

1
2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

3 W.CHRIS WICKER; WOODBURN AND
4 WEDGE,

5 Petitioners,
6 vs.

7 THE EIGHTH JUDICIAL DISTRICT
8 COURT FOR THE STATE OF
9 NEVADA, IN AND FOR THE COUNTY
10 OF CLARK, AND THE HONORABLE
11 JIM CROCKETT,

12 Respondents,

13 SHAE E. GITTER; JARED SHAFER,

14 Real Parties in Interest,
15 _____ /

16 **PETITION FOR WRIT OF MANDAMUS**

17 **WOODBURN AND WEDGE**

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2 **I. ROUTING STATEMENT**

3 This matter is not one presumptively assigned to the Court of Appeals pursuant
4 to NRAP 17(b). This is a matter of statewide public important because it affects how
5 PERS is to interpret NRS Chapter 286 and the decision broadens the liability of
6 counsel in the representation of clients NRAP 17(a)(14). This matter also arises from
7 fact that are the sect of two pending appeals.

8 **II. INTRODUCTION**

9 This Petition requests issuance of a writ of mandamus pursuant to NRAP 21
10 and NRS 34.160, directing the district court to vacate its order finding PERS' counsel
11 jointly and severally liable under NRS 7.085 for the attorneys' fees billed by Bailey
12 Kennedy in that firm's representation of Shae E. Gitter and Jared Shafer.

13 **III. STATEMENT OF FACTS**

14 **A. Pre-Litigation**

15 Kristine Jo Freshman was an employee of the Clark County School District, and
16 a member of PERS.¹ In August 2007, Ms. Freshman completed a Survivor Beneficiary
17 Designation, identifying Shae E. Gitter as Ms. Freshman's survivor beneficiary.² On
18 December 6, 2009, while employed by the Clark County School District, Ms. Freshman
19 was killed by her husband Walter E. Freshman.³ Ms. Freshman was survived by her
20 daughter, Ms. Gitter. On December 17, 2009, PERS sent Ms. Gitter a letter, informing
21 her that an audit of Ms. Freshman's account revealed there may be benefits available.⁴
22 The following month, Ms. Gitter received another letter from PERS explaining that she
23 may be entitled to survivor benefits based on Ms. Freshman's PERS membership.⁵
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25
26

27 ¹ Petitioners' Appendix ("PA") 1:166.

28 ² *Id.*

³ *Id.*

⁴ PA 3:547.

⁵ PA 3:549.

1 On September 10, 2010, Walter E. Freshman pleaded guilty to second-degree
2 murder for killing his wife, Ms. Freshman.⁶ On or about April 25, 2011, Ms. Gitter
3 submitted an Application for Survivor Benefits to PERS.⁷ On June 10, 2011, PERS
4 provided Ms. Gitter with a letter stating that under PERS statutes, when a member is
5 married at the time of death, only the member's spouse and minor children are eligible
6 to receive benefits.⁸ PERS relied on statutes providing that in the event of the death of
7 a currently employed PERS member who has a spouse, the spouse is entitled to
8 specified benefits earned by that member.⁹ PERS statutes also provide that members
9 may designate in writing a survivor beneficiary and additional payees.¹⁰ However,
10 payments can only be made to a survivor beneficiary "if the member is unmarried on
11 the date of the member's death."¹¹ Accordingly, PERS determined that under the
12 Retirement Act Ms. Gitter was not entitled to survivor benefits because Ms. Freshman
13 was married at the time of her death, and Ms. Gitter was not a minor child at that
14 time.¹²

15 Ms. Gitter, through her newly retained counsel of Bailey Kennedy, contacted the
16 Office of the Attorney General in May 2012, requesting documents related to Ms.
17 Freshman's PERS account and membership.¹³ Deputy Attorney General Kimberly A.
18 Okezie responded, reiterating that under the Retirement Act, Ms. Gitter was not
19 entitled to the payment of benefits, and explaining that information regarding Ms.
20 Freshman's estate was confidential pursuant to NRS 286.110 and NRS 286.117.¹⁴ In
21 pertinent part NRS 286.110(3) states, "The official correspondence and records, other
22
23

24 ⁶ PA 1:166.

25 ⁷ *Id.*

26 ⁸ PA 3:551

27 ⁹ *See*, NRS 286.674, 286.676, 286.6766.

28 ¹⁰ NRS 286.6767(1).

¹¹ *Id.*

¹² PA 3:551.

¹³ PA 3:557-58.

¹⁴ PA 3:553-54.

1 than the files of individual members or retired employees...are public records and are
2 available for public inspection.” NRS 286.117 further provides:

3 All records maintained for a member, retired employee or
4 beneficiary may be reviewed and copied only by the System,
5 the member, the member’s public employer or spouse, or
6 the retired employee or the retired employee’s spouse, or
7 pursuant to a court order, or by a beneficiary after the death
8 of the employee on whose account benefits are received.
9 Any member, retired employee or beneficiary may submit a
10 written waiver to the System authorizing the representative
11 of the member, retired employee or beneficiary to review or
12 copy all such records.

13 Having determined that Ms. Gitter was not entitled to survivor benefits, it
14 followed that under NRS 286.110(3) and NRS 286.117 Ms. Gitter also was not entitled
15 to Ms. Freshman’s confidential PERS member records.¹⁵ Under those circumstances,
16 PERS was statutorily prohibited from disclosing Ms. Freshman’s PERS account
17 information absent a court order.¹⁶ Plaintiff eventually did obtain a court order, and
18 PERS complied with that order, providing Plaintiff with the requested information.¹⁷

19 **B. Litigation**

20 On March 13, 2014, Ms. Gitter and Jared Shafer, Special Administrator of the
21 Estate of Kristine Jo Freshman (hereinafter collectively referred to as “Plaintiffs”), filed
22 a Complaint in the Eighth Judicial District Court.¹⁸ On October 27, 2014, the Parties
23 filed cross-motions for summary judgment.¹⁹ Plaintiffs argued that section 41B.310 of
24 Nevada’s Slayer Statutes required PERS to treat Mr. Freshman as having
25 predeceased Ms. Freshman for the purpose of determining who was entitled to
26 survivor benefits.²⁰ Plaintiffs argued that if Mr. Freshman was considered to have

26 ¹⁵ PA 4:590.

27 ¹⁶ *Id.*

28 ¹⁷ *Id.*

¹⁸ PA 1:1-13.

¹⁹ PA 1:30-129.

²⁰ PA 1:53-55, at 10:12-12:2.

