

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 GUADALUPE LYN, )
4 )
5 Plaintiff, )
6 vs. )
7 )
8 OUTBACK STEAKHOUSE OF FLORIDA, )
9 LLC, )
10 Defendant. )

Case No.: 2:17-cv-00614-GMN-NJK

ORDER

10 Pending before the Court is the Motion for Costs, (ECF No. 27), filed by Defendant
11 Outback Steakhouse of Florida, LLC ("Defendant"). Plaintiff Guadalupe Lyn ("Plaintiff") filed
12 a Response, (ECF No. 30), and Defendant filed a Reply, (ECF No. 31). For the reasons
13 addressed herein, Defendant's Motion is DENIED without prejudice.1

14 I. BACKGROUND

15 This case arises from injuries Plaintiff sustained while patronizing Defendant's
16 restaurant. (First Am. Compl. ("FAC") 3:2-11, ECF No. 1-11). Relevant to the present
17 Motion, the Court granted Defendant's motion for summary judgment and the clerk of court
18 subsequently entered judgment in favor of Defendant and against Plaintiff. (See Order 11:11-
19 12, ECF No. 23); (Clerk's J., ECF No. 24). Shortly thereafter, Defendant filed a bill of costs,
20 (ECF No. 25), requesting reimbursement under Nevada law, specifically NRS 18.020.
21 Defendant's counsel was subsequently notified that the clerk of court's authority to award costs
22 is limited to requests made under Federal Rule of Civil Procedure 54(d). (Def.'s Suppl. Br. 2:2-
23 4, ECF No. 34); see also D. Nev. LR 54-1.

24
25 1 As explained below, however, the Motion is denied with prejudice to the extent it requests expert witness costs under Nevada law.

1 Defendant refiled its memorandum, styling it as a “Motion for Costs” under NRS 18.020  
2 and requesting \$50,416.85 for various costs identified in NRS 18.005. (See Mot. for Costs  
3 1:17–18, ECF No. 27). The breakdown of Defendant’s requested award is as follows: (a)  
4 \$43,700.00 in expert witness fees; (b) \$2,000 in witness fees; (c) \$1,905.85 for medical records  
5 fees; (d) \$1,708.05 in deposition reporters’ fees; (e) \$637.00 in clerks’ fees; (f) \$300 for  
6 interpreter fees; (g) \$160 in subpoena fees; and (h) \$6.00 for expenses required to obtain motor  
7 vehicle records. (Id. 3:1–6:10).

8 The Court issued an order withholding ruling on Defendant’s Motion pending  
9 supplemental briefing from the parties. (See Minute Order, ECF No. 33). The Court stated that  
10 “Defendant has not sufficiently addressed why state law, rather than federal law, applies to the  
11 specific categories of costs requested.” (Id.). As such, the Court ordered supplemental briefing  
12 on the question of whether Defendant may recover costs under state law. (See id.) (“Defendant  
13 shall file a brief, supported by points and authorities, discussing whether federal or state law  
14 applies to each requested award category in its Motion.”). In response, the parties timely filed  
15 their respective supplemental briefs, (ECF Nos. 34–35).

## 16 **II. LEGAL STANDARD**

17 Rule 54(d)(1) provides: “Unless a federal statute, these rules, or a court order provides  
18 otherwise, costs—other than attorney’s fees—should be allowed to the prevailing party.” The  
19 rule thus “creates a presumption in favor of awarding costs to a prevailing party, but the district  
20 court may refuse to award costs within its discretion.” *Champion Produce, Inc. v. Ruby*  
21 *Robinson Co., Inc.*, 342 F.3d 1016, 1022 (9th Cir. 2003).

22 Pursuant to this District’s local rules, “[u]nless the court orders otherwise, the prevailing  
23 party is entitled to reasonable costs.” D. Nev. LR 54-1. The prevailing party “who claims costs  
24 must file and serve a bill of costs and disbursements on the form provided by the clerk,” which  
25

1 “must be supported by an affidavit and distinctly set forth each item so that its nature can be  
2 readily understood.” D. Nev. LR 54-1(a)–(b).

