No. 90864

In the Supreme Court of Nevada

USAA CASUALTY INSURANCE CO.,
Defendant,

v.

TIMOTHY TODD KUHN, individual,
Respondent.

On Appeal from the Eighth Judicial District Court,
Clark County, Case No. A-20-821602-C

RESPONDENT'S ANSWERING BRIEF

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March 6, 2026 — *Counsel for Respondent*

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. Gupta Wessler LLP, Bighorn Law, and Matthew L. Sharp, Ltd. are the only law firms that have appeared on behalf of the respondent, Timothy Todd Kuhn, in this matter or are expected to appear in this Court. Neither Mr. Kuhn nor his attorneys of record are publicly held or traded companies.

Dated: March 6, 2026

/s/ Deepak Gupta
Deepak Gupta

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INTRODUCTION

This fees-and-costs appeal is a companion to USAA's appeal from the jury verdict in Tim Kuhn's bad-faith insurance case, No. 90310. Whatever the merits of that appeal, this one is even weaker. The district court's post-judgment awards of attorney's fees and costs are reviewed only for abuse of discretion. And because USAA does not identify any claimed legal error under existing law, and instead merely critiques the evidence, that standard permits reversal only if *no reasonable person* could have reached the same conclusion as the district court. That is a high hurdle to overcome in any case. But it is impossible to surmount here, where the district court presided over four years of litigation, observed counsel firsthand, made detailed findings on every required factor, and awarded substantially less than the amount requested.

As to attorneys' fees, USAA no longer disputes that the first three factors under *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983)—the ones that determine whether to award attorneys' fees under NRCP 68—weigh against it. In other words, USAA concedes that Tim's offer was reasonable, that USAA's rejection was grossly unreasonable or in bad faith, and that fees under NRCP 68 are warranted. The only question on appeal is whether the court abused its discretion in setting the amount.

It did not. The district court evaluated each factor under *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969). It found that Tim's counsel were highly qualified—a conclusion drawn from both the fee motion and the court's own

experience with counsel across multiple trials. It found that this case was "heavily and thoroughly litigated," with cross-motions for summary judgment, a dozen evidentiary motions, numerous motions hearings, claims against two defendants (defended for most of the case by two separate insurers), and a weeklong trial involving over a dozen witnesses and more than 100 potential exhibits. It found that counsel "worked very hard" and "thoroughly addressed" every issue. And it found that the outstanding result was "far above" the offer of judgment. After weighing all of this, the district court awarded an amount that is equivalent to 63% of the 40% contingency fee that Tim actually owes for these exceptional legal services—reflecting only the post-offer portion of the work—and thereby cut Tim's request by more than a third.

There is no basis to overturn that decision. USAA hasn't shown that *no reasonable mind* could find this award justified. That's especially so because USAA doesn't contest the quality of Tim's counsel, the overwhelming success at trial, or the reasonableness of the contingency arrangement. It focuses instead on the "work actually performed," ignoring *Brunzell*'s instruction that no single factor should predominate. And even on its chosen ground, USAA merely substitutes its own characterization of the record—that this case, in its view, was "straightforward" and "not so heavily litigated"—for the district court's contrary assessment, based on years of firsthand observation. That is a request to reweigh the evidence, not a showing that no substantial evidence exists.

Unable to meet its burden, USAA (as its *lead* argument) throws a Hail Mary: a request to overturn *Capriati Construction Corp. v. Yahyavi*, 137 Nev. 675, 498 P.3d 226

(2021), which held that courts may award an entire contingency fee as post-offer fees under NRCP 68. But *Capriati* doesn't control here. The district court didn't award an entire contingency fee; it specifically tailored the award to post-offer work. So overturning *Capriati* wouldn't change the result. And USAA offers no basis for the drastic step of overruling precedent beyond its policy preference for lodestar-only awards—a preference that no Justice of this Court has endorsed and that is at odds with this Court's recent unanimous decision in *Nevins v. Martyn*, 140 Nev. Adv. Op. 66, 557 P.3d 965 (2024). If USAA wishes to advance its policy preference, its arguments belong before a rules committee or the legislature, not in an appeal before this Court.

USAA's challenge on costs fares no better. Tim's counsel itemized 118 expenses, provided receipts for each, and attested that every cost was reasonable, necessary, and incurred. The court marched through each category of costs at a hearing, explained why various costs were "obvious" and "perfectly legitimate," and denied nearly a third of what Tim sought—including $30,249 in jury-consultant fees and $13,717 in expert costs. USAA's argument that the court lacked enough documentation to award *any* costs proves too much; it would deny recovery even for the $3.50 filing fee for the complaint adding USAA as a defendant. And USAA's apportionment argument fails because Tim sued the at-fault driver solely to preserve his claims against USAA, the driver never appeared, USAA then intervened and stood in the shoes of the at-fault driver, and the entire case was geared toward recovery from USAA from start to finish.

At bottom, USAA's appeal asks the Court to second-guess case-specific discretionary judgments that the district court was uniquely positioned to make. That is not what abuse-of-discretion review permits. The district court applied the correct legal standards, made detailed findings, and reached a reasonable result well within the bounds of its discretion. The orders should be affirmed.

STATEMENT

I. Legal background

NRCP 68 exists to "incentivize settling."[1] *Golden Gate/S.E.T. Retail of Nevada, LLC v. Mod. Welding Co. of California, Inc.*, 141 Nev. Adv. Op. 12, 565 P.3d 1, 7 (2025). Resolving cases pretrial "save[s] time and money for the court system, the parties and the taxpayers." *Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 382, 989 P.2d 882, 888 (1999). To achieve those benefits, the rule allows a party to make an "offer of judgment," that is, "an offer in writing to allow judgment to be taken in accordance with its terms and conditions." NRCP 68(a). If the offer is accepted, the case ends. If it is rejected, the offeree faces NRCP 68's principal tool: a suite of "penalties" that may be imposed if the offeree fails to achieve a better outcome at the end of the case. NRCP 68(f).

These penalties "reward [the] party who makes a reasonable offer and punish the party who refuses to accept" it in three main ways. *Dillard*, 115 Nev. at 382, 989 P.2d at

[1] Unless otherwise specified, all internal quotation marks, emphases, alterations, and citations are omitted from quotations throughout.

888. First, the rule precludes an unsuccessful offeree from recovering any costs, expenses, attorneys' fees, or interest incurred after the offer, even if the offeree prevails and would otherwise have a right to recover. NRCP 68(f)(1)(A). Second, the rule permits the district court to award not just the offeror's post-offer costs (as is common in many jurisdictions), but also "reasonably necessary" expert fees and "reasonable attorney fees" that are "actually incurred" after the offer. NRCP 68(f)(1)(B). And third, the court may also award post-offer interest that runs from the time of the offer and that applies not just to damages for past harms but also (unlike ordinary pre-judgment interest) to awards for future harms and punitive damages. NRCP 68(f)(1)(B); *Olson v. Mid-Century Ins. Co.*, No. 86892, 2025 WL 2554820, at *5 (Nev. Sept. 4, 2025) (unpublished disposition). These additional sanctions for rejecting a reasonable offer make "the incentives to approach the bargaining table [] considerably greater." Anna Aven Sumner, *Is the Gummy Rule of Today Truly Better Than the Toothy Rule of Tomorrow? How Federal Rule 68 Should Be Modified*, 52 *Duke L.J.* 1055, 1059 (2003).

This Court has long overseen the use of NRCP 68 with any eye to ensuring that it serves its intended purpose—encouraging legitimate settlements—and is not abused to "unfairly" force litigants to "forego legitimate claims." *Beattie*, 99 Nev. at 588-89, 668 P.2d at 274 (1983). To ensure that outcome, this Court instructs district courts to "carefully" evaluate four considerations—often referred to as the "*Beattie* factors"—before exercising their discretion to enforce, or not, the rule's penalties: (1) whether the offeree's claim or defense is raised in good faith, (2) whether the offer is reasonable in

timing and amount, (3) whether the rejection was "grossly unreasonable or in bad faith," and (4) whether the fees are "reasonable and justified in amount." *Id.*

The last factor (attorneys' fees) itself requires consideration of four factors. District courts must evaluate (1) "the qualities of the advocate," (2) "the character of the work to be done," including its "difficulty" and "importance," (3) "the work actually performed," including the skill needed and attention devoted, and (4) the result. *Brunzell*, 85 Nev. at 349, 455 P.2d at 33. If the district court is satisfied after evaluating these factors that an award is warranted, it may "award up to the full amount" of any fees and interest requested. *Beattie*, 99 Nev. at 588-89, 668 P.2d at 274. And that remains true whether the fee request takes the form of hourly fees or a contingency fee. *See Capriati*, 137 Nev. at 680, 498 P.3d at 231 (2021).

