

Consolidated Case Nos. 69208, 69939, 69961

IN THE
SUPREME COURT OF NEVADA

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PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF NEVADA, a public entity
and component unit of the State of Nevada,

Appellant,

vs.

SHAE E. GITTER, an individual, and JARED SHAFER, as Special Administrator
of the Estate of Kristine Jo Freshman,

Respondents.

W. CHRIS WICKER; and WOODBURN & WEDGE,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF CLARK; and the HONORABLE JAMES
CROCKETT, DISTRICT JUDGE,

Respondents,

and

SHAE E. GITTER AND JARED SHAFER, as Special Administrator of the Estate
of Kristine Jo Freshman,

Real Parties in Interest.

Appeals and Petition for Writ of Mandamus from the
Eighth Judicial District Court, Clark County, Nevada
Honorable Judge James Crockett, Case No. A-14-697642-C

**RESPONDENTS/REAL PARTIES IN INTEREST SHAE E.
GITTER AND JARED SHAFER'S ANSWERING BRIEF**

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July 20, 2016

RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

- Respondents do not have any parent corporations.
- There is no publicly held company that owns 10% or more of Respondents' stock.
- Respondent's counsel, Bailey Kennedy, LLP is a professional corporation organized under the laws of the State of Nevada.

DATED this 20th day of July, 2016.

BAILEY ♦ KENNEDY

By: /s/ Kelly B. Stout

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1	<u>TABLE OF CONTENTS</u>	
2	RULE 26.1 DISCLOSURE	I
3	TABLE OF CONTENTS	II
4	TABLE OF AUTHORITIES	VI
5	I. JURISDICTIONAL STATEMENT	XI
6	II. ROUTING STATEMENT	XI
7	III. STATEMENT OF ISSUES PRESENTED FOR REVIEW	XI
8	IV. STATEMENT OF THE CASE	1
9	V. STATEMENT OF FACTS.	4
10	A. Factual Background.	4
11	1. Kristine Jo Freshman’s PERS Account.	4
12	2. Walter Was Convicted For Kristine’s Murder.	5
13	3. PERS Denies Shae’s Application For Survivor Benefits.	5
14	4. PERS Refuses Plaintiffs’ Request for Documents Related to Kristine’s PERS Records.	7
15	B. Procedural Background.	8
16	1. The Court Grants Plaintiffs’ Motion for Partial Summary Judgment and Determines that Shae is Entitled to Survivor Benefits.	8
17	2. The Court Orders PERS to Pay Pre-Judgment and Post-Judgment Interest.	9
18	3. The Court Awards Plaintiffs Costs and Attorneys’ Fees.	11
21	VI. SUMMARY OF THE ARGUMENT	12
22	VII. ARGUMENT.	15
	A. Standards of Review.	15

1	1. Orders Granting Summary Judgment and Orders Awarding Interest Are Subject to De Novo Review.	15
2		
3	2. Order Awarding of Costs Is Reviewed for Abuse of Discretion.	16
4	3. An Order Awarding Attorneys' Fees Is Reviewed for Manifest Abuse of Discretion.	17
5	B. The Court Should Affirm the District Court's Order Granting Summary Judgment Because the Slayer Statute Applies to Survivor Benefits.	19
6		
7	1. Relevant Statutes.	20
8	a. Nevada's Slayer Statute Provides that a "Killer" Shall Be Treated As Having Predeceased the Decedent.	20
9	b. The PERS Act Provides Survivor Benefits If a Qualifying Member is Unmarried at the Time of Death.	23
10	2. PERS' Interpretation is Not Entitled to Deference.	25
11	3. The Forfeiture Rule Does Not Prevent Survivor Benefits from Accruing or Devolving Upon the Member's Death.	26
12	4. The Plain Language of the Slayer Statute Requires that PERS Treat Walter as Having Predeceased Kristine.	28
13	5. The Legislature Did Not Exempt PERS Survivor Benefits.	29
14	6. Refusing to Apply the Slayer Statute to PERS Survivor Benefits Would Lead to An Absurd Result.	30
15		
16	C. Shae Is Entitled to Collect Pre-Judgment and Post-Judgment Interest Pursuant to NRS 99.040(1)(a).	33
17		
18	1. The PERS Act Does Not Prohibit Payment of Interest on Benefits Improperly Withheld.	35
21	a. The Legislature Intended PERS To Be Liable for Statutory Interest.	35
22	b. Payment of Interest on Improperly Withheld Benefits Would Not	

1	Harm the Fund.	37
2	c. NRS 286.220 Does Not Prohibit Payment of Interest from the Fund.	39
3	2. Pursuant to NRS 99.040, Shae is Entitled to Interest on Each Past Due	
4	Payment from the Date Owed Until Paid.	41
5	a. Pursuant to NRS 99.040(1)(a), Shae is Entitled to 12% Interest on	
6	Each Payment From the Time it Was Due Until Paid Because the	
7	Payments Arise out of a contract.	42
8	(i) PERS Benefits Arise Out of the PERS Member's Employment	
9	Contract.	42
10	(ii) Interest Accrues at 12% Because That Was the Rate in Effect at the	
11	Time the Contract was Signed.	44
12	b. Alternatively, Shae is Entitled to 5.25% Interest on Each Payment	
13	from the Time it was Due until Paid under NRS 99.040(1)(c) Because	
14	PERS is a Trustee and Detained the Money Without Shae's Consent.	45
15	(i) PERS Benefits are Money Received To the Use and Benefit of	
16	Another.	46
17	(ii) Interest Accrues at the Rate of 5.25% Per Annum.	47
18	3. Even if NRS 99.040 is Not Applicable, Shae is Owed 5.25% Interest	
19	from the Time the Complaint Was Filed.	48
20	D. Plaintiffs Are Entitled to Recover Expert Witness Fees for	
21	Consulting Experts.	49
22	1. NRS Chapter 18 Provides that a Prevailing Party May Recover Expert	
23	Fees as Costs.	50
24	2. A Party Should Be Able Recover up to \$1500.00 for Fees Paid To a	
25	Consulting Expert Under NRS 18.020 When the Expert is Reasonably	
26	Necessary.	51
27	E. Plaintiffs Are Entitled to Recover Attorneys' Fees and Costs Because	
28	PERS and Its Counsel Maintained Defenses That Were Devoid of All	

1	Merit.	54
2	1. A Party May Recover Attorney’s Fees from an Opposing Party or Its	
3	Counsel when the Party’s Legal Position Is Maintained Without Reasonable	
	Grounds.	55
4	2. From the Time of Kristine’s Death, PERS Has Taken Unreasonable	
	Positions that Are Not Supported by Existing Law.	57
5	a. Based on Its Decision to Deny Shae Survivor Benefits, PERS	
6	Refused to Allow Plaintiffs Access to the Relevant Account	
	Documents.	58
7	b. In Denying Shae Survivor Benefits, PERS Ignored the Plain	
8	Language of the Slayer Statute and Disregarded Established Canons of	
	Statutory Instruction.	58
9	c. PERS Refusal to Pay Prejudgment Interest Was Patently	
	Unreasonable.	59
10	3. The Attorney’s Fees Requested By Plaintiffs’ Are Reasonable Under	
11	the <i>Brunzell</i> Factors.	61
12	a. Plaintiffs May Recover the Fees Incurred in Connection with Re-	
	Opening Probate Because PERS’ Actions Made It Necessary.	61
13	b. Plaintiffs Provided Enough Information for the Court to Evaluate	
	The Request for Attorneys’ Fees Using the Brunzell Factors.	62
14	VIII. CONCLUSION.	65
15	IX. CERTIFICATE OF COMPLIANCE	66
16	CERTIFICATE OF SERVICE	68

TABLE OF AUTHORITIES

CASES

<i>Albios v. Horizon Communities, Inc.</i> , 122 Nev. 409, 132 P.3d 1022 (2006).	49
<i>Bates v. Presbyterian Intercommunity Hosp., Inc.</i> , 138 Cal. Rptr. 3d 680 (Cal. Ct. App. 2012),	52
<i>Bobby Berosini, Ltd. v. PETA</i> , 114 Nev. 1348, 971 P.2d 383 (1998)	16, 51
<i>Carter v. Barbash</i> , 92 Nev. 289, 417 P.2d 154 (1966)	46
<i>City of Fernley v. State, Dep't of Tax.</i> , 132 Nev. Adv. Op. 4, 366 P.3d 699 (2016)	16
<i>City of Reno v. Bld. & Constr. Trades Counsel of N. Nev.</i> , 12 Nev. Adv. Op. 2, 251 P.3d 718 (2011)	25
<i>City of Reno v. Reno Police Protective Ass'n</i> , 118 Nev. 889, 59 P.3d 1212 (2002)	17
<i>Clayton v. Snow</i> , 131 P.3d 1202 (Colo. App.2006)	52
<i>Davis v. Beling</i> , 128 Nev. Adv. Op. 28, 278 P.3d 501 (2012)	16
<i>Div. of Ins. v. State Farm Mut. Auto. Ins. Co.</i> , 116 Nev. 290, 995 P.2d 482 (2000)	29, 36
<i>Edwards v. Emperor's Garden Rest.</i> , 122 Nev. 317, 130 P.3d 1280 (2006)	17
<i>Emerson v. Eighth Jud. Dist. Court</i> , 127 Nev. 672, 263 P.3d 224 (2011)	17
<i>First Interstate Bank of Nev. v. Green</i> , 101 Nev. 113, 694 P.2d 496 (1985)	41, 46, 47
<i>Foster v. Costco Wholesale Corp.</i> , 128 Nev. Adv. Op. 71, 291 P.3d 150 (2012)	15

1	<i>Frantz v. Johnson</i> , 116 Nev. 455, 999 P.2d 361 (2000).....	17
2	<i>Haley v. Dist. Ct.</i> , 128 Nev. Adv. Op. 16, 273 P.3d 855 (2012).....	62
3	<i>Kerala Properties, Inc. v. Familian</i> , 122 Nev. 601, 137 P.3d 1146 (2006).....	15, 44
4	<i>Laird v. Public Emp. Ret. Bd.</i> , 98 Nev. 42, 639 P.2d 1171 (1982).....	30
5	<i>Leven v. Frey</i> , 123 Nev. 399, 168 P.3d 712 (2007).....	31
6	<i>Logan v. Abe</i> , 131 Nev. Adv. Op. 31, 350 P.3d 1139 (2015).....	51, 563
7	<i>Moran v. Hagerman</i> , 69 F. 427 (C.C.D. Nev. Aug. 13, 1895)	36
8	<i>Nicholas v. State</i> , 116 Nev. 40, 992 P.2d 262 (2000).....	43
9	<i>Paradise Homes, Inc. v. Cent. Sur. & Ins. Corp.</i> , 84 Nev. 109, 437 P.2d 78 (1968).....	41
10	<i>Pressler v. City of Reno</i> , 118 Nev. 506, 50 P.3d 1096 (2002)	16
11	<i>Pub. Emps. Benefits Program v. Las Vegas Metro Police</i> <i>Dep't</i> , 124 Nev. 138, 179 P.3d 542 (2008)	28, 42
12	<i>Pub. Emps. Ret. Bd. v. Washoe Cnty.</i> , 96 Nev. 718, 615 P.2d 972 (1980)	43
13	<i>Ramada Inns, Inc. v. Sharp</i> , 101 Nev. 824, 711 P.2d 1 (1985).....	40
14	<i>Richard J. & Esther E. Wooley Trust v. DeBest Plumbing,</i> <i>Inc.</i> , 983 P.2d 834 (Idaho 1999)	52
15	<i>Schoepe v. Pac. Silver Corp.</i> , 111 Nev. 563, 893 P.2d 388 (1995).....	42, 44
16	<i>Stratosphere Gaming Corp. v. City of Las Vegas</i> , 120 Nev. 523, 96 P.3d 756 (2004).....	17
17	<i>Tate v. Bd. of Med. Exam'rs</i> , 131 Nev. Adv. Op. 67, 356 P.3d 506 (2015).....	31
18		
21		
22		

1	<i>Triex Fin. Servs., Inc. v. Dep't of Bus. & Indus., Fin. Insts.</i>	
2	<i>Div.</i> , 126 Nev. 763, 367 P.3d 828 (2010).....	16
3	<i>United Ins. Co. of Am. v. Chapman Indus.</i> , 120 Nev. 745, 749,	
4	100 P.3d 664 (2004).....	15, 56
5	<i>Valentine v. M States Mut. Cas. Co.</i> , 252 P.3d 1182, 1188	
6	(Colo. Ct. App. 2011)	52
7	<i>Pub. Util. Dist. No. 2 of Pac. Cnty. v. Comcast of Wash. IV,</i>	
8	<i>Inc.</i> , 336 P.3d 65 (Wash. Ct. App. 2014).....	52
9	<i>Water Co. of Tonopah v. Tonopah Extension Mining Co.</i> , 53	
10	F.2d 653 (D. Nev. 1931)	36
11	<i>Watson Rounds v. Eighth Jud. Dist. Ct.</i> , 131 Nev. Adv. Op.	
12	79, 358 P.3d 228 (2015).....	17, 31
13	<u>STATUTES</u>	
14	NRS 7.085	<i>passim</i>
15	NRS 17.130	<i>passim</i>
16	NRS 18.005	<i>passim</i>
17	NRS 18.010	<i>passim</i>
18	NRS 18.020	49, 50
19	NRS 41B.090	13, 22, 29
20	NRS 41B.200	<i>passim</i>
21	NRS41B.250	14
22	NRS 41B.300	13, 14, 22
	NRS 41B.310	<i>passim</i>
	NRS 41B.320	22
	NRS 41B.330	22

