IN THE SUPREME COURT OF THE STATE OF NEVADA

KEITH BRILL, M.D. and WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA-MARTIN, PLLC,

Appellants,

v.

KIMBERLY TAYLOR,

Respondent.

SUPREME COURT CASE NOS.
84492 & 84881 (consolidated)

On Appeal from the Eighth Judicial District Court
Clark County, Nevada, Department III, Hon. Monica Trujillo, Presiding

RESPONDENT'S ANSWERING BRIEF

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DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

Pursuant to NRAP 26.1, Respondent's counsel Adam J. Breeden, Esq. hereby discloses the following:

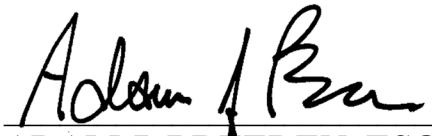
There are no corporations or business entities involved in this appeal for the Respondent, Kimberly Taylor, and therefore there are no related or parent companies for the Respondent to disclose.

The only counsel appearing or expected to appear for the Respondent is Adam J. Breeden, Esq. and Anna Albertson, Esq. of the Breeden & Associates, PLLC law firm. Respondent was also represented at the District Court level by Breeden & Associates, PLLC and the Law Office of James Kent/James Kent, Esq.

The Respondent is not using a pseudonym.

Dated this 2nd day of November, 2022.

BREEDEN & ASSOCIATES, PLLC



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I. STATEMENT OF THE CASE

Appellant Kimberly Taylor filed a medical malpractice action against her OB/GYN physician, Dr. Keith Brill, after a hysteroscopy procedure. It is undisputed that during the procedure Dr. Brill perforated *both* Taylor's uterus and the small bowel with a resectoscope, leading to serious illness, infection, a hospital stay of nine days, and hundreds of thousands of dollars in medical expenses for Taylor. Dr. Brill's "defense" at trial was that uterine and bowel perforation is a known risk of which he advised Taylor in advance, an assumption of risk defense.

After a jury verdict for the defense entered on November 19, 2021, Dr. Brill and WHASN sought post-judgment awards of litigation costs and attorney's fees against Taylor. The District Court granted in part and denied in part an award of litigation costs, awarding $21,649.87 in costs to Dr. Brill and WHASN. The request for attorney's fees based on a $0 offer of judgment was denied. Dr. Brill and WHASN now appeal the denial of certain costs and the attorney's fees requested.

II. STATEMENT OF FACTS

This consolidated appeal concerns the District Court's adjudication of Appellants Dr. Brill and Women's Health Associates of Southern Nevada's (WHASN) requests for post-judgment litigation and attorney's fees.[1] While much of

[1] For the sake of brevity, the remainder of the Answering Brief will simply refer to the appellants generally as "Dr. Brill," with the understanding that technically the appellants are both Dr. Brill and his employer, Women's Health Associates of

Dr. Brill's Statement of Facts section of his Opening Brief accurately reflects the procedural history of the case, Taylor provides the following to elaborate on several points for the Court.

The parties agree that case is a medical malpractice action by Plaintiff Kimberly Taylor against her OB/GYN physician, Defendant Dr. Keith Brill. (Supp. Appx. Vol. IV 590-612) On April 26, 2017, Dr. Brill performed an intended dilation and curettage with hysteroscopy combined with fibroid tumor removal and hydrothermal ablation procedure on Ms. Taylor. (Supp. Appx. Vol. IV at 592-594) In layman's terms, this meant that during part of the procedure a small camera and cutting device called a resectoscope would be inserted into the uterus and a fibroid tumor previously identified via ultrasound in the uterus would be removed. It was undisputed that during the procedure, Dr. Brill perforated *both* the uterus and small bowel with the resectoscope. However, Dr. Brill wished to proceed to trial and argue that although he perforated two different organs during the procedure which he should not have, his care did not fall below the standard of care.

On June 29, 2021, roughly four months prior to trial, Dr. Brill served a zero dollar ($0) offer of judgment to Taylor. (Appx. Vol. II at 246) Taylor proceeded to trial on October 7, 2021 before Hon. Monica Trujillo and the jury returned a defense verdict on October 19, 2021. (Appx. Vol. I at 3) Taylor wishes to note that she

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Southern Nevada-Martin, PLLC (WHASN).

asserts the trial judge made numerous errors during trial and she has appealed that verdict also to this Court. Taylor's appeal of the verdict remains pending as of the submission date of this Answering Brief, see *Taylor v. Brill, M.D. & Women's Health Assoc. of Southern Nevada* Supreme Court Case No. 83847. Should that appeal be successful and a new trial is granted to Taylor, these consolidated appeals regarding post-verdict costs and fees issues would be rendered moot. Taylor does not advocate for consolidation of all three appeals, but notes this for the Court's reference.

Following the verdict, on November 19, 2021, Dr. Brill filed a *Verified Memorandum of Costs*. (Appx. Vol. I at 9) On November 22, 2021, Dr. Brill filed a *Motion for Attorneys' Fees and Costs* (Appx. Vol. II at 231-261) which was briefed with an *Opposition* by Taylor (Appx. Vol. III at 529-544) and a *Reply* by Dr. Brill (Appx. Vol. III at 551-560). Also on November 22, 2021, Taylor filed a formal *Motion to Re-Tax and Settle Costs* (Appx. Vol. II at 262-500), which set forth in writing deficiencies in the *Verified Memorandum of Costs*. A written *Opposition* to Taylor's motion was filed by Dr. Brill (Appx. Vol. III at 501-528) and a *Reply in Support* was filed by Taylor (Appx. Vol. III at 545-550). Important to this appeal is that Taylor's primary argument against attorney's fees was that the $0 was not made "in good faith" (Appx. Vol. III at 536-541) and that many of the costs claimed by Dr. Brill may have been allowed by NRS § 18.005 on its face but in practice had not

been properly established as reasonable, necessary and/or supported with sufficient documentation per the precedent of this Court. (Appx. Vol. II at 262-271, Appx. Vol. III at 532-533). Because the issues in Dr. Brill's *Motion for Attorney's Fees and Costs* and Taylor's *Motion to Re-Tax and Settle Costs* overlapped substantially, there was abundant briefing by the parties.

