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

3 W. CHRIS WICKER; WOODBURN  
4 AND WEDGE,

5 Petitioners,  
6 vs.

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

12 Respondents,

13 SHAE E. GITTER; JARED  
14 SHAFER,

15 Real Parties in Interest, /

16 **PETITIONERS', W. CHRIS WICKER AND WOODBURN AND**  
17 **WEDGE, APPENDIX, VOLUME IV**

18 **WOODBURN AND WEDGE**

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Tina K. Lindeman  
Appeal from the Eighth Judicial District Court, Clark County,  
Clerk of Supreme Court  
Case No. A697642

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Opposition to Plaintiffs' Motion for Attorneys' Fees	12/02/2015	III	App. 526-558
Reply in Support of Motion for Attorneys' Fees	01/11/2016	III	App. 559-569

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Dated this 14<sup>th</sup> day of March, 2016.

WOODBURN AND WEDGE

By: /s/ W. Chris Wicker  
W. Chris Wicker, Esq.  
Nevada Bar No. 1037  
Joshua Woodbury, Esq.  
Nevada Bar No. 11326

Chris Nielsen  
Nevada Bar No. 8206

Attorneys for Appellants

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3  
4 IN THE EIGHTH JUDICIAL DISTRICT COURT  
5 CLARK COUNTY, NEVADA  
6  
7

8 SHAE GITTER, ET AL., )  
9 Plaintiffs, )  
10 vs. ) Case No.  
11 PUBLIC EMPLOYEES ) A-14-697642-C  
12 RETIREMENT SYSTEM OF )  
13 NEVADA, ) Dept. No. 24  
14 Defendant. )  
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15 HEARING  
16 -----

17 Before the Honorable Jim Crockett  
18 Tuesday, January 19, 2016, 9:00 a.m.

19 Reporter's Transcript of Proceedings  
20 -----  
21  
22  
23  
24

25 REPORTED BY ROBERT A. CANGEMI, CCR 888

1 APPEARANCES :

2 FOR THE PLAINTIFFS: Dennis Kennedy, Esq.  
3 Kelly Stout, Esq.

4  
5 FOR THE DEFENDANT: W. Chris Wicker, Esq.  
6 Chris Nielsen, Esq.

1 Las Vegas, Nevada, Tuesday, January 19,  
2 2016

3 \* \* \* \* \*

4 THE COURT: Page 7, Shae Gitter versus  
5 Public Employees Retirement System of Nevada.

6 This is case A-697642, Shae Gitter versus  
7 Public Employees Retirement System of Nevada.

8 Do counsel want to check in for the record.

9 MR. KENNEDY: For the Plaintiffs, Dennis  
10 Kennedy and Kelly Stout.

11 MR. WICKER: Your Honor, for the Defendant,  
12 Chris Wicker and Chris Nielsen, who is the general  
13 counsel for PERS.

14 THE COURT: All right.

15 Have a seat I. I have read over everything,  
16 and this is on for the motion to re-tax costs, and  
17 on the motion for attorneys fees.

18 With regard to the motion to re-tax costs,  
19 these are my thoughts; the only challenge here is as  
20 to the expert witness fees on the costs.

21 The expert never wrote a report or gave a  
22 deposition, or testified. The case that is cited  
23 Bergmann versus Boyce, at 109 Nevada 670, at pages  
24 679 to 680 makes it clear that to recover witness  
25 fees, it is not necessary that the witness actually

1 be called as a witness at trial.

2 But the Court's commentary in this regard is  
3 vague and ambiguous about whether that was really  
4 intended to apply to experts too.

5 Although the Court clearly lumped expert and  
6 non-expert witnesses into the same sentence when  
7 discussing the need for the witness, expert or non  
8 to appear at trial.

9 However, I think it would be err to allow  
10 more than \$1,500 in expert fees, because it is clear  
11 that the Fraizer versus Drake, and my own  
12 inclination prior to even reading Fraizer would  
13 require the conclusion that an expert would have to  
14 testify in order to be awarded more than \$1,500,  
15 because NRS 18.110 clearly references the need to  
16 evaluate the "circumstances surrounding the expert's  
17 testimony," to determine whether or not an award of  
18 more than \$1,500 was necessary and appropriate.

19 Accordingly, my inclination is to award  
20 expert fees, limit them to the amount of \$1,500,  
21 which would result in a reduction of the costs  
22 sought by \$3,500.

23 Does anybody wish to add anything to that to  
24 persuade me to do something differently?

25 MR. WICKER: If I might, Your Honor, I don't

1 want to talk you out of what you have already done,  
2 but what I would add is this, Your Honor, we have  
3 kind of a novel issue here.

4           If you look at cases where there have been  
5 expert witness fees awarded, it has always been in  
6 the cases where there is actually expert witnesses  
7 in the case.

8           This situation is different. In that this  
9 person was basically a consultant until it came time  
10 to do a memorandum of costs, so I think as a  
11 consultant, that they do not qualify under Chapter  
12 18 to recover expert witness fees.

13           And I think another evaluation that needs to  
14 be made is whether or not the expert was needed to  
15 assist the Court in determining an issue of fact,  
16 and while that is most clearly addressed when you  
17 are doing an analysis for in excess of \$1,500 in  
18 witness fees, I think that it needs to be addressed  
19 to for the first increment of expert witness fees,  
20 because under Chapter 50.275, that's the point of an  
21 expert witness is to assist the Court or the trier  
22 of facts on the issue of fact.

23           In this case you have PERS making a  
24 calculation in which something it does everyday for  
25 thousands of people, and obviously PERS has

1 expertise in making the calculation, and on the  
2 other hand --

3 THE COURT: It has some expertise.

4 MR. WICKER: Yes. I think it has the  
5 expertise in the State, but not to say that  
6 everybody is mistake free.

7 But in this case, the Plaintiffs' have not  
8 put forward enough of a sufficient showing that  
9 their so called expert witness, who was a consultant  
10 until the memorandum of costs came out, actually had  
11 the required expertise to evaluate the calculation  
12 of PERS benefits under PERS' statute.

13 Certainly that issue does not no go to the  
14 calculation of interest rates, but the calculation  
15 of interest rates is approximately a third of the  
16 time it appears that has expanded in this.

17 And, so, I think it is not the duty of the  
18 Defendant to prove that their expert witness is the  
19 expert, it is the duty of the Plaintiffs' who are  
20 seeking recovery of expert witness fees as costs in  
21 is this matter.

22 And you also have to look at --

23 THE COURT: Let me ask you this, as counsel  
24 for PERS, would you have defended the case without  
25 consulting an expert?

1 I bet you have an in-house in PERS.

2 MR. WICKER: I would consult an expert.

3 THE COURT: Shouldn't the Plaintiff be  
4 required for do the same?

5 MR. WICKER: I think the Plaintiff has the  
6 ability to consult an expert.

7 To evaluate a case to recover expert witness  
8 fees as costs, I think you have to make an expert  
9 witness disclosure, make this consultant an expert  
10 witness.

11 And, as I mentioned before, I think that  
12 might be a novel issue of Nevada law as to whether  
13 or not a consultant is entitled to the witness fees  
14 under 18.110.

15 So, I think also in order to recover the  
16 fees, you have to prove, because we never had a  
17 trial or a deposition, or an affidavit, or a report  
18 or anything, it is up to the Plaintiffs' to prove  
19 that the person that they are seeking to recover  
20 these costs for has the necessary expertise to do  
21 the evaluation.

22 And I think the Plaintiffs' have failed to  
23 show that expertise.

24 THE COURT: Well, I think that the  
25 curriculum vitae that they presented indicates that

1 the person certainly has the requisite education,  
2 training, background and experience to serve as an  
3 expert.

4 And I think that the fact that the Defendant  
5 would feel necessary to consult with an expert, even  
6 though it is probably an in-house person in order to  
7 competently defend the case is sauce for the goose  
8 and sauce for the gander.

9 Plaintiffs' counsel would also be expected  
10 as reasonably competent counsel to consult with an  
11 expert to give advice and information to Plaintiffs'  
12 counsel on these financial matters. I think it is  
13 essential to the case.

14 I do think that while the Bergmann case is a  
15 little confusing the way the quote these kind of  
16 references witnesses, both expert and non all in the  
17 same breath, without making it really, really  
18 crystal clear that they intended to put them on an  
19 equal footing as to whether or not they have to  
20 testify.

21 I think it is the best information we have  
22 to work with, and so I think it is appropriate to  
23 award the expert fees, even though they are with a  
24 consultant in this particular case, and not someone  
25 who rendered a report, or testified in deposition or

1 trial.

2 MR. WICKER: Thank you, Your Honor.

3 THE COURT: Now, with regard to the motion  
4 for attorneys fees, I am reducing the costs by  
5 \$3,500. They had included a \$5,000 in expert  
6 witness fees in their costs, and the Defendant  
7 challenged that, filed a motion to re-tax, and I am  
8 agreeing in part with the Defendant that \$5,000 is  
9 not allowable, but that \$1,500 is.

10 So the Plaintiffs' memorandum of costs,  
11 collectable costs will be reduced by the sum of  
12 \$3,500.

13 As to the motion for attorneys fees, let me  
14 give you ample opportunity to argue this, but in  
15 terms of adding anything you wish to that is not  
16 contained in your briefs, but my conclusion is that  
17 PERS at all times was acting unreasonably  
18 vexatiously and doing everything it could  
19 procedurally and legally to throw bricks into the  
20 path of the Plaintiff, somehow transferring to her  
21 the kind of resistance to payment that one might  
22 have expected, had it been the murdering husband who  
23 was the one seeking funds.

24 But here we have an incident party who was  
25 just seeking the benefit of this PERS, and I think

1 it was unconscionable that PERS tried so  
2 aggressively to retain these funds, and not pay them  
3 to the Plaintiff.

4 And because of that, I think it is  
5 appropriate that the award of fees be joint and  
6 several against PERS and their counsel, under NRS  
7 7.085 and NRS 18.010 (2) (b).

8 And, so, it is my intention to award  
9 attorneys fees jointly and severally in the amount  
10 requested, which is \$96,272.50.

11 Counsel for PERS, I would happy to hear from  
12 you.

13 MR. WICKER: Your Honor, the finding for  
14 fees in this case would be based on a finding that  
15 PERS defended with no reasonable basis or good faith  
16 statement of the law, and unreasonably or  
17 vexatiously extending a civil action.

18 As to the attorneys in this case, as we  
19 pointed out in our reply, PERS made the  
20 determination initially that no funds were due by  
21 reason of the statute, and I will get into that in a  
22 minute.

23 And then that was upheld by the Attorney  
24 General's Office, who was initially appearing in  
25 this case in their correspondence with Plaintiff.

1           And, of course, they would concur that PERS  
2 was correct on the law in this matter. And I don't  
3 think there was any evidence that there was any  
4 intent to harass or vexatiously string out this  
5 case.

6           I think what the evidence has presented by  
7 the Plaintiffs' is a claim that PERS was acting  
8 unreasonably under the law, and their simplistic  
9 statement of PERS' position was that PERS' claim  
10 that because Chapter 286 was the statute in which to  
11 calculate benefits, that PERS said simply that the  
12 slayer statute had no application, because Chapter  
13 286 was prevalent.

14           Now that is a part of it, but the analysis  
15 presented in our motion for summary judgment before  
16 the Court was much more detailed than that, and I  
17 would like to, if I could, go through that with Your  
18 Honor.

19           THE COURT: Well, you can, but even though I  
20 didn't make that decision, I went back and reviewed  
21 the materials supporting it in connection with my  
22 analysis here.

23           And those contentions were summerely  
24 rejected. I don't think there was any serious  
25 consideration given to them, but you are welcome to

1 address those.

2 MR. WICKER: Okay.

3 Let me first talk about the requirement for  
4 Plaintiffs' to obtain the file. Under Chapter  
5 286.117, there's a limited number of parties that  
6 can obtain a confidential file .