1	NRS 99.040.....	<i>passim</i> 3,
2	NRS 286.015.....	32
3	NRS 286.110.....	43, 46
4	NRS 286.120.....	46
5	NRS 286.190.....	40, 40 n.13,
6		46
7	NRS 286.220.....	15, 38, 39,
8		40 n.13, 47
9	NRS 286.288.....	40 n.13
10	NRS 286.665.....	26, 37
11	NRS 286.669.....	<i>passim</i>
12	NRS 286.670.....	12
13	NRS 286.673.....	26
14	NRS 286.674.....	12, 14, 26
15	NRS 286.6765.....	26
16	NRS 286.6767.....	<i>passim</i>
17	NRS 286.6768.....	24
18	NRS 286.67685.....	24
19	NRS 286.677.....	22, 26
20	<u>COURT RULES</u>	
21	NRCP 56(a).....	12
22		

LEGISLATIVE AUTHORITY

Assemb. B. 159, 1999 Leg. 70 th Sess. (Nev. 1999)	20
Amend. No 158 to Assemb. B. 159 at § 35, 70 th Leg. Sess. (Nev. 1999)	20 n.5
Hearing on S.B. 349 before the Assemb. Comm. on Gov't Affairs, 2001 Leg., 71st Sess. (Nev. May 4, 2001)	23, 24, 24 n.8
Hearing on S.B. 349 before the S. Comm. on Finance, 2001 Leg., 71 st Sess. (Nev. Apr. 5, 2001)	24
S.B. 349, 1999 Leg., 70 th Sess. (Nev. 1999)	24 n.7

OTHER RESOURCES

PERS, Comprehensive Annual Financial Report for the Fiscal Year Ended June 30, 2014	31
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Pursuant to NRAP 28(b), Respondents omit a Jurisdictional Statement.

Pursuant to NRAP 28(b), Respondents omit a Routing Statement.

Pursuant to NRAP 28(b), Respondents omit a Statement of Issues

Presented for Review.

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1 **IV. STATEMENT OF THE CASE**

2 Kristine Jo Freshman (“Kristine”) was a PERS Member for 24 years.
3 (I.APP0019 ¶ 6.¹) On December 6, 2009, Kristine was killed by her husband,
4 Walter E. Freshman (“Walter”). (I.APP0062; I.APP0175 ¶¶ 3-4.) Ultimately,
5 Walter pleaded guilty and adjudicated a “Killer” within the meaning of NRS
6 41B.010 - 41B.420 (“Slayer Statute”) on December 10, 2010. (I.APP0105-
7 110; I.APP0118-21.)

8 Prior to her death, Kristine had designated her only child, Shae, as her
9 survivor beneficiary. (I.APP0064.) Nonetheless, PERS denied Shae’s
10 application for Survivor Benefits.² (I.APP0078.)

11 Questioning PERS’ decision, Shae wanted to confirm that she had been
12 designated as Kristine’s survivor beneficiary. Despite numerous requests for
13 Kristine’s Survivor Beneficiary Designation and other documents related to
14 Kristine’s PERS account (“Records”), PERS refused. (I.APP0437 ¶ 7-10.)
15 Based on its finding that Shae was not a beneficiary, PERS claimed that Shae
16 was not entitled to copies of the Records. (IV.APP0486-88.)

17 _____
18 ¹ Respondents cite to Petitioners W. Chris Wicker and Woodburn and
19 Wedge’s Appendix, which was filed with their Petition for Writ of Mandamus
20 on March 15, 2016.

21 ² “Survivor Benefits” refers collectively to benefits paid pursuant to NRS
22 286.671-.679, which includes benefits paid to a child, spouse, survivor
beneficiary, or parent.

1 In order to obtain the Records, Shae was forced to petition the Probate
2 Court to re-open probate of her mother's estate, have Jared Shafer re-
3 appointed as Special Administrator, and Order PERS to produce copies of the
4 Records. (IV.APP0444-515.)

5 Upon receipt of the Records, Shae quickly determined that she was
6 designated as Kristine's survivor beneficiary. (I.APP0011.)

7 Accordingly, Shae commenced litigation to recover Survivor Benefits
8 on May 1, 2014. (I.APP0001-013.) Following a brief discovery period, the
9 Parties filed cross-motions for summary judgment on October 27, 2014.
10 (I.APP0030-043, I.APP0044-0129.)

11 The court concluded that the Slayer Statute "applies to PERS benefits
12 for survivors of a deceased PERS member. . . ." and ordered that "Shae E.
13 Gitter, as the sole survivor beneficiary of Kristine Jo Freshman, is entitled to
14 Survivor Benefits as set forth in NRS 286.6767 – NRS 286.6769, inclusive.'"
15 (I.APP0179:15-16.)

16 Pursuant to the court's entry of summary judgment in Shae's favor, the
17 Parties were able to agree on the amount of back payments PERS owed to
18 Shae, but PERS refused to pay any interest on the back payments. (I.APP0232
21 ¶ 1.)
22

1 Shae was forced to file a motion to compel PERS to pay pre-judgment
2 and post-judgment interest. (I.APP0180-197.) The court determined that
3 Shae was entitled to interest under NRS 99.040(1)(a), which would accrue at a
4 rate of 12% per annum from the time each payment was due until paid.
5 (I.APP0234:11-18.)

6 Finally, Plaintiffs filed a Memorandum of Costs and Disbursements and
7 a Motion for Attorneys' Fees pursuant to NRS 18.010 and 7.085 against PERS
8 and its counsel. (II.APP0237-0342; II.APP0348-515.) Plaintiffs argued that
9 PERS has taken unreasonable positions, which were unsupported by existing
10 law and at odds with the plain language of Nevada's statutes.
11 (III.APP0356:13-16.)

12 PERS opposed the Motion for Attorneys' Fees and filed a Motion to
13 Retax Costs, challenging Plaintiffs' claim of \$5,000.00 in fees for a non-
14 testifying expert witness. (III.APP0342-347.) Ultimately, the court
15 determined that Plaintiffs recovery of costs was limited to \$1500.00 in expert
16 fees, and it reduced Plaintiffs' costs by \$3500.00. (IV.APP0661:1-5.)

17 The court further found that PERS did everything possible to prevent
18 Shae from collecting Survivor Benefits, and its conduct throughout the dispute
21 was "unconscionable." (IV.APP0648 ¶¶ 17, 19.) Accordingly, the District
22

1 Court awarded Plaintiffs \$96,272.50 in attorneys’ fees—the full amount
2 requested. (IV.APP0650:4-5.)

3 PERS has appealed the Court’s January 29, 2015 Order Granting
4 Plaintiffs’ Motion for Partial Summary Judgment and Denying Defendant’s
5 Motion for Summary Judgment, the November 16, 2015 Order Granting
6 Plaintiffs’ Motion for Pre-Judgment and Post-Judgment Interest and Final
7 Judgment; the February 19, 2016 Order Granting Plaintiffs’ Motion for
8 Attorneys’ Fees; and the February 10, 2016 Order Granting Motion to Retax.

9 PERS’ Counsel filed a Petition for a Writ of Mandamus directing the
10 District Court to vacate its February 19, 2016 Order Granting Plaintiffs’
11 Motion for Attorneys’ Fees as it applies to Petitioners.

12 **V. STATEMENT OF FACTS.**

13 **A. Factual Background.**

14 **1. Kristine Jo Freshman’s PERS Account.**

15 Kristine taught kindergarten in the Clark County public school system
16 for 24 years and was a PERS Member. (I.APP0003 ¶ 5.) Kristine had one
17 child, Shae. (I.APP0002 ¶ 2(a).)

18 In August 2007, Kristine completed a “Survivor Beneficiary
21 Designation” identifying, Shae as her survivor beneficiary. (I.APP0175 ¶ 3-4;
22 I.APP0011.)

1 At the time of her death, Kristine had accrued 24.00 years of service
2 credit. (I.APP0232 ¶ 1(c).)

3 **2. Walter Was Convicted For Kristine’s Murder.**

4 On December 6, 2009, Kristine was shot and killed by her husband,
5 Walter (Shae’s step-father). (I.APP0175 ¶¶ 5-6, 8.) Walter subsequently
6 pleaded guilty to second-degree murder for causing his wife’s death and was
7 sentenced to ten to twenty-five years in prison. (*Id.* ¶ 9; I.APP0094-95.)

8 After the time to appeal the conviction had lapsed, Walter was
9 adjudicated a “killer” as defined by the Slayer Statute. (I.APP0175 ¶ 10.) The
10 court further ordered that Kristine’s estate be distributed as if Walter had
11 predeceased Kristine. (I.APP119-20 ¶ 6.) The Order specifically included,
12 “[a]ll retirement benefits and/or Survivor Benefits payable to, or with respect
13 to the death of, KRISTINE JO FRESHMAN, deceased, from and/or under
14 plans maintained by [PERS].” (I.APP0120 ¶ 6(e).)

15 **3. PERS Denies Shae’s Application For Survivor Benefits.**

16 Within days of Kristine’s death, PERS sent Shae a letter requesting a
17 copy of Kristine’s death certificate because “[a] recent audit of Kristine’s
18 account [had] revealed that there may be benefits available.” (I.APP0073.)
21 Shae immediately submitted Kristine’s death certificate. (I.APP0062.)
22

1 On December 21, 2009, PERS' counsel stated that PERS could not pay
2 any benefits to the Estate because a spouse who unlawfully kills a PERS
3 Member is ineligible to receive benefits under NRS 286.669, and the murder
4 charges pending against Walter had not been fully resolved. (I.APP0123-25.)
5 However, on January 10, 2010, PERS sent a conflicting letter stating that it
6 had determined that Shae may be eligible to receive "[a] monthly benefit in the
7 approximate amount of \$2,900.00 payable for [her] lifetime" or "[a] lump-sum
8 refund of approximately 50% of the employer paid contributions in the
9 approximate amount of \$112,000.00." (I.APP0075-76.)

10 After Walter's criminal charges and the probate of Kristine's Estate had
11 been resolved, Shae submitted an Application for Survivor Benefits to PERS
12 on or about April 25, 2011. (I.APP0066.) On June 10, 2011, PERS denied
13 Shae's application, and informed her that the PERS Act disqualified her step-
14 father as a beneficiary, but does not authorize payment to any other individual,
15 whether or not designated as a secondary beneficiary. (I.APP0078.)

16 Counsel for Shae and Kristine's Estate made repeated efforts to discuss
17 the legal merits with PERS' counsel, but its position remained unchanged.
18 (III.APP0491 ¶ 9; IV.APP0508-09; IV.APP0510.)

1 **4. PERS Refuses Plaintiffs' Request for Documents Related to**
2 **Kristine's PERS Records.**

3 In order to evaluate PERS' denial of Survivor Benefits, Shae and
4 Kristine's Estate requested copies of Kristine's PERS Records. (III.APP0437
5 ¶¶ 6-9; III.APP0490 ¶ 4; III.APP0491 ¶ 6-7, 9; III.APP0493-94; III.APP0496-
6 0503.) However, PERS used its decision regarding Survivor Benefits as the
7 basis to refuse her subsequent requests for access to the relevant documents.
8 (III.APP0508-10; III.APP0512-13.)

9 Despite numerous written requests and conversations between counsels,
10 PERS continued to refuse all requests for the Records. (III.APP0486-88;
11 III.APP0490 ¶ 5; III.APP0491 ¶ 9; III.APP0508-510; III.APP0505-06;
12 III.APP0512-13.) PERS based its refusal on its determination that neither
13 Shae nor the Estate was a beneficiary, and therefore, neither was entitled to
14 copies of the Records. (III.APP0486-88.)

15 Ultimately, Shae had to petition the Probate Court to re-open Kristine's
16 Estate, have Jared Shafer re-appointed as Special Administrator, and obtain a
17 court order instructing PERS to provide copies of the documents.
18 (III.APP0444 -515; III.APP0438 ¶ 11.)

21 PERS produced Kristine's PERS Records on January 30, 2014.
22 (I.APP0129.) Upon receiving the documents, Shae confirmed that she was

1 designated as her mother's secondary survivor beneficiary on her PERS
2 Account. (I.APP0011.)

3 **B. Procedural Background.**

4 Shae and Jared, as Special Administrator of Kristine's Estate, filed this
5 action in the Eighth Judicial District Court in order to collect Survivor
6 Benefits that PERS has wrongfully withheld from Shae. (I.APP0001-13.)

7 **1. The Court Grants Plaintiffs' Motion for Partial Summary**
8 **Judgment and Determines that Shae is Entitled to Survivor**
9 **Benefits.**

10 On October 27, 2014, the Parties filed cross-motions for summary
11 judgment. (I.APP0030-43; I.APP0044-129.) Plaintiffs argued that the plain
12 language of the Slayer Statute requires PERS to treat Walter as having
13 predeceased Kristine for the purpose of determining who was entitled to
14 Survivor Benefits. (I.APP0053-55.) PERS argued that the Slayer Statute did
15 not apply because PERS is not subject to statutes other than the PERS Act.
(I.AP0035-40.)

