

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 REPLY BRIEF ON BEHALF OF GILBERT P. HYATT

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1. INTRODUCTION.

The district court abused its discretion in rubber-stamping Respondent the Franchise Tax Board of California's (the "FTB") \$2,262,815.56 cost request without any independent review on the record, without any deductions for any requested cost, and without any consideration of the episodic procedural history and earlier substantive district court determinations of what is and what is not an allowable cost under Nevada law. The district court disregarded its prior and more detailed rulings on specific cost items, where it denied Appellant Gilbert Hyatt's ("Hyatt") identical costs when he was the prevailing party via jury verdict, only to grant those same costs to the FTB many years later.

The FTB's Answering Brief nonetheless argues the district court fulfilled its obligation by holding a hearing, stating it would review the papers submitted and then signing the draft order submitted by the FTB, without making any changes or providing any comment whatsoever. The district court's order does not specifically address any of the cost categories, any of the arguments put forth by Hyatt in opposing the FTB's cost requests, or any of the district court's contradictory cost rulings from earlier in the case. The record supports only one conclusion: the district court abused its discretion by rubber-stamping the FTB's cost request. The district court's order should be reversed.

Realizing the weakness of its position in light of the one-sided procedural and substantive history of the case, the FTB’s Answering Brief repeatedly and disingenuously asserts that the FTB actually challenged “jurisdiction” from the outset of the case 24 years ago (1998), on the same grounds that ultimately prevailed in the United States Supreme Court decades later. By pushing this false narrative, the FTB ignores that it chose not to challenge the viability and seek reversal of *Nevada v. Hall*¹ at the outset of the case—even when given the rarified forum of a pre-trial review by the United States Supreme Court.

Whatever other “jurisdictional” arguments the FTB made at the outset of the case, or during the many years the FTB waited to pursue reversal of *Nevada v. Hall*, the FTB now admits that it consciously and deliberately chose not to seek reversal of *Nevada v. Hall*. This deliberate FTB “strategy” did not give this Court or the United States Supreme Court the opportunity to evaluate the continuing authority of *Nevada v. Hall* at the inception of the case. Instead, the FTB’s strategy forced the courts and Hyatt to go through exhaustive and expensive discovery, motion practice, trial, and post-trial briefings and appellate decisions, until the FTB determined that the time was finally “right” to seek reversal of *Nevada v. Hall*. That is the “jurisdictional” issue Hyatt has raised in opposing the

¹ 440 U.S. 410, 99 S. Ct. 1182 (1979), *overruled by Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. ___, 139 S. Ct. 1485 (2019) (“*Hyatt III*”).

FTB's cost request and now appealing the district court's order awarding, with no finding or explanation or analysis or apparent exercise of discretion, every cent of every cost sought by the FTB during this now 24-year-old case.

Also contrary to the FTB's narrative, the United States Supreme Court never addressed whether the FTB's 16-year wait to raise and pursue reversal of *Nevada v. Hall* is an appropriate basis to consider in determining whether all costs requested by the FTB during those 16 years were reasonable and necessary.

Rather, the United States Supreme Court ruled only that the FTB had not waived its immunity as it raised "an immunity-based argument from this suit's inception."²

And contrary to the FTB's assertion, Hyatt cited ample Nevada precedent that supports a holding that most of the FTB's requested costs were not reasonable and necessary in the context of the unique procedural and substantive history of this case.

The FTB attempts to misrepresent the procedural history of this case and the underlying merits of Hyatt's claims by repeatedly calling Hyatt's case "baseless." Saying so does not make it so. As evidenced by this Court's affirmance of the jury's verdict that the FTB committed fraud and intentionally inflicted emotional distress upon Hyatt, the one adjective that cannot be used to describe Hyatt's claims is "baseless." Hyatt presented and had adjudicated meritorious claims,

² *Hyatt III*, 587 U.S. at ___ n.__, 139 S.Ct. at 1491 n.1.

including that a California state agency committed fraud, as affirmed in a detailed ruling by this Court. The FTB prevailed in this action only because a United States Supreme Court precedent, wholly unrelated to the merits of Hyatt's claims, was reversed 17 years after this Court and 16 years after the United States Supreme Court had cited that very precedent in allowing the action to proceed and the FTB expressly declined to seek that reversal.

