

IN THE SUPREME COURT OF THE STATE OF NEVADA

PUBLIC EMPLOYEES
RETIREMENT SYSTEM, a public
agency, a public entity and component
of the State of Nevada,
Appellant,

vs.

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

W. CHRIS WICKER;
WOODBURN AND WEDGE,
Petitioners,
vs.

THE EIGHTH JUDICIAL
DISTRICT COURT FOR THE
STATE OF NEVADA, IN AND
FOR THE COUNTY OF CLARK,
AND THE HONORABLE JIM
CROCKETT,
Respondents,

SHAE E. GITTER; JARED
SHAFER,
Real Parties in Interest.

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Case No. A697642

No. 69961

Original Proceeding from the
Eighth Judicial
District Court, Clark County,
Case No. A697642

**APPELLANT'S PUBLIC EMPLOYEES RETIREMENT
SYSTEM'S OPENING BRIEF**

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NRAP 26.1 DISCLOSURE STATEMENT

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

Appellant's counsel, Woodburn and Wedge, is a professional corporation organized under the laws of the State of Nevada.

Appellant's co-counsel is the general counsel for Appellant.

Dated this 3rd day of June, 2016.

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TABLE OF CONTENTS

I. JURISDICTIONAL STATEMENT	1
II. ROUTING STATEMENT	1
III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	1
IV. STATEMENT OF THE CASE	2
V. SUMMARY OF ARGUMENT	4
VI. STANDARDS OF REVIEW	7
VII. STATEMENT OF THE FACTS	9
A. Pre-Litigation	9
B. Summary Judgment Order	11
C. Request for Attorney's Fees	13
D. Order Granting Attorney's Fees	19
VIII. ARGUMENT	21
A. Gitter Is Not An Eligible Survivor Beneficiary Under the PERS Act.	21
1. <i>NRS 286.6767 Does Not Apply to Members Who are Married at the Time of Their Death.</i>	24
2. <i>Nevada's Slayer Statute Does Not Affect Gitter's Eligibility as Survivor Beneficiary.</i>	24
3. <i>PERS interpretation of the PERS Act is entitled to deference.</i>	26
B. The Slayer Statute Is Not Applicable.	27
C. No Prejudgment Interest Should Have Been Awarded.	29
1. <i>PERS Has No Obligation to Pay Pre-Judgment or Post-Judgment Interest, as the PERS Statutes do not Provide for the Payment of Interest.</i>	30
2. <i>NRS 99.040(1)(a) is Not Applicable to This Case.</i>	32
3. <i>Assuming an Award of Interest Was Warranted Such Award Must Be Limited to the Interest Provided For By NRS 17.130.</i>	33
D. The Trial Court Abused Its Discretion and Erred as a Matter of Law in Awarding Attorney's Fees Under 18.010(2)(b).	34
E. The Trial Court Abused its Discretion by Awarding Attorney's Fees Under NRS 7.085.	40
F. The Trial Court Abused its Discretion by Awarding Attorney's Fees Not Supported by <i>Brunzell</i> Factors.	42
1. <i>The Trial Court Abused its Discretion by Awarding Fees Billed by Attorneys and Paralegals Which Were Not Supported by Substantial Evidence.</i>	44
G. The Trial Court Erred By Awarding Expert Witness Fees.	46
IX. CONCLUSION	47
VII. ATTORNEY CERTIFICATE	48

TABLE OF AUTHORITIES

Cases

<i>Allianz Ins. Co. v. Gagnon</i> , 109 Nev. 990, 995, 860 P.2d 720, 724 (1993); 18.010(2)(b).....	34
<i>Anvui, LLC v. G.L. Dragon, LLC</i> , 123 Nev. 212, 215, 163 P.3d 405, 407 (2007)....	7
<i>Baldonado v. Wynn Las Vegas, LLC</i> , 124 Nev. 951, 967-68, 194 P.3d 96, 106-07 (2008)	35
<i>Beazer Homes Nevada, Inc. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark</i> , 120 Nev. 575, 579, 97 P.3d 1132, 1135 (2004)	8
<i>Bergmann v. Boyce</i> , 109 Nev. 670, 676, 856 P.2d 560, 564 (1993)	41, 47
<i>Birth Mother v. Adoptive Parents</i> , 118 Nev. 972, 974, 59 P.3d 1233, 1235 (2002) 7, 8	
<i>Brunzell v. Golden Gate Nat. Bank</i> , 85 Nev. 345, 349, 455 P.2d 31, 33 (1969)....	42, 43, 44, 46
<i>Butler v. Bogdanovich</i> , 101 Nev. 449, 451, 705 P.2d 662, 663 (1985).....	7
<i>Centex Corp. v. United States</i> , 486 F.3d 1369, 1372 (Fed. Cir. 2007).....	42
<i>Christiansburg Garment Co. v. EEOC</i> , 434 U.S. 412, 421, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978)	41
<i>City of Boulder City v. General Sales Drivers</i> , 101 Nev. 117, 118-19, 694 P.2d 498, 500 (1985)	25, 37
<i>City of Reno v. Reno Gazette-Journal</i> , 119 Nev. 55, 60, 63 P.3d 1147, 1150 (2003)	25, 37
<i>Frank Settelmeier & Sons, Inc. v. Smith & Harmer, Ltd.</i> , 124 Nev. 1206, 1215, 197 P.3d 1051, 1057 (2008).....	8
<i>Frazier v. Drake</i> , 131 Nev. Adv. Op. 64, 357 P.3d 365, 374 n. 12 (2015)	47
<i>Grynberg v. Praxair, Inc.</i> , 389 F.3d 1038, 1058 (10th Cir. 2004)	41