The cost and fee issues went to a hearing and oral argument on January 18, 2022, before Hon. Michael Cherry, a senior status judge and former member of the Nevada Supreme Court. (Appx. Vol. III at 561-572) This was due to a temporary leave of Judge Trujillo. At oral argument, Judge Cherry did not address each and every argument and counterargument of the parties which is not uncommon when the parties are disputing perhaps two dozen or more issues of costs and fees. (Appx. Vol. III at 561-572). Judge Cherry commented on some arguments but for the most part just announced a decision in a summary manner. (Appx. Vol. III at 569-571) The end result of his ruling was that he denied Dr. Brill's motion for attorney's fees and granted in part and denied in part the motion for costs. While Dr. Brill had urged a costs award of $60,167.20 and Taylor urged an award of only $3,889.12, Judge Cherry awarded Clerk's Fees in the amount of $3,889.12, Reporters/Transcript Fees of $16,260.75 and fees for Dr. Brill's expert at the presumptive cap of $1,500 contained in NRS § 18.005(5), for a total costs award of $21,649.87.

For unknown reasons, District Court did not immediately execute the Orders

from the hearing. The Order as to costs was signed by the Court on March 1, 2022, by another covering senior judge, Hon. Joseph Bonaventure. (Appx. Vol. III at 576). The written order itemized the costs that Dr. Brill was awarded. The written order cited to *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 971 P.2d 383 (1998), the controlling Nevada Supreme Court precedent, and denied the remainder of the costs other than those specifically awarded by stating "the remaining costs are denied as not reasonable, necessary or properly supported with justifying documents under the applicable case law." (Appx. Vol. III at 577)

The parties submitted separate proposed orders as to the attorney's fees issue. Taylor's proposed order included a line that plainly stated "The Court believes that Plaintiff Taylor's arguments are more persuasive that the $0 offer of judgment was not a bona fide settlement offer made in good faith and Taylor's decision to reject the offer and proceed to trial was not grossly unreasonable or in bad faith." (Supp. Appx. Vol. IV at 616) Dr. Brill did not want this line in the Order and submitted a separate order which omitted it. Without comment, the District Court now with Judge Trujillo presiding again having returned from her leave, signed Dr. Brill's Order which omitted the more detailed, explanatory language. (Appx. Vol. III at 582) Taylor mentions this specifically because it appears that Dr. Brill is trying to complain in this appeal that the wording of the orders is inadequate on the attorney's fee issue but if this is so it is simply because he objected to the language in the Order

that better explained the ruling and he should not be allowed to benefit from the language of a less-specific order his own attorney's drafted. After formal entry of the Orders was noticed, Dr. Brill filed timely notices of appeal to each Order.

III. SUMMARY OF THE ARGUMENT

Taylor argues that this appeal is subject to the abuse of discretion standard of appellate review. In this case, the record will establish that many of the cost items sought by Dr. Brill were not mandated by statute and Taylor heavily disputed the claimed costs as unreasonable, unnecessary and/or not supported with justifying documentation per Nevada Supreme Court precedent. As to the attorney's fees issues, Dr. Brill tried to enforce a $0 offer of judgment to obtain an award of attorney's fees. Taylor argued that this offer was not in good faith and her decision to decline it was not grossly unreasonable under the controlling Nevada Supreme Court precedent. The District Court did not abuse its discretion when denying Dr. Brill's requests for certain costs and attorney's fees and the appellate court should not reverse the District Court on these issues.

IV. ARGUMENT

A. THE ABUSE OF DISCRETION STANDARD OF REVIEW APPLIES TO THIS APPEAL

The proper standard of review for this appeal is likely one of the most important aspects of the appeal. It is well-established as Dr. Brill concedes in his Opening Brief that the proper standard of review is **abuse of discretion**, which is

likely the most difficult standard of review for an appellant to satisfy. *Sands Expo & Convention Ctr., Inc. v. Bonvouloir*, 132 Nev. 1026, 385 P.3d 62 (2016) ("We review orders denying attorney fees and costs for abuse of discretion"). The Nevada Supreme Court has explained that "[a]n abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances." *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014), *citing Delno v. Mkt. St. Ry. Co.*, 124 F.2d 965, 967 (9th Cir. 1942). Stated differently, to find an abuse of discretion the reviewing court must find the decision was "arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001) (explaining the high burden of meeting the abuse of discretion standard). Moreover, the Supreme Court will uphold a correct decision even if the wrong rationale was used to reach the decision. *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (holding the court will affirm orders that reach the right result, even if for the wrong reason).

The abuse of discretion standard is the figurative death knell of this appeal, announcing there is virtually no chance of Dr. Brill to succeed in this appeal if any rational explanation exists as to why the fees and costs sought would be denied. As Taylor will show, not only do such rational explanations for the District Court's denial *merely exist*, but the explanations are also straight forward, compelling and plainly based on controlling Supreme Court precedent.

B. THE DISTRICT COURT PROPERLY USED ITS DISCRETION TO DENY DR. BRILL'S REQUEST FOR REPORTER/TRANSCRIPT AND TRAVEL EXPENSES

Dr. Brill's first four assignments of error concern his efforts to recover certain litigation costs. Dr. Brill's Opening Brief is fond of highlighting or bolding words such as "must" or "mandatory" in the Brief. However, the law has never been that a prevailing party gets a blank check to fill in whatever amount of costs they wish to charge to their adversary. Instead, as explained more below and to the District Court (Appx. Vol. II at 264-270), a litigant seeking costs as a prevailing party has always had to show that the costs sought were (1) reasonable in amount, (2) necessary to incur, (3) actually incurred, and (4) supported with justifying documentation. While the District Court denied many of Dr. Brill's requested costs, it did so because Dr. Brill had failed to satisfy these requirements.

As a primer on Supreme Court precedent on these issues, "[t]he determination of which expenses are allowable as costs is within the sound discretion of the trial court." *Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 565-66 (1993). However, "[o]nly reasonable costs may be awarded." *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 493, 117 P.3d 219, 227 (2005) (emphasis added). In other words, costs must be "reasonable, necessary, and actually incurred." *Cadle Co. v. Woods & Erickson, LLP*, 345 P.3d 1049, 1054 (Nev. 2015) (*citing Vill. Builders 96, L.P. v. U.S. Labs., Inc.*, 121 Nev. 261, 276, 112 P.3d 1082, 1092

(2005)). The district court has discretion "in determining the reasonableness of the amounts and the items of cost to be awarded." *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1050, 881 P.2d 638, 643 (1994).

"NRS § 18.020 and NRS § 18.050 give district courts wide, but not unlimited, discretion to award costs to prevailing parties." *Cadle Co.*, 345 P.3d at 1054. Parties may not simply estimate a reasonable amount of costs. *Gibellini v. Klindt*, 110 Nev. 1201, 1205-06, 885 P.2d 540, 543 (1994) (prevailing party could not simply estimate its costs as 4% of total billings but must show actual costs incurred). Instead, NRS § 18.110(1) requires "a memorandum [of costs]...verified by the oath of the party...stating that to the best of his or her knowledge and belief the items are correct, and that the costs have been necessarily incurred in the action or proceeding." Further, a party must "demonstrate how such [claimed costs] were necessary to and incurred in the present action." *Bobby Berosini, Ltd.*, 114 Nev. at 1352-53, 971 P.2d at 386. This requires some "justifying documentation" in addition to a memorandum of costs, the absence of which excludes an award for that claimed cost. *Cadle Co.*, 345 P.3d at 1054 (affirming a decision to deny costs for photocopies, runner service and depositions because no documentation support or invoices were provided).