The FTB also misstates Hyatt's Opening Brief by suggesting Hyatt is Monday-morning quarterbacking the FTB's "strategy," by now speculating that the *Nevada v. Hall* precedent would have been overturned in 2003 if pursued then by the FTB. That is not what Hyatt asserts in his Opening Brief. Hyatt is very clear, without predicting or suggesting how this Court would have ruled in 2003. A United States Supreme Court ruling in 2003, either upholding or reversing *Nevada v. Hall*, would have adversely affected the FTB's ability to obtain the costs it now seeks: upholding *Nevada v. Hall* would establish that precedent as the law of the case *in this case*, thereby making it even more difficult for the FTB to later reverse *Nevada v. Hall* and prevail and seek costs; and reversing *Nevada v. Hall* in 2003 would have ended the litigation, without either side incurring millions in costs to take the case through trial and additional appeals.

In addition to all of the reasons listed above, the district court also abused its discretion by awarding some costs demonstratively not necessary and others

wholly unsupported by sufficient documentation. For all of these reasons, the district court's order awarding the FTB \$2,262,815.56 in costs should be reversed and the FTB's cost request be denied or, at a minimum, reviewed with the level of discretion required under Nevada law.

2. ARGUMENT.

A. The district court abused its discretion in not addressing whether the FTB cost requests post-*Hyatt I* were necessary and reasonable.

(1) The FTB misquotes Hyatt's Opening Brief in misstating that the United States Supreme Court has addressed and rejected Hyatt's argument.

Throughout its Answering Brief the FTB repeatedly says that it challenged "jurisdiction" from the outset without defining what it means by "jurisdiction" and falsely implying its early jurisdictional challenge included Hyatt's specific assertion in this appeal (as in the district court) that the FTB sat on its hands in *not seeking reversal of Nevada v. Hall at the outset of the case*.³ In a clear misrepresentation to this Court, the FTB partially quotes Hyatt's brief but leaves off the key qualifying phrase that gives complete context and explanation to Hyatt's assertion that the FTB sat on its hands at the outset in regard to the very issue on which it prevailed many years later.

Specifically, on page 7 of its brief, the FTB states:

³ Respondent's Answering Brief, at 5 n.3, 7, 8.

Hyatt accuses the FTB of sitting “on its hands from the outset of the case” on jurisdictional issues and not seeking “jurisdictional relief.” *See* Appellant’s Opening Brief at 8-9.

But what Hyatt’s brief actually says at pages 8-9 is:

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 exhausted all appeals in this Court. (Emphasis added)

The FTB then uses its incomplete quote to erroneously argue that the United States Supreme Court has addressed and rejected the argument that the FTB misquotes Hyatt as making.⁴ But the language from *Hyatt III*⁵ cited and quoted by the FTB did not address or have anything to do with an award for costs to a party that had sat on its hands in regard to raising a specific jurisdictional defense and seeking its costs for the entire time it sat on its hands.

The FTB’s deceptive argument is not simply a lawyer’s attempt at zealous advocacy; instead, it deflects and ignores the FTB’s admitted conscious and deliberate strategy to sit on its hands for this specific but ultimately dispositive “jurisdictional” issue, *i.e.*, the reversal of *Nevada v. Hall*. The FTB’s decision not to challenge *Nevada v. Hall* in *Hyatt I*, as a strange, decades-long attempt to judge-

⁴ Respondent’s Answering Brief, at 8.

⁵ *Hyatt III*, 587 U.S. ___, 139 S. Ct. 1485.

shop for a favorable composition of the United States Supreme Court, goes to the heart of what costs were reasonable, necessary and recoverable in this case. The fact the FTB failed to raise its ultimate winning argument for almost two decades must be considered in determining which costs requested by the FTB were reasonable and necessary under NRS 18.005 and NRS 18.020.⁶ As Hyatt proposed to the district court, using *Hyatt I* as the break-point between what is and what is not recoverable is a definitive and accurate place to stop the FTB's cost clock: if the FTB believed in 2003 that *Nevada v. Hall* should be reversed, but deliberately chose not to seek that remedy, then all its costs incurred after that decision are the result of its own strategy and not chargeable to Hyatt.

(2) This Court's prior interpretation of reasonable and necessary supports Hyatt's position, not the FTB.

