* petition was granted in 2002. AA 2548. In its *cert* petition, the FTB did not argue that *Nevada v. Hall* should be overruled. AA 2500-2518, 2535-46. *Hyatt I* was then briefed and argued by the parties in 2003, again without the FTB asking the Court to overrule *Nevada v. Hall*. AA 2550-2656. The United States Supreme Court issued its decision in *Hyatt I* in April 2003.

it does not implicate another state managing another state's core sovereign function. It's -- *Nevada v. Hall* was strictly an automobile accident.¹⁶

Then towards the end of the oral argument in 2003 Justice Stevens addressed whether *Nevada v. Hall* should be overruled. FTB counsel similarly responded that “*the Court doesn’t have to go that far* to get -- to get to this point. The Court can literally analogize to the special protections that are provided to state tax systems within the federal system itself.”¹⁷ The United States Supreme Court then rejected the FTB’s “exception” argument in 2003 in *Hyatt I*,¹⁸ thereby affirming *this Court’s decision in 2002* that Nevada had jurisdiction over the FTB based on *Nevada v. Hall*.¹⁹

¹⁶ AA 9116 (emphasis added).

¹⁷ AA 9120 (emphasis added). The FTB’s Supplemental Brief filed December 2, 2021 (AA 9690-9710) in the district court admits the FTB deliberately chose not to seek reversal of *Nevada v. Hall* when it had the opportunity to do so in 2002, because it determined that “the issue of reversing *Hall* was unlikely to succeed based on caselaw and the composition of the United States Supreme Court justices. Because of the paucity of caselaw after *Hall*, FTB asserted a narrower argument [in 2002] in its briefing of *Hyatt I* aimed at ‘guidance in the interpretation and application of the full faith and credit analysis of *Nevada v. Hall*.’” (AA 9694-95.) With hindsight, the FTB now claims that it was its *Hall*-reversal argument “asserted at the perfect time that won this case for FTB.” *Id.* That “perfect time” represents the fortuitous situation of new justices being appointed to the United States Supreme Court and new cases being decided, where that Court for the first time in its history not only reversed long-standing precedent but did so in the same case where it previously had rejected FTB’s “jurisdiction” challenges, after the FTB expressly refused to seek such reversal in *Hyatt I*.

¹⁸ 538 U.S. at 498-99, 123 S. Ct. at 1689-90.

¹⁹ 2002 Nev. LEXIS 57, at *10.

The case then proceeded to full discovery, an additional stay in 2006-07 in which writ review was sought but denied, a four-month jury trial in 2008, then the long post-trial appeal process before this Court,²⁰ and finally two additional trips to the United States Supreme Court.²¹ This entire procedural history of the case was predicated on the first decision by this Court in 2002 and the first decision by the United States Supreme Court in *Hyatt I* in 2003, where the FTB ***chose not to challenge*** the viability of *Nevada v. Hall*, because it did not like the composition of that Court at that time and felt there was a “paucity of caselaw after *Hall*”.²² In other words, the FTB agreed with *Hyatt* in 2003 that as long as *Nevada v. Hall* remained the law of the land, it had to advance the exception argument and not seek reversal, because it concluded that the then-comprised United States Supreme Court would not overturn *Hall*.

None of the more than \$2 million in costs that were incurred by the FTB after the decision in *Hyatt I* in April 2003—other than perhaps the filing fees later paid to the United States Supreme Court for *Hyatt II* and *Hyatt III*—contributed to the FTB ultimately prevailing in this case when the United States Supreme Court, having been presented expressly with the question, overturned *Nevada v. Hall*. If the FTB had made the same jurisdictional argument for overturning *Nevada v. Hall* to the

²⁰ 130 Nev. 662, 395 P.3d 125 (2014).

²¹ *Hyatt II*, 578 U.S. 171, 136 S. Ct. 1277; *Hyatt III*, 139 S. Ct. 1485.

²² AA 9694-95.

United States Supreme Court in 2003, the FTB would have either: (1) prevailed in 2003 and saved itself from incurring the very costs it asks Hyatt to pay or (2) not prevailed in 2003 making it the “law of the case”, with the subsequent jury verdict in place, in favor of Hyatt after appellate scrutiny of the non-jurisdictional issues.²³

Based on this procedural context and *Nevada v. Hall* being the law of the land from 2003 forward, the district court was required to apply its discretion and evaluate which of the FTB’s total \$2,262,815.56 in itemized costs were reasonable and necessary in accord with Nevada law, especially those incurred after *Hyatt I*. The district court did none of that. Without comment during oral argument and without explanation in its written order,²⁴ the district court simply awarded the FTB every dollar it requested for every cost incurred in every category during the 20-plus years of the litigation. In so doing, the district court abused its discretion, and its order must be reversed and remanded for a determination as to what cost requests by the FTB were mandatory and what, if any, other cost requests were reasonable and necessary in accord with Nevada law. The record before the district court is clear: simply signing off on a party’s cost requests, without substantive analysis, is not and should not be the law of this State.

²³ In this event, the FTB would have had to convince the 2019 United States Supreme Court to overrule not only the 40-year-old precedent of *Nevada v. Hall*, but also have to overturn its own decision in this case on the identical issue, which the Court had never done before in its more than 200-year history.

²⁴ AA 9711-20.

4. STATEMENT OF FACTS.

A. For over 20 years this case proceeded based on the long-standing *Nevada v. Hall* precedent.

Hyatt filed this action in the district court on January 6, 1998, against the FTB, the California state agency responsible for assessing state income taxes. Hyatt's lawsuit against the FTB in Nevada was based on the United States Supreme Court's holding in *Nevada v. Hall* that a state could not claim immunity in the courts of a sister state based on that state's own immunity laws.

This Court cited *Nevada v. Hall* four times on two different pages in its 2002 order rejecting the FTB's writ seeking to dismiss this case early in this litigation.²⁵ Under the comity doctrine, this Court dismissed Hyatt's negligence claim against the FTB, but allowed Hyatt's intentional tort claims to proceed.²⁶

The United States Supreme Court granted the FTB's petition in 2002 for writ of *certiorari* seeking review of this Court's 2002 order.²⁷ The FTB's petition for review and its briefing on the merits did not seek review on the issue of whether *Nevada v. Hall* was wrongly decided and should be reversed. Rather, it argued that an exception to *Nevada v. Hall* should be established, so that certain "sovereign" functions, such as taxing activities, be exempted from the holding in

²⁵ 2002 Nev. LEXIS 57 at *6-7 (copy at AA 2491-2498).

