

SEVENTH JUDICIAL DISTRICT COURT  
DAN L. PAPEZ  
DISTRICT JUDGE  
DEPARTMENT 2  
WHITE PINE, LINCOLN AND EUREKA COUNTIES  
STATE OF NEVADA



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OFFICIAL RECORDS  
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NO. \_\_\_\_\_  
**FILED**  
JAN 8 2004  
Eureka County Clerk  
BY *[Signature]* Deputy

Case No. 3543

Dept No. 2 **185458**  
EUREKA COUNTY, NEVADA  
FILE NO. REDEALTY RECORDER  
FEES 31<sup>00</sup>

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF  
NEVADA, IN AND FOR THE COUNTY OF EUREKA

\*\*\*\*\*

ANGELA WONG KURTZ,

Plaintiff,

vs.

STATE OF NEVADA on relationship to the  
NEVADA DEPARTMENT OF  
TRANSPORTATION; JEFFREY ALLEN  
EASTES; WATKINS AND SHEPPARD  
TRUCKING, INC.; DONALD WOODWORTH  
PARKER; and JOHN DOES I-X, all individually,  
jointly, and severally.

Defendants.

LISA MENDEZ, as Administrator of the Estate  
of EDWARD P. KURTZ and LILY M. KURTZ,  
Decendants and RICHARD KURTZ,  
individually.

Plaintiffs,

vs.

JEFFREY ALLAN EASTES, WATKINS AND  
SHEPPARD TRUCKING, INC., DONALD  
WOODWORTH PARKER, STATE OF  
NEVADA DEPARTMENT OF  
TRANSPORTATION and DOES I-XX.

Defendants.

**ORDER AWARDING IN PART,  
AND DENYING IN PART,  
DEFENDANTS' REQUEST FOR  
COSTS AND ATTORNEY'S FEES**

**BACKGROUND**

Defendants Jeffrey Allen Eastes and Watkins and Sheppard Trucking, Inc., filed a Motion



1 for Costs and Attorney's Fees on November 13, 2003. Plaintiff Estates faxed an Opposition to  
2 Motion for Attorney's Fees and Costs of Suit to the Eureka County Clerk's Office that was  
3 received on November 24, 2003.<sup>1</sup> Plaintiff Angela Wong Kurtz filed a Reply in Opposition to  
4 Defendants' Motion for Costs and Attorney's Fees on December 1, 2003. Defendants filed a Reply  
5 in Support of Defendant Jeffrey Allen Eastes and Watkins & Sheppard Trucking, Inc.'s Motion for  
6 Costs and Fees From Plaintiff Angela Wong Kurtz on December 5, 2003. Defendants also filed a  
7 Reply in Support of Defendant Jeffrey Allen Eastes and Watkins & Sheppard Trucking, Inc.'s  
8 Motion for Costs and Attorney's Fees from Plaintiff Estates on December 5, 2003.

## DISCUSSION

### I. Costs

Defendants argue that they are entitled to costs pursuant to NRS §§ 17.115, 18.020, and  
NRCP 68.

NRS § 17.115 provides in relevant part:

4. Except as otherwise provided in this section, if a party who rejects an offer of judgment fails to obtain a more favorable judgment, the court: ...

(c) Shall order the party to pay the taxable costs incurred by the party who made the offer; and

(d) May order the party to pay the party who made the offer any and all of the following:

(1) A reasonable sum to cover any such costs incurred by the party who made the offer for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case.

See NRS § 17.115.

Additionally, NRS § 18.020 provides in relevant part:

Costs must be allowed of course to the prevailing party against any adverse party against whom judgment is rendered, in the following cases: ...

3. In any action for the recovery of money or damages, where the plaintiff seeks to

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<sup>1</sup>As of this date, however, a signed original copy has not been received by the Eureka County Clerk's Office. Accordingly, this document has not been filed.



1 recover more than \$2,500.

2 See NRS § 18.020.

3 Finally, NRCP 68 provides in relevant part:

4 (f) Penalties for Rejection of Offer. If the offeree rejects an offer and fails to obtain  
a more favorable judgment ...

