IN THE SUPREME COURT OF THE STATE OF NEVADA

KEITH BRILL, M.D., FACOG, FACS, AN INDIVIDUAL; AND WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA-MARTIN PLLC, A NEVADA PROFESSIONAL LIMITED LIABILITY COMPANY,

Appellants,

vs.

KIMBERLY TAYLOR, AN INDIVIDUAL,

Respondent.

Supreme Court Case No.: 84492/84881

Dist. Court Case No.: A773472

APPELLANTS, KEITH BRILL, M.D. AND WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA-MARTIN, PLLC'S OPENING BRIEF

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I.

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. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

RELATED ENTITIES:

None.

LAW FIRMS APPEARING FOR RESPONDENTS IN THE CASE OR EXPECTED TO APPEAR IN THIS COURT:

Robert C. McBride, Esq. and Heather S. Hall, Esq. of McBride Hall represent Appellants Keith Brill, M.D. and Women's Health Associates of Southern Nevada-Martin, PLLC.

DATED: October 3rd, 2022.

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/s/ Heather S. Hall

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JURISDICTIONAL STATEMENT

This is an appeal from two post-judgment orders. Specifically, Defendants appeal the District Court's ruling Order Granting in Part and Denying in Part Plaintiff's Motion to Re-Tax and Settle Costs entered on March 1, 2022 and the Order denying attorneys' fees entered on May 13, 2022. Defendants filed a Notice of Appeal related to the Order Granting in Part and Denying in Part Plaintiff's Motion to Re-Tax and Settle Costs on March 31, 2022. Defendants filed a Notice of Appeal related to the Order denying attorneys' fees on June 13, 2022. Thus, both orders were timely appealed.

On August 11, 2022, this Court issued its Order Consolidating Appeals wherein these two appeals were consolidated. This Court has jurisdiction over this appeal pursuant to NRAP 3A(b)(8).

V.

ROUTING STATEMENT

This case is presumptively assigned to the Court of Appeals under NRAP 17(b)(7). However, this Court has inherent authority to retain this case.

VI.

ISSUES PRESENTED

This appeal presents the following, primary issues:

1. Did the District Court err by refusing to award Defendants mandatory costs pursuant to NRS 18.005 and NRS 18.020 in the form of reporter and transcript costs for depositions, travel expenses for taking the deposition of Plaintiff's expert, parking for court appearances, costs of obtaining medical records, mediation costs, copying, and expert costs in excess of $1,500?

2. Did the District Court err in refusing to award Defendants attorneys' fees pursuant to the valid Offer of Judgment served on June 29, 2021?

VII.

STATEMENT OF THE FACTS

Kimberly Taylor filed this medical malpractice case against her OB/GYN, Keith Brill, M.D. and his practice group, Women's Health Associates of Southern Nevada-Martin, PLLC (hereinafter referred to as "WHASN") on April 25, 2018. (A. V.II, APPX 000235).

On June 29, 2021, Defendants timely served an Offer of Judgment to Plaintiff for a mutual waiver of attorneys' fees and costs. (A. V.II, APPX 000246 – APPX 000248). At the time of the Offer, and as set forth in the Offer, Defendants' attorneys' fees incurred, as of June 29, 2021, totaled $41,522.25 and $19,200.53. (A. V.II, APPX 000246).

This matter proceeded to trial on October 7, 2021. (A. V.II, APPX 000235). On October 19, 2021, the jury returned a unanimous defense verdict. *Id.* Judgment

was entered in favor of Dr. Brill and WHASN on November 19, 2021. (A. V.I, APPX 000001 – APPX 000008).

Following entry of the Judgment, Defendants timely filed a Verified Memorandum of Costs on November 19, 2021 which included a statement of counsel compliant with NRS 18.110(1). (A. V.I, APPX 000009 – APPX 000230). Defendants also timely filed their Motion for Attorneys' Fees and Costs on November 22, 2021. (A. V.II, APPX 000231 – APPX 000261).

Plaintiff filed a Motion to Re-Tax and Settle Costs on November 22, 2021. (A. V.II, APPX 000262 – APPX 000500). Defendants filed an Opposition to that Motion on December 6, 2021. (A. V.III, APPX 000501 – APPX 000528). Plaintiff filed a Reply in Support of Plaintiff's Motion to Re-Tax and Settle Costs on December 13, 2021. (A. V.III, APPX 000545 – APPX 000550).