16 The District Court heard oral argument on December 2, 2014, and
17 concluded that "NRS Chapter 41B [Nevada's Slayer Statute] applies to PERS
18 benefits for survivors of a deceased PERS member, including, but not limited
21 to Spousal Benefits and benefits for a survivor beneficiary pursuant to NRS
22 286.6767." (I.APP0178 ¶ 31.) Accordingly, the court determined that

1 “[p]ursuant to NRS 41B.310(3), PERS shall treat Kristine Jo Freshman as
2 being unmarried at the time of her death for the purpose of determining
3 entitlement to PERS benefits for survivors.” (I.APP0178 ¶ 33.)

4 The court ordered that Shae E. Gitter, as the sole survivor beneficiary of
5 Kristine Jo Freshman, “is entitled to Survivor Benefits as set forth in NRS
6 286.6767 – NRS 286.6769, inclusive.” (I.APP0178 ¶ 35.)

7
8 **2. The Court Orders PERS to Pay Pre-Judgment and Post-**
Judgment Interest.

9 Pursuant to the court’s Order Granting Summary Judgment in Shae’s
10 favor, the Parties were able to stipulation as to the amount of back payments
11 PERS owed to Shae. (I.APP0232 ¶ 1.) However, PERS maintained that the
12 PERS Act is not subject to either pre-judgment or post-judgment interest on
13 the back payments. Plaintiffs filed a motion seeking interest. (I.APP0180-
14 0197).

15 Plaintiffs argued that PERS owed pre-judgment and post-judgment
16 interest under NRS 99.040(1)(a), which applies to money due “[u]pon
17 contracts, express or implied.” (I.APP0185:20- I.APP0190:5; I.APP0187:5-
18 I.APP0188:19.) In the alternative, Plaintiffs sought interest under NRS
21 99.040(1)(c), which applies to money due “[u]pon money received to the use
22 and benefit of another and detained without his or her consent”

1 (I.APP0188:20-I.APP0190:2). In the event that the Court denied interest
2 under either section of NRS 99.040, Plaintiffs requested interest under NRS
3 17.130, which applies “all judgments and decrees, rendered by any court of
4 justice, for any debt, damages or costs[w]hen no rate of interest is
5 provided by contract or otherwise by law” (I.APP0190:3-25).

6 Although PERS has been earning interest on the back payments of
7 Survivor Benefits it has wrongfully withheld from Shae, it claimed “PERS is
8 not obligated to pay pre-judgment or post-judgment interest” because it is
9 governed only by NRS Chapter 286 and is not subject to other statutes of
10 general application. (I.APP0200:2-4; I.APP0201:19-21.)

11 The District Court determined that Shae was entitled to interest under
12 NRS 99.040(1)(a) at a rate of 12% on each payment from the time due until
13 paid. (I.APP0234:16-18.) The court entered judgment in Shae’s favor in the
14 amount of \$272,572.16 (\$203,231.76 in past-due Survivor Benefits and
15 \$69,340.40 in pre-judgment interest) and ordered that PERS continue to pay
16 interest at the rate of 12% per annum on each of the back payment until paid
17 and on all future payments from the time due until paid. (I.APP0235:20-24;
18 I.APP0236:3-9)

1 **3. The Court Awards Plaintiffs Costs and Attorneys' Fees.**

2 On October 23, 2015, Plaintiffs filed their Memorandum of Costs and
3 Disbursements, which was supported by a detailed declaration and
4 documentation. (II.APP0237-0341.) On October 29, 2015, PERS filed a
5 Motion to Retax Costs, challenging \$5,000.00 in fees paid to a non-testifying
6 expert. (II.APP0342-346.)

7 On November 9, 2015, Plaintiffs filed a Motion for Attorneys' Fees
8 pursuant to NRS 18.010 and 7.085 against PERS and its counsel.
9 (III.APP0348-0515.) Plaintiffs sought \$96,272.50 in attorneys' fees for
10 422.75 hours of work (III.APP0361 ¶ 9) and argued that PERS—by and
11 through its counsel-- had repeatedly taken unreasonable positions, which were
12 unsupported by Nevada law. (III.APP0356:13-16.)

13 PERS opposed the Motion for Attorneys' Fees and argued that its legal
14 positions were based on a reasonable reading of the PERS Act.
15 (III.APP0532:20; III.APP0534:20-24; III.APP0535:7-8.) PERS further argued
16 that the Motion for Attorneys' Fees was not supported by the *Brunzell* factors.
17 (III.APP0537:24- III.APP0539:12.) Finally, PERS disputed \$17,963.00,
18 which Plaintiffs incurred to file the Petition to re-open the probate proceedings
21 prior to filing the District Court case, obtain a copy of Kristine's PERS
22 Records, and (III.APP00536:22- III.APP0537:23.)

1 The District Court held a hearing on January 19, 2016, on PERS’
2 Motion to Retax Costs and Plaintiffs’ Motion for Attorneys’ Fees.
3 (III.APP0581:1-2, 15-17.) Pursuant to NRS 18.005(5), the court awarded
4 Plaintiffs \$1,500.00 of the \$5,000.00 they requested in expert fees.
5 (IV.APP0661:1-5.) The court further found that PERS did everything possible
6 to prevent Shae from collecting Survivor Benefits, and its conduct throughout
7 the dispute was “unconscionable.” (IV.APP0648 ¶¶ 17, 19.) Accordingly,
8 the District Court awarded Plaintiffs all \$96,272.50 in requested attorneys’
9 fees. (IV.APP0650:4-5.)

10 **VI. SUMMARY OF THE ARGUMENT**

11 At the time Kristine became a Member in 1986, the PERS Act provided
12 that the spouse of an eligible Member is entitled to Survivor Benefits. NRS
13 286.674. However, the PERS Act also includes a Forfeiture Rule, which
14 states that a person convicted of the murder or voluntary manslaughter of a
15 Member is ineligible to receive PERS Benefits. NRS 286.670. The PERS
16 Act does not expressly authorize or prohibit PERS from paying Survivor
17 Benefits that would have otherwise been paid to the Killer to another person.
18 In 2001 and 2003, the PERS Act was further amended to allow Members to
21 designate a survivor beneficiary who would be entitled to Survivor Benefits if
22 the Member was unmarried at the time of death. NRS 286.6767.

1 In 1999, Nevada enacted the Slayer Statute, which is a comprehensive
2 legislative scheme that prevents a person convicted of murder or voluntary
3 manslaughter from receiving any interest or benefit as a result of the killing
4 and ensures that the interest or benefit remains available for the decedents'
5 heirs. Therefore, it provides that the Killer shall be treated as if he or she
6 predeceased the decedent. NRS 41B.300(3).

7 The Legislature's intent to have the Slayer Statute apply broadly is clear
8 from the statutory language:

9 *Notwithstanding any other provision of law*, the
10 provisions of this chapter apply to *any* appointment,
11 nomination, power, right, property, interest or
benefit that accrues or devolves to a killer of a
decedent based upon the death of the decedent.

12 NRS 41B.200(1) (emphasis added). Nonetheless, the Slayer Statute
13 specifically states that it applies to “

14 Any public or private plan or system that entitles a
15 person to the payment or transfer of any property,
16 interest or benefit, including, without limitation, a
plan or system that involves . . . [p]ension benefits,
retirement benefits or other similar benefits.”

17 NRS 41B.090(9)(a).

18 Walter and Kristine were married at the time of Kristine's death, and
21 Kristine had designated Shae as her survivor beneficiary. As the spouse of a
22

1 deceased Member, Survivor Benefits immediately accrued/devolved to Walter
2 as a result of Kristine’s death. NRS 286.674.

3 However, when Walter pleaded guilty to Kristine’s murder on
4 November 30, 2010, he forfeited his right to Survivor Benefits in accordance
5 with the Slayer Statute. NRS41B.250. Additionally, “any right, property,
6 interest or benefit [subject to forfeiture] must be treated as if the killer had
7 predeceased the decedent.” NRS 41B.300(2).

8 Pursuant to the Slayer Statute, PERS was required to treat Walter as
9 having predeceased Kristine. NRS 41B.310(3). This legal fiction meant
10 PERS would have to treat Kristine as being unmarried on the date of her
11 death, and Shae would be eligible for Survivor Benefits. NRS 286.6767.
12 Therefore, this Court should affirm the District Court’s Order awarding Shae
13 Survivor Benefits.

14 Additionally, Plaintiffs are entitled to pre-judgment and post-judgment
15 interest under NRS 99.040, which provides that interest accrues from the time
16 that money is due. Interest is due under subsection (1)(a), which applies to
17 “cases . . . upon contracts, express or implied,” because PERS benefits arise
18 out of the Member’s employment contract. In the alternative, Plaintiffs are
21 entitled to interest under subsection (1)(b), which applies to “money received
22

1 to the use and benefit of another and detained without his or her consent”
2 because PERS is a trustee of the PERS Trust Fund. NRS 286.220.

3 Additionally, Plaintiffs are entitled to seek up to \$1500 in costs for fees
4 paid to its consulting expert because the services were reasonable and
5 necessary due to the subject matter of the case.

6 Finally, this Court should affirm the Order Granting Plaintiffs’ Motion
7 for Attorneys’ fees against PERS and its counsel under NRS 18.010 and 7.085
8 because PERS and its counsel have taken one unreasonable position after
9 another, which was contrary to existing law and at odds with the plain
10 language of Nevada’s statutes.

11 VII. ARGUMENT.

12 A. Standards of Review.

13 1. Orders Granting Summary Judgment and Orders Awarding 14 Interest Are Subject to De Novo Review.

15 “This court reviews a district court's grant of summary judgment de
16 novo, without deference to the findings of the lower court.” *Foster v. Costco*
17 *Wholesale Corp.*, 128 Nev. Adv. Op. 71, 291 P.3d 150, 153 (2012); NRCP
18 56(a). Likewise, an award of pre-judgment or post-judgment interest is
19 reviewed for error. *Kerala Properties, Inc. v. Familian*, 122 Nev. 601, 604,
20 137 P.3d 1146, 1148 (2006); *United Ins. Co. of Am. v. Chapman Indus.*, 120
21 Nev. 745, 749, 100 P.3d 664, 667 (2004).
22

Furthermore, “[a]ny questions of law are also reviewed de novo.” *Pressler v. City of Reno*, 118 Nev. 506, 509, 50 P.3d 1096, 1098 (2002). In particular, “[q]uestions of statutory construction, including the meaning and scope of a statute, are questions of law, which this court reviews de novo.” *Davis v. Beling*, 128 Nev. Adv. Op. 28, 278 P.3d 501, 510 (2012) (quoting *City of Reno v. Reno Gazette–Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003)).

In this case, there are no disputed facts relevant to the issue of Shae’s entitlement to Survivor Benefits or PERS’ obligation to pay pre-judgment and post-judgment interest. Rather, the Parties agree that both issues present pure legal questions of statutory interpretation, which are subject to de novo review.

2. Order Awarding of Costs Is Reviewed for Abuse of Discretion.

So long as an award of costs is authorized by statute, rule, or contract, it shall not be disturbed absent an abuse of discretion. *City of Fernley v. Dep’t of Tax.*, 132 Nev. Adv. Op. 4, 366 P.3d 699, 705 n.4 (2016); *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998).

Abuse of discretion is a “deferential” standard.” *Triex Fin. Servs., Inc. v. Dep’t of Bus. & Indus., Fin. Insts. Div.*, 126 Nev. 763, 367 P.3d 828 (2010).

1 ““A decision that lacks support in the form of substantial evidence is arbitrary
2 or capricious’ and, therefore, an abuse of discretion.” *Stratosphere Gaming*
3 *Corp. v. City of Las Vegas*, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004)
4 (quoting *Tighe v. Las Vegas Metro. Police Dep’t*, 110 Nev. 632, 634, 877 P.2d
5 1032, 1034 (1994)). “Substantial evidence is evidence that a reasonable
6 person would deem adequate to support a decision.” *City of Reno v. Reno*
7 *Police Protective Ass’n*, 118 Nev. 889, 899, 59 P.3d 1212, 1219 (2002).

8
9 **3. An Order Awarding Attorneys’ Fees Is Reviewed for**
Manifest Abuse of Discretion.

10 “A district court’s award of attorney fees will not be disturbed on
11 [review] absent a manifest abuse of discretion.” *Frantz v. Johnson*, 116 Nev.
12 455, 471, 999 P.2d 351, 361 (2000). *See also Edwards v. Emperor’s Garden*
13 *Rest.*, 122 Nev. 317, 330, 130 P.3d 1280, 1288 (2006) (“[t]he decision to
14 award attorney fees is within the [district court’s] sound discretion . . . and will
15 not be overturned absent a ‘manifest abuse of discretion.’”). The Court
16 applies the same standard of review whether the issue is raised on appeal or in
17 a Petition for an extraordinary writ. *Emerson v. Eighth Judicial Dist. Court*,
18 127 Nev. 672, 676, 263 P.3d 224, 227 (2011); *see also Watson Rounds v.*
21 *Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 79, 358 P.3d 228, 231 (2015).

