

IN THE SUPREME COURT OF THE STATE OF NEVADA

ESTATE OF REBECCA POWELL,
THROUGH BRIAN POWELL, AS
SPECIAL ADMINISTRATOR; DARCI
CREECY, INDIVIDUALLY AND AS
HEIR; TARYN CREECY,
INDIVIDUALLY AND AS HEIR;
ISAIAH KHOSROF, INDIVIDUALLY
AND AS HEIR; AND LLOYD
CREECY, INDIVIDUALLY,

Appellants,

vs.

VALLEY HEALTH SYSTEM, LLC,
D/B/A CENTENNIAL HILLS
HOSPITAL MEDICAL CENTER, A
FOREIGN LIMITED LIABILITY
COMPANY,

Respondent.

Supreme Court No. 84861
District Court Case No. A-19-788787-C

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RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

1. Respondent VALLEY HEALTH SYSTEM, LLC, D/B/A CENTENNIAL HILLS HOSPITAL MEDICAL CENTER, A FOREIGN LIMITED LIABILITY COMPANY is a division of Universal Health Services, Inc. a publicly traded corporation on the New York Stock Exchange.

2. The undersigned counsel of record for Respondent are the only attorneys who have appeared on their behalf in this matter, both before this court and in the district court. Attorneys Adam Garth, Esq., and S. Brent Vogel, Esq. of Lewis Brisbois Bisgaard & Smith, LLP appeared for the Respondent in the proceedings before the district court and the law firm of Hall Prangle & Schoonveld previously appeared on behalf of Respondent in the district court before a change of counsel to Lewis Brisbois Bisgaard & Smith, LLP, the current counsel of record.

These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

Dated this 24th day of February, 2023.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: /s/ Adam Garth

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I. STATEMENT OF ISSUES

1. Whether Appellants' ("Plaintiffs") failure to raise the issues contained in their opening brief before the District Court precludes them from doing so for the first time on appeal?

2. Whether the withdrawal of an appeal prior to the presentation, signing and entry of judgment against Plaintiffs removes any restrictions on the District Court to enter an order or judgment in the case?

3. Whether a notice of appeal is considered prematurely filed and therefore jurisdictionally defective if it is filed after a timely motion for reconsideration is filed and before that motion has been formally resolved?

4. Whether the District Court's award of attorneys' fees and costs pursuant to NRCP 68(f) and NRS § 17.117 was arbitrary and capricious when it considered and analyzed all the *Beattie* factors in making its award?

II. STATEMENT OF THE CASE

The underlying matter was predicated on allegations of professional negligence arising from the care and treatment Respondent Valley Health System, LLC dba Centennial Hills Hospital Medical Center ("Defendant" or "VHS") and co-defendant physicians provided to decedent Rebecca Powell from May 3-11,

2017.^{1 2}

VHS moved for summary judgment in the District Court on September 2, 2020, demonstrating the date Plaintiffs' were on inquiry notice of the alleged professional negligence, and that Plaintiffs filed their lawsuit eight months beyond the statute of limitations.³ The District Court initially denied VHS's motion on November 2, 2020,⁴ which prompted VHS to petition this Court for a writ of mandamus to order the District Court to vacate its decision and order that summary judgment be granted in VHS's favor on the statute of limitations issue.⁵

On October 18, 2021, this Court granted VHS's petition, noting that the District Court manifestly abused its discretion in failing to grant summary judgment in the wake of irrefutable evidence of Plaintiffs' inquiry notice and the late filing of the lawsuit based upon said notice.⁶ On November 22, 2021, this Court issued a writ of mandamus directing the District Court to vacate its prior order and issue a new order granting summary judgment in VHS's favor.⁷

¹ AA references are to Appellants' Appendix designated by ____ (Volume) AA ____ (page(s))

² 1 AA 51-79

³ 2 AA 125-179

⁴ 2 AA 180-189

⁵ 3 AA 190-228

⁶ 3 AA 229-234

⁷ 3 AA 261-267

Plaintiffs' appeal relates to the District Court's signing of a judgment awarding \$110,849.85 (\$106,619.85 in attorneys' fees plus \$4,230 in paralegal time), and \$8,056.93, for a total of \$118,906.78 due to Plaintiffs' rejection of the offer of judgment pursuant to NRCP 68(f) and NRS § 17.117,⁸ after the District Court followed this Court's direction, vacated its original decision denying summary judgment, and subsequently granted summary judgment in favor of VHS. The granting of summary judgment in VHS's favor disposed of all issues in VHS's favor, and triggered the provisions of NRCP 68 and NRS § 17.117 for which VHS sought the recovery of its costs and attorneys' fees.

Plaintiffs failed to raise issues now pending before this Court in the court below, precluding them from consideration on appeal. Additionally, Plaintiffs attempt to raise issues pertaining to the District Court's decision on VHS's motion for reconsideration, when the time to file the notice of appeal regarding that order expired four days prior to the Plaintiff's filing of their notice of appeal, thus precluding this Court's consideration thereof.

Moreover, despite Plaintiffs' assertions to the contrary, the record, evidence, and legal authority demonstrates that the District Court always had jurisdiction to sign a judgment in this matter, as there was no longer a pending appeal when the

⁸ 6 AA 614-656

judgment was signed.⁹ For one, VHS withdrew its appeal prior to presenting the judgment for signature, and this Court ordered the dismissal of the appeal weeks before the District Court signed the judgment. Thus, there was no pending appeal and no restriction on the District Court signing the judgment at issue.

Furthermore, if VHS's appeal withdrawal prior to the signing and entry of judgment was insufficient, VHS's notice of appeal was jurisdictionally defective. At the time of the notice of appeal's filing, VHS previously filed a motion for reconsideration of the decision which formed the basis for the notice of appeal, and that motion for reconsideration remained unresolved at the time of the notice of appeal's filing. The motion for reconsideration acted as a tolling motion related to any notice of appeal.^{10 11} Therefore, at the time of the decision on the motion for reconsideration, there was no pending appeal which prevented the District Court from issuing any judgment or order.

Finally, the District Court's award of costs and attorneys' fees was made in accordance with NRCP 68 and NRS § 17.117 based upon Plaintiffs' failure to accept an offer of judgment, and required no determination of Plaintiffs' motives or

⁹ 6 AA 606-609

¹⁰ RA references are to Respondent's Appendix designated by ____ (Volume) RA ____ (page(s))

¹¹ II RA 171-296, III RA 297-422, IV 423-485, V 486-519, VI 520-759, VII 760-469 (Exhibit E to RA Appendix spans multiple volumes)

reasonable rejection thereof. The mere fact of rejection coupled with Plaintiffs' dismissal after an award of summary judgment in favor of VHS provided the necessary basis for the awarding of costs and attorneys' fees. The District Court's analysis of the requisite factors for an award of costs and attorneys' fees generally bars this Court's overruling of same absent a manifest abuse of discretion which Plaintiffs failed to demonstrate.