5 (2) the offeree shall pay the offeror's post-offer costs, applicable interest on the  
judgment from the time of the offer to the time of entry of the judgment and  
6 reasonable attorney's fees, if any be allowed, actually incurred by the offeror from  
the time of the offer.

7 See NRCP 68.

8 As a threshold matter, Defendants argue that they are entitled to all costs, pre-offer and  
9 post-offer, due to an inconsistency in language between NRS §17.115 and NRCP 68. Because the  
10 Court concludes, however, that Defendants are entitled to all costs as a prevailing party under to  
11 NRS § 18.020, the Court need not address the issue of any possible conflict in language between  
12 NRS § 17.115 and NRCP 68.

13 The types of costs that may be awarded to a prevailing party are set forth in NRS § 18.005,  
14 which provides:

15 For the purposes of NRS 18.010 to 18.150, inclusive, the term "costs" means:

- 16 1. Clerks' fees.
- 17 2. Reporters' fees for depositions, including a reporter's fee for one copy of each  
18 deposition.
- 19 3. Jurors' fees and expenses, together with reasonable compensation of an officer  
appointed to act in accordance with NRS 16.120.
- 20 4. Fees for witnesses at trial, pretrial hearings and deposing witnesses, unless the  
21 court finds that the witness was called at the instance of the prevailing party without  
reason or necessity.
- 22 5. Reasonable fees of not more than five expert witnesses in an amount of not more  
23 than \$ 1,500 for each witness, unless the court allows a larger fee after determining  
that the circumstances surrounding the expert's testimony were of such necessity as  
24 to require the larger fee.
- 25 6. Reasonable fees of necessary interpreters.
- 26 7. The fee of any sheriff or licensed process server for the delivery or service of any  
summons or subpoena used in the action, unless the court determines that the  
service was not necessary.



8. The fees of the official reporter or reporter pro tempore.
9. Reasonable costs for any bond or undertaking required as part of the action.
10. Fees of a court bailiff who was required to work overtime.
11. Reasonable costs for telecopies.
12. Reasonable costs for photocopies.
13. Reasonable costs for long distance telephone calls.
14. Reasonable costs for postage.
15. Reasonable costs for travel and lodging incurred taking depositions and conducting discovery.
16. Any other reasonable and necessary expense incurred in connection with the action, including reasonable and necessary expenses for computerized services for legal research.

See NRS § 18.005.

Defendants filed a Memorandum of Costs on November 13, 2003 in which Defendants set forth eight (8) categories of costs they seek to recover, including: (1) clerk's fees, (2) reporter's fees (depositions), (3) juror's fees and expenses, (4) fees for witnesses at trial, (5) expert witness fees, (6) fees for service of subpoenas, (7) fees for the official reporter, (8) "reasonable costs." See Defs. Jeffrey Allen Eastes and Watkins and Sheppard Trucking, Inc.'s Mem. of Costs (filed Nov. 13, 2003).

#### 1. Clerk's Fees

Defendants seek \$291.00 in Clerk's fees. See Mem. of Costs at 2. Plaintiffs do not oppose these costs, which are appropriate and allowed under NRS § 18.005(1). Accordingly, the Court finds Defendants are entitled to costs of \$291.00 for Clerk's fees.

#### 2. Reporter's Fees – Depositions

Defendants seek \$10,703.65 in reporter's fees from depositions. These costs include amounts for a reporting fee, an original, one copy, a mini transcript, an ASCII file, exhibits, e-transcripts, "realtime," rough draft, and postage. See Mem. of Costs at 2-6. NRS § 18.005 allows:



1 "Reporters' fees for depositions, including a reporter's fee for one copy of each deposition." See  
2 NRS § 18.005(2). Nowhere in the statute does it allow for costs of a mini transcript, an ASCII file,  
3 e-transcripts, "realtime," rough draft, or postage. As a result, these costs will not be considered by  
4 the Court.

5 Additionally, Defendants seek \$100.00 for "Copy of Videotape of depositions of Lt. Patrick  
6 Gallagher, Trp. Dan Hammill and Trp. [sic] Greg Johnson." See id. at 6. These videotapes were  
7 not used at trial and the associated costs will not be considered by the Court.