1 predeceased Ms. Freshman, Ms. Freshman was unmarried on the date of her death,
2 and Ms. Gitter would be a survivor beneficiary, entitled to benefits.²¹

3 The district court heard oral argument on summary judgment motions on
4 December 2, 2014, and concluded that “NRS Chapter 41B [Nevada’s slayer statute]
5 applies to PERS benefits for survivors of a deceased PERS member, including, but
6 not limited to, Spousal Benefits and benefits for a survivor beneficiary pursuant to NRS
7 286.6767.”²² The Court further found that “[p]ursuant to NRS 41B.310(3), Walter
8 Freshman is deemed to have predeceased Kristine Jo Freshman for the purposes of
9 determining entitlement to PERS benefits for survivors as set forth in NRS 286.671 –
10 286.679, inclusive,” and that PERS must “treat Kristine Jo Freshman as being
11 unmarried at the time of her death for the purpose of determining entitlement to PERS
12 benefits for survivors.”²³

13 Based on its findings, the district court held that Ms. Gitter was “the sole
14 survivor beneficiary of Kristine Jo Freshman, [and] is entitled to survivor benefits as set
15 forth in NRS 286.6767 – NRS 286.6769, inclusive.”²⁴ Upon entry of summary
16 judgment in Ms. Gitter’s favor, the parties stipulated to the amount of back PERS
17 benefits.²⁵

18 **C. Request for Attorneys’ Fees**

19 On November 11, 2015, Plaintiffs filed their Motion for Attorneys’ Fees.²⁶
20 Plaintiffs based their motion on NRS 7.085 and NRS 18.010(2)(b), alleging that PERS
21 and its legal counsel, Mr. Wicker, should be ordered to pay Plaintiffs’ attorneys’ fees
22 for maintaining frivolous defenses without reasonable grounds.²⁷ Plaintiffs sought
23 recovery for all legal fees incurred by Bailey Kennedy since the commencement of
24

25 ²¹ *Id.*

26 ²² PA 1:169, at ¶ 31.

27 ²³ *Id.*, at ¶¶ 31-32.

²⁴ PA 1:170, at 6:15-16.

28 ²⁵ PA 3:438, at ¶ 18.

²⁶ PA 3:348-515.

²⁷ PA 3:355-56.

1 their representation in May 2012.²⁸ Included in Plaintiffs' request were fees incurred in
2 negotiations with the Attorney General's office to obtain documents related to Ms.
3 Freshman's PERS account, in petitioning to re-open the Estate of Kristine Jo
4 Freshman so as to obtain an order directing PERS to provide Plaintiffs with Ms.
5 Freshman's PERS records, and in prosecuting its claims for PERS survivor benefits.²⁹
6 Bailey Kennedy's negotiations with the Attorney General's office over the production of
7 Ms. Freshman's PERS records, and its efforts to reopen Ms. Freshman's estate, took
8 place prior to Wicker's representation of PERS.³⁰ In total, Plaintiffs sought recovery of
9 \$96,272.50 in attorneys' fees representing 422.75 hours billed by Bailey Kennedy.³¹

10 The District Court held a hearing on Plaintiffs' Motion for Attorneys' Fees on
11 January 19, 2016.³² At the hearing, prior to the Parties arguing the issue, the district
12 court judge expressed his conclusion "that PERS at all times was acting unreasonably
13 vexatiously and doing everything it could procedurally and legally to throw bricks into
14 the path of the Plaintiff."³³ Out of the gate, the judge stated his belief that "it was
15 unconscionable that PERS tried so aggressively to retain these funds, and not pay
16 them to the Plaintiff."³⁴ The court further explained:

17 I was just taken a back [sic] by the great lengths that were gone
18 to by PERS and its counsel to avoid paying out a public
19 employee's benefit to an incident party, who I think clearly
20 intended to benefit from the Public Employees Retirement
21 System. And that came up again and again, and again
22 throughout the course of the litigation. I don't think there was
23 ever anything that was ever agreed to or stipulated by PERS as
24 something that was clearly the intent and spirit of the PERS
25 system.³⁵

25 ²⁸ PA 3:353.

26 ²⁹ PA 3:353-54.

27 ³⁰ PA 4: 649; PA 4:588, at 10:13-25.

28 ³¹ PA 3:355.

³² PA 4:579-624.

³³ PA 4:587.

³⁴ PA 4:587-88.

³⁵ PA 4:594.

1 When given an opportunity to respond, Wicker explained that “PERS made the
2 determination initially that no funds were due by reason of the statute.”³⁶ That decision
3 “was upheld by the Attorney General’s Office, who was initially appearing in this case
4 in their correspondence with Plaintiff,” and concurred that PERS’ application of the law
5 was correct.³⁷

6 Wicker further explained that under NRS 286.117, there is “a limited number of
7 parties that can obtain a confidential file.”³⁸ Those authorized to receive a file are
8 limited to a member, a spouse, a beneficiary receiving payments, or someone
9 authorized by court order.³⁹ Based on PERS’ determination that Plaintiff was not a
10 beneficiary under the relevant statute, PERS “was prohibited by law of providing the
11 file of Christine [sic] Freshman until a Court order was obtained.”⁴⁰ Accordingly,
12 requiring Plaintiffs to obtain a court order:

13 ...in order to obtain the file was something that PERS had to
14 require of the Plaintiff.

15 It is not something to harass her, or to extend the litigation. It
16 was something that the law required PERS to do, based on
17 their determination that she [was] not a beneficiary entitled to
18 payments.⁴¹

19 Demonstrating that PERS was not acting to harass Plaintiffs, Wicker noted that as
20 soon as a court order was obtained, “PERS did provide the file.”⁴²

21 Moving to the issue of why PERS denied Ms. Gitter’s claim to benefits, Wicker
22 explained:

23 ...you need to first look at the PERS statute

24 ... Under NRS 286.6767, a person only has the status of a
25 survivor beneficiary if the member, meaning Ms. Freshman, her

26 ³⁶ PA 4:588, at 10:18-22.

27 ³⁷ PA 4:588-89.

28 ³⁸ PA 4:590, at 12:3-6.

³⁹ PA 4:590-91, at 12:22-13:2.

⁴⁰ PA 4:590, at 12:7-12.

⁴¹ PA 4:592-93, at 14:18-15:2.

⁴² PA 4:590, at 12:7-12.

1 mother, was unmarried on the date of the member's death. So
2 by reason of that statute, Ms. Gitter did not have the status of a
3 survivor beneficiary, because it only applies if the member is
unmarried at the date of her death.

4 Wicker explained:

5 What PERS has to do, is they have to look closely at the law
6 and determine whether they are authorized to make a payment.

7 Now, going back to the PERS Act, under Chapter 286.669,
8 PERS has its own version of the Slayer Statute.

9 What it says is that any person convicted of murder or
10 involuntary manslaughter of a member of the system is
ineligible to receive any benefit concurred by any provision of
this Chapter, by reason of the death of that member.