<i>In re Estate & Living Trust of Miller</i> , 125 Nev. 550, 552-53, 216 P.3d 239, 241 (2009)	8
<i>Kahn v. Morse & Mowbray</i> , 121 Nev. 464, 479, 117 P.3d 227, 238 (2005)	35
<i>LVMPD v. Yeghiazarian</i> , 129 Nev. Adv. Op. 81, 312 P.3d 503, 510 (2013)	43
<i>Martin v. Arkansas Blue Cross & Blue Shield</i> , 299 F.3d 966, 971 (8th Cir. 2002)	42
<i>Mays v. Todaro</i> , 97 Nev. 195, 199, 621 P.2d 260, 263 (1981)	47
<i>McKay v. Bd. of Sup'rs of Carson City</i> , 102 Nev. 644, 650, 730 P.2d 438, 443 (1986)	24
<i>Meridian Gold Co. v. State ex rel. Department of Taxation</i> , 81 P.3d 516, 520, 119 Nev. 630, 637 (Nev. 2003)	26
<i>Miller v. Wilfong</i> , 121 Nev. 619, 623-24, 119 P.3d 727, 730 (2005)	43
<i>Mulder v. State</i> , 116 Nev. 13, 992 P.2d 845, 852 (2000)	47
<i>Nevada PERS v. Smith</i> , 129 Nev. Adv. Op. 65, 310 P.3d 560, 565 (2013)	26
<i>Nicholas v. State</i> , 116 Nev. 40, 992 P.2d 262 (2000)	32
<i>Paramount Ins. V. Rayson & Smitley</i> , 86 Nev. 644, 649, 472 P.2d 530, 533 (1970)	26
<i>Rodgers v. Rodgers</i> , 110 Nev. 1370, 1373, 887 P.2d 269, 271 (1994)	25
<i>Rodriguez v. Primadonna Co.</i> , 125 Nev. 578, 588, 216 P.3d 793, 800 (2009)	34
<i>Shuette v. Beazer Homes Holdings Corp</i> , 121 Nev. 837, 865, 124 P.3d 530, 549 (2005)	43
<i>Simonian v. Univ. & Cmty. Coll. Sys.</i> , 122 Nev. 187, 128 P.3d 1057, 1063 (2006)	34
<i>Townsend v. Holman Consulting Corp</i> , 929 F.2d 1358, 1362 (9 th Cir. 1990)	41
<i>Trident Const. Corp. v. W. Elec., Inc.</i> , 105 Nev. 423, 429, 776 P.2d 1239, 1243 (1989)	35
<i>Wood v. Safeway, Inc.</i> , 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)	7

<i>Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc</i> , 313 F.3d 385, 390-91 (7th Cir. 2002).....	42
---	----

Statutes

NRS 17.130.....	2, 6, 29, 30, 33, 34
NRS 17.130(2)	34
NRS 18.005(5)	47
NRS 18.010.....	35, 40
NRS 18.010(2)(b).....	13, 19, 34
NRS Chapter 41B.....	2, 12, 25, 27, 28, 36, 37, 38, 39
NRS 41B.010	5, 27
NRS 41B.090(9)(a)	29
NRS 41B.200	24, 27, 36
NRS 41B.200(1).....	27, 37
NRS 41B.310	12, 29
NRS 41B.310(3).....	28, 29
NRS 99.040(1)(a).....	3, 6, 29, 30, 32, 33
NRS 99.040(1)(c).....	29
NRS 228.110(1)	38
NRS 228.125	38
NRS 228.130.....	38
NRS 228.150.....	38
Chapter 286.....	1, 3, 7, 15 16, 21 24, 25, 31, 36
NRS 286.015	22
NRS 286.015(1)(a).....	21
NRS 286.015(1)(c).....	21
NRS 286.110.....	10
NRS 286.110(3)	11