7 In this case PERS had determined that the  
8 Plaintiff, Gitter, was not a beneficiary under the  
9 statute, and therefore it was prohibited by law of  
10 providing the file of Christine Freshman until a  
11 Court order was obtained, and soon as that was done,  
12 PERS did provide the file as to that first piece.

13 THE COURT: What did Gitter have to go  
14 through to get that file?

15 MR. WICKER: They had to go through a  
16 probate -- now they could have -- the way they chose  
17 to was to go open up a probate proceeding, and get a  
18 Court order requiring production of the Court file.

19 THE COURT: Well, would anything less have  
20 satisfied PERS that she was in fact an heir and  
21 entitled to that property?

22 MR. WICKER: The statute that PERS operates  
23 under is very clear, it tells you who is required to  
24 get a copy of that file.

25 It could be a member, a spouse, a

1 beneficiary receiving payments, or by reason of  
2 Court order.

3           So, certainly once PERS made the  
4 determination that Ms. Gitter was not a beneficiary,  
5 by law they had to wait until the Plaintiff obtained  
6 a Court order, so this was not a --

7           THE COURT: So what the Plaintiff did was  
8 not unreasonable in terms of what PERS would expect  
9 and require in order to get the file.

10           The Plaintiffs' effort to go through probate  
11 Court to get an actual order saying she had standing  
12 to have a copy of the file produced to her, that  
13 would have been something PERS required anyway,  
14 correct?

15           MR. WICKER: Yes. I think whether it had to  
16 be through a probate proceeding or not, but I  
17 understand what the Court is saying.

18           THE COURT: What would be the alternative?

19           MR. WICKER: I think the alternative would  
20 be to file the action that they filed, and ask for a  
21 Court order producing the file.

22           THE COURT: Don't you think that any  
23 District Court would say; doesn't their need to be a  
24 probate determination that Gitter has standing to do  
25 this?

1           MR. WICKER: Well, Gitter would be taking  
2 the position that she was a beneficiary, and  
3 therefore --

4           THE COURT: Well, just to get a copy of the  
5 file. To get a copy of the file, PERS wanted her to  
6 be able to show that she was entitled to it, so by  
7 going to probate Court, she was able to establish  
8 that she was an heir and stood in the shoes of her  
9 deceased mother to get a copy of the file.

10          MR. WICKER: It wasn't that status that  
11 allowed her to get a copy of the file, it was the  
12 Court order, and I don't know, a like in this  
13 litigation, if they had filed suit in this  
14 litigation and asked the Court for a Court order,  
15 they could have obtained a Court order and obtained  
16 the file.

17          THE COURT: Well, maybe, maybe not.

18          MR. WICKER: Well, that's not what  
19 happened. But PERS requirement that they have a  
20 Court order in order to obtain the file was  
21 something that PERS had to require of the  
22 Plaintiff.

23               It is not something to harass her, or to  
24 extend the litigation. It was something that the  
25 law required PERS to do, based on their

1 determination that she not a beneficiary entitled to  
2 payments.

3 THE COURT: Therefore, it was something that  
4 Ms. Gitter was required to do legally, and therefore  
5 legally necessary and reasonable to advance her  
6 claim.

7 MR. WICKER: To get a Court order, that  
8 would be true, Your Honor.

9 THE COURT: Okay.

10 MR. WICKER: Now, PERS -- to understand why  
11 PERS denied the claim, you need to first look at the  
12 PERS statute.

13 The Court has said you have read the  
14 pleadings, so I will be brief on this, but what  
15 Ms. Gitter was saying that she was, was a survivor  
16 beneficiary and entitled to benefits by reason of  
17 that status.

18 Under NRS 286.6767, a person only has the  
19 status of a survivor beneficiary if the member,  
20 meaning Ms. Freshman, her mother, was unmarried on  
21 the date of the member's death.

22 So by reason of that statute, Ms. Gitter did  
23 not have the status of a survivor beneficiary,  
24 because it only applies if the member is unmarried  
25 at the date of her death.

1           Now, the second --

2           THE COURT: I understand that, and I realize  
3 that a determination was made that the killer, the  
4 murderer pre-deceased the mother, so that at the  
5 time she was in fact no married, and that enabled  
6 Ms. Gitter to have the standing.

7           But I will tell you what perplexed me as I  
8 read through this is, I think of this Public  
9 Employees Retirement System, and I am not a part of  
10 it, in fact, because I am a new Judge.

11           New judges are part of a different system.  
12 I was kind of breathing a sigh of relief when I  
13 found that out, because fiduciary duties are  
14 mentioned in your paperwork, and I was just taken a  
15 back by the great lengths that were gone to by PERS  
16 and its counsel to avoid paying out a public  
17 employee's benefit to an incident party, who I think  
18 on the face of it was somebody who was clearly  
19 intended to benefit from the Public Employees  
20 Retirement System.

21           And that came up again and again, and again  
22 throughout the course of the litigation. I don't  
23 think there was ever anything that was ever agreed  
24 to or stipulated by PERS as something that was  
25 clearly the intent and spirit of the PERS system.

1           And, so, that was a thread that I saw  
2 running continuously throughout the litigation. And  
3 I hear it echoing this morning, but I don't want to  
4 stop you from putting anything on the record that  
5 you wish to.

6           MR. WICKER: Thank you, Your Honor.

7           And you are right, I think that PERS has a  
8 fiduciary duty not only to the member, but also to  
9 the trust fund.

10          And, so, PERS has a duty to only make  
11 payments that are authorized either by law or by the  
12 other parts of the PERS act.

13          So PERS has a duty to look at any claims and  
14 make a determination. And as you know, there's  
15 substantial deference is shown to the determinations  
16 by PERS, as far as how they implement the parts of  
17 their act, so they have a fiduciary duty where they  
18 have to look at the law.

19          They have to look at the statute closely,  
20 and they have to determine whether they are  
21 authorized to make these payments.

22          Now PERS makes payments to thousands of  
23 people. That's in the record, but I think that  
24 everybody knows that PERS makes thousands of  
25 payments every day to one hundred thousand people in

1 the State.

2           So there is no motive or no reason for PERS  
3 to not make a payment to Ms. Gitter, who has a very  
4 sympathetic situation, and there is not doubt about  
5 that.

6           There is no reason or motive for PERS to be  
7 deliberately harassing her or acting in bad faith  
8 towards her. They make payments every day.

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

12           Now, going back to the PERS Act, under  
13 Chapter 286.669, PERS has its own version of the  
14 slayer statute.

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

20           So if you look at the Chapter that PERS has  
21 to implement under 6767, Ms. Gitter was not survivor  
22 beneficiary.

23           Under 669. Walter Freshman was not entitled  
24 to any benefit from PERS, so that's implementing the  
25 PERS statute, that's the status of determining if

1 anything is due.

2           So now I would like to look at the slayer  
3 statute. Under 41B090, it defines a deadly  
4 instrument, and in this case, under Subparagraph 9,  
5 it says; any public or private plan or system that  
6 entitles a person to the payment or the transfer of  
7 any property, interest or benefit, including -- and  
8 it goes on and lists other things, including pension  
9 benefits.

10           So, assuming for this argument that Chapter  
11 286 is the governing instrument, under the slayer  
12 the statute, then you look at the applicability of  
13 slayer statute to this situation, and this goes to  
14 the heart of the reasonable basis.

15           THE COURT: Was Gitter a slayer?

16           MR. WICKER: No.

17           THE COURT: And, so, the slayer statute is  
18 intended and designed, and carefully crafted to make  
19 sure that no one who takes the life of a PERS member  
20 will be able to ever gain financial benefit from  
21 doing so, correct?

22           MR. WICKER: That's correct.

23           THE COURT: So, that is a strange place to  
24 be looking for whether or not Gitter is entitled to  
25 coverage.

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

5           It is not under the PERS statute at all.  
6 Under Chapter 286, Ms. Gitter is absolutely not  
7 entitled to any benefit, and that's what the law  
8 says, and PERS cannot be sympathetic and say this is  
9 a tragic case of a person losing her mother, which  
10 it is a tragic case, but PERS has to follow the  
11 statute, and under Chapter 286 --

12          THE COURT: Do you think if you asked a rank  
13 and file member of PERS, who had not read the fine  
14 print of either the slayer statute NRS 286, the  
15 general slayer statute, if they told no knowledge of  
16 that information, they just were a PERS member for  
17 20 years, do you think that their instinctive  
18 reaction would be that Gitter would be entitled to  
19 the benefits after her mother was murdered?

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

22          MR. WICKER: I think that that is asking me  
23 to speculate a little bit, but I think human nature  
24 being what it is, this is very sympathetic  
25 situation, where the mother had PERS benefits for

1 years, and she was murdered by her husband.

2 THE COURT: I think it is more than a  
3 sympathetic situation. I think it is a reasonable  
4 expectation, and I recognize that this is  
5 technically not insurance, but it makes me think of  
6 Professor Keaton's book on insurance, where he says;  
7 there is notion more firmly established in the law  
8 of insurance to the concept that the bold print  
9 giveth, and the fine print take it away.

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

16 I understand how it could be done, but what  
17 it tells me is that the motivation was to look for  
18 ways to avoid paying her, as opposed to delivering  
19 on the reasonable expectations of the members of the  
20 PERS system.

21 And that's why I asked you, what do you  
22 think their expectation might be, not because it  
23 answers our question, but because I think it tells  
24 us what the purposes of the PERS system is.

25 I don't think that it would violate any

1 tenant or policy of the PERS system, were a  
2 situation like this to happen, and even though it is  
3 certainly, hopefully not a common occurrence, it is  
4 certainly a foreseeable occurrence that something  
5 like this would happen.

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

12 That's just my take on having have reviewed  
13 everything.

14 MR. WICKER: Well, with all due respect,  
15 Your Honor, I think PERS does not have the luxury of  
16 paying out money in sympathetic situations. PERS  
17 has the requirement to follow its statute.

18 THE COURT: Does PERS have an obligation to  
19 honor the reasonable expectations of their members?

20 MR. WICKER: Well, not if they conflict with  
21 the statute, Your Honor, because the legislature has  
22 said what payments PERS can make, and who eligible  
23 to receive benefits.

24 And I am sure there is many situations in  
25 life, and particularly with something like a pension

1 plan, where sympathetic situations arise, and PERS  
2 would be violating its fiduciary duty to the trust  
3 fund to pay out benefits that were not authorized by  
4 its statute.

5 THE COURT: I think that members would sing  
6 the praises of administrators and legal counsel who  
7 have reviewed the situation and said; well, clearly  
8 this is an unusual situation, and we could carve out  
9 a path to the ocean for this that might avoid  
10 coverage, but we think that we would be shirking our  
11 responsibilities as the administrators of the PERS  
12 program if we were to deny this person, because we  
13 think that a reasonable member would have a  
14 reasonable expectation that under this kind of a  
15 circumstance, tragic or not, the surviving daughter  
16 would be entitled to claim the benefit.

17 So I think that PERS and its counsel in this  
18 case were very short-sighted in terms of their  
19 analysis of taking in the big picture here.

20 And I have no idea what they spent in terms  
21 of time, money and effort to try to beat her claim,  
22 but I would venture a guess that it was a not an  
23 economic use of resources for PERS either in terms  
24 of getting a big picture idea of what was going on.

25 I am not suggesting that the mere fact that

1 a person is in a tragic situation, or a sympathetic  
2 situation that that warrants payment of money,  
3 because whenever there is a death involved, it is  
4 generally tragic.

5 I am just talking about the case that is in  
6 front of us here, so I wanted to give you the  
7 benefit of that thinking, too, if it is of any  
8 guidance to you in your remarks.

9 MR. WICKER: Yes, and I think that all I can  
10 say in response to that, Your Honor, is that -- I  
11 guess repeating myself a little bit -- that PERS has  
12 to follow the law as written by the legislature.

13 And whether it is looking at the big picture  
14 or being sympathetic or --

15 THE COURT: Now, you say they have to follow  
16 laws written by legislature. Let's say, God forbid,  
17 that tomorrow the same situation happens, and a  
18 member who has been a member for 20 years is killed,  
19 murdered by the spouse, and leaving behind an adult  
20 child, would PERS pay on that claim now?