The FTB suggests there is no precedent for Hyatt's argument for time-based consideration of what costs were reasonable and necessary as sought in this case.⁷

While there is no case with the exact procedural and substantive history of this

⁶ The FTB makes a knowingly false assertion by stating Hyatt's position is now that the FTB would have prevailed if it sought to reverse *Nevada v. Hall* in *Hyatt I* in 2003. See Respondent's Answering Brief, at 3, 9. That is not what Hyatt clearly articulated in his Opening Brief. As stated on page 12 of Appellant's Opening Brief, 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," and therefore have to convince the United States Supreme Court to overrule not only the 40-year-old precedent of *Nevada v. Hall*, but also overturn its own decision in this very case on the identical issue, which the Court had never done before in its more than 200-year history.

⁷ Respondent's Answering Brief, at 4, 5, 34.

case that has been reviewed for a combined seven times by this Court and the United States Supreme Court, analogous precedent exists in other contexts where a party waits or delays in raising a defense, such as subject matter jurisdiction,⁸ and the court reduces or does not award costs to that tardy prevailing party. *See, e.g., Eckardt v. Gold Cross Servs., Inc.*, No. 2:03-CV-302 TS, 2007 WL 626362, at *1 (D. Utah Feb. 23, 2007) (“Defendants allowed this case to proceed in federal court for three years of discovery and brought three separate rounds of dispositive motions before they finally raised the notice issue in their Motion for Summary Judgment . . . the legal issue of the sufficiency of the notices could have been raised at the beginning of the case, well before any costs were incurred (footnotes omitted);” *see also Micrometl Corp. v. Tranzact Techs., Inc.*, 656 F.3d 467 (7th Cir. 2011) (“We have no trouble concluding that the district court did not abuse its discretion by considering Tranzact's delay in seeking remand as part of its decision not to award fees and costs pursuant to § 1447(c).”).

Here, moreover, the standard of reasonableness and necessity is well-established in precedent, and this Court has consistently evaluated and rejected cost claims that did not meet those standards. For example, the FTB repeatedly cites *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 345 P.3d 1049 (2015).

⁸ *See Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011) (recognizing that “whether a court lacks subject matter jurisdiction can be raised by the parties at any time”) (other internal citations and quotations omitted).

But in *Cadle* this Court reversed the award of several categories of costs because the prevailing party's submitted documentation "did not demonstrate how such fees were necessary to and incurred in the present action." 131 Nev. at 121, 345 P.3d at (internal citation and quotation omitted).⁹

Hyatt asserts that the FTB's post-*Hyatt I* costs were not necessary or reasonable, *because of a conscious and deliberate FTB strategy to withhold a dispositive argument from the courts*. Appellate courts have disallowed costs as unreasonably and unnecessary for a variety of reasons. This is another circumstance, where under this record, disallowing costs is well-founded under the standard, because the FTB's strategy led to the incurrence of unnecessary and unreasonable costs. This case has an extraordinary procedural history, for which no precedent can or is likely to be expected: three separate United States Supreme Court opinions, sandwiched around a jury trial with a massive judgment in favor of one party, ultimately reduced on one appeal and finally wiped out by a jurisdictional argument that was present for the FTB to raise on Day One of this case, but did not.

⁹ Despite repeatedly citing *Cadle*, the FTB complains that it should not be held to the standards pronounced therein by this Court because the costs at issue were incurred before *Cadle* was issued in 2015. Respondent's Answering Brief, at 21 n. 5. But the FTB submitted its cost request well after *Cadle* was issued and should be held to its standards.

Now, the FTB argues that even though it admits that it recognized that argument and consciously chose not to raise it because it did not like the composition of the United States Supreme Court at that time, its final appeal properly challenged the district court's subject matter jurisdiction. Hyatt submits, however, that a party that has the means and opportunity to raise this issue early on (and here the FTB was expressly asked by the United States Supreme Court if it was raising that issue in *Hyatt I*) but fails to do so must have some consequence, particularly where the substantial subsequent costs incurred in no way contributed or supported the basis on which the party later prevailed.

