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DISTRICT COURT
CLARK COUNTY, NEVADA

In the Matter of the Administration of THE FISCHER TRUST, dated November 21, 1988.	Case No.: P-10-067881-T Dept. No.: 31

NOTICE OF ENTRY OF DECISION AND ORDER RE: FEES

PLEASE TAKE NOTICE that a Decision and Order re: Fees was entered by the Court on the 15th day of April, 2016, a true and correct copy of which is attached hereto.

Dated this 22nd day of April, 2016.

DICKINSON WRIGHT, PLLC

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of April, 2016, I caused a copy of the foregoing **NOTICE OF ENTRY OF DECISION AND ORDER RE: FEES** to be served by the Court's electronic filing system on the following persons:

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Administration of: THE FISCHER TRUST, DATED NOVEMBER 21, 1988	Case No.: P-10-067881-T Dept. No.: XXXI

This matter came on for hearing on December 16, 2015, on Tsai Gerth's ("Ms. Gerth") Motion for Stay of Execution of Judgment Pending the Disposition of Post-Trial Motions and H. Ownby and China Post No. 1's ("Petitioners") Countermotion for Award of Attorney Fees and Costs as Sanctions Pursuant to EDCR 7.60; Ms. Gerth's Motion for Attorney Fees and Costs based on Offer of Judgment and Petitioners Countermotion for Award of Attorney Fees and Costs as Sanctions Pursuant to EDCR 7.60; Ms. Gerth's Motion for an Order taking Judicial Notice of Post-Trial Payment to Trust of $16,000 by Estate for Expenses Paid by Trust and Allowing Offset Credit; Petitioners Counter-Motion for Fees and Recovery of Funds for Ms. Gerth's Failure to Pay Petitioners for the Trust's Vehicle; Ms. Gerth's Motion to Deny or in the Alternative to Retax Costs; Motion to Amend Findings of Fact, Conclusions of Law and Judgment; Petitioners

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Omnibus Motion for Amended Findings Pursuant to NRCP 52(B); Motion for Attorney Fees Pursuant to NRCP 54, NRS 18.010 and ICA SEC 633A.4507; and Ms. Gerth's Motion to Quash Premature Execution on Judgment.[1] Present at the hearing was Elizabeth Brickfield, Esq., counsel for Petitioners; and Elizabeth Foley, Esq., counsel for Ms. Gerth. During the hearing, an issue arose as to whether Nevada law or Iowa law controlled in evaluating an award of attorney fees based on new Nevada case law. The parties requested additional briefing, and the Court allowed supplemental briefing on the issue of whether a determination of attorney's fees is procedural or substantive law. Both parties timely submitted supplemental briefs which the Court took into consideration in its rulings.

I. FACTUAL BACKGROUND

This matter came on for a bench trial on November 10, 12, 13, 14, 17, and 20, 2014, and on January 8, 9, 12, 13, 14, 20, and 23, 2015. The Court issued its decision on September 11, 2015. In its Order, the Court held as follows:

> "IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Respondent Tsai Lynn Gerth breached her fiduciary duties as Trustee to the Fischer Trust, and given those breaches is not entitled to any compensation as Trustee, and thus, must disgorge the thirteen thousand, five hundred dollars ($13,500) that she paid herself as Trustee and repay it to the Beneficiary of the Trust.

[1] The issues raised by the Motion for Stay of Execution of Judgment Pending the Disposition of Post-Trial Motions, the Countermotion for Award of Attorney Fees and Costs as Sanctions Pursuant to EDCR 7.60 and Motion to Quash Premature Execution on Judgment were both fully addressed and resolved at the December 16, 2015, hearing. Thus, they will not be discussed further in this Order.

IT IS FURTHER HEREBY ORDERED, ADJUDGED, AND DECREED Respondent Tsai Lynn Gerth breached her fiduciary duties as Trustee to the Fischer Trust, and given those breaches included her paying non-Trust debts with Trust assets, she must refund to the Trust beneficiary the amount of seven thousand, seven hundred and forty-nine dollars, and fifty-six cents ($7,749.56).

IT IS FURTHER HEREBY ORDERED, ADJUDGED, AND DECREED that Petitioners request to be reimbursed for the sixty-five thousand, one hundred and eighty-six dollars, and eighty-eight cents ($65,186.88) which they contend Ms. Gerth improperly paid in attorney fees to Edward Marshall is DENIED.

IT IS FURTHER HEREBY ORDERED, ADJUDGED, AND DECREED that Petitioners request to be awarded as an element of damages the one hundred and ninety-nine thousand, nine hundred and fifty-nine dollars, and nine cents ($199,959.09) that they spent in attorney fees in this action, as well as additional attorney's fees that were incurred after that amount was disclosed, is denied as an element of damages for the reasons set forth herein. The Court takes no position as to whether the fees can or cannot be awarded as part of the Contempt hearing that is being heard by the Honorable Mark Denton.

IT IS FURTHER HEREBY ORDERED, ADJUDGED, AND DECREED that the other assets of the Trust including, but not limited to, any books or pictures that have not yet been turned over to the Beneficiary by Ms. Gerth be turned over within 30 days of the date of this Order if such assets still exist in her possession custody or control.