II. Factual background

The lead-up to litigation. In October 2018, while driving to the airport, Tim Kuhn was struck from behind at about 45 miles per hour. 7-AA1400. The impact inflicted a "traumatic brain injury," leaving him with a concussion and, ultimately, post-concussive syndrome that resulted in persistent headaches, dizziness, difficulty concentrating, lapses in memory, and fatigue. 7-AA1402; RA44-45.

Tim was intent on making sure his family would be prepared for something like this. Nearly two decades earlier, Tim had purchased $300,000 in

uninsured/underinsured motorist coverage from USAA.[2] And he also purchased excess coverage of $700,000 from a second insurer out of concern that USAA's coverage wouldn't be enough. 6-AA1407, 6-AA1410.

To ensure he received the coverage that he was due under this insurance, Tim engaged the attorneys at Bighorn Law to help him navigate the process. 1-AA74. They stepped in immediately to provide information about the crash to USAA and then to facilitate USAA's request that Tim provide a recorded statement about the crash. AA74; RA73, 75.

Over the next year and a half, Tim focused on his recovery—obtaining treatment from three separate neurologists and pursuing cognitive therapy—but with his medical bills growing and cognitive injuries not subsiding, Tim began the process of collecting the insurance money due. In June 2020, Tim obtained the limits of the at-fault driver's insurance, $50,000, which he secured, in part, through an agreement not to attempt to collect more from the driver. 4-AA844. And the same month, Tim's counsel asked USAA to pay the remaining policy limits of $250,000 on its policy. RA68. If USAA had

[2] Underinsured motorist coverage exists so that, in the event of an accident where the at-fault driver's insurance doesn't have enough money to cover the damage (whether medical bills or pain and suffering), the insured has guaranteed financial support when recovering; whatever the insured would be "legally entitled to recover" from the at-fault driver in tort, they can recover from the insurer (up to the policy limits). *See White v. Cont'l Ins. Co.*, 119 Nev. 114, 118, 65 P.3d 1090, 1092 (2003); 6-AA1259-61.

paid, that would have given Tim access to the $700,000 on the excess coverage. 8-AA1735.[3]

But Tim received nothing from USAA—no offer, let alone the requested policy limits. RA67-68. So, with the statute of limitations against the at-fault driver approaching, Tim filed this lawsuit against him at the end of September to protect his rights. 1-AA1. Another six weeks passed without any investigation from USAA—only a call to check on the status of the lawsuit and to ask if a formal demand letter would be coming. RA66.

So in November 2020, Tim's lawyers sent that letter, requesting the policy limits. RA39. The letter set out in detail the medical care Tim received, providing the dates of care, names of doctors, tests run and results, insurance codes used, and itemized costs. RA39-49. It described the impact of his injuries: not just recounting symptoms—headaches, memory loss, mental fatigue, to name a few—but also how they impaired Tim's life by, for instance, preventing him from treating patients at his physical therapy practice and leaving him so disoriented at times that he did not know which side of the road he was on. RA12-19. And the letter made clear that Tim would need continued care to achieve "maximum" recovery for his cognitive injuries. RA47.

[3] Under California law, where the policy was purchased, the at-fault driver's $50,000 payment had the effect of reducing the policy limit to $250,000 from $300,000. *See also* 5-AA1112; Cal. Ins. Code § 11580.2(p)(4).

Still, despite USAA's delay to that point, the letter sought nothing more than the policy limits. It offered to resolve the issue for good and to release any claim that could be brought based on the delay to that point. RA48.

USAA rebuffed the request and settlement proposal. RA50. It rejected Tim's request for coverage and countered with an offer of just $10,000, claiming it needed additional records. *Id.* Tim provided those records just a few days later, but it didn't change USAA's position. 5-AA1008, 6-AA1256. Instead, USAA intervened in this lawsuit against the at-fault driver in February 2021. 1-AA8.

Litigation begins and Tim's medical costs rise. In response to USAA's intervention motion, Tim's amended the complaint to add USAA as a defendant. 1-AA61-84, 1-AA104-13. The complaint added a breach of contract and a bad faith claim against USAA, and the parties began discovery. 1-AA109-11, 1-2112-16.

While discovery proceeded, in December 2021, Tim obtained a concrete treatment plan for cognitive rehabilitation from physicians at MedTrak Diagnostics.[4] RA92. The MedTrak plan made clear that, to manage his post-concussive syndrome and achieve the greatest possible recovery, Tim would need lifetime care that would eventually total over $1 million. RA92, RA98.

[4] To the extent that the merits brief suggests that Tim received the treatment plan in December 2020, *see* Resp. Answering Br. at 12, *USAA Casualty Ins. Co. v. Kuhn*, No. 90310 (Nev. S. Ct., filed Feb. 13, 2026), we clarify that the treatment plan was not created until the next year, in December 2021. RA86.

Tim's NRCP 68 offer. In October 2022, after more than a year of litigation, Tim made an offer of judgment under NRCP 68 to USAA. 10-AA2095. By then, Tim had provided USAA the MedTrak plan so it knew that, even apart from any pain and suffering—which USAA was also obligated to cover—Tim's past and future medical care alone would exceed the policy limits. 6-AA1365. Nonetheless, Tim sought only the policy limits already due, $250,000; the offer did not seek any attorneys' fees and costs or any consequential damages—either for emotional distress caused by USAA or for the $700,000 in excess coverage that USAA was holding up—available under Tim's bad-faith claim. 10-AA2095-96.

Still, USAA rejected the offer. 11-AA2404. It would later be revealed that USAA had not even completed an evaluation of whether it would cover the MedTrak plan. 6-AA1365-66.

The case proceeds to trial. Over the next two years, the parties engaged in hard-fought litigation in the lead up to trial. The excess carrier intervened. 10AA-2115-16. The parties retained and deposed multiple experts, took fact-witness depositions, and exchanged written discovery. 9-AA1807-10. Tim's counsel also successfully fought off USAA's motion for summary judgment. 10-AA2132.

As trial approached, Tim's counsel took a number of steps to narrow the scope of the trial. They successfully moved to limit the testimony of USAA's expert; they filed seven motions in limine; and they successfully obtained partial summary judgment against the at-fault driver so that his negligence would not be at issue, only the damages

he caused. 10-10-AA2129-32; RA26-27. Even still, by the time trial arrived, Tim's pretrial memorandum identified 100 exhibits and 38 potential witnesses. RA26-34.

Then, with trial just around the corner, USAA decided to tender the full policy limits to Tim. 6-AA1187. Still unwilling to admit Tim was entitled to the money, USAA's claims handler attempted to pass this off as merely a "good faith gesture" to allow Tim to avoid the burdens of trial and to access his $700,000 in excess coverage. 6-AA1187-88. But the amount that USAA handed over was the same amount that Tim's counsel had requested, first, in the demand letter and, later, in the NRCP 68 offer.[5]

The trial. Trial commenced in January 2025 against USAA and the at-fault driver.[6] It lasted a total of seven days—two days of voir dire and five days of testimony and argument. Tim's counsel called 11 witnesses, including two retained experts (one on insurance practices and one on Tim's medical injuries) as well as Tim's treating physician as an expert. They also cross-examined three experts witnesses that USAA retained and a witness on punitive damages. 4-AA1013, 5-AA1048, 6-AA1268-69, 7-AA1456-47, 8-AA1649.

[5] The benefit for Tim, however, was not the same. In the litigation, USAA sought to recover attorneys' fees, effectively encumbering the money tendered so that Tim could not use it. 5-AA1014, 6-AA1409-10.

[6] As the excess policy was also a California policy, once USAA tendered the policy limits, it formally triggered the excess carrier's obligation to investigate, evaluate, and pay, which the excess carrier immediately did and dropped out of the case that, to that point, it had defended alongside USAA. 10-AA2117, 2121, 2130.

Throughout trial Tim's counsel had to walk a difficult-to-navigate line. To persuade the jury that USAA acted in bad faith, counsel had to prove that Tim's cognitive injuries were sufficiently severe and clear that USAA acted unreasonably in denying him the policy limits. The more palpable the injuries, the stronger Tim's liability case would be. At the same time, however, Tim's counsel also had to impress on the jury that USAA's conduct, itself, caused Tim additional and profound injuries. These two tasks were in tension with one another—the greater Tim's initial injuries, the stronger the bad-faith claim but the more difficult it would be to convince the jury of the reality that Tim had experienced for the past four years: that USAA's conduct inflicted on him additional, grave injuries that made his life far worse.