Plaintiff's Opposition to Defendants' Motion for Attorneys' Fees and Costs was filed on December 6, 2021. (A. V.III, APPX 000529 – APPX 000544). Defendants filed their Reply in Support of Motion for Attorneys' Fees and Costs on December 23, 2021. (A. V.III, APPX 000551 – APPX 000560).

On January 18, 2022, Retired Justice Michael Cherry heard Defendants' Motion for Attorneys' Fees and Costs and Plaintiff's Motion to Re-Tax and Settle Costs. (A. V.III, APPX 000561 – APPX 000572). The District Court refused to award Defendants the following mandatory costs: reporter and transcript costs for

depositions, parking at court appearances and trial, costs of obtaining medical records, travel expenses incurred taking the deposition of Plaintiff's expert, Dr. Berke, mediation costs and copying. (A. V.III, APPX 000569 – APPX 000570). Additionally, the District Court refused to allow the defense expert costs in excess of $1,500. (A. V.III, APPX 000569).

The District Court also refused to award attorney's fees pursuant to the timely, valid Offer of Judgment served on June 29, 2021 and essentially disregarded the Offer of Judgment, stating as follows:

> "As far as the attorneys' fees are concerned, I'm going to follow the *Singer* case in this particular matter. I think that's more appropriate in this type of case. You know, I feel bad that there has to be defense costs, but there has to be, unfortunately. When you defend a case, you did a good job, and you got your client off any type of liability, which I think is very admirable. So, what -- but I don't feel that there's been any change in *Singer versus Chase Manhattan*. Maybe it's something that the insurance industry ought to look at and visit my former colleagues up in Carson City, if that's an issue, because you raised a very valid point. The -- your second point was valid, but the first point just doesn't fly with *Singer versus Chase Manhattan*."

(A. V.III, APPX 000570).

Because this comment ignores the request for post-offer attorney's fees, defense counsel clarified that the District Court was also denying that request, as well. (A. V.III, APPX 000570 – APPX 000571).

VIII.

SUMMARY OF ARGUMENT

Senior Judge Michael Cherry decided the post-trial motions which are the subject of this appeal, as the trial judge, Honorable Monica Trujillo, was on maternity leave at the time the post-trial motions were heard. Unlike Judge Trujillo, Senior Judge Michael Cherry was not familiar with the complex issues presented at trial. His rulings were based on the pleadings submitted and the brief oral argument of counsel.

Defendants were erroneously denied mandatory costs in the form of reporter and transcript costs for depositions, parking at court appearances and trial, costs of obtaining medical records, travel expenses incurred taking the deposition of Plaintiff's expert, Dr. Berke, mediation costs and copying. The District Court's decision to deny these mandatory costs was an abuse of discretion. The District Court also abused its discretion in refusing to allow the to allow the defense expert costs in excess of $1,500 and refusing to award attorneys' fees pursuant to the valid, timely Offer of Judgment. In this medical malpractice action, Defendants could not

have successfully defended this case without impeccable expert support in the form of Steven McCarus, M.D.'s expert opinions.

IX.

LEGAL ARGUMENT

A. STANDARD OF REVIEW.

A district court's award of costs is reviewed for an abuse of discretion. *Vill. Builders 96, L.P. v. U.S. Labs., Inc.*, 121 Nev. 261, 276, 112 P.3d 1082, 1092 (Nev. 2005). A district court's decision on attorneys' fees is also reviewed for an abuse of discretion. *Frazier v. Drake*, 131 Nev. 632, 641 – 42, 357 P.3d 365, 372 (Ct. App. 2015).

B. THE DISTRICT COURT ERRED BY REFUSING TO AWARD REPORTER AND TRANSCRIPT COSTS FOR DEPOSITIONS COMPLETED DURING DISCOVERY AND TRAVEL EXPENSES INCURRED IN COMPLETING DISCOVERY.