In addition, Hyatt, the district court, and this Court all correctly interpreted *Nevada v. Hall* from the inception of the case in 1998 through the decision in *Hyatt III* in 2019. This is not a case in which a party prevailed in the trial court by convincing the trial court of a legal position later to be found erroneous on appeal. Hyatt advanced the proposition from Day One that *Nevada v. Hall* allowed his claims to proceed in Nevada state court. The FTB challenged his right to proceed with his claims in Nevada state court, but on grounds other than that *Nevada v. Hall* was wrongly decided and should be reversed. This Court and the United States Supreme Court rejected those FTB-asserted grounds and allowed Hyatt's claims to proceed through trial. This deliberate FTB delay in seeking reversal of *Nevada v. Hall* until that was ultimately accomplished in *Hyatt III* cries out for a

cut-off time for FTB's allowable costs, based on when it could have but chose not to seek such relief.

Contrary to the FTB's suggestion that the Court would create a bad precedent by reversing the district court and holding that the FTB in *this* case is not entitled to costs unrelated to the basis on which it prevailed, Hyatt asserts this is precisely the type of precedent the Court should issue. Parties should be motivated to raise all jurisdictional challenges including reversal of standing precedent early, and not be reimbursed large cost requests for failing to do so, when the same are not necessary or reasonable under the legal theory that the FTB withheld from the courts until its other avenues failed.

(3) The FTB sat on its hands and should not recover costs incurred during the 16 years between Hyatt I and Hyatt III.

The FTB argues Hyatt is 'Monday morning quarterbacking'¹⁰ by now arguing the FTB should have sought reversal of *Nevada v. Hall* in *Hyatt I*.¹¹ To the contrary, Hyatt is simply pointing out the irrefutable fact the FTB had the very forum necessary to seek reversal of *Nevada v. Hall* in *Hyatt I* and was even asked by two separate Supreme Court justices in 2003 whether *Nevada v. Hall* should be reversed, but the FTB said no, "the Court doesn't have to go that far"¹² 16

¹⁰ Respondent's Answering Brief, at 4, 26.

¹¹ *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 123 S. Ct. 1683 (2003).

¹² See Appellant's Opening Brief, at 9-10. In *Hyatt III*, the United States Supreme

years later, the FTB changed its strategy, after having lost. It does not matter why or what reason or what strategy, or if the FTB even had a strategy in failing to seek reversal in 2003. The point is it had the means and opportunity but expressly declined to do so.

But if its strategy was to wait for a new composition of the United States Supreme Court, as the FTB volunteered in arguing to the district court,¹³ that strategy should be held against the FTB. First, it shows that the intervening 16 years of costs incurred were not necessary, reasonable or in furtherance of the FTB's prevailing argument. They were instead the FTB's costs for delaying, sitting on its hands and waiting for the right time to seek a change in the law to reverse its loss. Whatever meaning reasonable and necessary have under NRS 18.005 and NRS 18.020, it does not mean costs incurred while waiting for an opportune time to seek a change in the law, based on a party's conscious decision that a judge or judges then on the bench might not rule in its favor.

Second, the FTB's stated strategy should be repugnant to any notion of judicial efficiency and judicial economy. Where a party chooses to wait for a change in the judiciary before pursuing its dispositive "jurisdictional" argument, its

Court explicitly said it did not address whether to overrule *Nevada v. Hall* in 2003 in *Hyatt I* because the FTB did not ask the Court to do so. 587 U.S. at ___, 139 S. Ct. at 1491.

¹³ See Appellant's Opening Brief, at 10 n.17 (citing the FTB briefing in the district court at AA 9694-95).

intervening litigation costs that were not directed at or necessary for that argument fail any definition of reasonable and necessary.

Similarly, a finding that the FTB's intervening litigation costs between *Hyatt I* and *Hyatt III* were not reasonable and necessary as asserted by Hyatt in his Opening Brief would not set an unworkable rule or precedent. No other case is likely to have a procedural history remotely like this case. But if there is another case that proceeds for 20 years after the initial review by this Court, by an adverse jury verdict, and by a 9-0 decision of the United States Supreme Court, during which the party had an opportunity but chose (or just failed) to make an argument, only to lose the case and then successfully make the argument after-the-fact many years later, this Court should set a precedent in this case. If the rarified circumstances of this case repeat, the intervening litigation costs sought by that prevailing party should be closely scrutinized as to whether they were necessary and reasonable, considering the basis on which the party prevailed and the procedural history leading to that result.