### 3 **III. DISCUSSION**

4 In its supplemental brief, Defendant reiterates that it seeks costs under Nevada law.  
5 (Def.’s Suppl. Br. 2:20, ECF No. 34). According to Defendant, it may recover costs under  
6 NRS 18.020 because that statute confers a substantive right and therefore controls rather than  
7 Rule 54(d) of the Federal Rules of Civil Procedure. (Id. 3:1–24). Plaintiff contends that Rule  
8 54(d) governs this case and precludes Defendant from recovering costs under Nevada law.  
9 (Pl.’s Suppl. Br. 1:20–4:2, ECF No. 35).

10 As a general rule, “[a]n award of standard costs in federal district court is normally  
11 governed by Federal Rule of Civil Procedure 54(d), even in diversity cases.” *Champion*  
12 *Produce*, 342 F.3d at 1022. With respect to expert witness fees, Rule 54(d) governs rather than  
13 NRS 18.020. In *Aceves*, the Ninth Circuit, following the lead of sister circuits, held that  
14 “federal law should control the reimbursement of expert witnesses in federal courts sitting in  
15 diversity jurisdiction.” *Aceves v. Allstate Ins. Co.*, 68 F.3d 1160, 1168 (9th Cir. 1995) (citing  
16 *Chaparral Res., Inc. v. Monsanto Co.*, 849 F.2d 1286, 1291–92 (10th Cir. 1988), *Kivi v.*  
17 *Nationwide Mut. Ins. Co.*, 695 F.2d 1285, 1289 (11th Cir. 1983), and *Bosse v. Litton Unit*  
18 *Handling Sys., Div. of Litton Sys., Inc.*, 646 F.2d 689, 695 (1st Cir. 1981)).

19 In *Aceves*, the choice of law issue was between “state and federal expert witness cost  
20 provisions,” where California’s expert witness compensation rules were in “direct collision”  
21 with the federal expert witness cost provision. *Id.* Specifically, while California law permits  
22 “the defendant to recover expert witness fees in full[,]” federal law “allows the defendant to  
23 recover forty dollars per day per witness.” *Id.* at 1167 (citing 28 U.S.C. § 1821(b)). The *Aceves*  
24 Court noted that California’s expert witness compensation provisions would apply if “the  
25 pedigree of the federal rule could not be traced back to a federal statute or a Federal Rule of

1 Civil Procedure, duly enacted pursuant to the Rules Enabling Act or if the federal rule created  
2 an incentive to shop for the federal forum.” Id. at 1168 (internal citation omitted). According to  
3 the Ninth Circuit, neither factor favored application of California law over federal law. See id.  
4 (finding “no indication that section 1821(b) of Title 28 has a suspect pedigree” and recognizing  
5 the unlikelihood “that section 1821(b) provides litigants an incentive to sue in or remove to  
6 federal courts”).

7 Here, as in *Aceves*, Nevada’s provision with respect to reimbursement of expert  
8 witnesses is in direct collision with its federal counterpart. While federal law permits recovery  
9 of forty dollars per day for each day of a witness’s attendance, Nevada law permits reasonable  
10 fees “in an amount not more than \$1,500 for each witness.” Compare 28 U.S.C. § 1821, with  
11 NRS 18.005(5). And per *Aceves*, the Court finds no indication that 28 U.S.C. § 1821(b) has a  
12 suspect pedigree or would otherwise incentivize forum shopping. *Aceves*, 68 F.3d at 1167.

13 Defendant argues that *Clausen*, decided after *Aceves*, governs the instant case and  
14 establishes that NRS 18.020 is substantive in nature. (Mot. for Costs 3:12–14). In *Clausen*, the  
15 Ninth Circuit upheld a district court’s award of costs under Oregon law. *Clausen v. M/V NEW*  
16 *CARISSA*, 339 F.3d 1049, 1064–66 (9th Cir. 2003). As in *Aceves*, *Clausen* considered whether  
17 28 U.S.C. § 1821(b) trumps a state law cost provision. Id. The relevant Oregon statute in that  
18 case, Or. Rev. Stat. § 468B.300, entitles prevailing plaintiffs to recover “costs of any kind” for  
19 claims brought pursuant to the Oregon Oil Spill Act. Id. at 1064. The Court distinguished  
20 *Aceves* from the case before it by stating:

21 In *Aceves* . . . . we faced a choice between a state rule of procedure  
22 and a federal rule of procedure. In the present case, however, we  
23 are presented with a choice between a federal cost provision, and a  
24 state damages provision that permits prevailing plaintiffs under the  
25 Oil Spill Act to recover “costs of any kind” as one element of its  
compensatory damages.