NRS 286.117	10, 11, 14
NRS 286.220	21
NRS 286.220(2)	30
NRS 286.220(4)	31
NRS 286.410	21
NRS 286.462	21
NRS 286.510	22
NRS 286.676	10, 22
NRS 286.6766	10, 22
NRS 286.669	36, 37, 39
NRS 286.671	13, 21, 22
NRS 286.673	22
NRS 286.674	10, 22
NRS 286.6767	12, 13, 14, 15, 23, 24, 26, 28, 29, 36
NRS 286.6767(1)	10, 16, 23, 24, 35
NRS 286.67675	22, 23
NRS 286.6768	22, 23
NRS 286.67685	22, 23
NRS 286.679	13, 21
NRS 286.6769	13, 28
NRS 286.680	21

Rules

NRAP 3A(b)(1)	1
NRAP 3A(b)(8)	1
NRAP 17(b)	1
NRAP 28(e)(1)	49
NRAP 32(a)(4)	48

NRAP 32(a)(5).....	48
NRAP 32(a)(6).....	48
NRAP 32(a)(7).....	48
NRAP 32(a)(7)(C).....	49
NRCP 11	41
NRCP 56(a).....	7

I. JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction pursuant to NRAP 3A(b)(1) and (8) as this is a consolidated appeal of a final judgment and special order entered after final judgment. The Notice of Entry of the Motion for Prejudgment and Post Judgment Interest and Final Judgment was served and filed on October 16, 2015, and a Notice of Appeal was served and filed on November 13, 2015. The Notice of Entry of Order Granting Attorney's Fees was served and filed on February 9, 2016, and the Notice of Appeal was served and filed on March 8, 2016. The Notice of Entry of Order Granting Motion to Retax Costs was served and filed on February 10, 2016, and the Notice of Appeal was served and filed on March 8, 2016. A Petition for Writ of Mandamus was served and filed on March 15, 2016.

II. ROUTING STATEMENT

This matter is not one presumptively assigned to the Court of Appeals pursuant to NRAP 17(b). This is a matter of statewide public importance because it affects how PERS is to interpret NRS Chapter 286 and whether statutes outside of Chapter 286 may be used to broaden eligibility for PERS benefits.

Additionally, important issues regarding the breadth of statutory liability for attorney's fees is at issue in this case.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Were Respondents Shae E. Gitter and Jared Shaffer, as Special

Administrator of the Estate of Kristine Jo Freshman (hereinafter collectively referred to as “Gitter”) entitled to survivor beneficiary benefits?

2. Is the Slayer Statute (NRS 41B, *et seq.*) applicable to determine Gitter’s eligibility for PERS survivor beneficiary benefits?

3. Should prejudgment interest have been awarded against PERS?

4. If prejudgment interest may be awarded against PERS, should it have been calculated pursuant to NRS 17.130?

5. Did the trial court abuse its discretion and err as a matter of law by awarding attorney’s fees to Gitter against PERS and its counsel, W. Chris Wicker and Woodburn and Wedge?¹

6. Did the trial court err by awarding expert witness fees for a non-disclosed consultant?

IV. STATEMENT OF THE CASE

Kristine Jo Freshman was a PERS member. She designated her adult daughter Shae E. Gitter (“Ms. Gitter”) as her survivor beneficiary. Walter E. Freshman, Ms. Freshman’s spouse, murdered Ms. Freshman, and was convicted of the murder on November 30, 2010. APP46.

¹ The issue of whether the trial court abused its discretion by awarding attorney’s fees to Gitter against PERS’ counsel has been addressed in PERS’ counsel’s Petition for Writ of Mandamus.

Ms. Gitter applied for survivor beneficiary benefits. She was advised by PERS and the Attorney General's office that since the member, Ms. Freshman, was married at the time of her death, under the PERS Act (NRS Chapter 286) survivor beneficiary designations were ineffectual. Therefore Ms. Gitter was not eligible to receive survivor beneficiary benefits. Gitter filed her case in the Eighth Judicial Trial court for Clark County, claiming that she was entitled to payment of survivor beneficiary payments.

Gitter filed a Motion for Partial Summary Judgment and PERS filed a Motion for Summary Judgment in Department XVIII. A hearing was held on December 2, 2014, and the trial court granted the Gitter Motion for Partial Summary Judgment for Declaratory Relief and denied PERS' Motion for Summary Judgment. PERS and Gitter stipulated to the amounts due pursuant to the trial court's order. Gitter filed a Motion for Prejudgment Interest and Post-Judgment Interest on July 31, 2015, which was opposed by PERS. A hearing was held on September 1, 2015, and the trial court granted prejudgment interest pursuant to NRS 99.040(1)(a) at 12%, the legal rate in existence in 1986, when Ms. Freshman's employment commenced. The trial court's Order Granting Gitters' Motion for Pre-Judgment and Post-Judgment Interest and Final Judgment was entered on October 16, 2015.

