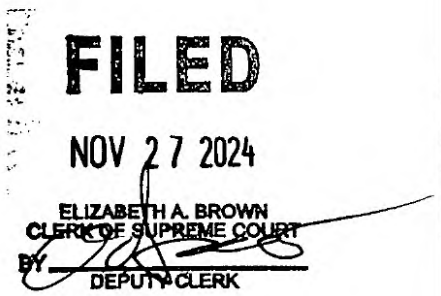
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FLAMINGO LAS VEGAS OPERATING COMPANY, LLC, A NEVADA DOMESTIC LIMITED LIABILITY COMPANY, D/B/A FLAMINGO LAS VEGAS,
Appellant,
vs.
BRITTANY HIGASHI,
Respondent.

No. 86855-COA



ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Flamingo Las Vegas Operating Company, LLC (Flamingo) appeals from a judgment and a district court order on a motion to retax costs. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge.

In July 2015, respondent Brittany Higashi was on the premises of the Flamingo Las Vegas, walked through the hotel, and slipped and fell upon the tiled floor. In July 2017, Higashi initiated a complaint against Flamingo asserting claims for negligence and negligent entrustment, hiring, training, instructing, warning and/or supervision. A few weeks before trial was set to begin, Flamingo served Higashi with an NRCP 68 offer of judgment for $600,000 (the amount of her past medical specials), exclusive of costs, fees, and interest, which Higashi subsequently accepted. Higashi filed and served a verified memorandum requesting costs, fees, and interest. Flamingo moved to retax, specifically challenging, as relevant on

appeal, $220,447.98 in expert witness fees for seven expert witnesses, $1,750 in costs for Elite Medical Experts (a company used to locate expert witnesses), $3,750 in costs for Medicare consultants, and $5,940 in costs for DK Global (a company hired by Higashi to enhance the surveillance video produced in the action). Higashi filed an opposition to the motion to retax.

The district court held a hearing on the matter. Subsequently, the district court entered an order granting the motion to retax in part, finding that Higashi was limited to obtaining the costs for five of her experts and awarded $217,377.98 in expert witness fees for five experts of Higashi's choosing. Additionally, the court awarded $1,750 in costs for Elite Medical Experts; $3,750 in costs for Medicare consultants; and $5,940 in costs for DK Global. The court found that these costs were reasonable and necessary and were properly awarded under NRS 18.005(17). This appeal followed.

On appeal, Flamingo argues that the district court abused its discretion in awarding expert witness fees in excess of the $1,500 statutory limit in effect at that time. *See* NRS 18.005(5) (2007); 2007 Nev. Stat., ch. 440 § 7, at 2191.[1] Thus, Flamingo asserts that the district court was limited to awarding only $1,500 for each of the five non-testifying expert witnesses because there was no trial in the matter and the experts did not testify. Flamingo then argues that the court abused its discretion in awarding

[1]The Nevada Legislature has amended NRS 18.005(5) to authorize awards up to $15,000, rather than $1,500, for each expert witness, which amendment became effective on July 1, 2023, for any action "pending on July 1, 2023." 2023 Nev. Stat., ch. 70, § 1, at 342-43 (enacting A.B. 76, 82d Leg. (Nev. 2023)).

$11,440 in total costs for Elite Medical Experts, Medicare consultants, and DK Global because those costs were neither necessary nor reasonable.

Conversely, Higashi argues that Flamingo did not sufficiently raise the argument regarding the expert fees before the district court and has waived it on appeal.[2] Nevertheless, Higashi asserts that she satisfied NRS 18.005(5) because the experts provided sworn testimony at deposition. With respect to the costs for Elite Medical Experts, Medicare consultants, and DK Global that Flamingo challenges, Higashi asserts that the district court made detailed findings to support that the costs were reasonable and necessary. In reply, Flamingo argues that it did sufficiently raise the expert fees issue before the district court.

The district court abused its discretion in awarding expert fees in excess of the statutory maximum without making the requisite findings that the circumstances surrounding each expert's testimony were of such necessity as to require the larger fee

NRS 18.005(5) provides that reasonable fees for expert witnesses may be recoverable as costs. Fees are limited to $1,500 per expert "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." NRS 18.005(5) (2007); 2007 Nev. Stat., ch. 440 § 7, at 2191. "A district court's decision to award more than $1,500 in expert witness fees is reviewed for an abuse of discretion." *Frazier v. Drake*, 131 Nev. 632, 644, 357 P.3d 365, 373 (Ct. App. 2015); *see also Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 82, 319 P.3d 606, 616 (2014) (noting that the

[2]We are not persuaded by this argument, as a review of the record reflects that Flamingo sufficiently raised the issue of the expert fees before the district court.

district court abuses its discretion when it "fail[s] to apply the full, applicable legal analysis").