²⁶ *Id.* at 7-8.

²⁷ AA 2548.

Nevada v. Hall.²⁸ Hyatt filed opposition briefing, arguing that in *Nevada v. Hall* there was no basis for an exception as asserted by the FTB.²⁹

The United States Supreme Court issued its opinion in *Hyatt I* denying the FTB's request for a "tax" exception to *Nevada v. Hall* in a unanimous 9-0 decision.³⁰ The decision cited *Nevada v. Hall* and concluded that the Nevada Supreme Court had appropriately decided the issues presented to it, which included sovereign immunity, full faith and credit, choice of law, and comity, by allowing Hyatt's intentional tort claims to proceed in Nevada state court while dismissing Hyatt's negligence claim.

A jury trial commenced on April 14, 2008, and lasted four months.³¹ On September 8, 2008, the district court entered a judgment consistent with the jury's verdicts awarding Hyatt \$388,085,282.56.³²

The FTB appealed the 2008 judgment to this Court.³³ In 2014, this Court affirmed the portion of the judgment in favor of Hyatt on his claims for fraud and

²⁸ AA 2500-2518, 2535-46, 2550-74, 2631-56.

²⁹ AA 2576-2629.

³⁰ 538 U.S. 488, 123 S. Ct. 1683 (2003).

³¹ AA 3195-3200.

³² AA 3202-06.

³³ AA 3208-15.

the award of \$1,085,281.56, citing specific evidence supporting the fraud claim and on liability for Hyatt's intentional infliction of emotional distress claim.³⁴

B. In 2016, the United States Supreme Court reviewed the case a second time but did not reverse *Nevada v. Hall*.

Having exhausted its appeals in Nevada, the FTB sought and received a second review by the United States Supreme Court in 2015. Unlike its positions and arguments in 2003, for the first time the FTB sought reversal of *Nevada v. Hall*. The FTB also alternatively argued that the award of damages in favor of Hyatt must be limited to \$50,000 per claim in accord with Nevada law limiting damages for claims made against Nevada state agencies.³⁵ Hyatt opposed the FTB on both grounds.³⁶

The United States Supreme Court rendered a 4 to 4 decision in 2016 on the FTB's request to reverse *Nevada v. Hall*.³⁷ A majority of the Court, however, granted the FTB's alternative request that, in accord with *Hyatt I*, the FTB must be treated the same as a Nevada state agency regarding damage limitations. The United States Supreme Court therefore ordered the case remanded to Nevada state court for proceedings consistent with its ruling.³⁸

³⁴ 130 Nev. 662, 395 P.3d 451 (2014).

³⁵ AA 3887-3932, 4209-37.

³⁶ AA 4145-4207.

³⁷ 578 U.S. 171, 136 S. Ct. 1277.

³⁸ *Id.*

C. In 2018, the FTB sought and obtained a third review of the case by the United States Supreme Court.

After remand, this Court issued a decision in 2017 applying *Hyatt II* and limiting Hyatt's recovery to the statutory cap applicable to a Nevada state agency.³⁹ This Court's decision in 2017 did not reference and had nothing to do with *Nevada v. Hall*.

Nonetheless, the FTB again petitioned the United States Supreme Court to review the case, and again sought reversal of *Nevada v. Hall*.⁴⁰ Hyatt opposed the petition.⁴¹ The United States Supreme Court again granted the FTB's petition for review on the issue of whether the Court should reverse its long-standing *Nevada v. Hall* precedent.⁴²

D. In 2019, the United States Supreme Court reversed its long-standing *Nevada v. Hall* precedent.

After briefing and arguments by the parties,⁴³ the United States Supreme Court in a 5-4 decision in *Hyatt III* reversed *Nevada v. Hall* and remanded this case to Nevada state court for proceedings not inconsistent with the Court's opinion.⁴⁴

³⁹ 133 Nev. 826, 407 P.3d 717 (copy at AA 4407-43).

⁴⁰ AA 4445-82, 4508-22.

⁴¹ AA 4484-4506.

⁴² AA 4531.

⁴³ AA 4534-4687.

⁴⁴ 587 U.S. ___, 139 S. Ct. 1485.

E. Upon remand, the district court awarded the FTB every cent of every cost it requested for the entirety of the 20-plus year litigation.

The district court entered its new judgment on February 21, 2020, and notice of entry of the Judgment was filed and served on February 26, 2020.⁴⁵ The FTB filed an itemized memorandum of costs on February 26, 2020, seeking \$2,262,815.56.⁴⁶

Hyatt filed a motion to retax on March 3, 2020.⁴⁷ The district court denied the FTB's request for costs and attorneys' fees on April 23, 2020, finding no prevailing party per the judgment entered February 21, 2020.⁴⁸ This Court reversed the judgment in part on April 23, 2021, holding that an award of some statutory costs was mandatory under NRS 18.005 and 18.020 and remanding the matter to the district court for further proceedings consistent with its order.⁴⁹

Upon remand, the district court approved additional briefing on the cost issue, and the parties each submitted supplemental briefing.⁵⁰

On January 25 and 27, 2022, the district court heard oral argument lasting over two hours in total on Hyatt's motion to retax cost. The district court asked no

⁴⁵ AA 4739-48.

⁴⁶ AA 4761-72.

⁴⁷ AA 8695-8705.

⁴⁸ AA 9054-64.

⁴⁹ AA 9075-83.

⁵⁰ AA 9086-9283, 9690-9710, 9284-9689.

questions and made no comments during the two-plus hours of argument.⁵¹ The district court then entered an order on April 7, 2022, with no analysis or explanation, making no deductions, and awarding all costs requested by the FTB, \$2,262,815.56.⁵²

5. STANDARD OF REVIEW.

A district court's award of costs is reviewed for an abuse of discretion. *Logan v. Abe*, 131 Nev. 260, 267, 350 P.3d 1139, 1144 (2015) ("We review an award of costs for an abuse of discretion."); *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 120, 345 P.3d 1049, 1054 (2015) ("We will reverse a district court decision awarding costs if the district court has abused its discretion in so determining.").