This case was transferred to Department XXIV on January 5, 2015. Gitter filed a Memorandum of Costs. PERS filed a Motion to Retax Costs on October 29, 2015, asserting Gitter was not entitled to an award of any expert witness fees. Gitter also filed a Motion for an Award of Attorney's Fees on November 9, 2015. The trial court held a hearing for both motions on January 19, 2016. The trial court partially granted PERS' Motion to Retax Costs reducing the amount of expert fees. The trial court awarded Gitter their attorney's fees, entering an award jointly and severally against PERS and its counsel. The trial court's orders were entered on February 9, 2016, and February 10, 2016. PERS now appeals the trial court's entry of partial summary judgment and final judgment in Gitter's favor, denial of PERS' Motion for Summary Judgment, the award of prejudgment interest, award of expert witness fees and award of attorney's fees.

PERS counsel, W. Chris Wicker and Woodburn and Wedge, filed a Petition for Writ of Mandamus ("Petition") on March 15, 2016, challenging the attorney's fee award against PERS' counsel. The three matters were consolidated on April 16, 2016. The Appendix filed with the Petition is the Appendix referred to herein.

V. SUMMARY OF ARGUMENT

PERS is only authorized to pay those benefits expressly provided by the legislature as codified in the PERS Act. Under the PERS Act, a member may

designate a survivor beneficiary to receive benefits in the event the member is unmarried at the time of the member's death. Kristine Jo Freshman designated Shae Gitter as her survivor beneficiary. However, Ms. Freshman was married at the time of her death, when Ms. Freshman was murdered by her spouse, Mr. Freshman. Mr. Freshman became ineligible to receive spousal benefits under the PERS Act because he murdered Ms. Freshman. Because Ms. Freshman was married at the time of her death, Ms. Gitter was not entitled to survivor beneficiary benefits.

The Slayer Statute, NRS 41B.010, et seq. generally prohibits a person convicted of murdering another from benefiting from the death of the victim. The Slayer Statute applies to any interest that devolves to a killer as a result of the death of the victim. However, the Slayer Statute does not apply to Mr. Freshman or this case because no interest devolved to him from PERS. Instead, the PERS Act precluded any PERS interest from flowing to him.

Accordingly, the trial court erred by failing to apply all of the applicable provisions of the PERS Act and by applying instead the Slayer Statute so as to presume the killer predeceased Ms. Freshman, and ordered that Ms. Gitter was eligible to receive survivor beneficiary benefits. In sum, the trial court rendered PERS' Slayer Statute (NRS 286.669) to be meaningless, and erroneously found the Slayer Statute applied to the interest claimed by Ms. Gitter.

There is nothing in the PERS Act that allows a court to order PERS to pay prejudgment interest out of the PERS' trust fund and it was error to order it. However, if PERS may be ordered to pay prejudgment interest, the trial court erred by applying NRS 99.040(1)(a) to determine the interest rate. That rate only applies to obligations arising out of contracts. The trial court granted partial summary judgment for declaratory relief based on the statutes and did not base the judgment on Gitter's contract claim. In the prejudgment interest order, the trial court found there was an employment contract between Ms. Freshman and her public employer. There was no finding that Gitter or PERS were parties to any contract. Even if Ms. Freshman's right to be eligible to participate in PERS is part of her contract with the public employer, Ms. Gitter's right, if any, to survivor beneficiary benefits is based on statutes and not a contract. Therefore, it was error to apply NRS 99.040(1)(a). If Ms. Gitter is entitled to prejudgment interest, which PERS denies, it would be pursuant to NRS 17.130.

The trial court abused its discretion in ordering PERS to pay Gitter's attorney's fees. There was no evidence at all that PERS' defense was brought without reasonable grounds or to harass Gitter. In fact, the only reason for PERS not to pay is that the payment was precluded by law. PERS staff made the determination in consultation with the Attorney General's office, and the Attorney General's office, concurred with the decision. Trial counsel also agreed

with the analysis. As described herein, PERS' decision was made on the express language of the PERS Act, a reasonable basis for PERS to determine that the benefits claimed by Gitter was not authorized by NRS Chapter 286.

Finally, the trial court erred by awarding expert witness fees for a consultant who had never been disclosed, never submitted a report, and never testified.

VI. STANDARDS OF REVIEW

A motion for summary judgment may be granted only where no issues of material fact remain and the moving party is entitled to judgment as a matter of law. NRCp 56(a); *Butler v. Bogdanovich*, 101 Nev. 449, 451, 705 P.2d 662, 663 (1985). Accordingly, on appeal, orders granting summary judgment are reviewed de novo “to determine whether the evidence properly before the trial court demonstrate[s] that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.” *Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 215, 163 P.3d 405, 407 (2007) (quoting *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)) (internal quotations omitted). Here, the trial court’s decision to grant Gitter’s Motion for Partial Summary Judgment and to deny PERS’ Motion for Summary Judgment is subject to de novo review.