8 Moreover, included under this heading are costs associated with the reporting of the May  
9 30, 2003 "Court Hearing on Motion." See id. at 5. These costs relate to the sanctions levied  
10 against Defendants and are not appropriate costs.

11 Finally, Defendants state in their "Reply in Support of Defendant Jeffrey Allen Eastes and  
12 Watkins & Sheppard Trucking, Inc.'s Motion for Costs and Attorney's Fees from Plaintiff Estates"  
13 that Defendants will not dispute Plaintiff Estates opposition to reimbursement for the costs of the  
14 deposition of Richard Kurtz. See Reply to Estates at 3. Accordingly, this cost also will not be  
15 considered.

16 In the Estates Opposition to Motion for Attorney's Fees and Costs, Plaintiff Estates argue  
17 that the deposition costs of Janice Peterson and Larry Barton also should not be included.  
18 Defendants, however, point out that the costs here are related to depositions that were noticed by  
19 Plaintiffs. See Reply to Estates at 3, Ex. A. As these costs were incurred as a result of the actions  
20 of Plaintiff Estates, the Court finds that purchasing a copy of a transcript of these depositions was  
21 reasonable and necessary.

22 Accordingly, the Court finds Defendants are entitled to costs of \$7,456.85 for reporter's  
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1 fees from depositions.

2 **3. Juror's Fees and Expenses**

3 Defendants seek \$120.00 in juror's fees and expenses for the first day jury deposit. See  
4 Mem. of Costs at 6. Plaintiffs do not oppose these costs, which are appropriate and allowed under  
5 NRS § 18.005(3). Accordingly, the Court finds Defendants are entitled to costs of \$120.00 for  
6 juror's fees and expenses.

7  
8 **4. Fees for Witnesses at Trial**

9 Defendants seek \$560.90 in fees for witnesses at trial. See Mem. of Costs at 6. The  
10 witnesses include Joseph Patrick Gallagher, Gregory A. Johnson, Winslow Pierce Fretwell, Glen  
11 Carter, Michelle Decker, and Margie Turpin. Plaintiffs do not oppose these costs, which are  
12 appropriate and allowed under NRS § 18.005(4). Accordingly, the Court finds Defendants are  
13 entitled to costs of \$560.90 for fees for witnesses at trial.

14  
15 **5. Expert Witness Fees**

16 Defendants seek \$20,621.50 in expert witness fees. See Mem. of Costs at 6-7.  
17 Specifically, Defendants seek \$7,154.26 for Scott Kimbrough, \$250 for Gregory DuVal, \$666.67  
18 for Stanley Thompson, \$510 for George Beaulieu, \$300 for Larry Cole, \$525 for Terry Winkler,  
19 M.D., \$400 for Edward Howden, and \$10,815.47 for Albert Calkin. See id.

20  
21 NRS §18.005(5) allows: "Reasonable fees of not more than five expert witnesses in an  
22 amount of not more than \$1,500 for each witness, unless the court allows a larger fee after  
23 determining that the circumstances surrounding the expert's testimony were of such necessity as to  
24 require the larger fee." Defendants argue that circumstances here warrant an amount in excess of  
25 the \$1,500 limit, because:  
26



1 First, Dr. Kimbrough lives in Utah and consequently part of his expert witness fee  
2 included travel expenses. Despite Dr. Kimbrough residing in Utah, Defendants  
3 retained him because he was reasonably close to the accident scene and has  
4 outstanding credentials as an accident reconstruction expert. Dr. Kimbrough's  
5 testimony was helpful to the trier of fact because his testimony helped to identify  
6 the speed of the Chevrolet Citation at the time of impact.

7 See Reply to Estates at 4. The Court has reviewed these arguments and finds that the  
8 circumstances of this case do not warrant a departure above the \$1,500 limit. The Court  
9 specifically notes that the speed of the Chevrolet Citation at the time of impact also was  
10 established by the accident reconstruction conducted by the Nevada Highway Patrol.

11 The Court, however, will award costs incurred from all eight experts, as a large portion of  
12 the expert costs resulted from depositions of experts hired by Plaintiffs.