1 A “manifest abuse of discretion is ‘[a] clearly erroneous interpretation
2 of the law or a clearly erroneous application of a law or rule.’” *State v. Eighth*
3 *Jud. Dist. Ct.*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (quoting *Steward*
4 *v. McDonald*, 330 Ark. 837, 958 S.W.2d 297, 300 (1997)). It is more than a
5 mere error in judgment; it “occurs when the law is overridden or misapplied,
6 or when the judgment exercised is manifestly unreasonable or the result of
7 partiality, prejudice, bias or ill will.” *Id.* (quoting *Blair v. Zoning Hrg. Bd. of*
8 *Tp. of Pike*, 676 A.2d 760, 761 (Pa. Commw. Ct. 1996)).

9 PERS claims that the District Court’s award of attorneys’ fees is a pure
10 issue of law that should be reviewed de novo because there was “no evidence
11 that the PERS intended to harass Gitter or that PERS acted in bad faith.”
12 (Appellant’s Br. 8:11-15.³) However, NRS 18.010(2)(b), does not require
13 evidence of intent to harass or bad faith; it provides that “the court may make
14 an allowance of attorney's fees to a prevailing party . . . (b) Without regard to
15 the recovery sought, when the court finds that the claim, counterclaim, cross-
16 claim or third-party complaint or defense of the opposing party was brought or

17
18 ³ Additionally, PERS’ Statement of the Issues recognizes that the
appropriate standard of review is for abuse of discretion. (“Did the trial court
21 ***abuse its discretion*** and err as a matter of law by awarding attorney’s fees to
22 Gitter against PERS and its counsel” (Appellant’s Br. 2:8-10 (emphasis
added.)

1 maintained without reasonable ground or to harass the prevailing party.”

2 Thus, the absence of evidence of intent to harass or bad faith is irrelevant.⁴

3 **B. The Court Should Affirm the District Court’s Order Granting**
4 **Summary Judgment Because the Slayer Statute Applies to Survivor**
5 **Benefits.**

6 The District Court concluded that the Slayer Statute “applies to PERS
7 benefits for survivors of a deceased PERS member, including, but not limited
8 to Spousal Benefits and benefits for a survivor beneficiary pursuant to NRS
9 286.6767.” (I.APP0178 ¶ 31.) Accordingly, it applied NRS 41B.310(3) to
10 find that “Walter Freshman is deemed to have predeceased Kristine Jo
11 Freshman for the purposes of determining entitlement to PERS benefits for
12 survivors as set forth in NRS 286.671 – 286.679, inclusive.” (I.APP0178 ¶
13 32.) Consequently, it held that “Shae E. Gitter, as the sole survivor
14 beneficiary of Kristine Jo Freshman, is entitled to Survivor Benefits as set
15 forth in NRS 286.6767 – NRS 286.6769, inclusive.” (I.APP0179:15-16.)

16 PERS appeals the District Court’s January 29, 2015 Order Granting
17 Plaintiffs’ Motion for Partial Summary Judgment and Denying Defendant’s
18 Motion for Summary Judgment. (Appellant’s Br. 1:20 – 2:4.) Specifically,

21 ⁴ Nonetheless, the District Court made detailed findings of facts that
22 would support a finding that PERS’ defense was maintained to harass the
prevailing party. (IV.APP0648 at ¶ 17, 19.)

PERS disputes Shae’s entitlement to Survivor Benefits because it maintains that the Slayer Statute is not applicable to PERS Survivor Benefits. (*Id.*)

1. Relevant Statutes.

a. Nevada’s Slayer Statute Provides that a “Killer” Shall Be Treated As Having Predeceased the Decedent.

In 1999, the Nevada Legislature enacted a comprehensive legislative scheme under which a person convicted of murder or voluntary manslaughter forfeits all rights to benefit from the decedent’s death. Assemb. B. 159, 1999 Leg., 70th Sess. (Nev. 1999).⁵ Later codified as NRS Chapter 41B, the Legislature’s intent is clear— (1) to prevent a person from realizing a profit as a result of an unlawful killing *and* (2) to ensure that the benefit forfeited by the Killer is preserved for the decedent’s heirs.

First, it prevents a Killer from receiving any benefit that results from the killing. Specifically, it states as follows:

1. *Notwithstanding any other provision of law*, the provisions of this chapter apply to any appointment, nomination, power, right, property, interest or benefit that accrues or devolves to a killer of a decedent based upon the death of the decedent. If

⁵ Available at https://www.leg.state.nv.us/Session/70th1999/bills/AB/AB159_EN.pdf . See also Assemb. B. 159, 1999 Leg. 70th Sess. § 35 (Nev. 1999) (setting forth the text of the statutes being amended and repealed), available at https://www.leg.state.nv.us/Session/70th1999/bills/Amendments/A_AB159_158.html.

any such appointment, nomination, power, right, property, interest or benefit is not expressly covered by the provisions of this chapter, it must be treated in accordance with the principle that a killer cannot profit or benefit from his or her wrong.

2. The provisions of this chapter ***do not abrogate or limit*** the application of:

(a) The anti-lapse provisions of NRS 133.200 or the right of representation, as defined and applied in chapter 134 of NRS, with respect to a person who is not a killer of the decedent; or

(b) Any provision of a ***governing instrument*** that designates:

1. A ***contingent or residuary beneficiary*** who is not a killer of the decedent; or

2. Any other beneficiary who is not a killer of the decedent.

3. The provisions of this chapter do not abrogate or limit any principle or rule of the common law, unless the principle or rule is inconsistent with the provisions of this chapter.

NRS 41B.200 (emphasis added).

The Slayer Statute applies to all “governing instruments”, which is expressly defined to include:

9. ***Any public or private plan*** or system that entitles a person to the payment or transfer of any property, interest or benefit, including, without limitation, a plan or system ***that involves*** any of the following:

(a) ***Pension benefits, retirement benefits or other similar benefits.***

1 NRS 41B.090(9)(a) (emphasis added).

2 Next, the Slayer Statute creates a legal fiction to ensure that that the
3 decedent's family and heirs are not deprived of any interest or benefit forfeited
4 by the killer. NRS 41B.320(2)(b), 41B.330(2). In each case, the forfeited
5 interest shall be treated as if the Killer predeceased the decedent. NRS
6 41B.300(2), 41B.310(3), 41B.320(2)(b), 41B.330(2).

- 7 1. Except as otherwise provided in NRS 41B.320,⁶ a
8 killer of a decedent forfeits any appointment,
9 nomination, power, right, property, interest or
10 benefit that, pursuant to the provisions of a
governing instrument executed by the decedent or
any other person, accrues or devolves to the killer
based upon the death of the decedent.

11 . . .

- 12 3. If a killer of a decedent forfeits any appointment,
13 nomination, power, right, property, interest or
14 benefit pursuant to this section, *the provisions of
each governing instrument affected by the
forfeiture must be treated as if the killer had
predeceased the decedent.*

15 NRS 41B.310 (emphasis added).

21 _____
22 ⁶ NRS 41B.320 relates to community property with right of survivorship
and joint tenants with right survivor ship.

b. The PERS Act Provides Survivor Benefits If a Qualifying Member is Unmarried at the Time of Death.

The PERS Act has long provided that if a Member with qualifying service is married at the time of his or her death, the Member's spouse is eligible to receive Survivor Benefits. NRS 286.674-286.6766. In 1979, the PERS Act was amended to state that a person who is convicted of the murder or voluntary manslaughter of a PERS Member is ineligible to receive any PERS benefits that are payable because of the Member's death:

Any person convicted of the murder or voluntary manslaughter of a member of the System is ineligible to receive any benefit conferred by any provision of this chapter by reason of the death of that member. The System may withhold the payment of any benefit otherwise payable under this chapter by reason of the death of any member from any person charged with the murder or voluntary manslaughter of that member, pending final determination of those charges.

NRS 286.669 (PERS' "Forfeiture Rule"). Notably, the Forfeiture Rule does nothing more than declare the Killer's ineligibility; it does not authorize or prohibit payment of Survivor Benefits to any other person if a Member's spouse is ineligible because he or she has killed the Member.

In 2001, the PERS Act was amended to allow PERS Members to designate a secondary survivor beneficiary to receive benefits in the event that the Member is unmarried on the date of his or her death:

1 A member may designate, in writing, a survivor
2 beneficiary and one or more additional payees to
3 receive the payments provided pursuant to NRS
286.67675, 286.6768 or 286.67685 if the member is
unmarried on the date of the member's death.

4 NRS 286.6767(1).⁷ This provision was added to ensure equity among
5 Members by providing that all Members received the same benefits,
6 regardless of marital or employment status at death. Previously, an unmarried
7 Member could designate a beneficiary at the time of retirement, but forfeited
8 the ability to designate a beneficiary if he or she died while still employed.⁸

9 George Pyne, then-Executive Officer of PERS explained that "Married
10 and single members paid for Survivor Benefits and they should be able to
11 extend them to any named beneficiary, whether a parent, son, daughter, or
12 friend. Currently, any single member could choose a beneficiary at retirement,
13 but had no choice while actively employed." Hearing on S.B. 349 before the

14 ⁷ In 2003, NRS 286.6767 was further amended to allow a PERS Member
15 to designate multiple survivor beneficiaries. S.B. 349, 1999 Leg., Reg. Sess.
(Nev. 2016).

16 ⁸ Hearing on S.B. 349 before the Assemb. Comm. on Gov't Affairs, 2001
17 Leg., 71st Sess. 4 (Nev. May 4, 2001) (statement of Georg Pyne explaining
18 inequity of a PERS Member who divorced spouse after 27 years; divorce
19 decree provided for the former spouse to be named PERS benefit recipient
20 upon retirement; PERS Member died while he was actively employed; ex-
21 spouse received no benefit because she was not a spouse in the "Survivor
22 Benefit structure), *available at* [https://www.leg.state.nv.us/Session/71st2001/
Minutes/Assembly/GA/Final/1245.html](https://www.leg.state.nv.us/Session/71st2001/Minutes/Assembly/GA/Final/1245.html) (last visited July 18, 2016).

1 Assemb. Comm. on Gov't Affairs, 2001 Leg., 71st Sess. 4 (Nev. May 4,
2 2001). "Extending survivor benefits to a named beneficiary, be it parent, son
3 or daughter, friend, or whomever, provides all members of the plan with the
4 same insurance type of benefit they have paid for."⁹ Hearing on S.B. 349
5 before the S. Comm. on Finance, 2001 Leg., 71st Sess. 9 (Nev. Apr. 5, 2001).

6 **2. PERS' Interpretation is Not Entitled to Deference.**

7 PERS argues that it is entitled to deference in the interpretation of
8 statutes it is charged with administering. (Appellant's Br. 26:3-27:7.) Yet,
9 PERS admits that it does not administer the Slayer Statute. (I.APP0070:2-4.)¹⁰

10 Moreover, the Court may decide "pure legal questions without
11 deference to an agency determination." *City of Reno v. Bld. & Constr. Trades*
12 *Counsel of N. Nev.*, 12 Nev. Adv. Op. 2, 251 P.3d 718, 721 (2011). PERS has
13 conceded that Shae's entitlement to Survivor Benefits is a pure question of
14 law. (Appellant's Br. 7:8-20.) Therefore, PERS' arguments regarding the
15 applicability of the Slayer Statute are not entitled to any deference.

16
17 ⁹ Available at <https://www.leg.state.nv.us/Session/71st2001/Minutes/Senate/FIN/Final/859.html> (last visited July 18, 2016).

18 ¹⁰ PERS also argues that the Legislature's acquiescence to an agency's
21 reasonable interpretation is evidence of the Legislature's intent, but PERS has
22 not demonstrated that PERS has encountered this precise set of facts in the
past. Therefore, the Legislature could not have acquiesced to PERS'
interpretation of the PERS Act.

PERS has consistently argued that PERS is not subject to any statutory provisions outside of the PERS Act, but has never provided any legal authority to support this position. Rather, PERS simply expects that the court will ignore the plain language of statutes and violate well-established canons of statutory construction. Each time, the District Court has ruled against PERS.

3. The Forfeiture Rule Does Not Prevent Survivor Benefits from Accruing or Devolving Upon the Member's Death.

PERS' Survivor Benefits are plainly a benefit that accrues based on the death of the decedent. It is evident from the plain language of the statutes pertaining to Survivor Benefits that they automatically accrue upon the death of the Member. NRS 286.671-286.679. The relevant provisions are not contingent upon any fact other than the death of an eligible Member and survivor's entitlement to survivor payments automatically begins "on the first day of the month following the member's death." NRS 286.673(1); NRS 286.674(1); NRS 286.6765(1); NRS 286.677(1).

Therefore, PERS' argument that the Slayer Statute does not apply to the PERS Act because the Forfeiture Rule prevents any interest or benefit from accruing or devolving to Walter is unavailing (Appellant's Br. 27:8-29:14.). That provision states:

Any person convicted of the murder or voluntary manslaughter of a member of the System is ineligible to receive any benefit *conferred by any provision of this chapter by reason of the death of that member*. The System may withhold the payment of any benefit otherwise payable under this chapter by reason of the death of any member from any person charged with the murder or voluntary manslaughter of that member, pending final determination of those charges

NRS 286.669 (emphasis added).

The plain language of the Forfeiture Rule plainly applies to benefits already “conferred . . . by reason of the death of that member.” Furthermore, it authorizes PERS to *withhold* payments of benefits of a person who has been charged but not convicted pending final determination of the charges. If, as PERS contends, this statute operates to *prevent* a benefit from accruing, no benefits payments would be due. Furthermore, a person becomes ineligible to receive benefits upon conviction, which would not occur until after benefits had already accrued or devolved.¹¹ Prior to conviction, a person remains eligible to receive benefits.