NRS 18.020(3) mandates that "[c]osts **must** be allowed of course 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." (Emphasis added.) Under NRS 18.020, "allowance of costs to the prevailing party…is mandatory rather than discretionary." *Beattie v. Thomas*, 99 Nev. 579, 588 n.5, 668 P.2d 268, 274 (1983); See also, *Day v. West Coast Holdings, Inc.*, 101 Nev. 123, 133, 466 P.2d 218, 224 (1970) (citing *Randono v. Turk*, 86 Nev.

123, 133, 466 P.2d 218, 224 (1970)). In this case, it is undisputed that Plaintiff sought to recover more than $2,500.

Recoverable costs are defined in NRS 18.005 and specifically include "Reporters' fees for depositions, including a reporter's fee for one copy of each deposition" and "reasonable costs for travel and lodging incurred taking depositions and conducting discovery". *See* NRS 18.005(2) and (15). These costs are not discretionary.

All of the mandatory costs requested by Defendants were detailed in the Verified Memorandum of Costs filed on November 19, 2021. (A. V.I, APPX 000009 – APPX 000230). In addition to details, supporting invoices and related payment documentation was provided. *Id.* In Defendants' Opposition to Plaintiff's Motion to Re-Tax and Settle Costs, Defendants provided additional invoices and supporting emails for the $16,260.75 in costs requested for trial transcripts. (A. V.III, APPX 000512 –APPX 000515). Defendants also provided credit card receipts for the costs of a rental car and gasoline necessarily incurred in completing the July 20, 2021 deposition of Plaintiff's expert, David Berke, D.O. in Riverside, California. (A. V.III, APPX 000516 –APPX 000521). Plaintiff's counsel also attended this deposition in-person.

In addition to the travel expenses related to completing Dr. Berke's deposition, Defendants also requested costs for parking associated with court and

trial attendance, and 3 meals eaten during trial. These costs fall under NRS 18.005(15) and NRS 18.005(17), which allows for "any other reasonable and necessary expense incurred in connection with the action . . ."

In Plaintiff's Motion to Re-Tax and Settle Costs, Plaintiff objected to the $16,260.75 requested for the trial transcripts. (A. V.II, APPX 265 – 266). The District Court considered the supplemental support for the trial transcript costs and awarded those costs. (A. V.III, APPX 000577). With no explanation, the District Court denied the request for mandatory costs of reporters' fees, one copy of each deposition transcript, and travel expenses that were all necessarily incurred in defending against Plaintiff's claims. The additional $4,832.85 requested for reporters' fees included a transcript of the motion in limine hearing and costs associated with five depositions completed during discovery. Attorney invoices and third-party vendor invoices were provided that demonstrated these costs. All five of the witnesses – Plaintiff Kimberly Taylor, treating physician Dr. Yeh, Plaintiff's expert, Dr. Berke, Defendant Dr. Brill, and Defendants' expert, Dr. McCarus – all testified in-person at trial. The District Court did not have discretion to refuse Defendants these costs.

Additionally, Defendants requested $429.08 for travel expenses that were necessarily incurred in defending against this matter. NRS 18.005(15) specifically permits an award to a prevailing party of "reasonable costs for travel and lodging

incurred taking depositions and conducting discovery." In response to Plaintiff's claim that the attorney invoices showing these costs were incurred were not sufficient, Defendants provided credit card receipts showing that the cost of $93.59 incurred on July 19, 2021 was for a rental car to drive to the deposition of Plaintiff's expert Dr. Berke. (A. V.III, APPX 000516 –APPX 000521). This deposition took place in Riverside, California. The remaining two charges for this deposition – $27.09 and $32.41 – were for gas to drive to and from the deposition. *Id.* As discussed in the briefing, Plaintiff's position that defense counsel should not have traveled to take this deposition in person was not well taken in light of the fact that Plaintiff's counsel, Adam Breeden, Esq., also attended this deposition in person and advised defense counsel he drove to the deposition.

Defendants also requested costs for 3 meals eaten during trial that totaled $81.99. These costs should have been awarded but were not. Pursuant to NRS 18.005(17), the District Court may award "any other reasonable and necessary expense incurred in connection with the action . . ." Meals should be included. Each and every travel expense included in Defendants' Verified Memorandum of Costs was necessarily incurred and should have been awarded. The District Court abused its discretion in denying these ***mandatory*** costs that were sufficiently supported by documentation and information as to why they were reasonable and necessarily incurred.