13 Accordingly, the Court finds Defendants are entitled to costs of \$5,651.67 for expert  
14 witness fees.

15 **6. Fees for Service of Subpoenas**

16 Defendants seek \$400.00 in fees for service of subpoenas. See Mem. of Costs at 7.  
17 Plaintiffs do not oppose these costs.

18 NRS § 18.005(7) allows: " The fee of any sheriff or licensed process server for the delivery  
19 or service of any summons or subpoena used in the action, unless the court determines that the  
20 service was not necessary." Here, Defendants do not state whether the people listed were licensed  
21 process servers nor do Defendants state how or why service was necessary. Accordingly, the Court  
22 finds Defendants are not entitled to costs for fees for service of subpoenas.  
23

24 **7. Fees for the Official Reporter**

25 Defendants seek \$8,021.13 in fees for the official reporter. See Mem. of Costs at 7.  
26





1 Plaintiffs do not oppose these costs, which are appropriate and allowed under NRS § 18.005(8).  
2 Accordingly, the Court finds Defendants are entitled to costs of \$8,021.13 for fees for the official  
3 reporter.

4 **8. "Reasonable Costs"**

5 **a. Photocopying (Outside Vendor)**

6 Defendants seek \$26.52 in photocopying costs from an outside vendor. See Mem. of Costs  
7 at 8. Plaintiffs do not oppose these costs, which are appropriate and allowed under NRS §  
8 18.005(12). Accordingly, the Court finds Defendants are entitled to costs of \$26.52 in  
9 photocopying costs from an outside vendor.  
10

11 **b. Facsimile Charges**

12 Defendants seek \$138.90 in facsimile charges. See Mem. of Costs at 8. Plaintiffs do not  
13 oppose these costs, which are appropriate and allowed under NRS § 18.005(16). Accordingly, the  
14 Court finds Defendants are entitled to costs of \$138.90 in facsimile charges.  
15

16 **c. Investigator Charges**

17 Defendants state in their "Reply in Support of Defendant Jeffrey Allen Eastes and Watkins  
18 & Sheppard Trucking, Inc.'s Motion for Costs and Attorney's Fees from Plaintiff Estates" that  
19 Defendants will not dispute Plaintiff Estates opposition to investigative charges. See Reply to  
20 Estates at 4. Accordingly, these costs will not be considered.  
21

22 **d. Express Mailings**

23 Defendants seek \$1,142.15 in costs for express mailings. See Mem. of Costs at 9-11.  
24 Plaintiffs do not oppose these costs, which are appropriate and allowed under NRS § 18.005(14).  
25  
26





1 Accordingly, the Court finds Defendants are entitled to costs of \$1,142.15 in costs for  
2 express mailings.

3 **e. Photocopying**

4 Defendants seek \$6,138.15 in photocopying costs. See Mem. of Costs at 12-13. Plaintiffs  
5 do not oppose these costs, which are appropriate and allowed under NRS § 18.005(12).  
6 Accordingly, the Court finds Defendants are entitled to costs of \$6,138.15 in photocopying costs.  
7

8 **f. Telephone**

9 Defendants seek \$570.83 in telephone costs. See Mem. of Costs at 13. Plaintiffs do not  
10 oppose these costs, which are appropriate and allowed under NRS § 18.005(13). Accordingly, the  
11 Court finds Defendants are entitled to costs of \$570.83 in telephone costs.  
12

13 **g. Postage**

14 Defendants seek \$49.70 in postage costs. See Mem. of Costs at 13. Plaintiffs do not  
15 oppose these costs, which are appropriate and allowed under NRS § 18.005(14). Accordingly, the  
16 Court finds Defendants are entitled to costs of \$49.70 in postage costs.

17 **h. Travel Expenses**

18 Defendants seek \$9,243 in travel expenses. See Mem. of Costs at 13-15. Plaintiffs do not  
19 oppose these costs.

20  
21 NRS § 18.005(15) allows: " Reasonable costs for travel and lodging incurred taking  
22 depositions and conducting discovery." Additionally, NRS § 18.005(16) allows: "Any other  
23 reasonable and necessary expense incurred in connection with the action, including reasonable and  
24 necessary expenses for computerized services for legal research."  
25

26 Defendants included \$4.25 as "miscellaneous travel expense" incurred on July 29, 2002.



1 This description is not sufficient for the Court to determine whether it is a reasonable or necessary  
2 expense. As a result, it will be excluded.