IT IS FURTHER HEREBY ORDERED, ADJUDGED, AND DECREED that the other assets of the Trust to which there was not a specific request as to their outcome, to wit: the stock and the land in New Mexico, there is nothing for the Court to adjudicate as the beneficiaries have the information and there is nothing known to be in the possession Ms. Gerth nor any damages demonstrated with regard to these two assets." (Findings of Fact, Conclusions of Law and Judgment p. 33-35)

Subsequently, on September 29, 2015, Ms. Gerth filed a Motion for Attorney's Fees and Costs Based Upon Offer of Judgment and a Motion for an

Order Taking Judicial Notice of Post-Trial Payment to Trust of $16,000 by Estate for Expense Paid by Trust and Allowing Offset Credit. On October 9, 2015, Ms. Gerth filed a Motion for Stay of Execution of Judgment Pending Disposition of Post Trial Motions on an Order Shortening Time. On October 16, 2015, Ms. Gerth filed a Motion to Deny or in the Alternative to Retax Costs; and on October 21, 2015, Ms. Gerth filed a Motion to Amend Findings of Fact, Conclusions of Law and Judgment. On November 2, 2015, Petitioners filed an Omnibus Motion for Amended Findings Pursuant to NRCP 52(b); Motion for Attorney Fees Pursuant to NRCP 54, NRS 18.010, NRC 153.031 and I.C.A. 633A.4507; and Additional Relief.

At the hearing on October 27, 2015, on the Motion for Stay of Execution of Judgment Pending Disposition of Post-Trial Motions, the parties agreed to have a consolidated hearing on all pending Motions at that time and any additional Motions timely filed after that date. They agreed on a new hearing date.

All Motions were heard on December 16, 2015. The parties requested, and the Court allowed, the parties to file supplemental briefing on the issue of whether a determination of attorney's fees was substantive or procedural law based on a recent Nevada Supreme Court case. The supplemental briefs were timely filed by the parties. After a full review of all papers, pleadings, and argument, the Court rules as follows

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II. PETITIONERS OMNIBUS MOTION FOR AMENDED FINDINGS PURSUANT TO NRCP 52(B0 MOTION FOR ATTORNEY FEES PURSUANT TO NRCP 54, NRS 18.010 NRC 153.031 AND ICA SECTION 633A.4507; AND ADDITIONAL RELIEF[2]

Petitioners' Omnibus Motion for Amended Findings Pursuant to NRCP 52(b) requests that the Court amend its Findings to include an award of attorney fees and costs they have incurred exclusive of the attorney fees and costs they incurred related to the Estate of Harold Edward Fischer, and those fees that they are still incurring with the pending contempt proceedings. Petitioners also filed a combined Motion for Attorney Fees both pursuant to Nevada law and Iowa law. Petitioners also combined a request to revisit the Court's ruling regarding the status of the van as either trust or estate property.[3] Given the various Motions were combined in one pleading, and overlap other pleadings, the Court finds it proper to address first the Petitioners' various Motions for Attorney Fees and Costs.

A. A Determination Of Attorney's Fees And Costs Is Substantive Under Nevada Law And Therefore Iowa Law Applies To The Court's Determination Of Attorney's Fees And Costs

Statutes and rules regarding attorney fees and costs are substantive rather than procedural, and is therefore governed by the law that applies to the

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[2] While the caption does not directly address costs, and Petitioners filed a separate Memorandum of Costs, within the body of the Motion, Petitioners' also requested costs in the body of the Motion. Further, Ms. Gerth opposed the Costs requests both in her Opposition to the Motion as well as her Motion to Deny or in the Alternative Retax Costs. As the parties have combined the Cost issues in the various motions, the Court will address the Costs issue both pursuant to the Motion and in the Memorandum in a combined manner.

[3] The Court DENIES Petitioners' Motion to Amend relating to the van as this is an untimely Motion to Reconsider as more fully discussed in herein. The Court also finds that the status of the Van was already determined by the prior judge assigned to the case, Judge Cadish; and thus, that ruling is law of the case.

case at hand. *WPH Architecture, Inc. v. Vegas VO, LP* 360 P.3d 1145, 131 Nev. Adv. Op. 88 (2015). ("*WPH Architecture*") Based on the Court's prior ruling that Iowa law is the governing law pursuant to *WPH Architecture*, Iowa law would also apply to the pending Motions for fees and costs. Within the supplemental briefs submitted by the parties, neither party opposes the application of Iowa law to the Court's determination of fees and costs. Therefore, all pleadings relating to Fees and Costs will both be analyzed under Iowa law.

B. Petitioners' Motion for Costs and Fees

Iowa law provides that costs shall be recovered by the successful party against the losing party. I.C.A. Section 625.1. In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may also award costs and expenses, including reasonable attorney fees, to any party, to be paid by another party or from the trust that is the subject of the controversy. I.C.A. Section 633A.4507.

An applicant for attorney's fees has the burden to prove that the services were reasonably necessary and that the charges were reasonable in amount. *City of Riverdale v. Diercks,* 806 N.W. 2d 643,659 (Iowa 2011) Iowa has identified five factors to be considered in determining whether a fee award is just and equitable, and those factors include: reasonableness of the parties claims, contentions or defenses; unnecessarily prolonging litigation; relative ability to bear financial burden; result obtained by the litigation and prevailing party concepts; whether a party has acted in bad faith, vexatiously, wantonly or for oppressive reasons in bringing or conduct of the litigation. *In re Trust No. T-1 of*

Trimble, 826 N.W.2d 474, 492 (Iowa 2013).

1. Motion for Costs pursuant to I.C.A. 625.1

Petitioners, in their supplemental briefing, contend they are entitled to costs both pursuant to I.C.A. Section 625.1 and I.C.A. Section 633A.4507. Ms. Gerth opposed both of their requests and filed her Motion to Deny or in the Alternative Retax Costs. The Court will address each basis raised by the parties in turn.