NRS § 18.005 contains an itemized list of costs that are recoverable by the prevailing party. After setting forth several particular categories, such as costs for photocopies and costs for postage, it contains a catch-all or miscellaneous provision

allowing for "[a]ny other reasonable and necessary expense incurred in connection with the action." NRS § 18.005(17). However, while the court has discretion to award "reasonable and necessary" costs not otherwise specifically delineated by the statute, the Nevada Supreme Court has held that this discretion under the catch-all provision "should be sparingly exercised when considering whether or not to allow expenses not specifically allowed by statute and precedent" and that "[t]he trial court should exercise restraint because 'statutes permitting recovery of costs, being in derogation of the common law, must be strictly construed…'" *Bergmann*, 109 Nev. at 679, 856 P.2d at 565-66; *accord*, *Bobby Berosini, Ltd.*, 114 Nev. at 1352, 971 P.2d at 385; *see also Cadle Co.*, 345 P.3d at 1054 ("NRS 18.020 and NRS 18.050 give district courts wide, but not unlimited, discretion to award costs to prevailing parties. Costs awarded must be reasonable.").

As Taylor briefs these issues herein as she did to the District Court, a common theme will emerge that the *Verified Memorandum of Costs* (Appx. Vol. I at 9) filed by Dr. Brill is deficient as a matter of law because it repeatedly attaches the internal accounting records of the Defense law firm and insurer, but not the actual itemized invoices of third parties to enable the reasonableness and necessity of the charges to be assessed in accordance with governing Nevada legal precedent.

Turning now to the first assignment of error (Part B of the Opening Brief), Dr. Brill asserts that the District Court erred in refusing to allow certain

reporter/transcript and travel expenses. (Appx. Vol. I at 11, 13) However, the record (explained more below) shows that these expenses were not properly supported and thus properly denied by the District Court. *E.g., Sands Expo & Convention Ctr.*, 132 Nev. 1026, 385 P.3d 62 (affirming the district court's decision not to award requested expenses for "postage, filing fees, and legal research costs" because the expenses were not supported with appropriate documentation, i.e. invoices).

As for the claimed travel expenses for the out-of-state deposition of Plaintiff's expert Dr. Berke, (Appx. Vol. III at 507-508, 517-521) Taylor noted several cogent points in opposing these costs. (Appx. Vol. II at 268-269) She noted that many of the entries for these expenses were merely summary and not supported by any invoice or described with any particularity. For example, several entries are for "Travel to Deposition…" but did not detail what costs were incurred, did not attach any invoice or receipt from the actual provider and contained nothing so Taylor can assess whether the charges are reasonable, necessary and actually incurred. (Appx. Vol. II at 268-269) Admittedly, Dr. Brill did afterward try to attach some invoices to establish these costs, but asserted travel costs, such as for a rental vehicle to drive to California for a deposition and related gasoline were challenged as unnecessary. Taylor argued that in a modern time of video conference remote depositions during the COVID era, it was unnecessary for counsel to set this brief deposition as an in-person deposition causing additional travel expenses at all. (Appx. Vol. II at 268-

269) Dr. Brill sought parking expenses under travel costs but Taylor argued she was unaware of any case law involving "court parking" or "meal at Courthouse" to be a recoverable cost and that addition to no invoice or receipt for these expenses being provided (in other words, no justifying documentation), these expenses are just overhead and ordinary living costs. (Appx. Vol. I at 13, Appx. Vol. II at 269) For the meal expenses for $81.99 for three meals eaten during trial, there is no express category in NRS § 18.005 at all for meals. These seem to be slipped under the "travel" category inappropriately because they are not allowed under that category at all. Furthermore, while certain meals incurred during business purposes may be deductible from income for tax purposes with the IRS, this is not the legal standard for determining taxable costs in a lawsuit. The oft-argued point regarding meals—which the District Court appeared to agree with—is that defense counsel would have to eat regardless of whether a trial was ongoing, therefore Taylor should not have to pay for meals of the defense counsel. Moreover, no receipts or invoices for the meals was provided.

Dr. Brill mentions $16,260.75 in trial transcripts (daily transcripts). (Opening Brief at 8) While it is true that Taylor objected to this cost as unnecessary (Appx. Vol. II at 265-266), this was one of the line item costs wherein the District Court agreed with Dr. Brill. The District Court's written Order plainly awards these expenses for trial transcripts to Dr. Brill (Appx. Vol. III at 577) therefore Dr. Brill

was awarded virtually all of the transcript and reporter costs he sought. As to the additional $4,832.85 for transcript expenses for depositions during discovery which were not awarded, Taylor successfully argued to the District Court that Dr. Brill had provided no justifying documentation for these expenses. (Appx. Vol. II at 265-266) Notably, a pattern emerged where Dr. Brill would produce his attorney's statements listing costs, but not an actual invoice or justifying documentation from the provider. In this particular instance, that was a lack of an actual invoice from the court reporter.

Given the fact that Dr. Brill did not properly establish that the transcript, reporter, travel and meal costs sought by Dr. Brill and his counsel were reasonable, necessary and supported with justifying documentation, the District Court did not abuse its discretion in denying these costs under the *Bobby Berosini, Ltd.* case.

C. THE DISTRICT COURT PROPERLY USED ITS DISCRETION TO DENY DR. BRILL'S REQUEST FOR COPYING AND MEDICAL RECORD COSTS

Dr. Brill and WHASN sought an award of $2,667.63 in copying costs. (Appx. Vol. I at 11-12) As a general statement of the law, "reasonable" photocopying expenses can be taxable costs under NRS § 18.005(12) if they are properly supported. However, the Nevada Supreme Court in *Bobby Berosini, Ltd.* expressly found that a party seeking reimbursement of photocopying expenses must provide "sufficient justifying documentation beyond the date of each photocopy and the total photocopying charge." *Bobby Berosini, Ltd.*, 114 Nev. at 1353, 971 P.2d

at 386 (denying copying expenses for failure to fully itemize). In other words, a mere printout showing the date of the copies and the expense is insufficient. Instead, the exact purpose of the copies, number of pages and cost per page must be itemized to allow opposing counsel an opportunity to assess why the copies were made and whether they were reasonable, especially in this digital age.

