**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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| KEITH BRILL, M.D., FACOG, FACS, AN INDIVIDUAL; AND WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA-MARTIN PLLC, A NEVADA PROFESSIONAL LIMITED LIABILITY COMPANY,<br><br>Appellants,<br><br>vs.<br><br>KIMBERLY TAYLOR, AN INDIVIDUAL,<br><br>Respondent. | Supreme Court Case No.: 84492/84881<br><br>Dist. Court Case No.: A-17-3472 |



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

ROBERT C. McBRIDE, ESQ.
Nevada Bar No.: 007082
HEATHER S. HALL, ESQ.
Nevada Bar No.: 010608
McBRIDE HALL
8329 W. Sunset Road, Suite 260
Las Vegas, Nevada 89113
Phone: (702) 792-5855
Fax: (702) 796-5855
Attorneys for Appellants
Keith Brill, M.D. and Women's Health
Associates of Southern Nevada-Martin, PLLC

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## INTRODUCTION

This appeal is limited to the post-judgment orders that were issued. Specifically, whether the District Court erred by refusing to award Defendants mandatory costs pursuant to NRS 18.005 and NRS 18.020 and denying Defendants post-Offer of Judgment attorney's fees and costs. Respondent acknowledges this appeal is timely. *See* Answering Brief, page 6. Respondent does not challenge the timeliness of the Verified Memorandum of Costs on November 19, 2021 which included a statement of counsel compliant with NRS 18.110(1). (A. V.I, APPX 000017). Respondent also does not challenge the timeliness of Defendants' Motion for Attorneys' Fees and Costs on November 22, 2021. (A. V.II, APPX 000231 – APPX 000261). Instead, Respondent attempts to reargue the underlying verdict.

What Respondent presents as a "Statement of Facts" simply reargues Respondent's position that Dr. Brill was negligent. This position was unequivocally rejected by the jury when it returned a unanimous defense verdict on October 19, 2021. The jury's verdict in this case was the result of careful consideration of the substantial evidence presented at trial. In this appeal about post-judgment orders, it is not appropriate for Respondent to reargue the case and question the jury's verdict.

The only undisputed facts germane to this particular appeal are that Defendants served a valid Offer of Judgment on June 29, 2021 and the jury

unanimously found in favor of the defense at trial. While Respondent repeatedly refers to the Offer of Judgment as a "zero dollar offer of judgment", Retired Justice Cherry did not make such a finding. In fact, he never made any comment or findings related to Defendants' Offer of Judgment at the hearing he conducted, which is one of the grounds for Defendants' challenge of his Order. Defendants' Offer of Judgment served on June 29, 2021, offered significant consideration and was a valid offer invoking the penalties for failing to prevail at trial. Defendants offered to waive $41,522.25 in attorney's fees and $19,200.53 in litigation costs incurred as of the date of service, which Plaintiff rejected. This supported an award under NRCP 68.

Although the issue of Defendants' entitlement to post-offer of judgment attorney's fees and costs pursuant to NRCP 68(f)(2) was extensively briefed and argued at the hearing, Senior Judge Michael Cherry seemingly disregarded or overlooked this issue in ruling on Defendants' Motion for Attorneys' Fees and Costs and Plaintiff's Motion to Re-Tax and Settle Costs at the January 18, 2022 hearing. (A. V.III, APPX 000561 – APPX 000572) and (A. V.III, APPX 000563 – APPX 000566). Despite this, Senior Judge Cherry's ruling regarding the request for attorneys' fees was 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).

The District Court also refused to award attorney's fees pursuant to the timely, valid Offer of Judgment without even an acknowledgement of the Offer. When Defense counsel asked for clarification, Senior Judge Cherry stated that he had not seen the issue before but provided no additional information as to why the request for post-offer of judgment attorneys' fees was denied:

MS. HALL: 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.

MS. HALL: 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. So it may be something you want to consider.

Thank you, both. You're excellent litigators, both of you. Very good briefs and very good argument. It was a tough case for me coming in like this. Have a good day. Stay safe.

(A. V.III, APPX 000570 – 571).