¹¹ The Forfeiture applies equally to persons designated as a beneficiary at retirement. In the event that a person was designated as a beneficiary at retirement and murdered the Member years later, PERS could not raise any reasonable dispute that the benefits had already accrued.

1 Thus, NRS 286.669 does not prevent any benefit from accruing or
2 devolving to a Killer. Rather, it cuts off a person’s eligibility to receive
3 benefits upon conviction of murder or voluntary manslaughter. Therefore,
4 NRS 286.669 does not remove Survivor Benefits from the scope of the Slayer
5 Statute.

6
7 **4. The Plain Language of the Slayer Statute Requires that PERS**
8 **Treat Walter as Having Predeceased Kristine.**

9 It is well established that “when interpreting a statute, the language of
10 the statute should be given its plain meaning unless doing so violates the act’s
11 spirit. Thus, when a statute is facially clear, the Court should not go beyond
12 its language in determining the Legislature’s intent.” *Pub. Emps. Benefits*
13 *Program v. Las Vegas Metro Police Dep’t*, 124 Nev. 138, 147, 179 P.3d 542,
14 548 (2008) (citing *McKay*, 102 Nev. at 648, 730 P.2d at 441 (1986)).

15 The Slayer Statute is exceptionally clear and unambiguous:

16 *Notwithstanding any other provision of law*, the
17 provisions of this chapter apply to *any* appointment,
18 nomination, power, right, property, interest or
19 benefit that accrues or devolves to a killer of a
20 decedent based upon the death of the decedent.

21 NRS 41B.200(1) (emphasis added). It applies to *any* benefit or interest that
22 the killer would receive as a result of the death. *Id.*

1 Furthermore, the plain language of the Slayer Statute preempts any
2 contrary statutory provisions. NRS 41B.200(1) (emphasis added). Thus,
3 PERS’ attempts to use any provisions (or the absence of provisions) of the
4 PERS Act to argue against applying the Slayer Statute to Survivor Benefits is
5 error; such an interpretation is preempted by the Slayer Statute.

6 Consequently, the Slayer Statute requires that PERS treat Kristine as
7 though her husband had pre-deceased her; it must treat her as being unmarried
8 at the time of her death.

9 **5. The Legislature Did Not Exempt PERS Survivor Benefits.**

10 The Court presumes that “when the legislature enacts a statute . . . it
11 does so ‘with full knowledge of existing statutes relating to the same subject.’”
12 *Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 295, 995 P.2d
13 482, 486 (2000) (quoting *City of Boulder v. Gen. Sales Drivers*, 101 Nev. 117,
14 118–19, 694 P.2d 498, 500 (1985)). Thus, the Legislature was aware of the
15 PERS Act at the time it enacted the Slayer Statute and it could have created an
16 exception for PERS Survivor Benefits. It did not.

17 Instead, it did the opposite – the Legislature specifically *included* public
18 pension and retirement benefits within the scope of the Slayer Statute. NRS
21 41B.090(b)(9), 41B.200(2)(b). A governing instrument is defined to include
22 “Any public or private plan or system that entitles a person to the payment or

1 transfer of any property, interest or benefit, including, without limitation, a
2 plan or system that involves any of the following: (a) Pension benefits,
3 retirement benefits or other similar benefits.” NRS 41B.090(9)(a). Nothing in
4 the plain language of Chapter 41B suggests that PERS Survivor Benefits are
5 exempt from the Slayer Statute.

6 The Slayer Statute was enacted in 1999 – long after the forfeiture
7 provision in Chapter 286. Even if the Slayer Statute is inconsistent with
8 Chapter 286, “the one more recent in time controls over the provisions of an
9 earlier enactment.” *Laird v. Public Emp. Ret. Bd.*, 98 Nev. 42, 45, 639 P.2d
10 1171, 1173 (1982).

11 Thus, PERS Survivor Benefits are subject to the Slayer Statute, and
12 PERS must treat Walter as having predeceased Kristine for the purposes of
13 determining entitlement to Survivor Benefits. Kristine is deemed to have been
14 unmarried at the time of her death, and Survivor Benefits are owed to Shae.

15
16 **6. Refusing to Apply the Slayer Statute to PERS Survivor
Benefits Would Lead to An Absurd Result.**

17 In addition to arguing that the Slayer Statute does not apply, PERS
18 maintains that in the event that a Member is murdered by his or her spouse
21 prior to retirement, the PERS Act does not authorize payment of benefits to
22 any person. (Appellant’s Br. 21:2-27:7.) This interpretation would run

1 counter to the clear legislative intent underlying the Slayer Statute and PERS
2 Survivor Benefits.

3 It is well-established that statutory construction must not run counter to
4 “the spirit of the statute” and “should always avoid an absurd result.” *Tate v.*
5 *Bd. of Med. Exam'rs*, 131 Nev. Adv. Op. 67, 356 P.3d 506, 508 (2015).

6 “Whenever possible, a court will interpret a rule or statute in harmony with
7 other rules or statutes.” *Watson Rounds v. Eighth Jud. Dist. Ct.*, 131 Nev.
8 Adv. Op. 79, 358 P.3d 228, 232 (2015) (quoting *Nev. Power Co. v. Haggerty*,
9 115 Nev. 353, 364, 989 P.2d 870, 877 (1999)). “[S]tatutory interpretation
10 should not render any part of a statute meaningless, and a statute's language
11 ‘should not be read to produce absurd or unreasonable results.’ ” *Leven v.*
12 *Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007) (quoting *Harris Assocs. v.*
13 *Clark County Sch. Dist.*, 119 Nev. 638, 632, 81 P.3d 532, 534 (2003)).

14 The Slayer Statute plainly expresses the legislature’s intent to prevent a
15 Killer from profiting from his or her wrongful act **and** to avoid forfeiture of
16 benefits that would otherwise accrue to the Killer. NRS 41B.310.

17 Additionally, the intent to avoid forfeiture is evident by the Legislature’s
18 decision to provide a mechanism that allows the deceased’s heirs to share in
21 his or her estate and other benefits that accrue based on his or her death.

1 Likewise, PERS Survivor Benefits were created to ensure that all
2 Members received the same benefit regardless of marital or retirement status at
3 the time of their death. *See infra* § IV.B.1.b. Moreover, the PERS Act overall
4 is designed to create “an equitable separation procedure” and “make
5 government employment attractive to qualified . . . [and] encourage these
6 employees to remain in government service.” NRS 286.015(1)(b)-(c).
7 Applying PERS’ interpretation would defeat both purposes.

8 PERS benefits are a component of the compensation provided to public
9 employees. While retirement benefits provide financial support for the
10 Member, Survivor Benefits allow Members to provide for his or her loved
11 ones in the event of their untimely death. In order to create “an equitable
12 separation procedure” NRS 286.015(1)(b)-(c), the same benefits must be
13 available to all Members (and Retired Members).

14 Furthermore, this interpretation does not render the Forfeiture Rule
15 superfluous. That section continues to have effect upon the death of a
16 Member who did not choose to designate a survivor beneficiary or whose
17 survivor beneficiary would not be eligible to receive benefits.

18 Refusing to apply the Slayer Statute to PERS Survivor Benefits, it
21 would lead to an inequitable result—an active Member murdered by his or her
22 spouse would be penalized for being a victim. Such a Member would forfeit a

benefit conferred on all other Members—the ability to provide Survivor Benefits to a child, sibling, or another loved one. This result would frustrate the purpose of Survivor Benefits and lead to an absurd result.

C. Shae Is Entitled to Collect Pre-Judgment and Post-Judgment Interest Pursuant to NRS 99.040(1)(a).

Pursuant to the District Court’s decision granting Plaintiffs’ Motion for Partial Summary Judgment, the Parties stipulated to the number and amount of back payments, but were unable to agree regarding Shae’s right to pre-judgment and post-judgment interest. Although three separate provisions of NRS 99.040 and NRS 17.130 entitle Shae to interest, PERS maintained that it is not subject to NRS 99.040 or NRS 17.130.

Accordingly, Plaintiffs filed a Motion for Pre-judgment and Post-Judgment Interest (“Motion for Interest”) asking the District Court to award interest on each payment from the time the payment was due under NRS 99.040(1)(a), which applies to damages arising from a contract, express or implied, “when there is no express contract in writing fixing a different rate of interest.” (I.APP0187:5 – I.APP0188:19.) In the alternative, Plaintiffs asked the court to award interest on each payment from the time the payment was due under NRS 99.040(1)(c), which is applicable to “money received to the use and benefit of another and detained without his or her consent.”

1 (I.APP0188:20 – APP0190:2) Finally, Plaintiffs requested that the court
2 award interest under NRS 17.130, which allows a judgment to draw interest
3 from the time that the summons and complaint were served on March 17,
4 2014, until the judgment is satisfied. (I.APP090:3-25.)

5 PERS opposed the Motion for Interest and argued that “PERS is not
6 obligated to pay pre-judgment and post-judgment interest in the present matter
7 because the PERS statutes, which outline the expenses to which PERS trust
8 funds can be applied, do not identify interest as an expense which can be paid
9 from the PERS trust fund.” (I.APP0200:2-4.) In the event that this Court
10 determines that Shae is entitled to interest, PERS argued NRS 99.040 was
11 inapplicable and that that interest could only be awarded under NRS 17.130.
12 (I.APP0200:5-8.)

13 After a hearing, the District Court found that “[a] claim for PERS
14 benefits is a case ‘upon a contract’ because an individual’s right to PERS
15 benefits arises out of an employment contract with a qualified employee.”
16 (II.AP0234:3-4.) Accordingly, it granted Plaintiffs’ Motion for Interest under
17 NRS 99.040(1)(a) and ordered that “PERS shall pay pre-judgment and post-
18 judgment interest at the rate of 12% per annum to Plaintiff Shae E. Gitter on
21 all Monthly Benefits from the date each payment is due until it is paid in full.”
22 (II.APP0234:14-18.)

1 Although, PERS has challenged the applicability of NRS 99.040, it does
2 not challenge Plaintiffs’ calculation of interest under each of the three
3 statutory provisions or its obligation to pay post-judgment interest.

4 (Appellant’s Br. 2:5-7.) Pursuant to its Statement of Issues Presented on
5 Appeal, PERS has raised only two issues on appeal:

6 Should *prejudgment* interest have been awarded
7 against PERS?

8 If *prejudgment* interest may be awarded against
9 PERS, should it have been calculated pursuant to
10 NRS 17.130?

11 (*Id.* (emphasis added).) Therefore, the Court need only determine which of the
12 three provisions applies to prejudgment interest.

13 **1. The PERS Act Does Not Prohibit Payment of Interest on**
14 **Benefits Improperly Withheld.**

15 **a. The Legislature Intended PERS To Be Liable for**
16 **Statutory Interest.**

17 PERS argues that “payment of pre-judgment and post-judgment interest
18 from the PERS trust res is neither anticipated by nor permitted under NRS
19 Chapter 286.” (Appellant’s Br. 31:11-12.) Nonetheless, PERS cannot identify
20 a statutory exemption. Instead, it relies on the absence of express
21 authorization as proof of the Legislature’s intent that PERS not pay interest.
22 This is essentially the same argument that PERS made (and lost) with respect
to its obligation to pay Survivor Benefits to Shae.

1 Rather, the lack of an express statutory exemption evidences the
2 Legislature’s intent that PERS be liable for interest under statutes of general
3 applicability. It is a well-established canon of statutory interpretation that
4 “when the legislature enacts a statute . . . it does so ‘with full knowledge of
5 existing statutes relating to the same subject.” *Div. of Ins. v. State Farm Mut.*
6 *Auto. Ins. Co.*, 116 Nev. 290, 295, 995 P.2d 482, 486 (2000) (quoting *City of*
7 *Boulder v. Gen. Sales Drivers*, 101 Nev. 117, 118–19, 694 P.2d 498, 500
8 (1985)).

9 At the time that the PERS Act was passed in 1947, Nevada’s statutes
10 included the predecessors to NRS 99.040 and 17.030. *See Moran v.*
11 *Hagerman*, 69 F. 427 (C.C.D. Nev. Aug. 13, 1895) (citing Gen. St. Nev. Sec.
12 4903); *Water Co. of Tonopah v. Tonopah Extension Mining Co.*, 53 F.2d 653,
13 654 (D. Nev. 1931) (citing Nev. Comp. Laws, Sec. 8827). Consequently, it
14 can be assumed that the Legislature knew that PERS would be liable for the
15 payment of pre-judgment and post-judgment interest if it did not create a
16 statutory exception.

17 Furthermore, the Legislature has expressly exempted PERS from
18 payment of interest or costs under other circumstances. NRS 286.665(3).
21 NRS 286.665 requires PERS to transfer any contributions remaining in a
22 Member’s, retired employee’s, or beneficiary’s individual account upon the

1 individual's death to the Fund if the deceased did not have an heir, devisee, or
2 legatee capable of receiving the money. NRS 286.665(1). If, however, a
3 person timely asserts a claim for the transferred funds and the court finds that
4 the claimant is entitled to the transferred funds, the court "shall order the
5 Public Employees' Retirement Board to pay such money forthwith to the
6 claimant, but without interest or cost to the Board." NRS 286.665(3).