III. STATEMENT OF FACTS

Plaintiffs' rendition of the facts underlying their original lawsuit (which VHS wholly disputes), are irrelevant to any of the issues pending before this Court. VHS moved for summary judgment on September 2, 2020 demonstrating the late filed action¹², which motion was denied by Judge Wiese on October 29, 2020.¹³ On October 18, 2021, this Court issued an order granting the VHS's writ petition and directed the Supreme Court Clerk to issue a writ of mandamus directing Judge Wiese to vacate his order denying VHS's motion for summary judgment and enter summary judgment in favor of all defendants.¹⁴ The District Court entered judgment in favor of Defendants on November 19, 2021.¹⁵

¹² 2 AA 125-179

¹³ 2 AA 180-189

¹⁴ 3 AA 229-234

¹⁵ 4 AA 270-281

Before any decision on the aforesaid motion for summary judgment, pursuant to NRCP 68, VHS served Plaintiff with an Offer of Judgment on August 28, 2020.¹⁶ In that Offer of Judgment, VHS offered to waive any presently or potentially recoverable costs in full and final settlement of the claims. At the time of the Offer, VHS's incurred costs were \$58,514.36. The Offer was not accepted by Plaintiffs and expired on September 11, 2020.

After this Court reversed the District Court's decision and summary judgment was granted, VHS filed and served a memorandum of costs pursuant to NRS §§ 18.005, 18.020, 18.110, 17.117 and NRCP 68(f) in the sum of \$42,492.03.¹⁷ Plaintiffs failed to timely move to retax costs, and chose to pursue an untenable motion for an extension of time to move to retax costs,¹⁸ which the District Court denied,¹⁹ thus entitling VHS to the costs as presented in the aforementioned memorandum of costs totaling \$42,492.03.

At the same time as VHS filed its memorandum of costs, VHS also moved for \$110,930.85 in attorneys' fees per NRCP 68 and NRS § 17.117, plus \$58,514.36 in

¹⁶ 1 AA 121-124

¹⁷ 4 AA 282-305

¹⁸ I RA 1-155 (Exhibits A-C) (Plaintiffs chose to omit evidence of their failed motion to extend time to retax costs due to their abject failure to timely retax VHS's memorandum of costs.)

¹⁹ I RA 156-159, II RA 160-170 (Exhibit D to RA Appendix spans multiple volumes)

pre-NRCP 68 offer fees and expenses pursuant to NRS §§ 7.085, 18.010(2) and EDCR 7.60.²⁰ The District Court initially denied VHS's motion on February 15, 2022, which order was served with notice of entry on February 16, 2022,²¹ claiming that it was not sufficiently supported with invoices and billing statements reflecting every moment of work performed on this case, that somehow the declaration of an officer of the Court attesting to the hours spent by all timekeepers on this case was insufficient.²² Additionally, the District Court denied the request to conduct an *in camera* hearing at which time any supporting evidence could be presented before opposing counsel and the Court without having to publicly trot out VHS's private bills and expenses related hereto.²³

On February 23, 2022, VHS timely moved the District Court for reconsideration of its decision regarding costs and attorneys' fees,²⁴ to which Plaintiffs interposed opposition on March 9, 2022,²⁵ and to which VHS interposed a

²⁰ 4 AA 306-480

²¹ 4 AA 481-496

²² 4 AA 491-496

²³ 4 AA 496-496

²⁴ II RA 171-296, III RA 297-422, IV 423-485, V 486-519, VI 520-759, VII 760-769 (Exhibit E to RA Appendix spans multiple volumes) (Plaintiffs curiously omitted the exhibits and evidence considered by the District Court substantiating its granting of VHS's motion for reconsideration and have therefore been provided to this Court for its reference)

²⁵ VII RA 770-803 (Exhibit F)

reply in further support of its motion on March 23, 2022.²⁶ As is evident from Plaintiffs' aforementioned opposition,²⁷ Plaintiffs failed to substantively argue anything in opposition to the motion for reconsideration, relying exclusively on their failed procedural argument that the District Court should not entertain any of the evidence submitted on reconsideration. At no point did Plaintiffs argue that the evidence was unsubstantiated or incorrect, just that the District Court should not consider it on procedural grounds.

On March 14, 2022, about three weeks after filing its motion for reconsideration with the District Court, VHS filed its notice of appeal²⁸ and case appeal statement²⁹ pertaining to the District Court's February 15, 2022 order.

The District Court issued an order on May 4, 2022³⁰ pertaining to VHS's motion for reconsideration, in which it found that the costs contained in VHS's memorandum of costs amounting to \$42,492.03³¹ were substantiated, reasonable and actually incurred in this matter.³² The District Court further found that VHS

²⁶ VII RA 804-844 (Exhibit G) (Plaintiffs further omitted VHS's reply entirely from their Appendix)

²⁷ VII RA 770-803 (Exhibit F)

²⁸ 5 AA 539-560

²⁹ 5 AA 561-570

³⁰ 6 AA 593-605

³¹ 4 AA 282-305

³² 6 AA 603

incurred \$106,619.85 in attorneys' fees and \$4,230 in paralegal time subsequent to the service of the NRCP 68(f) offer of judgment, and that such fees were reasonable, appropriate and recoverable in the defense of the case,³³ but reduced the costs incurred to \$8,056.93 which included only \$1,500 per expert, despite proof that expert fees and other costs totaled \$49,956.03. The District Court mistakenly stated that it lacked jurisdiction, but held that if it had jurisdiction to award attorneys' fees and costs, it would award \$110,849.85 (\$106,619.85 in attorneys' fees plus \$4,230 in paralegal time), and \$8,056.93, for a total of \$118,906.78 based upon Plaintiffs' rejection of the offer of judgment pursuant to NRCP 68(f) and NRS § 17.117.

On April 29, 2022, this Court issued an order to show cause to VHS^{34 35} stating in pertinent part:

Preliminary review of the docketing statement, the documents submitted to this court pursuant to NRAP 3(g), and the district court docket entries reveals a potential jurisdictional defect. Specifically, the notice of appeal appears to be prematurely filed under NRAP 4(a) because it appears that it was filed after the timely filing of a tolling motion for reconsideration and before that motion has been formally resolved . . . A timely tolling motion terminates the 30-day appeal period, and a notice of appeal is of no effect if it is filed after such a tolling motion is filed and before the district court enters a written order

³³ 6 AA 605

³⁴ VII RA 845-847 (Exhibit H)

³⁵ Conspicuously absent from Appellants' Appendix and Opening Brief is any reference to this Court's order to show cause and the legal authorities and statements contained therein, and have therefore been provided to this Court for the sake of a complete record.

finally resolving the motion. See NRAP 4(a)(2).³⁶

On May 12, 2022, within the 30 days allotted by this Court for VHS to show cause why its notice of appeal pertaining to the District Court's February 15, 2022 order should not be dismissed for lack of jurisdiction due to the pending motion for reconsideration, VHS withdrew its pending appeal,³⁷ and this Court ordered the dismissal thereof pursuant to said withdrawal on May 16, 2022.³⁸

Immediately after this Court ordered the dismissal of the appeal on May 16, 2022, VHS submitted a proposed judgment to the District Court the same day, with notice thereof to Plaintiffs' counsel, which the District Court signed on June 2, 2022,³⁹ with notice of entry thereof served and filed on June 7, 2022.⁴⁰ Along with the proposed judgment for \$118,906.78, VHS provided the District Court with the order granting VHS's motion for summary judgment,⁴¹ the order granting VHS's motion for reconsideration of its motion for costs and attorneys' fees,⁴² and VHS's withdrawal of its appeal pertaining to the District Court's initial denial of VHS's

³⁶ *Id.*

³⁷ 6 AA 606-608

³⁸ 6 AA 609

³⁹ 6 AA 614-656

⁴⁰ 6 AA 610-612

⁴¹ 6 AA 600-634

⁴² 6 AA 635-650

motion for costs and attorneys' fees⁴³ so as to provide the District Court with all evidence that there was no longer any appeal pending and any alleged jurisdictional limitations on signing any judgment were non-existent.