Following this hearing, competing orders on the denial of Defendants' Motion for Attorneys' Fees were submitted. While Respondent would like this Court to believe that Defendants intentionally omitted "the more detailed, explanatory language", what actually occurred is that Defense counsel refused to sign an order that included findings that were never made by Senior Judge Cherry. *See* Answering Brief, page 5. The order proposed by Plaintiff included the following language: "Defendants served a $0 offer of judgment for a waiver of costs prior to trial" and "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." (A. V.IV, APPX 000616). Neither of these findings were ever made by Senior Judge Cherry. Respondent acknowledges as much stating, "Judge Cherry

commented on some arguments but for the most part announced a decision in a summary manner." *See* Answering Brief, page 4.

Further demonstrating that there was no substantive finding that Defendants' Offer of judgment was not a bona fide settlement offer made in good faith, and Plaintiff's rejection of the Offer in favor of proceeding to trial was not grossly unreasonable or in bad faith is the fact that Respondent does not cite to anywhere in the record that such findings were ever made. This is simply because it does not exist.

Respondent insinuates that Hon. Monica Trujillo did something untoward by signing the Defense proposed Order when it is clear that the Order prepared and proposed by Respondent included findings that were never made by Senior Judge Cherry. This is consistent with Respondent's pattern of making inflammatory, unsupported accusations of bias against our trial judge simply because Respondent is unsatisfied with the outcome. Despite Respondent's argument to the contrary, it is not the wording of the Order that warrants reversal. It is the ruling itself. Submitting an accurate Order limited to the Court's actual findings does not constitute a waiver to challenging the ruling memorialized therein.

There were also competing orders submitted on Plaintiff's Motion to Re-Tax and Settle Costs. The Court specifically ruled that transcript costs would be awarded stating: "I'm going to -- I'm ready to rule on this. I'm -- I'll grant the Motion in this

respect. I'm going to give the transcript costs." (A. V.III, APPX 000569). Because of this ruling, Defendants proposed an Order that included the following award of costs:

> "All Reporters' Fees for depositions, hearings and trial as set forth in Defendants' verified memorandum of costs at page 3, totaling $21,093.60 which includes the amount sought for daily trial transcripts;" (A. V.V, APPX 000621).

The competing orders were submitted to the Department on or around February 16, 2022. (A. V.V, APPX 000623). This time, another Senior Judge, Joseph Bonaventure was covering Department 3 and signed the order submitted by Plaintiff that specifically omitted the award of deposition transcript fees totaling $4,832.85. It is Appellants' position that the Order should have included the deposition transcript fees.

As is apparent from the record, Defendants did not estimate any of the costs requested. The costs are detailed down the cent in compliance with Nevada law. (A. V.I, APPX 000017). Defendants specifically sought $60,167.20 in recoverable, documented litigation costs. *Id.* Respondent's primary argument is that the fees and costs were not properly documented and supported with third-party invoices. Third-party invoices are not required to award any of the requested fees and costs.

Defendants provided the invoices from the law firm detailing the costs and fees requested in the Verified Memorandum of Costs.

Respondent's Answering Brief contains the following factual misstatement: "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)". *See* Answering Brief, page 31. In truth, the Affidavit of Heather S. Hall, Esq. in Support of Motion for Attorneys' Fees and Costs was included at pages 3 and 4 of the Motion. (A. V.II, APPX 000233 – APPX 000234). The Motion and the Reply in Support both analyzed the *Brunzell* factors and demonstrated why the attorneys' fees and costs requested were reasonable and justified under these factors. (A. V.II, APPX 000242 – APPX 000243) (A. V.II, APPX 000557 – APPX 000558).

The District Court's decision to deny 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 charges was an abuse of discretion. There is no rationale for denying mandatory litigation costs that were thoroughly supported. The complexity of the medical issues in this case justified an award of expert costs in excess of $1,500 and the decision limiting the expert fees

for Board-certified OB/GYN, Steven McCarus, M.D. was also an abuse of discretion.