11 So if you look at the Chapter that PERS has to implement
12 under 6767, Ms. Gitter was not [a] survivor beneficiary.

13 Under 669, Walter Freshman was not entitled to any benefit
14 from PERS, so that's implementing the PERS statute, that's the
status of determining if anything is due.⁴³

15 Because Plaintiffs' argument that benefits were owed to Ms. Gitter was based
16 on Nevada's slayer statute, Wicker went on to address whether the slayer statute was
17 applicable to PERS in light of the provisions of Chapter 286.⁴⁴ The court interjected,
18 beginning the following discussion:

19 **The Court:** Was Gitter a Slayer?

20 **Mr. Wicker:** No.

21 **The Court:** And, so, the slayer statute is intended and
22 designed, and carefully crafted to make sure that no one who
23 takes the life of a PERS member will be able to ever gain
financial benefit from doing so, correct?

24 **Mr. Wicker:** That's correct.

25 **The Court:** So, that is a strange place to be looking for whether
26 or not Gitter is entitled to coverage.

⁴³ PA 4:596-97, at 18:9-19:1.

⁴⁴ PA 4:597.

1 **Mr. Wicker:** Well, I am looking at the slayer statute because
2 that's the statute that the Plaintiffs' have used successfully thus
3 far to say that Ms. Gitter is entitled to a benefit.

4 It is not under the PERS statute at all. Under Chapter 286, Ms.
5 Gitter is absolutely not entitled to any benefit, and that's what
6 the law says...⁴⁵

7 Not understanding that whether the slayer statute applied to PERS was
8 instrumental to PERS' position regarding the payment of benefits to Ms. Gitter, the
9 court steered the discussion to public policy considerations:

10 **The Court:** Do you think if you asked a rank and file member of
11 PERS, who had not read the fine print of either the slayer
12 statute NRS 286, the general slayer statute, if they told no
13 knowledge of that information, they just were a PERS member
14 for 20 years, do you think that their instinctive reaction would be
15 that Gitter would be entitled to the benefits after her mother was
16 murdered?

17 Not that that answers the question for us in a Court of law.

18 **Mr. Wicker:** I think that that is asking me to speculate a little bit,
19 but I think human nature being what it is, this is very
20 sympathetic situation, where the mother had PERS benefits for
21 years, and she was murdered by her husband.

22 **The Court:** I think it is more than a sympathetic situation. I
23 think it is a reasonable expectation, and I recognize that this is
24 technically not insurance, but it makes me think of Professor
25 Keaton's book on insurance, where he says; there is a notion
26 more firmly established in the law of insurance to the concept
27 that the bold print giveth, and the fine print taketh away.

28 And that is what it feels like we are dealing with here. It seems
29 to me that PERS and its counsel did everything they could to
30 try to string together beads in order to make a necklace that
31 choked, and I just think that it involved a great deal of legal and
32 mental gymnastics to get there.

33 I understand how it could be done, but what it tells me is that
34 the motivation was to look for ways to avoid paying her, as
35 opposed to delivering on the reasonable expectations of the
36 members of the PERS system.

⁴⁵ PA 4:597-98, at 19:15-20:8.

1 And that's why I asked you, what you think their expectation
2 might be, not because it answers our question, but because I
3 think it tells us what the purpose of the PERS system is.

4 I don't think that it would violate any tenant or policy of the
5 PERS system, were a situation like this to happen, and even
6 though it is certainly, hopefully not a common occurrence, it is
7 certainly a foreseeable occurrence that something like this
8 would happen.

9 And the mere happenstance that the murderer did not
10 somehow pre-decease his wife, or commit suicide with a
11 simultaneous death provision in some will somewhere, it just is
12 untenable to me that PERS would advance the arguments that
13 they did to avoid paying the benefit to Ms. Gitter.⁴⁶

14 Wicker countered, explaining that regardless of sympathetic expectations,
15 PERS is bound by the language of the Retirement Act, leading to the following
16 dialogue:

17 **Mr. Wicker:** Well, with all due respect, Your Honor, I think
18 PERS does not have the luxury of paying out money in
19 sympathetic situations. PERS has the requirement to follow its
20 statute.

21 **The Court:** Does PERS have an obligation to honor the
22 reasonable expectations of their members?

23 **Mr. Wicker:** Well, not if they conflict with the statute, Your
24 Honor, because the legislature has said what payments PERS
25 can make, and who [is] eligible to receive benefits.

26 And I am sure there is [sic] many situations in life, and
27 particularly with something like a pension plan, where
28 sympathetic situations arise, and PERS would be violating its
fiduciary duty to the trust fund to pay out benefits that were not
authorized by its statute.

The Court: I think that members would sing the praises of
administrators and legal counsel who have reviewed the
situation and said; well, clearly this is an unusual situation, and
we could carve out a path to the ocean for this that might avoid
coverage, but we think that we would be shirking our
responsibilities as the administrators of the PERS program if
we were to deny this person, because we think that a

1 reasonable member would have a reasonable expectation that
2 under this kind of a circumstance, tragic or not, the surviving
3 daughter would be entitled to claim the benefit.

4 So I think that PERS and its counsel in this case were very
5 short-sighted in terms of their analysis of taking in the big
6 picture here.⁴⁷

7 Later, the court added:

8 I think it doesn't matter, but I think that if the PERS membership
9 was aware of this case, and the position that PERS is taking,
10 and its counsel, PERS members would be shaking in their
11 boots to think that PERS and its counsel would work so hard to
12 deny somebody a benefit under the facts and circumstances of
13 this case.⁴⁸

14 To the court's argument that PERS should have made an exception to the law in Ms.
15 Gitter's case, Wicker responded, "Yes, and I think that all I can say in response to that,
16 Your Honor, is that - - I guess repeating myself a little bit - - that PERS has to follow
17 the law as written by the legislature."⁴⁹

18 Wicker went on to explain that PERS is in the business of paying out pension
19 benefits in conformity with the law, and had no reason to maliciously withhold benefits
20 from Ms. Gitter, stating:

21 **Mr. Wicker:** And you know it is a - - let me put it this way - -
22 there is no motive on PERS' part to deny benefits, or to try to
23 fine [sic] devious ways to deny benefits to somebody.

24 There is no reason for PERS to do that.

25 **The Court:** Well, there shouldn't be.

26 **Mr. Wicker:** And I don't think that there has been any evidence
27 of any bad motives or bad faith, except for the fact that they
28 didn't award benefits in this case because of their interpretation
of the statute.

⁴⁷ PA 4:600-601, at 22:14-23:19.

⁴⁸ PA 4:609, at 31:6-12.

⁴⁹ PA 4:602, at 24:9-12.