Constitutional issues and other pure questions of law are reviewed *de novo*. *Jackson v. State*, 128 Nev. 598, 603, 291 P.3d 1274, 1277 (2012).

6. ARGUMENT.

A. The district court abused its discretion in awarding without explanation all costs requested by the FTB (\$2,262,815.56) over the 20-plus year litigation.

Costs awarded by the district court "must be reasonable, necessary, and actually incurred." *Cadle*, 131 Nev. at 120, 345 P.3d at 1054. "To support an

⁵¹ AA 9729-95.

⁵² AA 9711-20.

award of costs, justifying documentation must be provided to the district court to ‘demonstrate how such [claimed costs] were necessary to and incurred in the present action.’” *Jacksonville Police & Fire Pension Fund v. Brokaw (In re DISH Network Derivative Litig.)*, 133 Nev. 438, 452, 401 P.3d 1081, 1093 (2017).

It is an abuse of discretion for the district court to award costs where the necessity of the requested costs is not demonstrated. *See Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352-53, 971 P.2d 383 (1998) (reversing district court cost award for juror and investigative fees where requesting party failed to demonstrate how the costs were necessary to and incurred in the action); *Borgerson v. Scanlon*, 117 Nev. 216, 221, 19 P.3d 236, 239 (2001) (reversing cost award where requesting party failed to demonstrate costs were reasonable and necessary thereby failing to provide the district court a basis for awarding the costs); *Cadle*, 131 Nev. at 121, 345 P.3d at 1054 (reversing award of costs for which there was no showing of necessity to the present action).

Further, it is an abuse of discretion for the district court to grant an award of costs without providing an adequate explanation as to the necessity of the costs awarded. *See Frazier v. Drake*, 131 Nev. 632, 651-652, 357 P.3d 365, 378 (Ct. App. 2015) (reversing award of costs for expert witnesses where the district court failed to adequately set forth the basis for its decision); *see also Halley v. Honeywell Int’l, Inc.*, 861 F.3d 481, 501 (3d Cir. 2017) (“[T]he District Court

should provide sufficient reasoning so there is a basis to review for abuse of discretion. . . .”); *see also Otay Land Co. v. United Enterprises Ltd.*, 672 F.3d 1152, 1160 (9th Cir. 2012); *Gagnon v. United Technisource, Inc.*, 607 F.3d 1036, 1045 (5th Cir. 2010); *Koch v. Hankins*, 8 F.3d 650, 652 (9th Cir. 1993).

(1) The district court failed to exercise any discretion in granting without explanation every cost requested by the FTB, totaling \$2,262,815.56.

The FTB filed a memorandum of costs seeking \$2,262,815.56.⁵³ Hyatt challenged costs in 9 of the 13 categories sought by the FTB.⁵⁴ Most of the requested costs related to discovery and trial, virtually none of the requested costs related to the FTB’s post-trial appeals to the United States Supreme Court seeking reversal of *Nevada v. Hall*.⁵⁵

The district court then held two hours of oral argument over two days on the motion without a comment or question by the district court.⁵⁶ The district court then took the matter under submission and subsequently issued a minute order summarily granting all \$2,262,815.56 in costs requested by the FTB. The entirety of the district court’s explanation for granting every cent of every cost request in all 13 categories was:

⁵³ AA 4761-72.

⁵⁴ AA 9086-9283.

⁵⁵ *See* Hyatt briefing in the district court at AA 9100-9112.

⁵⁶ AA 9729-95.

The COURT FINDS that costs are mandatory under 18.020 and awards costs to Franchise Tax Board.

The COURT FURTHER FINDS that Franchise Tax Board's costs incurred after April 2003 are reasonable and necessary, considering the more than twenty (20) year litigation of the instant case.⁵⁷

The district court's order did not address any of Hyatt's arguments that the vast majority of the FTB's requested costs have no relation to, nor assisted in, nor were used as part of, the FTB's post-trial appeal seeking reversal of *Nevada v. Hall*. The district court's order was also inconsistent with and contradicted, without explanation, its prior order on costs from 2010, by granting the FTB in 2022 many of the very same types of costs that it denied to Hyatt in 2010. The district court's order also did not address Hyatt's arguments that certain categories lacked sufficient documentation.

This record demonstrates that the district court gave no meaningful review, and thereby exercised no discretion, in ruling on the FTB's cost requests.⁵⁸

⁵⁷ AA 9711-12. The FTB then submitted a *pro forma* order consistent with the minute order, also lacking any further explanation, which was signed by the district court. AA 9713-20.

⁵⁸ Reversal is required where a district court grants the entirety of a prevailing party's cost request without conducting any analysis of the necessity of the requested costs and without any meaningful review of the adequacy of the submitted supporting documentation. *See Cadle*, 131 Nev. at 120, 345 P.3d at 1053-54; *Vill. Builders 96, LP v. U.S. Labs., Inc.*, 121 Nev. 261, 277-78, 112 P.3d 1082, 1093 (2005). By summarily granting the FTB's costs request and not conducting any actual review of its costs documentation, the district court abused

(2) The district court failed to consider and address that the FTB incurred most of its costs after Hyatt I (2003).

The total costs incurred by the FTB as of April 2003 when *Hyatt I* was issued were \$211,734.32,⁵⁹ compared to the total costs sought and awarded to the FTB for the 20-plus year litigation of \$2,262,815.56. This was calculated based on the FTB's own supporting documentation that shows when the costs requested in each category under NRS 18.005 were incurred. The over \$2 million in claimed costs incurred by the FTB *after April 2003* were not reasonable and necessary, given the FTB's choice not to challenge *Nevada v. Hall* in *Hyatt I*.⁶⁰ The FTB could and should have raised reversal of *Nevada v. Hall* as part of *Hyatt I* and had the issue resolved by April 2003, saving millions for both parties if *Nevada v. Hall* had been reversed at that time.