7 Here, this Court does not need to rely on a presumption to establish the
8 Legislature's knowledge of the statutory provisions awarding interest.
9 Instead, NRS 286.665 demonstrates that the Legislature was aware that PERS
10 is liable for interest (and costs) absent a statutory exemption. Thus, the
11 Legislature's decision to expressly prohibit the court from awarding interest
12 ONLY under the specific circumstances addressed by NRS 286.665 implies its
13 intent that PERS be liable for statutory interest (and costs) under any other
14 circumstances.

15
16 **b. Payment of Interest on Improperly Withheld Benefits
Would Not Harm the Fund.**

17 PERS also argues that requiring it to pay interest would be harmful to
18 the Fund and other PERS Members. (Appellant's Br. 31:23-26.) This
21 argument also fails. The PERS Act requires that "the Fund must be invested
22 and administered to assure the highest return consistent with safety in

1 accordance with accepted investment practices” and that “the interest and
2 income earned on the money in the Public Employees’ Retirement Fund, after
3 deducting any applicable charges, must be credited to the Fund.” NRS
4 286.220(2)-(3). Thus, the Survivor Benefits that PERS owes to Shae been
5 earning interest the entire time it has been withheld, and the interest has been
6 credited to the Fund. NRS 286.220(3).

7 Accordingly, requiring PERS to pay interest on back payments would
8 not have a detrimental effect on the Fund because the Fund earned money by
9 investing the payments that should have been paid to Shae—money that would
10 *not* have been credited to the fund if PERS had paid benefits to Shae when
11 due. For the fiscal year ending in 2014, the Fund’s return on its investments
12 was reported to total 17.6%—a much higher rate than Shae would be entitled
13 to under any of the three interest provisions. PERS, Comprehensive Annual
14 Financial Report for the Fiscal Year Ended June 30, 2014 at 14.¹² At that rate,
15 the Fund earned approximately \$36,000.00 by investing the \$204,170.01 that
16 it should have paid to Shae.

17
18
21
22 ¹² Available at <https://www.nvpers.org/public/publications/FY14CAFR.pdf> (last visited July 19, 2016).

1 **c. NRS 286.220 Does Not Prohibit Payment of Interest**
2 **from the Fund.**

3 PERS points to NRS 286.220(4) as limiting PERS' ability to pay
4 interest because interest on improperly withheld benefits is not identified in
5 the statute. However, NRS 286.220(4) is not an exclusive list.

6 Money in the Public Employees' Retirement Fund
7 must be expended by the Board for the purpose of
8 paying:

- 9 (a) Service retirement allowances;
- 10 (b) Disability retirement allowances;
- 11 (c) Postretirement allowances;
- 12 (d) Benefits for survivors;
- 13 (e) Authorized refunds to members and their
14 beneficiaries;
- 15 (f) Amounts equivalent to disability retirement
16 allowances to be used by employers for
 rehabilitation; and
- 17 (g) Allowances to beneficiaries,
- 18 ↪ and for the payment of expenses authorized by law
19 to be paid from the Fund.

20 While NRS 286.220 contains mandatory language requiring PERS to
21 use the Fund for certain purposes, it does not contain limiting language
22 prohibiting the Fund's use for other purposes. Thus, NRS 286.220 does not
prevent PERS from using the Fund to pay statutory interest on payments

1 wrongfully withheld. Moreover, Plaintiffs have not demanded that interest be
2 paid from the Fund. Should this Court order PERS to pay interest, Plaintiffs
3 do not lay claim to specific money from any particular source.

4 Additionally, PERS seeks to support its position by citing to NRS
5 286.220(2) as a provision designed to allow the PERS Board to “maintain the
6 trust res.” (Appellant’s Br. 30:12-20.) However, the authorization conferred
7 by statute is not limited to recovering money owed to the Fund—it allows the
8 Fund to make payments not otherwise authorized by statute. NRS 286.190.

9 Furthermore, NRS 286.190 authorizes the Board to pay interest on
10 payments wrongfully withheld:

11 The Board . . . may . . . Adjust the service or correct
12 the records, allowance or benefits of any Member,
13 retired employee or beneficiary after an error or
14 inequity¹³ has been determined, and require
15 repayment of any money determined to have been
16 paid by the System in error, if the money was paid
17 within 6 years before demand for its repayment.

18 NRS 286.190(3)(a).

19 When read in its entirety, this provision allows the Board discretion to
20 adjust benefits or allowances up or down as necessary to address extenuating

21 ¹³ “Error or inequity” means “the existence of extenuating circumstances,
22 including, but not limited to, a member’s reasonable and detrimental reliance
on representations made by the System or by the public employer pursuant to
NRS 286.288 which prove to be erroneous, or the mental incapacity of the
member.” NRS 286.190(4).

1 circumstances. The rationale for awarding pre-judgment interest is to
2 compensate the defendant for use of the money. *Ramada Inns, Inc. v. Sharp*,
3 101 Nev. 824, 826, 711 P.2d 1, 2 (1985). Therefore, the PERS Act grants
4 statutory authority to increase the amount of each past-due payment to include
5 statutory interest on all unpaid benefits in order to avoid inequity, even if not
6 otherwise authorized by the PERS Act.

7
8 **2. Pursuant to NRS 99.040, Shae is Entitled to Interest on Each
Past Due Payment from the Date Owed Until Paid.**

9 Under Nevada law, when “a party is entitled to repayment on a certain
10 date, and payment is not made, interest is recoverable from the date due.”
11 *First Interstate Bank of Nev. v. Green*, 101 Nev. 113, 115, 694 P.2d 496, 498
12 (1985). Accordingly, there are four categories of cases in which “interest must
13 be allowed . . . upon all money from the time it becomes due”:

- 14 (a) Upon contracts, express or implied, other than book
accounts.
15 (b) Upon the settlement of book or store accounts from
16 the day on which the balance is ascertained.
17 (c) Upon money received to the use and benefit of
another and detained without his or her consent.
18 (d) Wages or salary, if it is unpaid when due, after
demand therefor has been made.
21
22

1 NRS 99.040(1) (2015) (emphasis added). Under these circumstances, a
2 plaintiff may recover interest so long as the court can determine: “(1) the rate
3 of interest; (2) the time when it commences to run; and (3) the amount of
4 money to which the rate of interest must be applied.” *Paradise Homes, Inc. v.*
5 *Cent. Sur. & Ins. Corp.*, 84 Nev. 109, 116, 437 P.2d 78, 83 (1968).

6 **a. Pursuant to NRS 99.040(1)(a), Shae is Entitled to 12%**
7 **Interest on Each Payment From the Time it Was Due**
8 **Until Paid Because the Payments Arise out of a**
9 **contract.**

10 “When there is no express contract in writing fixing a different rate of
11 interest, interest must be allowed . . . upon all money from the time it becomes
12 due, in . . . cases . . . [u]pon contracts, express or implied, other than book
13 accounts.” NRS 99.040(1)(a). As explained below, a public employee’s right
14 to pension benefits arise out of the employment contract, and “interest is
15 recoverable as a matter of right upon money due from contracts.” *Schoepe v.*
16 *Pac. Silver Corp.*, 111 Nev. 563, 567, 893 P.2d 388, 390 (1995). Therefore,
17 Shae is entitled to 12% interest on each payment from the date the payment
was due until it is paid.

18 **(i) PERS Benefits Arise Out of the PERS Member’s**
19 **Employment Contract.**

20 Here, the Court need not look beyond the plain language of NRS
21
22 90.040(1)(a) to determine that Shae is entitled to interest. *See Pub. Emps.*

1 *Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 147, 179
2 P.3d 542, 548 (2008). It is evident that the application of NRS 99.040(1)(a) is
3 controlled by *the nature or character of the damages* alleged—not the
4 identity or relationship of the parties to the litigation. Thus, it is not limited to
5 cases in which the dispute is between parties to a contract.

6 This Court has repeatedly held that PERS benefits are an element of
7 compensation that is contained in the employment contract. *E.g., Nicholas v.*
8 *State*, 116 Nev. 40, 44, 992 P.2d 262, 265 (2000). Although eligibility for
9 PERS membership and PERS' benefits are set forth by statute, PERS'
10 obligation to individual employees is created as a result by the Member's
11 employment contract with a public employer. Thus, "[a] pension right may
12 not be destroyed without impairing the contractual obligation of the public
13 employer." *Pub. Emps. Ret. Bd. v. Washoe Cnty.*, 96 Nev. 718, 722, 615 P.2d
14 972, 974 (1980).

15 Kristine's PERS membership arose out of her employment contract with
16 a qualified employer, the Clark County School District. Nonetheless, public
17 employers are not liable for any obligation of PERS. NRS 286.110(4).
18 Rather, PERS is directly liable to the Member for the contractual obligation to
21 provide pension benefits. Accordingly, a claim for PERS benefits is a case
22 upon a contract—the Member's right to PERS benefits arises from the

1 employment contract and the employment contract gives rise to PERS’
2 obligation to pay Survivor Benefits. Therefore unpaid PERS Benefits are
3 subject to the Slayer Statute

4 **(ii) Interest Accrues at 12% Because That Was the**
5 **Rate in Effect at the Time the Contract was**
6 **Signed.**

7 To determine the appropriate rate of interest for cases involving a
8 contract, “the transactional date for purposes of NRS 99.040(1) is the date
9 when the contract was signed.” *Kerala Props., Inc. v. Familian*, 122 Nev.
10 601, 605, 137 P.3d 1146, 1149 (2006); *Schoepe v. Pac. Silver Corp.*, 111 Nev.
11 563, 566 n.1, 893 P.2d 388, 389 n.1 (1995). When Kristine was hired on
12 August 22, 1986, the statutory interest rate was 12%. NRS 99.040 (1985).¹⁴

13 Under the version of NRS 99.040 that was in effect on August 22, 1986,
14 “NRS 99.040 is neither a prejudgment nor a postjudgment interest statute.
15 Instead, NRS 99.040 provides an interest rate on ‘all money from the time it
16 becomes due’ and there is no limitation on the length of the period. This
17

18 ¹⁴ In 1987, NRS 99.040(1) (and other statutes awarding interest) was
21 amended to provide that interest rates would be tied to the prime interest rate.
22 S.B. 45 (1997). Available at http://www.leg.state.nv.us/Statutes/64th/Stats198704.html#CHz413_zSBz45 (last visited July 19, 2016).

1 period could include both prejudgment and postjudgment interest.” *Wilson v.*
2 *Pac. Maxon, Inc.*, 102 Nev. 52, 53, 714 P.2d 1001, 1002 (1986).¹⁵

3 PERS argues that Shae is not entitled to an award of interest under NRS
4 99.040. However, if this Court finds that Shae is entitled to interest pursuant
5 to NRS 99.040,(1)(a), PERS does not dispute that each back benefit payment
6 shall accrue interest at the rate of 12% from the day it was due, until it is paid.

7 **b. Alternatively, Shae is Entitled to 5.25% Interest on**
8 **Each Payment from the Time it was Due until Paid**
9 **under NRS 99.040(1)(c) Because PERS is a Trustee and**
10 **Detained the Money Without Shae’s Consent.**

11 If this Court determines that NRS 99.040(1)(a) does not apply to PERS
12 benefits, Shae requested that the Court award interest under NRS 99.040(1)(c),
13 which applies to “money received to the use and benefit of another and

14 ¹⁵ In 1986, NRS 99.040 stated: When there is no express contract in
15 writing fixing a different rate of interest, interest must be allowed at the rate of
16 12 percent per annum upon all money from the time it becomes due, in the
17 following cases:

- 18 1. Upon contracts, express or implied, other than book accounts.
- 19 2. Upon the settlement of book or store accounts from the day on which
20 the balance is ascertained.
- 21 3. Upon money received to the use and benefit of another and detained
22 without his consent.
4. Upon wages or salary, if it is unpaid when due, after demand therefor
has been made.

The provisions of this section do not apply to money owed for the construction
or remodeling of a building pursuant to section 1 of this act.

1 detained without his or her consent.”¹⁶ Under this provision, Shae would be
2 entitled to 5.25% interest annually on each payment, from the time it was due,
3 until it is paid in full.

4 Although Plaintiffs raised this argument in the trial court, PERS has not
5 offered any opposition on appeal.

6
7 **(i) PERS Benefits are Money Received To the Use
and Benefit of Another.**

8 Nevada cases applying NRS 99.040(1)(c) establish that this provision
9 applies broadly; it is not limited to confidential, special, or fiduciary
10 relationships. *E.g., Carter v. Barbash*, 92 Nev. 289, 417 P.2d 154 (1966)
11 (affirming district court order that defendant pay statutory interest to surety
12 company’s assignee on sum defendant embezzled from bank and reimbursed
13 by insurance company); *Green*, 101 Nev. at 115, 694 P.2d at 497-98 (holding
14 that bank was entitled to interest under NRS 99.040 when the bank committed
15 a clerical error, accidentally crediting defendants’ account with an extra
16 \$100,000.00, and defendants refused to return money).

17 PERS is a system designed to provide benefits for the retirement,
18 disability, and death of public employees. NRS 286.110(1). It is governed by

21 ¹⁶ Although PERS objected to an award of interest under NRS
22 99.040(1)(c)) in the trial court (I.APP020:27- I.APP0204:20), it has not raised
this argument on appeal.