1 And the statute is pretty clear on its face as to when survivor
2 beneficiary, if somebody is a survivor beneficiary, it is very clear
3 on its face, and it is clear on its face that Walter Freshman - ⁵⁰

4 The court again directed the discussion away from the letter of the statute, focusing
5 instead on public policy considerations and supposed legislative intent, sparking the
6 following:

7 **The Court:** ... I would think that the legislature would have
8 trusted that the PERS policy makers and decision makers
9 would understand the general thrust of what the legislature was
10 trying to do and try implement that, and that's where I think that
11 PERS and its counsel really missed the mark.

12 **Mr. Wicker:** And I don't disagree that the intent of the
13 legislature is that these benefits are made payable to
14 appropriate beneficiaries, but when you have explicit wording of
15 a statute that prevents that, that says; no, this person is this not
16 entitled to benefits, it is would be really a slippery slope for
17 PERS to go down to say; well, despite what this statute says,
18 the legislature intended us to be forthcoming in paying benefits,
19 we will pay it anyway even though the statute says it can't.

20 I don't think, maybe in this particular case, Your Honor thinks
21 that would be good public policy.

22 But in the long run, it would not be good public policy for PERS
23 to be making those kinds of decisions in the face of an explicit
24 statute that says no, those benefits are not due.

25 **The Court:** I understand your argument, but I disagree,
26 because I am not talking about doing things just on the basis of
27 public policy considerations.

28 I am saying that I think that this falls well, well, well within the
29 realm of what the legislative intent was, and that PERS and its
30 counsel worked very hard to try to find a way to avoid
31 accomplishing the legislative intent of making funds available to
32 a person in Ms. Gitter's situation, because I think that was the
33 purpose.⁵¹

34 Wicker circled back to explain how the slayer statute in Chapter 41B was not
35 applicable to the case, thereby demonstrating cause for withholding benefits from Ms.

1 Gitter.⁵² The court again responded, “I don’t understand why counsel for PERS and
2 PERS want to continually focus on the murderer being excluded. Can you tell me why
3 that is, because that is not really an issue.”⁵³ PERS’ counsel simply stated, “Because,
4 as argued by the Plaintiffs” [sic], they say the slayer statute applies...”⁵⁴

5 At the conclusion of the hearing, the court awarded Plaintiffs’ attorneys’ fees in
6 the amount of \$96,272.50 jointly and severally against PERS and Wicker pursuant to
7 NRS 7.085 and NRS 18.010(2)(b).⁵⁵

8 **D. Order Granting Attorneys’ Fees**

9 The district court’s Order Granting Plaintiffs’ Motion for Attorneys’ Fees was
10 filed on February 9, 2016.⁵⁶ The court found that “[s]ince Kristine’s death, PERS has
11 done everything possible to prevent Shae from collecting survivor benefits,” and that
12 “[t]hroughout this case, the conduct of PERS and its counsel has been
13 unconscionable.”⁵⁷ The court further found that all of PERS’ “unconscionable” conduct
14 was committed “with the active assistance of its prior counsel (the Office of the
15 Nevada Attorney General) and/or current counsel (Woodburn & Wedge).”⁵⁸

16 Based on its findings, the district court concluded that “[f]rom the time of
17 Kristine’s death, PERS and its counsel have acted unreasonably and vexatiously in
18 their dealings with Plaintiffs, which has significantly prolonged this case.”⁵⁹ The court
19 further concluded that “PERS’ defense was maintained without reasonable grounds,”
20 and “PERS’ counsel maintained a defense that was not well-grounded in fact or
21 warranted by existing law.”⁶⁰ The court held that the arguments raised by PERS as to
22 why benefits were withheld from Ms. Gitter “were unsupported by any legal authority,
23

24 ⁵² PA 4:607.

25 ⁵³ PA 4:607-08, at 29:25-30:4.

26 ⁵⁴ PA 4:608, at 30:5-6.

27 ⁵⁵ PA 4:610-11.

28 ⁵⁶ PA 4:638-642.

⁵⁷ PA 4:648, at ¶¶ 17, 19.

⁵⁸ PA 4:648-49, at ¶ 20.

⁵⁹ PA 4:649, at ¶ 22.

1 violated established canons of statutory interpretation, and/or were completely devoid
2 of merit.”⁶¹

3 Concluding that PERS and its counsel acted in concert at all times, and that the
4 billing rates and number of hours billed were reasonable, the district court awarded
5 Plaintiffs the entire sum of \$96,272.50 requested by Plaintiffs.⁶² The court assessed
6 attorneys’ fees against PERS and its counsel, W. Chris Wicker and the law firm of
7 Woodburn and Wedge, jointly and severally.⁶³

8 **IV. STATEMENT OF THE ISSUES PRESENTED AND RELIEF SOUGHT**

9 As no appeal lies from an order awarding attorney’s fees against an attorney,
10 because an attorney is not a real party to the case, a petition for a writ of mandamus is
11 the proper means by which to challenge such an order.⁶⁴ The first issue presented
12 here is whether an award of attorney’s fees against Petitioner was warranted under
13 NRS 7.085 where PERS and its counsel sought to apply existing statutes to novel
14 issues of fact and law that have never before been addressed by the Nevada Supreme
15 Court. The second issue presented is, if an award of fees was warranted, whether the
16 district court abuse its discretion by permitting certain attorney’s fees not properly
17 supported by substantial evidence. Petitioners W. Chris Wicker and the law firm of
18 Woodburn and Wedge respectfully request that the Nevada Supreme Court issue a
19 Writ of Mandamus, directing District Judge Jim Crockett to vacate the order granting
20 attorney’s fees against Petitioners.

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25 ⁶⁰ PA 4:649, at ¶¶ 23-24.

26 ⁶¹ PA 4:649, at ¶ 26.

27 ⁶² PA 4:649-50, at ¶¶ 28-32.

28 ⁶³ PA 4:650.

⁶⁴ *Office of Washoe County Dist. Atty. v. Second Judicial Dist. Court ex rel.*, 116 Nev. 629, 632, 5 P.3d 562, 566 (2000) (citing *Albany v. Arcata Associates*, 106 Nev. 688, 799 P.2d 566 (1990)).

1 **V. LEGAL ANALYSIS**

2 **A. Standards for Reviewing Petitions for Writs of Mandamus and**
3 **Questions of Law.**

4 This Court has original jurisdiction over the extraordinary remedies of writs of
5 mandamus, prohibition, and certiorari.⁶⁵ A writ of mandamus is available to compel
6 the performance of an act which the law requires as a duty resulting from an office,
7 trust or station, or to control a manifest abuse of discretion.⁶⁶ An abuse of discretion is
8 “a clearly erroneous interpretation of the law or a clearly erroneous application of a law
9 or rule.”⁶⁷ Accordingly, an abuse of discretion occurs if the district court’s decision is
10 arbitrary and capricious or if it exceeds the bounds of law or reason.⁶⁸ An arbitrary
11 and capricious exercise of discretion is “one founded on prejudice or preference rather
12 than on reason, or contrary to the evidence or established rules of law.”⁶⁹

13 A writ of mandamus must be issued “in all cases where there is not a plain,
14 speedy, and adequate remedy in the ordinary course of law.”⁷⁰ In determining whether
15 remedies at law exist, “each case must be individually examined, and where
16 circumstances reveal urgency or strong necessity, extraordinary relief may be
17 granted.”⁷¹ Even when an adequate legal remedy does exist, this Court may “exercise
18 its discretion to consider issuing a writ of mandamus or certiorari if an important issue
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20 ⁶⁵ Nev. Const. Art. 6 §§ 4, 6.