Despite this clear case law, Dr. Brill's request for copying, printing and scanning charges did exactly what is forbidden under the *Bobby Berosini, Ltd.* case, i.e., Dr. Brill's documentation provided only a bare list of dates and charges. (Appx. Vol. I at 11-12) The *Verified Memorandum of Costs* did not list the purpose of the copying or the document copied to enable an assessment of the reasonableness of the costs. It did not itemize the number of pages so the copying cost per page can be assessed. The *Verified Memorandum of Costs* also did not include the actual invoice for copying from third party services, only the internal McBride Hall accounting (this was the law firm that represented Dr. Brill), which is summary and insufficient under the law. Entries such as "Copies (In House)" in the *Memorandum of Costs* (Appx. Vol. I at 11-12) are the exact type of entry the case law states should not be accepted by the district court. Taylor raised all of these issues in opposing these costs. (Appx. Vol. II at 266-267) While this may seem like a technicality or petty to question a few dollars of photocopies and require a detailed accounting and explanation for them, the Nevada Supreme Court has repeatedly found this important

when assessing requests for cost reimbursement and rightfully so. A bare date, client and total prevents the opposing party from assessing the nature of the copying expense, why the expenses were incurred and whether the expenses were reasonable, necessary and actually incurred. Therefore, the District Court did not abuse its discretion is denying these copying costs.

The District Court also denied costs for Dr. Brill to order copies of Taylor's medical records from several different providers. The *Verified Memorandum of Costs* had sought $3,399.95 in such expenses but provided no invoices. (Appx. Vol. I at 13-16) Because NRS § 18.005 does not expressly allow recovery of the costs of medical records as taxable costs, Dr. Brill relied on the catch-all provision of NRS 18.005(17), which the Nevada Supreme Court has held should be narrowly construed, to argue for reimbursement of these costs. Taylor opposed these medical record costs for several reasons. (Appx. Vol. II at 269) She argued that (1) Dr. Brill attached no actual invoices from the third-party medical providers or medical records services to support the expenses[2] and that (2) the costs should be denied as not reasonable and necessarily incurred in this particular case given that Taylor

[2] This is arguably quite important because NRS § 629.061(4) limits these costs at $0.60 per page and medical providers notoriously try to tack on administrative and other fees in violation of the statute. The entries in the *Verified Memorandum of Costs* indicates a third party service, Prodox, LLC was used which heavily implies that service charges and administrative fees beyond the $0.60 per page existed, but Dr. Brill did not allow inspection of the invoices to determine this.

voluntarily provided a copy of all relevant medical records to the defense but the defense then frivolously made re-requests to the same or similar providers and incurred additional charges needlessly. Indeed, as Taylor pointed out virtually none of the medical records for which Dr. Brill wished to be reimbursed were actually used or admitted into evidence during trial. No itemization of per page cost was given and several of the records appeared to be a general canvass of Taylor's medical care providers rather than records narrowly limited to the scope of her case. Therefore, Taylor had opposed these costs as not necessary and not properly supported with justifying documentation.

Given the fact that Dr. Brill did not properly establish that the copying and medical records costs sought were reasonable, necessary and supported with justifying documentation, the District Court did not abuse its discretion in denying these costs under the *Bobby Berosini, Ltd.* case.

D. THE DISTRICT COURT PROPERLY USED ITS DISCRETION TO DENY DR. BRILL'S REQUEST FOR MEDIATION AND ILLUSTRATION FEES

For his next assignment of error, Dr. Brill argues that the District Court erred by refusing to award him $7,850 in mediator fees as taxable costs. Taylor opposed this in writing in a Motion to Re-Tax Costs. (Appx. Vol. II at 270) Fees for mediators are not one of the enumerated reimbursable costs set forth in NRS § 18.005. As such, Dr. Brill sought reimbursement under a catch-all or miscellaneous provision

allowing for "[a]ny other reasonable and necessary expense incurred in connection with the action." NRS § 18.005(17). The Nevada Supreme Court has held that the catch-all provision "'should be sparingly exercised when considering whether or not to allow expenses not specifically allowed by statute and precedent'…[t]he trial court should exercise restraint because 'statutes permitting recovery of costs, being in derogation of the common law, must be strictly construed…'" *Bergmann*, 109 Nev. at 679, 856 P.2d at 566 (citing with approval out of state holdings).

Taylor argued that the District Court should not exercise its discretion and award those mediation costs because (1) no bill or invoice from the mediator had been provided, (2) it was Dr. Brill that desired to use a particular private mediator when the cost-free district court settlement conference program could have been used, and (3) Dr. Brill attended the mediation in bad faith by offering nothing to resolve the case, thus unnecessarily increasing everyone's costs. (Appx. Vol. II at 270) Stated differently, Taylor argued that under the circumstances the mediation fees were not reasonable, were not necessary to incur and had not been properly supported through "justifying documentation" by Dr. Brill. These points appear to well-justify the District Court's decision to deny these costs in its discretion, costs which are not even specifically allowed under NRS § 18.005.

Next, Dr. Brill sought $3,350 in fees for a medical illustrator to use as at trial. Taylor opposed this in writing in her *Motion to Re-Tax and Settle Costs*. (Appx. Vol.

II at 270) She argued that the illustrations (reproduced at Appx. Vol. III at 525-528) were basic stock-looking images that could be downloaded from various websites at little to no cost. They were not MRI or CT overlay images and were not an exact replica of Taylor's anatomy. Taylor noted that no actual invoice from the illustrator was provided. She also noted that none of the express categories under NRS § 18.005 allowed recovery of these expenses except for arguably the catch-all provision of NRS § 18.005(17) which is narrowly construed. (Appx. Vol. II at 270)

Given the fact that Dr. Brill did not properly establish that the mediation and medical illustration/exhibit costs sought were reasonable, necessary and supported with justifying documentation, the District Court did not abuse its discretion in denying these costs under the *Bobby Berosini, Ltd.* case.

E. THE DISTRICT COURT PROPERLY USED ITS DISCRETION TO DENY DR. BRILL'S REQUEST TO EXCEED THE PRESUMPTIVE CAP OF $1,500 FOR LITIGATION EXPERT WITNESS FEES

For his final assignment of error concerning his request for costs, Dr. Brill asserts that the District Court erred by refusing to award him more than $1,500 for the fees of his retained medical expert, Dr. McCarus. He sought an award of $16,955.70 in expert witness fees. (Appx. Vol. I at 12) Immediately this should strike this Court as a difficult assignment of error upon which Dr. Brill could prevail. There is a specific statute, NRS § 18.005(5) which contains a presumptive maximum of $1,500 per expert witness. Mathematically, Dr. Brill sought more than 10 times

the presumptive amount as compensation for his expert witness, meaning that failure to award that amount is likely not an abuse of discretion.