Tim's counsel met the challenge and struck the right balance. In the end, a unanimous jury awarded $7 million in compensatory damages against USAA and $100 million in punitive damages, which the district court reduced to $63 million. 8-AA1788-94.

The district court's fee and cost awards. Following trial, Tim moved for post-offer attorneys' fees under NRCP 68 as well as for costs under both NRCP 68 and NRS 18.020. 9-AA1805. The fees motion walked the district court through every *Beattie* factor this Court has instructed must be considered. It argued that USAA's defenses were not raised in good faith, 10-AA2069-70; that Tim's offer was made in good faith and reasonable (after all, it sought only the policy limits), 10-AA2070; that USAA's rejection was grossly unreasonable, as the company knew that Tim's medical costs alone

outstripped the policy limit and then tendered the same amount on the eve of trial, 10-AA2070-71; and that the fees requested were reasonable, 10-AA2071-76.

On the last point—the reasonableness of the fees—the motion addressed each *Brunzell* criterion. It detailed counsels' credentials and experience handling hundreds of other insurance disputes. 10-AA2072-73. It explained that the case involved complex and hotly contested factual disputes about medical treatment and the "value of damages" that counsel had to distill to easy-to-understand concepts for the jury. 10-AA2073-74. Counsel also described the extensive work that they and their staff had put into the case, with "months" spent preparing for trial and "thousands of hours" in total. 10-AA2074-76. And finally, the motion noted what was obvious from the verdict: the result was an overwhelming success. 10-AA2076. Tim's counsel therefore requested the full amount of the contingency fee (40 percent) that Tim now owed them.

Tim also filed a separate verified memorandum of costs. 9-AA1805. In it, Tim's counsel itemized 118 separate expenses and included the reason each fee was incurred (for instance, that an e-filing fee was tied to a motion to strike or the name of the witnesses connected to a court reporter's deposition-transcript bill), 9-AA1805-11, as well as the accompanying receipts, 9-AA1812-2030. And counsel averred that each expense was "necessarily incurred." 9-AA1810.

USAA opposed both requests. On fees, USAA disputed every single *Beattie* factor. It challenged even that the "amount and timing of the offer"—that is, Tim's policy-limits offer after USAA had more than a year to conduct discovery—supported

an award. 10-AA2175. As to the reasonableness of the requested fees specifically (the fourth *Beattie* factor), USAA argued principally that Tim's request was unreasonable because counsel had not established that they had worked hours equivalent to the amount of contingency fee. 10-AA2178-81. And on costs, USAA moved to retax on the ground that some expenses were unrecoverable as a matter of law and that Tim had insufficiently documented the need for the rest. *See* 9-AA2032-43. Additionally, USAA claimed that some of the costs should have been apportioned so Tim could collect them only from the at-fault driver—who had not once appeared in this case.

After further responsive briefing and argument, the district court granted the motions in part and denied them in part. On fees, the court first held that consideration of the *Beattie* factors warranted enforcement of Rule 68's penalties. 11-AA2404. The court found that USAA litigated in good faith, but it held that every other factor counted against it. First, Tim's offer was reasonable and made in good faith, the court explained, because it came 18 months after USAA's motion to intervene, giving the company sufficient time to understand its risk in the case. 11-AA2404. Next, USAA's rejection was either "grossly unreasonable or in bad faith" because USAA had enough information to understand the value of the offer but failed to give it adequate "consideration." 11-AA2404-05.

Finally, the court gave extended consideration to the amount of fees that Tim's counsel requested. The court first determined that "the way to look at it is contingent

fee." 11-AA2388. But it then asked, given Tim's contingency arrangement, "what is a reasonable amount to recover?" 11-AA2388.

To answer that question, the court expressly "analyze[d] the factors from *Brunzell,*" relying on full briefing, a hearing on the fee motion, its familiarity with the case over more than four years, and its knowledge of counsel extending beyond that. 11-AA2371-90, 11-AA2405-07. 11-AA2388. On the first *Brunzell* factor, the court determined that Tim's counsel are highly qualified, a conclusion it reached from the "detailed information" that counsel submitted in the fee motion and the court's own "familiar[ity] with counsel," who "had a number of trials with" the court where they "always present [t]heir cases in a very thorough and prepared manner." 11-AA2388, 11-AA2405.

The court next assessed the character and amount of work (the second and third *Brunzell* factors) based on its experience having "sat through this thing" for more than four years. 11-AA2387. The work on this case, the court explained, outstripped the norm: Unlike the court's many cases where "we never see the people," the court recognized that this case was "heavily and thoroughly litigated," with a number of "different issues," and counsel frequently in court, with well over a dozen hearings or trial days. 11-AA2406, 11-AA2837. And the docket was extensive beyond that, involving numerous substantive motions brought by both parties. 10-AA2112-47. The court further recognized that counsel had to pursue not just the claim against USAA, but also the claim against the at-fault driver, which both USAA and the excess carrier

defended, meaning Tim prepared for a trial on all claims against a defense from two insurance companies.[7] 11-AA2406.

And finally, the court took into account the outcome, the fourth *Brunzell* factor. 11-AA2406. As the court put it, in understated terms, the result here was "far above" the offer of judgment. *Id.*

But even with this evidence to support each *Brunzell* factor, the court still scrutinized whether an award of the full contingency fee would be reasonable and decided against it. The court acknowledged that the percentage was reasonable, noting 40 percent was "less than the Court has seen from other successful plaintiff firms in Clark County." 11-AA2404-05, 11-AA2389. But the court nonetheless concluded that awarding a reasonable amount required reducing Tim's request to account for only the portion of the work performed post-offer, which came out to 63 percent of the fee from the $70 million verdict, or $17,640,000. 11-AA2406-07.

The court also issued a split decision on costs. In large part, the court denied USAA's motion to retax, awarding Tim $91,846.75. 11-AA2393-94. Many of the costs, the court explained, were "just presumptively legitimate." 10-AA2261. Wading into the minutia, the court explained that, for instance, it could "even confirm" the need for the filing fees Tim sought to recover from its own review of the docket; that "the cost for binders" in the motion was easy to "understand" and "perfectly legitimate" because

[7] Although the at-fault driver did not appear, USAA fully defended the claim against him, even urging the jury to award *no damages* against him. 8-AA1728.

there were "lots and lots of exhibits" at trial; that it was "obvious" why Tim incurred the expense associated with an expert showing up for a deposition; and that it was likewise "obvious why [medical] records were collected" as "part of the pre-filing claims process" in this "first party" insurance case. 10-AA2261-62, 2269, 2274, 2277, 2281. These were all "cost[s] that [USAA] would expect," probably paid "the same amount themselves," and "should not [have] be[en] a surprise." 10-AA2269.

But the court did reduce Tim's request by $43,966.82. 11-AA2393-94. The court determined that $30,249 in juror consultant and research fees were unrecoverable because Tim had not established that they were "reasonable" and "necessary." 11-AA2393. Additionally, the court awarded only $38,028.97 of the $51,746.79 (a difference of $13,717.82) that Tim sought to recover for the cost of his medical expert, Dr. Hossein Ansari. 11-AA2394. The court determined that Tim had justified exceeding the presumptive statutory cap insofar as he incurred costs to have Dr. Ansari testify in person because "there was a benefit to the finder-of-fact to see [him] in person," but concluded that Tim had failed to substantiate the need for the additional $13,028.97 above the cap that he paid Dr. Ansari for pre-trial work. 11-AA2394.

SUMMARY OF ARGUMENT

I. This Court affords district courts broad discretion in awarding fees under NRCP 68. So long as the court considers the *Brunzell* factors and substantial evidence supports the amount awarded, this Court will affirm. The district court here did exactly what is required. It awarded fees only after expressly considering each *Brunzell* factor,

scrutinizing the evidence, and then making express findings. And ultimately, to tailor the amount to the work performed after the offer of judgment, the court awarded less than two-thirds of what Tim requested.

Neither argument that USAA advances—a request to overturn precedent and a record-specific quarrel with how the district court weighed the evidence—warrants overturning the district court's careful award.