As the record before this Court reflects, Plaintiffs pursued no further action in the District Court regarding the signed judgment save the filing of the notice of appeal which precipitated this proceeding.

IV. SUMMARY OF ARGUMENT

Plaintiffs failed to file a timely notice of appeal regarding the District Court's order pertaining to VHS's motion for reconsideration for costs and attorneys' fees against Plaintiffs in direct contravention of NRAP 4(a)(1). Plaintiffs' notice of appeal was filed on June 7, 2022, which they claim was addressed to the judgment signed by the District Court on June 7, 2022, but also based upon the District Court's prior May 4, 2022 order on the motion for reconsideration. With respect to the order on the motion for reconsideration, Plaintiffs had until June 3, 2022 to file a notice of appeal. Filing and service of a notice of appeal on June 7, 2022 was four days late as to the motion for reconsideration. Their failure to timely file regarding this issue divests this Court of any jurisdiction to consider any arguments advanced by Plaintiffs in regard thereto. Furthermore, Plaintiffs failed to make any motion (timely or otherwise) related to the District Court's order on the motion for

⁴³ 6 AA 651-656

reconsideration as reflected in the records, which waives any such arguments in this Court. *See, Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

Plaintiffs' appeal regarding the District Court's signing of the judgment at issue is also moot as VHS's pending appeal regarding the District Court's decision on the original motion for costs and attorneys fees was already withdrawn by the time the judgment was presented to the District Court for signature, and weeks before the District Court actually signed the judgment. On May 12, 2022, VHS withdrew its pending appeal, and this Court ordered the dismissal thereof pursuant to said withdrawal on May 16, 2022. The judgment was presented to the District Court for signature on the same day as this Court ordered the dismissal of VHS's appeal, i.e., May 16, 2022, and the judgment at issue was signed on June 2, 2022 and served with notice of entry on June 7, 2022, both beyond the dismissal of the appeal for which the Plaintiffs claim the District Court was divested of jurisdiction to act regarding any motion for costs and attorneys' fees.

Even if VHS's appeal had not been withdrawn, VHS prematurely filed its notice of appeal regarding the District Court's initial denial of its motion for costs and attorneys' fees, since VHS filed its notice of appeal about three weeks after it timely moved the District Court for reconsideration of its aforementioned decision, which motion remained unresolved at the notice of appeal's filing. VHS's untimely filing of its notice of appeal was a jurisdictional defect which resulted in the District Court

as never having been divested of jurisdiction in the first place to decide either the motion for reconsideration or to sign the judgment at issue. *See, AA Primo Builders, LLC, supra* 126 Nev. at 585, 245 P.3d at 1195; NRAP 4(a)(6).

Finally, between VHS's original motion for costs and attorneys' fees pursuant to NRCP 68 and NRS § 17.117 and VHS's motion for reconsideration, the District Court conducted a comprehensive analysis of the factors outlined in *Beattie v. Thomas*, 99 Nev. 579, 588–89, 668 P.2d 268, 273 (1983) and *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) and considered all of the evidence submitted and argument of counsel for all parties. This Court has repeatedly held that so long as the District Court engaged in that very analysis, it will not disturb an award resulting therefrom. *See, Frantz v. Johnson*, 116 Nev. 455, 471, 999 P.2d 351, 361 (2000); *Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 382, 989 P.2d 882, 886 (1999); *Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 429–30 (2001); *Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318, 324, 890 P.2d 785, 789 (1995); *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252 n.16, 955 P.2d 661, 673 n.16 (1998). Such is the case here.

V. ARGUMENT

A. Standard of Review

- 1. Plaintiffs' Failure to File a Notice of Appeal Regarding the District Court's Decision on VHS's Motion For Reconsideration Waives Their Appellate Rights On this Issue**

To raise an issue on appeal, a litigant must have properly preserved the issue in the district court. *Peke Res., Inc. v. Fifth Jud. Dist. Ct.*, 113 Nev. 1062, 1068 n.5, 944 P.2d 843, 848 n.5 (1997).

An argument or issue not raised before the district court is deemed waived and cannot be advanced on appeal. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981); *see also Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989) (holding that “[a] party may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below”).

This Court generally will not consider an argument raised for the first time on appeal. *Hampe v. Foote*, 118 Nev 405, 409 n.10, 47 P.3d 438, 440, n.10 (2002); *Peke Res., Inc. v. Dist. Ct.*, 113 Nev. 1062, 1068 n.5, 944 P.2d 843, 848 n.5 (1997); *Wolff v. Wolff*, 112 Nev 1355, 1363-1364, 929 P.2d 916, 921 (1996); *Montesano v. Donrey Media Group*, 99 Nev. 644, 650 n.5, 668 P.2d 1081, 1085 n.5 (1983); *Laird v. State Pub. Employees Retirement Bd.*, 98 Nev 42, 46, 639 P.2d 1171, 1173 (1982); *Hooper v. State*, 95 Nev. 924, 926, 604 P.2d 115, 116 (1979).

A party must object in the district court to the complained-of conduct in order to preserve an issue for appeal. *Lioce v. Cohen*, 124 Nev. 1, 19, 174 P.3d 970, 981 (2008); *Fick v. Fick*, 109 Nev. 458, 462, 851 P.2d 445, 448 (1993). “When a party fails to make a specific objection before the district court, the party fails to preserve the issues for appeal.” *Khoury v. Seastrand*, 132 Nev. 520, 534 n.3, 377 P.3d 81, 91

n.3 (2016), quoting *In re Parental Rights as to J.D.N.*, 128 Nev. 462, 468, 283 P.3d 842, 846 (2012).

The record is devoid of any evidence demonstrating that Plaintiffs made any effort to vacate the judgment. Furthermore, Plaintiffs failed to raise any arguments in the court below which addressed any of the substantive issues related to the District Court's award of attorneys' fees and costs. Moreover, Plaintiffs failed to raise the issue in the court below that the District Court needed to first find that Plaintiffs' rejection of the offer of judgment was unreasonable or made in bad faith before the District Court could award costs and attorneys' fees per NRCP 68 and NRS § 17.117 (a claim which itself is unsupported by any legal authority).

Plaintiffs' failure to address either issue in the court below waived their rights to pursue an appeal on those issues before this Court. To the extent that the Plaintiffs will claim on reply that their first issue (whether the District Court had jurisdiction to award costs and attorneys' fees) is jurisdictional in nature and not subject to waiver, that argument will be addressed herein, and VHS will demonstrate that the District Court was never divested of jurisdiction in the first place to so award costs and attorneys' fees, thus eviscerating Plaintiffs' claims to the contrary.

2. While Eligibility For Costs And Attorneys' Fees Is Reviewed *De Novo*, When Statutorily Authorized, It Will Not Be Overturned Absent A Manifest Abuse Of Discretion

Although eligibility for attorney fees is reviewed de novo, a District Court's

award of attorney fees where such an award is authorized by statute, contract or rule will not be disturbed absent a manifest abuse of discretion. *Nelson v. Peckham Plaza P'ships*, 110 Nev. 23, 26, 866 P.2d 1138, 1139–40 (1994). Awards of costs and attorney fees are reviewed for an abuse of discretion. *Pub. Emp. Ret. Sys. of Nev. v. Gitter*, 133 Nev. 126, 133, 393 P.3d 673, 680, 682 (2017). A District Court properly exercises its discretion where it gives appropriate, careful, correct and express consideration of the factual and legal circumstances before it. *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 93–94, 787 P.2d 777, 780 (1990). When reviewing a district court decision for abuse of discretion, this Court does not substitute its judgment for that of the District Court. *Id.* at 92, 787 P.2d at 779. In pursuing this appeal, however, Plaintiffs are requesting this Court to do just that.