3 Similarly, the "miscellaneous travel expenses" totaling \$66.76 from May 9, 2003, May 29,  
4 2003, June 9, 2003, and August 8, 2003 also will be excluded.

5 Defendants include \$361.00 in travel expenses incurred in connection with the May 30,  
6 2003 hearing sanctioning Defendants. These costs relate to the sanctions levied against Defendants  
7 and are not appropriate.

8 Defendants also include \$22.61 from Heidi's Family Restaurant on October 28, 2003, as a  
9 meal on return trip from Eureka. The Court notes that Heidi's Family Restaurant has locations in  
10 Carson City and Reno. The Court is not convinced that this is a reasonable or necessary expense.  
11 Accordingly, it will be excluded. Similarly, the two meals captioned trial preparation meeting at  
12 Red Robin and MacGrill Reno also have not been shown to be reasonable or necessary expenses.  
13 Accordingly, they too will be excluded.

14 Finally, Defendants included \$65 paid to the Eureka Justice Court on June 3, 2003 as a  
15 miscellaneous travel expense. See Mem. of Costs at 14. The Court can only assume that a \$65  
16 "travel expense" paid to the Eureka Justice Court is payment for a traffic citation. **If that indeed is**  
17 **the case, the Court is outraged that Defense counsel would attempt to include a fine for a**  
18 **traffic citation as a reasonable and necessary expense incurred in connection with the action.**

19 Accordingly, the Court finds Defendants are entitled to costs of \$8,375.94 in travel  
20 expenses.  
21 ...



1                    **i. Jury Consultant**

2                    Defendants state in their "Reply in Support of Defendant Jeffrey Allen Eastes and Watkins  
3                    & Sheppard Trucking, Inc.'s Motion for Costs and Attorney's Fees from Plaintiff Estates" that  
4                    Defendants will not dispute Plaintiff Estates opposition to reimbursement for the costs of the jury  
5                    consultant. See Reply to Estates at 4. Accordingly, these costs will not be considered.

6                    **j. "Miscellaneous"**

7                    Under the heading of "Miscellaneous," Defendants seek \$9,652.84 to pay for sanctions paid  
8                    to Gregory Corn, sanctions paid to Gary Green, "miscellaneous trial expense," and for trial  
9                    computer consultation.

10                  Defendant incurred sanctions from the Court as a result of the Court finding that  
11                  Defendants were "at fault" for the termination of the mandatory settlement conference. See Reply  
12                  in Support of Defendant Jeffrey Allen Eastes and Watkins & Sheppard Trucking, Inc.'s Motion for  
13                  Costs and Attorney's Fees from Angela Wong Kurtz, Ex. A (filed Dec. 5, 2003). Sanctions levied  
14                  by the Court as the result of Defendants arriving at a mandatory settlement conference without  
15                  settlement authority are not a reasonable and necessary expense. See NRS §18.005(16).  
16                  Accordingly, Defendants are not entitled to these costs.

17                  As for the "miscellaneous trial expense" and the trial computer consultation, the Court is  
18                  unable to determine whether these costs were reasonable or necessary expenses. Accordingly,  
19                  these costs will not be considered.

20                  For the reasons stated above, and good cause appearing, the Court finds that an award of  
21                  \$38,723.74 is appropriate.

22                  Accordingly, Plaintiffs are hereby ordered to pay Defendants \$38,723.74 in costs.  
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1 Liability for the costs be apportioned jointly and severally between Plaintiffs, in accordance  
2 with the rationale employed by the Nevada Supreme Court in University of Nevada v. Tarkanian,  
3 110 Nev. 581, 593, 879 P.2d 1180 (1994), where the court stated: "we see no reason to prohibit the  
4 imposition of joint and several fee liability where the losing defendant has caused the plaintiff to  
5 suffer a single indivisible harm." It is so ordered.