A. USAA's lead argument for reversal asks this Court to overturn *Capriati*, 137 Nev. 675, 498 P.3d 226. *Capriati*, however, held that an *entire* contingency fee may be awarded as post-offer fees under NRCP 68. But in this case, the district court declined to order the full amount, instead tailoring its award to the fees incurred after Tim's offer. Overturning *Capriati* therefore would not affect the outcome here. Acknowledging this, USAA claims that reconsidering *Capriati* is necessary so that district courts do not place undue weight on the existence of a contingency fee agreement to the exclusion of the *Brunzell* factors. But *Capriati* (and every other fee decision from this Court) instructs the district courts to apply the *Brunzell* factors. This Court does not overturn precedent based on speculation that district courts will defy it, and the decision below shows that they won't.

Regardless, USAA has failed to offer the type of compelling justification needed for this Court to depart from its precedent. By its own description, USAA asks this Court to reconsider *Capriati* based on "public policy." This sort of "mere disagreement" with a decision "does not suffice." *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112,

1124 (2008). The proper forum for USAA to air its policy concerns (which are meritless anyway) is in front of a committee on the rules or the legislature.

B. USAA's alternative argument is no better. This Court will affirm a fee award so long as it is supported by substantial evidence, that is, if *any* "reasonable mind" could find that the evidence supported the district court's order. *See Wright v. State, Dep't of Motor Vehicles*, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005). USAA cannot overcome this highly deferential standard of review.

As an initial matter, USAA wrongly asks this Court to narrowly focus on the amount of work performed. But the *Brunzell* analysis is a holistic one that takes account of all the evidence under each factor. USAA cannot demonstrate that the award lacks supporting evidence without addressing all the evidence underlying it.

Even setting aside that foundational flaw in USAA's challenge, the company falls well short of establishing that the district court acted so arbitrarily that not one reasonable person could agree with it. USAA, for instance, takes issue with the district court's conclusion that this case was heavily litigated and asserts that the issues were more "straightforward" than the district court thought. These sorts of quibbles with how to assess the evidence are appropriate for motion practice in the district court, not substantial-evidence review in this Court. And all that's left of USAA's argument beyond that is a complaint that Tim's counsel have not established that their lodestar matches the award. Although dressed up differently, that is nothing more than an

argument—at odds with this Court's clear precedent—that district courts should be prohibited from issuing contingency-based awards in all cases.

II. The district court also did not abuse its discretion in awarding some, but not all, of the costs that Tim sought.

A. USAA begins its challenge to the district court's cost award with the broad-based assertion that the court lacked sufficient evidence to award even a single cost. The record conclusively shows otherwise. The district court can award costs so long as it has "justifying documentation" or other evidence that establishes that the costs "were reasonable, necessary, and actually incurred." *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 120, 345 P.3d 1049, 1054 (2015). Here, Tim itemized every single cost he sought, stated what the cost covered, and included matching receipts. USAA's contention that this is insufficient to allow the district court to award *any* costs—even for filing fees or the transcript of Tim's deposition—finds no support in this Court's case law or common sense.

USAA's only two targeted challenges to the district court's cost award are no better. USAA claims that the district court had insufficient evidence to award the costs of exhibit binders at trial. But the court observed firsthand how the binders were used at trial (including by the court itself) and thus deemed the expense "perfectly legitimate." USAA also argues that the record provides no ground to exceed the presumptive statutory cap of $15,000 for Tim's only retained medical expert. To the contrary, the district court heard at trial how the doctor had extensive experience with Tim's precise

injuries, observed how he rebutted one of USAA's main defenses on damages, and learned that USAA's experts charged more. The district court thus acted well within its discretion in exceeding the cap.

B. USAA also has not shown that reversal is warranted because the district court did not make express findings that apportioning costs between USAA and the at-fault driver would be impractical. Apportionment is not required for the post-offer costs that make up the vast majority of what the district court awarded. At any rate, the district court's conclusion is the only one permissible on this record, and a remand for findings could not possibly change the outcome. From day one, the lawsuit against the driver was just a means to establish USAA's liability, and it would not have been brought but-for USAA's refusal to honor its promise to Tim. Every cost incurred was thus attributable to USAA and properly awarded against it.

ARGUMENT

I. There is no basis to reverse the district court's fee award.

This Court reviews fee awards for abuse of discretion. *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015). So long as the district court considers the *Beattie* factors (governing whether to award fees at all) and *Brunzell* factors (governing the amount of fees to award), and its assessment of a "reasonable" amount is supported by substantial evidence, this Court will affirm. *Id.*

On appeal, USAA leaves much of the district court's order unchallenged. It now concedes that the *Beattie* factors warrant enforcement NRCP 68's penalties. In other

words, it does not dispute that Tim's offer was reasonable in amount and timing or that its rejection of the offer was grossly unreasonable or in bad faith. And on the *Brunzell* factors, USAA questions neither counsel's skill nor the success of the result at trial. Still, USAA asserts that the district court's fee award—a consequence of USAA's intransigence in denying Tim what was owed even in the face of an exceptionally reasonable offer—must be overturned.

But USAA identifies no legal or factual error that warrants vacating the district court's careful order. Indeed, a clear signal that the district court heeded both the law and the record is that USAA finds it necessary, as its lead argument, to ask this Court to overturn precedent. But there is no basis for doing so, as the subject of USAA's attack, *Capriati*, 137 Nev. 675, 498 P.3d 226, involved a dispute over whether an *entire* contingency fee may be awarded as post-offer fees under NRCP 68—an issue that cannot affect the outcome of this case, where the court tailored its award to post-offer work only. This case is thus far from the "persuasive vehicle" for "revisit[ing]" *Capriati* that USAA suggests (at 6, 13).

Nor is there any basis to reverse under USAA's backup argument: that the district court's order is unsupported by substantial evidence. That is a "highly deferential" standard of review, *Rosky v. State*, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005), that asks only whether an award is backed by evidence that *any* "reasonable mind might accept as adequate to support" it, *Wright*, 121 Nev. at 125, 110 P.3d at 1068. USAA's fact-bound challenge cannot overcome it. Here, the district court's decision rested on

express consideration of every *Brunzell* factor, and it cannot be said that *no* reasonable person would agree with its ultimate conclusion: that less than two-thirds of the contingency fee was "reasonable" for a hard-fought case, stretching four years and ending in a weeklong trial where highly competent and hardworking counsel secured an overwhelming victory.

A. There is no ground—or, on this record involving a partial contingency award, any reason—to overturn *Capriati.*

USAA's lead argument—a plea to for this Court to overturn *Capriati*—suffers from a fundamental threshold problem: *Capriati* has no application here. The dispute in *Capriati* concerned an award of an entire contingency fee, not one, as here, tailored to post-offer work. Regardless, as USAA's heading for this argument admits (at 12), USAA's argument is founded on USAA's preferred "[p]ublic [p]olicy." But USAA's (unfounded) policy disagreements are a reason to try to get the rule changed, not for this Court to depart from precedent and upset reliance interests.

1. This Court has long recognized that "an award of attorney fees may be based on a contingency fee." *Nevins*, 140 Nev. Adv. Op. 66, 557 P.3d at 975 (citing *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864, 124 P.3d 530, 549 (2005)). *Capriati*, however, addressed a narrower issue: whether a court "may award the entire contingency fee as post-offer attorney fees under NRCP 68 because the contingency fee does not vest until the client prevails." *Capriati*, 137 Nev. at 680, 498 P.3d at 231 (2021).

A majority of this Court concluded that it could. It explained that contingency fees do "not vest until the client prevails" so the entire fee can fit NRCP 68's requirement that the amount awarded have been "actually incurred" since "the time of the [rejected] offer." *Id.* at 680, 498 P.3d at 231-32; NRCP68(f)(1)(B). And, the Court further reasoned, awarding the full contingency fee (in appropriate cases) accords with the purpose of NRCP 68 as it "serves as a punishment for rejecting a reasonable offer." *Capriati*, 137 Nev. at 680, 498 P.3d at 231-32. At the same time, the Court cautioned "that a party seeking NRCP 68 attorney fees based on a contingency-fee agreement must still satisfy the *Beattie* and *Brunzell* factors." *Id.* at 680, 498 P.3d at 232.

Three Justices dissented. They did not question that a contingency fee may be the basis of a post-offer award under NRCP 68. They did not even dispute that the entire fee may be awarded in appropriate case, and subsequently, this Court unanimously affirmed one such award (as reduced by the statutory cap for malpractice actions). *See Nevins*, 140 Nev. Adv. Op. 66, 557 P.3d at 976. Rather, the *Capriati* dissent took issue only with the district court awarding "the *entirety* of the contingency fee under NRCP 68 in the manner in which the district court did so in the underlying case," that is, "without additional evidence" that the award was "reasonable." *Capriati*, 137 Nev. at 681-83, 498 P.2d at 232-33 (Herndon, J., concurring in part, dissenting in part) (emphasis added). That was improper, in the dissent's view, because some of the work had been performed prior to the NRCP 68 offer. *Id.* at 682-83, 498 P.2d at 233; *see also*

Bellomo v. Roybal, No. 86412 at 10-12 (Nev. 2025) (Herndon, C.J., dissenting) ("reiterat[ing]" this view).

