

IN THE SUPREME COURT OF THE STATE OF NEVADA

GILBERT P. HYATT,
Appellant,
vs.
FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,
Respondent.

No. 84707

FILED

JUL 05 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

This is an appeal from a post-judgment district court order awarding costs. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

This case began when appellant Gilbert P. Hyatt sued respondent Franchise Tax Board of California (FTB) in Nevada state court in 1998. Hyatt, who had recently relocated from California to Nevada, alleged that FTB had committed intentional torts against him while conducting a tax audit. Two decades of litigation ensued, including multiple appeals to the United States Supreme Court. Hyatt prevailed at trial in 2008, but after an appeal to this court and two writs of certiorari, in 2019 the Supreme Court reversed a longstanding constitutional doctrine permitting Hyatt's suit and held that FTB had immunity from civil suits in Nevada. *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt III)*, __ U.S. __, 139 S. Ct. 1485 (2019).¹ Consequently, the district court entered judgment for

¹*Hyatt III* overruled *Nevada v. Hall*, which for 40 years held that the United States Constitution does not bar suits brought by an individual

FTB, and this court held that FTB was entitled to costs under NRS Chapter 18. *Franchise Tax Bd. of Cal. v. Hyatt*, No. 80884, 2021 WL 1609315 (Nev. Apr. 23, 2021) (Order Affirming in Part, Reversing in Part and Remanding). On remand in 2022, the district court awarded FTB its full cost request of \$2,262,815.56, which included costs stretching back to the late 1990s.

Hyatt now appeals the district court's cost award. "A district court's decision regarding an award of costs will not be overturned absent a finding that the district court abused its discretion." *Vill. Builders 96, L.P. v. U.S. Labs., Inc.*, 121 Nev. 261, 276, 112 P.3d 1082, 1092 (2005). We reverse in part the district court's cost award, as the court abused its discretion in awarding costs related to (1) travel and lodging expenses, (2) video deposition costs, (3) pro hac vice fees, (4) expert witness fees, (5) photocopies, (6) phone calls, (7) telecopies, and (8) postage. We vacate and remand the cost awards for expert witness and travel and lodging expenses for the district court to make appropriate findings. We affirm the remaining portions of the cost award.

Legal standard for a post-judgment cost award

Under NRS 18.020, "[c]osts *must* be allowed to the prevailing party against any adverse party against whom judgment is rendered in 'an action for the recovery of money or damages, where the plaintiff seeks to recover more than \$2,500.'" *Vill. Builders 96*, 121 Nev. at 276, 112 P.3d at 1092 (emphasis added) (quoting NRS 18.020(3)). NRS 18.005 enumerates

against a state in the courts of another state. 440 U.S. 410, 416-421 (1979), *overruled by Hyatt III*, 139 S. Ct. at 1492.

17 specific categories under which a party may claim costs. See NRS 18.005.²

Pursuant to *Cadle Co. v. Woods & Erickson, LLP*, “costs must be reasonable, necessary, and actually incurred” rather than mere estimates. 131 Nev. 114, 120, 345 P.3d 1049, 1054 (2015). Accordingly, “a party must ‘demonstrate how such [claimed costs] were necessary to and incurred in the present action.’” *Id.* (alteration in original) (quoting *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352-53, 971 P.2d 383, 386 (1998)). To meet this burden, a party moving for costs must supply additional “justifying documentation” to show the district court that its requested costs were “reasonable, necessary, and actually incurred.” *Cadle Co.*, 131 Nev. at 120-21, 345 P.3d at 1054. Without such evidence, a district court may not award costs. *Id.* at 121, 345 P.3d at 1054.

This court has already determined that FTB is the prevailing party and is thus entitled to costs under NRS 18.020(3) “as a matter of right.” *Hyatt*, 2021 WL 1609315, at *2. Therefore, this court’s current task is to determine whether the district court abused its discretion in determining that FTB’s requested costs were reasonable, necessary, and actually incurred in accordance with NRS 18.005 and *Cadle Co.*

The district court abused its discretion in awarding FTB travel and lodging costs

NRS 18.005(15) permits an award of “[r]easonable costs for travel and lodging incurred taking depositions and conducting discovery.”

²NRS 18.005 was recently amended during the 2023 Legislative Session. See A.B. 76, 82nd Leg. (Nev. 2023). Relevant changes to NRS 18.005, which take effect July 1, 2023, are discussed below. See *infra* note 5.

FTB requested, and was awarded, \$225,431.41 in travel and lodging costs pursuant to NRS 18.005(15). This award covers expenses from the entire 20-year litigation period, and includes costs unrelated to depositions and discovery, which ended in 2007. Thus, a large portion of FTB's cost award was improper under NRS 18.005(15).