The district court did not address this issue in its order. The extraordinary procedural history of this case compels that the district court address this issue.

its discretion and should be reversed.

⁵⁹ AA 9276-79. This amount was calculated based on the summaries submitted by the FTB with its backup documentation that lists each requested cost by date. *See, e.g.*, AA 4777, 4982-83, 5239-97, 5299-5596, 5601-05, 5807-5935, 6006-6035, 7002-7027, 7537-7551, 8150, 8166-67, 8269, 8317, 8404-08, 8596-97, 8659.

⁶⁰ The lone exception may be the Clerk fees the FTB incurred in petitioning the United States Supreme Court in regard to *Hyatt II* and *Hyatt III*. AA 4777. But even those fees never would have been incurred had the FTB sought reversal of *Nevada v. Hall* in 2003, thereby never needing to incur repeated United States Supreme Court filing fees.

What happened in *Hyatt III* is not equivalent to a case in which a party wins an appeal via reversal of a district court decision and then is awarded its costs incurred in the district court and the reviewing court. Here, the district court *and this Court* correctly applied the law under *Nevada v. Hall* (as correctly advocated by Hyatt at the time), and then the United States Supreme Court in *Hyatt I* affirmed *this Court* in 2003, rejecting the FTB's jurisdictional arguments that Hyatt could not sue it in Nevada courts. The United States Supreme Court did not consider overruling *Nevada v. Hall* at that time because the FTB expressly declared that it did not seek that remedy. Now, the FTB admits that this was its deliberate litigation strategy because it thought it would not succeed. The FTB calculated that existing precedent was not sufficient to seek reversal and that the existing United States Supreme Court would not agree to reverse. In other words, in 2003, the FTB internally decided that *Nevada v. Hall* was good law and would not be overturned. This decision led directly to the 9-0 decision that Hyatt's case could proceed, *i.e.*, none of the FTB's jurisdictional arguments were valid.

The FTB therefore "prevailed" in this case, but not because a reviewing court found any district court error in applying the correct, long-standing law in place after *Hyatt I* in 2003 (*Nevada v. Hall*). Rather, the district court *correctly* applied *Nevada v. Hall*, then was told 16 years later that the law was being changed. And it was the FTB that waited those 16 years to seek the change in law.

The FTB's deliberate litigation strategy *not* to seek reversal of *Nevada v. Hall* in 2003 is unique to this case. That FTB strategy caused millions in costs to both sides and, thus, must be considered in determining whether post-2003 FTB costs were reasonable and necessary. The district court did not do so.

(3) The district court failed to address that most costs sought by the FTB were not necessary for seeking reversal of Nevada v. Hall.

Only a small fraction of the costs requested by the FTB were necessary, *i.e.*, contributed in any way, to the FTB achieving prevailing party status via its appeal seeking reversal of *Nevada v. Hall* in *Hyatt III* (2019). Specifically, NRS 18.005 lists and describes 17 categories of potentially recoverable costs. The FTB sought recovery in 13 of 17 categories. At most, no more than \$214,720.91 of the FTB's requested \$2,262,815.56 costs meet the necessary and reasonable standard.

This number was calculated by including the costs requested by the FTB for the four categories listed in NRS 18.005 in which the statutory language reads as strictly mandatory, as these categories do not specifically reference the costs having to be necessary and/or reasonable: No. 1 (clerk's fees - \$2,270.02), No. 2 (reporter's depo fees - \$170,320.91), No. 3 (juror fees - \$2,055.88), and No. 8 (official reporter fees - \$31,432.57).⁶¹ In addition, Hyatt conceded small amounts under No. 5 (expert fees - \$7,500) and No. 7 (service of process - \$999).

⁶¹ See NRS 18.005(1), (2), (3), and (8).

The remaining \$2,048,094.65 in costs were not necessarily or reasonably incurred by the FTB, despite NRS 18.005 requiring that the FTB must establish necessity and reasonableness in order to recover those items: No. 4 (witness fees at trial), No. 5 (expert fees above \$1,500 per expert specifically require showing of necessity), No. 11 (telecopies/faxes), No. 12 (photocopies), No. 13 (long-distance calls), No. 14 (postage), No. 15 (travel for depositions), and No. 17 (other). The FTB made no showing of necessity and reasonableness for any of these costs relative to its appeal to overturn *Nevada v. Hall*.⁶² The district court did not analyze necessity and reasonableness either.

Application of the “necessary and reasonable” requirement on this category-by-category basis under NRS 18.005 therefore limits the FTB’s recovery of costs to no more than \$214,720.91.⁶³ Alternatively, the FTB could have argued that costs from the August 2008 jury verdicts forward were “reasonably and necessarily” incurred as it pursued its appeal and ultimately secured the reversal of *Nevada v. Hall* in *Hyatt III*. But the FTB did not argue this or put forth a requested amount for this period, and the district court did not undertake such analysis at oral argument or in its decision and order, instead the district court awarded the FTB all of its claimed costs from inception of the case in 1998.

⁶² AA 8910-20, 9690-9710.

⁶³ AA 9097-98.

Under the district court's reasoning, or lack of reasoning, Hyatt is effectively punished for bringing a lawsuit under then-existing U.S. Supreme Court precedent in 1998, with jurisdiction found to be proper in the Nevada district court (*Hyatt I*), with facts found to be meritorious through the substantial jury verdicts, including punitive damages against FTB in 2008, with those verdicts being upheld in part on appeals, and now facing the current order requiring Hyatt to pay more than \$2,000,000 to FTB for post-2003 claimed costs. This reality is based on a reversal of *Nevada v. Hall* sixteen years after the FTB had affirmatively decided not to seek that same review when it could have done so. This is tantamount to the FTB misusing the Nevada court system by not asserting all of its claims (i.e., not seeking reversal of *Nevada v. Hall*), then seeking to have Hyatt pay for this FTB strategy.