Defendants served a valid Offer of Judgment to Plaintiff on June 29, 2021, which detailed that Defendants had incurred a total of $41,522.25 in attorney's fees and a total of $19,200.53 in litigation costs. (A. V.II, APPX 000246 – APPX 000248). In exchange for a dismissal with prejudice, the Offer of Judgment offered to waive these substantial attorneys' fees and costs. This Offer was rejected by Plaintiff. Pursuant to the valid Offer of Judgment served on behalf of Defendants, the District Court erred in refusing to award post-Offer of Judgment attorney's fees to the defense totaling $86,148.75.

## IV.

## LEGAL ARGUMENT

### A. UNDER NRS 18.020(3) AND NRS 18.005, THE DISTRICT COURT WAS REQUIRED TO AWARD DEFENDANTS REPORTER AND TRANSCRIPT COSTS AND TRAVEL EXPENSES.

Defendants were erroneously denied certain mandatory costs and post-offer of judgment attorney's fees and costs. Defendants sought litigation costs of $60,167.20 which were just a fraction of the total litigation costs incurred in this case from April 2018 to the conclusion of trial on October 19, 2021. Respondent's primary argument is that the fees and costs were not properly documented and supported with third-party invoices. Third-party invoices are not required to award

any of the requested fees and costs. While Respondent claims the costs that the District Court denied Appellants were not sufficiently documented or demonstrated to be reasonable, Appellants provided ample invoices supporting the costs incurred. Documentation supporting each category of costs was set forth in the 221-page Verified Memorandum of Costs. APPX 000009 – APPX 000230

Expert involvement was appropriately supported in the Motion for Attorneys' Fees and Costs and Opposition to Plaintiff's Motion to Re-Tax and Settle Costs. The grounds for awarding attorneys' fees and costs were further argued at the January 18, 2022 hearing. Yet, the appropriately supported fees and costs along with the legal basis to award them was disregarded.

Defendants requested $4,832.85 for reporters' fees which included a transcript of the motion in limine hearing in addition to the costs associated with five depositions completed during discovery. As with each category of costs sought, Respondent claims that the requested costs for reporter's fees/depositions was not supported by sufficient documentation. This is not correct. In the Verified Memorandum of Costs submitted on behalf of Defendants, each deposition transcript and corresponding third-party invoice was detailed:

| | | |
|---|---|---|
| 4/22/2019 | Vertitext, LLC (Invoice #CA374378), Transcript of Deposition of Kimberly Taylor | $1,012.70 |
| 12/4/2020 | Magna Legal Services (Invoice #644078), Deposition Transcript of Szu Yeh, M.D. | $422.20 |

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| 4/30/2021 | Western Reporting Services, Inc. (Invoice #46378), Deposition Transcript of Keith Brill, M.D. | $701.40 |
| 7/27/2021 | Litigation Services (Invoice #1480396), Deposition Transcript of David Berke, D.O. | $820.52 |
| 8/10/2021 | Western Reporting Services, Inc. (Invoice #56745), Deposition Transcript of Steven McCarus, M.D. | $245.25 |
| 8/22/2021 | Litigation Services (Invoice #1485963), Zoom tech for Deposition of David Berke, D.O. | $420.00 |
| 9/29/2021 | Certified legal Videography (Invoice #21671), Video of the Deposition of Keith Brill, M.D. | $224.40 |
| 10/1/2021 | Tracy Gegenheimer (Invoice #NV10012021),Transcript of September 27, 2021 motion in limine hearing | $246.41 |
| 10/1/2021 | Court Recording Fee (Invoice #26467) | $40.00 |
| 10/4/2021 | TheRecordXchange, Daily Trial Transcripts | $16,260.75 |
| 10/31/2021 | Clark County Treasurer, Transcriber Fee | $700.00 |

(A. V.II, APPX 000011)

Respondent does not refute that 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", nor is there any dispute that Ms. Taylor sought to recover more than $2,500. Accordingly, the District Court should have awarded the mandatory costs associated with "Reporters' fees for depositions, including a reporter's fee for one copy of each deposition". *See* NRS 18.005(2).