FTB argues that while costs claimed under NRS 18.005(15) are limited to deposition and discovery, travel and lodging expenses are recoverable without such limitation under NRS 18.005(17)'s catch-all provision.³ However, FTB did not request, nor did the district court award, any travel and lodging costs pursuant to NRS 18.005(17). Rather, FTB requested the entirety of its travel and lodging costs under NRS 18.005(15). Because FTB included costs unrelated to depositions or discovery, the district court abused its discretion by awarding FTB its full cost request. Therefore, we vacate this cost award and remand for factual findings as to which expenses were incurred taking depositions and conducting discovery pursuant to NRS 18.005(15), which is the sole basis for awarding these costs in this case.

The district court abused its discretion in awarding video deposition costs

FTB requested, and was awarded, \$63,007.71 in videotape services for depositions pursuant to NRS 18.005(17)'s catch-all provision. Recently, in *North Las Vegas Infrastructure Investment and Construction, LLC v. City of North Las Vegas*, this court explained that “[t]he costs of videotaping depositions . . . are not allowed when no statute or any uniform

³NRS 18.005(17), in relevant part, permits an award of “[a]ny other reasonable and necessary expense incurred in connection with the action”

course of procedure authorizes the taxation of such costs.” 139 Nev., Adv. Op. 5, 525 P.3d 836, 842 (2023) (quoting 20 Am. Jur. 2d *Costs* § 43 (2022)). Because the appellant in that case did not use its video depositions at trial, and did not explain why obtaining videos of depositions was necessary when the district court did not order videotaping of depositions, we held that appellant “failed to demonstrate that its costs for videotaping certain depositions were necessarily incurred” and thus was not entitled to recover these costs. *N. Las Vegas Infrastructure Inv. and Constr., LLC*, 139 Nev., Adv. Op. 5, 525 P.3d at 842-43.

Here, FTB’s cost memorandum merely stated that “[v]ideotape services were reasonable and necessary to videotape depositions.” We hold that this cursory explanation is insufficient, especially without any indication that the district court ordered videotaping of depositions. Moreover, FTB observed that “[v]ideotaped depositions can be powerful evidence in jury trials like this one,” but did not explain whether FTB actually used its videotaped depositions at trial.

While we recognize that NRS 18.005(17) is a catch-all category, costs claimed under this provision must still be “reasonable and necessary” in accordance with the language of the statute. Because FTB failed to demonstrate that its costs for videotaping depositions were necessarily incurred, we conclude that the district court abused its discretion in awarding these costs and reverse the district court’s award of video deposition expenses.⁴

⁴We further recognize that our decision in *North Las Vegas Infrastructure Investment and Construction* concerned video deposition costs claimed as court reporter fees for taking depositions under NRS 18.005(2), rather than video deposition costs claimed under NRS

The district court abused its discretion in awarding pro hac vice fees

FTB requested, and was awarded, \$3,850 in pro hac vice fees under NRS 18.005(1). NRS 18.005(1) permits an award of “[c]lerks’ fees.” FTB paid its requested sum in pro hac vice fees to the Nevada State Bar for California-licensed attorneys whom it retained as co-counsel alongside its Nevada-licensed attorneys. Because FTB did not pay these fees to any clerk of the court, we cannot permit FTB to recover these costs under NRS 18.005(1). Thus, the district court abused its discretion in awarding FTB pro hac vice fees, and we reverse this cost award.

The district court abused its discretion in awarding expert witness fees without a showing of necessity

NRS 18.005(5) permits an award of “[r]easonable fees of not more than five expert witnesses in an amount of not more than \$1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert’s testimony were of such necessity as to require the larger fee.”⁵

This court has held that “[w]hen a district court awards expert fees in excess of \$1,500 per expert [under NRS 18.005(5)], it must state the basis for its decision.” *Khoury v. Seastrand*, 132 Nev. 520, 541, 377 P.3d 81, 95 (2016) (emphasis added). Moreover, an expert must testify in order for

18.005(17)’s catch-all. See 139 Nev., Adv. Op. 5, 525 P.3d at 842-43. Nonetheless, we conclude that *North Las Vegas*’s analysis of whether video depositions were necessarily incurred under NRS 18.005(2) is applicable to our determination of whether FTB necessarily incurred its video deposition costs under NRS 18.005(17).