## 6 **II. Fees**

7  
8 Defendants argue that they are entitled to attorney's fees pursuant to NRS § 17.115 and  
9 NRCP 68.

10 The Nevada Supreme Court has stated that the decision of a trial court to award attorney's  
11 fees is discretionary. See Beattie v. Thomas, 99 Nev. 579, 588, 668 P.2d 268 (1983).  
12 Additionally, the court stated:

13  
14 In exercising its discretion regarding the allowance of fees and costs under NRCP  
15 68 ... the trial court must carefully evaluate the following factors: (1) whether the  
16 plaintiff's claim was brought in good faith; (2) whether the defendants' offer of  
17 judgment was reasonable and in good faith in both its timing and amount; (3)  
18 whether the plaintiff's decision to reject the offer and proceed to trial was grossly  
19 unreasonable or in bad faith; and (4) whether the fees sought by the offeror are  
20 reasonable and justified in amount.

21 See id. at 588-89.

### 22 **A. Plaintiff Angela Wong Kurtz**

#### 23 **1. Beattie Factor One: Whether Plaintiff's Claim Brought in Good Faith.**

24 The first factor the Court must consider is whether Plaintiff's claim was brought in good  
25 faith.

26 Defendants argue that the claim was not brought in good faith because Plaintiff proceeded  
to litigation despite Defendants' arguments of contributory negligence.



1 The issue of contributory negligence in this case, however, was not at all clear-cut. The  
2 Court issued an Order for Further Briefing on October 3, 2003, which sought additional points,  
3 authorities and argument on the issue of whether all evidence of contributory negligence should be  
4 excluded at trial. Then, on October 21, 2003, the Court issued an Order Re Motion in Limine  
5 when it ultimately ruled that evidence of Plaintiff's contributory negligence could be admitted  
6 during trial.

7  
8 In light of Plaintiff's strong argument that could have excluded all evidence of contributory  
9 negligence, the Court is hard pressed to find that the claim was not brought in good faith.

10 Moreover, the Court heard all of the evidence presented and believes a jury easily could  
11 have found negligence on the part of Defendants.

12 Accordingly, this factor weighs against the awarding of attorney's fees.

13  
14 **2. Beattie Factor Two: Whether Defendants' Offer of Judgment was**  
15 **Reasonable and in Good Faith in Both its Timing and Amount.**

16 The second factor the Court must consider is whether Defendants' offer of judgment was  
17 reasonable and in good faith in both its timing and amount.

18 Defendants argue that the offer of \$20,001 was made at a time when both sides could  
19 adequately assess liability, and that the offer was generous given the fact that jury ultimately found  
20 in favor of Defendants.

21  
22 In the circumstances of this case, an offer of \$20,001 could be considered reasonable given  
23 the possibility of a verdict in favor of Defendants as well as the possibility of verdict in favor of  
24 Plaintiff that would be reduced by comparative negligence. Accordingly, this factor weighs in  
25 favor of an award of attorney's fees.  
26



1                   **3. Beattie Factor Three: Whether Decision to Proceed to Trial was Grossly**  
2                   **Unreasonable or in Bad Faith**

3                   The third factor the Court must consider is whether Plaintiff's decision to proceed to trial  
4 was grossly unreasonable or in bad faith.

5                   Defendants argue that it was unreasonable for Plaintiff to reject the offer, because the offer  
6 was generous and because Plaintiff presumably was aware of the facts and law in this case.

7  
8                   Here, however, Plaintiff sought an \$11 million verdict and rejected an offer of \$20,001.  
9 Given the disparity between these two numbers and Plaintiff's strong argument for exclusion of  
10 any evidence of contributory negligence, the Court is hard pressed to find that Plaintiff's rejection  
11 was grossly unreasonable or in bad faith. Moreover, the Court heard the evidence presented in this  
12 case with regard to damages and believes a jury easily could have returned a verdict that was  
13 sizably larger than \$20,001.  
14

15                  The Court also notes that simply because the offer may have been reasonable, the corollary  
16 does not mandate that rejection of such an offer is grossly unreasonable or in bad faith.