Even depositions not used at trial may be included in taxable costs under NRS 18.005. *Jones v. Viking Freight Sys.*, 101 Nev. 275, 701 P.2d 745, 1985 Nev. LEXIS

417 (Nev. 1985). In this trial, all 5 depositions for which costs were requested were used at trial. Dr. Yeh, Ms. Taylor, Dr. Brill, Dr. Berke, and Dr. McCarus's depositions were used in their trial examinations. The District Court's decision to deny these mandatory costs was an abuse of discretion. No explanation was given for the decision.

Similarly, "reasonable costs for travel and lodging incurred taking depositions and conducting discovery" are mandatory. *See* NRS 18.005 (15). These costs are not 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)).

Respondent's argument that the fees and costs were not properly documented with third-party invoices is not supported by any authority. That is because third-party invoices are not required to award any of the requested fees and costs. Defendants provided the invoices from the law firm detailing the costs and fees requested in the Verified Memorandum of Costs. Additionally, 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). Respondent acknowledges as much, stating: "Admittedly, Dr. Brill did afterward try to attach some invoices to establish these costs . . ." *See* Answering Brief, page 11. Defendants did not "try" to attach additional documentation. Defendants actually did attach additional documentation of these requested costs even though not required. (A. V.III, APPX 000516 –APPX 000521). Further, it was noted in the Opposition to the Motion to Re-Tax that "The documentation provided in the Verified Memorandum of Costs is more than sufficient and the inclusion of additional support in this Opposition is not a concession that the documentation was deficient in any regard." (A. V.III, APPX 000514).

As for Respondent's argument that it was unnecessary for Defense counsel to conduct the deposition of opposing expert, David Berke, D.O. in person in Riverside, California, this argument is without merit. The lack of merit is underscored by the fact that Respondent's counsel, Mr. Breeden, also deemed it necessary to attend Dr. Berke's deposition in-person. Mr. Breeden also drove from Las Vegas, Nevada to Riverside, California and attended the deposition of Dr. Berke in-person when a Zoom link was offered to him.

The travel expenses Respondent disputes are for $429.08 related to completing Dr. Berke's deposition. They were necessarily incurred in defending

against this matter and properly supported. Defendants provided credit card receipts showing that the cost of $93.59 was incurred on July 19, 2021 for a rental car to drive to the deposition of Plaintiff's expert Dr. Berke. (A. V.III, APPX 000516 – APPX 000521). The remaining two charges for this deposition – $27.09 and $32.41 – were for gas to drive to and from the deposition, as discussed in the briefing to the District Court. *Id.* The decision to deny these mandatory costs was improper. *See* NRS 18.005 (15).

The costs for parking and 3 meals eaten during trial were also detailed in the Verified Memorandum of Costs. As argued to the District Court, these costs were appropriate under NRS 18.005(2) and under NRS 18.005(17), which allows the District Court to award "any other reasonable and necessary expense incurred in connection with the action . . ." Each and every travel expense included in Defendants' Verified Memorandum of Costs was necessarily incurred and should have been awarded.

### B. COPYING AND MEDICAL RECORDS COSTS WERE SUFFICIENTLY DOCUMENTED AND SHOULD HAVE BEEN AWARDED.

Defendants also sought costs related to photocopies and obtaining medical records, totaling $2,667.63 for approximately three years of litigation. (A. A.VI, APPX 000012). Defendants also sought $3,399.95 incurred in obtaining Ms. Taylor's medical records. The necessity of medical records to defend against a

patient's claim that she was provided negligent medical care and sustained injuries as a result is obvious. NRS 18.005(12) does not limit the type of photocopies. Fees and copies associated with obtaining copies of medical records fits this statutory allowance.