⁵A.B. 76 recently amended NRS 18.005(5) to permit an award of up to \$15,000, rather than \$1,500, for each expert witness. A.B. 76, 82nd Leg. (Nev. 2023). This amendment takes effect July 1, 2023. *Id.*

a party “to recover more than \$1,500 in expert fees.” *Pub. Emps. Ret. Sys. of Nev. v. Gitter*, 133 Nev. 126, 134, 393 P.3d 673, 681 (2017). When an expert “acts only as a consultant and does not testify, . . . [a] district court[] may [only] award \$1,500 or *less*, so long as the district court finds that such costs constitute ‘[r]easonable fees.’” *Id.* (emphasis added) (quoting NRS 18.005(5)).

Here, FTB requested, and was awarded, \$242,254.67 in expert witness fees pursuant to NRS 18.005(5). This award accounted for fees paid to three witnesses: John Sullivan (\$106,750.00); Kathleen Wright (\$68,876.30); and Deirdre Mulligan (\$66,628.37). The district court did not state a basis for its decision to award fees greater than \$1,500 for these three expert witnesses. Nor did the district court make findings as to whether these witnesses testified at trial so as to merit awards greater than \$1,500. FTB insists that it provided sufficient documentation to demonstrate that its expert witness fees were reasonable and necessary. But even if FTB met its burden under NRS 18.005(5), the district court did not provide the requisite findings in support thereof, and thus the district court’s expert fee award was an abuse of discretion. Accordingly, we reverse this cost award and remand for the district court to make appropriate findings pursuant to NRS 18.005(5).

The district court abused its discretion in awarding photocopy costs

NRS 18.005(12) permits an award of “[r]easonable costs for photocopies.” FTB requested, and was awarded, \$651,628.14 in photocopy costs pursuant to NRS 18.005(12)—its largest single award. Most of this award accounted for photocopying conducted in-house by FTB’s counsel. A considerable minority (\$187,943.77) was incurred through outside vendors.

Hyatt argues that FTB lacked sufficient documentation to support its cost request for photocopies.

In *Cadle Co.*, this court dealt specifically with an award of photocopy costs. 131 Nev. at 121, 345 P.3d at 1054. There, the respondent “did not submit documentation about photocopies other than an affidavit of counsel stating that each and every copy made was reasonable and necessary.” *Id.* This court explained that claims for photocopy costs which provide “only the date and cost of each copy” are insufficient. *Id.* (citing *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1353, 971 P.2d 383, 386 (1998)). Rather, “documentation substantiating the *reason* for each copy ‘is precisely what is required under Nevada law.’” *Id.* (emphasis added) (quoting *Vill. Builders 96, L.P. v. U.S. Labs., Inc.*, 121 Nev. 261, 277-78, 112 P.3d 1082, 1093 (2005)). Accordingly, the respondent’s affidavit of counsel was insufficient to support its cost request, because it “*told* the court that the costs were reasonable and necessary, but it did not ‘*demonstrate* how such fees were necessary to and incurred in the present action.’” *Id.* (quoting *Bobby Berosini*, 114 Nev. at 1352-53, 971 P.2d at 386).

Here, FTB’s request for in-house photocopy costs are supported only by an itemized spreadsheet listing the date and cost of each copy between February 1998 and September 2018. But in *Village Builders* and *Bobby Berosini*, this court rejected cost requests supported only by such itemizations as insufficient. *See Vill. Builders 96*, 121 Nev. at 277-78, 112 P.3d at 1093; *Bobby Berosini*, 114 Nev. at 1352-53, 971 P.2d at 386. FTB’s memorandum of costs and affidavit of counsel explain how FTB’s counsel tracks its in-house photocopy costs through an electronic accounting system. But, as explained above, *Cadle Co.* makes clear that an affidavit of counsel stating that costs were actually incurred is an inadequate

substitute for supporting documentation. *Cf. Cadle Co.*, 131 Nev. at 121, 345 P.3d at 1054. Therefore, we determine that the district court abused its discretion in awarding FTB its request for in-house photocopy costs, and we reverse the district court's award in that respect.

Further, while FTB included supporting documentation for its photocopy costs incurred through outside vendors, it appears much of this supporting documentation does not substantiate the *reason* for each set of photocopies, as *Cadle Co.* specifically requires. 131 Nev. at 121, 345 P.3d at 1054. Thus, we also reverse the portion of FTB's photocopy costs incurred through outside vendors.

The district court abused its discretion in awarding certain phone call costs

NRS 18.005(13) permits an award of "[r]easonable costs for long distance telephone calls." FTB requested, and was awarded, \$15,844.82 in telephone costs pursuant to NRS 18.005(13). Most of this award (\$13,547.53) accounted for in-house calls made by FTB's counsel. A minority (\$2,297.29) accounted for conference calls billed by outside vendors.