17                  Accordingly, this factor weighs against an award of attorney's fees.

18                   **4. Beattie Factor Four: Whether the Fees Sought are Reasonable or Justified**  
19                   **in Amount.**

20  
21                  The fourth factor the Court must consider is whether the fees sought by Defendants are  
22 reasonable or justified in amount.

23                  Here, Defendants billed at a rate of \$125 per hour for attorney time and \$55 per hour for  
24 paralegal time and submitted an itemized record of fees reasonably and necessarily incurred in  
25 defending this action. See Mot. for Attorney's Fees and Costs. Aff. of Christian L. Moore, Esq.  
26



1 (filed Nov. 13, 2003). The total fees incurred were \$103,230.

2 A portion of these fees relate to the sanctions levied against Defendants with regard to the  
3 mandatory settlement conference, which the Court finds were not reasonably and necessarily  
4 incurred in defending this action. Particularly, the Court finds that 6.3 hours of time billed at \$100  
5 per hour and 51.39 hours of attorney time billed at \$125 per hour from May 9, 2003 until May 30,  
6 2003 were not reasonably and necessary incurred in defending this action as this related to the  
7 sanctions levied against Defendants. Accordingly, the corresponding \$7,053.75 in fees will not be  
8 included.  
9

10 Additionally, Plaintiff argues that a portion of these fees also relate to the cross-claim filed  
11 by NDOT. Plaintiff, however, does not cite to any of these fees in particular. In reviewing the  
12 record of fees provided by Defendants the Court has located 0.10 hour on June 6, 2003 that relate  
13 specifically to the cross-claim as opposed to NDOT's ordinary involvement as a Defendant.  
14 Accordingly, the corresponding \$12.50 in fees will not be included.  
15

16 The Court notes that the remaining \$96,163.75 in fees relate to Defending both Angela  
17 Wong Kurtz's claim and the Estates' claim.  
18

19 The Court finds that in balancing the equities, 75 percent of Defendants time was devoted  
20 to Plaintiff Angela Wong Kurtz's claim, which was much more serious than the very weak punitive  
21 damage claim brought by the Estates.

22 Accordingly, fees of \$ 72,122.81 could be reasonable or justified in amount.

23 **5. Conclusion**

24 In light of all of the factors set forth in Beattie, the Court finds in its discretion that an  
25 award of attorney's fees against Angela Wong Kurtz is not appropriate. This case was brought in  
26





1 good faith, and Plaintiff Angela Wong Kurtz was completely justified in proceeding to trial.

2 **B. Plaintiff Estates**

3 **1. Beattie Factor One: Whether Plaintiff's Claim Brought in Good Faith.**

4 The first factor the Court must consider is whether Plaintiff's Claim was brought in good  
5 faith.

6 Plaintiff Estates' claim was for actual damages and punitive damages pursuant to the  
7 Nevada wrongful death statute.

8 At the outset, there is nothing in the record to indicate that the initial filing of this claim  
9 was in bad faith. Accordingly, this factor weighs against an award of attorney's fees.

10 **2. Beattie Factor Two: Whether Defendants' Offer of Judgment was**  
11 **Reasonable and in Good Faith in Both its Timing and Amount.**

12 The second factor the Court must consider is whether Defendants' offer of judgment was  
13 reasonable and in good faith in both its timing and amount.

14 Defendant made its offers of judgment to the Estates on November 6, 2002. See Mot. for  
15 Attorney's Fees and Costs, Ex. A. Additionally, on December 4, 2002, the Court issued an Order  
16 approving a settlement from Defendant Donald Woodworth Parker, which paid the Estates a total  
17 of \$25,000. See Reply in Support of Mot. for Fees and Costs from Plaintiff Estates, Ex. B. The  
18 Motion for Good Faith Settlement was filed on October 28, 2002. See "Mot. for Good Faith  
19 Settlement Pursuant to NRS 127.245 and For Dismissal of the Complaint and Cross-Claim Against  
20 Donald Woodworth Parker. Only" (filed Oct. 31, 2002). In October 2002, Plaintiff Estates' agreed  
21 to a settlement which more than covered any claims it might have had for actual damages pursuant  
22 to NRS § 41.085(5). Defendants offer of \$10,002 was made at about the same time as the offer  
23  
24  
25  
26



1 from Parker that was accepted by the Estates. As a result, Defendants offer came at a time where  
2 Plaintiff Estates would be aware that the only claim that could entitle them to relief at trial was the  
3 claim for punitive damages. Additionally, it came at a time when the Estates could evaluate the  
4 likelihood of success of such a claim for punitive damages and could realize that such a claim was  
5 extremely weak.