B. Plaintiffs' Failure to Raise Issues on Appeal In District Court Waives Their Right To Pursue An Appeal Thereon

As noted in Section IV(A)(1) above, arguments which were never raised in the District Court and preserved for appellate review are deemed waived for appellate purposes. *See, e.g., Peke Res., Inc., supra* 113 Nev. at 1068 n.5, 944 P.2d at 848 n.5; *Old Aztec Mine, Inc., supra* 97 Nev. at 52, 623 P.2d at 983. Plaintiffs advance the following two arguments on appeal: (1) the District Court lacked jurisdiction to sign a judgment after VHS filed its notice of appeal, and (2) the District Court manifestly abused its discretion when it awarded costs and attorneys' fees to VHS despite a finding that Plaintiffs' rejection of VHS's NRCP 68 and NRS

§ 17.117 Offer of Judgment was not grossly unreasonable nor made in bad faith.⁴⁴

Neither issue, however, was ever raised in the District Court.

It is uncontroverted that VHS's Offer of Judgment⁴⁵ was rejected by Plaintiffs. It is further uncontroverted that VHS served a memorandum of costs on November 22, 2022.⁴⁶ Plaintiffs failed to timely move to retax costs and waived their rights to do so, even going so far as to seek judicial relief which lacked any statutory or legal basis,⁴⁷ which effort was denied by the District Court.⁴⁸ At no point in any of that motion practice did Plaintiffs dispute the amount of costs claimed by VHS.

VHS moved the District Court for costs and attorneys' fees which Plaintiffs opposed,⁴⁹ and the District Court initially denied that motion.⁵⁰ Plaintiffs did not appeal that decision nor did they file a notice of appeal pertaining thereto. After VHS moved for reconsideration in the District Court,⁵¹ the court below found the costs contained in VHS's memorandum of costs amounting to \$42,492.03⁵² were

⁴⁴ Plaintiffs' Opening Brief, p. 2

⁴⁵ 1 AA 121-124

⁴⁶ 4 AA 282-305

⁴⁷ I RA 1-155 (Exhibits A-C)

⁴⁸ I RA 156-159, II RA 160-170 (Exhibit D spans multiple volumes)

⁴⁹ 4 AA 306-480

⁵⁰ 4 AA 481-496

⁵¹ II RA 171-296, III RA 297-422, IV 423-485, V 486-519, VI 520-759, VII 760-844 (Exhibit E to RA Appendix spans multiple volumes) (Exhibits E-G)

⁵² 4 AA 282-305

substantiated, reasonable and actually incurred in this matter.⁵³ The District Court further found that VHS incurred \$106,619.85 in attorneys' fees and \$4,230 in paralegal time subsequent to the service of the NRCP 68(f) offer of judgment, and that such fees were reasonable, appropriate and recoverable in the defense of the case,⁵⁴ but reduced the costs incurred to \$8,056.93 which included only \$1,500 per expert, despite proof that expert fees and other costs totaled \$49,956.03. The District Court further held that if it had jurisdiction to award attorneys' fees and costs, it would award \$110,849.85 (\$106,619.85 in attorneys' fees plus \$4,230 in paralegal time), and \$8,056.93, for a total of \$118,906.78 based upon Plaintiffs' rejection of the offer of judgment pursuant to NRCP 68(f) and NRS § 17.117. The timely filing of a notice of appeal is jurisdictional and is essential to perfecting an appeal. NRAP 3(a)(1); *see, e.g., Walker v. Scully*, 99 Nev. 45, 46, 657 P.2d 94, 94–95 (1983) (appellate court lacks jurisdiction to entertain an untimely appeal); *Zugel by Zugel v. Miller*, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983) (the timely filing of an appeal is jurisdictional).

Plaintiffs were served with notice of entry of the District Court's decision regarding the motion for reconsideration on May 4, 2022.⁵⁵ Pursuant to NRAP

⁵³ 6 AA 603

⁵⁴ 6 AA 605

⁵⁵ 6 AA 593-605

4(a)(1), Plaintiffs had 30 days from service of the order with notice of entry, i.e., until June 3, 2022, to serve and file their notice of appeal relating to the District Court's decision on VHS's motion for reconsideration. The time to appeal cannot be extended by an appellate court, a district court, or a stipulation between parties. *Walker v. Scully*, 99 Nev. 45, 46, 657 P.2d 94, 94–95 (1983); NRAP 26(b)(1)(A). Plaintiffs filed no notice of appeal until June 7, 2022,⁵⁶ which was limited to the judgment signed by the District Court. The fact that Plaintiffs assert in their notice of appeal that they seek to appeal not only the judgment, but the order served with notice of entry filed and served 34 days earlier, is of not moment, as their deadline for filing their notice of appeal regarding said decision elapsed.

At no point in their opposition to VHS's motion for reconsideration⁵⁷ did Plaintiffs make any of the arguments they advance on appeal. Plaintiffs' sole arguments on opposition to the reconsideration motion were limited to whether VHS demonstrated that the District Court's original order was clearly erroneous or that there was substantial new evidence submitted. In other words, Plaintiffs limited their argument to whether VHS overcame the procedural requirements required for a successful motion for reconsideration.

On appeal, however, Plaintiffs assert a completely different argument, i.e.,

⁵⁶ 6 AA 657-658

⁵⁷ 5 AA 527-538

that the District Court abused its discretion in awarding costs and attorneys' fees based upon Plaintiffs' decisions regarding the rejection of VHS's offer of judgment. This issue is completely new, never litigated in the court below, and based upon the precedent established by this Court, waived by Plaintiffs and may not be considered by this Court.

More importantly, as previously demonstrated, Plaintiffs had until June 3, 2022 to file a notice of appeal related to the District Court's decision regarding VHS's motion for reconsideration in accordance with NRAP 4(a)(1). Unless a tolling motion is filed by a party including a motion to alter or amend the judgment under NRCP 59; NRAP 4(a)(4), the 30 day period cannot be extended. *See, AA Primo Builders, Ltd. Liab. Co. v. Washington*, 126 Nev. 578, 581-582, 245 P.3d 1190, 1192 (2010); *Lytle v. Rosemere Estates Prop. Owners Ass'n*, 129 Nev. 923, 926, 314 P.3d 946, 948 (2013). Moreover, a tolling motion must be filed in the District Court no later than 28 days from the date that written notice of entry of the judgment or final order is served. NRCP 50(b); NRCP 52(b); NRCP 59(b). The time to file tolling motions cannot be extended. NRCP 6(b)(2).

Plaintiffs filed no tolling motion as the Plaintiffs' appendix reflects. Plaintiffs filed no notice of appeal regarding said motion within the 30 days. Plaintiffs therefore have waived their rights to pursue an appeal on any issues raised in the motion or the decision and order stemming therefrom. Thus, Plaintiffs' arguments

regarding the District Court's decision on the motion for reconsideration have been waived.