21 ⁶⁶ NRS 34.160; *Beazer Homes Nevada, Inc. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*,
22 120 Nev. 575, 579, 97 P.3d 1132, 1134-35 (2004) (quoting *State v. Eighth Judicial Dist. Court*
ex rel. Cty. of Clark, 118 Nev. 140, 146, 42 P.3d 233, 237 (2002)).

23 ⁶⁷ *State v. Dist. Ct. (Armstrong)*, 127 Nev. Adv. Op. 84, 267 P.3d 777, 780 (2011) (citations
24 omitted).

25 ⁶⁸ *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (quoting *Jackson v.*
State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)).

26 ⁶⁹ *State v. Dist. Ct. (Armstrong)*, 127 Nev. Adv. Op. 84, 267 P.3d at 780 (internal citations
27 omitted).

28 ⁷⁰ NRS 34.170.

⁷¹ *Jeep Corp. v. Second Judicial Dist. Court*, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982).

1 of law needs clarification, and public policy will be served by this court's invocation of
2 its original jurisdiction."⁷²

3 This Court reviews questions of law de novo.⁷³ Statutory interpretation is a
4 question of law that this Court reviews de novo.⁷⁴ Although this Court generally
5 reviews petitions for extraordinary relief with an abuse of discretion standard, this
6 Court will still apply a de novo standard of review to questions of law, such as statutory
7 interpretation, in writ petition proceedings.⁷⁵

8 Here, a writ of mandamus must be issued because no plain, speedy, and
9 adequate remedy at law exists for Petitioners to seek review of the district court's
10 award of attorneys' fees, as Petitioners are not parties to the underlying litigation and
11 have no appeal rights. Accordingly, this Court must review the district court's order for
12 an abuse of discretion, with issues of statutory interpretation reviewed de novo.

13 **B. The District Court Abused its Discretion by Awarding Attorneys'**
14 **Fees Under NRS 7.085.**

15 NRS 7.085 allows for an award of attorney's fees to be paid by an opposing
16 attorney only when that attorney has maintained or defended an action not well-
17 grounded in fact or warranted by law, or has unreasonably or vexatiously extended a
18 civil action. In full, NRS 7.085 provides:

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

20 (a) Filed, maintained or defended a civil action or
21 proceeding in any court in this State and such action or
22 defense is not well-grounded in fact or is not warranted by

23 ⁷² *Dayside Inc. v. First Judicial Dist. Court of State of Nevada, in & for Carson City*, 119 Nev.
24 404, 407, 75 P.3d 384, 386 (2003) *overruled on other grounds by Lehrer McGovern Bovis, Inc.*
v. Bullock Insulation, Inc., 124 Nev. 1102, 197 P.3d 1032 (2008).

25 ⁷³ *Birth Mother v. Adoptive Parents*, 118 Nev. 972, 974, 59 P.3d 1233, 1235 (2002).

26 ⁷⁴ *Id.*; *Beazer Homes Nevada, Inc.*, 120 Nev. at 579, 97 P.3d at 1135.

27 ⁷⁵ *Int'l Game Tech., Inc. v. Second Judicial Dist. Court ex rel. Cty. of Washoe*, 124 Nev. 193,
198, 179 P.3d 556, 559 (2008) (internal citation omitted).

1 existing law or by an argument for changing the existing law
2 that is made in good faith; or

3 (b) Unreasonably and vexatiously extended a civil action or
4 proceeding before any court in this State,

5 the court shall require the attorney personally to pay the
6 additional costs, expenses and attorney's fees reasonably
7 incurred because of such conduct.

8 2. The court shall liberally construe the provisions of this
9 section in favor of awarding costs, expenses and attorney's
10 fees in all appropriate situations. It is the intent of the
11 Legislature that the court award costs, expenses and
12 attorney's fees pursuant to this section and impose
13 sanctions pursuant to Rule 11 of the Nevada Rules of Civil
14 Procedure in all appropriate situations to punish for and
15 deter frivolous or vexatious claims and defenses because
16 such claims and defenses overburden limited judicial
17 resources, hinder the timely resolution of meritorious claims
18 and increase the costs of engaging in business and
19 providing professional services to the public.

20 NRS 7.085 is related to NRCP 11 which provides for the sanctioning of an
21 attorney or party upon the filing of a pleading or paper for an improper purpose, to
22 assert claims or defenses which are not warranted by law, or to make factual
23 contentions having no evidentiary support.⁷⁶ Under NRS 7.085 and NRCP 11,
24 attorney's fees may be imposed for frivolous actions or defenses.⁷⁷

25 "A frivolous claim is one that is 'both baseless and made without a reasonable
26 and competent inquiry.'"⁷⁸ A determination of whether a claim is frivolous requires a
27 two-pronged analysis: (1) whether the pleading is "well grounded in fact and is
28 warranted by existing law or a good faith argument for the extension, modification or
reversal of existing law" and (2) "whether the attorney made a reasonable and
competent inquiry."⁷⁹ The trial court must examine "the actual circumstances

⁷⁶ NRCP 11(b).

⁷⁷ *Bergmann v. Boyce*, 109 Nev. 670, 676, 856 P.2d 560, 564 (1993).

⁷⁸ *Id.* (quoting *Townsend v. Holman Consulting Corp.* 929 F.2d 1358, 1362 (9th Cir. 1990)).

⁷⁹ *Id.*

1 surrounding the case” to determine whether claims or defenses had reasonable
2 grounds.⁸⁰

3 The mere fact that a party ultimately does not prevail on its claims or defenses
4 “is not in itself a sufficient justification for the assessment of fees.”⁸¹ If that were the
5 case, the American Rule that attorney fees may not be awarded absent a statute, rule,
6 or contract authorizing such award, would be completely undermined.⁸²

7 In the present matter, the district court abused its discretion in awarding
8 attorney’s fees under NRS 7.085 because the defense maintained by PERS and its
9 counsel was well-grounded. In essence, this case boiled down to whether Nevada’s
10 slayer statute, NRS Chapter 41B, applied to the Retirement Act. The application of the
11 slayer statute to the Retirement Act is crucial to this case, because if it were not
12 applicable, Ms. Gitter would have no claim to PERS benefits pursuant to NRS
13 286.6767(1). Because Ms. Freshman was married at the time of her death, no
14 survivor beneficiary designation would have been effective. Despite the District
15 Court’s assertions about the intention of the legislature, an application the explicit
16 provision of Chapter 286, makes Mr. Gitter ineligible for benefits pursuant to NRS
17 286.6767. Suit would be a novel issue of law and order statute outside of the PERS
18 act, such as Chapter 41B, to be used to determine eligibility of PERS benefits.