C. THE DISTRICT COURT ERRED BY REFUSING TO AWARD COPYING AND MEDICAL RECORDS COSTS.

Defendants also sought mandatory costs related to photocopies and obtaining medical records. Defendants sought a total of $2,667.63 for approximately three years of litigation. (A. A.VI, APPX 000012). Below, Plaintiff argued that Defendants did not provide specificity as to the documents copied, the reason for the copies, and the necessity of the same. However, Plaintiff acknowledged that Defendants identified the month of the charges, number of copies, the total amount of charges per month and Defendants referenced the billing statement to their insurance carrier. NRS 18.005(12) only states "reasonable costs for photocopies." The $2,667.63 requested for copying charges was necessarily incurred as stated in the Verified Memorandum of Costs and should have been awarded.

Defendants also sought $3,399.95 incurred in obtaining Ms. Taylor's medical records. In this medical malpractice action, the relevance of and necessity to obtain the patient's medical records is clear on its face. In particular, Plaintiff disputed the costs associated with follow-up to medical facilities that were slow to respond to the defense's request for records. Ms. Taylor's medical records were necessary to successfully defend this case and any follow-up with a medical facility due to lack of response to a request for medical records or for updated medical records was not needless. Defendants incurred $3,399.95 in medical records charges since 2018.

These costs were appropriately documented, necessarily incurred and should have been awarded pursuant to NRS 18.005(17).

D. DEFENDANTS SHOULD HAVE BEEN AWARDED COSTS FOR MEDIATION AND MEDICAL ILLUSTRATIONS USED AT TRIAL.

Defendants also sought costs for a private mediation and medical illustrations that were prepared and utilized frequently during the 8-day trial in this case. Additional documentation of the $7,850 paid in private mediation fees and the $3,350 for medical illustrations was included in Defendants' Opposition to Plaintiff's Motion to Re-Tax and Settle Costs. (A. V.III, APPX 000522 –APPX 000528).

While no provision of NRS 18.005 specifically lists mediation fees and medical illustrations, NRS 18.005 (17) allows for costs for "Any other reasonable and necessary expense incurred in connection with the action, including reasonable and necessary expenses for computerized services for legal research." Pursuant to NRS 41A.081, an action such as this for professional negligence must submit to a mandatory settlement conference prior to trial. The private mediation held on June 24, 2021 was in lieu of the mandatory settlement conference required by NRS 41A.081 and was necessary to successfully try this case. While the mediation was not successful, the lack of success does not negate that the mediation was necessarily incurred. Defendants bore the full brunt of the expense, but there was never any

waiver of Defendants' right to seek reimbursement of this necessarily incurred cost in the event that Defendants prevailed at trial.

Plaintiff argued that the medical illustrations utilized by the defense were basic, but they were very detailed and specific to Ms. Taylor's unique anatomy. The medical illustrations used repeatedly during trial were provided in the Opposition to Plaintiff's Motion to Re-Tax and Settle Costs. (A. V.III, APPX 000525 – APPX 528). These were not stock illustrations, nor was it possible to use stock illustrations. The crux of this case was Ms. Taylor's unusual anatomy that led to the injury she experienced. In order to demonstrate this, it was critical for the defense to have illustrations demonstrating her anatomy.

In order for the professional illustrator to prepare these detailed anatomic color illustrations, the illustrator required input from the medical records, defense counsel, and defense expert Dr. McCarus, especially in light of the unusual anatomy being illustrated. Beginning with Opening Statement, defense counsel utilized these illustrations throughout the trial presentation. They were also utilized during witness testimony and Closing Argument. These illustrations were vital to demonstrating the internal anatomy of the patient and key to the defense's success at trial.

Costs for mediation and medical illustrations were reasonable and necessarily incurred. Pursuant to NRS 18.005 (17), the District Court should have awarded mediation costs and costs for the necessary medical illustrations.

E. THE DISTRICT COURT ERRED BY REFUSING TO AWARD EXPERT COSTS IN EXCESS OF $1,500.

NRS 18.005(5) provides that a district court may award "reasonable 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." It is within this Court's sound discretion to award expert witness fees in excess of $1,500.00. *Arnold v. Mt. Wheeler Power Co.*, 101 Nev. 612, 707 P.2d 1137 (1985); *Bergmann v. Boyce*, 109 Nev. 670, 856 P.2d 560 (1993).