Capriati, in other words, has nothing to do with this case. The district court specifically tailored its award to capture only post-offer work, awarding 63 percent of the requested amount because that is how much of "this case took place after the October 19, 2022 Offer of Judgment." 11-AA2406. Overturning *Capriati* would not affect that result.

USAA claims (at 13) that it is nonetheless appropriate to "revisit" *Capriati* so that district courts do not "plac[e] undue weight on contingency-fee agreements" to the exclusion of the *Beattie* and *Brunzell* factors. But *Capriati*, as noted, expressly directs courts that parties must still satisfy those factors. So USAA's argument boils down to an assertion that this Court should overturn *Capriati* because district courts will not heed its clear instructions. That is not a valid basis for overturning precedent, especially since the only case USAA holds out as evidence of this problem (this case) offers the company no support (as recounted above, the district court evaluated every *Beattie* and *Brunzell* factor, *supra* at 14-17).

2. USAA's real gripe appears to be the possibility of awarding any contingency-based fee, no matter the amount and no matter the scenario—a position that would require reversing more than *Capriati* and that no justice has endorsed. *See also, e.g.*, *Nevins*, 140 Nev. Adv. Op. 66, 557 P.3d at 975; *Shuette*, 121 Nev. at 864, 124

P.3d at 549; *Jackson v. Tongol*, No. 84178, 2023 WL 4056930 (Nev. June 16, 2023) (unpublished disposition). USAA has failed to offer any legitimate basis to do so.

As this Court frequently cautions litigants, it is "loath to depart from the doctrine of stare decisis." *City of Reno v. Howard*, 130 Nev. 110, 113-14, 318 P.3d 1063, 1065 (2014). Adherence to precedent "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 315, 448 P.3d 1106, 1116 (2019) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). This Court will therefore "overrule precedent only if there are compelling reasons to do so." *Reno*, 130 Nev. at 113-14, 318 P.3d at 1065. "Mere disagreement" with a prior decision "does not suffice." *Miller*, 124 Nev. at 597, 188 P.3d at 1124. Rather, the decision must rest on reasoning that is "clearly erroneous," *Armenta-Carpio v. State*, 129 Nev. 531, 536, 306 P.3d 395, 398 (2013), or produce consequences that are "unworkable," *AmTrust N. Am., Inc. v. Vasquez*, 140 Nev. Adv. Op. 61, 555 P.3d 1164, 1167 (2024).

USAA has not made either showing here. It does not claim that NRCP 68's plain language precludes awarding the post-offer portion of contingency fee. That makes sense, as those fees are plainly—as even the *Capriati* dissent agreed—"actually incurred" after "the time of the offer." NRCP 68(f)(1)(B).

Instead, USAA's text-based arguments address factual scenarios not present here. The company complains (at 19) that allowing an attorney with a contingency

agreement to recover based on their lodestar instead when there is a small judgment "would not comport with the plain language" of the rule. Whatever the merits of that argument, it has no bearing in *this* case, where a party with a contingency agreement seeks a contingency-based amount. Similarly, USAA contends (at 22) that because the "plain language" of the rule "specifically contemplates not awarding a full contingency fee"—by requiring any award be "deducted from th[e] contingen[cy] fee" to avoid double recovery by the lawyer, NRCP 68(f)(1)(B)—district courts "should not simply rubberstamp a contingency-fee amount." Fair enough. There was no rubber stamping here, and, because of that, the district court awarded less than the "full contingency fee" Tim requested.[8]

USAA, moreover, has not even attempted to show that this Court's precedent allowing for contingency-based awards is "unworkable." Experience plainly shows otherwise. Parties continue to make offers of judgment. Defendants, as USAA's own conduct proves, have not been unduly deterred from rejecting offers. District courts, as the decision below demonstrates, do not reflexively award full contingency fees, but

[8] USAA also asserts (at 26 n.10) that allowing recovery of a contingency fee under NRCP 68 would preclude a party with a contingency agreement from recovering fees for a discovery sanction, which is imposed regardless of the outcome at trial. The argument depends on accepting the premise—which the Court never has—that if a party with a contingency arrangement can recover their contingency fee under NRCP 68, then they cannot recover their lodestar. But regardless, even if that were a proper interpretation of NRCP 68, the discovery rule, NRCP 37(a)(5), does not use the same language. *Compare* NRCP 37(a)(5) (referring to "expenses incurred…including attorney fees") *with* NRCP 68(f)(1) (referring to "reasonable attorney fees, if any be allowed, *actually* incurred (emphasis added)).

instead properly evaluate the *Beattie* and *Brunzell* factors. And this Court has proven capable of weeding out unjustified awards. *See Mendoza v. Jackson*, Nos. 85091, 85557, 2024 WL 3841782 (Nev. Aug. 14, 2024) (unpublished disposition).

Rather than provide the type of "compelling reason" that this Court has required before overturning precedent, *Reno*, 130 Nev. at 113-14, 318 P.3d at 1065, USAA advances its preferred "policy" positions. But USAA's desire for NRCP 68 to advance different policies is exactly the type of "mere disagreement" that is insufficient to warrant overruling a prior decision. *Miller*, 124 Nev. at 597, 188 P.3d at 1124.

And policy disagreements provide a particularly inappropriate basis to depart from stare decisis when it comes to the Rules of Civil Procedure. This Court has the power to establish committees comprised of judges, academics, and practitioners to study the rules and to propose amendments to assess competing policy considerations. *See, e.g.*, Hon. Mark Gibbons et. al., *Overview of the 2019 Amendments to the Nevada Rules of Civil Procedure*, *Nev. Law.,* June 2019, at 8, https://perma.cc/8FC8-R62B. Indeed, this Court has done so specifically to change NRCP 68 when a decision had the unintended effect of impeding settlement. See Amend. to the NRCP Adv. Comm. N.—2019 Amends. Preface, at 234 (2019), https://perma.cc/B72Y-8TBQ (explaining that a 2019 amendment allowing post-offer fees to run from the first offer displaced *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 132 P.3d 1022 (2006), to incentivize multiple offers and "encourage settlement"). Even if there were a basis to consider changing how NRCP 68 operates (and, to be clear, there is none), it should come through the

careful study of a committee, not the happenstance of whatever arguments the parties to this particular case present.

At any rate, USAA's policy arguments are unfounded. For instance, USAA criticizes (at 17) contingency-based awards as impeding "accurate[] calculat[ion]" of risk because the terms of contingency agreements are "possibly unknown" rather than "objective [and] knowable." But it's no secret that contingency fees run between 33 and 50 percent. This Court just confronted a ballot initiative based on that fact. *See Uber Sexual Assault Survivors for Legal Accountability v. Uber Techs., Inc*, No. 88813, 2025 WL 314211 (Nev. Jan. 27, 2025) (unpublished disposition). An offeree can therefore multiply that fee by what it deems to be the range of possible verdicts to ascertain its potential exposure.

The premise of USAA's critique—that the alternative is "objective [and] knowable"—is also faulty. An offeree cannot know with any precision what hourly fees will add up to. Summary judgment may be more complicated than predicted. Trial may be two weeks instead of the one anticipated. There may be a retrial. In a large-verdict case, a change in the start date of trial by just months can yield hundreds of thousands of additional dollars in post-offer interest. Perfect certainty just is not part of NRCP 68. And while USAA asserts without evidence (at 18) that the uncertainty tied to contingency-based awards will force defendants to "forego legitimate claims or defenses," this case—where the offer was made after *Capriati*—shows that some will still feel comfortable holding on to even illegitimate ones.