21 MR. WICKER: Well, there would be a  
22 different statute involved with regard to a child,  
23 as opposed to a survivor beneficiary.

24 And in this case, I am sure that Ms. Gitter  
25 probably -- well, she wasn't a minor, so there's

1 particular benefits for minor children, but this is  
2 obviously not a situation that the legislature  
3 anticipated when they wrote the statute that PERS is  
4 charged with following.

5           They anticipated it to extend that Walter  
6 Freshman does not benefit from his murder of  
7 Ms. Freshman, but they left it with PERS that Shae  
8 Gitter is not a survivor beneficiary, by reason of  
9 67.67, and Walter Freshman is not entitled to a  
10 benefit by reason of 669.

11           And, so, there would be no benefit due at  
12 that point, because of the way the statutes are  
13 written.

14           THE COURT: So PERS would just retain them?

15           MR. WICKER: Yes. And you know it is a --  
16 let me put it this way -- there is no motive on  
17 PERS' part to deny benefits, or to try to find  
18 devious ways to deny benefits to somebody.

19           There is no reason for PERS to do that.

20           THE COURT: Well, there shouldn't be.

21           MR. WICKER: Well, and I don't think there  
22 has been any evidence.

23           THE COURT: There shouldn't be.

24           MR. WICKER: And I don't think that there  
25 has been any evidence of any bad motives or bad

1 faith, except for the fact that they didn't award  
2 benefits in this case because of their  
3 interpretation of the statute.

4 And the statute is pretty clear on its face  
5 as to when survivor beneficiary, if somebody is a  
6 survivor beneficiary, it is very clear on its face,  
7 and it is clear on its face that Walter Freshman --

8 THE COURT: Maybe I didn't make my  
9 hypothetical clear, because I said maybe something  
10 happens tomorrow that involves an adult child, I was  
11 trying to give you the same hypothetical as happened  
12 in this case.

13 So, let's say the same scenario happens that  
14 happened in this case, does PERS pay?

15 MR. WICKER: Your Honor, my -- I hate to  
16 speculate, but I would say probably not.

17 I would say that PERS has appealed the  
18 decision in this case, and if the Supreme Court says  
19 that PERS you need to be flexible in your  
20 determination of payments, then PERS will after that  
21 point do that.

22 THE COURT: I think it is perhaps flexible  
23 as not the word I would choose, but I think in terms  
24 of implementing the legislative intent, you  
25 mentioned that the legislature kind a created a no

1 man's land, or a limbo or a gap here.

2 I would think that the legislature would  
3 have trusted that the PERS policy makers and  
4 decision makers would understand the general thrust  
5 of what the legislature was trying to do and try  
6 implement that, and that's where I think that PERS  
7 and its counsel really missed the mark.

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

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

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

1           THE COURT: I understand your argument, but  
2 I disagree, because I am not talking about doing  
3 things just on the basis of public policy  
4 considerations.

5           I am saying that I think that this falls  
6 well, well, well within the realm of what the  
7 legislative intent was, and that PERS and its  
8 counsel worked very hard to try to find a way to  
9 avoid accomplishing the legislative intent of making  
10 funds available to a person in Ms. Gitter's  
11 situation, because I think that was the purpose.

12           It is one of the main purposes behind the  
13 PERS system.

14           Is there anything else you wish to add?

15           MR. WICKER: Yes. I would like to add 2  
16 things, Your Honor.

17           Once, as far as assessing fees jointly and  
18 severely against counsel, PERS has -- and there is  
19 case law -- that PERS is to be afforded deference in  
20 how it implements its statute.

21           And the Attorney General's Office gets  
22 involved and concurs with the same evaluation, and,  
23 so, it is not just this attorney taking that  
24 position, there's a lot behind that.

25           And the other thing I would like to add, for

1 the record, Your Honor, is how the slayer statute  
2 itself is not applicable in this case.

3 Under NRS 41B200, it says; notwithstanding  
4 any other provision the law, the provisions of this  
5 Chapter apply to any appointment, nomination, power,  
6 right, property, interest or benefit that accrues or  
7 devolves to a killer of a decedent based upon the  
8 death of the decedent.

9 In this case, once you apply the governing  
10 instrument, which is Chapter 286, there is no  
11 benefit that devolves upon the killer of  
12 Ms. Freshman, because of 286.669, there is no  
13 benefit which would make the general slayer statute  
14 applicable to this case.

15 Then if you look at 41B310, which talks  
16 about governing instruments, in Subparagraph one it  
17 says; except as otherwise provided in 41B320, a  
18 killer of a decedent forfeits any appointment,  
19 nomination, power, right or interest or benefit,  
20 that pursuant to the provisions of the governing  
21 instrument executed by the decedent or any other  
22 person, accrues or devolves to the killer, based  
23 upon the death of the decedent.

24 Now --

25 THE COURT: See, I don't understand why

1 counsel for PERS and PERS want to continually focus  
2 on the murderer being excluded.

3 Can you tell me why that is, because that is  
4 not really an issue.

5 MR. WICKER: Because, as argued by the  
6 Plaintiffs', they say the slayer statute applies,  
7 and it goes to the next subparagraph.

8 But again, that's pointing out that there  
9 was no benefit going to the slayer by reason of the  
10 governing instrument, so there is no forfeit of a  
11 benefit pursuant to 41B310.

12 THE COURT: Because there wasn't one  
13 anyway?

14 MR. WICKER: Right.

15 THE COURT: I have understand what you are  
16 saying.

17 MR. WICKER: But, then, when you get to  
18 Subparagraph 3, the Plaintiffs' have argued that if  
19 the killer forfeits any appointment nomination,  
20 power, right, property, interest or benefit,  
21 pursuant to this section, the provisions of each  
22 governing instrument affected by forfeiture must be  
23 treated as if the killer had pre-deceased the  
24 decedent.

25 And, again, this does not apply to what

1 happened here, because this section did not cause  
2 the killer to forfeit any benefit.

3           So it is PERS' position that the slayer  
4 statute is simply not applicable to the  
5 circumstances of this case.

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

13           MR. WICKER: I understand Your Honor's  
14 position.

15           I think going to the unreasonable, we cited  
16 the case law, and the Court has read the pleadings,  
17 so I don't get into that, but under the case law, if  
18 there is a novel issue of Nevada law, then that's  
19 not a basis to find that an unreasonable position  
20 was forwarded.

21           Also, if the State law is unsettled, then in  
22 this case what Your Honor is proposing is that PERS  
23 decide that legislative intent more or less  
24 overrides the definition of a survivor beneficiary.

25           THE COURT: Well, does PERS claim that the

1 law is unsettling?

2 MR. WICKER: What PERS claims is there is no  
3 case law saying that PERS has that ability to ignore  
4 a legislative direction as far as when a benefit is  
5 due.

6 THE COURT: So if PERS is in the position of  
7 settling the fiduciary duty, that's a strange  
8 position for them to say we are going to deny  
9 benefits, because the law is uncertain, and we are  
10 going to err on the side of not paying it.

11 MR. WICKER: What I am saying, Your Honor,  
12 is that the statute is clear, but the position that  
13 Your Honor has described, which is that PERS is  
14 should implement the legislative intent by  
15 essentially ignoring what 286.669 says.

16 THE COURT: I am suggesting that PERS should  
17 ignore it, I am suggesting that PERS needs to read  
18 it in content with the legislative intent.

19 Then I think it becomes crystal clear that  
20 the legislative intent was to provide benefits, not  
21 deny them.

22 MR. WICKER: I think that part of the law  
23 would be unsettled, therefore under case law should  
24 not be a basis for finding that PERS has  
25 unreasonably defended this case.

1 Court's indulgence for a moment.

2 THE COURT: Of course.

3 MR. WICKER: I would just add, Your Honor,  
4 there is other circumstances where application of  
5 the statute leads to a harsh result.

6 One example related by my co-counsel is that  
7 if a person has been married for 15 years, and then  
8 they divorce and get remarried, and then die  
9 immediately in a tragic accident, the benefits go to  
10 the new spouse, if the original spouse had not been  
11 married for a sufficient amount of time, that would  
12 be a harsh application of the rules, but one  
13 nevertheless created by the legislature.

14 THE COURT: It would have been addressed in  
15 Divorce Court in terms of the property settlement,  
16 and that would have been taken into account.

17 MR. WICKER: I think in light of that, I  
18 have nothing to add at this time.

19 THE COURT: Thank you.

20 Mr. Kennedy.

21 MR. KENNEDY: No, Your Honor, I think in  
22 light of what's been said, there is nothing for me  
23 to add.

24 THE COURT: All right.

25 So I am going to award fees in the amount of

1 \$96,272.50, and I do specifically find that PERS and  
2 its counsel at all times acted under circumstances  
3 that warrant that the award of fees be joint and  
4 several, in accordance with NRS 7.085, and NRS  
5 18.010 (2) (b), and I think that for clarity's sake  
6 we should have 2 orders, one on the motion to  
7 re-tax, and counsel for PERS, I will ask you to  
8 prepare that and submit it to Mr. Kennedy for  
9 approval as to form and content.

10 In any event, if you can't get approval as  
11 to form and content, I need it on my desk within the  
12 7 days, per EDCR 7.21.

13 Then, Mr. Kennedy, if your firm would  
14 prepare the motion for the attorney's fee and submit  
15 it to counsel for PERS as to form and content.

16 Likewise, if you can't get approval as to  
17 form and content, I still need it on my desk within  
18 7 days, pursuant to EDCR 7.21.

19 MR. KENNEDY: We will do that.

20 THE COURT: Anything further?

21 MR. WICKER: Nothing further.

22 Thank you.

23 MR. KENNEDY: Nothing further.

24  
25 (Proceedings concluded.)

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## 1 REPORTER'S CERTIFICATE

2  
3 STATE OF NEVADA )

4 ) ss.

5 CLARK COUNTY )  
6  
7

8 I, Robert A. Cangemi, a certified court  
9 reporter in and for the State of Nevada, hereby  
10 certify that pursuant to NRS 239B.030 I have not  
11 included the Social Security number of any person  
12 within this document.

13 I further certify that I am not a relative  
14 or employee of any party involved in said action,  
15 nor a person financially interested in said action.  
16  
17

18 (signed) /s/ Robert A. Cangemi

19 -----  
20 ROBERT A. CANGEMI, CCR NO. 888  
21  
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1 C E R T I F I C A T E

2 STATE OF NEVADA )

3 ) ss.

4 CLARK COUNTY )

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9 I, Robert A. Cangemi, CCR 888, do  
10 hereby certify that I reported the foregoing  
11 proceedings, and that the same is true and  
12 accurate as reflected by my original machine  
13 shorthand notes taken at said time and  
14 place.