Similarly, this Court reviews questions of law de novo. *Birth Mother v. Adoptive Parents*, 118 Nev. 972, 974, 59 P.3d 1233, 1235 (2002). For example, statutory interpretation is a question of law that this Court reviews de novo. *Id.*; *Beazer Homes Nevada, Inc. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 120 Nev. 575, 579, 97 P.3d 1132, 1135 (2004). An award of fees and costs is generally reviewed for abuse of discretion. *Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd.*, 124 Nev. 1206, 1215, 197 P.3d 1051, 1057 (2008). However, when eligibility for fees or costs involve purely legal questions or questions of statutory construction, a question of law is presented and subject to de novo review. *Id.*; *In re Estate & Living Trust of Miller*, 125 Nev. 550, 552-53, 216 P.3d 239, 241 (2009). In this case, no evidence was presented that PERS intended to harass Gitter or that PERS acted in bad faith. The trial court's decision was solely based on the merits of the defense presented by PERS. The merits of the defense were based on statutes. Therefore, this Court should review the attorney's fee award de novo.

A review of whether Gitter was entitled to prejudgment interest, and whether the expert witness fees were compensable, are questions of law subject to statutory construction by this Court. Accordingly, the issues of whether the trial court erred in awarding prejudgment interest and Gitter's expert witness fees are subject to de novo review.

VII. STATEMENT OF THE FACTS

A. Pre-Litigation

Ms. Freshman was an employee of the Clark County School District, and a member of PERS. APP1, p. 166. In August 2007, Ms. Freshman completed a Survivor Beneficiary Designation, identifying Ms. Gitter as Ms. Freshman's survivor beneficiary. APP1, p. 166. On December 6, 2009, while employed by the Clark County School District, Ms. Freshman was killed by her husband Mr. Freshman. APP1, p. 166. Ms. Freshman was survived by her daughter, Ms. Gitter. On December 17, 2009, PERS sent Ms. Gitter a letter, informing her that an audit of Ms. Freshman's account revealed benefits may be available. APP3, p. 547. The following month, Ms. Gitter received another letter from PERS explaining that she may be entitled to survivor beneficiary benefits based on Ms. Freshman's PERS membership. APP3, p. 549.

On September 10, 2010, Mr. Freshman pleaded guilty to second-degree murder for killing his wife, Ms. Freshman and was convicted on November 30, 2010. APP1, p. 46; APP1, p. 166. On or about April 25, 2011, Ms. Gitter submitted an Application for survivor beneficiary benefits to PERS. APP1, p. 166. On June 10, 2011, PERS provided Ms. Gitter with a letter stating that under PERS statutes, when a member is married at the time of death, only the member's spouse and minor children are eligible to receive benefits. APP3, p. 551. PERS

relied on statutes providing that in the event of the death of a currently employed PERS member who has a spouse, the spouse is entitled to specified benefits earned by that member. NRS 286.674, 286.676, 286.6766. PERS statutes also provide that members may designate in writing a survivor beneficiary and additional payees. NRS 286.6767(1). However, payments can only be made to a survivor beneficiary “if the member is unmarried on the date of the member’s death.” NRS 286.6767(1). Accordingly, PERS determined that under the PERS Act, Ms. Gitter was not entitled to survivor beneficiary benefits because Ms. Freshman was married at the time of her death, and Ms. Gitter was not a minor child at that time. APP3, p. 551.

Ms. Gitter, through her newly retained counsel, Bailey Kennedy, contacted the Office of the Attorney General in May 2012, requesting documents related to Ms. Freshman’s PERS account and membership. APP3, pp. 557-558. Deputy Attorney General, Kimberly A. Okezie, responded, reiterating that under the PERS Act, Ms. Gitter was not entitled to the payment of benefits, and explaining that information regarding Ms. Freshman’s estate was confidential pursuant to NRS 286.110 and NRS 286.117. APP3, pp. 553-554. In pertinent part NRS 286.110(3) states, “The official correspondence and records, other than the files of individual members or retired employees...are public records and are available for public inspection.” Emphasis added. NRS 286.117 further provides:

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

Having determined that Ms. Gitter was not entitled to survivor beneficiary benefits, it followed that under NRS 286.110(3) and NRS 286.117 Ms. Gitter also was not entitled to Ms. Freshman's confidential PERS member records. APP4, p. 590. Under those circumstances, PERS was statutorily prohibited from disclosing Ms. Freshman's PERS account information absent a court order. APP4, p. 590. Gitter petitioned the probate court for an order instructing PERS to provide copies of Ms. Freshman's PERS documents. APP1, p. 183. Upon entry of that court's order PERS promptly complied and provided Gitter with the requested information. APP4, p. 590.