This is a medical malpractice case which necessitated hiring a qualified expert witness to testify at trial and to defend against Plaintiff's allegations. Pre-litigation, a settlement demand was made on behalf of Ms. Taylor which prompted Defendants to retain counsel. Defense counsel retained Steven McCarus, M.D. on or around March 7, 2018. Dr. McCarus is a Board-certified OB/GYN and a Fellow of the American College of Obstetricians and Gynecologists (ACOG). In addition to various seminars and teaching positions, he has been in private practice for nearly 30 years. There were numerous medical records and deposition transcripts to review in this case. Dr. McCarus reviewed the entire case file in order to provide competent expert opinions to defend the care at issue.

After being retained in March of 2018, Dr. McCarus worked closely with defense counsel in explaining the medical issues and how to present those to a jury

in a clear manner. He worked 3 plus years on this matter and traveled from Florida to Nevada to testify in-person at the trial. Defendants requested costs of $16,995.70 for his professional services. His invoices ranged from April 21, 2018 to October 16, 2021. (A. V.I, APPX 000012). His expertise and work on this matter justified a fee larger than $1,500. Had the trial judge decided this matter, his importance

The Nevada Court of Appeals has provided the following factors to determine when such an award is warranted:

> (1) the importance of the expert's testimony to the party's case; (2) the degree to which the expert's opinion aided the trier of fact in deciding the case; (3) whether the expert's reports or testimony were repetitive of other expert witnesses; (4) the extent and nature of the work performed by the expert; (5) whether the expert had to conduct independent investigations or testing; (6) the amount of time the expert spent in court, preparing a report, and preparing for trial; (7) the expert's area of expertise; (8) the expert's education and training; (9) the fee actually charged to the party who retained the expert; (10) the fees traditionally charged by the expert on related matters; (11) comparable experts' fees charged in similar cases; and (12) if an expert is retained from outside the area where the trial is

> held, the fees and costs that would have been incurred to hire a comparable expert where the trial was held.

Frazier v. Drake, 131 Nev. 632, 646, 357 P.3d 365, 373 (Ct. App. 2015).

The Nevada Court of Appeals emphasized "that not all of these factors may be pertinent to every request for expert fees in excess of $1,500 per expert under NRS 18.005(5), and thus, the resolution of such requests will necessarily require a case-by-case examination of appropriate factors. *Id.* at 650-51, 378. In addition to consideration of these factors, an award of expert witness fees as costs may be made under NRS 18.005(5) if the district court is presented with evidence that the costs were reasonable, necessary and actually incurred. *Id.*; See also, *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 120, 345 P.3d 1049, 1054 (Nev. 2015) (holding that "justifying documentation" must mean something more than a memorandum of costs); *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971 P.2d 383, 185-56 (Nev. 1998) (stating that costs awarded must be supported by documentation rather than just an estimate).

The request for $16,995.70 was well-supported. The Verified Memorandum of Costs included attorney invoices demonstrating that Dr. McCarus's fees were incurred in the defense of this matter. Plaintiff did not take issue with Dr. McCarus's qualifications but argued that it was not necessary for Dr. Brill to hire a retained medical expert at all in this case because Dr. Brill could have testified alone in his

defense. The suggestion that a medical malpractice action can be successfully defended without a retained expert is without merit. Had the District Court considered the *Frazier* factors, a larger amount would have been awarded for Dr. McCarus's work.

Although Senior Judge Michael Cherry was not present for trial and, thus, unfamiliar with the case, the parties and the complex medical issues, Defendants presented evidence that Dr. McCarus's testimony was essential to the defense. Here, the importance of Dr. McCarus's testimony to the defense's case; the degree to which his opinions and testimony on Ms. Taylor's anatomy resulting in this known risk and complication aided the trier of fact in deciding the case; the fact that Dr. McCarus was the defense's only retained expert; the length and extent of the work he performed over 3 ½ years, and the amount of time he spent preparing expert reports, preparing for his deposition and trial testimony; Dr. McCarus's education and training; and that his fees are comparable to those charged by Plaintiff's expert, Dr. Berke all justified a fee larger than $1,500.