6 Accordingly, Defendants' offer of \$10,002 was reasonable and good faith in timing and  
7 amount.  
8

9 **3. Beattie Factor Three: Whether Decision to Proceed to Trial was Grossly**  
10 **Unreasonable or in Bad Faith.**

11 The third factor the Court must consider is whether Plaintiff's decision to proceed to trial  
12 was grossly unreasonable or in bad faith.

13 As noted above, Defendants made offers of judgment to the Estates on November 6, 2002.  
14 See Mot. for Attorney's Fees and Costs. Ex. A. Similarly, as noted above, this was close in time to  
15 when the Estates had accepted a settlement from Parker that more than covered any claims the  
16 Estates might have had for actual damages pursuant to the wrongful death statute. As a result,  
17 when Plaintiffs rejected Defendants offer of \$10,002 and decided to proceed to trial, the only  
18 possible recovery Plaintiff Estates could receive would be through its very questionable and weak  
19 claim for punitive damages. Plaintiff Estates' claim for punitive damages was dismissed when the  
20 Court granted Defendants' 41(b) motion, and the Court gave very detailed reasons for its decision  
21 to grant the motion. For these same reasons, Plaintiff Estates rejection of Defendants offers was  
22 grossly unreasonable. No rational jury could find for punitive damages based upon the evidence  
23 presented in this case. Deciding to proceed to trial on such a claim was grossly unreasonable.  
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1 Accordingly, this factor weighs in favor of an award of attorney's fees.

2 4. Beattie Factor Four: Whether the Fees Sought are Reasonable or Justified  
3 in Amount.

4 The fourth factor the Court must consider is whether the fees sought by Defendants are  
5 reasonable or justified in amount. As noted above, here Defendants billed at a rate of \$125 per  
6 hour for attorney time and \$55 per hour for paralegal time and submitted an itemized account of  
7 fees reasonably and necessarily incurred in defending this action. See Mot. for Attorney's Fees and  
8 Costs, Aff. of Christian L. Moore, Esq. The total fees incurred were \$103,230.

9 As noted above, \$96,163.75 in fees were reasonably incurred in Defending both Angela  
10 Wong Kurtz's claim and the Estates' claim. The Court finds that in balancing the equities, 75  
11 percent of Defendants time was devoted to Plaintiff Angela Wong Kurtz's claim, which was much  
12 more serious than the very weak punitive damage claim by the Estate.

13 Accordingly, fees of \$24,040.94 would be reasonable or justified in amount.

14 5. Conclusion

15 In light of all of the factors set forth in Beattie, the Court finds in its discretion that an  
16 award of attorney's fees against Plaintiff Estates is appropriate.

17 Accordingly, the Estate of Edward P. Kurtz and Lily M. Kurtz is hereby ordered to pay  
18 Defendants \$24,040.94 in attorney's fees.

19 DATED this 6<sup>th</sup> day of January, 2004.

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SEVENTH JUDICIAL DISTRICT COURT IN AND FOR COUNTY OF EUREKA STATE OF NEVADA	} SS
I, the Undersigned COUNTY CLERK and Ex-Officio CLERK of the SEVENTH JUDICIAL DISTRICT COURT do hereby CERTIFY that the foregoing is a full, true and correct copy of the original on file in my office and that I have carefully compared the same with the original.	
WITNESS My Hand and Seal of said DISTRICT COURT, this 11 <sup>th</sup> day of February, 2004	
<i>Francois H. H.</i> County Clerk and Ex-Officio Court Clerk	<i>Mary [Signature]</i> Deputy Clerk

*Dan L. Lopez*  
DISTRICT JUDGE

185458  
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