1 Id. (internal citations omitted). According to the Ninth Circuit, this cost provision serves as an  
2 “‘express indication’ of [the Oregon legislature’s] ‘special interest in providing litigants’ with  
3 full compensation for reasonable sums expended in pursuit of an Oil Spill Act claim.” Id. at  
4 1065 (citation omitted). And because “the measure of damages is a matter of state substantive  
5 law, it would do violence to the principles enunciated in Erie to disregard Oregon law in favor  
6 of § 1821(b).” Id. 1065–66 (quotation marks and citations omitted).

7 Here, unlike the sought-after costs in Clausen, the costs Defendant requests are not  
8 elements of a compensatory damage award tethered to a substantive cause of action. Cf. id. at  
9 1064–65 (“We think that such a right is substantive, for the question of the proper measure of  
10 damages is inseparably connected with the right of action . . . .”) (internal citation and quotation  
11 marks omitted). Rather, NRS 18.020(3) applies generally to actions “for the recovery of  
12 money or damages, where the plaintiff seeks to recover more than \$2,500.” Furthermore,  
13 unlike the statute at issue in Clausen, NRS 18.020(3) permits recovery of costs “as a matter of  
14 course to the prevailing party,” *Campbell v. Campbell*, 705 P.2d 154, 156 (Nev. 1985), whether  
15 it be the party bringing the action or defending against it. Because the statute applies to any  
16 prevailing party and any action where a plaintiff seeks more than \$2,500, it is readily  
17 distinguishable from the substantive cost provisions at issue in Clausen, which are limited to a  
18 “prevailing plaintiffs,” in actions brought under the Oil Spill Act. Clausen, 339 F.3d 1064–65.  
19 As such, Defendant’s reliance upon Clausen is misplaced.

20 In sum, because Aceves controls the disposition here, the Court denies Defendant’s  
21 Motion with prejudice insofar as it requests expert fees under Nevada law. With respect to the  
22 remaining categories of costs, the Court ordered Defendant to “file a brief, supported by points  
23 and authorities, discussing whether federal or state law applies to each requested award  
24 category in its Motion.” (See Minute Order, ECF No. 33) (emphasis added). Aside for  
25 addressing the cases cited by the Court in its minute order, Defendant’s brief is silent as to the

1 categories of costs outside of expert witness fees. As such, Defendant has failed to satisfy the  
2 Court of the inapplicability of the general rule that Rule 54(d) applies to cost awards in  
3 diversity cases. See *Champion*, 342 F.3d at 1022.

4 Accordingly, Defendant's Motion for Costs is denied without prejudice. Should  
5 Defendant seek to file a bill of costs pursuant to Rule 54(d) and Local Rule 54-1, Defendant  
6 may do so within fourteen (14) days of this Order's issuance. Alternatively, should Defendant  
7 elect to file a renewed motion for costs under Nevada law, it may do so within fourteen (14)  
8 days of this Order, provided the motion remedies the deficiencies discussed above. Any such  
9 motion, however, shall not include a request for expert witness fees under Nevada law, which  
10 the Court denies with prejudice in this Order.

11 **IV. CONCLUSION**

12 **IT IS HEREBY ORDERED** that Defendant's Motion for Costs, (ECF No. 27), is  
13 **DENIED without prejudice.**

14 **IT IS FURTHER ORDERED** that Defendant's Motion for Costs, (ECF No. 27),  
15 insofar as it requests costs for expert witness fees under Nevada law, is **DENIED with**  
16 **prejudice.**

17 **IT IS FURTHER ORDERED** that Defendant may, if it so chooses, file an amended  
18 bill of costs consistent with Rule 54(d) and Local Rule 54-1, within fourteen (14) days of this  
19 Order's issuance. Alternatively, Defendant may file a renewed motion for costs within (14)  
20 days of this Order's issuance provided, however, that the motion addresses the deficiencies  
21 discussed in this Order.

22 **DATED** this 14 day of August, 2019.

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Gloria M. Navarro, Chief Judge  
United States District Judge