In this matter, Higashi was awarded $217,377.98 in expert witness fees pursuant to NRS 18.005(5). This award accounted for fees paid to five expert witnesses: Dr. Joshua Prager ($87,192), Tricia West/Erin O'Connell ($62,751), Joellen Gill ($31,109.98), Dr. Steven Richeimer ($26,275), and Enrique Vega ($10,050). On appeal, the parties dispute whether an expert is required to testify at trial in order for a party to receive expert witness fees in excess of $1,500. NRS 18.005(5) specifically refers to expert testimony, but the parties dispute whether that testimony only applies to trial testimony or whether it can encompass other types of testimony, such as deposition testimony.

Generally, the supreme court has held that, under NRS 18.005(5), awards of expert fees in excess of $1,500 are only allowed in circumstances where the experts testify at trial. *See, e.g., Pub. Emps. Ret. Sys. of Nev. v. Gitter*, 133 Nev. 126, 134, 393 P.3d 673, 681 (2017) (explaining that, when an "expert acts only as a consultant and does not testify, . . . [a] district court[ ] may [only] award $1,500 or less, so long as the district court finds such costs constitute '[r]easonable fees.'" (emphasis omitted) (quoting NRS 18.005(5)); *Hyatt v. Franchise Tax Bd. of the State of Cal.*, No. 84707, 2023 WL 4362562, at *3 (Nev. Jul. 5, 2023) (Order Affirming in Part, Reversing in Part and Remanding) (reversing an NRS 18.005(5) award of expert fees where the district court failed to "make findings as to whether these witnesses testified at trial so as to merit awards greater than $1,500").

In arguing that the district court properly awarded her expert fees, Higashi cites to *Logan v. Abe*, 131 Nev. 260, 350 P.3d 1139 (2015), as providing an exception to the requirement that an expert testify at trial in order to recover NRS 18.005(5) expert fees in excess of $1,500. In *Logan*, the supreme court affirmed an award of expert fees in excess of $1,500 where the rebuttal expert, who was prepared to testify at trial, did not do so solely because the opposing party did not call his expert to testify in his case in chief and therefore the rebuttal expert did not testify. *Logan*, 131 Nev. at 268, 350 P.3d at 1144 ("[T]he circumstances surrounding the expert's testimony, or in this case, the lack thereof, . . . [in determining the costs] were of such necessity as to require the larger fee." (internal quotations omitted)). However, in a subsequent case, the supreme court declined to extend *Logan* in the summary judgment context, where the expert reports were not relied on by the court. *See Cotter ex rel. Reading Int'l, Inc. v. Kane*, 136 Nev. 559, 567, 473 P.3d 451, 457-58 (2020) ("Because the underlying matter was resolved at the summary judgment stage, without the district court relying on the directors' expert reports, the experts' testimony was not of such a necessity as to warrant the larger fee."). Nonetheless, while the supreme court did not apply *Logan*'s exception in *Cotter*, the decision in *Cotter* suggests that there may be additional circumstances where a party could be awarded expert fees in excess of $1,500 where the experts did not testify at trial, including if the court otherwise relied on the expert testimony in resolving the case.

However, in both *Logan* and *Cotter*, the supreme court made clear that in order to exceed the statutory cap when awarding expert fees, the circumstances surrounding the expert's testimony must be of such

necessity as to require the larger fee. Here, while the district court's order contains findings suggesting that the expert testimony *would* have been necessary if the matter proceeded to trial or *would* have aided the trier of fact if a trial was held, a trial was ultimately not held in this matter. The pertinent inquiry for the district court is not whether the expert testimony *would* have aided the trier of fact, but rather whether it *did* aid or assist in the ultimate resolution of the case such that the expert's testimony was necessary. Consequently, the court's findings are insufficient to show that "the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee" given the context of this particular case, which was resolved by the acceptance of a pre-trial offer of judgment. *See Cotter*, 136 Nev. at 567, 473 P.3d at 458 (reversing an award of expert fees in excess of $1,500 where the district court did not rely on the experts' reports when resolving the case at summary judgment).