(4) Hyatt's claims were anything but "baseless."

Attempting to justify recovery of its pretrial and trial costs incurred between *Hyatt I* and *Hyatt III*, the FTB makes multiple references to Hyatt's claims as "baseless."¹⁴ That description does not comport with any reasonable interpretation

¹⁴ See Respondent's Answering Brief, at 5, 28.

of Hyatt's claims, the jury's multi-million dollar verdict or this Court's final review of the merits the case, in which this Court affirmed the jury's finding that the FTB, a state agency of California, committed fraud in its actions directed at Hyatt and intentionally inflicted emotional distress on Hyatt.¹⁵ While Hyatt's winning claims were reversed on entirely unrelated and procedural grounds, they certainly were not baseless in fact or under then existing law (*Nevada v. Hall*).

More importantly to this appeal and the cost award at issue, the FTB does not make any attempt to explain how the pretrial and trial costs it incurred in losing every phase of the case including during the 16 years between *Hyatt I* and *Hyatt III*, contributed to its efforts to reverse *Nevada v. Hall*. Without this basis or even argument, the district court could and should have found most of the FTB's costs were not reasonable and necessary, since they were unrelated to the delayed assertion of the jurisdictional argument on which FTB prevailed.

(5) The district court abused its discretion by providing no explanation of the necessity and reasonableness of any of the over \$2 million in costs incurred by the FTB between Hyatt I in 2003 and Hyatt III in 2019.

In response to Hyatt's assertion that district court abused its discretion by failing to exercise any discretion, the FTB baldly asserts that the district court

¹⁵ *Franchise Tax Bd. of Cal. v. Hyatt*, 130 Nev. 662, 690-92, 695-97, 335 P.3d 125, 144-45, 147-48 (2014).

spent weeks reviewing thousands of pages and entered a detailed order.¹⁶ As to the former, there is no basis for the FTB's statement other than it was several weeks between the time the district court concluded the hearing in this matter and issued its order.¹⁷ As to the latter, the purported detailed order, the district court merely signed the verbatim order prepared by the FTB that made no findings as to specific cost requests.¹⁸

The FTB, however, does not address the case law cited by Hyatt that reversed cost awards for abuse of discretion where no explanation was provided as to the basis of the district court's cost award. *See Frazier v. Drake*, 131 Nev. 632, 651-652, 357 P.3d 365, 378 (Nev. 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).

¹⁶ Respondent's Answering Brief, at 6.

¹⁷ AA 009711-12; AA 009729-74; AA 0099775-95.

¹⁸ AA 009713-20.

If the district court had provided any explanation for its decision on any of the 9 categories of costs sought by the FTB, or deducted even *de minimis* amounts from those categories, it might be arguable that the district court exercised discretion in making the cost award at issue. But it did none of that. Instead it rubber stamped the FTB's entire \$2,262,815.56 costs request, awarding every penny requested.

The total costs incurred by the FTB as of April 2003 when *Hyatt I* was issued were \$211,734.32.¹⁹ Hyatt has not questioned this amount. But the over \$2 million in claimed costs incurred by the FTB after April 2003 were challenged by Hyatt as not reasonable and necessary, given the FTB's choice not to challenge *Nevada v. Hall* in *Hyatt I*, and then the FTB incur over \$2 million in costs in mostly pretrial and trial costs, only seeking to reverse *Nevada v. Hall* 13 years later in 2016 via *Hyatt II*²⁰ after having lost at trial and exhausted its appeals in this Court.

The extraordinary procedural history of this case including the FTB's affirmative decision to not seek reversal of *Nevada v. Hall* in *Hyatt I*, but then do so starting 13 years later and to succeed three years after that in *Hyatt III*, compelled the district court to address the timing of the FTB's costs in determining

¹⁹ See AA 9276-79 and explanation in Appellant's Opening Brief, at 22 n.59.

²⁰ *Franchise Tax Bd. of Cal. v. Hyatt*, 578 U.S. 171, 136 S. Ct. 1277 (2016).

which requested costs were reasonable and necessary. The district court did not do so, and certainly provided no explanation in which its exercise of discretion can be reviewed for its decision to award every cent of every cost requested by the FTB. The district court's cost award should therefore be reversed.