Regardless, the $1,500 is a presumptive cap only and the statute does state that the District Court can exercise discretion to award more inappropriate cases. In *Frazier v. Drake*, 131 Nev. 632, 634, 357 P.3d 365, 377-78 (Nev. Ct. App. 2015), the Nevada Court of Appeals set forth a list of factors the District Court should consider when assessing whether to award more than the presumptive cap of $1,500.[3] Neither Dr. Brill's *Verified Memorandum of Costs* (Appx. Vol. I at 12) nor his *Motion for Attorney's Fees and Costs* (Appx. Vol. II at 235-236) even cited to the *Frazier* case. Nevertheless, Taylor preemptively briefed the case in her *Motion to Re-Tax and Settle Costs* (Appx. Vol. II at 267-268) and had argued all of the following points under *Frazier*: (a) It was not necessary for Dr. Brill to hire a retained medical expert at all in this case because Dr. Bill (a physician) could have

[3] The non-exclusive factors set forth in *Frazier* are: (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; the fee actually charged to the party who retained the expert; (9) the fees traditionally charged by the expert on related matters; (10) comparable experts' fees charged in similar cases; and, (11) 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.

testified alone in his defense (and did so), (b) Dr. McCarus' opinions should have been excluded at trial because all he did was testify that intestinal perforation during hysteroscopy is a risk of the procedure (which is not even true) and therefore Dr. Brill wasn't liable, simply raising the improper assumption of risk defense, (c) No CV or fee schedule for Dr. McCarus has been provided, (d) No itemized bill for the expert's time had been provided so Taylor could not assess the reasonableness and necessity of the work, (e) No evidence of what the expert's hourly rate for seeing patients is, nor what his actual expenses to travel to Las Vegas for the trial were, nor what the comparable costs for a local expert would have been had been provided. None of this information was provided so the court cannot even begin to evaluate the request.

Notably, some judges might criticize the legislature and argue that the $1,500 cap in NRS § 18.005(5) is outdated and in need of increasing. The difficulty for Dr. Brill in this appeal, however, is again the abuse of discretion standard of review. Even if arguably a member of this Court might have awarded more than $1,500 for the expert, it is difficult to characterize how the issue was handled as arbitrary, capricious, lacking all law or reason, or a result that no reasonable judicial officer could reach. The District Court heard both sides at a fully briefed motion hearing. Each side made persuasive arguments and the District Court made a ruling based on the particular facts and case in front of it. The District Court did not abuse its

discretion in denying these costs under *Frazier* and NRS § 18.005(5).

F. THE DISTRICT COURT PROPERLY USED ITS DISCRETION TO DENY DR. BRILL'S REQUEST FOR ATTORNEY'S FEES

For the last assignment of error, Dr. Brill asserts that the District Court improperly denied his request for attorney's fees. Dr. Brill requested attorney's fees citing two legal bases. First, he sought fees under NRS § 18.010. (Appx. Vol. II at 236-239) Second, he sought fees pursuant to an offer of judgment for $0 under NRCP 68. (Appx. Vol. II at 239-243) Taylor fully briefed and cited numerous legal authorities in opposition to these requests. (Appx. Vol. III at 533-543) On appeal, Dr. Brill has not briefed the issues under NRS § 18.010, which regardless appeared to have been definitively decided against him by this Court in *Singer v. Chase Manhattan Bank*, 111 Nev. 289, 890 P.2d 1305 (1995) (finding that NRS § 18.010 pertaining to awards in cases where less than $20,000 was awarded inapplicable to cases where the Defendant prevailed but did not assert affirmative claims). Because Dr. Brill briefed only the issues involving the offer of judgment, any issues regarding application of NRS § 18.010 are waived for this appeal. *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (issues not raised in appellate briefing are waived).

1. Dr. Brill's offer of judgment for $0 was not made in good faith and therefore was properly not enforced by the District Court

Turning to the offer of judgment, the purpose of NRCP 68 "is to save time

and money for the court system, the parties and the taxpayers." *Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 382 (1999). The rule will "reward a party who makes a *reasonable* offer and punish the party who refuses to accept such an offer." *Id. citing Muije v. A North Las Vegas Cab Co.*, 106 Nev. 664, 667 (1990). "It is within the discretion of the trial court judge to allow attorney's fees pursuant to Rule 68" and such awards will not be overturned unless they are arbitrary or capricious. *Schouweiler v. Yancey* Co., 101 Nev. 827, 833 (1985).

While "the purpose of NRCP 68 is to encourage settlement, it is not to force plaintiffs unfairly to forego legitimate claims." *Beattie v. Thomas*, 99 Nev. 579, 588, 668 P.2d 268, 274 (1983). The District Court is well within its discretion to completely deny all fees sought under NRCP 68 when the offer was not a genuine, good faith attempt at settlement but rather a technical attempt to invoke the rule without making a reasonable offer. *Trustees of Carpenters for S. Nev. Health & Welfare Trust v. Better Bldg. Co.*, 101 Nev. 742, 710 P.2d 1379 (Nev. 1985) (declining to enforce an offer of judgment made before critical documents had been produced during discovery).

The District Court must consider several factors when ruling on a motion for attorney's fees. First, under *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P. 2d 31, 33 (Nev. 1969) the District Court must consider:

> (1) the qualities of the advocate: his ability, his 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; (4) the result: whether the attorney was successful and what benefits were derived.

Second, if the award of fees is sought pursuant to an offer of judgment, the Court must additionally consider the following factors from *Beattie v. Thomas* in order to determine whether the offer was made in good faith and whether it was grossly unreasonable or in bad faith for the offeree to reject it:

> In exercising its discretion, the trial court must evaluate the following factors: (1) whether plaintiff's claim was brought in good faith; (2) whether the offeror's offer of judgment was brought in good faith; (3) whether the offeree's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether fees sought by the offeror are reasonable and justified in amount.

These are commonly known as the *Brunzell* and *Beattie* factors. *E.g., Uniroyal Goodrich Tire Co. v. Mercer*, 890 P. 2d 785, 789 (Nev. 1995) (affirming factors set forth in *Beattie* and explaining them).