Because the district court did not undertake the analysis outlined above in awarding expert fees in excess of the statutory cap, we conclude that the district court's significant expert fee award without such analysis was an abuse of discretion.[3] As a result, we necessarily reverse

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[3]We acknowledge that, under these circumstances, where a pre-trial offer of judgment is accepted, it may be difficult to prove that each expert's testimony necessitated a larger fee, pursuant to NRS 18.005(5). *See Hyatt v. Franchise Tax Bd. of the State of Cal.*, 2023 WL 4362562, at *3 (noting that the burden is on the party seeking expert witness fees pursuant to NRS 18.005(5)). Higashi would need to prove that each expert's testimony was necessary and ultimately contributed to the resolution of the case through the acceptance of the offer of judgment being mindful of attorney client privilege issues. Nevertheless, we reverse for the parties and the district court to examine this issue further upon remand.

the expert witness fees award and remand for further proceedings on this issue.[4]

The district court did not abuse its discretion in awarding costs pursuant to NRS 18.005(17)

We then turn to the district court's award of costs pursuant to NRS 18.005(17). "A district court's decision regarding an award of costs will not be overturned absent a finding that the district court abused its discretion." *Vill. Builders 96, L.P. v. U.S. Labs., Inc.*, 121 Nev. 261, 276, 112 P.3d 1082, 1092 (2005). In addition, "costs must be reasonable, necessary, and actually incurred" rather than mere estimates. *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 120, 345 P.3d 1049, 1054 (2015). Accordingly, "a party must 'demonstrate how such [claimed costs] were

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[4]We note that Higashi argues, for the first time on appeal, that if this court accepts Flamingo's argument that she was only entitled to the fees allowed by NRS 18.005(5)'s general statutory cap, she should be entitled to an award of $15,000 per expert under the revised version of NRS 18.005(5). Notably, following the entry of the district court's order, the Legislature amended NRS 18.005(5) to authorize awards up to $15,000, rather than $1,500, for each expert witness, which amendment became effective on July 1, 2023, for any action "pending on July 1, 2023." 2023 Nev. Stat., ch. 70, § 1, at 342-43 (enacting A.B. 76, 82d Leg. (Nev. 2023)). We decline to address this issue in the first instance. Nonetheless, in light of our determination that this matter must be reversed, in the event that the district court ultimately determines, on remand, that Higashi cannot recover fees in excess of the statutory cap, the district court should determine, in the first instance, whether the post-amendment version of NRS 18.005(5) is applicable here. *See Griffith v. Rivera*, 140 Nev., Adv. Op. 60, 555 P.3d 1171, 1175 (2024) (analyzing when an amendment to a statute or rule does not change substantive rights and instead relates solely to remedies and procedure and holding that such procedural and remedial rule changes will be applied to any cases pending when enacted where the appellants were provided fair notice of the rule change).

necessary to and incurred in the present action.'" *Id.* (alteration in original) (quoting *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352-53, 971 P.2d 383, 386 (1998)). To meet this burden, a party moving for costs must supply additional "justifying documentation" to show the district court that its requested costs were "reasonable, necessary, and actually incurred." *Cadle Co.*, 131 Nev. at 120-21, 345 P.3d at 1054.

NRS 18.005(17) is a catchall provision that allows for the award of costs for "[a]ny other reasonable and necessary expense incurred in connection with the action, including reasonable and necessary expenses for computerized services for legal research." Here, the district court determined that the costs for Elite Medical Experts, Medicare consultants, and DK Global were reasonable and necessary. Specifically, the court made detailed findings that Higashi's retainment of Elite Medical Experts was reasonable to locate a specialized expert and that the costs were appropriate; that it was reasonable and necessary to retain the services of Medicare consulting companies "to review compliance requirements" with Medicare and Medi-Cal and that the costs charged were reasonable and necessary in light of the amount of money at stake; and that it was reasonable and necessary to retain the services of DK Global to enhance the video surveillance due to Flamingo's dispute of liability and the manner of Higashi's fall. Although Flamingo argues that these costs, while incurred, were neither necessary nor reasonable, we conclude that the district court made sufficient findings to support its decision to award Higashi these costs and see no basis for reversal of these costs. *See Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009) (explaining that a district court's factual findings will not be set aside unless they are clearly erroneous or not

supported by substantial evidence); *Jackson v. Groenendyke*, 132 Nev. 296, 303, 369 P.3d 362, 367 (2016) (declining to reweigh the evidence on appeal or substitute our judgment for that of the district court's where the record supports the district court's decision).

Thus, for the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[5]

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Mary Kay Holthus, District Judge
Jay Young, Settlement Judge
Brandon Smerber Law Firm
Bertoldo Baker Carter Smith & Cullen
Eighth District Court Clerk

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[5]Insofar as the parties raise other issues not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.