C. VHS's Withdrawal Of Its Appeal On The Initial Decision Denying Costs And Attorneys' Fees Vested The District Court With Jurisdiction To Issue The Subject Judgment

On May 12, 2022, VHS withdrew its pending appeal,⁵⁸ and this Court ordered the dismissal thereof pursuant to said withdrawal on May 16, 2022.⁵⁹

On May 16, 2022, after this Court ordered dismissal of VHS's appeal, VHS submitted a proposed judgment to the District Court, with notice thereof to Plaintiffs' counsel, which the District Court signed on June 2, 2022,⁶⁰ with notice of entry thereof served on June 7, 2022.⁶¹ Along with the proposed judgment for \$118,906.78, VHS provided the District Court with the order granting VHS's motion for summary judgment,⁶² the order granting VHS's motion for reconsideration of its motion for costs and attorneys' fees,⁶³ and VHS's withdrawal of its appeal pertaining to the District Court's initial denial of VHS's motion for costs and attorneys' fees⁶⁴

⁵⁸ 6 AA 606-608

⁵⁹ 6 AA 609

⁶⁰ 6 AA 614-656

⁶¹ 6 AA 610-612

⁶² 6 AA 600-634

⁶³ 6 AA 635-650

⁶⁴ 6 AA 651-656

so as to provide the District Court with all evidence that there was no longer any appeal pending and any alleged jurisdictional impediments to signing any judgment were eliminated.

Conspicuously absent from Plaintiffs' briefing is any reference to the timing of VHS's withdrawal of its appeal, that the judgment presented for signature occurred after VHS withdrew its appeal and this Court already ordered the dismissal thereof, demonstrating Plaintiffs' conscious disregard for the facts and lack of candor, rendering Plaintiffs' appeal regarding this issue untenable.

D. VHS's Premature Filing Of Its Notice Of Appeal Rendered It Jurisdictionally Defective, Thus Never Divesting The District Court Of Jurisdiction To Decide The Motion For Reconsideration Or Sign A Judgment

As if withdrawal of VHS's appeal was insufficient (which it was not), the District Court was never divested of jurisdiction to decide anything, nor was it prevented from signing the judgment entered in this matter since the notice of appeal was filed **after** the motion for reconsideration, but before the motion for reconsideration was ever decided. In *Foster v. Dingwall*, 126 Nev. 49, 228 P.3d 453 (2010), this Court held:

This court has repeatedly held that **the timely filing of a notice of appeal** "divests the district court of jurisdiction to act and vests jurisdiction in this court." *Mack-Manley v. Manley*, 122 Nev. 849, 855, 138 P.3d 525, 529 (2006) (quoting *Rust v. Clark Cty. School District*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987)). We have further held that

when an appeal is perfected, the district court is divested of jurisdiction to revisit issues that are pending before this court, [but] the district court retains jurisdiction to enter orders on matters that are collateral to and independent from the appealed order, *i.e.*, matters that in no way affect the appeal's merits.

Mack-Manley, 122 Nev. at 855, 138 P.3d at 529-30.

Foster, supra 126 Nev. at 52, 228 P.3d at 454-55 (emphasis supplied).

While motions for reconsideration have historically been treated as not tolling the time for filing a notice of appeal (*see Alvis v. State, Gaming Control Bd.*, 99 Nev. 184, 186, 660 P.2d 980, 981 (1983)), this Court has taken a functional approach to motions for reconsideration, by overruling the previously rigid standard for tolling motions. *See Id.*; *Chapman Indus. v. United Ins. Co. of America*, 110 Nev. 454, 458, 874 P.2d 739, 741 (1994). Now, this Court has ruled that **a timely motion for rehearing or reconsideration will be treated as a tolling motion**, with a tolling effect on the final judgment, so long as the motion has the effect of requesting substantive alteration of the judgment. *See, AA Primo Builders, LLC, supra* 126 Nev. at 585, 245 P.3d at 1195. Specifically, this Court held “ . . . so long as a post-judgment motion for reconsideration is in writing, timely filed, states its grounds with particularity, and ‘request[s] a substantive alteration of the judgment, not merely the correction of a clerical error, or relief of a type wholly collateral to the judgment,’ 11 C. Wright, A. Miller & M. Kane, *supra*, § 2810.1, at 121, there is no reason to deny it NRCP 59(e) status, with tolling effect under NRAP 4(a)(4)(C).” *Id.*

Additionally, NRAP 4(a)(6) states in pertinent part: “A premature notice of appeal does not divest the district court of jurisdiction.”

In the instant case, on February 23, 2022, VHS timely moved the District Court for reconsideration of its decision regarding costs and attorneys’ fees,⁶⁵ to which Plaintiffs interposed opposition on March 9, 2022,⁶⁶ and to which VHS interposed a reply in further support of its motion on March 23, 2022.⁶⁷ On March 14, 2022, about **three weeks after filing its motion for reconsideration with the District Court, VHS filed its notice of appeal**⁶⁸ and case appeal statement⁶⁹ pertaining to the District Court’s February 15, 2022 order. Thus, under the rationale of *AA Primo*, VHS’s February 23, 2022 timely motion for reconsideration was a tolling motion. The notice of appeal filed on March 14, 2022 was therefore prematurely filed since a timely tolling motion, which remained undecided until May 4, 2022⁷⁰ when the District Court decided the aforesaid motion for reconsideration. VHS had 30 days from May 4, 2022 to file its notice of appeal regarding either the District Court’s decision on the motion for reconsideration or the decision which

⁶⁵ II RA 171-296, III RA 297-422, IV 423-485, V 486-519, VI 520-759, VII 760-769 (Exhibit E to RA Appendix spans multiple volumes)

⁶⁶ VII RA 770-803 (Exhibit F)

⁶⁷ VII RA 804-844 (Exhibit G)

⁶⁸ 5 AA 539-560

⁶⁹ 5 AA 561-570

⁷⁰ 6 AA 593-605

preceded it which initially denied VHS's motion for costs and attorneys' fees.

However, on April 29, 2022, this Court issued an order to show cause to VHS⁷¹ stating in pertinent part:

Preliminary review of the docketing statement, the documents submitted to this court pursuant to NRAP 3(g), and the district court docket entries reveals a potential **jurisdictional defect**. Specifically, the **notice of appeal appears to be prematurely filed under NRAP 4(a) because it appears that it was filed after the timely filing of a tolling motion for reconsideration and before that motion has been formally resolved . . . A timely tolling motion terminates the 30-day appeal period, and a notice of appeal is of no effect if it is filed after such a tolling motion is filed and before the district court enters a written order finally resolving the motion.** See NRAP 4(a)(2).

Accordingly, appellant shall have 30 days from the date of this order within which to show cause **why this appeal should not be dismissed for lack of jurisdiction. Failure to demonstrate that this court has jurisdiction may result in this court's dismissal of this appeal.**⁷²

(emphasis supplied). Therefore, as this Court already suggested in its order to show cause in this case, based upon the timing of the motion for reconsideration and the filing of the notice of appeal, VHS's notice of appeal was jurisdictionally defective upon its filing, since the pending motion for reconsideration had already been made but not ruled upon. If the notice of appeal was jurisdictionally defective, it became a legal fiction and a notice of appeal was of no effect since it never vested this Court

⁷¹ VII RA 845-847 (Exhibit H)

⁷² *Id.*

with any jurisdiction in the first place. *See, Carrera v. Montes*, 454 P.3d 1261 (Nev. 2019); *Lopez v. Bennett*, No. 69551, 2016 Nev. Unpub. LEXIS 201, 2016 WL 2586664 (May 3, 2016)⁷³; *Morris v. State Dep't of Family Servs.*, No. 69281, 2016 Nev. Unpub. LEXIS 103, 2016 WL 383036 (Jan. 28, 2016); *Knox v. Dick*, 99 Nev. 514, 517, 665 P.2d 267, 269 (1983). Additionally, since NRAP 4(a)(6) specifically states that premature notices of appeal do not divest the District Court of jurisdiction, the District Court in this case was never divested of jurisdiction because the notice of appeal filed by VHS was premature.