1 the PERS Board, which is charged with the responsibility of managing the
2 system, including the PERS Fund, which is a trust fund. NRS 286.120,
3 286.190(1). PERS contributions, which are made by employers and Members
4 on behalf of and for the benefit of individual Members, are deposited in the
5 Fund, invested, and then used to pay PERS benefits, including Survivor
6 Benefits. NRS 286.220(4)(d). Accordingly, a suit involving an individual's
7 right to unpaid PERS benefits is a suit to recover "money [PERS] received to
8 the use and benefit of another and detained without his or her consent." NRS
9 99.040(1)(c).

10
11 **(ii) Interest Accrues at the Rate of 5.25% Per Annum.**

12 NRS 99.040 provides that "interest must be allowed at a rate equal to
13 the prime rate at the largest bank in Nevada, as ascertained by the
14 Commissioner of Financial Institutions, on January 1 or July 1, as the case
15 may be, immediately preceding the date of the transaction, plus 2 percent."
16 When awarding interest under this subsection, the proper interest rate is the
17 rate that was in effect during the period of wrongful detention. *Green*, 101
18 Nev. at 115, 694 P.2d at 498.

21 Shae should have received her first monthly payment on January 1,
22 2010. (II.APP0233.) Since that time, the interest rate has remained steady at

1 5.25%. Accordingly, if the Court awards interest under NRS 99.040(1)(b),
2 each back payment has accrued interest at the rate of 5.25% per annum since
3 the date it was due.

4 **3. Even if NRS 99.040 is Not Applicable, Shae is Owed 5.25%**
5 **Interest from the Time the Complaint Was Filed.**

6 Even if the Court denies interest under either section of NRS 99.040,
7 NRS 17.130 allows for interest beginning on March 17, 2014 (the date that the
8 Complaint and Summons were served on PERS).

- 9 1. In all judgments and decrees, rendered by any court
10 of justice, for any debt, damages or costs, and in all
11 executions issued thereon, the amount must be
12 computed, as near as may be, in dollars and cents,
13 rejecting smaller fractions, and no judgment, or other
14 proceedings, may be considered erroneous for that
15 omission.
- 16 2. When no rate of interest is provided by contract or
17 otherwise by law, or specified in the judgment, the
18 judgment draws interest from the time of service of
19 the summons and complaint until satisfied, except
20 for any amount representing future damages, which
21 draws interest only from the time of the entry of the
22 judgment until satisfied, at a rate equal to the prime
rate at the largest bank in Nevada as ascertained by
the Commissioner of Financial Institutions on
January 1 or July 1, as the case may be, immediately
preceding the date of judgment, plus 2 percent. The
rate must be adjusted accordingly on each January 1
and July 1 thereafter until the judgment is satisfied.

18 NRS 17.130. The plain language of the statute is expansive—it applies
21 to “*all* judgments and decrees, rendered *by any court* of justice, for *any debt*,
22 *damages or costs.*” NRS 17.130(1) (emphasis added). Unless otherwise

1 specified, a judgment draws interest, which continues to accrue until the
2 judgment is satisfied.

3 Unlike NRS 99.040, the applicable interest rate is the one in effect at the
4 time the judgment is entered. NRS 17.130(2); *see also Albios v. Horizon*
5 *Communities, Inc.*, 122 Nev. 409, 431, 132 P.3d 1022, 1036 (2006).

6
7 **D. Plaintiffs Are Entitled to Recover Expert Witness Fees for Consulting Experts.**

8 Pursuant to NRS 18.020, Plaintiffs filed their Memorandum of Costs
9 and Disbursements (“Memorandum of Costs”) on August 23, 2015.

10 (II.APP0237-341.) Plaintiffs sought \$7586.59, which included \$5000.00 in
11 fees paid to a consulting expert, Kirk Jacobson, CPA (“Mr. Jacobson”).
12 (II.APP0239:17-18; II.APP0315-320.)

13 PERS filed a Motion to Retax Costs and objected to Plaintiffs’ expert
14 fees because the expert “did not prepare a report, was never sworn and did not
15 testify at trial.” (III.APP0345:5-6.¹⁷) Plaintiffs responded to the Motion to
16 Retax Costs and argued that Nevada case law provides that a party entitled to
17 costs under NRS 18.020 may recover fees for an expert that does not testify at
18 trial. (IV.APP0523:5 – IV.APP0524:4.)

21
22 ¹⁷ Additionally, PERS challenged the qualifications of Mr. Jacobson and his associate. However, PERS has not raised that argument on appeal.

1 The District Court found that “[i]t was reasonable for [Plaintiffs] to
2 retain a financial consultant to review amounts calculated by PERS and
3 calculate interest amounts.” (IV.APP0652:10-12.) However, the court found
4 that NRS 18.005(5) did not permit Plaintiffs to recover more than \$1500.00 in
5 expert fees. (IV.APP0652:27-28.) Therefore, the court granted PERS Motion
6 to Retax Costs and reduced Plaintiffs’ recovery of costs by \$3500.00.
7 (IV.APP0653:1-5.)

8 On appeal, PERS raises only one issue regarding the Motion to Retax—
9 “whether the trial court erred by awarding expert witness fees for a non-
10 disclosed consultant.” (Appellant’s Br. 2:11-12.)

11 **1. NRS Chapter 18 Provides that a Prevailing Party May**
12 **Recover Expert Fees as Costs.**

13 NRS Chapter 18 provides that “[c]osts must be allowed of course to the
14 prevailing party against any adverse party against whom judgment is rendered
15 . . . [i]n an action for the recovery of money or damages, where the plaintiff
16 seeks to recover more than \$2,500.” NRS 18.020(3). Costs include
17 “[r]easonable fees of not more than five expert witnesses in an amount of not
18 more than \$1,500 for each witness, unless the court allows a larger fee after
19 determining that the circumstances surrounding the expert’s testimony were of
20 such necessity as to require the larger fee.” NRS 18.005(5).
21
22

1 **2. A Party Should Be Able Recover up to \$1500.00 for Fees Paid**
2 **To a Consulting Expert Under NRS 18.020 When the Expert**
3 **is Reasonably Necessary.**

4 Pursuant to the plain language of NRS 18.005, this Court has stated that
5 an expert witness is not required to testify in order to recover fees up to
6 \$1,500. *Logan v. Abe*, 131 Nev. Adv. Op. 31, 350 P.3d 1139, 1144 (2015);
7 *Bergmann v. Boyce*, 109 Nev. 670, 680, 856 P.2d 560, 566 (1993) (“calling [a]
8 witness[] at trial [is] not a prerequisite to an award of [expert] witness fees as
9 costs”).

10 Additionally, NRS 18.005 does not require that an expert be disclosed
11 in discovery or write a report. Reading in such a requirement would provide a
12 disincentive to settle cases until after certain events have occurred. Rather,
13 “[t]he determination of allowable costs is within the sound discretion of the
14 trial court.” *Bobby Berosini, Ltd.*, 114 Nev. at 1352, 971 P.2d at 385.

15 Accordingly, the trial court must award costs so long as the prevailing party
16 provides sufficient documentation to allow the court to determine if the costs
17 were actual and reasonable. *Id.* The supporting documentation submitted
18 with Plaintiffs’ Memorandum of Costs was more than adequate to meet this
19 burden.

20 Although this Court has never determined whether a party may recover
21 fees paid to a consulting expert, other jurisdictions allow recovery of fees paid
22 to a consulting expert.

1 to “an expert who does not testify at trial. . . . [such as] experts who were hired
2 to provide advisory or consulting services.” *Clayton v. Snow*, 131 P.3d 1202,
3 1203 (Colo. App.2006) (citing 10 Charles A. Wright & Arthur R. Miller,
4 Federal Practice and Procedure § 2678, at 464 (3d ed.1998) (explaining that
5 the presumption against awards for non-testifying experts may be overcome
6 by showing that some extrinsic circumstance rendered the testimony
7 unnecessary)).

8 These jurisdictions generally allow recovery of fees paid to a consulting
9 expert if the expert’s services were reasonably necessary, a determination that
10 is left to the discretion of the trial court. *Valentine v. M States Mut. Cas. Co.*,
11 252 P.3d 1182, 1188 (Colo. Ct. App. 2011). *See also Pub. Util. Dist. No. 2 of*
12 *Pac. Cnty. v. Comcast of Wash. IV, Inc.*, 336 P.3d 65 (Wash. Ct. App. 2014),
13 (holding that expenses awarded to prevailing party for use of consulting expert
14 were not unreasonably high); *Bates v. Presbyterian Intercommunity Hosp.,*
15 *Inc.*, 138 Cal. Rptr. 3d 680, 690 (Cal. Ct. App. 2012) (declining to find that
16 trial court abused discretion in awarding the prevailing party costs of
17 consulting expert under statute allowing recovery of expert witness fees
18 “actually incurred and reasonably necessary in ... preparation for trial”);
21 *Richard J. & Esther E. Wooley Trust v. DeBest Plumbing, Inc.*, 983 P.2d 834,

1 840 (Idaho 1999) (affirming lower court’s order awarding costs for consulting
2 experts’ fees and expenses).

3 Plaintiffs submitted the Declaration of Kelly B. Stout, Esq. with their
4 Opposition to PERS’ Motion to Retax Costs, which explained that “the Parties
5 entered into a series of stipulations designed to minimize the scope and
6 expense of discovery for both Parties.” (II.APP0255 ¶ 82.) One such
7 stipulation pertained to the amount of Survivor Benefits owed to Shae.
8 (II.APP0255 ¶ 82(c).) However, this stipulation required that each party
9 review Kristine’s PERS Records and perform an independent calculation of
10 the Survivor Benefits owed to Shae.

11 Whereas PERS employs individuals who have the expertise to perform
12 the necessary calculation, “Plaintiffs needed to retain a financial expert to
13 evaluate PERS’ determination of past due benefits because the complexity of
14 the formula used to calculate PERS benefits requires specialized skills.”
15 (II.APP0254 ¶ 82(a).) Plaintiffs retained Mr. Jacobson to review Kristine’s
16 PERS Records and verify PERS’ calculations. (II.APP0254 ¶ 82(b).) It is
17 notable that PERS has not disputed that the calculation of PERS benefits owed
18 to Shae requires an expert.

21 Based on the Memorandum of Costs (including the exhibits thereto), the
22 briefing on the Motion to Retax, and oral argument, the District Court found

1 that “[i]t was reasonable for [Plaintiffs] to retain a financial consultant to
2 review amounts calculated by PERS and calculate interest amounts,” and
3 allowed Plaintiffs to recover \$1500.00 of their expert fees. (IV.APP0653:1-5.)
4 Accordingly, the District Court did not abuse its discretion in awarding
5 Plaintiffs \$1500.00 in costs for a non-testifying consulting expert, and the
6 Order Granting PERS Motion to Retax should be affirmed.

7 **E. Plaintiffs Are Entitled to Recover Attorneys’ Fees and Costs**
8 **Because PERS and Its Counsel Maintained Defenses That Were**
9 **Devoid of All Merit.**

10 On November 9, 2015, Plaintiffs filed a Motion for Attorneys’ Fees
11 pursuant to NRS 18.010 and 7.085 against PERS and its counsel.
12 (III.APP0348-0515.) Plaintiffs argued that PERS has taken one unreasonable
13 position after another, which were contrary to existing law and at odds with
14 the plain language of Nevada’s statutes. (III.APP0356:13-16.) PERS opposed
15 the Motion for Attorneys’ Fees on both procedural and substantive grounds,
16 but the District Court found that PERS did everything possible to prevent Shae
17 from collecting Survivor Benefits, and its conduct throughout the dispute was
18 “unconscionable.” (IV.APP0648 ¶¶ 17, 19.) Accordingly, the court awarded
19 Plaintiffs \$96,272.50 –the full amount of fees requested. (IV.APP0650:4-5.)

20 Although PERS raised additional arguments in the District Court, PERS
21 limits its arguments to the substantive issue on appeal: “Did the trial court
22

1 abuse its discretion and err as a matter of law by awarding attorney's fees to
2 Gitter against PERS and its counsel, W. Chris Wicker and Woodburn and
3 Wedge?" (Appellant's Br. 2:8-10.)

4 **1. A Party May Recover Attorney's Fees from an Opposing**
5 **Party or Its Counsel when the Party's Legal Position Is**
6 **Maintained Without Reasonable Grounds.**

7 Defendants are entitled to an award of attorney's fees pursuant to NRS
8 18.010 and 7.085. NRS 7.085 allows an award of fees from opposing counsel.

9 1. If a court finds that an attorney has:

10 (a) Filed, maintained or **defended a civil**
11 **action or proceeding** in any court in this
12 State and such action or **defense is not**
13 well-grounded in fact or is not **warranted**
14 **by existing law or by an argument for**
15 **changing the existing law that is made in**
16 **good faith;** or

17 (b) Unreasonably and vexatiously extended a
18 civil action or proceeding before any court
19 in this State,

20 the court shall require the attorney personally to
21 pay the additional costs, expenses and attorney's
22 fees reasonably incurred because of such
conduct.

NRS 18.010(2)(b) provides for a party to recover attorney's fees from the
opposing party under the same circumstances.

2. In addition to the cases where an allowance is
authorized by specific statute, the court may
make an allowance of attorney's fees to a
prevailing party:

1 . . .