19 Accordingly, Plaintiffs asserted that under Nevada’s slayer statute, Mr.
20 Freshman was deemed have predeceased Ms. Freshman, thereby making Ms.
21 Freshman’s survivor beneficiary designation of Ms. Gitter effective. PERS, relying on
22 the explicit language of the Retirement Act statutes, argued that NRS Chapter 41B
23

24 ⁸⁰ *Id.*

25 ⁸¹ *U.S. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1058 (10th Cir. 2004) (quoting
26 *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S.Ct. 694, 54 L.Ed.2d 648
(1978)).

27 ⁸² *See Centex Corp. v. United States*, 486 F.3d 1369, 1372 (Fed. Cir. 2007); *Zapata Hermanos*
28 *Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 313 F.3d 385, 390-91 (7th Cir. 2002); *Martin v.*
Arkansas Blue Cross & Blue Shield, 299 F.3d 966, 971 (8th Cir. 2002).

1 was not applicable to Ms. Freshman's benefits and Ms. Gitter was not a beneficiary
2 recognized under the Act.

3 Further, PERS asserted the Slayer Statue was not applicable of another
4 reason. Pursuant to NRS 41B.200(1) the chapter only applies to benefit that accrues
5 a killer based on the death of the decedent. After application of Chapter 286, there
6 was not benefit accruing to Ms. Freshman's killer because of NRS 286.669. The killer
7 is not related as giving preceded Mr. Freshman because of PERS Act is the
8 "governing Instrument", the killer was not eligible for any benefit under the governing
9 instrument NRS 41B310(3).

10 PERS' position was based on a reasonable reading of the Retirement Act.
11 For example, the purpose of the slayer statute, enacted by the Nevada legislature in
12 1999, is to prevent a killer from profiting from his or her wrongful actions.⁸³ However,
13 the Retirement Act contains a statute similar to NRS 41B.200, providing that a
14 "person convicted of the murder or voluntary manslaughter of a member of the
15 System is ineligible to receive any" benefit arising from the death of that member.⁸⁴
16 The PERS statute predates NRS 41B.200 by 22 years, having been enacted in
17 1979.

18 Recognizing that the legislature did not repeal NRS 286.669, amend Chapter
19 286 so that its language mirrored that of Chapter 41B, or include a specific reference
20 to PERS in the scope of Chapter 41B upon the enactment of NRS Chapter 41B, the
21 argument set forth by PERS that the slayer statute did not apply to the Retirement Act
22 was well-grounded, even if not ultimately successful in the district court. This is
23 especially true in light of the fact that the Retirement Act contains its own statutes
24 which function similarly to the slayer statute.

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27 ⁸³ NRS 41B.200.

28 ⁸⁴ NRS 286.669.

1 The reasonable nature of PERS' defense is further bolstered by rules of
2 statutory construction. For example, the Nevada Supreme Court has explained that
3 when the legislature enacts new legislation, "[i]t is presumed that in enacting a statute
4 the legislature acts with full knowledge of existing statutes relating to the same
5 subject."⁸⁵ Additionally, "it is an accepted rule of statutory construction that a provision
6 which specifically applies to a given situation will take precedence over one that
7 applies only generally."⁸⁶ It stood to reason then, that the Retirement Act provisions
8 which predated the slayer statute, and which applied specifically to the distribution of
9 PERS benefits would take preference over the slayer statute.

10 Furthermore, the reasonable nature of PERS' defense is demonstrated by the
11 fact that PERS' statutory interpretation of the Retirement Act and its conclusions
12 regarding whether benefits could be paid to Ms. Gitter, were supported by the Office of
13 the Attorney General. The Attorney General and duly appointed deputies of the
14 Attorney General are "legal advisors on all state matters arising in the Executive
15 Department of the State Government."⁸⁷ The Office of the Attorney General serves
16 prosecutorial functions,⁸⁸ and is tasked with providing written opinions "upon any
17 question of law relating to their respective offices, departments, agencies, boards or
18 commissions."⁸⁹

19 Prior to Petitioners' involvement in this case, PERS and the Office of the
20 Attorney General determined that Ms. Gitter was not entitled to survivor benefits under
21 the Retirement Act.⁹⁰ By definition, the Office of the Attorney General's concurrence
22 that PERS' application of relevant law mandated that Ms. Gitter attain a court order to
23 obtain Ms. Freshman's PERS records and barred Ms. Gitter from receiving survivor
24

25 ⁸⁵ *City of Boulder City v. General Sales Drivers*, 101 Nev. 117, 118-19, 694 P.2d 498, 500
26 (1985).

27 ⁸⁶ *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 60, 63 P.3d 1147, 1150 (2003).

28 ⁸⁷ NRS 228.110(1).

⁸⁸ NRS 228.125; NRS 228.130; NRS 228.140.

⁸⁹ NRS 228.150.

benefits, demonstrates that PERS' conduct and defenses were not unreasonable or vexatious. After all, the Office of the Attorney General is the top legal enforcement office and legal advisor in the State. Without any Nevada case law determining that the slayer statute of Chapter 41B applied to the Retirement Act, the position staked by PERS, the Office of the Attorney General, and subsequently by Petitioners, was well grounded.

The fact that the legislature did not alter, amend, or repeal NRS 286.669 upon the passage of Chapter 41B, that rules of statutory construction prefer specific provisions apply over general provisions, that the Office of the Attorney General supported the positions taken by PERS, and that no Nevada case law has addressed the applicability of the slayer statute to the Retirement Act, demonstrate at the very least that PERS' defense was not frivolous, baseless, unreasonable, or intended to vexatiously extend the litigation, but was well grounded in a reasonable reading of relevant Nevada Statute as it pertained to the payment of PERS benefits. Accordingly, even though PERS was not successful in its defense, no grounds existed for awarding attorney's fees under NRS 7.085.

Nevertheless, the district court, instead of basing its decision regarding attorneys' fees on whether PERS had a reasonable statutory basis for its position, reasoned that PERS should have ignored the plain language of the Retirement Act.⁹¹ The district court suggested that PERS should have issued benefits on the basis that PERS members would have an expectation that benefits would be paid under the circumstances of the underlying case.⁹² Indeed, the district court dismissed out of hand any discussion of the relevant statutes and whether PERS' reliance on those statutes was warranted. Specifically, in the hearing on Plaintiffs' motion for attorneys' fees, each time PERS' counsel attempted to explain why the slayer statute did not

⁹⁰ PA 3:553-54; PA 4:588-89.