The district court therefore abused its discretion in awarding anything more than \$214,720.91, particularly without providing any explanation or specific finding as to how and why pretrial discovery expenses and trial expenses were reasonable and necessary for the FTB to prevail in reversing *Nevada v. Hall*.⁶⁴

⁶⁴ The district court's failure to conduct any meaningful review of Mr. Hyatt's objections to the FTB's costs requests also violated his state and federal constitutional due process rights. See discussion, *infra* at 42-44.

B. The district court abused its discretion in awarding the FTB substantial costs that were the same types denied to Hyatt in 2010.

The district court gave so little consideration to Hyatt's motion to retax that it awarded the FTB over \$700,000 in types of costs that were denied to Hyatt when he was the prevailing party in 2010.⁶⁵ Specifically, after Hyatt prevailed at trial in this case in 2008, the district court implemented an extensive process for reviewing and considering the costs Hyatt sought. A Special Master was appointed to review all of Hyatt's cost requests and backup documentation.⁶⁶ There were multiple rounds of briefing and argument before both the Special Master and the district court. This resulted in a 22-page report issued by the Special Master in 2009, which was then approved by the district court in 2010.⁶⁷ The report explained why certain costs were approved and others were denied.⁶⁸ The report demonstrated the painstaking consideration the Special Master applied to his ruling in granting some cost requests, denying others and reducing a number of others, all with an explanation as to how and why the Special Master so ruled. The district court accepted without modification the extremely detailed Special Master's report.⁶⁹

⁶⁵ The costs awarded to the FTB but denied or reduced in regard to Hyatt in 2010 under NRS 18.005(1), (2), (15) and (17) equal \$702,594.62 as addressed below, *infra* at 28-37.

⁶⁶ AA 9281-83.

⁶⁷ AA 9131-9157.

⁶⁸ *Id.*

⁶⁹ AA 9259-9262.

Far from the process employed between 2008 and 2010 when Hyatt was the prevailing party, the district court approved and awarded without comment or explanation every cent of every cost requested by the FTB in 2021. This contradicts its own 2010 ruling on what categories would (and would not) be allowed in this matter, without any explanation or analysis of why the district court today deemed such categories now recoverable, when it determined those categories were not recoverable in 2010.

(1) Travel expenses, other than for depositions, were denied to Hyatt but awarded to the FTB.

The Special Master's Report in 2009 limited Hyatt's recovery under NRS 18.005(15) strictly to attorney travel expenses relating to depositions and conducting discovery.⁷⁰ The Special Master's Report excluded costs for meals, parking, party/non-attorney travel costs, attending hearings and any travel costs incurred after the close of discovery sought by Hyatt.⁷¹ Despite this success in 2010 in limiting Hyatt's recovery for travel expense to attorney travel for depositions, the FTB sought and was awarded under this same category the entirety of its outside and in-house counsel's travel expenses throughout this 20-plus year litigation amounting to \$225,431.41. The FTB made no attempt to segregate

⁷⁰ AA 9148, 9153.

⁷¹ *Id.*

which expenses legitimately fell within this category (*i.e.*, attorney travel expenses relating to depositions and conducting discovery) and which do not.⁷²

Indeed, the descriptions in the supporting documents include only a handful of references to depositions for mileage paid to the FTB attorneys that totals \$897.10.⁷³ No other documents reference depositions. Further, the dates of the listed travel expenses show that the vast majority of entries relate to travel expenses for hearings, pretrial matters, and the trial in 2008 or even post-trial—not depositions or discovery which ended in 2007.⁷⁴ The list of depositions set forth in support of the FTB’s request for reporter’s fees confirms that no deposition was taken after December 2007.⁷⁵ Nonetheless, the FTB sought and received ten pages of listed travel expenses occurring after that date.⁷⁶

Similarly, the FTB sought under NRS 18.005(17) and was awarded by the district court \$12,295.41 in meal expenses dating from 2003 through 2019 with no explanation or even reference as to who was at the meal, what event it pertained to, or why it was a necessary and reasonable expense. The FTB’s submission was simply a listing of restaurant charges with receipts.⁷⁷ Hyatt was denied such

⁷² AA 6998-7526.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ AA 4819-21.

⁷⁶ AA 7018-7027

⁷⁷ AA 8404-8591.

expenses that were unrelated to attorney travel for depositions and discovery.⁷⁸

Indeed, the dates for most of the meals listed were from late 2007 and thereafter, when discovery was closed.⁷⁹

The district court therefore abused its discretion in granting these requests in contradiction to its prior ruling on this subject and without explanation as to how such FTB expenses were reasonable and necessary now, but not in 2010.

(2) Many “other” types of expenses were denied to Hyatt but awarded to the FTB.

NRS 18.005(17) is a miscellaneous, catch-all category for “other” expenses. NRS 18.005(17) allows for “[a]ny other reasonable and necessary expense.” It is the only subsection of NRS 18.005 that specifically includes the term “reasonable and necessary expense”, thereby requiring some scrutiny by the district court of costs sought under this subsection.

The FTB’s requests under this category were broken down into nine types of costs.⁸⁰ The district court, via the Special Masters’ Report in 2009, denied or limited Hyatt in regard to five of the nine types of costs now sought by the FTB.⁸¹ Despite successfully limiting Hyatt’s recovery for these expenses in 2010, the FTB

⁷⁸ AA 9148, 9153.

⁷⁹ AA 8404-8591.

⁸⁰ AA 4761-72.

⁸¹ Video deposition fees (AA 9141), trial and supply expenses (AA 9154), limiting computer research (AA 9150), private investigator fees (AA 9154), and *pro hac vice* fees (AA 9154-55).

sought and was awarded by the district court all of its requested costs in all of these types as “other” expenses under NRS 18.005(17).⁸²

(a) Video (deposition) expenses were denied to Hyatt but granted to the FTB.

The Special Master’s Report in 2009 denied Hyatt’s request for \$101,705.87 for deposition video expenses.⁸³ Despite successfully opposing Hyatt’s request for this expense in 2010, the FTB requested and was awarded \$63,007.71 in deposition video expenses.⁸⁴ By statute, videographer fees for a deposition are not recoverable if a court reporter was present at the deposition. NRS 18.005(2). The Special Master’s Report in 2009 was explicit on this point in recommending denial of Hyatt’s request.⁸⁵ The district court provided no explanation for its contradictory ruling in 2022.