Pursuant to ICA 625.1, a prevailing party is entitled to its reasonable documented costs. Petitioners assert that they are entitled to costs in the amount of twenty-seven thousand, nine hundred sixteen dollars, and fifty-three cents ($27,916.53). They then break down that cost amount as follows: Certified Copies: three hundred seventy-eight dollars and fifteen cents ($378.15); Filing Fees: three hundred sixty-one dollars and fifty cents ($361.50); Court Reporter/Transcripts: eight thousand, six hundred sixty-six dollars, and seventy-five cents ($8,666.75); Duplicating: three thousand, five hundred sixty-nine dollars and eighteen cents ($3569.18); Long Distance: sixteen dollars and fourteen cents ($16.14); Service of Process: two thousand and seven hundred sixty-five dollars ($2,765.00); Professional Fees: two thousand, nine hundred eighty-six dollars and thirty-eight cents ($2,986.38); Research - Computer Assisted: eight thousand, four hundred forty seven dollars and ninety cents ($8,447.90); Travel and Related Expenses: twenty eight dollars and forty-eight cents ($28.48); and Witness Fees: six hundred, thirty-six dollars, and forty cents ($636.40). Under Iowa law, as in Nevada, there must be support for the costs

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provided by the counsel requesting the costs. *Boyle v. Alum-Line, Inc.*, 773 N.W.2d 829, 832 (Iowa 2009). In the present case, Petitioners did provide support for its costs and detailed billing statements over more than five years to substantiate the costs requested including receipts from the deposition service which oversaw some of the depositions.

Ms. Gerth contends that there are not itemized bills for *inter alia* the electronic legal research and the duplicating charges. Petitioners responded that the firm's practice was to provide monthly legal research billing and that duplicating charges were appropriately accounted for. The Court finds Petitioners' arguments persuasive given this is a five-year case which involved a multitude of Motions, and the state law of two and sometimes three jurisdictions (Nevada, Iowa and Texas).

Ms. Gerth also disputes the claim for professional fees charged as not being properly substantiated and involving estate matters. The Court concurs that they are not properly substantiated as relating to the instant case. Further, there were not billings for video charges; and thus, they are disallowed. Accordingly, the Court reduces the Costs sought by two thousand, nine hundred sixty-eight dollars and thirty-eight cents ($2968.38).

Accordingly, except as noted herein, the amount of costs requested is facially reasonable. The Court also needs to take into consideration the accounting department of Petitioners' law firm is no longer in existence, as well as the fact that the Iowa case law precedent cited does not have the same particularity requirement as Nevada case law.

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In addition to contending that there was not sufficient support, Ms. Gerth also argues that Petitioners only mentioned that it was seeking costs in the amount of approximately twelve thousand dollars ($12,000.00) at the time of closing arguments. She contends that they should be bound to that amount. There, however, was no legal support provided that would preclude Petitioners from determining that the amount of costs incurred were greater than they thought at the time of trial once they had an opportunity to review all the cost billings which were properly supported. Thus, the Court does not find that Petitioners were limited to the amount mentioned at trial given all the factors set forth herein.

In sum, looking at all of the factors in their totality, and applying the case law of the appropriate jurisdiction, the Court finds the costs requested in the amount of twenty seven thousand, nine hundred sixteen dollars and fifty-three cents ($27,916.53) are reduced by two thousand, nine hundred eighty-six, and thirty-eight cents ($2986.38) and that the amount of costs awarded in the amount of twenty four, nine hundred thirty dollars, and fifteen cents ($24,930.15) is reasonable and appropriately supported. Accordingly, Petitioners' Memorandum of Costs is GRANTED in part and Ms. Gerth's Motion to Retax is DENIED in part as set forth herein. [4]

[4] Ms. Gerth had also asserted that costs were not appropriate due to her submitting an Offer of Judgment. As discussed herein, that argument fails as the Offer of Judgment was not timely and thus, does not bar Petitioners' claim for costs as a prevailing party.

2. Motion for Costs and Fees pursuant to ICA 633A.4507

Petitioners also contend that they are entitled to costs and fees pursuant to ICA 633A.4507. That provision provides that the Court has discretion to award fees and costs "as justice and equity require" *In re Trust of Trimble*, 826 N.W.2d 474.

The *Trimble* Court went on to determine the meaning of the phrase "as justice and equity require" as it stated the case, was one of first impressions in Iowa. Utilizing the analysis of other states including Oklahoma, the Iowa court found that trial courts would need to engage in a two-part test. The first prong of the analysis is to determine whether the party was entitled to fees. If an award of fees is merited, courts then need to analyze whether the fees requested were reasonable.

In deciding whether a party is entitled to fees, the *Trimble* Court held that the reviewing Court should evaluate the following five factors: 1. reasonableness of the parties claims, contentions or defenses; 2. unnecessarily prolonging litigation; 3. relative ability to bear financial burden; 4. result obtained by the litigation and prevailing party concepts; and 5. whether a party has acted in bad faith, vexatiously, wantonly or for oppressive reasons in bringing or conduct of the litigation. *Id.* at 492. Thereafter, if the Court establishes that there is a basis for attorney's fees and costs, the Court must then evaluate the reasonableness of the fees and costs being requested, as it is the burden of the party moving for fees to establish the services were reasonably necessary and the charges were reasonable. *City of Riverdale v Diercks*, 806 N.W. 2d 643, 659 (Iowa 2011). The

Trimble factors are discussed in turn below.