Hyatt also made an alternative argument to the district court and in his Opening Brief that removed the temporal demarcation of costs incurred between *Hyatt I* and *Hyatt III* and conceded the FTB's costs that were mandatory, and which were necessary in furtherance of the FTB's appeals seeking to overturn *Nevada v. Hall*. Under this calculation, no more than \$214,720.91 of the FTB's requested \$2,262,815.56 costs meet the necessary and reasonable standard.²¹ The FTB does not directly address this in its Answering Brief.

Nor did the district court's order address this argument or provide any explanation for what costs were reasonable and necessary on the basis they were in furtherance of the FTB's effort to reverse *Nevada v. Hall*. The district court's cost award should therefore also be reversed for failing to provide any explanation as to which costs were reasonable and necessary for the FTB to pursue and prevail on appeals seeking to reverse *Nevada v. Hall*.

²¹ See Appellant's Opening Brief, at 24-26.

B. The district court abused its discretion in awarding the FTB over \$700,000 in costs in 2022 without explanation and in direct contradiction with its 2010 detailed order denying Hyatt the identical costs.

The FTB seeks to justify the district court's disparate treatment of Hyatt's cost requests in 2010 versus those of the FTB in 2022 by arguing that the FTB had superior documentation for certain cost items and was wrong on the law in 2010 regarding other cost items.²² But the district court made no such findings as to the FTB's claimed costs, and based on the record, it appears it gave no consideration to these disputed points that resulted in the district court awarding the FTB over \$700,000 in costs that were denied to Hyatt.²³

The arguments the FTB asserts in this appeal are not a district court finding. Hyatt vigorously disputes that his supporting documentation was materially different from that submitted by the FTB or deficient for the purpose of establishing the cost requests for this case. Again, the district court abused its discretion by giving no consideration and exercising no discretion on this point. The district court clearly left no record of its review and decision on these issues, preventing meaningful review of the district court's required exercise of discretion.

Contrary to the FTB's speculative footnote 8 on page 29 of its Answering Brief, Hyatt is not intimating, suggesting, or requesting that consideration and

²² Respondent's Answering Brief, at 29-31.

²³ Appellant's Opening Brief, at 22.

determination of the FTB's cost requests must be delegated to a special master. But at the district court there must be a consideration and determination with a record of findings from which the district court's exercise of discretion can be reviewed. The deficiency in the district court 2022 cost order awarding all costs requested by the FTB with no further explanation is glaringly deficient and an abuse of discretion, considering the contrary rulings on the same issues from the district court in 2010.

(1) There is no record or district court finding of any kind to support the FTB's argument of superior documentation to account for the district court's contrary rulings.

The FTB argues that its documentation for travel expenses was superior to that of Hyatt's years earlier and was sought under a different category.²⁴ But there was no such finding by the district court. The record does not show what if any conclusion the district court came to as to the FTB's submitted documentation, whether it was different or better from Hyatt's and whether it could be claimed under an alternative category. As Hyatt argued below and maintains on appeal,²⁵ the FTB's documentation for its requested travel expenses listed dates and expenses but made no attempt to tie them to discovery or other case events. Just listing expenses and their dates is not sufficient. The party seeking costs must

²⁴ Respondent's Answering Brief, at 29.

²⁵ Appellant's Opening Brief, at 28-30.

demonstrate the costs were reasonable and necessary to the case. *Cadle*, 131 Nev. at 121, 345 P.3d at 1054-55.²⁶

The FTB's documentation was not superior to Hyatt's regarding travel expenses, and the FTB should not have been treated differently than Hyatt regarding the award of costs for travel expenses. The district court abused its discretion in ruling in 2022 contrary to its ruling in 2010, but there is no record from which there can be meaningful review of the district court's purported exercise of discretion.

Similarly, the district court's award of costs to the FTB for trial supplies and legal research in 2022 was contrary to the district court's denial or limiting of these costs to Hyatt in 2010.²⁷ The FTB again argues it had superior documentation,²⁸ but Hyatt disputes this and the district court made no finding in this regard. The district court abused its discretion in making a contrary ruling in 2022 in favor of

²⁶ The FTB improperly cites an unpublished case, *Las Vegas Land Partners, LLC v. Nype*, 2017 WL 5484391 (Order Affirming In Part In Docket No. 68819, and Reversing In Part and Remanding In Docket No. 70520 (Nev. November 14, 2017)), in attempting to justify its request for travel and other expenses under the miscellaneous provision, NRS 18.005(17). The FTB's reference and argument relative to this case should be stricken and disregarded.