2. <u>The Nominal $0 "Offer of Judgment" was properly not Enforced under *Beattie*</u>

In 2004 doctors and their insurers launched the massive ballot initiative political campaign called KODIN where voters were told (falsely) that doctors were leaving Nevada due to "astronomical" insurance rates and thus tort reform must be enacted. After this campaign, jurors became very reluctant to award money to any patient suing a doctor, even in obvious cases such as Taylor's wherein her OB/GYN

burned or shoved a scope through her uterus and small bowel resulting severe injury to her. As a result, the local medical malpractice industry began serially abusing offers of judgment by serving nominal offers of judgment that were not truly designed to resolve cases. In nearly every litigated malpractice case today, defense attorneys do this (serve a token $0 or $1.00 offer of judgment) in order to try to harass and intimidate innocent victims of medical malpractice by threatening them into abandoning potentially meritorious cases for nothing. In this case, on June 29, 2021 Dr. Brill served a $0 offer of judgment on Taylor. (Appx. Vol. II at 246) Dr. Brill's offer was literally to pay $0. He never offered to pay any amount of money, even aside from the offer of judgment despite severely injuring his patient and having no real defense other than to plead that sometimes these things (putting a massive hole through a patient's uterus and small intestine during a routine procedure) just happen.

The purpose of NRCP 68 was not to abrogate the American Rule of attorney's fees and was not to not to "force plaintiffs unfairly to forego legitimate claims." *Beattie*, 99 Nev. at 588, 668 P.2d at 274. When defendants serve a $0 or other nominal or token offer of judgment, the defendants are not actually assessing their risks and potential exposure at trial but rather they are abusing the legal system by trying to claim there is a one-way exception to the American Rule of attorney's fees that automatically allows attorney's fees with a defense verdict but not with a

plaintiff verdict. These $0 or nominal offers of judgment do nothing to encourage settlement, which is the purpose of NRCP 68. Instead, they are solely about harassment and intimidation of the claimant.

In states which have offer of judgment rules, courts skeptically view nominal offers of judgment and rarely enforce them because they do not actually represent a good faith offer. *Wear v. Calderon*, 121 Cal. App. 3d 818, 821, 175 Cal. Rptr. 566, 568 (1981) (rejecting a $1 offer because "[n]ormally, therefore, a token or nominal offer will not satisfy this good faith requirement); *Pineda v. L.A. Turf Club, Inc.*, 112 Cal. App. 3d 53, 63, 169 Cal. Rptr. 66, 72 (1980) (declining to enforce a $2,500 offer of judgment in a wrongful death action due to the "enormous exposure" the defense had at trial had liability been found); *Eagleman v. Eagleman*, 673 So. 2d 946, 948 (Fla. Dist. Ct. App. 1996) (not enforcing a nominal $100 offer of judgment because it "was not based on any reasonable foundation, but was made merely to lay the predicate for a future award of attorney's fees and costs"); *Warr v. Williamson*, 359 Ark. 234, 239, 195 S.W.3d 903, 907 (2004) (stating that a $1 offer of judgment is not a bona fide offer but rather an attempt to abuse the offer of judgment rules on technical grounds); *Anderson v. Alyeska Pipeline Serv. Co.*, 234 P.3d 1282, 1289 (Alaska 2010) (refusing to enforce a $10 offer of judgment because the defendant could not have believed the plaintiff would "accept ten dollars to settle her case -- or that the offer would even start a dialogue that could lead to settlement"). *Century*

21 Today, Inc. v. Tarrant, No. 240696, 2003 Mich. App. LEXIS 2762, at *2 (Ct. App. Oct. 28, 2003) (rejecting enforcement of a $1 offer of judgment because "it was de minimus [sic] and made with the intent to tack attorney fees to the costs in the event of success and not with the intent to actually settle.").

The case of *Beal v. McGuire*, 216 P.3d 1154, 1178 (Alaska 2009) is particularly instructive on this point. In *Beal*, the Alaska Supreme Court actually adopted the Nevada Supreme Court's decision in *Beattie* and found that a $1 offer of judgment was unenforceable. The Alaska Supreme Court gave a seething analysis of the abuse of these nominal offers. It held that "[e]ven though a purpose of Rule 68 is to encourage settlement and avoid protracted litigation, offers of judgment made without any chance or expectation of eliciting acceptance or negotiation do not accomplish the purposes behind the rule." Such nominal offers "were nothing more than tactical demands that plaintiffs dismiss their claims to avoid exposure to Rule 68 fees awards" and "these offers could not be considered valid offers of settlement or compromise, or valid attempts to encourage negotiation." Of course, Dr. Brill's offer exemplifies the *exact* type of abusive offer that court was discussing.

A $0 offer of judgment is likely never enforceable absent some sort of showing that the plaintiff's claim was objectively frivolous or plainly subject to an absolute defense, such as complete immunity from suit or prior settlement and release. In this case, Taylor argued that Dr. Brill conceded essentially every fact of

the case. (Appx. Vol. III at 540) He conceded he caused the perforation to Taylor's uterus and small intestine. He conceded he is required to use his skill training and experience to avoid such perforations. He conceded Taylor was seriously injured. He did not contest any of Taylor's after-care or assert that the $200,000+ in medical expenses she incurred was not usual or customary. His sole defense—argued at every turn by his counsel—was that he had deemed intestinal perforation to be a "risk" of the procedure and, therefore, he was could not be held liable for it because Taylor was made aware of the risk and consented to the procedure. This defense is universally barred in medical malpractice actions but was allowed by the trial judge for this action.

Respectfully, Dr. Brill's $0 offer of judgment (which actually would have been a negative offer since it would have required Taylor to absorb thousands of dollars in litigation expenses and hundreds of thousands of dollars in medical expenses on her own) was not made in good faith and could not support an award under NRCP 68. The District Court properly denied attorney's fees pursuant to the offer of judgment.

3. Taylor's Claims were Brought in Good Faith and Taylor's Decision to Proceed to Trial was not Grossly Unreasonable

Further under *Beattie*, Taylor argued that her claims were brought in good faith and it was not grossly unreasonable for her to proceed to trial. (Appx. Vol. III at 540-542) Taylor argued that Dr. Brill admitted to essentially every fact and every

piece of damages in the case against him and that he had simply been allowed to present an improper assumption to risk defense to excuse his malpractice during trial. Even Dr. Brill's own expert, Taylor argued, conceded that had the injury been caused by a burn it would be below the standard of care, and the expert never even tried to explain how such a serious perforation through the uterus and into the small bowel could have occurred under full visualization with Dr. Brill being careful. (Appx. Vol. III at 540) Had Dr. Brill not been allowed to present an improper defense, he would have had no defense at all. By no stretch of the imagination could Taylor's claims have been deemed frivolous. They were filed by competent counsel who reviewed the facts with an OB/GYN expert prior to filing. (Appx. Vol. III at 540, Supp. Appx. Vol. IV at 608-614)