Defendants incurred $16,955.70 in expert fees. These fees are recoverable pursuant to NRS 18.005(5) and NRS 18.005(4), which allow for "Fees for witnesses at trial, pretrial hearings and deposing witnesses, unless the court finds that the witness was called at the instance of the prevailing party without reason or necessity" and should have been awarded.

F. DEFENDANTS SHOULD HAVE BEEN AWARDED POST-OFFER OF JUDGMENT ATTORNEY'S FEES AND COSTS.

In addition to fees and costs sought as the prevailing parties, Defendants alternatively requested post-offer attorneys' fees that totaled **$86,148.75**. It is well-settled precedent in Nevada that "an offeree who makes an unimproved-upon offer of judgment – an offer that is more favorable to the opposing party than the judgment ultimately rendered by the district court – is entitled to recover costs and reasonable attorney fees incurred after making the offer of judgment." *See Logan v. Abe*, 131 Nev. 260, 262, 360 P.3d 1139, 1140 (2015). On June 29, 2021, Defendants served an Offer of Judgment to Plaintiff offering to waive attorneys' fees and costs totaling $41,522.25 and litigation costs totaling $19,200.53. This Offer was rejected by Plaintiff.

When awarding fees in the Offer of Judgment context under NRCP 68 and NRS 17.115 (currently NRS 17.117), the District Court must also consider the reasonableness of the fees pursuant to *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (Nev. 1969). When determining the amount of attorneys' fees to award, the District Court has wide discretion, to be "tempered only by reason and fairness"' *Shuette v. Beazer Homes*, 121 Nev. 837, 864 (2005).[1] If the district

[1] Reasonable attorneys' fees also include fees for paralegal and non-attorney staff "whose labor contributes to the work product for which an attorney bills her client." *See Las Vegas Metro. Police Dep't v. Yeghiazarian*, 312 P.3d 503, 510 (Nev. 2013).

court's exercise of discretion is neither arbitrary nor capricious, it will not be disturbed on appeal. *Schouweiler v. Yancey Co.*, 101 Nev. 827, 833, 712 P.2d 786, 790 (Nev. 1985).

The following four *Brunzell* factors are to be considered by the Court:

> (1) the qualities of the advocate: ability, training, education, experience, professional standing and skill;
>
> (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where 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.

Brunzell v. Golden Gate, at 349 – 50.

Further, when deciding whether to award attorney fees subsequent to an offer of judgment, the court must consider the following factors set forth in *Beattie v. Thomas*: "(1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to

trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount." 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983); see also, *Busick v. Trainor*, 2019 Nev. Unpub. LEXIS 378, at *7, 437 P.3d 1050 (Nev. Mar. 28, 2019).

While Plaintiff took the position that Defendants' Offer of Judgment was not adequate consideration, the Offer of Judgment served on June 29, 2021 offered significant consideration and was a valid offer. Defendants offered to waive attorney's fees and costs totaling $41,522.25 in attorneys' fees incurred and $19,200.53 in litigation costs incurred, which Plaintiff rejected.

In that Offer, Defendants were willing to forego a substantial sum in exchange for a dismissal, which is sufficient to support an award of post-offer attorneys' fees. *Busick v. Trainor*, 2019 Nev. Unpub. LEXIS 378, 437 P.3d 1050 (Nev. 2019). The language of NRCP 68 does not state that the offer must be one of a certain dollar amount payment to Plaintiff.

Further, the case at hand is strikingly analogous to the facts of the case of *Busick v. Trainor*, 2019 Nev. Unpub. LEXIS 378, 437 P.3d 1050 (Nev. Mar. 28, 2019). Similar to the waiver of fees and costs served in the instant case, the defendant in *Busick* offered a mutual waiver of fees and costs in exchange for dismissal of the lawsuit with prejudice. *Id.* The district court in *Busick* awarded defendant $59,689.50 for attorney's fees incurred from the expiration of the offer of

judgment, after finding that the offer of judgment was justified and reasonable after analysis of the *Beattie* and *Brunzell* factors. *Id*. at *8. This was affirmed. *Id.* at *10.