Respondent argues that photocopies were denied because insufficient detail was provided. *See* Answering Brief, pages 13 – 14. The photocopies made within Defense counsel's law firm are included on the invoices that identify the month of the charges, number of copies, the total amount of charges per month and that this was billed to the insurance carrier. For the in-house copies made at the law firm, exactly what was copied is not described. However, at a bare minimum, Defendants should have been awarded the costs for the outside copying of the trial exhibits which were detailed in the Verified Memorandum of Costs:

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|---|---|---|
| 9/14/2021 | NRC Discovery (Invoice #NRC01806059) | $178.72 |
| 9/30/2021 | NRC Discovery (Invoice #NRC01806147) | $1,244.54 |
| 9/30/2021 | NRC Discovery (Invoice #NRC01806162) | $622.27 |

(A. V.II, APPX 000012)

Copying of the trial exhibits total $2,045.53. Trial exhibits were necessary to successfully try this case. Copying of trial exhibits falls clearly under the NRS 18.005(12) which allows "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.

### C. COSTS FOR PRIVATE MEDIATION AND MEDICAL ILLUSTRATIONS USED AT TRIAL WERE PROPERLY REQUESTED.

Pursuant to NRS 18.005 (17) which 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", Defendants requested an award of costs associated with the private mediation conducted in this case and unique medical illustrations used throughout the trial presentation. The private mediation costs and costs for having a medical illustrator prepare medical illustrations of Ms. Taylor's unusual anatomy based upon the specific medical records in this case were reasonable and necessary in defending against Ms. Taylor's allegations. In particular, the medical illustrations were utilized in Opening Statement and Closing Argument of Defense counsel, examination of Plaintiff's expert, Dr. Berke, and examination of Defendant Dr. Brill and defense expert, Dr. McCarus.

Again, Respondent claims these costs were not adequately supported. In addition to the attorney invoices provided with the Verified Memorandum of Costs, 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). Any contention that the medical illustrations utilized by the defense were stock or could have been obtained from google are belied by the illustrations which were attached to Defendants' Opposition. (A. V.III, APPX 000525 –APPX 000528). Illustrator Carolyn Holmes worked with defense expert Dr. McCarus and reviewed detailed medical records to render an accurate depiction of Ms. Taylor's specific anatomy, as compared to a non-bicornuate uterus. Given Ms. Taylor's unique anatomy, Defense counsel did not have the option of using stock illustrations to demonstrate the medical issues to the jury. As presented to the District Court, these illustrations were vital in obtaining a defense verdict.

The private mediation conducted on June 24, 2021 was for the express purpose of satisfying the mandatory requirements of NRS 41A.081. These requested costs were appropriate under NRS 18.005(17). Costs for mediation and medical illustrations were reasonable, necessarily incurred, and should have been awarded.

### D. THE COMPLEX MEDICAL ISSUES IN THIS CASE JUSTIFIED THE EXPERT FEES ASSOCIATED WITH STEVEN McCARUS, M.D. AND THE DISTRICT COURT ERRED BY REFUSING TO AWARD EXPERT COSTS IN EXCESS OF $1,500.

As occurred in briefing these issues to the District Court, Respondent greatly mischaracterizes the trial testimony of defense expert, Steven McCarus, M.D. Respondent claims that "Dr. McCarus' [sic] 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. . ." *See* Answering Brief, page 20. In reality, the Defense's primary theory was not that Ms. Taylor assumed the risk of negligence. Instead, Defendants' position throughout the litigation and trial was that Ms. Taylor experienced a known risk and complication that occurred in the absence of negligence.

Plaintiff never sought to exclude Dr. McCarus as an expert in this matter. Presumably, this is because there was no basis to seek his exclusion. The suggestion that a physician could defend against an allegation of professional negligence without expert support is baseless. It is unreasonable to contend that no expert was needed to defend against these claims, as defending against an allegation of medical malpractice at trial without the very necessary aid of a supportive liability expert would be fatal to the defense.

This is a medical malpractice case which necessitated hiring a qualified expert witness to testify at trial and to defend against Plaintiff's allegations. Defendants' retained expert was necessary to defend against Plaintiff's claims that the medical treatment provided was below the standard of care. The testimony of Dr. McCarus assisted the jury in understanding the medical issues involved in this complex medical case.