15

16

17 (signed) /s/ Robert A. Cangemi

18

19 -----  
Robert A. Cangemi, CCR 888

20 Certified Court Reporter

21 Las Vegas, Nevada

22

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/s/

but

<p>/</p> <p>/s/ (36:18)(37:17)</p> <p><b>A</b></p> <p>ability (7:6)(32:3)  able (14:6)(14:7)(19:20)  absolutely (20:6)  accident (33:9)  accomplishing (28:9)  accordance (34:4)  accordingly (4:19)  account (33:16)  accrues (29:6)(29:22)  accurate (37:12)  act (17:12)(17:17)(18:12)  acted (34:2)  acting (9:17)(11:7)(18:7)  action (10:17)(13:20)(36:14)(36:15)  actual (13:11)  actually (3:25)(5:6)(6:10)  add (4:23)(5:2)(28:14)(28:15)(28:25)(33:3)(33:18)(33:23)  adding (9:15)  address (12:1)  addressed (5:16)(5:18)(33:14)  administrators (23:6)(23:11)  adult (24:19)(26:10)  advance (15:5)(22:10)  advice (8:11)  affected (30:22)  affidavit (7:17)  afforded (28:19)  after (20:19)(26:20)  again (16:21)(30:8)(30:25)  against (10:6)(28:18)  aggressively (10:2)  agreed (16:23)  agreeing (9:8)  all (3:14)(8:16)(9:17)(20:5)(22:14)(24:9)(33:24)(34:2)  allow (4:9)  allowable (9:9)  allowed (14:11)  already (5:1)  also (6:22)(7:15)(8:9)(17:8)(31:21)  alternative (13:18)(13:19)  although (4:5)  always (5:5)  ambiguous (4:3)  amount (4:20)(10:9)(33:11)(33:25)  ample (9:14)  analysis (5:17)(11:14)(11:22)(23:19)  another (5:13)  answers (20:20)(21:23)  anticipated (25:3)(25:5)  any (11:3)(11:24)(13:22)(17:13)(18:15)(18:17)(18:18)(18:24)(19:5)(19:7)(20:7)(21:25)(24:7)(25:22)(25:25)(29:4)(29:5)(29:18)(29:21)(30:19)(31:2)(34:10)(36:11)(36:14)  anybody (4:23)  anything (4:23)(7:18)(9:15)(12:19)(16:23)(17:4)(19:1)(28:14)(34:20)  anyway (13:13)(27:17)(30:13)  appealed (26:17)  appear (4:8)  appearances (2:1)  appearing (10:24)  appears (6:16)  applicability (19:12)  applicable (29:2)(29:14)(31:4)  application (11:12)(33:4)(33:12)  applies (15:24)(30:6)  apply (4:4)(29:5)(29:9)(30:25)  appointment (29:5)(29:18)(30:19)  appropriate (4:18)(8:22)(10:5)(27:10)  approval (34:9)(34:10)(34:16)  approximately (6:15)</p>	<p>are (3:19)(5:17)(6:19)(7:19)(8:23)(11:25)(16:11)(16:13)(17:7)(17:11)(17:20)(18:10)(21:10)(25:12)(27:9)(27:25)(30:15)(32:8)(32:9)  argue (9:14)  argued (30:5)(30:18)  argument (19:10)(28:1)  arguments (22:10)  arise (23:1)  ask (6:23)(13:20)(34:7)  asked (14:14)(20:12)(21:21)  asking (20:22)  assessing (28:17)  assist (5:15)(5:21)  assuming (19:10)  attorney (10:23)(28:21)(28:23)  attorneys (3:17)(9:4)(9:13)(10:9)(10:18)  attorney's (34:14)  authorized (17:11)(17:21)(18:11)(23:3)  available (28:10)  avoid (16:16)(21:18)(22:10)(23:9)(28:9)  award (4:17)(4:19)(8:23)(10:5)(10:8)(26:1)(33:25)(34:3)  awarded (4:14)(5:5)  aware (31:7)  away (21:9)</p> <p><b>B</b></p> <p>back (11:20)(16:15)(18:12)  background (8:2)  bad (18:7)(25:25)  based (10:14)(14:25)(29:7)(29:22)  basically (5:9)  basis (10:15)(19:14)(28:3)(31:19)(32:24)  beads (21:13)  beat (23:21)  because (4:10)(4:15)(5:20)(7:16)(10:4)(11:10)(11:12)(15:24)(16:10)(16:13)(20:2)(21:22)(21:23)(22:21)(23:12)(24:3)(25:12)(26:2)(26:9)(28:2)(28:11)(29:12)(30:3)(30:5)(30:12)(31:1)(32:9)  becomes (32:19)  been (5:4)(5:5)(9:22)(13:13)(24:18)(25:22)(25:25)(33:7)(33:10)(33:14)(33:16)(33:22)  before (1:17)(7:11)(11:15)  behind (24:19)(28:12)(28:24)  being (20:24)(24:14)(30:2)  beneficiaries (27:10)  beneficiary (12:8)(13:1)(13:4)(14:2)(15:1)(15:16)(15:19)(15:23)(18:22)(24:23)(25:8)(26:5)(26:6)(31:24)  benefit (9:25)(16:17)(16:19)(18:17)(18:24)(19:7)(19:20)(20:4)(20:7)(22:11)(23:16)(24:7)(25:6)(25:10)(25:11)(29:6)(29:11)(29:13)(29:19)(30:9)(30:11)(30:20)(31:2)(31:11)(32:4)  benefits (6:12)(11:11)(15:16)(19:9)(20:19)(20:25)(22:23)(23:3)(25:1)(25:17)(25:18)(26:2)(27:9)(27:13)(27:16)(27:25)(32:9)(32:20)(33:9)  bergmann (3:23)(8:14)  best (8:21)  bet (7:1)  big (23:19)(23:24)(24:13)  bit (20:23)(24:11)  bold (21:8)  book (21:6)  boots (31:10)  both (8:16)  boyce (3:23)  breath (8:17)  breathing (16:12)  bricks (9:19)  brief (15:14)  briefs (9:16)  but (4:2)(5:2)(6:5)(6:7)(6:14)(9:9)(9:14)(9:16)(9:24)(11:14)(11:19)(11:25)(13:16)(14:19)(15:14)(16:7)(17:3)(17:8)(17:23)(20:10)(20:23)(21:5)(21:16)(21:23)(23:10)(23:22)(25:1)(25:7)(26:16)(26:23)(27:10)(27:22)(28:1)(30:8)(30:17)(31:6)(31:17)(32:12)(33:12)</p>
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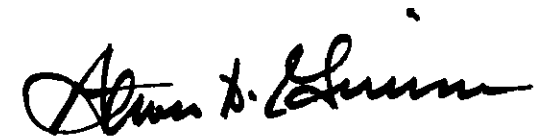
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<b>W</b>	<b>Y</b>
<b>wait</b> (13:5) <b>walter</b> (18:23)(25:5)(25:9)(26:7) <b>want</b> (3:8)(5:1)(17:3)(30:1) <b>wanted</b> (14:5)(24:6) <b>warrant</b> (34:3) <b>warrants</b> (24:2) <b>was</b> (4:3)(4:18)(5:9)(5:14)(6:9)(9:17)(9:23)(9:24)(10:1)(10:23)(10:24)(11:2)(11:3)(11:7)(11:9)(11:10)(11:13)(11:16)(11:24)(12:8)(12:9)(12:11)(12:17)(12:20)(13:4)(13:6)(13:7)(14:2)(14:6)(14:7)(14:8)(14:11)(14:20)(14:24)(15:3)(15:4)(15:15)(15:20)(16:3)(16:5)(16:12)(16:14)(16:18)(16:23)(16:24)(17:1)(18:21)(18:23)(19:15)(20:19)(21:1)(21:17)(23:22)(23:24)(26:10)(27:5)(28:7)(28:11)(30:9)(31:7)(31:20)(32:20) <b>wasn't</b> (14:10)(24:25)(30:12) <b>way</b> (8:15)(12:16)(25:12)(25:16)(28:8) <b>ways</b> (21:18)(25:18) <b>welcome</b> (11:25) <b>well</b> (7:24)(11:19)(12:19)(14:1)(14:4)(14:17)(14:18)(20:1)(22:14)(22:20)(23:7)(24:21)(24:25)(25:20)(25:21)(27:14)(28:6)(31:25) <b>went</b> (11:20) <b>were</b> (10:20)(11:23)(16:15)(20:16)(22:1)(23:3)(23:12)(23:18) <b>what</b> (5:1)(5:2)(11:6)(12:13)(13:7)(13:8)(13:17)(13:18)(14:18)(15:14)(16:7)(18:9)(18:15)(20:7)(20:24)(21:10)(21:16)(21:21)(21:24)(22:22)(23:20)(23:24)(27:5)(27:15)(28:6)(30:15)(30:25)(31:22)(32:2)(32:11)(32:15) <b>what's</b> (33:22) <b>when</b> (4:6)(5:16)(16:12)(25:3)(26:5)(27:10)(30:17)(32:4) <b>whenever</b> (24:3) <b>where</b> (5:4)(5:6)(17:17)(20:25)(21:6)(23:1)(27:6)(33:4) <b>whether</b> (4:3)(4:17)(5:14)(7:12)(8:19)(13:15)(17:20)(18:10)(19:24)(24:13) <b>which</b> (4:21)(5:24)(10:10)(11:10)(20:9)(29:10)(29:13)(29:15)(32:13) <b>while</b> (5:16)(8:14) <b>who</b> (3:12)(6:9)(6:19)(8:25)(9:22)(9:24)(10:24)(12:23)(16:17)(16:18)(18:3)(19:19)(20:13)(22:22)(23:6)(24:18) <b>why</b> (15:10)(21:21)(29:25)(30:3) <b>wicker</b> (2:5)(3:11)(3:12)(4:25)(6:4)(7:2)(7:5)(9:2)(10:13)(12:2)(12:15)(12:22)(13:15)(13:19)(14:1)(14:10)(14:18)(15:7)(15:10)(17:6)(19:16)(19:22)(20:1)(20:22)(22:14)(22:20)(24:9)(24:21)(25:15)(25:21)(25:24)(26:15)(27:8)(28:15)(30:5)(30:14)(30:17)(31:13)(32:2)(32:11)(32:22)(33:3)(33:17)(34:21) <b>wife</b> (22:7) <b>will</b> (9:11)(10:21)(15:14)(16:7)(19:20)(22:9)(26:20)(27:17)(34:7)(34:19) <b>wish</b> (4:23)(9:15)(17:5)(28:14) <b>with</b> (3:18)(8:5)(8:10)(8:22)(8:23)(9:3)(9:8)(10:15)(10:25)(11:17)(11:21)(21:11)(22:8)(22:14)(22:20)(22:25)(24:22)(25:4)(25:7)(28:22)(32:18)(34:4) <b>within</b> (28:6)(34:11)(34:17)(36:12) <b>without</b> (6:24)(8:17) <b>witness</b> (3:20)(3:24)(3:25)(4:1)(4:7)(5:5)(5:12)(5:18)(5:19)(5:21)(6:9)(6:18)(6:20)(7:7)(7:9)(7:10)(7:13)(9:6) <b>witnesses</b> (4:6)(5:6)(8:16) <b>word</b> (26:23) <b>wording</b> (27:11) <b>work</b> (8:22)(31:10) <b>worked</b> (28:8) <b>would</b> (4:9)(4:12)(4:13)(4:21)(5:2)(6:24)(7:2)(8:5)(8:9)(10:11)(10:14)(11:1)(11:17)(12:19)(13:8)(13:13)(13:18)(13:19)(13:23)(14:1)(15:8)(19:2)(20:18)(21:25)(22:5)(22:10)(23:2)(23:5)(23:10)(23:13)(23:16)(23:22)(24:20)(24:21)(25:11)(25:14)(26:16)(26:17)(26:23)(27:2)(27:4)(27:13)(27:20)(27:22)(28:15)(28:25)(29:13)(31:9)(31:10)(32:23)(33:3)(33:11)(33:14)(33:16)(34:13) <b>written</b> (24:12)(24:16)(25:13)	<b>years</b> (20:17)(21:1)(24:18)(33:7) <b>yes</b> (6:4)(13:15)(24:9)(25:15)(28:15) <b>you</b> (5:1)(5:4)(5:16)(5:23)(6:22)(6:23)(6:24)(7:1)(7:8)(7:16)(9:2)(9:14)(9:15)(10:12)(11:19)(11:25)(12:23)(13:22)(15:11)(15:13)(16:7)(17:4)(17:5)(17:6)(17:7)(17:14)(18:20)(19:12)(20:12)(20:17)(21:21)(24:6)(24:8)(24:15)(25:15)(26:11)(26:19)(26:24)(27:11)(28:14)(29:9)(29:15)(30:3)(30:15)(30:17)(33:19)(34:7)(34:10)(34:16)(34:22) <b>your</b> (3:11)(4:25)(5:2)(9:2)(9:16)(10:13)(11:17)(15:8)(16:14)(17:6)(22:15)(22:21)(24:8)(24:10)(26:15)(26:19)(27:20)(28:1)(28:16)(29:1)(31:13)(31:22)(32:11)(32:13)(33:3)(33:21)(34:13)



CLERK OF THE COURT

RTRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

SHAE E. GITTER, et al,

Plaintiffs,

vs.