B. Summary Judgment Order

On March 13, 2014, Gitter filed a Complaint in the Eighth Judicial Trial court. APP1, p. 183. On July 15, 2014, the Parties appeared before Discovery Commissioner Bulla. APP1, p. 183. The Parties agreed to a shortened discovery period and any early deadline for filing dispositive motions given the absence of disputed facts and the largely legal nature of the case. APP1, p. 183.

On October 27, 2014, Gitter filed a Motion for Partial Summary Judgment and PERS filed a Motion for Summary Judgment. APP1, pp. 30-129; 184. Gitter argued that section 41B.310 of the Slayer Statute required PERS to treat Mr. Freshman as having predeceased Ms. Freshman for the purpose of determining whether Ms. Gitter was entitled to survivor beneficiary benefits. APP1, pp. 53-55, at ¶¶ 10:12-12:2. Gitter then argued that if Mr. Freshman was considered to have predeceased Ms. Freshman, Ms. Freshman was unmarried on the date of her death, and Gitter would be a survivor beneficiary entitled to benefits. APP1, pp. 53-55, at 10:12-12:2. PERS, consistent with its previous correspondence to Gitter, maintained that the PERS Act precluded the payment of benefits to Gitter as a survivor beneficiary because Ms. Freshman was married at the time of her death. APP1, pp. 38-40, at 9:1-11:26. PERS further asserted the Slayer Statute was not applicable to determine PERS benefits because Mr. Freshman was not entitled to any interest from PERS. APP1, p. 39, at 10:8-16.

The trial court heard oral argument on the summary judgment motions on December 2, 2014, and concluded that “NRS Chapter 41B Slayer Statute applies to PERS benefits for survivors of a deceased PERS member, including, but not limited to, Spousal Benefits and benefits for a survivor beneficiary pursuant to NRS 286.6767.” APP1, p. 169, at ¶ 31. In granting Gitter’s claim for declaratory relief, the Court further found that “[p]ursuant to NRS 41B.310(3), Mr. Freshman

is deemed to have predeceased Kristine Jo Freshman for the purposes of determining entitlement to PERS benefits for survivors as set forth in NRS 286.671 – 286.679, inclusive,” and that PERS must “treat Kristine Jo Freshman as being unmarried at the time of her death for the purpose of determining entitlement to PERS benefits for survivors.” APP1, p. 169, at ¶¶ 32-33. Based on its findings, the trial court held that Gitter was “the sole survivor beneficiary of Kristine Jo Freshman, [and] is entitled to survivor beneficiary benefits as set forth in NRS 286.6767 – NRS 286.6769, inclusive.” APP1, p. 170, at 6:15-16. Upon entry of summary judgment in Gitter’s favor, the parties stipulated to the amount of back PERS benefits in light of the trial court’s Order. APP3, p. 438, at ¶ 18. In essence, Gitter’s interpretation would render PERS “slayer” statute meaningless.

C. Request for Attorney’s Fees

On November 11, 2015, Gitter filed their Motion for Attorney’s Fees. APP3, pp. 348-515. Gitter based her motion on NRS 7.085 and NRS 18.010(2)(b), alleging that PERS and its legal counsel, Mr. Wicker and Woodburn and Wedge, should be ordered to pay Gitters’ attorney’s fees for maintaining frivolous defenses without reasonable grounds. APP3, pp. 355-356. In total, Gitter sought recovery of \$96,272.50 in attorney’s fees representing 422.75 hours billed by Bailey Kennedy. APP3, pp. 355-357.

The trial court heard Gitters' Motion for Attorney's Fees on January 19, 2016. APP4, pp. 579-624. At the hearing, prior to the Parties arguing the issue, the trial court expressed his conclusion "that PERS at all times was acting unreasonably vexatiously and doing everything it could procedurally and legally to throw bricks into the path of the Gitter." APP4, p. 587, at 9:13-20. The judge stated his belief that "it was unconscionable that PERS tried so aggressively to retain these funds, and not pay them to the Plaintiff." APP4, pp. 587-588, at 9:24-10:3.

PERS explained that "PERS made the determination initially that no funds were due by reason of the statute," (APP4, p. 588, at 10:18-22) and that decision "was upheld by the Attorney General's Office, who was initially appearing in this matter in their correspondence with Gitter," and concurred that PERS' application of the law was correct. APP4, pp. 588-589, at 10:23-11:5.

PERS further explained the PERS' reasoning for initially retaining Ms. Freshman's PERS file, stating that under NRS 286.117, there is "a limited number of parties that can obtain a confidential file," (APP4, p. 590, at 12:3-6) and that those authorized to receive a file are limited to a member, a spouse, a beneficiary receiving payments, or someone authorized by court order. APP4, pp. 590-591, at 12:22-13:2. Since NRS 286.6767 mandated that Gitter was not a survivor beneficiary benefit, PERS "was prohibited by law from providing the

file of Christine [sic] Freshman until a Court order was obtained.” APP4, p. 590, at 12:7-12. Accordingly, PERS made clear that Gitter was required to obtain a court order allowing PERS to release the file. As soon as a court order was obtained, “PERS did provide the file”. APP4, 590, at 12:7-12.