Additionally, the FTB does not and cannot make a showing that this expense was necessary relative to the FTB’s appeal that resulted in the United States Supreme Court overturning *Nevada v. Hall* in 2019. Videos from depositions were used at trial, but the FTB lost at trial. None of the videos taken at the depositions were used or cited to as part of the appeal and therefore did not assist the FTB or the United States Supreme Court in deciding to overturn *Nevada v. Hall*. Notably,

⁸² AA 9711-20.

⁸³ AA 9141, 9152.

⁸⁴ AA 8166-68, 8169-8267.

⁸⁵ AA 9141, 9152.

the vast majority of these expenses were incurred after April 2003, when *Hyatt I* was decided. Only \$5,263.50 of the \$63,007.71 in deposition video expenses requested was incurred before April 2003.⁸⁶

The district court therefore abused its discretion in granting this request in contradiction to its prior ruling on this subject, in contradiction to NRS 18.005(2), and without explanation as to how the expenses were reasonable and necessary in 2022 for the FTB but not for Hyatt in 2010.

(b) Trial and supply expenses were denied to Hyatt but awarded to the FTB.

The Special Master's Report from 2009 denied Hyatt's request for expenses of \$29,943.77 consisting of "Office/Trial Supplies".⁸⁷ Despite successfully opposing Hyatt's request for these expenses, the FTB nonetheless requested and was awarded \$8,434.76 in "Trial Expenses" and \$9,646.10 in "Supply" expenses.⁸⁸ The district court provided no explanation for its contradictory ruling.⁸⁹

Additionally, the FTB did not and cannot make a showing that these expenses assisted in or were necessary relative to the FTB's appeal reversing

⁸⁶ AA 8166-68, 8169-8267.

⁸⁷ AA 9154.

⁸⁸ AA 8269-8312, 8317-8399.

⁸⁹ AA 9711-20.

Nevada v. Hall in 2019. And none of these expenses were incurred before the decision in *Hyatt I* in April 2003.⁹⁰

The district court therefore abused its discretion in granting this request in contradiction to its prior ruling on this subject and without explanation as to how the expenses were reasonable and necessary in 2022 for the FTB but not for Hyatt in 2010.

(c) Computer legal research expenses were limited to Hyatt but awarded in full to the FTB.

The Special Master report from 2009 limited Hyatt's request to 55% of the total computer research expense requested.⁹¹ Despite successfully limiting Hyatt's recovery for this expense, the FTB requested and was awarded all of its \$183,030.42 in computer research expense.⁹² The district court provided no explanation for its contradictory ruling.

Moreover, the FTB did not tie or limit this requested expense to research related to securing the reversal of *Nevada v. Hall* in 2019. Instead, the FTB submitted a request to recover all computer research incurred during the 20-plus year case with entries dated from 1998 to 2018.⁹³ Based on the dates listed, the

⁹⁰ AA 8269-8312, 8317-8399.

⁹¹ AA 9150. This reduced Hyatt's request of \$265,186.80 in computer research to \$141,189.95. *Id.*

⁹² AA 7537-8148.

⁹³ *Id.*

vast majority of these expenses had nothing to do with seeking to overturn *Nevada v. Hall*. For example, of the 15 pages of listed legal research expenses submitted by the FTB, only the last 3 pages in expenses are dated from 2016 forward when the FTB was seeking to overturn *Nevada v. Hall*.⁹⁴ Arguably this more limited expense for 2016 forward for computer research related to its successful appeal to overturn *Nevada v. Hall* in 2019 and meets the reasonableness and necessity standard. But none of the earlier pre-2016 computer research expense contributed to the FTB overturning *Nevada v. Hall* in 2019.

The district court therefore abused its discretion in granting this entire request in contradiction to its prior ruling on this subject and without explanation as to how all of these expenses were reasonable and necessary in 2022 for the FTB but not for Hyatt in 2010.

(d) Private investigator expenses were denied to Hyatt but awarded to the FTB.

The Special Master's Report in 2009 excluded Hyatt's request for \$3,348.35 in private investigator expenses.⁹⁵ Despite successfully opposing Hyatt's requests for this expense, the FTB nonetheless requested and was awarded all private

⁹⁴ AA 7549-51.

⁹⁵ AA 9154.

investigator costs of \$1,494.63.⁹⁶ The district court provided no explanation for its contradictory ruling.

The FTB also made no showing of necessity and reasonableness for this expense. FTB's backup documentation consisted of four invoices from an investigator dated from 2006 and 2007.⁹⁷ The invoices themselves give no indication as to what the investigator was doing or why his work was necessary.

The district court therefore abused its discretion in granting this request in contradiction to its prior ruling on this subject and without explanation as to how the expenses were reasonable and necessary in 2022 for the FTB but not for Hyatt in 2010.

(e) Mediator and Special Master Fees were not awarded to Hyatt but were awarded to the FTB.

The FTB lumped together fees for a failed mediation in 2007 (\$1,575) and fees for the Special Master in 2009 and 2010 (\$75,572.71) when Hyatt was the prevailing party.⁹⁸ In regard to the mediator's fees, the parties split these in 2007 as is typical in mediation. The Special Master did not therefore address these expenses in 2009.⁹⁹ In regard to the Special Master's fees, the district court's order appointing the Special Master specifically held that the fees would be split

⁹⁶ AA 7531-35.

⁹⁷ *Id.*

⁹⁸ AA 8150-64.

⁹⁹ AA 9131-9157.

50/50.¹⁰⁰ This was also referenced in the materials the FTB submitted in support of its costs.¹⁰¹ The district court nonetheless in contradiction awarded the FTB the entirety of the FTB's requested mediator fees and Special Master fees.

The district court therefore abused its discretion in granting this request in contradiction to its prior ruling on this subject and without explanation as to how these expenses were reasonable and necessary in 2022 for the FTB but not for Hyatt in 2010.

(3) Pro Hac Vice fees were denied to Hyatt but awarded to the FTB.