USAA's other policy-based arguments suffer from similar flaws,[9] and they all dance around what's really animating USAA's plea to overturn precedent that isn't even at issue: Contingency-based awards can sometimes be bigger. The problem for USAA is that this attribute of contingency-based awards aligns perfectly with NRCP 68's design of rewarding litigants who make reasonable settlement offers and punishing litigants who reject them. Indeed, in contingency cases, contingency-based awards are necessary for plaintiffs to enjoy the same incentive to make a reasonable offer—the prospect of being able to walk away without paying attorney fees for the post-offer portion of the case—as plaintiffs in other cases. And because the *Beattie* and *Brunzell* factors serve as adequate safeguards to protect against unreasonable awards and undue deterrence of legitimate defenses, there's no basis, or reason, to deny those who make

[9] Equally mistaken is USAA's reliance (at 15-17) on cases from other jurisdictions addressing different statutes and rules (or in two cases, a contractual right to fees). For instance, one addressed a prevailing-party fee-shifting statute that does not have punishment as an aim, *see City of Burlington v. Dague*, 505 U.S. 557 (1992), and that numerous courts have rejected anyway, *see, e.g.*, *Joyce v. Federated Nat'l Ins. Co.*, 228 So. 3d 1122, 1132 (Fla. 2017). Another considered a "carefully crafted [] party neutral" statute that involved express factors to be considered but did not include multipliers. *Sarkis v. Allstate Ins. Co.*, 863 So. 2d 210, 217 (Fla. 2003); *see Cajun Contractors, Inc. v. Peachtree Prop. Sub, LLC*, 861 S.E.2d 222, 240 (Ga. Ct. App. 2021) (distinguishing *Sarkis* on this basis and allowing for contingency multiplier); *see also, e.g.*, *Holzman v. Fiola Blum, Inc.*, 125 Md. App. 602, 642 (1999) (providing that contingency fees may be awarded in appropriate cases). Most important, although the statutes and rules in USAA's cases all differ, they do share one thing in common: none contains the same language and the full suite of incentives and penalties as NRCP 68.

reasonable and good-faith offers—like Tim—the ability to recover a justified contingency-based award when the offer is rejected in bad faith.

B. The district court's fee award is supported by substantial evidence.

USAA fares no better in its alternative argument that the district court's award is not supported by substantial evidence. USAA's decision to ask to overturn precedent *before* confronting the record here impliedly admits that the court's award was backed by substantial evidence and comports with this Court's case law. And although USAA still attempts to argue otherwise, its challenge to the fee award departs from the *Brunzell* analysis, disregards the standard of review, and mischaracterizes the district court's decision.

1. "In determining the amount of fees to award, the district court is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount, so long as the requested amount is reviewed in light of the *Brunzell* factors." *Logan*, 131 Nev. at 266, 350 P.3d at 1143. Thus, district courts may "award attorney fees to the prevailing party who was represented under a contingency fee agreement." *Nevins*, 140 Nev. Adv. Op. 66, 557 P.3d at 975. And it may do so "even if there are no hourly billing records to support the request." *Id.*

That does not mean that a court may reflexively award the contingency fee amount simply because a contingency agreement exists. The district court must always consider, and the moving party must always "satisfy," the *Brunzell* factors, even for a contingency-based award. *Capriati*, 137 Nev. at 680, 498 P.3d at 231-32. In other words,

the question is not whether the contingency arrangement was a reasonable arrangement *ex ante*, a question that will almost invariably be answered in the affirmative based on freedom-of-contract principles. Instead, the question is whether the amount that the contingency agreement produces is reasonable when viewed through the lens of counsel's actual performance, the nature of the case, and the outcome achieved. The district court's answer to that question will be upheld so long as it is "supported by substantial evidence," *Logan*, 131 Nev. at 266, 350 P.3d at 1143, that is evidence "which a reasonable mind might accept as adequate to support" the award, *Wright*, 121 Nev. at 125, 110 P.3d at 1068.

2. The district court's award must be upheld under this standard. The court chose an approved method for evaluating the request—basing it on the contingency fee that Tim now owes his counsel—and it then assessed the *Brunzell* factors one by one to determine a reasonable award, specifically asking, "what is a reasonable amount to recover?" 11-AA2388, 11-AA2404-06. Drawing on Tim's submission, oral argument, and the court's familiarity with the case from four years oversight, the court accounted for the high quality of Tim's counsel, the substantial amount of work they put into the case and time spent in court, the numerous different issues and parties involved, and the unambiguous success they achieved. *Supra* at 15-17; 10-AA2404-07. And while it concluded that this warranted an amount tied to the contingency fee that Tim is now obligated to pay his counsel, the court still discounted Tim's request by more than a third to tailor the award to the work performed after the offer of judgment. 11-AA2406.

It cannot be said that *no* reasonable mind would agree that the resulting amount is "reasonable"—and it therefore cannot be said that the award is unsupported by substantial evidence.

3. In claiming that the district court's award is nonetheless deficient, USAA leaves much uncontested. It does not question the district court's findings on the quality of Tim's counsel, the success they achieved, or the reasonableness of the contingency arrangement.

Nonetheless, USAA asserts that the award is unsupported by substantial evidence—that not one reasonable person could think the amount awarded is justified—based on the district court's consideration of "the work actually performed." *See* USAA Br. at 23-31. USAA's argument fails for a host of reasons.

First, USAA's narrow focus on the work performed misunderstands the *Brunzell* analysis. The question this Court has directed district courts to answer is not whether each *Brunzell* factor independently supports the award, but whether, after consideration of the factors together, the award is reasonable. As *Brunzell* itself explained, "no one element should predominate or be given undue weight." 85 Nev. at 349-50, 455 P.2d at 33. USAA's argument entirely fails to engage with the holistic analysis this requires, never addressing the quality of Tim's counsel or the indisputably successful outcome at trial. USAA cannot demonstrate that the award is unsupported by substantial evidence without actually engaging with all the evidence that underlies the award.

Second, even if USAA's focus on the work performed were proper, the company's critique ignores the evidence on which the district court relied. According to USAA (at 23), the court's decision was based on nothing other than Tim's counsels' estimate of hours and a vague reference to the extent of the district court docket. USAA asserts that this "same 'evidence,' if accepted, would support the same attorney fee award" in every case.

This badly misconstrues the district court's decision. The district court stressed that the case was "heavily and thoroughly litigated" (a fact reflected in cross-motions for summary judgment, motions to strike experts, and numerous motions in limine); that it involved a significant number of "different issues" across the case; that Tim's counsel spent substantial time actually in court with numerous hearings and seven trial days—a stark contrast with the court's cases where "we never see the people"; that counsel took claims against two defendants to verdict and had to prepare for a trial defended by two separate insurance companies; and that counsel "work[ed] very hard" throughout and "thoroughly addressed" all the issues at every turn of the case. 11-AA2406. This is not a judge "waving a hand and expressing familiarity with the case," as USAA claims (at 23). Nor is it an analysis that dictates the same result in every case "regardless of the attorneys involved, regardless of the actual time spent by the attorneys, and regardless of the type of case." *Id.* It is a record-specific analysis that,

combined with the exceptional result and the quality of counsel—again, neither of which USAA questions—fully justifies the award here.[10]

Third, tacitly acknowledging that the district court did more than just "wave its hand," USAA tries to undercut the district court's assessment of how much work Tim's counsel performed and the difficulty of the case. Its argument defies the deferential standard of review applicable here. For instance, USAA asserts (at 25) that the case "was not so heavily litigated" because it involved twenty substantive motions, a number that USAA apparently thinks is minimal. And it claims (at 25) that the issues were "straightforward" and the number of witnesses (fifteen) and exhibits (more than 100 identified to be potentially introduced in the pretrial memoranda) was "small." But the district court presides over a busy docket, and the court's daily experience informed its assessment that this case was heavily litigated and complex. USAA gives no reason why

[10] This evidence also demonstrates why USAA is mistaken to rely (at 30) on this Court's (unpublished) comment that a "general and conclusory" affidavit is insufficient. *See Comstock Residents Ass'n v. Lyon Cnty. Bd. of Comm'rs*, No. 83463, 2022 WL 4298634, at *2 (Nev. Sept. 16, 2022) (unpublished disposition). In *Comstock*, the defendant mining company tried to recover its lodestar (from a local residents' group that challenged a zoning decision) with nothing but a conclusory affidavit. Where the hours expended are what is at issue, providing nothing but conclusory assertions may be insufficient. But this Court has never required the level of detail USAA suggests, even in those lodestar cases. In *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, for example, this Court held that no discount was required where the movant provided "inadequate documentation" because the award was justified based on the district court's "familiarity with the work quality of the parties' attorneys" and the partial invoices submitted. 134 Nev. 235, 245-46 n.7, 416 P.3d 249, 259 n.7 (2018); *see also* Appellant's Op. Br., *MEI-GSR Holdings,* 2017 WL 2453985, at *59 (explaining that the movant provided documentation for only $61,142.50 of the more than $200,000 requested).

its characterization of the record must be credited over the district court's contrary one, and the company's self-serving description—which, if USAA genuinely believes, only underscores the level of bad-faith involved in its rejection of the offer of judgment—does not establish that no "reasonable mind" could agree with the court below. *Wright*, 121 Nev. at 125, 110 P.3d at 1068 (2005).