2 (c) Without regard to the recovery sought,
3 **when the court finds that the** claim,
4 counterclaim, cross-claim or third-party
5 complaint or **defense of the opposing**
6 **party was brought or maintained**
7 **without reasonable ground** or to harass
8 the prevailing party. . . .

9 Both statutes were enacted “to punish for and deter frivolous or
10 vexatious claims and defenses because such claims and defenses overburden
11 limited judicial resources, hinder the timely resolution of meritorious claims
12 and increase the costs of engaging in business and providing professional
13 services to the public.” NRS 7.085(2), 18.010(2)(b). Accordingly, the
14 Legislature has instructed that both provisions shall be liberally construed in
15 favor of awarding attorneys’ fees. NRS 7.085(2), 18.010(2)(b).

16 Consequently, a party and the party’s counsel may be ordered to pay the
17 opposing party’s attorney’s fees when the party’s defenses are frivolous or
18 without reasonable grounds. *United Ins. Co. of Am. v. Chapman Indus.*, 120
19 Nev. 745, 748, 100 P.3d 664, 667 (2004) (finding that defendant’s position in
20 contravention of existing law was without reasonable grounds).

1 **2. From the Time of Kristine’s Death, PERS Has Taken**
2 **Unreasonable Positions that Are Not Supported by Existing**
3 **Law.**

4 Plaintiffs have spent more than five years pursuing this matter because
5 of PERS’ unreasonable defenses, which were not supported by law and
6 needlessly prolonged this case. Initially, PERS forced Plaintiffs to jump over
7 unjustified legal hurdles to obtain the documents necessary to meet their
8 obligation of good faith and determine if Shae had a claim. Ultimately,
9 Plaintiffs were forced to obtain a court order before PERS would provide
10 copies of Kristine’s PERS Records to her sole heir and the Special
11 Administrator of her Estate.

12 Next, PERS has taken unreasonable positions throughout this litigation
13 to avoid paying Survivor Benefits to Shae. PERS has consistently argued that
14 PERS is not subject to any statutory provisions outside of the PERS Act, but
15 has never provided any legal authority to support this position. Rather, PERS
16 simply expects that the court will ignore the plain language of statutes and
17 violate well-established canons of statutory construction. Each time, the
18 District Court has ruled against PERS.

1 **a. Based on Its Decision to Deny Shae Survivor Benefits,**
2 **PERS Refused to Allow Plaintiffs Access to the**
3 **Relevant Account Documents.**

4 After denying Shae Survivor Benefits, PERS refused to allow Shae or
5 the Estate of Kristine Freshman to obtain documents regarding Kristine’s
6 PERS account. PERS acknowledges that a Member or a survivor beneficiary
7 is entitled to copies of a Member’s PERS documents. (Writ Pet’n 8:15-9:14.)
8 However, PERS insisted (falsely) that Shae was not a beneficiary and then
9 used that decision to prevent her from obtaining the documents necessary to
10 determine if PERS was correct. (*Id.*)

11 This position needlessly prolonged the dispute and required a
12 substantial amount of additional effort.

13 **b. In Denying Shae Survivor Benefits, PERS Ignored the**
14 **Plain Language of the Slayer Statute and Disregarded**
15 **Established Canons of Statutory Instruction.**

16 PERS recognizes “that words in a statute are given ‘their plain meaning
17 unless this violates the spirit of the act’” (I.APP0036:19-21), and that the
18 “‘plain meaning rule’ provides that where ‘a statute is clear on its face, a court
19 may not go beyond the language of the statute to determine the legislature’s
20 intent’” (I.APP0036:21-23).

21 As detailed above, construing the Slayer Statute and/or the PERS Act to
22 exempt PERS Survivor Benefits would contradict the statutes’ plain language

1 and disregard well established canons of statutory interpretation. The Slayer
2 Statute is clear and unambiguous. “[n]otwithstanding any other provision of
3 law,” it applies to any interest that accrues or devolves to a killer of a decedent
4 based upon the death of the decedent. NRS 41B.200(1) (emphasis added).
5 Additionally, PERS Act Survivor Benefits accrue upon the death of the
6 decedent. Thus, the Court determined that the Slayer Statute applies to
7 Survivor Benefits. (I.APP0169:7-10.)

8 Nonetheless, PERS continues to maintain that the Slayer Statute does
9 not apply.

10 **c. PERS Refusal to Pay Prejudgment Interest Was**
11 **Patently Unreasonable.**

12 PERS contends that its position regarding Plaintiffs’ award of interest
13 “was reasonable based on Nevada Statute.” (III.APP353:7-8.) Again, PERS
14 asks the Court to ignore the plain language of a statute and well-established
15 rules of statutory construction. In the District Court, PERS unreasonably
16 maintained that it was not required to pay *any interest*, and forced Plaintiffs to
17 file another motion (further prolonging the litigation) to receive interest that
18 Shae was rightly due by statute.

21 Notwithstanding the plain language of NRS 17.030 and 99.040, which
22 provide three separate bases for awarding interest, PERS maintained that it

1 was not required to pay any interest at all—either pre-judgment or post-
2 judgment. While PERS argued that the Retirement Act does not authorize
3 payment of interest, it ignores the statutes of general application which plainly
4 require that interest be paid. NRS 17.030; NRS 99.040.

5 Notwithstanding the fact that the PERS’ prior counsel, the Office of the
6 Attorney General, pursued the same legal strategy, it is clear from the District
7 Court’s rulings that PERS’ defenses against Plaintiffs’ claims were patently
8 unreasonable. PERS maintained its defenses despite the total lack of support
9 in Nevada law. In fact, the District court found that “[i]n When contesting
10 Shae's entitlement to survivor benefits, PERS raised numerous arguments that
11 were unsupported by any legal authority, violated established canons of
12 statutory interpretation, and/or were completely devoid of merit.”

13 (IV.APP0649 ¶¶ 26.) It made the same finding with respect to Plaintiffs’
14 Motion for Interest. (IV.APP0649 ¶ 27.) As a result, Shae has waited more
15 than five years to recover survivor benefits. Accordingly, PERS and its
16 Counsel should be ordered to pay Plaintiffs attorneys’ fees.

1 **3. The Attorney’s Fees Requested By Plaintiffs’ Are Reasonable**
2 **Under the *Brunzell* Factors.**

3 **a. Plaintiffs May Recover the Fees Incurred in Connection**
4 **with Re-Opening Probate Because PERS’ Actions**
5 **Made It Necessary.**

6 PERS argues that the District Court erred in awarding Plaintiffs the fees
7 incurred while trying to obtain Kristine’s PERS records and to re-open
8 probate. Again, PERS cites to no legal authority that shows the statutes
9 should be interpreted this way. However, NRS 18.010(2)(b) requires the court
10 to “liberally construe the provisions of this paragraph in favor of awarding
11 attorney’s fees in all appropriate situations . . . to punish for and deter
12 frivolous or vexatious claims and defenses.” This furthers Nevada’s public
13 policy objectives because such claims and defenses overburden limited
14 judicial resources, hinder the timely resolution of meritorious claims and
15 increase the costs of engaging in business and providing professional services
16 to the public.” NRS 18.010(2)(b).

17 Although the probate fees were incurred prior to commencing this
18 litigation, Plaintiffs were forced to re-open the probate proceedings in order to
19 determine if Shae had a valid claim because PERS unreasonably withheld
20 Kristine’s Records. Although Plaintiffs requested the Records, PERS denied
21 the request based on its unilateral decision that Shae was not a beneficiary
22

1 under the Retirement Act. Accordingly, Plaintiffs pursued the matter in the
2 Probate Court, which allows for an ex parte motion to obtain the Records
3 instead of filing a premature adversarial proceeding.

4 The fees Plaintiffs incurred for re-opening the probate proceedings
5 could have been avoided if PERS had not taken an unreasonable position and
6 allowed Plaintiffs access to the Records upon their request. Instead, PERS
7 forced Plaintiffs to obtain a court order to obtain the Records, which were
8 necessary to evaluate potential claims. Therefore, the Court should award fees
9 incurred in obtaining the court order.

10 **b. Plaintiffs Provided Enough Information for the Court**
11 **to Evaluate The Request for Attorneys’ Fees Using the**
Brunzell Factors.

12 “[I]n determining the amount of fees to award, the court is not limited
13 to one specific approach; its analysis may begin with any method rationally
14 designed to calculate a reasonable amount,” so long as the requested amount is
15 reviewed in light of the factors set forth in *Brunzell*” *Haley v. Dist. Ct.*,
16 128 Nev. Adv. Op. 16, 273 P.3d 855, 860 (2012). “While it is preferable for a
17 district court to expressly analyze each factor relating to an award of attorney
18 fees, express findings on each factor are not necessary for a district court to
21 properly exercise its discretion.” *Logan v. Abe*, 131 Nev. Adv. Op. 31, 350
22 P.3d 1139, 1143 (2015).

1 PERS ignores the declaration of Dennis L. Kennedy and the attached
2 invoices with detailed descriptions of all the time billed in this matter and
3 simply declares that Plaintiffs’ Motion for Attorneys’ Fees was not supported
4 by sufficient detail to support an award of attorneys’ fees under the *Brunzell*
5 factors. However, the invoices provide the detail that PERS alleges is
6 missing.

7 First, PERS & its counsel claim that there was insufficient evidence of
8 the work performed by each attorney or paralegal. However, the invoices
9 include a description of the work performed, the name of the person who
10 performed the work, and the time required to complete the work. This
11 information provides a sufficient basis for the court to evaluate the character
12 of the work performed by each lawyer or paralegal, and is more than adequate
13 to support the court’s findings and justify an award of attorneys’ fees under
14 the *Brunzell* factors.

15 Secondly, PERS contends that Plaintiffs’ counsel has not provided
16 sufficient information regarding each individual’s “training, education,
17 experience, professional standing or skill.” (IV.APP0538:24-25.) Although
18 Plaintiffs did not include a CV for each attorney or paralegal, this is not
21 expressly required. The Kennedy Declaration identifies whether each person
22 is an attorney or paralegal and if attorneys are an associate or partner.

1 (III.APP0361 ¶ 10.) Additionally, it states how many years the associates
2 have been attorneys. (III.APP0361.) This is sufficient information for the
3 court to make findings regarding the fees charged for each individual. Where
4 the fees are closely aligned to the rates charged by other attorneys with the
5 same number of years of experience, the court may have sufficient information
6 to evaluate the hourly rate for reasonableness. This is especially true when the
7 court can evaluate the actual work performed by each individual.

8 Based on the information provided, the District Court made the
9 following findings:

10 (1) The hourly rates charged by attorneys Dennis L.
11 Kennedy, Joshua M. Dickey, Kelly B. Stout, Mark
12 Hesiak, Leon Gil, and Amanda Stevens are
reasonable given each attorney's number of years in
practice and the average rates charged by Las Vegas
attorneys.

13 (2) The hourly rates charged by Linda Thomas
14 and Bonnie O'Laughlin are reasonable rates for
paralegals in the Las Vegas market.

15 (3) The billing descriptions provide sufficient detail
16 to assess the difficulty, intricacy, importance, and
skill required to perform each task.

17 ///

18 ///

21 ///

22 ///

(4) The number of hours billed is reasonable in light of the time this case has been pending, the difficulty of the case, and the quality of work performed by Plaintiffs' attorneys.

(IV.APP0649.)

Accordingly, the Court should affirm the Order Granting Plaintiffs' Motion for Attorneys' Fees in its entirety.

VIII. CONCLUSION.

In conclusion, Plaintiffs request that the Court deny PERS appeal and Petitioner's Writ Petition affirm the District Court's January 29, 2015 Order Granting Plaintiffs' Motion for Partial Summary Judgment and Denying Defendant's Motion for Summary Judgment; the November 16, 2015 Order Granting Plaintiffs' Motion for Pre-Judgment and Post-Judgment Interest and Final Judgment; the February 19, 2016 Order Granting Plaintiffs' Motion for Attorneys' Fees; and the February 10, 2016 Order Granting Motion to Retax.

DATED this 20th day of July, 2016.

BAILEY ♦ KENNEDY

By: /s/ Kelly B. Stout
DENNIS L. KENNEDY
KELLY B. STOUT
AMANDA L. STEVENS

Attorneys for Respondents
SHAE E. GITTER and JARED
SHAFER, as Special Administrator
of the Estate of Kristine Jo Freshman

IX. CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 in 14 point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 13,995 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any,

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1 of the transcript or appendix where the matter relied on is to be found. I
2 understand that I may be subject to sanctions in the event that the
3 accompanying brief is not in conformity with the requirements of the Nevada
4 Rules of Appellate Procedure.

5 DATED this 21st day of July, 2016.

6 BAILEY ♦ KENNEDY

7 By: /s/ Kelly B. Stout

DENNIS L. KENNEDY

KELLY B. STOUT

8 AMANDA L. STEVENS

9 *Attorneys for Respondents*

SHAE E. GITTER and JARED

10 SHAFER, as Special Administrator

11 of the Estate of Kristine Jo Freshman

CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY ♦ KENNEDY and that on the 22nd day of July, 2016, service of the foregoing **RESPONDENTS/REAL PARTIES IN INTEREST SHAE E. GITTER AND JARED SHAFER'S ANSWERING BRIEF** was made by electronic service through Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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