The Special Master's Report from 2009 excluded as unnecessary \$9,850 in *pro hac vice* fees paid by Hyatt to the Nevada State Bar for out-of-state attorneys who were co-counsel with Nevada attorneys on this case.¹⁰² Despite successfully opposing Hyatt's request for *pro hac vice* fees, the FTB's sought and was awarded under NRS 18.005(1) (Clerk's Fees) \$3,850 in *pro hac vice* fees it paid to the Nevada State Bar for the FTB's California attorneys who were co-counsel with its Nevada attorneys.¹⁰³ The district court provided no explanation of this contradictory ruling.

¹⁰⁰ AA 9281-83.

¹⁰¹ AA 8160.

¹⁰² AA 9154-55. Hyatt sought the *pro hac vice* fees under NRS 18.005(17), which is for miscellaneous costs.

¹⁰³ AA 4777.

The district court therefore abused its discretion in granting this request in contradiction to its prior ruling on this subject and without explanation as to how the expenses were reasonable and necessary in 2022 for the FTB but not for Hyatt in 2010.

C. The district court abused its discretion by awarding the FTB \$242,254.67 in expert witness fees without any showing of necessity.

NRS 18.005(5) limits recovery to five expert witnesses for no more than \$1,500 per expert, “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.” Per the language of the statute, particular scrutiny is required as to the necessity of costs requests for expert witness in excess of \$1,500 per expert. This Court has frequently reversed expert witness fee awards lacking in a showing of necessity. *See Cotter ex rel. Reading Int’l, Inc. v. Kane*, 136 Nev. 559, 565-66, 473 P.3d 451, 457-58 (2020); *see also Frazier*, 131 Nev. at 645, 651-652, 357 P.3d at 378.

The district court nonetheless awarded the FTB every cent of its requested \$242,254.67 in expert witness fees with no explanation as to the necessity of these expenses.¹⁰⁴ The district court did not analyze the reasonableness of the claimed expert witness fees or their necessity, given that their testimony was both rejected

¹⁰⁴ AA 9711-20.

by the jury and unnecessary as to reversal of *Nevada v. Hall*. The trial in this case had nothing to do with overturning *Nevada v. Hall* and the FTB lost at trial—all the evidence presented at trial in 2008, including from the FTB’s experts (John Sullivan, Kathleen Wright, and Deidre Mulligan), related to the FTB’s commission of intentional torts directed towards Hyatt. None of them had any connection or relation to the FTB’s effort to overturn *Nevada v. Hall* years later in 2019.

The FTB’s recoverable costs related to its experts should have been limited to \$1,500 for each of the five experts for a total of \$7,500. The district court therefore abused its discretion in awarding the FTB \$242,254.67 in expert witness fees with no showing or finding of necessity.

D. The district court abused its discretion in granting FTB cost requests that lacked sufficient documentation.

(1) Under NRS 18.005(12) (Photocopies) — the FTB failed to provide sufficient supporting documentation.

Photocopies was the FTB’s largest single cost request on its Memorandum of Costs totaling \$651,628.14 (over 25% of its requested costs). Of this amount, \$463,684.37 was the FTB’s outside law firm’s own internal billing/tracking records with nothing more submitted.¹⁰⁵ The Special Master’s Report from 2009 required supporting documentation beyond a mere spreadsheet and disallowed

¹⁰⁵ AA 5299-5596.

almost 80% of Hyatt's requested copying expenses on that basis.¹⁰⁶ The reasonableness and necessity of the FTB's \$651,628.14 copying cost request therefore could not be evaluated. The FTB did not attempt to tie the charges to its later success in reversing *Nevada v. Hall*. Further, at minimum the copying charges should be reduced by 80% as the Special Master ruled for Hyatt's copying charges. Lastly, from the dates of the asserted charges, most were before the 2008 trial, not for the post-trial appeal related to the reversal of *Nevada v. Hall*.¹⁰⁷

The district court therefore abused its discretion in granting this request in contradiction to its prior ruling on this subject and without explanation as to how all these expenses were reasonable and necessary in 2022 for the FTB but not for Hyatt in 2010.

(2) Under NRS 18.005(13) (Long-distance calls) – the FTB failed to provide sufficient supporting documentation.

The FTB has also submitted the entirety of its outside law firm's long-distance telephone calls for reimbursement seeking \$15,844.82.¹⁰⁸ There was no explanation as to what the calls were for, whom they were to and from, or how they assisted in the case, let alone how they assisted the FTB in its post-trial appeal related to the reversal of *Nevada v. Hall*. This approach was found insufficient by

¹⁰⁶ AA 9146.

¹⁰⁷ AA 5299-5605.

¹⁰⁸ AA 5239-97.

the Special Master in 2009 who allowed only a small percentage of Hyatt's requested long-distance call expenses.¹⁰⁹

The district court therefore abused its discretion in granting this request in contradiction to its prior ruling on this subject and without explanation as to how the expenses were reasonable and necessary in 2022 for the FTB but not for Hyatt in 2010.

(3) Under NRS 18.005(11) (Telecopies) – the FTB failed to provide sufficient supporting documentation.

The FTB also sought the entirety of its outside law firm's billed telecopy (*i.e.*, fax) charges of \$6,728 based on the firm's billing records and with no explanation as to what the faxes were for or how they assisted in the case.¹¹⁰ The Special Master in 2009 disallowed Hyatt's requested fax expenses finding spreadsheets to be insufficient documentation and determining that source documentation is needed.¹¹¹ The district court nonetheless awarded the FTB all of its requested fax costs without explanation. The district court therefore abused its discretion in granting this request in contradiction to its prior ruling on this subject and without explanation as to how the expenses were reasonable and necessary.

¹⁰⁹ AA 9147.

¹¹⁰ AA 5239-97.

¹¹¹ AA 9146.

(4) Under NRS 18.005(14) (Postage) – the FTB failed to demonstrate reasonableness and necessity.