The Verified Memorandum of Costs provided adequate documentation of Dr. McCarus's fees in the form of law firm invoices. In the Motion for Attorneys' Fees and Costs, as well as the Opposition to Plaintiff's Motion to Re-Tax and Settle Costs, Dr. McCarus's qualifications and the importance of his testimony were discussed in detail. (A. V.II, APPX 000231 – APPX 000261) and (A. V.III, APPX 000501 – APPX 000528).

Respondent's bold mischaracterization of Dr. McCarus's trial testimony is clear from review of the trial transcript. Dr. McCarus testified on day 6 of trial. Per the trial transcript, Dr. McCarus took the stand at 2:17 p.m. and his testimony finished at 5:07 p.m. During his testimony, Dr. McCarus described his background, training and experience as a Board-certified OB/GYN practicing for over 25 years and his role as a Fellow of the American College of Obstetricians and Gynecologists (ACOG). Dr. McCarus testified about the technique in performing the hysteroscopy and D&C surgery Dr. Brill performed for Ms. Taylor including the instrumentation used, a very critical point in this trial. He defined the standard of care and testified at length about his opinions that the surgical choices Dr. Brill made met the standard of care and he did everything that was expected of him as a competent physician.

He further testified about the fact that uterine perforation is the most common, known risk and complication of the procedure. As to bowel perforation, Dr. McCarus explained that it is a rarer, known risk and complication of the procedure.

His testimony also explained to the jury that there are times the surgeon does everything expected but a complication occurs, and there are times when surgery is not performed correctly and a complication results. Dr. McCarus testified that Dr. Brill fully complied with the standard of care and that Ms. Taylor's unusual anatomy led to the complications she experienced absent negligence.

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." Here, the circumstances warranted additional expert fees. Given that Dr. McCarus was first retained in March 2018, he spent over 3 years working on this matter and traveled to Las Vegas for in-person trial testimony, the $16,995.70 requested for his professional services was reasonable and justified. *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).

Had the trial judge decided this matter, Dr. McCarus's importance at trial would have been clear. Instead, the matter was decided by someone unfamiliar with the trial. If the *Frazier* factors had been appropriately considered, additional expert fees related to Dr. McCarus would have been awarded. *Frazier v. Drake*, 131 Nev. 632, 646, 357 P.3d 365, 373 (Ct. App. 2015). As discussed by the Nevada Court of

Appeals, resolution of a request for expert fees in excess of $1,500 necessarily requires a case-by-case examination of these factors. *Id.* at 650-51, 378. That did not occur here.

### E. THE DENIAL OF POST-OFFER OF JUDGMENT ATTORNEY'S FEES AND COSTS WAS AN ABUSE OF DISCRETION.

Defendants were entitled to all costs incurred after the Offer of Judgment was served on June 29, 2021 and post-offer attorneys' fees of $86,148.75. Respondent does not challenge the amount of fees requested or the inclusion of paralegal time in the request, nor does Respondent dispute that 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). Respondent's argument against attorneys' fees focuses on Respondent's wish to classify the Offer of Judgment Defendants served as a "zero dollar" and thereby, unenforceable offer when it was clearly not.

As discussed in the Opening Brief, this case is strikingly similar 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.

While *Busick* is not binding on this Court, it is persuasive authority demonstrating that an offer of judgment offering to waive substantial attorney's fees and costs incurred is valid consideration for awarding attorney's fees and costs pursuant to NRCP 68. Additionally, California courts have routinely held that an offer for waiver of attorney's fees and costs constitutes a good faith offer. *See Culbertson v. R. D. Werner Co., Inc.*, 190 Cal. App. 3d 704, 1987 Cal. App. LEXIS 1534 (Cal. App. 4th Dist. 1987). In *Culbertson*, the court held that "[w]hen a defendant perceives himself to be fault free and has concluded that he has a very significant likelihood of prevailing at trial, it is consistent with the legislative purpose of section 998 for the defendant to make a modest settlement offer." That is exactly what transpired in this case and led to the Offer of Judgment served on June 29, 2021.