3. **Reasonableness of the parties' claims, contentions, or defenses**

While Petitioners were not the prevailing party on all claims set forth in this matter, they were successful in establishing that the Trustee breached her fiduciary duty and the Court ordered that Ms. Gerth repay the Trustee fees she paid herself. As there was enough evidentiary support to establish a breach of the Trustee's fiduciary duties, the claims made by the Petitioners were reasonable.

The Court also needs to evaluate the contentions and defenses of Respondent Ms. Gerth. In so doing, the Court has to evaluate how she acted at the various stages of the litigation but not take into account the pending contempt proceeding. A review of the record demonstrates that Ms. Gerth's position evolved during the litigation.

At the commencement of the litigation Ms. Gerth does not appear to have provided the initially requested accounting yet did not have a valid defense for not doing so. Her conduct also resulted in her being removed as Trustee.

As the case proceeded to trial, and at trial, as noted in the Court's Findings and Judgment, some of her defenses proved meritorious in part in that Petitioners were not successful in receiving all the relief requested. Accordingly, in evaluating the totality of the contentions and defenses raised by Ms. Gerth, the Court finds that some were without merit and others were meritorious. In light of the Court's analysis of this first factor, Petitioners would be eligible to obtain some portion of their fees.

4. Unnecessarily prolonging litigation

This matter was litigated for over five years and was prolonged for several reasons. Petitioners contend the litigation was prolonged due to the conduct of Ms. Gerth in not providing accountings, not following up on trust assets, and not properly protecting the trust assets. They also claim that she then filed pleadings with the Court which had no merit.

Ms. Gerth contends that the litigation was prolonged because Petitioners would not accept reasonable settlement overtures. She contends that Petitioners insisted on litigating what turned out to be not a significant sum.

While this Court was not the initial Court assigned to hear the matter, from a thorough review of the record, as well as being the trier of fact at the trial, the Court determines that the litigation was properly initiated by Petitioners due to the conduct of Ms. Gerth. Indeed, her conduct resulted in her being removed as Trustee as noted herein. At the same time, the Court needs to be cognizant that Ms. Gerth contends she relied on the advice of counsel and that counsel is now deceased so the Court did not have the benefit of hearing his position. In sum, while the matter could have likely been resolved at various times prior to trial or during the break in trial, if all parties were amenable to resolution, the Court does not find that Petitioners' actions unnecessarily prolonged the litigation. The Court further finds that Ms. Gerth's conduct in not providing information and Trust assets timely, prior to her engaging her most recent counsel, did prolong the

litigation[5].

5. **Relative ability to bear financial burden**

China Post No. 1 is a non-profit organization whose single largest asset was the bequest it was to receive from Colonel Fischer; however, that bequest was reduced by Ms. Gerth's breach of her fiduciary duties in managing the Trust. Ms. Gerth's financial status is uncertain and it is unclear as to whether or not she would be able to bear the financial burden of paying all or some portion of Petitioners' fees and costs. Given what has been presented to the Court in the record however, Ms. Gerth is retired and does have some assets.[6] The Court does take into account that Petitioners are seeking three hundred twenty-five thousand, nine hundred fifteen dollars, and seventy-five cents ($325,915.75) in fees and there is no evidence presented to the Court that Ms. Gerth has the ability to pay that amount. The Court also has to take into account the *Trimble* Court analysis and how that factual pattern was different than the current one. In *Trimble*, the Court found that the Trustee, Ms. Cunningham, was not responsible for fees as there was not a finding that she breached her fiduciary duty and instead prevailed on her position. In contrast, in the present case, Ms. Gerth was found to have breached her fiduciary duties. Accordingly, the finding that Ms. Gerth did breach her fiduciary duty as Trustee is a factor that needs to be taken into consideration pursuant to applicable law.

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[5] The delay referenced in this Motion is for the matters before this Court and is not intended to be utilized in any manner with regards to the contempt matter being heard by a different Judge within the Eighth Judicial District.

[6] To the extent her son may have assets due to an inheritance from his father, who is unrelated to this matter, is not something the Court can consider.

6. Result obtained by the litigation and prevailing party concepts

There was not one single prevailing party in this matter as both Parties were both successful and unsuccessful on certain claims. The main issue in this matter, although prevalent in a variety of the claims, was whether Ms. Gerth's breached of her fiduciary duty in managing the Trust. The Court found Ms. Gerth breached her fiduciary duties; and thus, Petitioners were the prevailing party on that claim. Given there is a separate contempt proceeding that will be overseen by a different District Court Judge, the Court cannot take into account the asserted merits or lack of merit to that claim. The Court does have to take into account that Petitioners were not successful in obtaining a large percentage of the amounts they were claiming were owed. Taking the totality of the claims and results into account, this factor still weighs in the Petitioners' favor based on the successful ruling in regards to Ms. Gerth's breach of her fiduciary duty.

7. Whether a party has acted in bad faith, vexatiously, wantonly or for oppressive reasons in bringing or conduct of the litigation

As noted above, there is a pending contempt Motion which is being heard by another District Court Judge; and thus, the Court cannot take a position as to the potential ruling in that matter. Without taking any position with regards to that hearing, the Court does find that Petitioners had a supportable basis for bringing the litigation and ultimately prevailed on some of their claims. Thus, they cannot be found to have acted in bad faith.