Fourth, USAA engages in an extended argument (at 25-28) that the award here is unreasonable because counsels' lodestar would have been lower. This is nothing more than an argument, irreconcilable with this Court's precedent, that contingency-based awards should never be allowed. It ignores entirely the important role contingency arrangements play in incentivizing representation for "those who cannot afford an attorney." *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 559, 429 P.3d 664, 671 (Nev. App. 2018). It ignores that, if accepted, plaintiffs under a contingency arrangement would never have the same incentive as other parties to make an offer of judgment. And most important, it ignores the core of the inquiry: whether the award is "reasonable." Exceeding the lodestar does not make an award per se unreasonable.

This case shows why. It's hard to imagine *any* neutral observer describing this award—secured after four years of litigation (and six years of representation) and a life-changing victory for Tim—as "unreasonable."[11] And, of course, to show that the award

[11] USAA cites a single (unpublished) case in which this Court reversed a contingency-based award even after considering the *Brunzell* factors, but it is perfectly consistent with the award here being reasonable. *See Mendoza*, 2024 WL 3841782. In

is unsupported by substantial evidence, USAA needed to show that is the *only* conclusion a reasonable person could draw.[12]

II. The district court did not abuse its discretion in awarding costs.

Just as the district court carefully considered the evidence supporting Tim's motion for fees, it carefully scrutinized his motion for costs. In the end, after full briefing and an argument where the court marched category by category through the costs claimed, the court awarded $91,846.75 in costs that Tim sought and denied him $43,966.82. 11-AA2393-94.

Despite the district court's methodical parsing of each category of costs—and its refusal to grant nearly a third of what Tim sought—USAA claims that the entire award must be thrown out due to insufficient documentation and a failure to apportion the costs among USAA and the at-fault driver. Neither argument has merit.

Mendoza, the district court entered a default and damages were established through a "prove-up hearing." *Id.* at *1, *4. In that scenario, where the case was essentially uncontested, the full contingency award would have represented a windfall rather than a reasonable amount. The same cannot be said of the partial contingency award after a hotly contested trial here.

[12] USAA asks this Court to simply reverse. Although there is no basis to disturb the district court's award at all, the proper course would be to remand for further consideration of the *Brunzell* factors. *See, e.g., Lai v. Saga*, Nos. 87911, 88331, 2025 WL 1766325, at *3 (Nev. June 25, 2025) (unpublished disposition) (remanding after finding that award was not supported by substantial evidence); *Comstock*, 2022 WL 4298634 at *2 (same).

A. The district court did not abuse its discretion in holding that it had sufficient documentation to award costs.

1. District courts are afforded "wide" discretion in awarding costs. *Cadle*, 131 Nev. at 120, 345 P.3d at 1054. That discretion is not "unlimited," and a court cannot base its award on speculation. *Id.* at 120-22, 345 P.3d at 1054-55. But so long as the party seeking costs submits "justifying documentation" that evidences that the costs "were reasonable, necessary, and actually incurred," the court's award will be upheld. *Id.*

Cadle illustrates how this framework operates—and that it does not impose a high bar. There, this Court held that there was sufficient documentation of "service costs," "parking fees," and "filing fees" because they were supported by "receipts" and "court records." *Id.* at 121 & n.5, 345 P.3d at 1054 & n.5. Similarly, invoices for deposition transcripts, even without any additional "itemization" or "justification," were sufficient. *Id.* at 122, 345 P.3d at 1055. By contrast, costs could not be awarded for the expense of a deposition transcript when the requested was accompanied neither by a receipt nor any other "justification," and the costs of photocopies could not be awarded when there was no explanation of what was photocopied, precluding the district court from assessing the reasonableness and necessity of the cost. *Id.* at 121, 345 P.3d at 1055-56.

2. With two exceptions discussed below, USAA does not single out specific costs that it believes were insufficiently justified. Instead, it launches a broad-based claim (at

32-34, 36-37) that the district court lacked adequate documentation of the "reasonableness and necessity" of *any* costs—not one. The breadth of USAA's challenge reveals that it is based on a flawed understanding of this Court's case law. Just consider how USAA's argument applies to Tim's claim for the costs associated with the $3.50 filing fee for the amended complaint, which added USAA as a defendant. 1-AA104-13. Tim included that cost in his memorandum of costs as a separate line item in an itemized chart of all expenses incurred. 9-AA1807 (item 29). He included the receipt for the filing fee. 9-AA1852-53. And his counsel verified that the expense was reasonable, necessary, and actually incurred. 9-AA1810. What more does USAA think is needed to establish that the cost of filing the amended complaint against it is justifiably recovered? And what purpose would that additional explanation or documentation serve?

The same questions could be asked of every other cost on the chart. To take a few examples: the cost of obtaining the medical records from Tim's treating neurologist (item 2), the cost of obtaining the transcript for Tim's deposition (item 43), the cost of paying to depose USAA's experts (items 53 and 54), or the cost of parking during trial for Tim's counsel (items 110 and 111), each of which was backed by corresponding invoices or receipts. 9-AA1805-10; 9-AA1813, 1884, 1895-96, 2019-20. The district court did not need anything more to determine that these obviously reasonable, necessary, and actually incurred costs were all three of those things. That is why the court was able to march category by category through each cost at the hearing and

explain—in a colloquy that USAA never mentions—why it found various costs to be "obvious" items that could be recovered and things that the court could "even confirm" itself were reasonably, necessarily, and actually incurred. 10-AA2261-62, 2269, 2274, 2277, 2281.

If USAA thought any specific items were lacking in support, it needed to identify them in its opening brief. By instead trying to knock out nearly the entire award with a single shot—the absence of sufficient documentation for *anything*—USAA has waived any more specific challenges. *Bongiovi v. Sullivan*, 122 Nev. 556, 569 n.5, 138 P.3d 433, 443 n.5 (2006) ("declin[ing] to consider" argument the appellant "did not raise … in his opening brief").

2. USAA does raise specific challenges to two costs: for trial binders and Tim's medical expert. Both fail.

The trial binders. The district court was fully justified in awarding the complete cost of the binders used at trial. This isn't like an unexplained photocopy charge where the court does not know what was copied or why. *See Cadle*, 131 Nev. at 121-22, 345 P.3d at 1055. The court itself used these binders. Thus, at the hearing on the motion to retax, the court remarked, "I understand that one" because "yeah, we had a lot. There were lots and lots of exhibits." 10-AA2269; *see also* 10-AA2274 ("We had so many binders. Gosh, how many, 12 or something? It was huge. And they were huge. They weren't the little binders. They were the big ones."). Indeed, the district court did not

even think there was a "need to discuss" the binders; this was a "perfectly legitimate" expense. AA2274.

USAA claims (at 35-36) the district court had no way to know the "reasonableness or necessity" of the binders and points the Court to a case where the cost of one binder was disallowed because the binder was "an unrequested courtesy copy." But it was not difficult for the court to determine the need for these binders. Again, the binders were in the courtroom, the district court observed firsthand how counsel used them, and the court used the binders itself. As Tim explained in opposing the motion to retax, "[t]he printed binders were provided to the Court, *pursuant to the Court's instructions*." 10-AA2167 (emphasis added). The court did not abuse its discretion in awarding costs for the binders under these circumstances.

Expert costs. USAA's attack on the district court's partial award of the costs Tim incurred in hiring Dr. Hossein Ansari—his only retained medical expert—is just as weak. When determining whether to award expert costs exceeding the presumptive statutory cap of $15,000, a district court "should consider several factors, including the importance of the expert's testimony to the party's case, the extent of the expert's work, and whether the expert had to conduct independent investigations or testing." *Motor Coach Indus., Inc. v. Khiabani by & through Rigaud*, 137 Nev. 416, 428, 493 P.3d 1007, 1017 (2021).

The district court did not abuse its discretion here in granting some, but not all, of the costs above the cap that Tim sought. Dr. Ansari has credentials particularly

well-tailored to Tim's claims. He did a fellowship at the Mayo Clinic in "headache and facial pain," developed a "multidisciplinary headache clinic" in Ohio, ran the "headache center" at the University of California, San Diego (where he is still a professor), and then went on to open up and run the Kaizen Brain Center in San Diego to "focus more on headache[s]," "TBI" (i.e., traumatic brain injuries), "concussion[s]," and "memory problem[s]"—the exact ailments that Tim suffered from. 5-AA1069.