PUBLIC EMPLOYEES RETIREMENT  
SYSTEM OF NEVADA,

Defendant.

CASE NO.: A697642

DEPT. XVIII

**TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE DAVID BARKER, DISTRICT COURT JUDGE  
TUESDAY, DECEMBER 2, 2014

***PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT***

APPEARANCES:

For the Plaintiffs:

KELLY STOUT, ESQ.

For Defendant:

KIMBERLY A. OKEZIE, ESQ.  
Deputy Attorney General  
(Appearing telephonically)  
WALTER C. WICKER, ESQ.

RECORDED BY: CHERYL CARPENTER, COURT RECORDER

1 LAS VEGAS, NEVADA, TUESDAY, DECEMBER 2, 2014 at 8:37 A.M.

2  
3 THE COURT: Let's move to page 5, that's 697642, Shae Gitter versus  
4 PERS. Could I have counsel present state appearance for the record, please?

5 MS. STOUT: Kelly Stout on behalf of the Plaintiffs.

6 THE COURT: Ms. Stout.

7 MR. WICKER: Your Honor, Chris Wicker on behalf of PERS.

8 THE COURT: Thank you, Mr. Wicker.

9 And we have CourtCall present as well? CourtCall? No one?

10 THE RECRDER: Hello?

11 MS. OKEZIE: Yes.

12 THE RECORDER: Okay.

13 THE COURT: Could I -- Counsel, this is Judge Barker. Could you state your  
14 appearance for the record, please? CourtCall?

15 MS. OKEZIE: Kimberly Okezie.

16 THE COURT: Thank you.

17 MS. OKEZIE: Kimberly Okezie, for the Public Employees Retirement System  
18 of Nevada.

19 THE COURT: Thank you, Ms. Okezie.

20 All right, this is time set Plaintiffs' motion for partial summary judgment  
21 and a dueling defense motion for summary judgment. We're going to take it from the  
22 Plaintiffs' perspective first. Ms. Stout, you have the floor.

23 MS. STOUT: Your Honor, also with me is Plaintiff Shae Gitter. She's  
24 present --

25 THE COURT: Okay.

1 MS. STOUT: -- in the courtroom.

2 As both sides have fully briefed the issue and we've acknowledged this  
3 is a pure matter of law, that the sole issue is a statutory interpretation issue, that the  
4 facts -- the material facts are undisputed, my client, Shae Gitter, is the sole heir and  
5 beneficiary of Kristine Freshman who was a member of PERS. Kristine was a  
6 member for -- with 24 years of service credit. At the time of her death she was --

7 THE COURT: Sorry, I need to make a Canon's disclosure. I am a PERS --  
8 I'm enrolled in PERS and have 30 plus years in PERS. I'm making that -- a judicial  
9 disclosure. I don't know if that impacts either side. Frankly, it hasn't impacted  
10 anything in my mind, but I want to make that disclosure to you and if you wish, and I  
11 -- if you wish me to recuse, as a function of the fact that I'm a contributing -- I've  
12 contributed to PERS for that period of time, okay doing that.

13 MS. STOUT: Plaintiffs have no objection.

14 THE COURT: Very good. Thank you. Let's move forward.

15 MS. STOUT: Kristine Freshman was murdered by her husband, my client's  
16 step father, again, an undisputed fact. The question before the Court is whether or  
17 not my client is entitled to survivor benefits under Chapter 286 of the NRS and  
18 Chapter 41B.

19 The plain language of NRS 41B Section 200 says that it applies  
20 notwithstanding any other provision of law. The Plaintiffs maintain that that would  
21 definitely include any of the provisions included in Chapter 286 which is the chapter  
22 that governs PERS, the PERS Act. It applies to any interest or benefit that accrues  
23 or devolves to a killer based upon the victims death. The parties have not disputed  
24 that Walter Freshman was a killer within the meaning of the PERS Act and that he  
25 would also meet the definition of a killer under the slayer statutes.

1 THE COURT: I don't think anybody can dispute that this man's a murderer.

2 MS. STOUT: Her survivor benefits accrues to a spouse immediately upon the  
3 members death. If the spouse is later convicted, then the spouse forfeits -- any  
4 rights to survivor benefits.

5 THE COURT: Under 6767? No.

6 MS. STOUT: Sorry?

7 THE COURT: No, under -- you're pulling that under the slayer statute --

8 MS. STOUT: Well, --

9 THE COURT: -- under 41.

10 MS. STOUT: Under Chapter 41B and under the PERS Act.

11 THE COURT: Okay.

12 MS. STOUT: That under both chapters include a provision where a spouse  
13 forfeits benefits if they're adjudicated a killer.

14 THE COURT: Right.

15 MS. STOUT: However, under both chapters the benefits immediate -- do not  
16 divest until there's a point to the conviction. It is not the killing but the conviction  
17 which causes the forfeiture.

18 THE COURT: Okay.

19 MS. STOUT: Therefore, Chapter 41B is going to apply because it's a benefit  
20 that immediately accrues to a spouse and is later forfeited. Therefore, Chapter 41B  
21 applies, notwithstanding any other provision of law.

22 Chapter 41B then further creates a legal fiction which allows benefits to  
23 be distributed to other beneficiaries. It specifically states also that the slayer  
24 statutes do not aggregate or limit the provisions of a governing instrument that  
25 designate a contingent or residuary beneficiary. Therefore, the plain language is

1 clear that the slayer statutes apply.

2           Walter Freshman was a killer. At the time of his conviction he was  
3 divested of the benefits that had already accrued to him by nature of Kristine  
4 Freshman's death. At that point, he shall be deemed to have predeceased her.

5           Under the PERS Act, if a person is unmarried at the time of their death,  
6 then they may designate a survivor beneficiary. Kristine Freshman designated my  
7 client, Shae Gitter, therefore she is entitled to survivor benefits.

8           THE COURT: Very succinctly and well argued.

9           MS. STOUT: Thank you.

10          THE COURT: Mr. Wicker, your position.

11          MR. WICKER: Thank you, Your Honor.

12                 I think, too, you have to look at the statutes in a little more depth than  
13 Ms. Stout has. Clearly, this is a sympathetic case, but as we point out in our brief  
14 PERS has a fiduciary duty to apply --

15          THE COURT: Do you waive --

16          MR. WICKER: -- the law.

17          THE COURT: -- my conflict, the fact that I'm a member of PERS --

18          MR. WICKER: Oh, yes.

19          THE COURT: -- as well?

20          MR. WICKER: We don't --

21          THE COURT: Very good.

22          MR. WICKER: Hard-pressed to find a judge in this state that's not a  
23 member --

24          THE COURT: Not in PERS.

25          MR. WICKER: -- of the system --

1 THE COURT: We're all in PERS. Right.

2 MR. WICKER: -- so.

3 But what you have to look at, I'll go step by step on our position, Your  
4 Honor. First of all, you look at the potential benefits available to either the killer or to  
5 Ms. Gitter. Spousal benefits are a different kind of benefit than survivor beneficiary  
6 that Ms. Gitter, if she were eligible, would be entitled to. Spousal benefits are under  
7 NRS 286.674 to 6766. And the amount of that benefit varies according to different  
8 conditions as set forth in the statute.

9 The survivor beneficiary is set forth in a different part of the PERS Act.  
10 The survivor beneficiary provisions are in 286.67675 to 286.67685. And again,  
11 those benefits can vary according to the circumstances of the particular person as  
12 set forth in the statute.

13 So you start with the concept that the spousal benefit is a different  
14 benefit entirely than the survivor beneficiary benefit. So, you have two different  
15 benefits.

16 Under the survivor beneficiary, pursuant to 286.6767, a survivor  
17 beneficiary is only eligible if the decedent was unmarried at the time of her death  
18 and that's one of the issues we have in this case.

19 THE COURT: Right. Does it play into this action? Because I also  
20 understood that they were estranged and that she'd -- the decedent had expressed  
21 a desire to terminate the marriage. And I guess that probably doesn't play because  
22 factually they were legally married at the time of her death.

23 MR. WICKER: Right, Your Honor. The way the PERS Act is set up is that if a  
24 decedent dies, then there's a spousal benefit according to the circumstances of the  
25 case. However, if the PERS member is unmarried at the time of her death, then she

1 can designate a survivor beneficiary which can be more than one person. In this  
2 case it was one person. But the PERS Act allows a PERS member to -- designate  
3 five survivor beneficiaries. It just so happens in this case we have one.

4 THE COURT: Okay.

5 MR. WICKER: Now, Mr. Freshman would have been entitled to a spousal  
6 benefit, however, under 286.669 a person convicted of the murder of a PERS  
7 member is ineligible to receive any benefit conferred by this chapter. And I think -- I  
8 point that out, Your Honor, because without really pointing to a statutory provision,  
9 Ms. Stout asserts that the benefit accrues to Mr. Freshman and then its later  
10 somehow divested when he's convicted. What the PERS statute actually says is  
11 that he is ineligible to receive any benefits so it doesn't suggest that a benefit has  
12 accrued. It says he is ineligible.

13 THE COURT: What doesn't -- all right, keep going.

14 MR. WICKER: Okay?

15 THE COURT: Right.

16 MR. WICKER: Now, the slayer statute is not applicable to the circumstances  
17 here. First of all, you have the general provision that says the provisions of the  
18 chapter apply to any benefit that accrues or it devolves to a killer of a decedent  
19 based upon the death of the decedent. In this case, the PERS Act says he is  
20 ineligible to receive any benefits, so there is no benefit to be handled by the slayer  
21 statute and that's reinforced.

22 If you look at the slayer statute in a little more detail, the provision that  
23 is at issue here is NRS 41B.310.

24 THE COURT: Subsection 3.

25 MR. WICKER: Subsection 310 which is the governing instruments.

1 THE COURT: Right.

2 MR. WICKER: We don't dispute in this case that PERS -- the PERS  
3 Retirement System is a governing instrument as defined in the slayer statute.

4 Now, pursuant to Subsection 1, a killer forfeits any benefit -- let me just  
5 read the statute: A killer of decedent forfeits any benefit that pursuant to the  
6 provisions of a governing instrument executed by the decedent or any other person  
7 accrues or devolves to the killer based upon the death of the decedent. So, you  
8 look at the governing instrument. The governing instrument, in this case, is the  
9 PERS Act, and you can't pick one piece of the PERS Act and say, we're just going  
10 to focus on this as the governing instrument. Under the statute, by referring to the  
11 governing instrument, you have to look at the whole PERS Act and you look at it as  
12 a result of the PERS Act; is there any benefit that accrues to Walter Freshman?  
13 And the answer is no. No benefit accrues to him pursuant to the PERS Act. And so  
14 under Subsection 310, the slayer statute is not applicable to the circumstance we  
15 have here.

16 And I'll go a little further with that, Your Honor. Plaintiff asserts that  
17 under 310 Subsection 3 you need to take an additional step and say that because  
18 Walter Freshman forfeited any benefit, then you consider him to have predeceased  
19 and therefore makes Ms. Gitter eligible under the survivor beneficiary. You have to  
20 look at the Subsection 3 a little more closely than that. First of all, it says: If a killer  
21 of a decedent forfeits any interest or benefit pursuant to this section -- and as I've  
22 described above, Your Honor, PERS position is that there has been no forfeiture  
23 pursuant to this section, 310, because under the PERS Act Mr. Freshman was  
24 ineligible to receive any benefit.

25 THE COURT: You mean the daughter?

1 MR. WICKER: No, Mr. --

2 THE COURT: Mr. Freshmen.

3 MR. WICKER: -- Freshman was ineligible to receive any benefit.

4 THE COURT: Okay.

5 MR. WICKER: So, this provision, which would ask you to consider Mr.  
6 Freshman to predecease the decedent, is inapplicable. But I would also go a little  
7 further than that, Your Honor. Under Subsection 3 it says: If a killer of a decedent  
8 forfeits any benefit pursuant to this section, the provisions of each governing  
9 instrument affected by the forfeiture must be treated as if the killer had predeceased  
10 the decedent.