In contrast, Ms. Gerth was found to have breached her fiduciary duty and had been previously removed as the Trustee, due to her actions, by the Judge

then presiding over the case. Given there is a pending Motion for Contempt, the Court would not find it proper to make more detailed findings as to this factor but finds that it has fully analyzed the facts and evidence presented by all parties. As a result of that review, the Court finds that Ms. Gerth's conduct created earlier challenges in the litigation when she was Trustee, but since the present Court was assigned the case, it has not found that she acted in a manner that would be considered vexatious or in bad faith.

Therefore, after reviewing the standards set forth under Iowa law and the supporting documentation attached to Petitioners' Motion for Attorney's Fees and Costs, the Court finds that justice and equity require that Petitioners have a basis to be eligible to receive a portion of their fees. Said fees are to be limited to the time period prior to when Ms. Gerth was removed as Trustee and limited to a reasonable fee amount to in accordance with justice and equity following the parameters of *Trimble*.

As the Court has found that Petitioners have a basis for fees in part, the next inquiry is what amount of reasonable fees Ms. Gerth can be held personally accountable for in accordance with Iowa precedent[7]. While neither party has presented the Court with any Iowa case law similar to *Brunzell v. Golden Gate Nat. Bank*, 455 P.2d 31, 33 (Nev. 1969), Iowa also requires that the fees be reasonable. Accordingly, the Court finds it appropriate to take into account the

[7] While the *Trimble* Court left open the possibility that the Trust could be required to pay for fees, in the present case it is the current Trustee and beneficiary who are requesting fees for amounts that were alleged to be depleted Trust assets. Further, in the present case, as there was a finding that Ms. Gerth breached her duty as a Trustee, the Court does not find it appropriate to have the Trust pay Petitioners' fees.

general framework of *Brunzell* as an appropriate basis to determine what would be the "reasonable fees" incurred that should be born by Ms. Gerth. The factors used in determining which fees are appropriate include: "1) the qualities of the advocate; 2) the character of the work to be done; 3) the work actually performed by the lawyer: the skill, time and attention to the work; 4) the result: whether the attorney was successful and what benefits were derived." *Id.* Each factor will be discussed in turn.

i. The Qualities of the Advocate

While evaluating the qualities of Petitioners' counsel, the Court considers the advocates' ability "training, education, experience, professional standing and skill." *Brunzell*, 85 Nev. at 349. This case required knowledge of trust and probate law; a highly specialized area of law that requires a technical understanding of the terms used in the industry as well as commercial litigation. Petitioners were primarily represented by Elizabeth Brickfield whose experience and professional standing justify her particular hourly compensation rate. Elizabeth Brickfield also has significant litigation and trust and probate experience. Ms. Brickfield is a shareholder in the Dickinson Wright Trusts and Estate Department and was previously with Lionel Sawyer & Collins. She practices tax and family law, including estate planning, trusts and estates, guardianship matters and trust and probate. She is a member of the American Bar Association's Probate, Tax, and Family Law Sections; the National Academy of Elder Law Attorneys; the Southern Nevada Council of Estate Planners; the State Bar of Nevada's Elder Law Section; and the Chair of the State Bar of Nevada's Trust and Probate Section. Ms. Brickfield received her LLM in taxation

from the New York University of Law, which has been ranked as the number one LLM program by U.S. News since 1992.

Matt Policastro, who worked extensively on this matter, during his tenure at Lionel Sawyer & Collins, also has significant trust and probate experience. Mr. Policastro is a member in the Dickinson Wright Firm's Business Law Department. His practice emphasis is in trusts and estates and taxation. Mr. Policastro has a LLM from Georgetown University.

The following attorneys also provided services in this matter and are similarly qualified: Rodney Jean, Esq., Amy Baker, Esq., and Kendall Davis Weisenmiller, Esq. Accordingly, the Court finds that each of the counsel are highly qualified.

ii. The Character of the Work to be Done

The Court also considered the difficulty, intricacy, "importance, time and skill required" to perform the work, "the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation." *Brunzell,* 85 Nev. at 349. This was a highly complex trust matter that spanned over five years. Petitioners were required to litigate this matter in several different district courts as well as had litigation in other states and other forums. Petitioners were required to analyze both Nevada and Iowa law and apply them in this matter. Respondent's counsel was also extremely qualified which required each party to respond to skilled and articulate briefing. With the combination of the complexity of the substantive and procedural questions of law that were raised in this matter, the Court finds that this case was intricate and difficult but handled well by all trial counsel.

iii. The Work Actually Performed By the Lawyer

The Court also looked at "the work actually performed by the lawyer; the skill, time and attention given to the work." *Brunzell, 85 Nev. at 349.* This case required substantial time and resources over approximately five years. The case involved extensive research based on Iowa law being the law of the case, extensive briefing, a three-week trial, multiple long oral arguments, multiple depositions, and now post-judgment Motions. The efforts expended by Petitioners' counsel in this litigation were appropriate to the magnitude of the case; and this factor is also met.

iv. The Result

In evaluating the result, the Court must evaluate whether the attorney was successful and what benefits were derived. *Brunzell, 85 Nev. at 349.* Here, Petitioners' attorneys prevailed before this Court in part.