The FTB has submitted the entirety of its outside law firm's postal expenses for reimbursement, \$46,745.97.¹¹² The Special Master in 2009 allowed a portion of Hyatt's requested postal expenses because there was reliable and supporting documentation, allowing \$13,735.98 and denying \$4,235.27 due to insufficient documentation.¹¹³ Unlike its fax, copy, and phone expenses, for its postage expenses the FTB submitted backup, *i.e.*, supporting documentation. Nonetheless, the FTB made no showing of necessity, and specifically how these charges assisted the FTB in overturning *Nevada v. Hall*. The timing of almost all these expenses predates the 2008 trial and therefore further demonstrate these costs were not necessary for nor assisted in the FTB's post-trial appeal seeking reversal of *Nevada v. Hall*.¹¹⁴

The district court therefore abused its discretion in granting this request without explanation as to how the expenses were reasonable and necessary in 2022 for the FTB but not for Hyatt in 2010.

¹¹² AA 6006-6997.

¹¹³ AA 9147.

¹¹⁴ AA 6006-6035.

E. The district court violated Hyatt’s due process rights when it awarded the FTB every dollar of its requested costs without conducting any meaningful review.

This Court has held that a constitutional challenge may be raised for the first time on appeal. *See Levingston v. Washoe County*, 112 Nev. 479, 916 P.2d 163 (1996), holding that “issues of a constitutional nature may be addressed for the first time on appeal (*citing McCullough v. State*, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983)). Given the important constitutional issues at hand, as well as the history of this case, it is appropriate and necessary for this Court to give *de novo* review of this constitutional issue.¹¹⁵ Further, this issue was arguably not ripe until after the district court had deprived Hyatt of his due process rights by the manner in which it conducted its review, or lack thereof, of the costs requested by the FTB.

The due process clause provides that “[n]o person shall be deprived of life, liberty or property without due process of law.” *See Nev. Const. art. 1, §8(2)*. The district court’s interpretation and application of NRS 18.020 as mandating an award of costs to the FTB without fact finding or application of its discretion to award only reasonable and necessary costs violates the due process clause as set forth in Article 1, Section 8, Subsection 2 of the Nevada Constitution and the Fourteenth Amendment of the United States Constitution.

¹¹⁵ *See* discussion of standard of review, *supra* at 18, citing *Jackson*, 128 Nev. at 603, 291 P.3d at 1277.

Hyatt has a financial and property interest in the costs of litigation sought by the FTB. As described above, the manner in which the district court conducted its review of the costs sought by the FTB and Hyatt's motion to retax costs and awarding of every cent of every cost requested by the FTB in contravention of both the district court's hearing process years earlier when Hyatt was the prevailing party and rulings on identical costs from years earlier violated the most basic tenets of due process.

Based on the hearing, or lack thereof, conducted by the district court in awarding the FTB every dollar of its requested costs, the district court's cost award should be reversed as a violation of Hyatt's due process rights. The record reflects no actual consideration of Hyatt's objections to the FTB's cost request, in stark contrast to the district court's treatment of the identical issues in 2010 when Mr. Hyatt was the prevailing party. The matter should be returned to the district court for a rehearing consistent with the due process requirements of both the Nevada Constitution and the United States Constitution, and consistent with the district court prior treatment of the very same subject matter.

Second, in regard to the violation of Hyatt's due process rights, the provisions of NRS 18.020 were interpreted by this Court in its April 23, 2021, Order as compelling some mandatory costs be imposed upon Hyatt by the district court upon remand. *Franchise Tax Bd. of Cal. v. Hyatt*, 2021 WL 1609315 (Order

Affirming In Part, Reversing In Part and Remanding, Docket No. 80884 (Nev. April 23, 2021)). This was constitutional error.

The United States Supreme Court has held that the “[a]utomatic imposition of a penalty and attorney fees and costs is a ‘taking of property’ in violation of the due process clause.” *See Missouri Pac. R Co. v. Tucker*, 230 U.S. 340, 351, 33 S. Ct. 961, 964 (1913). Indeed, the automatic application of a cost penalty by the district court afforded Hyatt “no opportunity for securing a judicial determination” of their validity, *see id.*, nor an opportunity for Hyatt to be heard in a meaningful manner.

Accordingly, NRS 18.020 should be held unconstitutional to the extent it mandates an award of costs to a prevailing party and precludes the exercise of discretion by a district court. For this additional reason, the district court award to the FTB of every dollar of its requested cost should be reversed as a violation of Hyatt’s due process rights. The matter should be returned to the district court for rehearing in a manner consistent with the due process requirements of both the Nevada Constitution and the United States Constitution.

7. CONCLUSION.

The district court gave no analysis of the grounds for Hyatt’s motion to retax the FTB’s memorandum of costs and exercised no discretion in awarding the FTB every cent of every requested cost. The district court’s process and ruling here is

in stark contrast to its detailed and diligent review and rulings in regard to Hyatt's request for costs in 2010. The district court abused its discretion by exercising no discretion and in disregarding its previous determinations on the same Hyatt cost categories in 2010. In failing to provide any actual review of the FTB's cost requests before depriving Hyatt of his property, the district court violated the Nevada and United States constitutional guarantees that prohibit depriving a person of property without due process of law.

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The district court order granting the FTB \$2,262,815.56 should be reversed in its entirety or reduced to those costs incurred prior to *Hyatt I* amounting to \$214,720.91. Alternatively, either this Court or the district court should review the FTB's cost requests on a category-by-category basis for reasonableness and necessity as was done previously in 2010 for Hyatt's cost request, applying the same standards for the FTB today as was done for Hyatt in 2010.

Dated this 10th day of October, 2022.

By: /s/ Joseph C. Reynolds

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CERTIFICATE OF COMPLIANCE

I hereby certify that this APPELLANT’S OPENING BRIEF ON BEHALF OF GILBERT P. HYATT complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman 14-point type.

I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, it is proportionally spaced, has a typeface of 14-point type, and contains 11,920 words. I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. The brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(c)(1) which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relief on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedures.

Dated this 10th day of October, 2022.

By: /s/ Joseph C. Reynolds
JOSEPH C. REYNOLDS
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this completed APPELLANT’S OPENING BRIEF ON BEHALF OF GILBERT P. HYATT was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court’s electronic filing system.

Dated this 10th day of October, 2022.

By: /s/ Kaylee Conradi
An Employee of
HUTCHISON & STEFFEN, PLLC