11 Now, as I mentioned before, these are two completely different benefits.  
12 In other words, the benefit that Mr. Freshman is ineligible to receive pursuant to the  
13 PERS Act would not go to Ms. Gitter if he had predeceased the decedent. It's a  
14 completely different statutory section and different benefit, a survivor beneficiary.  
15 And so the provision of the governing instrument that, if there had been a forfeiture,  
16 the spousal benefit, that spousal benefit can go to no one else. And so, under  
17 Subsection 3, you can't treat the situation as Walter Freshman having predeceased  
18 Kristine Freshman for two reasons. First, because there is no forfeit of a benefit  
19 pursuant to Subsection 310. The PERS Act said Mr. Freshman was ineligible to  
20 receive any benefit so there's been no forfeiture. Second, the provision of the  
21 governing instrument affected by a forfeiture under this section, if there had been  
22 one, is the spousal benefit. The survivor beneficiary is a completely different section  
23 and in that section it says that the survivor beneficiary does not come into play if the  
24 decedent was married at the time of her death. And so, you have to take two big  
25 jumps to get to a benefit for Ms. -- I mean, a benefit for Ms. Gitter under the Slayer

1 statute.

2 THE COURT: Okay.

3 Counsel CourtCall, any additional comment or insight?

4 MS. OKEZIE: Nothing further, Your Honor. Thank you.

5 THE COURT: Now returning to Ms. Stout on behalf of Plaintiff. This is your  
6 motion.

7 MS. STOUT: Just a couple of points, Your Honor.

8 We would refer you back to statute 286.669, the forfeiture provision  
9 within the PERS Act. You'll note that in addition to the fact that it specifically  
10 references that a person convicted of the murder is ineligible to receive benefits, that  
11 again is not until the time of the conviction that someone becomes ineligible.  
12 Therefore, the benefits have already accrued at which point they are later convicted  
13 and they then become ineligible.

14 Furthermore, the remainder of that statute allows the System to  
15 withhold the payment of benefits otherwise payable. If no benefits had accrued  
16 there would be no benefits to withhold. The fact that they can withhold benefits  
17 pending an adjudication, again, supports the fact that the benefits already accrued  
18 and are payable. However, because there has been a charge, they're allowed to  
19 withhold them pending adjudication.

20 THE COURT: All right.

21 MS. STOUT: Furthermore, no one has disputed that the amount of benefit  
22 that Shae would be entitled to would be different than that which Walter Freshman  
23 would be entitled to. We do understand that there are different formulas.

24 THE COURT: Different statutory formulas or sections that deal with each.

25 MS. STOUT: Exactly.

1 THE COURT: Right.

2 MS. STOUT: However, the Slayer statute, and again if you'll refer to section 3  
3 of 41B.310: If a killer of a decedent forfeits any interest or benefit pursuant to this  
4 section, the provisions of each governing instrument affected by the forfeiture must  
5 be treated as if the killer had predeceased. It doesn't necessarily require that the  
6 interest or benefit that would devolve to another beneficiary be exactly the same. It  
7 simply means that for the purposes of determining benefits and entitlement that you  
8 treat the killer as having predeceased the victim. It specifically references that there  
9 may be more than one provision at stake. It references provisions. The fact that the  
10 specific amount that she might be entitled to varies from what Walter Freshman  
11 might be entitled to, it doesn't change the fact that, for the purposes of determining  
12 survivor benefits, Walter Freshman must be treated as having predeceased Kristine.

13 THE COURT: Okay, any additional argument?

14 I know this is an issue of first impression so I'll be making a decision  
15 and I'm sure it won't be the last word either way.

16 MS. STOUT: Very astute.

17 MR. WICKER: That's my life litigating for PERS, Your Honor.

18 A couple of points, Your Honor, and again, this is nothing against Ms.  
19 Gitter. You know PERS --

20 THE COURT: She lost her mom.

21 MR. WICKER: -- is in the business of providing benefits, but PERS has a  
22 fiduciary duty to everybody in the system --

23 THE COURT: You do --

24 MR. WICKER: -- to follow the law.

25 THE COURT: -- and I respect that.

1 MR. WICKER: So, under 669 I would argue that the fact the System may  
2 withhold any benefit doesn't suggest that a benefit accrues to Mr. Freshman that is  
3 then taken away. It says -- it simply says that he is ineligible to receive any benefit.  
4 And so, if you consider PERS as the governing instrument, which I believe is the  
5 assertion by Plaintiff, you have to look at the whole governing instrument. Does any  
6 benefit come to Mr. Freshman from the PERS Act? And the answer to that is no.

7 And looking at the Slayer statute, Section 310 parens 3, the provision --  
8 it talks about considering someone predeceased. So not only do you have to have  
9 a forfeiture because of the Slayer statute, 41B, in order to get a benefit to Ms. Gitter,  
10 you have to find that Walter Freshman predeceased the mother. And in this case, --  
11 so, let's assume that you find -- if there was a forfeiture, you still have to find that  
12 there's a legal fiction of predeceasing. And in this case, the statute clearly says the  
13 provisions of each governing instrument, meaning the PERS Act, affected by the  
14 forfeiture -- well, that would be the spousal benefit, not the survivor beneficiary  
15 benefit. So, is there any impact on the spousal benefit for Walter Freshman  
16 considered to be predeceased -- I mean that he predeceased Kristine Freshman?  
17 And the answer is no. The spousal benefit is the spousal benefit. And the survivor  
18 beneficiary provisions of the PERS Act are completely unaffected by any forfeiture  
19 affect pursuant to the Slayer statute.

20 THE COURT: All right.

21 Well briefed both sides. Well argued both sides. It's my role to make a  
22 decision and I'm about to make it. I'm going to grant Plaintiffs' motion for partial  
23 summary judgment. I'm going to make a finding, that Chapter 41B of NRS is  
24 applicable. The survivor benefits payable to the spouse and/or survivor beneficiary  
25 of the deceased. PERS member, Walter Freshman, shall be treated as if he

1   predeceased Kristine Freshman for purposes of determining entitlement for survivor  
2   benefits from PERS. Kristine Freshman is treated as being unmarried at the time of  
3   her death for purposes of determining entitlement to survivor benefits from PERS.  
4   And Shae Gitter, as the sole survivor beneficiary of Kristine Freshman, is entitled to  
5   survivor benefits pursuant to NRS 286.6767, NRS 286.6769 inclusive.

6               I'm directing counsel for Plaintiff to prepare an order. Run it by  
7   opposing counsel for their consideration and submit for signature. And talk with the  
8   Supreme Court; all right? I'm sure you will.

9               MR. WICKER: Thank you, Your Honor.

10              THE COURT: Thank you very much.

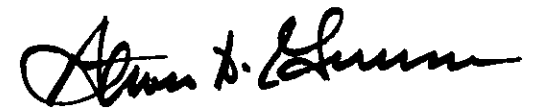
11              MS. STOUT: Thank you.

12                               [Proceedings concluded at 8:58 a.m.]

13                               \* \* \* \* \*

14  
15              ATTEST: I do hereby certify that I have truly and correctly transcribed the  
16   audio/video recording in the above-entitled case to the best of my ability.

17   *Cynthia Georgilas*  
18   \_\_\_\_\_  
19   CYNTHIA GEORGILAS  
20   Court Recorder/Transcriber  
21   District Court Dept. XIII  
22   702 671-4425  
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CLERK OF THE COURT

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18 AStevens@BaileyKennedy.com

19 *Attorneys for Plaintiffs*

20 SHAE E. GITTER and JARED SHAFER, as

21 Special Administrator of the Estate of Kristine Jo

22 Freshman

23 DISTRICT COURT

24 CLARK COUNTY, NEVADA

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

28 Plaintiffs,

vs.

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

32 Defendant.

Case No. A-14-697642-C  
Dept. No. XXIV

33 **ORDER GRANTING PLAINTIFFS' MOTION FOR ATTORNEYS' FEES**

34 Date of Hearing: January 19, 2016

35 Time of Hearing: 9:00 a.m.

BAILEY ♦ KENNEDY  
8984 SPANISH RIDGE AVENUE  
LAS VEGAS, NEVADA 89148-1302  
702.562.8820

DEPT. XXIV

FEB 02 2016

RECEIVED

2/2/16

1 On January 19, 2016, at the hour of 9:00 a.m., Plaintiffs' Motion for Attorneys' Fees came  
2 before the Court. Plaintiffs, Shae E. Gitter and Jared Shafer, were represented by Dennis L.  
3 Kennedy and Kelly B. Stout of the law firm Bailey ♦ Kennedy. Defendant, Public Employees'  
4 Retirement System of Nevada ("PERS"), was represented by Chris Nielsen of the Public Employees'  
5 Retirement System of Nevada and W. Chris Wicker of the law firm Woodburn and Wedge.

6 I. **FINDINGS OF FACT.**

7 1. Kristine Jo Freshman ("Kristine") was an employee of the Clark County School District  
8 and a member of PERS.

9 2. Ms. Freshman was murdered by her husband, Walter Freshman ("Walter"), on December  
10 6, 2009.

11 3. On December 17, 2009, PERS notified Shae "that there may be benefits available."

12 4. By December 10, 2010, the criminal proceedings against Walter were fully resolved, and  
13 Walter was adjudicated a "killer" for purposes of NRS Chapter 41B (Nevada's "Slayer Statute") and  
14 was deemed to have predeceased Kristine.

15 5. Believing that she was eligible for survivor benefits, Shae submitted a completed  
16 "Application for Survivor Benefits" on or about April 25, 2011.

17 6. On June 10, 2011, PERS denied Shae's application for survivor benefits contending that  
18 Chapter 286 disqualifies Walter as a beneficiary but does not expressly authorize payment to any  
19 other individual, whether or not designated as a secondary beneficiary.

20 7. In addition to denying benefits, PERS:

21 a. Refused to confirm whether Shae had been designated as a secondary  
22 beneficiary, and

23 b. Refused to provide any documents or information related to Kristine's  
24 account.

25 8. In particular, Plaintiffs requested a copy of Kristine's "Survivor Beneficiary Designation"  
26 so that they could determine if Shae had been designated as Kristine's secondary beneficiary.

27 9. PERS admits that a survivor beneficiary is permitted access to a member's records.

28 ///

1           10. Based on its own determination that Shae was not a beneficiary, PERS refused to provide  
2 Plaintiffs (who are Kristine's sole heir and the Special Administrator of her estate) with any  
3 documentation regarding Kristine's PERS account.

4           11. Due to PERS' denial of benefits and refusal to produce any documents, Shae sought  
5 counsel.<sup>1</sup>

6           12. Following months of unsuccessful discussions and efforts at negotiation, Shae  
7 determined that nothing short of litigation would be sufficient to resolve the dispute.

8           13. First, Shae petitioned the probate court to obtain an order permitting access to the  
9 relevant documents.

10           14. The probate court issued an order requiring PERS to produce documentation regarding  
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12           15. PERS finally produced the documents pertaining to Kristine's account on January 30,  
13 2014—almost three years after they were first requested.

14           16. Upon reviewing Kristine's "Survivor Beneficiary Designation," which identified  
15 Kristine's only child, Plaintiff Shae E. Gitter, as her survivor beneficiary, Plaintiffs filed this case on  
16 March 13, 2014.

17           17. Since Kristine's death, PERS has done everything possible to prevent Shae from  
18 collecting survivor benefits.

19           18. Once ordered by this Court to pay Shae survivor benefits—and having wrongfully  
20 withheld them for almost five years—PERS maintained that it was not required to pay any interest  
21 on the \$203,231.76 in past due survivor benefits.

22           19. Throughout this case, the conduct of PERS and its counsel has been unconscionable.

23           20. All of the foregoing conduct has been committed by PERS with the active assistance of  
24 its prior counsel (the Office of the Nevada Attorney General<sup>2</sup>) and/or current counsel (Woodburn &  
25

26 <sup>1</sup> Originally retained in April 2012 (as evidenced by Bailey Kennedy's billing statements), Bailey ♦ Kennedy  
agreed to represent the Plaintiffs on a contingency fee basis in October 2012.