In sum, justice and equity would require that Petitioners receive some portion of their reasonable attorney fees from Respondent, limited as noted herein. Accordingly, Petitioners' Motion for Attorney's Fees is GRANTED in part in the amount of fifty three thousand, twenty-five dollars, and twenty-five cents ($53,025.25).[8]

C. Petitioners' Motion for Amended Findings Pursuant to NRCP 52(b)

NRCP 52(b) states: "[u]pon a party's motion filed not later than 10

[8] Petitioners had sought costs also pursuant to this provision. Given the Court found that costs in the amount of $27,457.10 were awardable pursuant to I.C.A. 625.1, Petitioners cannot receive a double recovery for costs; and thus, the Court does not award costs separately pursuant to this provision. The Court finds, however, that given the analysis herein, costs could have alternatively been awarded pursuant to I.C.A. 633A.4507 if they had not been awarded pursuant to I.C.A. 625.1.

days after service of written notice of entry of judgment, the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may later be questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings." NRCP 52(b)

In the present case, Petitioners have filed a timely Motion but it is unclear whether they are seeking to amend the Findings of Fact and Conclusions of Law such that the fees and costs are awarded as part of their damages, or whether they are seeking a separate Order regarding fees and costs. If the latter, the Court has analyzed that request in section II(A) and II(B) above and would reaffirm its ruling with respect to the instant Motion. To the extent that Petitioners are seeking to have the Court amend its Findings of Fact and Conclusions of Law to award Petitioners' fees as an element of damages, that is more properly brought as a Motion for Reconsideration. Nevertheless, the Court finds it is proper to analyze the Motion to determine if the Findings of Fact and Conclusions of Law should be amended. In so doing, the Court finds that Petitioners have not demonstrated that the Court's Findings or Conclusions of Law should be disturbed.

Nevada law requires that the party seeking to set aside or amend findings must demonstrate a showing that the findings of fact are "clearly erroneous" to set those findings and conclusion aside. *Edwards Industries, Inc. vs. PTE/BTE. Inc.*, 923 P.2d 569, 112 Nev 1025 (Nev. 1996); citing *Trident Construction Corp. vs. West Electric, Inc.*, 105 Nev. 423,426,776 P.2d 1239, 1241 (1989).

Moreover, in a case such as this, where the trial court makes a determination predicated on conflicting evidence, that determination will not be disturbed on appeal where supported by substantial evidence. *Trident Construction Corp. vs. West Electric*, 105 Nev. 423, 426, 776 P.2d 1239, 1241 (1989) cited with approval *Edwards Industries, Inc. vs. PTE/BTE.* Inc., 923 P.2d 569, 112 Nev. 1025 (Nev. 1996).

As the Motion does not detail any specific reason why the Findings and Conclusions of Law should be set aside other than Petitioners' contention it is entitled to attorney fees, the Court cannot find that there is merit to the contention that Petitioners should be awarded their attorney's fees as part of their damages. Accordingly, the Court DENIES Petitioners' Motion for Amended Findings to the extent it is seeking to amend the Findings to award attorney fees or costs as damages rather than pursuant to applicable law as a prevailing party. As the Court has granted Petitioners' part of their fees as a prevailing party consistent with Iowa precedent, the Court need not amend the Findings as the fees were granted pursuant to a separate Motion.

III. MS. GERTH'S MOTION FOR ATTORNEY'S FEES AND COSTS BASED UPON OFFER OF JUDGMENT

The defendant in an action for the recovery of money only may, at any time after service of notice and before the trial, serve upon the plaintiff or the plaintiff's attorney an offer in writing to allow judgment to be taken against the defendant for a specified sum with costs. I.C.A. Section 677.7. If the plaintiff fails to obtain judgment for more than was offered by the defendant, the plaintiff cannot recover costs, but shall pay the defendant's costs from the time of the

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DEPARTMENT XXXI
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offer. I.C.A. Section 677.10.

Ms. Gerth initially based her Motion for fees and costs on NRS 17.115 and NRCP 68 which allows for an award of attorney's fees based on an offer of judgment being rejected prior to trial. During the supplemental briefing as noted above, the parties acknowledged that the Motion should be reviewed pursuant to Iowa law as that is the substantive law governing the case. In Iowa, there is an equivalent statute, I.C.A. Section 677.10, which provides the basis for the Court's analysis of Ms. Gerth's Offer of Judgment. This statute allows for the recovery of costs if a pre-trial offer is rejected and the Plaintiff fails to obtain more than the amount of the offer at trial. In this case, it is undisputed that Ms. Gerth's purported offer of thirty-five thousand ($35,000.00) was made after trial had already commenced. I.C.A. 677.7 clearly states that the offer must be made **before** trial commences. As Ms. Gerth's offer was made **after** the trial commenced, her offer was untimely. As a result, pursuant to Iowa law, there is no basis to award Ms. Gerth attorney's fees or costs based on her post-trial commencement offer of judgment. Accordingly, Ms. Gerth's Motion to Obtain Costs and Fees Pursuant to an Offer of Judgment is DENIED.[9]

As an alternative basis, to determine if fees should be awarded to Ms. Gerth, the Court also looked to I.C.A. Section 633A.4507. That provision gives the Court broad discretion in granting fees and costs where they are justifiable.

[9] Although the Nevada Supreme Court's decision in *WPH Architecture* makes it clear that the Court should analyze the requested fees and costs award pursuant to Iowa law, even if the Court did analyze the impact of the Offer of Judgment pursuant to Nevada law, it would still fail. The Offer does not meet the standards of NRS 17.115 or NRCP 68 which were then both in effect at the time the Offer was made.

In the present case, Ms. Gerth was found to have breached her fiduciary duties; and thus, did not prevail on the main issues of the case. Further, the procedural history of the case including her failure to timely provide documentation and Trust assets, means that the Court does not find that there is any justifiable basis to grant fees and costs to Ms. Gerth. While Ms. Gerth was successful in defending certain claims, the Court does not believe that justice and equity require Ms., Gerth to be awarded attorney's fees and costs as detailed herein and as raised in the Opposition to the Motion. Therefore, Ms. Gerth's Motion for Attorney's Fees and Costs is DENIED in its entirety[10].