In requesting attorneys' fees, Defendants provided invoices demonstrating the work performed by the primary attorneys who tried this case, as well as paralegal Kristine Herpin. Mr. McBride and Ms. Hall are experienced litigators who focus exclusively on all aspects of defending healthcare providers against allegations of professional negligence. Co-trial counsel, Ms. Hall was admitted to practice law in Nevada in 2007. She is admitted to practice before all Nevada state courts and the U.S. District Court for the District of Nevada. She has tried more than 25 cases in the State of Nevada, with a focus on defense of healthcare providers.

During this case, Ms. Hall took the deposition of Ms. Taylor, attended the deposition of Dr. Yeh, took the deposition of Plaintiff's expert, Dr. Berke, and defended the deposition of Defendants' expert, Dr. McCarus. Ms. Hall briefed and argued motions in limine. During trial, Ms. Hall handled a portion of jury selection, the Opening Statement, cross-examination of Ms. Taylor, the examination of Dr. Brill, Dr. Yeh and Dr. McCarus.

Mr. McBride, he has been admitted to practice law in the State of Nevada since 1999. He is a member in good standing of the State Bar of Nevada and has tried over 50 cases to verdict in his career. As co-counsel, he assisted in preparation and case presentation during the trial. He handled the majority of jury selection, the

examination of Bruce Hutchinson, RN and Plaintiff's expert Dr. Berke. He also gave the Closing Argument.

All attorneys who worked on this matter billed at $200/hour. All paralegals who worked on this matter billed at $95/hour. This case was complex and required the presentation of various medical issues and briefing of numerous legal issues and oral argument on the same. The hourly rate and the total amount of Defendants' requested attorneys' fees are well below the amounts Nevada courts have found reasonable. An appropriate consideration of the *Brunzell* factors demonstrated that entire amount of post-offer attorneys' fees should have been awarded.

Here, the amount that the Defendants were willing to forego constitutes valid consideration for the offer, as they were offering to give up a claim for costs and fees which they were legally entitled to pursue. In denying the request for attorneys' fees, the District Court improperly relied on *Singer v. Chase Manhattan Bank*, 111 Nev. 289, 890 P.2d 1305 (1995) which dealt with an award of fees to a prevailing party. The District Court did not adequately consider Defendants' alternative request for post-offer of judgment attorney's fees to which *Singer* is inapplicable.

Had the District Court analyzed the request for attorney's fees in the context of post-offer attorneys' fees, the District Court would have awarded the attorneys' fees that were incurred following the valid Offer of Judgment, $86,148.75.

/ / /

X.

CONCLUSION

For the reasons stated herein, the District Court's denial of certain mandatory costs and refusal to award Defendants any attorneys' fees were an abuse of discretion. Defendants Dr. Brill and WHASN appropriately sought mandatory costs that were properly supported. In addition, the District Court failed to analyze Defendants' request for post-Offer of Judgment attorneys' fees and improperly applied the holding in *Singer*. Accordingly, the Order Granting in Part and Denying in Part Plaintiff's Motion to Re-Tax and Settle Costs entered on March 1, 2022 and the Order denying attorneys' fees entered on May 13, 2022 should be vacated.

XI.

NRAP 28.2 CERTIFICATE OF COMPLIANCE

1. I, Heather S. Hall, Esq., hereby certify that this Answering Brief Under NRAP 27(e) complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of N.R.A.P. 32(a)(6).

2. I further certify that this Answering Brief complies with the page or type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the brief exempted by N.R.A.P. 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 4,818 words.

3. Finally, I hereby certify that I have read the Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I understand that I may be subject to sanctions for failure to comply with the Nevada Rules of Appellate Procedure.

DATED: October 3rd, 2022.

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/s/ Heather S. Hall

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Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of October 2022, service of the foregoing **APPELLANTS KEITH BRILL, M.D. AND WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA-MARTIN, PLLC'S OPENING BRIEF** was made this date by the Supreme Court's electronic service addressed as follows:

X VIA ELECTRONIC SERVICE: by mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; or

X VIA U.S. MAIL: By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on the service list below in the United States mail at Las Vegas, Nevada

/s/Candace Cullina
An employee of
McBRIDE HALL