Nor was the timing of the rejection unreasonable Taylor argued. (Appx. Vol. III at 541) The $0 offer of judgment was made on June 29, 2021 which was before the close of discovery, prior to the depositions of both parties' retained experts, prior to all motion in limine rulings and prior to the Court's devasting ruling on the Motion for Reconsideration made on October 7, 2021 (which all but assured an appeal in this case) that the District Court would allow the assumption of risk defense to be presented at trial. The decision to reject the $0 also had to be made before the District Court, during trial, refused to allow Taylor to present over $200,000 in medical expenses…that Dr. Brill and his expert did not even contest as unreasonable or

unrelated to the incident. At the time Taylor rejected the $0, Dr. Brill essentially had no genuine defense to liability or the $200,000+ in special damages. Total exposure to Dr. Brill exceeded well over $550,000 had the jury found liability and awarded all economic and non-economic damages, litigation costs and interest to Taylor. Under these circumstances, Taylor argued it was not unreasonable for her to have rejected a $0 offer of judgment and instead proceed to trial.

Dr. Brill's only argument on this issue was that Taylor was aware after settlements with other providers that other Defendants would be allowed on the verdict form at trial. (Appx. Vol. II at 241) The parties heavily disputed how *Piroozi v. Eighth Judicial Dist. Court*, 131 Nev. 1004, 363 P.3d 1168 (2015) would apply in this case and the motion in limine on that issue was not heard until September 27, 2021, several months after the $0 offer was made. (Appx. Vol. III at 541) Moreover, neither Dr. Brill nor his retained expert blamed *any* other providers and Taylor's expert only felt the other providers bore a small amount of liability and damages for failing to catch the injury that Dr. Brill caused sooner. The bulk of the fault was always placed on Dr. Brill. Two of the settling entities paid amounts to settle that were not nominal in amount, making it all the more reasonable that Taylor would proceed against Dr. Brill, who by any account would have far more liability than those providers. Dr. Brill's additional argument that Dr. Brill told her he was unable to finish the surgery because "it was complicated" bears on nothing. (Appx. Vol. II

at 242) Taylor argued that the testimony from Dr. Brill and Taylor was clear at trial that Dr. Brill had not told Taylor the perforations occurred (either one) immediately following the procedure. Dr. Brill also argued that Taylor had "unusual anatomy" but both Dr. Brill and his own expert agreed that hysteroscopy can be safely performed on a patient with retroverted and bicornuate uterus. Indeed, statistics show as many as 1 out of 5 women have a bicornuate uterus and Dr. Brill admitted he knew of these conditions *prior* to the procedure. (Appx. Vol. III at 542)

Taylor had even argued that prior to trial her counsel conducted two separate focus groups with virtually every juror awarding hundreds of thousands of dollars against Dr. Brill. Jury verdict and settlement research showed even a seven-figure settlement result from a virtually identical case. (Appx. Vol. III at 542) The difference in this case, Taylor argued, was that the District Court erred and allowed Dr. Brill to present a universally barred assumption of risk defense and wrongly refused to allow Taylor to present $200,000 in medical special damages so the severity of her injuries was hidden from the jury. Taylor's decision to reject a $0 offer of judgment was not grossly unreasonable given all available factors.

4. Dr. Brill's Briefing of the *Brunzell* factors was Wholly Inadequate

Even aside from the obvious problems a $0 offer of judgment presented under *Beattie* and its "good faith" requirement, Dr. Brill barely briefed any of the *Brunzell* factors which are also required to support any award of attorney's fees. (Appx. Vol.

II at 242). The original motion for attorney's fees contained no affidavits of counsel and basically just a summary line that "Defendants [Dr. Brill] were represented by duly licensed and experienced attorneys in good standing in the Nevada legal community." (Appx. Vol. II at 242) Taylor argued that Dr. Brill failed to adequately support his fee request under the *Brunzell* case, including but not limited to: (1) no itemized accounting of time incurred and actually billed to and paid by the client is given (defense counsel are insurance-retained and would clearly have this), (2) only an unsupported, global figure of fees allegedly incurred is given, (3) because no itemized statement of time spent by task is given, Taylor cannot assess or challenge the reasonableness of the hourly rate of the fees, including the fees per timekeeper and hourly rate per timekeeper, (4) because no itemized statement is given, Taylor cannot assess or challenge the reasonableness or necessity of the work performed, (5) because no itemized statement is given, Taylor cannot assess what work was performed *after* the $0 offer of judgment was served, (6) no affidavits from the attorneys involved attesting to their skill, training and experience were given, and (7) no analysis of hourly rates for insurance-retained medical malpractice defense attorneys and similar awards in the community were given. (Appx. Vol. III at 542-543) Even after Taylor raised these points in her opposition to Dr. Brill's fee request, Dr. Brill's reply cured none of these deficiencies and continued to make only cursory reference to *Bruznell* and extremely generalized statements such as "Defense

counsel in this case are well-respected, experienced attorneys who specialize in handling such sophisticated cases," which does little to directly address the *Brunzell* issues. (Appx. Vol. III at 557-558) The District Court could not fairly award any fees with a fee motion so poorly supported under *Brunzell*.

The only minimal effort Dr. Brill gave to comply with *Brunzell* appeared to be conclusory statements on pages 12 and 13 of his *Motion for Attorney's Fees and Costs* that Dr. Brill was "represented by duly licensed and experienced attorneys…" and that "the case involved depositions of several witnesses, consultation with a medical expert witness, multiple sets of written discovery requests, and review of voluminous medical records and other data, all of which culminated in a two-week jury trial." (Appx. Vol. II at 242) These conclusory statements offered little to comply with *Brunzell* and did not address the issues raised above. Indeed, many of the details about the defense counsel that tried this case for Dr. Brill—Ms. Hall and Mr. McBride—were stated on page 20 *of the Opening Brief on appeal* but were not stated to the District Court at all. Dr. Bill's motion also argued that Dr. Brill was in good standing in the medical community (Appx. Vol. II at 242), but this statement is irrelevant under *Brunzell*. Dr. Brill is not entitled to attorney's fees simply because he thinks he is a good guy or an important doctor in the community, this speaks to none of the *Beattie* and *Brunzell* factors.