27 <sup>2</sup> PERS was represented by the Office of the Nevada Attorney General until it filed a Substitution of Counsel on  
28 August 25, 2015.

1 Wedge<sup>3</sup>).

2 **II. CONCLUSIONS OF LAW.**

3 21. Plaintiffs' Motion for Attorneys' Fees was timely filed on November 9, 2015.

4 22. From the time of Kristine's death, PERS and its counsel have acted unreasonably and  
5 vexatiously in their dealings with Plaintiffs, which has significantly prolonged this case.

6 23. PERS' defense was maintained without reasonable grounds. NRS 18.010(2)(b).

7 24. PERS' counsel maintained a defense that was not well-grounded in fact or warranted  
8 by existing law. NRS 7.085(1)(a).

9 25. Plaintiffs' attorneys' fees related to reopening the probate case were necessarily  
10 incurred because Plaintiffs could not assess the merits of this case without determining if Shae was  
11 designated as Kristine's survivor beneficiary.

12 26. When contesting Shae's entitlement to survivor benefits, PERS raised numerous  
13 arguments that were unsupported by any legal authority, violated established canons of statutory  
14 interpretation, and/or were completely devoid of merit.

15 27. In opposing Plaintiffs' Motion for Pre-Judgment and Post-Judgment Interest, PERS  
16 again raised numerous arguments that were unsupported by any legal authority, violated established  
17 canons of statutory interpretation, and/or were completely devoid of merit.

18 28. PERS and its counsel, at all times, acted in concert and under circumstances  
19 justifying a joint and several award of attorneys' fees. NRS 7.085(1)(a); 18.015(b)(2).

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

23 30. The hourly rates charged by Linda Thomas and Bonnie O'Laughlin are reasonable  
24 rates for paralegals in the Las Vegas market.

25 31. The billing descriptions provide sufficient detail to assess the difficulty, intricacy,  
26 importance, and skill required to perform each task.

27 <sup>3</sup> Woodburn and Wedge first appeared on behalf of PERS on May 1, 2015.  
28

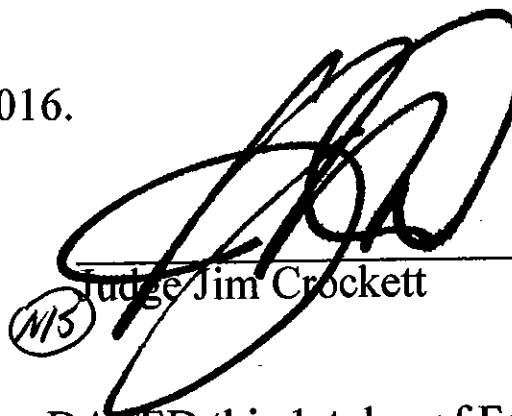
32. The number of hours billed is reasonable in light of the time this case has been pending, the difficulty of the case, and the quality of work performed by Plaintiffs' attorneys.

### III. ORDER.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs are awarded attorneys' fees in the amount of \$96,272.50.


IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that PERS and its counsel, Walter C. Wicker and the law firm of Woodburn and Wedge, shall be jointly and severally liable to Plaintiffs for the award of attorney's fees.

DATED this 5 day of February 2016.

  
Judge Jim Crockett

DATED this 2nd day of February 2016.

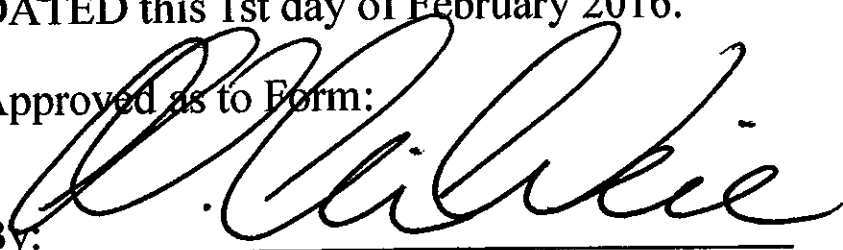
Respectfully Submitted By:

By:   
BAILEY ♦ KENNEDY  
DENNIS L. KENNEDY  
KELLY B. STOUT  
MARK HESIAK  
AMANDA L. STEVENS

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

DATED this 1st day of February 2016.

Approved as to Form:

By:   
WOODBURN AND WEDGE  
W. Chris Wicker  
  
PUBLIC EMPLOYEES RETIREMENT  
SYSTEM  
Chris Nielsen

*Attorneys for the Public Employees'  
Retirement System*

BAILEY ♦ KENNEDY  
8984 SPANISH RIDGE AVENUE  
LAS VEGAS, NEVADA 89148-1302  
702.562.8820

  
CLERK OF THE COURT

**NEOJ**  
DENNIS L. KENNEDY  
Nevada Bar No. 1462  
**KELLY B. STOUT**  
Nevada Bar No. 12105  
**MARK HESIAK**  
Nevada Bar No. 12397  
**AMANDA L. STEVENS**  
Nevada Bar No. 13966  
**BAILEY ♦ KENNEDY**  
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Las Vegas, Nevada 89148-1302  
Telephone: 702.562.8820  
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DKennedy@BaileyKennedy.com  
KStout@BaileyKennedy.com  
MHesiak@BaileyKennedy.com  
AStevens@BaileyKennedy.com

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

DISTRICT COURT  
CLARK COUNTY, NEVADA

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

Case No. A-14-697642-C  
Dept. No. XXIV

Plaintiffs,

vs.

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

Defendant.

**NOTICE OF ENTRY OF ORDER GRANTING  
PLAINTIFFS' MOTION FOR ATTORNEYS' FEES**

PLEASE TAKE NOTICE that an Order Granting Plaintiffs' Motion for Attorneys' Fees was  
entered on the 9th day of February, 2016, in the above-captioned matter.

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A true and correct copy of the Order is attached.

DATED this 10th day of February, 2016.

BAILEY ♦ KENNEDY

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

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

**BAILEY ♦ KENNEDY**  
8984 SPANISH RIDGE AVENUE  
LAS VEGAS, NEVADA 89148-1302  
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**CERTIFICATE OF SERVICE**

I certify that I am an employee of BAILEY ♦ KENNEDY and that on the 10th day of February, 2016, service of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING PLAINTIFFS’ MOTION FOR ATTORNEYS’ FEES** was made by mandatory electronic service through the Eighth Judicial District 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:

W. CHRIS WICKER <b>WOODBURN AND WEDGE</b> 6100 Neil Road, Suite 500 Reno, Nevada 89511	Email: cwicker@woodburnandwedge.com  Attorney for Defendant <b>PUBLIC EMPLOYEES’ RETIREMENT SYSTEM OF NEVADA</b>
---	---

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CHRIS NIELSEN <b>PUBLIC EMPLOYEES’ RETIREMENT SYSTEM OF NEVADA</b> 6693 West Nye Lane Carson City, Nevada 89703	Email: cnielsen@nvpers.org  Attorney for Defendant <b>PUBLIC EMPLOYEES’ RETIREMENT SYSTEM OF NEVADA</b>
--	--

/s/ Jennifer Kennedy  
Employee of BAILEY ♦ KENNEDY

CLERK OF THE COURT

1 **ORDG**

2 DENNIS L. KENNEDY

3 Nevada Bar No. 1462

4 KELLY B. STOUT

5 Nevada Bar No. 12105

6 MARK HESIAK

7 Nevada Bar No. 12397

8 AMANDA L. STEVENS

9 Nevada Bar No. 13966

10 **BAILEY ♦ KENNEDY**

11 8984 Spanish Ridge Avenue

12 Las Vegas, Nevada 89148-1302

13 Telephone: 702.562.8820

14 Facsimile: 702.562.8821

15 DKennedy@BaileyKennedy.com

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19 *Attorneys for Plaintiffs*

20 SHAE E. GITTER and JARED SHAFER, as

21 Special Administrator of the Estate of Kristine Jo

22 Freshman

23 DISTRICT COURT

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25 SHAE E. GITTER, an individual, and JARED  
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34 Date of Hearing: January 19, 2016

35 Time of Hearing: 9:00 a.m.

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DEPT. XXIV

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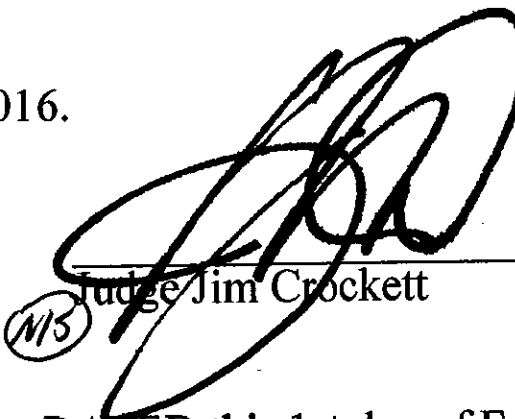
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### III. ORDER.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs are awarded attorneys' fees in the amount of \$96,272.50.


IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that PERS and its counsel, Walter C. Wicker and the law firm of Woodburn and Wedge, shall be jointly and severally liable to Plaintiffs for the award of attorney's fees.

DATED this 5 day of February 2016.

  
Judge Jim Crockett

DATED this 2nd day of February 2016.

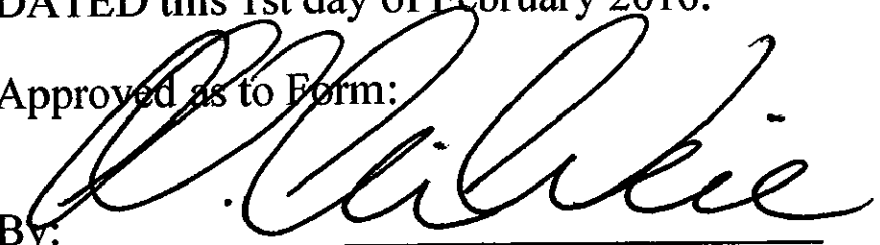
Respectfully Submitted By:

By:   
BAILEY ♦ KENNEDY  
DENNIS L. KENNEDY  
KELLY B. STOUT  
MARK HESIAK  
AMANDA L. STEVENS

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

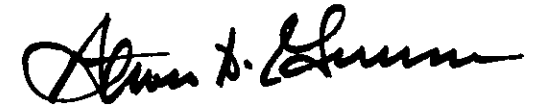
DATED this 1st day of February 2016.

Approved as to Form:

  
By: WOODBURN AND WEDGE  
W. Chris Wicker  
  
PUBLIC EMPLOYEES RETIREMENT  
SYSTEM  
Chris Nielsen

*Attorneys for the Public Employees'  
Retirement System*

BAILEY ♦ KENNEDY  
8984 SPANISH RIDGE AVENUE  
LAS VEGAS, NEVADA 89148-1302  
702.562.8820



CLERK OF THE COURT

**ORDR**

W. CHRIS WICKER

Nevada State Bar No. 1037

Woodburn and Wedge

6100 Neil Road, Suite 500

Reno, NV 89511

Telephone: (775) 688-3000

Facsimile: (775) 688-3088

Chris Nielsen, Esq.

Nevada Bar No. 8206

PUBLIC EMPLOYEES RETIREMENT SYSTEM

693 W. Nye Lane

Carson City, NV 89703

Telephone: (775) 687-4200

*Attorneys for the Public Employees'*

*Retirement System of Nevada*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Case No. A-14-697642-C

Dept. No. ~~XXI~~ 24

Plaintiffs,

vs.

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

Defendant.

**ORDER GRANTING MOTION TO RETAX COSTS**

**(Hearing Date: 01/19/2016 - Hearing Time: 9:00 a.m.)**

On January 19, 2016, Defendant, PUBLIC EMPLOYEES RETIREMENT SYSTEM  
OF NEVADA's ("PERS"), Motion to Retax Costs came before the Court. PERS was  
represented by W. Chris Wicker of Woodburn and Wedge and Chris Nielson General Counsel

1 for PERS. Plaintiffs, SHAE E. GITTER, an individual, and JARED SHAFER, as Special  
2 Administrator of the Estate of Kristine Jo Freshman ("Gitter"), were represented by Dennis  
3 Kennedy and Kelly Stout of Bailey Kennedy.