Thus, Plaintiffs' reliance upon the procedure in *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978) is unavailing since this Court never had jurisdiction at any point regarding VHS's notice of appeal related to the District Court's initial denial of VHS's motion for costs and attorneys' fees. Jurisdiction needed to vest somewhere, and if not with this Court, then the District Court itself possessed the very jurisdiction to decide the motion for reconsideration and the subsequent judgment which it signed. *See*, NRAP 4(a)(6).

E. Since The District Court Properly And Fully Considered The Beattie and Brunzell Factors, Its Decision To Award Costs And Attorneys' Fees Cannot Be Considered Either Arbitrary Or Capricious And This Court Indicated It Will Not Disturb Such A Ruling

⁷³ Per NRAP 36(c)(2), on or after January 1, 2016, an unpublished decision may be cited for its persuasive value, if any. Supreme Court Rule 123 prohibiting citation to unpublished decisions was repealed on November 12, 2015.

If this Court was to even entertain Plaintiffs' waived and jurisdictionally defective arguments pertaining to the District Court's order on the motion for reconsideration and subsequent judgment, VHS will demonstrate that Plaintiffs' position on this issue is meritless and unsupported by any legal authority.

NRCP 68 states in pertinent part:

(a) The Offer. At any time more than 21 days before trial, any party may serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions. Unless otherwise specified, an offer made under this rule is an offer to resolve all claims in the action between the parties to the date of the offer, including costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees.

* * *

(e) Failure to Accept Offer. If the offer is not accepted within 14 days after service, it will be considered rejected by the offeree and deemed withdrawn by the offeror. Evidence of the offer is not admissible except in a proceeding to determine costs, expenses, and fees. The fact that an offer is made but not accepted does not preclude a subsequent offer. With offers to multiple offerees, each offeree may serve a separate acceptance of the apportioned offer, but if the offer is not accepted by all offerees, the action will proceed as to all. Any offeree who fails to accept the offer may be subject to the penalties of this rule.

(f) Penalties for Rejection of Offer.

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

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

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

Similarly, NRS § 17.117 states in pertinent part:

1. At any time more than 21 days before trial, any party may serve an offer in writing to allow judgment to be taken in accordance with the terms and conditions of the offer. Unless otherwise specified, an offer made under this section is an offer to resolve all claims in the action between the parties to the date of the offer, including costs, expenses, interest and, if attorney's fees are permitted by law or contract, attorney's fees.

* * *

9. If the offer is not accepted within 14 days after service, the offer will be considered rejected by the offeree and deemed withdrawn by the offeror. Evidence of the offer is not admissible except in a proceeding to determine costs, expenses and fees. The fact that an offer is made but not accepted does not preclude a subsequent offer. With offers to multiple offerees, each offeree may serve a separate acceptance of the apportioned offer, but if the offer is not accepted by all offerees, the action will proceed as to all offerees. Any offeree who fails to accept the offer may be subject to the penalties of this section.

10. If the offeree rejects an offer and fails to obtain a more favorable judgment:

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

(b) The offeree must pay the offeror's post-offer costs and expenses, including a reasonable sum to cover any expenses incurred by the offeror for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case, applicable interest on the judgment from the time of the offer to the time of the entry of the judgment and reasonable attorney's fees, if any allowed, actually incurred by the offeror from the time of the offer. If the offeror's attorney is collecting a contingent fee, the amount of any attorney's fees awarded to the party for whom the offer is made must be deducted from that contingency fee.

11. The penalties in this section run from the date of service of the earliest rejected offer for which the offeree failed to obtain a more favorable judgment.

12. To invoke the penalties of this section, the court must determine if the offeree failed to obtain a more favorable judgment. If the offer provided that costs, expenses, interests and, if attorney's fees are permitted by law or contract, attorney's fees would be added by the court, the court must compare the amount of the offer with the principal amount of the judgment, without inclusion of costs, expenses, interest and, if attorney's fees are permitted by law or contract, attorney's fees. If a party made an offer in a set amount that precluded a separate award of costs, expenses, interest and, if attorney's fees are permitted by law or contract, attorney's fees, the court must compare the amount of the offer, together with the offeree's pre-offer taxable costs, expenses, interest and, if attorney's fees are permitted by law or contract, attorney's fees with the principal amount of the judgment.

An unsuccessful offeree, i.e., Plaintiffs, must pay all the post-offer costs of the offeror, i.e., VHS, including costs associated with expert witnesses. NRCP 68(f)(1)(B). The cost-shifting provisions in NRCP 68 extend to costs incurred on and after appeal. *See Lepome v. Berkson (In re Estate & Living Trust of Miller)*, 125 Nev. 550, 555, 216 P.3d 239, 243 (2009). Additionally, Plaintiffs were required to pay “applicable interest” (e.g., interest on VHS’s post-offer costs) from the time of the offer to the entry of judgment. NRCP 68(f)(2).

NRCP 68 vests the District Court with discretion to award an offeror attorneys’ fees if the offeree does not improve on an unaccepted offer of judgment. *See, Chavez v. Sievers*, 118 Nev. 288, 296, 43 P.3d 1022, 1027 (2002); *Beattie v. Thomas*, 99 Nev. 579, 588–89, 668 P.2d 268, 273 (1983). These fees must be actually incurred by the offeror from the time of service of the offer forward. NRCP 68(f)(2). The fee-shifting provisions in NRCP 68 extend to fees incurred on and after appeal. *Lepome v. Berkson (In re Estate & Living Trust of Miller)*, 125 Nev. 550, 555, 216 P.3d 239, 243 (2009).

This Court has set forth several factors that must be considered by District Courts in determining when and how to exercise their discretion in the award of attorney’s fees to an offeror after a judgment that determines the final outcome is obtained. Those factors include: (1) Whether the plaintiff’s claim was brought in good faith; (2) Whether the offer of judgment was reasonable and in good faith in

both its timing and amount; (3) Whether the decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) Whether the fees sought by the offeror are reasonable and justified in amount. *Beattie v. Thomas*, 99 Nev. 579, 588–89, 668 P.2d 268, 274 (1983); *see also Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 562, 216 P.3d 788, 792 (2009).

The District Court was required to make specific findings that the attorneys' fees sought were reasonable and justified and that the *Beattie* factors were considered by the court. *Wynn v. Smith*, 117 Nev. 6, 13, 16 P.2d 424, 429–30 (2001); *Beattie*, 99 Nev. at 588–589, 668 P.2d at 273. However, **an award will not be disturbed if the record is clear that the district court considered the factors and the court's award is not arbitrary or capricious.** *Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318, 324, 890 P.2d 785, 789 (1995). **No single factor under *Beattie* is determinative. The district court has broad discretion to grant the request as long as all appropriate factors are considered.** *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252 n.16, 955 P.2d 661, 673 n.16 (1998)

In determining the amount of the fees to award the offeror, the District Court is not limited to one specific approach: its analysis may begin with any method rationally designed to calculate a reasonable amount, including those based on a reasonable number of hours at a reasonable hourly rate or a contingency fee. *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864, 124 P.3d 530, 548–49 (2005).