IV. MOTION FOR ORDER TAKING JUDICIAL NOTICE OF POST-TRIAL PAYMENT TO TRUST OF $16,000 BY ESTATE FOR EXPENSES PAID BY TRUST AND ALLOWING OFFSET CREDIT AND COUNTER-MOTION FOR FEES AND RECOVERY OF FUNDS FOR MS. GERTH'S FAILURE TO PAY PETITIONERS FOR THE TRUST'S VEHICLE[11]

Ms. Gerth contends in her motion that "[o]n March 30, 2015, the Probate Court approved a payment of sixteen thousand dollars ($16,000) by the Fischer Estate to H. Ownby, Successor Trustee of the Fischer Trust in settlement of the Creditor's Claim filed by China Post No. 1 of the American Legion and the Fischer Trust." (Motion for Order Taking Judicial Notice, Pg. 2.) Based on this

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[10] In their Opposition to Ms. Gerth's Motion for Attorney Fees and Costs Based Upon Offer of Judgment, Petitioners also set forth a Counter-Motion seeking to be awarded attorney fees as sanctions pursuant to EDCR 7.60. As both parties initially addressed their respective Motion and Opposition pursuant to Nevada law, and then in provided supplemental briefing in light of *WPH Architecture*, to address the issue pursuant to Iowa law, the Court finds that sanctions pursuant to EDCR 7.60 are not warranted. They also would not be warranted as there was arguably some lack of clarity as to the status of the applicable law; and thus, sanctions would not be merited. Accordingly, Petitioners' Counter-Motion for Award of Attorney Fees and Costs as Sanctions pursuant to EDCR 7.60 is DENIED.

[11] Petitioners also sought relief relating to the van in their Omnibus Motion. As the issue was set forth in more detail in the instant Motion, the Court analyzed the relief sought pursuant to the Motion for Judicial Notice and incorporates its Findings in regards to the van with respect to Petitioners' Omnibus Motion.

settlement of the estate matter, Ms. Gerth seeks an offset from the judgment entered against her in the present case. Petitioners contend that there is not a basis of law or fact for her claim and seek sanctions for her filing the referenced Motion.

While the Court could take judicial notice that there was an Order Settling First and Final Account for Approval of Attorney Fees and for Decree of Final Distribution filed on March 30, 2015, and that there was a Receipt filed by counsel for Petitioners that acknowledges they received the sum of sixteen thousand dollars ($16,000.00) as full and final payment, which was filed April 24, 2015. The impact of those two documents, however, has not been proven. They do not support the assertions made in Ms. Gerth's Motions. Specifically, there is no evidence as to what the sum covered. Based on the Order Settling First and Final Account for Approval of Attorney Fees and for Decree of Final Distribution, Petitioner China Post No. 1 made a claim in the amount of one hundred ninety-one thousand, one hundred eight dollars, and seventy-nine cents ($191,108.79) and H. Ownby filed a Claim in the amount of two hundred fifteen thousand, two hundred fifty-six dollars, and eighty-three cents ($215,256.83). The documentation provided does not set forth what portion of those Claims the settlement funds were intended to cover. There is no evidence whether the amount was for attorney fees, and part of the four thousand four hundred eighty-one dollars and fifty-four cents ($4481.54) amount asserted in Ms. Gerth's Motion or whether it was for all the items listed by Ms. Gerth or for some other calculation. In the absence of evidence that the settlement amount covers the

amounts asserted in Ms. Gerth's Motion, (the four thousand four hundred eighty-one dollars and fifty-four cents - $4481.54, and the one hundred and twenty-two dollars - $122.00) filed on February 4, 2011, that Ms. Gerth contends were attributed to her in the judgment in this case, the Court cannot grant the offset that she requests. Further, as set forth in the Opposition, Ms. Gerth has not established that she was a third-party beneficiary who would be entitled to an offset. Accordingly, Ms. Gerth's Motion is DENIED as there is no authority that the amount should be treated as an offset credit.

In Petitioners' Opposition to the Motion, they presented a Counter-Motion seeking fees and to recover funds from Ms. Gerth's alleged failure to pay Petitioners for what they assert was a van owned by the Trust. They also sought sanctions and an award of attorney fees for having to respond to the Motion. With respect to Petitioners' claim that they should recover funds for what they assert was Ms. Gerth's failure to pay the Trust for the vehicle, that issue was determined in the Courts' Findings that no such recovery was appropriate. Specifically, as set forth in the Court's Findings of Fact and Conclusions of Law, the prior Judge who was assigned the case had made a specific finding that the vehicle was not a Trust asset. No party sought reconsideration of that Order in a timely manner; and thus, it was law of the case. The Court cannot now, at a post-trial Motion, go back and revisit that ruling made a few years earlier when there is no support for the contention that it should be revisited. Accordingly, the Court DENIES Petitioners' Counter-Motion in that regard.

Petitioners also ask the Court to award sanctions and fees for having to

respond to Ms. Gerth's Motion. As the Court finds that the Motion to seek judicial notice had an arguable (yet not prevailing) basis to be brought, there is no basis to award sanctions or fees. Accordingly, the Counter-Motion is DENIED in its entirety.