#### 4 FINDINGS OF FACT

5 1. Gitter's Memorandum of Costs was filed on October 23, 2015. Pursuant to NRS  
6 18.005(5), Gitter requested costs for expert witness fees in the amount of \$5,000.

7 2. Exhibit 26 of the Memorandum of Costs was presented as the backup for  
8 Gitter's request, which included an invoice from financial consultant, JW Advisors, in the  
9 amount of \$5,535, with time entries. Also included was the Curriculum Vitae of Kirk Jacobson.

10 3. It was reasonable for Gitter to retain a financial consultant to review amounts  
11 calculated by PERS and calculate interest amounts. JW Advisors were qualified for the work  
12 they did.

13 4. JW Advisors were not disclosed as expert witnesses, did not present any  
14 testimony, did not present any reports or affidavits and were not deposed.

#### 15 CONCLUSIONS OF LAW

16 1. The Nevada Supreme Court in *Bergmann v. Boyce*, 109 Nev. 670, 856 P.2d 560  
17 (1993) was not clear whether expert witness fees in excess of \$1,500 can be recovered if the  
18 witness did not testify at trial as the Supreme Court did not differentiate between expert and  
19 non-expert witness fees.

20 2. Gitter's financial consultant did not testify at trial, present affidavits or reports  
21 and was not deposed so the factors described in *Frazier v. Drake*, 131 Nev. Adv. Op. 64, 357,  
22 P.3d 365 (Nev. App. 2015) to evaluate costs in excess of \$1,500 cannot be evaluated.

23 3. Gitter was not required to establish the expertise of any staff at JW Advisors  
24 working under Mr. Jacobson.

25 4. Even though Gitter's expert was not disclosed, did not present reports or  
26 affidavits and was not deposed, Gitter is entitled to recover \$1,500 in expert fees.

27 5. Pursuant to NRS 18.005(5), Gitter is not entitled to recover more than \$1,500 in  
28 expert fees.

**ORDER****IT IS HEREBY ORDERED:**

1. PERS' Motion to Retax is granted in part by limiting expert witness costs to \$1,500.
2. Gitter's cost recovery shall be reduced by the amount of \$3,500.

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

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

DATED this 5 day of February, 2016.

By: 

District Court Judge – Jim Crockett

DATED this 1 day of February, 2016.

SUBMITTED BY: 

By:

W. CHRIS WICKER  
Nevada State Bar No. 1037  
Woodburn and Wedge

Chris Nielsen, Esq.  
Nevada Bar No. 8206  
Public Employees  
Retirement System  
of Nevada

Attorneys for Defendant  
Public Employees Retirement  
System of Nevada

DATED this 20 day of February, 2016.

APPROVED AS TO FORM:

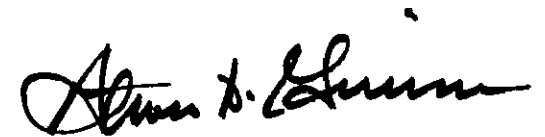
By: 

KELLY B. STOUT  
Nevada State Bar No. 12105  
Bailey Kennedy

Dennis L. Kennedy  
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Bailey Kennedy

Mark Hesiak  
Nevada State Bar No. 12397

Attorneys for Plaintiffs  
Shae E. Gitter and Jared Shafer,  
as Special Administrator of the Estate of  
Kristine Jo Freshman



CLERK OF THE COURT

**NOTC**

W. CHRIS WICKER  
Nevada State Bar No. 1037  
Woodburn and Wedge  
6100 Neil Road, Suite 500  
Reno, NV 89511  
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Telephone: (775) 687-4200

*Attorneys for the Public Employees'  
Retirement System of Nevada*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Case No. A-14-697642-C

Dept. No. XXIV

Plaintiffs,

vs.

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

**NOTICE OF ENTRY OF  
ORDER**

Defendant.

TO: Plaintiffs, SHAE E. GITTER, an individual, and JARED, SHAFER, as Special  
Administrator of the Estate of Kristine Jo Freshman, and their counsel of record:

PLEASE TAKE NOTICE that on the 10<sup>th</sup> day of February, 2016, the above-entitled  
Court entered the Order Granting Defendant's Motion to Retax Costs, attached hereto as  
Exhibit "1."

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

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

DATED this 10<sup>th</sup> day of February, 2016.

WOODBURN AND WEDGE

By: /s/ W. Chris Wicker  
W. Chris Wicker, Esq.  
Nevada Bar No. 1037

Chris Nielsen, Esq.  
Nevada Bar No. 8206  
PUBLIC EMPLOYEES RETIREMENT  
SYSTEM

Attorneys for Public Employees'  
Retirement System of Nevada

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**CERTIFICATE OF SERVICE**

I certify that I am an employee of Woodburn and Wedge, and that on this 10<sup>th</sup> day of February, 2016, I caused to be sent via electronic mail, through the Court’s filing system, a true and correct copy of the foregoing NOTICE OF ENTRY OF ORDER, addressed as follows

Dennis L. Kennedy  
Kelly B. Stout  
Bailey Kennedy  
8984 Spanish Ridge Avenue  
Las Vegas, NV 89148  
  
Chris Nielsen, Esq.  
PUBLIC EMPLOYEES RETIREMENT SYSTEM  
693 W. Nye Lane  
Carson City, NV 89703

By: /s/ Kelly N. Weaver  
Kelly N. Weaver

**EXHIBIT TO NOTICE OF ENTRY OF ORDER**

Exhibit 1:      Order Granting Defendant's Motion to Retax Costs, February 10, 2016.

## EXHIBIT 1

## EXHIBIT 1

1 **ORDR**

2 W. CHRIS WICKER

3 Nevada State Bar No. 1037

4 Woodburn and Wedge

5 6100 Neil Road, Suite 500

6 Reno, NV 89511

7 Telephone: (775) 688-3000

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15 *Attorneys for the Public Employees'*

16 *Retirement System of Nevada*

17 **DISTRICT COURT**

18 **CLARK COUNTY, NEVADA**

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

Case No. A-14-697642-C

Dept. No. ~~XXI~~ 24

22 Plaintiffs,

23 vs.

24 PUBLIC EMPLOYEES RETIREMENT  
25 SYSTEM OF NEVADA, a public entity and  
26 Component unit of the State of Nevada,

27 Defendant.

28 **ORDER GRANTING MOTION TO RETAX COSTS**

(Hearing Date: 01/19/2016 - Hearing Time: 9:00 a.m.)

On January 19, 2016, Defendant, PUBLIC EMPLOYEES RETIREMENT SYSTEM OF NEVADA's ("PERS"), Motion to Retax Costs came before the Court. PERS was represented by W. Chris Wicker of Woodburn and Wedge and Chris Nielson General Counsel

1 for PERS. Plaintiffs, SHAE E. GITTER, an individual, and JARED SHAFER, as Special  
2 Administrator of the Estate of Kristine Jo Freshman ("Gitter"), were represented by Dennis  
3 Kennedy and Kelly Stout of Bailey Kennedy.

#### 4 FINDINGS OF FACT

5 1. Gitter's Memorandum of Costs was filed on October 23, 2015. Pursuant to NRS  
6 18.005(5), Gitter requested costs for expert witness fees in the amount of \$5,000.

7 2. Exhibit 26 of the Memorandum of Costs was presented as the backup for  
8 Gitter's request, which included an invoice from financial consultant, JW Advisors, in the  
9 amount of \$5,535, with time entries. Also included was the Curriculum Vitae of Kirk Jacobson.

10 3. It was reasonable for Gitter to retain a financial consultant to review amounts  
11 calculated by PERS and calculate interest amounts. JW Advisors were qualified for the work  
12 they did.

13 4. JW Advisors were not disclosed as expert witnesses, did not present any  
14 testimony, did not present any reports or affidavits and were not deposed.

#### 15 CONCLUSIONS OF LAW

16 1. The Nevada Supreme Court in *Bergmann v. Boyce*, 109 Nev. 670, 856 P.2d 560  
17 (1993) was not clear whether expert witness fees in excess of \$1,500 can be recovered if the  
18 witness did not testify at trial as the Supreme Court did not differentiate between expert and  
19 non-expert witness fees.

20 2. Gitter's financial consultant did not testify at trial, present affidavits or reports  
21 and was not deposed so the factors described in *Frazier v. Drake*, 131 Nev. Adv. Op. 64, 357,  
22 P.3d 365 (Nev. App. 2015) to evaluate costs in excess of \$1,500 cannot be evaluated.

23 3. Gitter was not required to establish the expertise of any staff at JW Advisors  
24 working under Mr. Jacobson.

25 4. Even though Gitter's expert was not disclosed, did not present reports or  
26 affidavits and was not deposed, Gitter is entitled to recover \$1,500 in expert fees.

27 5. Pursuant to NRS 18.005(5), Gitter is not entitled to recover more than \$1,500 in  
28 expert fees.

**ORDER****IT IS HEREBY ORDERED:**

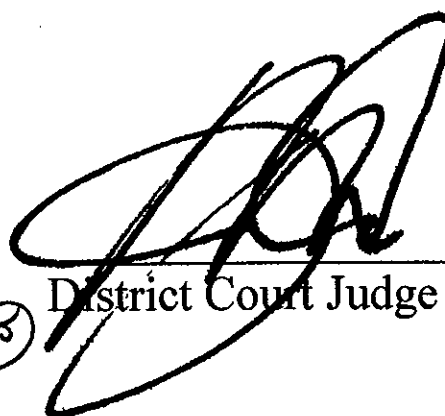
1. PERS' Motion to Retax is granted in part by limiting expert witness costs to \$1,500.
2. Gitter's cost recovery shall be reduced by the amount of \$3,500.

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

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

DATED this 5 day of February, 2016.

By:

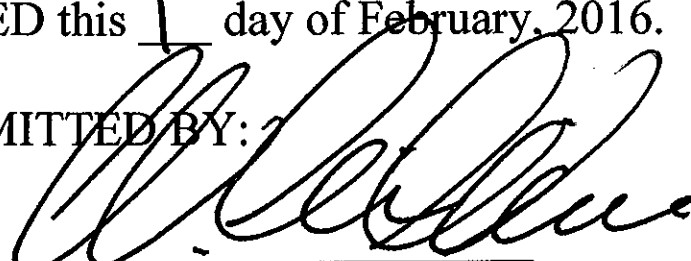


District Court Judge – Jim Crockett

DATED this 1 day of February, 2016.

SUBMITTED BY:

By:



W. CHRIS WICKER  
 Nevada State Bar No. 1037  
 Woodburn and Wedge

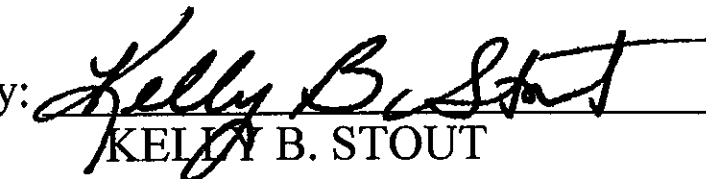
Chris Nielsen, Esq.  
 Nevada Bar No. 8206  
 Public Employees  
 Retirement System  
 of Nevada

Attorneys for Defendant  
 Public Employees Retirement  
 System of Nevada

DATED this 20 day of February, 2016.

APPROVED AS TO FORM:

By:



KELLY B. STOUT  
 Nevada State Bar No. 12105  
 Bailey Kennedy

Dennis L. Kennedy  
 Nevada State Bar No. 1462  
 Bailey Kennedy

Mark Hesiak  
 Nevada State Bar No. 12397

Attorneys for Plaintiffs  
 Shae E. Gitter and Jared Shafer,  
 as Special Administrator of the Estate of  
 Kristine Jo Freshman