FTB's award for phone calls runs into the same evidentiary problems as its photocopy award. FTB's request for in-house telephone costs is supported only by an itemized spreadsheet and a statement explaining the in-house electronic system that accounts for such costs. This supporting documentation is insufficient pursuant to *Cadle Co.* for the same reasons explained above in relation to in-house photocopy costs. Therefore, we determine that the district court abused its discretion in awarding FTB its request for in-house telephone costs, and we reverse the district court's award in that respect.

FTB's request for conference call costs incurred through outside vendors is supported by both an itemized spreadsheet and vendor-issued invoices. But, like photocopy costs, we have previously indicated that Nevada law requires supporting documentation to substantiate the reason for each call. *Vill. Builders 96*, 121 Nev. at 277-78, 112 P.3d at 1093. FTB's vendor-issued invoices provide insufficient information for us to ascertain the reason for each conference call beyond the date, time, cost, and host of each call. Therefore, we also reverse the award of FTB's conference call costs incurred through outside vendors.

The district court abused its discretion in awarding telecopy costs

NRS 18.005(11) permits an award of "[r]easonable costs for telecopies." FTB requested, and was awarded, \$6,728.00 in telecopy costs pursuant to NRS 18.005(11). However, this award was supported only by an itemized spreadsheet and a statement explaining how FTB's counsel electronically tracks such costs. As the foregoing analysis makes clear, this is insufficient documentation for a cost request pursuant to *Cadle Co.* and related cases. Thus, we conclude that the district court abused its discretion with respect to its cost award for telecopies, and we reverse the award in that respect.

The district court abused its discretion in awarding postage costs

NRS 18.004(14) permits an award of "[r]easonable costs for postage." FTB requested, and was awarded, \$46,745.97 in postage costs pursuant to NRS 18.005(14). Most of this award (\$45,426.27) was for overnight delivery service conducted by outside vendors. A small fraction of the award (\$1,319.70) was for in-house postage for mailings conducted by FTB's counsel.

FTB's award for overnight delivery service was supported by documentation in the form of vendor-issued invoices. However, these invoices do not substantiate the reason for each mailing, beyond the sender, recipient, date, and charge. FTB's award for in-house postage was supported only by an itemized spreadsheet and a statement explaining how counsel keeps track of costs. Again, as the foregoing analysis makes clear, the documentation for both overnight delivery service and in-house postage is insufficient to support a cost request. Therefore, we conclude that the district court abused its discretion with respect to FTB's award for postage costs, and accordingly reverse this cost award.

We affirm the district court's remaining cost awards

The district court did not abuse its discretion in awarding FTB the remainder of its requested costs. These include, but are not limited to, (1) \$98,434.76 in trial expenses and supplies pursuant to NRS 18.005(17), (2) \$12,295.41 in meal costs pursuant to NRS 18.005(17), (3) \$183,030.42 in computer legal research expenses pursuant to NRS 18.005(17), (4) \$1,494.63 in private investigator costs pursuant to NRS 18.005(17), and (5) \$1,575 in mediation fees and \$75,572.71 in special master fees pursuant to NRS 18.005(17). We conclude that FTB provided sufficient supporting documentation to show that these costs were reasonable and necessary in accordance with *Cadle Co.* Thus, we affirm these costs.

However, the portions of FTB's cost award that we have discussed in this order were an abuse of discretion. To summarize, we reverse FTB's cost awards pertaining to (1) video deposition costs, (2) pro hac vice fees, (3) photocopies, (4) phone calls, (5) telecopies, and (6) postage. We vacate FTB's cost award for expert witness fees and remand for the district court to make appropriate findings pursuant to NRS 18.005(5). We

also vacate FTB's cost award for travel and lodging expenses and remand for the district court to make appropriate findings under NRS 18.005(15). Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART, REVERSED IN PART, AND VACATED IN PART, AND REMAND this matter to the district court for proceedings consistent with this order.⁶

Stiglich, C.J.
Stiglich

Cadish, J.
Cadish

Pickering, J.
Pickering

Herndon, J.
Herndon

Parraguirre, J.
Parraguirre

Bell, J.
Bell

cc: Hon. Tierra Danielle Jones, District Judge
Stephen E. Haberfeld, Settlement Judge
Perkins Coie, LLP/Los Angeles
Hutchison & Steffen, LLC/Las Vegas
Hutchison & Steffen, LLC/Reno
PB Consulting, LLC
McDonald Carano LLP/Las Vegas
Lemons, Grundy & Eisenberg
Eighth District Court Clerk

⁶The Honorable Patricia Lee, Justice, voluntarily recused herself from participation in the decision of this matter.