Dr. Ansari's work on this matter was also both extensive and critical to Tim's case. Prior to trial, he produced both his own report on Tim's injuries and a rebuttal report to USAA's medical experts. 10-AA2165. At trial, he explained how traumatic brain injuries and post-concussive syndrome work (and did so in clear terms that were easy to understand for the jury); demonstrated why Tim's injuries warranted coverage from USAA; and offered pivotal testimony about how there was nothing inconsistent about Tim performing normally on certain neurological tests and, at the same time, having seriousness cognitive injuries—rebutting a central (but flawed) pillar of USAA's defense. *See, e.g.*, 5-AA1071-75, 5-AA1081; 4-AA891 (USAA raising these tests in its opening statement).

The district court would have been justified in awarding the full $51,000 that Tim sought, but it carefully exercised its discretion and determined that only a lesser amount was warranted. The court explained that there was a benefit to the jury seeing Dr. Ansari "in person," justifying his travel fees and the time "for the trial itself." 10-AA2279. But, the court held, Tim had not adequately substantiated the need to pay Dr. Ansari more

than $15,000 for his pre-trial work. 10-AA2279. Thus, the court awarded only $38,028.97. This was a measured analysis that held Tim to his burden of justifying cost, not a reflexive rubber stamp, and it was not abuse of discretion.

In challenging the fee, USAA contends (at 34) that there was no "evidence to support" a variety of the factors relevant to the presumptive cap, but the company's argument simply ignores the evidence in front of the court. Take USAA's claim that evidence was lacking of the need to "retain Dr. Ansari from out of state." As just recounted, Dr. Ansari had credentials that were a perfect fit for this case. And San Diego (where Dr. Ansari lives) is closer to Las Vegas than other parts of Nevada (including Reno).

Or consider USAA's assertion (at 34-35) that the record does not support that Dr. Ansari's fees were "consistent" with what is "traditionally charged" or "proportional to the amount of work performed." Both disregard what the court heard at trial. USAA's own expert, Dr. Ginsburg, charged $7,000 for just a half day of trial—a higher rate than Dr. Ansari's $10,000 total fee for trial testimony. *See* 7-AA1535-1536, 9-AA1885.[13] Likewise, because Dr. Ginsburg testified that he charged $18,000 for work

[13] In a one-sentence footnote, USAA claims the $9,000 that Tim's treating physician paid for a half day was unjustified. "[A] single sentence in a single footnote" is insufficient to preserve an argument. *United States v. Sanchez*, 745 F. App'x 690, 691 n. 2 (9th Cir. 2018). At any rate, Tim's counsel explained that the amount was necessary because the physician had to make himself available for a significant period of the day given the fluidity of trial and thus had to close his active practice while waiting to be called. 10-AA2271-72.

even before his deposition, 7-AA1534-36, the district court's award of just $15,000 for all of Dr. Ansari's pretrial work was fully supported by the record. Given the "obvious importance" of Dr. Ansari's role in the case, and the evidence the district court heard at trial, the court did not abuse its discretion in partially granting Tim's request. *Motor Coach*, 137 Nev. at 428, 493 P.3d at 1017; *see also, e.g.*, *Capanna v. Orth*, 134 Nev. 888, 896-97, 432 P.3d 726, 735 (2018) (holding that, although "the district court could have elaborated on its analysis of the doctors' necessity," the award was justified in view of each expert being "necessary to [the plaintiff's] case").

B. There is no basis to reverse the cost award for failure to apportion.

Finally, USAA asks this Court to throw out the entire cost award because the district court did not make express findings that the costs could not be apportioned between USAA and the at-fault driver. This fails for two reasons.

First, the district court could have awarded post-offer costs without regard to apportionment. The foundation of USAA's argument is that NRS 18.050, which allows a prevailing party to recover costs, provides that they "may be apportioned" among defendants. But NRCP 68 provides an independent basis to recover costs and—consistent with the rule's incentivizing of settlement—does not require

apportionment.[14] So because Tim also sought fees under NRCP 68, 9-AA1805, the post-offer costs can be upheld on that basis alone.

Second, even if apportionment did apply in this context, it would be impractical here and USAA has not attempted to show—and could not show—prejudice from the absence of express findings. NRS 18.050 provides that costs "may be apportioned," but does not require it in every case. This Court has therefore explained that district courts need not apportion costs among defendants when the claims are sufficiently "intertwined" that apportionment would be impracticable, though they are required to make findings on the issue before reaching that conclusion. *Mayfield v. Koroghli*, 124 Nev. 343, 353, 184 P.3d 362, 369 (2008).

Although the district court here did not make express findings, that was harmless. Tim initiated his lawsuit against the driver only to preserve his rights against USAA. 4-AA-844 (explaining that Tim had agree not to collect anything from the at-fault driver in exchange for the driver paying his policy limit of $50,000). As USAA acknowledged in its motion to intervene, it would be "bound by the result" of the lawsuit against the driver if it had not intervened. 1-AA10. USAA fully defended against

[14] In the district court, USAA argued that NRCP 68 did not provide an independent basis for recovering costs because this Court held in *Nevins* that "NRCP 68 does not conflict with NRS 18.005." 140 Nev. Adv. Op. 66, 557 P.3d at 977; 9-AA2036. That misunderstands *Nevins*. This Court held that NRCP 68, which provides a basis to recover costs, can be applied in tandem with NRS 18.005, which simply defines "costs" and provides limits on what may be recovered. 140 Nev. Adv. Op. 66, 557 P.3d at 977. By contrast, NRS 18.050 and NRCP 68 are two independent bases for recovering costs and only one (NRS 18.050) contemplates apportionment.

Tim's tort claim for damages caused by the driver. It is self-evident that those costs apply to the case against USAA. And as its corporate representative confirmed at trial, if it hadn't "step[ped] into the shoes of the at fault driver," it was "risking a default judgment and that would have been - it could have been used to collect money" from USAA. 5-AA1029. Reflecting this, USAA even opposed Tim's motion for partial summary judgment against the driver. 10-AA2122. In other words, from its commencement to its completion, the entire case was geared toward recovery against USAA—not the at-fault driver who never appeared—and apportionment is therefore impracticable.

Indeed, USAA does not even claim that apportionment would be possible for costs incurred after it entered the case. Instead, it attempts (at 38) to fault Tim for not addressing apportionment in his memorandum of costs. But the burden to establish apportionment rests with the party seeking to avoid costs. *See, e.g.*, *State Farm Fire & Cas. Co. v. Silver Star Health & Rehab*, 739 F.3d 579, 586 (11th Cir. 2013); *In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449, 469 (3d Cir. 2000). And, at any rate, Tim explained in his opposition to the motion to retax why apportionment was impracticable. 10-AA2160-61; *Katz v. Incline Vill. Gen. Improvement Dist.*, No. 71493, 2019 WL 6247743, at *4 (Nev. Nov. 21, 2019) (unpublished disposition) (relying on evidence and argument presented in the "opposition to [the] motion to retax").

The absence of express findings is just as harmless for the costs incurred prior to USAA intervening. Most of Tim's pre-intervention costs (items 1 through 18) were

for retrieving medical records that were used to support his claims against USAA for breach of contract (which USAA mooted by tendering the policy limits on the eve of trial) and bad faith. 9-AA1806-07. Indeed, the district court categorized them as evidence in a "first party" insurance case. 10-AA2277. That leaves only six pre-intervention costs (items 19, 20 through 23, and 25) for $883.60 in costs related to the filing and service of the complaint against the driver. But because Tim only ever sued the driver so that he could lay the foundation for establishing USAA's liability, those costs are just as much attributable to USAA and too intertwined with Tim's claims against it to be apportioned.

USAA had an obligation to pay Tim the policy limits. Its refusal to do so forced him to bring an unnecessary lawsuit against the at-fault driver just, as everyone knew, to set the stage to collect from USAA and hold it to its promise as an insurer. USAA's attempt now to avoid the costs its actions forced on Tim should be rejected.

CONCLUSION

The district court's orders awarding fees and costs should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word version 16.106.1 in 14-point Adobe Garamond font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 12,501 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, 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 if it does not, I may be subject to sanctions.

Dated: March 6, 2026

/s/ Matthew L. Sharp
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CERTIFICATE OF SERVICE

Under NRAP 25(b), I certify that on March 6, 2026, I submitted the foregoing brief for filing via the Nevada Supreme Court's eFlex electronic filing system. Electronic notification will be sent to the following counsel:

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