²⁷ Regarding legal research cost, the FTB makes another misstatement as to Appellant's Opening Brief. The Respondent's Answering Brief, at 31, indignantly states that "Hyatt misrepresents to this Court that the special master denied all his [legal research] costs" citing page 33 of Appellant's Opening Brief. Hyatt's brief says no such thing. Hyatt's brief accurately recites that the Special Master's report limited Hyatt legal research cost to 55%. *See* Appellant's Opening Brief, at 33.

²⁸ Respondent's Answering Brief, at 30-31.

the FTB, particularly without providing any explanation or record to review its exercise of discretion.

While lesser dollar amounts were at issue regarding private investigator fees, the district court's disparate treatment of Hyatt in 2010 versus the FTB in 2022 is glaring. Again, the FTB argues its documentation in 2022 was more detailed than Hyatt's in 2010, citing a one sentence explanation.²⁹ Hyatt disputes this as the documentation submitted by each side was quite similar.

Further, the FTB's brief attempts to provide an explanation that is missing from its cost request by asserting that the investigator fees were incurred to help locate witnesses.³⁰ But that is not what the FTB's backup documentation states, as Hyatt argued below. The FTB's backup documentation suggests the investigator fees were for a criminal investigation.³¹ This case was a civil case, filed, tried and appealed as a civil case, and the ultimate United States Supreme Court decision applied jurisdictional standards for a civil case. It had nothing to do with a criminal investigation, and the FTB costs asserted for a criminal investigation cannot be awarded in a civil case.

Despite these discrepancies, the FTB claims superior documentation. There is, however, no finding by the district court and no record to review its exercise of

²⁹ *Id.* at 32.

³⁰ *Id.*

³¹ Appellant's Opening Brief, at 34-35; *see, e.g.*, AA 7535.

discretion, if any, in deciding to award the FTB private investigator fees in 2022 after denying this cost to Hyatt in 2010.

(2) There is no record or district court finding of any kind to support the FTB's argument that the district court applied different legal analysis in 2022 in reaching its contrary rulings on costs.

The district court awarded substantial costs to the FTB in 2022 for deposition video expenses but denied the same to Hyatt in 2010. The FTB argues that the Special Master and district court were wrong in 2010 but correct in 2022.³² Putting aside that the FTB argued to the contrary in 2010, nothing supports the FTB's contrary argument in 2022 other than its own argument. The district court provided no explanation for its contrary ruling in 2022. The FTB's argument is not a substitute for the district court providing its rationale, if any, for the contrary ruling. By making the contrary ruling with no explanation, the district court abused its discretion in granting this cost to the FTB.

The FTB also argues it was justified for the district court to deny Hyatt costs for *pro hac vice* applications in 2010 but grant those same costs to the FTB in 2022. The FTB argues the Special Master's Report cited no authority for his conclusion to deny Hyatt this cost in 2010.³³ Again, this is FTB argument. There is no record of the district court's explanation for this discrepancy and no basis to

³² *Id.* at 30.

³³ *Id.* at 33.

review its exercise of discretion in denying Hyatt his cost in 2010 but granting it to the FTB in 2022. By making the contrary ruling with no explanation, the district court abused its discretion in granting this cost to the FTB.

Similarly, the district court provided no explanation for the discrepancy in ordering the parties to split the Special Master's fees in 2010 but then granting the FTB's request to be reimbursed for its share of the fees in 2022. The FTB again supplies argument for a possible district court rationale,³⁴ but there is no record from the district court explaining this discrepancy or adopting the FTB's possible rationale. By making the contrary ruling with no explanation, the district court abused its discretion in granting this cost to the FTB.

C. The district court abused its discretion in granting the FTB's requested expert witness fees.

The FTB acknowledges Hyatt's argument that the FTB's five experts were presented at the trial in this case in 2008 (which the FTB lost) and had nothing to do with the FTB's later successful appeal in 2019 reversing *Nevada v. Hall*. Hyatt argued therefore the FTB should be limited to no more than the \$1,500 statutory fee for each expert. The FTB tries to rebut Hyatt's argument that the district court abused its discretion in granting more than \$1,500 in expert fees to each of the FTB's five expert by quoting the definition of "necessary" from *Black's Law*

³⁴ *Id.* at 32.