⁹¹ PA 4:598-601, 605-06, 609.

⁹² *Id.*

1 apply, the court declared that the slayer statute was not an issue.⁹³ To the contrary,
2 summary judgment was entered in Plaintiffs' favor because the court concluded that
3 Chapter 41B applied to PERS benefits for survivors of a deceased PERS member.⁹⁴
4 Accordingly, a discussion of the slayer statute is directly relevant to whether PERS'
5 defense was well grounded.

6 Suggesting that PERS should issue benefits despite the express language of
7 the Retirement Act, and dismissing discussion regarding the applicability of the slayer
8 statute, demonstrate that the district court's award of attorneys' fees under NRS 7.085
9 was founded on prejudice or preference rather than reason. Accordingly, this Court
10 must issue a writ of mandamus directing the district court to vacate its arbitrary and
11 capricious award of attorneys' fees.

12 **C. The District Court Abused its Discretion by Awarding Attorneys'**
13 **Fees Not Supported by *Brunzell* Factors.**

14 Where an award of attorney's fees is appropriate, such an award is limited to
15 the reasonable value of the attorney services provided.⁹⁵ Courts determining the
16 reasonable value of attorney's fees must consider: (1) the qualities of the advocate:
17 his ability, training, education, experience, professional standing and skill; (2) the
18 character of the work to be done: its difficulty, its intricacy, its importance, time and
19 skill required, the responsibility imposed and the prominence and character of the
20 parties where they affect the importance of the litigation; (3) the work actually
21 performed by the lawyer: the skill, time and attention given to the work; (4) the
22 result: whether the attorney was successful and what benefits were derived.⁹⁶

23 A party seeking attorney's fees must support its fee request with affidavits or
24 other evidence supporting the *Brunzell* factors.⁹⁷ The trier of fact must consider

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26 ⁹³ PA 4:597-98, 607-08.

27 ⁹⁴ PA 1:169.

⁹⁵ *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

28 ⁹⁶ *Id.*

⁹⁷ *Μιλλερ π. Ωιλφονγ*, 121 Νεπ. 619, 623-24, 119 Π.3δ 727, 730 (2005).

1 each factor in light of the evidence provided, and no one element should
2 predominate.⁹⁸ Any fee award must be supported by substantial evidence.⁹⁹ Fees
3 charged for paralegals and law clerks may be included in an award of attorney's
4 fees, but those charges are also subject to the *Brunzell* factors to "evaluate whether
5 ... the office staff's hourly rates were reasonable under the circumstances."¹⁰⁰

6 Here, the district court abused its discretion by awarding fees which were not
7 supported by the *Brunzell* factors or by substantial evidence. Accordingly, even if
8 the award of attorney's fees was not wholly an abuse of discretion, this Court must
9 issue a writ of mandamus directing the district court to vacate its award of attorneys'
10 fees which were not adequately supported by evidence.

11 **1. The District Court Abused its Discretion by Awarding Fees Billed by**
12 **Attorneys and Paralegals Which Were Not Supported by Substantial**
13 **Evidence.**

14 In the district court, Plaintiffs requested certain attorney's fees and paralegal
15 fees for which insufficient evidence was presented to support the *Brunzell* factors. For
16 example, although Plaintiff provided the curriculum vitae and a supporting declaration
17 for two of the attorneys who worked on the case, Dennis L. Kennedy and Kelly B.
18 Stout, Plaintiff provided no such support for the four other attorneys for which Plaintiff
19 sought an award of fees. As it pertains to fees incurred by those attorneys, Joshua M.
20 Dickey, Mark Hesiak, Leon Gil, and Amanda L. Stevens, Plaintiff's motion for fees only
21 identified whether each attorney is a partner or an associate, along with the number of
22 hours billed by each attorney, and their applicable billing rates.¹⁰¹ The Declaration of
23 Dennis L. Kennedy provided only slightly more information, stating how long each

24 ⁹⁸ *Ιδ.* ατ 350, 455 Π.2δ ατ 33; *Λογαν π. Αβε*, 131 Νεπ. Αδπ. Οπ. 31, 350 Π.3δ 1139, 1143 (2
25 015).

26 ⁹⁹ *Λογαν*, 131 Νεπ. Αδπ. Οπ. 31, 350 Π.3δ ατ 1143; *Σηυεττε π. Βεαζερ Ηομεσ Ηολδινγσ*
27 *Χορπ.*, 121 Νεπ. 837, 865, 124 Π.3δ 530, 549 (2005) (της χουρτ μυστ προπιδε □συφφιχιεν
τ ρεασονινγ ανδ φινδινγσ ιν συππορτ οφ ιτσ υλτιματε δετερμινατιον□).

28 ¹⁰⁰ *ΛζΜΠΔ v. Yeghiazarian*, 129 Nev. Adv. Op. 81, 312 P.3d 503, 510 (2013).

¹⁰¹ PA 3:354.

1 attorney had been licensed to practice, along with a very cursory explanation of the
2 work performed by that attorney -- for example, "assisted with various tasks throughout
3 the course of this Matter."¹⁰²

4 Similarly, Plaintiffs' motion and the Declaration of Dennis L. Kennedy made
5 unsupported, blanket statements that the amount of time spent by legal counsel was
6 reasonable and necessary given the scope of representation.¹⁰³ However, Plaintiff did
7 not disclose curricula vitae, or any other information identifying the training, education,
8 experience, professional standing or skill of Joshua M. Dickey, Mark Hesiak, Leon Gil,
9 and Amanda L. Stevens. Similarly, Plaintiff did not address the difficulty, intricacy,
10 importance, and skill required to perform any of the tasks assigned to these attorneys.

11 Plaintiffs provided even less evidence in support of an award of Bailey
12 Kennedy's paralegal fees. Plaintiffs' motion and the Declaration of Dennis L. Kennedy
13 identify only the billing rates and hours billed by two paralegals, Bonnie O'Laughlin and
14 Linda Thomas.¹⁰⁴ Plaintiffs did not disclose the training, education, experience,
15 professional standing or skill of these paralegals. Additionally, Plaintiffs did not
16 address the difficulty, intricacy, importance, and skill required to perform the tasks
17 assigned to the paralegals.

18 Even though substantial evidence was not presented to support the fees
19 billed by attorneys Joshua M. Dickey, Mark Hesiak, Leon Gil, and Amanda L.
20 Stevens, the district court concluded that all rates were reasonable "given each
21 attorney's number of years in practice and the average rates charged by Las Vegas
22 Attorneys."¹⁰⁵ Similarly, absent any information besides their billing rates, the
23 district court concluded the fees billed by paralegals Bonnie O'Laughlin and Linda
24 Thomas were reasonable for paralegals in the Las Vegas market.¹⁰⁶ The district

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27 ¹⁰² PA 3:361.