Similarly, in *Bates v. Presbyterian Intercommunity Hospital*, the court deemed that the offer for waiver of costs by Defendant Hospital was made in good faith. The court acknowledged that an offer "has value beyond the monetary award provided if it also includes a waiver of costs because if accepted, it would … eliminate[] [the offeree's] exposure to the very costs which are the subject of [the]

appeal." *Bates v. Presbyterian Intercommunity Hospital, Inc.*, 204 Cal. App. 4th 210, 2012 Cal. App. LEXIS 279 (Cal. App. 2d. Dist. 2012).

The post-offer attorney fees sought by Defendants were just a fraction of the total fees incurred in defending against this case from 2018 to entry of judgment. As determined by this Court, even a plaintiff represented by counsel on a contingency fee basis may recover the entirety of the contingency fee as part of an award of post-offer of judgment attorney's fees under NRCP 68. *Capriati Constr. Corp., Inc. v. Bahram Yahyavi*, 498 P.3d 226, 230 – 232 (Nev. 2021)

In such a situation, there is typically no documentation of the attorney work performed. By contrast, here an abundance of invoices and documentation of demonstrating the attorney work performed in litigating this case were provided. (A. V.I, APPX 000009 – APPX 000230).

Respondent cites no supportive authority for the claim that the Offer of Judgment was not a reasonable offer or was otherwise unenforceable. Respondent does cite to *Trustees of Carpenters for S. Nev. Health & Welfare Trust v. Better Bldg. Co.,* 101 Nev. 742, 710 P.2d 1379 (Nev. 1985), but that case is factually distinguishable. In *Trustees of Carpenters*, the former Nevada Supreme Court determined that the Offer of Judgment served 9 months before the Defendants disclosed important information in the form of documents allowing for an accurate determination of whether carpenter employees were correctly paid benefits and

wages. *Id.*at 746-47. As a result, the Court determined that, absent those essential documents, the Plaintiffs' decision to proceed to trial could not be determined unreasonable or in bad faith. *Id.* at 746.

By contrast, Defendants' Offer of Judgment was served on June 29, 2021 after all the pertinent medical records were disclosed. It was served after Ms. Taylor was deposed on April 3, 2019 and after Dr. Brill was deposed on April 16, 2021. The Offer of Judgment was also served after Initial Expert Disclosures were made by all parties on February 16, 2021 and Rebuttal Expert Disclosures made on May 17, 2021. Thus, *Trustees of Carpenters*, is inapplicable here. The valid Offer of Judgment should have been enforced.

Respondent also cites to case law from other jurisdictions, including an unpublished 2003 case from Michigan, that is equally inapplicable. *See* Answering Brief, pages 25 – 26. An Offer of Judgment offering to forgo $60,722.78 in attorneys' fees and litigation costs is not "nominal" or in any comparable to $1 or $100 offers. The substantial 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 apply the *Beattie* or *Brunzell* factors. There was no evaluation of:

> (1) whether 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.

*Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).

Accordingly, reversal of the ruling denying Defendants' attorneys' fees without adequate findings is warranted. 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. Respondent's position would mean that a defendant could only be entitled to the fees and costs secured under Nevada Rule of Civil Procedure 68 if they betray their belief in the righteousness of their defense and pay plaintiff.

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## V.

## CONCLUSION

For the reasons stated herein, the District Court's denial of certain mandatory costs and refusal to award any post-offer of judgment attorneys' fees were an abuse of discretion. Appellants request the District Court be directed to enter an Order awarding $86,148.75 and the remaining costs.

## VI.
## NRAP 28.2 CERTIFICATE OF COMPLIANCE

1. I, Heather S. Hall, Esq., hereby certify that this Reply 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 Reply 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 6,257 words.

3. Finally, I hereby certify that I have read the Reply 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: December 14th, 2022.

McBRIDE HALL

*/s/ Heather S. Hall*

_____

ROBERT C. MCBRIDE, ESQ.
Nevada Bar No. 7082
HEATHER S. HALL, ESQ.
Nevada Bar No. 10608
Attorneys for Appellants

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of December 2022, service of the foregoing **APPELLANTS KEITH BRILL, M.D. AND WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA-MARTIN, PLLC'S REPLY 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 P. Cullina
An employee of
McBRIDE HALL