VI. MS. GERTH'S MOTION TO AMEND THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Ms. Gerth also requests to amend the Findings of Fact, Conclusions of Law, and Judgment. She asserts that there should be an offset for the estate expenses that have been paid. The standard for such a request pursuant to NRCP 52(b) is set forth above in Section II. Ms. Gerth contends, as she did in her Motion for Judicial Notice, that both the four thousand four hundred eighty-one dollars and fifty-four cents ($4481.54) relating to the estate litigation and the one hundred and twenty-two dollars ($122.00) relating to the tire should be offset from the Judgment awarded against her such that she should only be liable to Petitioners for the total amount of sixteen thousand, six hundred forty-five dollars, and ninety-six cents ($16,645.96).

In the Motion, Ms. Gerth incorporates the arguments raised in her prior Motion to Take Judicial Notice, which is discussed in detail in Section V infra. Ms. Gerth concedes that these same amounts were sought as offsets in that Motion. She contends, however, the standard of review is different in the two Motions. The Court finds that although the format of the Motion is different and the rule analysis is separate, the underpinning of the Court's ruling - to wit - that there is no evidentiary basis to grant the claimed relief is the same. Specifically, while it is undisputed that a party cannot obtain double recovery for the same

amount owed, Ms. Gerth has provided well-reasoned argument but not any facts or evidence to show that Petitioners have or could receive a double recovery. In the absence of any evidentiary support, the argument fails. Further, the additional basis that Ms. Gerth is not an intended third-party beneficiary would also apply. As Ms. Gerth has not established that she is entitled to have the Amended Judgment be amended further, the Court DENIES Ms. Gerth's Motion to Amend.[12]

VII. INTEREST

As noted above, the Court is denying the Motion to Amend the Judgment, and the Judgment originally filed on October 5, 2015, has remained in effect. Therefore, the interest calculation would run from the beginning of the case through December 18, 2015, when Ms. Gerth deposited the twenty-five thousand dollars ($25,000.00) with the Court Clerk. As such, the interest calculation under Iowa law from the beginning of the case through December 18, 2015, amounts to one thousand, five hundred eighty dollars, and eighty-nine cents ($1,580.89) on the thirteen thousand five hundred ($13,500.00) in Trustee's fees. An additional nine hundred seven dollars and fifty cents ($907.50) in pre-judgment interest is also appropriate based on the Court's denial of Ms. Gerth's post-trial Motions.

VIII. CONCLUSION AND ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT Petitioners' Omnibus Motion for Amended Findings Pursuant to NRCP 52(b);

[12] In their Opposition to the Motion to Amend, Petitioners sought sanctions. As there was not a sufficient basis set forth in the Opposition why sanctions should be imposed, the Court does not find that the there is a basis to impose sanctions. Thus, their "request for sanctions" is DENIED.

Motion for Attorney Fees Pursuant to NRCP 54, NRS 18.010, NRC 153.031, and ICA SECTION 633A.4507; and Additional Relief is GRANTED in part and DENIED in Part. It is GRANTED with respect to the costs requested in the amount of twenty-four thousand, nine hundred thirty dollars, and fifteen cents ($24,930.15) as that amount is reasonable and appropriately supported. Alternatively, given the analysis herein, costs could have been awarded pursuant to I.C.A. 633A.4507. The portion of the Omnibus Motion relating to Petitioners' Motion for Attorneys' Fees is GRANTED in part for the amount of fifty-three thousand, twenty-five dollars, and twenty-five cents ($53,025.25) as discussed herein to . All other portions of the Omnibus Motion are DENIED.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED THAT consistent with the above, Petitioners' Memorandum of Costs is GRANTED in part in the amount of twenty-four thousand, nine hundred thirty dollars, and fifteen cents ($24,930.15).[13].

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Ms. Gerth's Motion to Deny or in the Alternative to Retax Costs is DENIED in part consistent herewith.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Ms. Gerth's Motion for Attorney's Fees and Costs pursuant to an offer of judgment is DENIED.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that

[13] Nothing herein is intended to allow any double recovery for Petitioners, but given how the Motions and Memorandum overlapped, the total sum of costs awarded is twenty-four thousand, nine hundred thirty dollars, and fifteen cents ($24,930.15) but that amount was properly granted via the Motions filed or alternatively based on the Memorandum of Costs filed.

Petitioners' Counter-Motion for Award of Attorney Fees and Costs as Sanctions pursuant to EDCR 7.60 is DENIED.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Ms. Gerth's Motion for Order Taking Judicial Notice of Post-Trial Payment to Trust of sixteen thousand dollars ($16,000) By the Estate for Expenses Paid by Trust and Allowing Offset Credit ("Motion for Order Taking Judicial Notice") is DENIED.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Petitioners' Counter-Motion for Fees and Recovery of Funds For Ms. Gerth's Failure to Pay Petitioners for the Trust's Vehicle is DENIED. Petitioners' Counter-Motion for Sanctions and Fees with respect to the Motion for Order Taking Judicial Notice is also DENIED.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Ms. Gerth Motion to Amend Findings of Fact, Conclusions of Law, and Judgment is DENIED. Petitioners' Counter-Motion/Request for Sanctions relating thereto is also DENIED.

Dated this 15th day of April 2016.

JOANNA S. KISHNER
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of this Order was provided to all counsel, and/or parties listed below, as a courtesy not comprising formal written notice of entry, via one or more of the following manners: Email, Facsimile, U.S. mail, Electronic Service (E-Service) if the Attorney/Party has signed up as required, and/or a copy of this Order was placed in the attorney's file located at the Regional Justice Center:

ELIZABETH BRICKFIELD, ESQ.
DICKINSON WRIGHT

ELIZABETH J. FOLEY, ESQ.

TRACY L. CORDOBA-WHEELER
Judicial Executive Assistant