PERS explained why the law required denial of Gitter’s claim to benefits.

PERS explained:

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

... Under NRS 286.6767, a person only has the status of a survivor beneficiary if the member, meaning Ms. Freshman, her mother, was unmarried on the date of the member’s death. So by reason of that statute, Gitter did not have the status of a survivor beneficiary, because it only applies if the member is unmarried at the date of her death.

APP4, 593, at 15:10-21.

PERS explained that the PERS Act did not allow any interest to devolve to Mr. Freshman because he was convicted of Ms. Freshman’s murder. APP4, pp. 596-597, at 18:23-19:1.

Because Gitter’s argument was that Mr. Freshman should be deemed to have predeceased Ms. Freshman and therefore those survivor beneficiary benefits were owed to Gitter, based on the Slayer Statute, PERS went on to address whether the Slayer Statute was applicable in light of the provisions of Chapter 286. APP4, p. 597. The court interjected, beginning the following discussion:

The Court: Was Gitter a Slayer?

Mr. Wicker: No.

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

Mr. Wicker: That's correct.

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

Mr. Wicker: Well, I am looking at the Slayer Statute because that's the statute that the Gitters' have used successfully thus far to say that Gitter is entitled to a benefit.

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

APP4, pp. 597-598, at 19:15-20:8.

Not understanding that the issue of whether the Slayer Statute applied to PERS was critical to Gitter to avoid application of NRS 286.6767(1), the trial court steered the discussion to public policy considerations:

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

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

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

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

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

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

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

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

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

PERS explained that regardless of sympathetic expectations, PERS is bound by the language of the PERS Act. APP4, p. 600, at 22:14-23. The trial court asserted to PERS' counsel that PERS should have honored the reasonable expectations of its members. PERS responded that if such expectations conflicted with statutory requirement, PERS had a fiduciary duty to obey the statute. APP4, pp. 600-601, at 22:14-23:19. The policy of the legislature as set forth in NRS 286.015 does not agree with the trial court's speculation as to the intent of the legislature.

Later, suggesting that PERS should have found an exception to the provisions of the PERS Act in Ms. Gitter's case, the trial court added:

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

APP4, p. 609, at 31:6-12.

To the court's argument that PERS should have made an exception to the law in Ms. Gitter's case, PERS responded, "Yes, and I think that all I can say in response to that, Your Honor, is that - - I guess repeating myself a little bit - - that PERS has to follow the law as written by the legislature." APP4, p. 602, at 24:9-12.

At the conclusion of the hearing, the court awarded Gitter's attorney's fees in the amount of \$96,272.50 jointly and severally against PERS, W. Chris Wicker and Woodburn and Wedge pursuant to NRS 7.085 and NRS 18.010(2)(b). APP4, pp. 611-612, at 33:24-34:5.

D. Order Granting Attorney's Fees

The trial court's Order Granting Gitter's Motion for Attorney's Fees was filed on February 9, 2016. APP4, pp. 638-642. The court found that "[s]ince Kristine's death, PERS has done everything possible to prevent Shae from collecting survivor beneficiary benefits," and that "[t]hroughout this case, the conduct of PERS and its counsel has been unconscionable." APP4, p. 648, at ¶¶ 17, 19. The court further found that all of PERS' "unconscionable" conduct was committed "with the active assistance of its prior counsel (the Office of the Nevada Attorney General) and/or current counsel (Woodburn & Wedge)." APP4, pp. 648-49, at ¶ 20.

Based on its findings, the trial court concluded that "[f]rom the time of Kristine's death, PERS and its counsel have acted unreasonably and vexatiously in their dealings with Gitter, which has significantly prolonged this case." APP4, p. 649, at ¶ 22. The trial court did not mention the Parties' stipulation to shorten discovery or PERS' stipulation to the amount owed to Gitter following the trial court's order granting summary judgment. Instead, the trial court concluded that

“PERS defense was maintained without reasonable grounds,” and “PERS’ counsel maintained a defense that was not well-grounded in fact or warranted by existing law.” APP4, p. 649, at ¶¶ 23-24. The trial court further held that the arguments raised by PERS as to why benefits were withheld from Gitter “were unsupported by any legal authority, violated established canons of statutory interpretation, and/or were completely devoid of merit.” APP4, p. 649, at ¶ 26.

A review of the entire transcript demonstrates the trial court was unconcerned with the specific application of the relevant statutes, including the Slayer Statute. Rather the trial court awarded fees based on the trial court’s own opinion that legislative intent dictated PERS should have paid Ms. Gitter survivor beneficiary benefits. This is despite the express language of the PERS Act. APP4, pp. 579-624. Although the trial court purported to make findings, the trial court only made conclusory findings and conclusions in support of the award of fees. APP4, pp. 638-642.