¹⁰³ PA 3:355; PA 3:362, at ¶ 11.

¹⁰⁴ PA 3:354, 362.

¹⁰⁵ PA 4:641, at ¶ 29.

¹⁰⁶ PA 4:641, at ¶ 30.

1 court concluded it was able to rely on billing descriptions to assess the difficulty,
2 intricacy, importance, and skill required to perform each task billed for.¹⁰⁷

3 Plaintiffs' bore the burden of demonstrating the reasonableness of the fees
4 billed by each attorney and paralegal by substantial evidence. Merely noting that an
5 attorney or paralegal's hourly charge is not excessive compared to customary
6 hourly charges in a geographical area, is not sufficient to support the
7 reasonableness of the fees billed. Accordingly, the district court abused its
8 discretion in awarding the \$98.75 in fees billed by Joshua M. Dickey, the \$8,217.50
9 in fees billed by Mark Hesiak, the \$13,737.50 in fees billed by Leon Gil, the
10 \$4,000.00 in fees billed by Amanda L. Stevens, the \$1,050.00 in fees billed by
11 Bonnie O'Laughlin, and the \$43.75 in fees billed by Linda Thomas, for which
12 Plaintiff did not provide evidence supporting the *Brunzell* factors.

13 **D. The District Court Abused its Discretion by Assessing Attorneys'**
14 **Fees Incurred in Obtaining Ms. Freshman's PERS Records Against**
15 **Petitioners.**

16 On June 10, 2011, PERS informed Ms. Gitter by letter that she was not entitled
17 to receive survivor benefits.¹⁰⁸ After obtaining legal representation, Ms. Gitter, through
18 Bailey Kennedy, contacted the Office of the Attorney General in May 2012, requesting
19 documents related to Ms. Freshman's PERS account and membership.¹⁰⁹ Deputy
20 Attorney General Kimberly A. Okezie responded, explaining that Ms. Gitter was not
21 entitled to benefits and that information regarding Ms. Freshman's account was
22 confidential.¹¹⁰ Plaintiff petitioned the probate court for an order requiring PERS to
23 produce Ms. Freshman's records.¹¹¹ PERS complied with that order, providing Plaintiff
24 with the requested information.¹¹²

26 ¹⁰⁷ PA 4:641, at ¶ 31.

27 ¹⁰⁸ PA 3:551

28 ¹⁰⁹ PA 3:557-58.

¹¹⁰ PA 3:553-54.

¹¹¹ PA 4:640, at ¶ 13.

¹¹² PA 4:590, at 12:7-12.

1 Petitioners did not provide representation to PERS on this matter at the time
2 that Ms. Gitter requested Ms. Freshman's records, or at the time Ms. Gitter petitioned
3 the probate court for Ms. Freshman's records. Petitioners first appeared on behalf of
4 PERS on May 1, 2015.¹¹³ Nevertheless, the district court found Petitioners jointly and
5 severally liable for \$25,657.50 in attorneys' fees, representing 130.25 hours of work,
6 related to opening Ms. Freshman's probate and obtaining PERS member records.
7 Because Petitioners were not representing PERS at the time, and had nothing to do
8 with the fees incurred, the district court was arbitrary and capricious in assessing these
9 fees against Petitioners.

10 **VI. CONCLUSION**

11 This Court should grant W. Chris Wicker and Woodburn and Wedge's
12 petition for writ of mandamus. The district court abused its discretion by awarding
13 attorneys' fees under NRS 7.085 despite PERS' defense being established on a
14 reasonable interpretation of Nevada statute, supported by the Office of the Attorney
15 General. In addition, it was a novel issue of law whether a statute outside of the
16 PERS act, NRS Chapter 41B, superseded the PERS statutes and was required to
17 be used to calculate eligibility for PERS benefits. Furthermore, even if an award of
18 some fees was proper, the district court abused its discretion by assessing
19 unsupported or unreasonable attorney's fees against Petitioners. Accordingly, this

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1 Court should exercise its original jurisdiction, direct briefing for both the answer and
2 reply, as needed, and grant this writ petition by vacating the district court's order
3 awarding attorney's fees.

4 **AFFIRMATION**
5 **Pursuant to NRS 239B.030**

6 The undersigned does hereby affirm that the preceding document does not
7 contain the social security number of any person.

8 DATED this 14th day of March, 2016.

9 WOODBURN AND WEDGE

10 By: /s/ W. Chris Wicker
11 W. Chris Wicker, Esq.
12 NV Bar No. 1037
13 John F. Murtha, Esq.
14 NV Bar No. 835
15 Joshua M. Woodbury, Esq.
16 NV Bar No. 11326
17 Attorneys for Petitioners
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1 **AFFIDAVIT OF JOSHUA M. WOODBURY, ESQ. IN SUPPORT OF**
2 **PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**

3 STATE OF NEVADA)
4) SS:
5 COUNTY OF WASHOE)

6 Joshua M. Woodbury, being first duly sworn, deposes and says:

7 1. I am over the age of 18 years and have personal knowledge of the facts
8 stated herein, except for those stated upon information and belief, and as to those, I
9 believe them to be true. I am competent to testify as to the facts stated herein in a
10 court of law and will so testify if called upon.

11 2. I am an associate attorney director with the law firm of Woodburn and Wedge
12 and attorney of record for Petitioners in the above-captioned case.

13 3. Petitioners are not parties to the underlying litigation and therefore the district
14 court's order granting attorney's fees is not reviewable on appeal.¹¹⁴ As such, a writ
15 petition is the only available option for appellate review of the district court's order.¹¹⁵

16 4. I hereby certify and affirm that the petition for writ of mandamus pursuant to
17 NRS 34.170 is filed in good faith, and that the Petitioners have no plain, speedy, or

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¹¹⁴ *Office of Washoe County Dist. Atty. v. Second Judicial Dist. Court ex rel.*, 116 Nev. 629, 632, 5 P.3d 562, 566 (2000) (citing *Albany v. Arcata Associates*, 106 Nev. 688, 799 P.2d 566 (1990)).

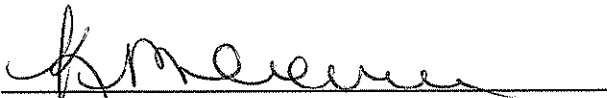
¹¹⁵ *Id.*

1 adequate remedy in the ordinary course of law that they could pursue in absence of
2 the extraordinary relief requested.

3 Dated this 14th day of March, 2016.

4
5 
6 Joshua Woodbury

7 SUBSCRIBED and SWORN to before me
8 this 14th day of March, 2016.

9 
10 NOTARY PUBLIC



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