Dictionary.³⁵ But the district court neither cited *Black's Law Dictionary* nor provided any other basis for awarding expert fees in excess of the statutory amount for expert work that was wholly unrelated to the FTB's basis for prevailing in the case via an appeal decided over a decade after the experts testified at trial on unrelated issues. 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 or reasonableness, and no explanation why such testimony unrelated to the ultimate prevailing argument should be awarded to the FTB.

D. The district court abused its discretion in granting costs for which the FTB did not provide sufficient documentation.

(1) Photocopies.

The FTB argues that subsequent changes in law from the time of the Special Master's Report in 2010 in part explains the FTB's full award of photocopy expense compared to the 2010 order disallowing 80% of Hyatt's requested photocopy expenses.³⁶ But even applying more recent law, the FTB's documentation was insufficient. The FTB's request for \$651,628.14 (over 25% of its requested costs) requires something more than spreadsheets listing dates of copy charges or outside vendor invoices. There was no attempt by the FTB to explain or tie these charges to necessary tasks during the litigation, let alone to tie the charges

³⁵ *Id.* at 34.

³⁶ *Id.* at 18-19, 21 n.5.

to its late successful appeal reversing *Nevada v. Hall*. This failure to establish necessity with documentation is the same defect this Court found in reversing costs in *Cadle*. 131 Nev. at 121, 345 P.3d at 1054-55.

Most significantly, the district court 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. Even for this enormous expense, the district court provides no record to review what if any discretion it exercised in granting every penny of the FTB requested \$651,628.14 in photocopy expenses.

(2) Long-distance telephone and postage.

The FTB also here argues it produced sufficient and superior documentation than Hyatt did in 2010, for its long-distance telephone and postage costs.³⁷ Hyatt again disputes this. The FTB's documentation failed to tie its lists of dates and expenses to how these expenses were reasonable and necessary in this case. *Id.* at 121, 345 P.3d at 1054-55. The district court therefore abused its discretion in granting these requests in contradiction to its prior ruling for these costs and without explanation as to how the expenses were reasonable and necessary. Like all other cost categories, the district court provides no record to review what if any discretion it exercised in granting every penny of these requested costs.

³⁷ *Id.* at 22-23.

E. The district court deprived Hyatt of procedural and substantive due process in awarding the FTB every cent of every cost requested without explanation and no record upon which its basis for each cost award can be meaningfully reviewed.

While the district court held a hearing and received briefing on Hyatt's challenge to the FTB's \$2,262,815.56 cost request, the district court rubber-stamped the FTB's request without questioning one cent of the FTB's asserted costs and provided no record of its decision as to any of the nine categories of costs requested by the FTB. Given the amount sought and awarded, the process followed, and lack of any record for review, the district court's actions failed to protect Hyatt's right to be heard and offends judicial notions of fairness. As such, Hyatt was deprived of both his procedural and substantive due process rights.³⁸ The district court's award of costs to the FTB should therefore be reversed.

3. CONCLUSION.

The district court simply punted and did not do its duty on what should have been the last act in this long-running case. The district court abused its discretion in not exercising any discretion and granting every cent of the FTB's \$2,262,815.56 in requested costs. The district court's order should be reversed and

³⁸ As noted by the FTB, *see* Respondent's Answering Brief, at 37, quotation marks were incorrectly placed in Hyatt's citation to *Missouri Pacific Railway Co. v. Tucker*, 230 U.S. 340, 351, 33 S. Ct. 961, 964 (1913). Those quotation marks should be omitted, and the citation should be preceded by the signal *see generally*.

the FTB's cost request denied or, at a minimum, reviewed with the level of discretion required under Nevada law.

Dated this 9th day of December, 2022.

By: /s/ Joseph C. Reynolds

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CERTIFICATE OF COMPLIANCE

I hereby certify that this APPELLANT’S REPLY 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 6,674 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 9th day of December, 2022.

By: /s/ 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 9th day of December, 2022.

By: /s/ Madelyn Carnate-Peralta
An Employee of Hutchison & Steffen, PLLC