5. The District Court did not err in refusing to award Dr. Brill attorney's fees under NRCP 68

When these issues were adjudicated in the lower court, the District Court was presented with a case where Dr. Brill made a highly suspect $0 offer of judgment and tried to enforce it. Taylor opposed this request and raised several convincing legal points as to why the $0 offer of judgment was not made in good faith under *Beattie*, why her decision to proceed to trial was not grossly unreasonable under *Beattie*, and why the motion had not been properly supported under *Brunzell*. The District Court then agreed with Taylor's position and denied the motion. The section of the May 12, 2022 Order addressing the attorney fees issues reads as follows (Appx. Vol. III at 583):

> **THE COURT FINDS** that attorney's fees are not recoverable under NRS § 18.010(2)(b) because this action was not filed "without reasonable ground or to harass the prevailing party." *Duff v. Foster*, 110 Nev. 1306, 1308, 885 P.2d 589, 591 (1994). Attorney's fees are also not recoverable under NRS § 18.010(2)(a) because the Defendants did not recover on any of their own claims. *Key Bank v. Donnels*, 106 Nev. 49, 53, 787 P.2d 382, 385 (1990) ("when attorney's fees are based on the provisions in [NRS 18.010(2)] subsection (a), we have held that an award of a money judgment is a prerequisite to an award of attorney's fees.").
>
> **THE COURT FINDS** that attorney's fees are not recoverable under NRCP 68 either. On June 29, 2021, Defendants served an offer of judgment for a mutual waiver of attorneys' fees and costs. Defense attorneys' fees incurred as of the date of service of the Offer were $41,552.25 and costs were $19,200.53. This Offer expired on July 13, 2021. The Court has reviewed the parties' arguments and the factors under *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (Nev. 1983) and *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P. 2d 31, 33

(Nev. 1969). The Court finds that Defendants' offer of judgment for a mutual waiver of attorneys' fee and costs does not entitle Defendants to attorneys' fees.

Dr. Brill seems to argue that there was error as to the attorney's fees issue because the District Court did not thoroughly address the issue at oral argument and/or did not make more detailed findings in its written order denying the fee. However, these arguments should not be well-taken by the Court for several reasons. First, unlike NRCP 56 when granting a summary judgment, there is no legal requirement that the District Court enter specific findings of fact and conclusions of law when denying a motion for attorney's fees. Second, there is no legal requirement that the District Court must verbally address all points and counterpoints of the parties already set forth in briefing at a motion's oral argument; indeed, there is no requirement of oral argument for a motion at all. Third, the parties submitted competing orders to the court for resolution of the attorney's fee motion. (Supp. Appx. Vol. IV at 615-619) Taylor's proposed order contained a more detailed explanation on the attorney's fees issue (Supp. Appx. Vol. IV at 616), but was opposed by Dr. Brill who submitted a more general order with less explanation. (Appx. Vol. III at 583-584) It seems somehow improper that Dr. Brill opposed the more detailed order submitted by Taylor and then turns around on appeal and argues the District Court erred by not explaining its decision well enough in its written Order. Dr. Brill should not be able to benefit from circumstances of his own making.

Fourth, Dr. Brill's counsel did specifically ask during oral argument whether the District Court's denial of attorney's fees also applied to the post-offer attorney fees and the District Court stated it did. The exchange went as follows (Appx. Vol. III at 570-571):

> DR. BRILL'S COUNSEL: And just so the ruling is clear, the request for attorneys' fees under the post-Offer fees, that is denied as well?
>
> THE COURT: Right. At this point. I think it's an interesting issue.
>
> DR. BRILL'S COUNSEL: Okay. Thank you, Your Honor.
>
> THE COURT: I didn't see it in the 12 years I was on the Court. I don't think I ever saw it in the briefs.[4] So it may be something you want to consider.

Taylor's counsel took this exchange to mean that the District Court had considered but denied the post-offer of judgment fees and the "interesting issue" the court was referring to was whether a $0 offer of judgment could *ever* be enforced as a bona fide, good faith offer (an issue the parties briefed extensively), with the District Court judge commenting that he had never seen such an offer of judgment enforced during his lengthy time on the bench. Therefore, there is an indication on the record that the District Court thoughtfully considered the enforceability of the offer of judgment and declined to enforce it, even if a complete dissertation on the law was not stated

[4] The legal issue of whether a $0 offer of judgment could be enforced was plainly raised by Dr. Brill and Taylor in their briefings. Here "the briefs" was referring to briefs in other matters Judge Cherry had seen in his time on the Court. Apparently he had not seen either an opinion from the Supreme Court on the issue or a case where the parties briefed the issues.

during the brief oral argument.

Also important is to remember that the District Court's decision is reviewed under the **abuse of discretion** standard. Even if arguably a member of this appellate court might have ruled differently, it is difficult to characterize how the motions were handled as arbitrary, capricious, lacking all law or reason, or a result that no reasonable judicial officer could reach. Therefore, the District Court did not abuse its discretion when it denied Dr. Brill's request for attorney's fees under Nevada's offer of judgment rules.

V. CONCLUSION

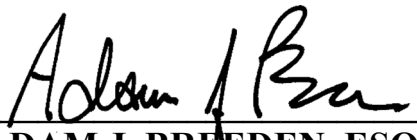
The abuse of discretion standard of review is the figurative death knell of this appeal. Dr. Brill and Taylor fully briefed and argued debatable legal positions and presented them professionally at an oral argument motion hearing. The District Court resolved the dispute, some issues in Dr. Brill's favor and others not. It does not seem hard to understand why a $0 settlement offer of judgment would have not been deemed "in good faith" and enforced. While Dr. Brill tries to characterize the costs issues as the District Court denying so-called "mandatory" items of costs, the reality is that Taylor successfully challenged many of the costs as not being reasonable, necessary and/or properly supported with justifying documents per clear Nevada Supreme Court precedent.

Therefore, Taylor submits that the District Court did not err in adjudicating

the post-trial litigation costs and attorney's fees issues and urges this Court to affirm the District Court on those rulings.

Respectfully submitted this 2nd day of November, 2022.

BREEDEN & ASSOCIATES, PLLC



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CERTIFICATION PURSUANT TO NRAP 28.2

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word, 2020 edition in 14-point Times New Roman font; or

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains approximately 11,157 words [this is a word count of the entire document and does not even remove words for the caption or other sections that do not count toward the word limitation]; or

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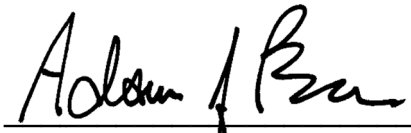
3. Finally, I hereby certify that I have read this appellate brief, and to the best

of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 2nd day of November, 2022.

BREEDEN & ASSOCIATES, PLLC



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of November 2022, I served a copy of the foregoing legal document entitled **RESPONDENT'S ANSWERING BRIEF** via the method indicated below:

X	Pursuant to NRAP 25(c), by electronically serving all counsel and e-mails registered to this matter on the Supreme Court Electronic Filing System.
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An Attorney or Employee of the firm:

/s/ Adam J. Breeden
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