However, regardless of the chosen method the District Court was required to continue its analysis by considering the following: (1)The qualities of skill; (2)The character of the work to be done: its difficulty, intricacy, importance and the skill and time required, the responsibility imposed and the prominence and character of the parties when they affect the importance of the litigation; (3)The work actually performed by the lawyer; the skill, time and attention given to the work; and (4)The result; whether the attorney was successful, and what benefits were derived. *Id.* at 864, 124 P.3d at 549; *Schouweiler v. Yancey Co.*, 101 Nev. 827, 834–35, 712 P.2d 786, 790 (1985); *Brunzell v. Golden Gate Nat’l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

An award for attorneys’ fees may include charges for non-attorney staff, such as paralegals; however, the District Court must determine whether the rates charged were reasonable using the *Brunzell* factors as provided above. *LVMPD v. Yeghiazarian*, 129 Nev. 760, 769–70, 312 P.3d 503, 510 (2013).

When the District Court properly considers the factors set forth in *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), the attorneys’ fee award is discretionary and will not be disturbed absent a manifest abuse of discretion. *Frantz v. Johnson*, 116 Nev. 455, 471, 999 P.2d 351, 361 (2000). Unless the district court’s exercise of discretion is arbitrary or capricious, this Court has previously indicated that it will not disturb the lower court’s ruling on

appeal. *Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 382, 989 P.2d 882, 886 (1999).

Additionally, if the record clearly reflects that the District Court properly considered the *Beattie* factors, this Court has ruled that it will defer to the District Court's discretion. *Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 429–30 (2001); *Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318, 324, 890 P.2d 785, 789 (1995).

In the instant case, the District Court noted the following in its order pertaining to VHS's motion for reconsideration: “. . . the Court found that the *Beattie* and *Brunzell* factors weighed in favor of the Defense, but since the Defense had not supported its request for fees and costs, as required by the Nevada Supreme Court, this Court was unable to award fees and costs. *Beattie v. Thomas*, 99 Nev. 579, 588, 668 P.2d 268 (1983); *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31 (1969).”⁷⁴ Specifically, the District Court was referring to its prior order on VHS's initial motion for costs and attorneys' fees,⁷⁵ in which it evaluated the four *Beattie/Schouweiler* factors (noted above),⁷⁶ and the *Brunzell* factors (noted

⁷⁴ 6 AA 603:4-8

⁷⁵ 4 AA 481-496

⁷⁶ 4 AA 487-488

above),⁷⁷ giving its rationale. Thereafter, on the motion for reconsideration decision, the District Court stated: “The Defendant has now submitted documentation supporting the claim for attorney’s fees. Because the Court has now been presented with substantially different or additional evidence, reconsideration is appropriate”,⁷⁸ and proceeded to evaluate the costs and attorneys’ fees and supporting evidence associated therewith,⁷⁹ concluding the costs contained in VHS’s memorandum of costs amounting to \$42,492.03⁸⁰ were substantiated, reasonable and actually incurred in this matter.⁸¹ The District Court further found that VHS incurred \$106,619.85 in attorneys’ fees and \$4,230 in paralegal time subsequent to the service of the NRCP 68(f) offer of judgment, and that such fees were reasonable, appropriate and recoverable in the defense of the case,⁸² but reduced the costs incurred to \$8,056.93 which included only \$1,500 per expert, despite proof that expert fees and other costs totaled \$49,956.03. The District Court further held that as to attorneys’ fees and costs, an award of \$110,849.85 (\$106,619.85 in attorneys’ fees plus \$4,230 in paralegal time) was justifiable in fees, and \$8,056.93 was justifiable in costs, for

⁷⁷ 4 AA 488-489; 4 AA 494-496

⁷⁸ 6 AA 603

⁷⁹ 6 AA 603-605

⁸⁰ 4 AA 282-305

⁸¹ 6 AA 603

⁸² 6 AA 605

a total of \$118,906.78 based upon Plaintiffs' rejection of the offer of judgment pursuant to NRCF 68(f) and NRS § 17.117.

In the District Court, VHS pointed out that considering all factors in awarding attorneys' fees under the current circumstances weigh in favor of Defendants. First, Plaintiffs did not bring his claims against VHS in good faith. The Nevada Supreme Court confirmed this fact by finding as follows:

Here, **irrefutable evidence demonstrates that the real parties in interest were on inquiry notice by June 11, 2017 at the latest**, when real party in interest Brian Powell, special administrator for the estate, filed a complaint with the State Board of Nursing. There, Brian alleged that the decedent, Rebecca Powell, "went into respiratory distress" and her health care providers did not appropriately monitor her, abandoning her care and causing her death. Thus, Brian's own allegations in this Board complaint demonstrate that he had enough information to allege a *prima facie* claim for professional negligence-that in treating Rebecca, her health care providers failed "to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." NRS 41A.015 (defining professional negligence); *Winn*, 128 Nev. at 252-53; 277 P.3d at 462 (explaining that a "plaintiffs general belief that someone's negligence may have caused his or her injury" triggers inquiry notice).³ **That the real parties in interest received Rebecca's death certificate 17 days later, erroneously listing her cause of death as suicide, does not change this conclusion.**⁴ Thus, the real parties in interest had until June 11, 2018, at the latest, to file their professional negligence claim. Therefore, their February 4, 2019 complaint was untimely.

3 The evidence shows that Brian was likely on inquiry notice even earlier. For example, real parties in interest had observed in real time, following a short period of recovery, the rapid deterioration of Powell's health while in petitioners' care. Additionally, Brian had filed a complaint with the Nevada Department of Health

and Human Services (NDHHS) on or before May 23, 2017. Similar to the Nursing Board complaint, this complaint alleged facts, such as the petitioners' failure to upgrade care, sterilize sutures properly, and monitor Powell, that suggest he already believed, and knew of facts to support his belief, that negligent treatment caused Powell's death by the time he made these complaints to NDHHS and the Nursing Board.

4 The real parties in interest do not adequately address why tolling should apply under NRS 41A.097(3) (providing that the limitation period for a professional negligence claim "is tolled for any period during which the provider of health care has concealed any act, error or omission upon which the action is based"). Even if they did, such an argument would be unavailing, as the medical records provided were sufficient for their expert witness to conclude that petitioners were negligent in Powell's care. *See Winn*, 128 Nev. at 255, 277 P.3d at 464 (holding that tolling under NRS 41A.097(3) is only appropriate where the intentionally concealed medical records were "material" to the professional negligence claims). Finally, we have not extended the doctrine of equitable tolling to NRS 41A.097(2), and the real parties in interest do not adequately address whether such an application is appropriate under these facts. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (refusing to consider arguments that a party did not cogently argue or support with relevant authority).

Given that uncontroverted evidence demonstrates that the petitioners are entitled to judgment as a matter of law because the complaint is time-barred under NRS 41A.097(2), see NRCP 56(a); *Wood*, 121 Nev. at 729, 121 P.3d at 1029 (recognizing that courts must grant summary judgment when the pleadings and all other evidence on file, viewed in a light most favorable to the nonmoving party, "demonstrate that **no genuine issue as to any material fact [remains]** and that the moving party is entitled to a judgment as a matter of law"

(internal quotations omitted)) . . .⁸³

This Court previously determined that Plaintiffs were certainly on notice of any alleged malpractice no more than one month after decedent's death. This Court also determined that the very records upon which Plaintiffs based their case were in their possession long before the statute of limitations expired and that they knowingly initiated complaints to State agencies manifesting definitive knowledge and belief of malpractice. Nevertheless, Plaintiffs chose to initiate a lawsuit which was dead on arrival, continued to maintain it even after irrefutable evidence demonstrated its untenability, and then used every opportunity to prevent the expenditure of additional resources in order to prove the impropriety of the lawsuit. Plaintiffs were given every opportunity to exit the matter gracefully, but they instead chose to pursue an untenable claim, with knowledge they were doing so, utilizing an attorney who presented no evidence supportive of his own personal theories, and did all of this to the financial detriment of VHS. There is a price to be paid for that, and the statutes and case law cited above, coupled with the clear findings of this Court more than justified the District Court's findings, the award of costs and fees in this matter and the ensuing judgment.

Second, VHS's Offer of Judgment was brought in good faith in both timing

⁸³ 3 AA 231-233

and amount which the District Court found.⁸⁴ At the time of the Offer, VHS incurred over \$58,000 in costs defending Plaintiffs' claims. The Offer was served several days prior to VHS's motion for summary judgment and about 1 ½ years from the lawsuit's commencement. Moreover, Plaintiffs were in possession of VHS's respective requests for production of documents and interrogatories six weeks prior to the motion for summary judgment having been filed, and they produced the "smoking gun" documents demonstrating irrefutable evidence of inquiry notice prior to the motion for summary judgment having been made and even while said motion was pending before the District Court. Plaintiffs were on notice of the statute of limitations issues even as early as the motion to dismiss made by VHS's predecessor counsel in July, 2019, just months after commencing this action, yet they still pursued their untenable claim while in full possession of the documents which defeated it. That was bad faith, pure and simple. Given the likelihood of Plaintiffs losing on this issue, the offered waiver of the right to seek reimbursement of costs was reasonable in both timing and amount, especially given the multiple opportunities for Plaintiffs to be on notice of the issue.

Third, Plaintiffs' decision to reject the Offer of Judgment was in bad faith and grossly unreasonable. Instead of abandoning their untimely filed action, (and accepting VHS's Offer of Judgment), Plaintiffs simply continued to push the

⁸⁴ 4 AA 485

litigation forward, blocking every opportunity VHS provided to “stop the financial bleeding” by staying the litigation while this case dispositive issue made its way through the courts. They opposed two stay motions and a motion to reconsider a stay. They opposed a motion to dismiss and a motion for summary judgment, presenting not one shred of evidence by anyone with personal knowledge of the facts, supporting their claim of a timely commencement of the action. They forced VHS to incur substantial legal costs and expenses to defend the action, requiring the engagement of counsel along with multiple experts, to pursue a lawsuit they knew could not be maintained from the start. Furthermore, Plaintiffs provided unresponsive answers to discovery requests seeking to avoid addressing the underlying claims in the lawsuit necessitating EDCR 2.34 conferences and their supplementation of a large number of discovery responses. At every turn and opportunity, Plaintiffs stonewalled providing materials and information supportive of their claims while placing VHS in the position of having to incur massive expenses to obtain that to which it was legally entitled and seek dismissal of what Plaintiffs clearly knew was an untenable claim. The Plaintiffs’ failure to accept VHS’s Offer of Judgment was both in bad faith and grossly unreasonable.

The fourth factor regarding the reasonableness of VHS’s requested attorneys’ fees also weighed in its favor, as the District Court determined.

All of these factors were fully and fairly litigated in the District Court, both

on VHS's original motion to costs and fees, and in its motion for reconsideration.⁸⁵

Based upon the precedents this Court set in *Frantz, supra*, 116 Nev. at 471, 999 P.2d at 361, *Dillard Dep't Stores, Inc., supra* 115 Nev. at 382, 989 P.2d at 886, *Wynn, supra* 117 Nev. at 13, 16 P.3d at 429–30, and *Uniroyal Goodrich Tire Co., supra* 111 Nev. at 324, 890 P.2d at 789 and the broad discretion this Court affords a District Court in making these very findings as noted in *Yamaha Motor Co., U.S.A., supra* 114 Nev. at 252 n.16, 955 P.2d at 673 n.16, the District Court's findings regarding the amounts of costs and fees to be awarded and the basis upon which such an award earned given NRCP 68, NRS § 17.117 and the cases interpreting those rules should not be disturbed or overruled. The mere fact that Plaintiffs are unhappy with the result of the choice they made to reject the Offer of Judgment and the consequences thereof is no reason to overturn the District Court regarding the amounts it awarded to VHS.

Moreover, the fact that both the District Court and Plaintiffs incorrectly assumed that the District Court lacked jurisdiction given the prematurely filed notice of appeal is of no moment, as the legal analysis and precedent noted above demonstrates that the District Court always had jurisdiction to award costs and fees, and also had jurisdiction to sign the judgment which forms the basis for this appeal.

⁸⁵ 4 AA 282-480; 5 AA 497-538; II RA 171-296, III RA 297-422, IV 423-485, V 486-519, VI 520-759, VII 760-844 (Exhibit E to RA Appendix spans multiple volumes) (Exhibits E-G)

VI. CONCLUSION

Plaintiffs failed to timely file a notice of appeal regarding the District Court's decision on VHS's motion for reconsideration, making any arguments raised by Plaintiffs in this regard jurisdictionally defective and improper, and limits Plaintiffs solely to the judgment signed by the District Court.

VHS's withdrawal of its appeal and this Court's subsequent order dismissing same regarding the District Court's initial denial of VHS's motion for attorneys' fees and costs lifted any restrictions on the District Court to order or award attorneys' fees and costs, and to sign the judgment which is the subject of this appeal.

Moreover, even without the withdrawal of VHS's appeal, VHS's notice of appeal was filed after its motion for reconsideration (itself a tolling motion) which was still undecided at the time the notice of appeal was filed, rendering VHS's notice of appeal jurisdictionally defective as it was prematurely filed. Since jurisdiction never vested in this Court and remained with the District Court, its decision regarding the award of costs and fees on reconsideration and subsequent signing of the judgment was proper and not jurisdictionally defective.

Finally, the District Court's consideration and analysis of both the *Beattie* and *Brunzell* factors and the conclusions made regarding same cannot be overturned absent a manifest abuse of discretion which cannot be found so long as an analysis of those factors was clearly articulated and based upon the evidence before the

District Court (which it was).

Therefore, Respondent VHS respectfully requests that the judgment be affirmed in its entirety.

DATED this 24th day of February, 2023.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or imposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record be supported by reference to the page or transcript or appendix where the matter relied upon is found. In addition, I certify that this brief satisfied NRAP 32 with an approximate word count of 10,397 words, using 14-point, Times New Roman font. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirement of the Nevada Rules of Appellate Procedure.

Dated this 24th day of February, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 2023, a true and correct copy of **RESPONDENT’S ANSWERING BRIEF AND RESPONDENT’S APPENDIX** was served upon the following parties by electronic service through this Court’s electronic service system and also by placing a true and correct copy thereof in the United States Mail in Las Vegas, Nevada with first class postage fully prepaid.

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