Concluding that PERS and its counsel acted in concert at all times, and that the billing rates and number of hours billed were reasonable, the trial court awarded Gitter the entire sum of \$96,272.50 requested by Gitter. APP4, pp. 649-650, at ¶¶ 28-32. Ultimately, the trial court assessed attorney’s fees against PERS and its counsel, W. Chris Wicker and the law firm of Woodburn and Wedge, jointly and severally. APP4, p. 650.

VIII. ARGUMENT

A. Gitter Is Not An Eligible Survivor Beneficiary Under the PERS Act.

The people of Nevada amended the State Constitution to establish the Public Employees Retirement System as a trust, which is governed by the Public Employees' Retirement Board. Nev. Const. art. 9, § 2. PERS is a public agency to provide benefits in order to attract and retain quality employees. NRS 286.015(1)(c). The primary purpose of the PERS Act is to provide a reasonable base income to qualified public employees whose earning capacity has been removed or substantially reduced by age or disability. NRS 286.015(1)(a). PERS is administered pursuant to and governed by the provisions of the PERS Act. NRS Chapter 286, *et seq.* The PERS Act defines who shall be eligible to receive benefit payments from the trust fund and what shall happen to members' contributions if there are no eligible beneficiaries to receive payments. NRS. 286.671-679. PERS administers a trust fund for all PERS members. NRS 286.220. The source of the trust funds are deductions from public employees' salaries, employer contributions and investment earnings. NRS 286.410-462 and NRS 286.680. PERS has a fiduciary obligation to administer the trust fund in accordance with the PERS Act. NRS 286.220. PERS is not designed by the legislature to operate like an insurance policy or act as an asset in a probate proceeding where a contingent beneficiary ultimately ends up with an interest in

property. Its purpose is set forth in NRS 286.015. Ms. Gitter's claimed interest is not even expressly covered by the legislative policy.

The distribution of survivor beneficiary benefits are governed by NRS 286.671, *et seq.* Under the statutory survivor benefit distribution scheme, children under the age of 18, and children under 23 who remain full-time students, may be entitled to benefits following the death of a PERS member. NRS 286.673. The spouse of a deceased PERS member is entitled to receive benefit payments pursuant to NRS 286.674 – 286.6766. The PERS Act has no provision for the payment of benefits to a deceased member's estate. Sometimes application of the PERS Act can lead to harsh results. For example, retiring members can choose reduced retirement benefits to allow a spouse to receive benefits after the retired member's death. However, if the member takes the full retirement, but dies soon after retirement, the spouse may receive nothing or a reduced amount depending on the option picked at the time of retirement. NRS 286.510. This harsh result is because PERS must follow the statutes.

In the event of the death of a currently employed PERS member who has a spouse, the spouse is entitled to specified benefits. *See*, NRS 286.674, 286.676, 286.6766. The PERS member may designate in writing a survivor beneficiary and one or more additional payees to receive payments as specified in NRS 286.67675, 286.6768 or 289.67685. However, the payments can only be made to

the survivor beneficiary “if the member is unmarried on the date of the member’s death.” NRS 286.6767(1). That statute provides:

1. A member may designate, in writing, a survivor beneficiary and one or more additional payees to receive the payments provided pursuant to NRS 286.67675, 286.6768 or 286.67685 if the member is unmarried on the date of the member’s death.
2. A designation pursuant to subsection 1 must be made on a form approved by the Executive Officer. If a member has designated one or more payees in addition to the survivor beneficiary, the member must designate the percentage of the payments that the survivor beneficiary and each additional payee is entitled to receive.

NRS 286.6767.

Even though Ms. Gitter was named a survivor beneficiary by Kristine Freshman, PERS is prohibited by law from making payments to Ms. Gitter because Ms. Freshman was married at the time of her death. NRS 286.6767(1).

PERS also is prohibited by law from making payments to Ms. Freshman’s spouse who was convicted of the murder of Ms. Freshman:

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

NRS 286.669.

1. *NRS 286.6767 Does Not Apply to Members Who are Married at the Time of Their Death.*

The leading rule of statutory construction is to ascertain the intent of the legislature in enacting a statute. *McKay v. Bd. of Sup'rs of Carson City*, 102 Nev. 644, 650, 730 P.2d 438, 443 (1986). In ascertaining the intent of the legislature, well established principles of statutory construction dictate that words in a statute are given “their plain meaning unless this violates the spirit of the act.” *Id.* at 648, 730 P.2d at 441. This “plain meaning rule” provides that where “a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature’s intent.” *Id.* In this case the language of NRS 286.6767(1) and 286.669 are clear on their face.

2. *Nevada’s Slayer Statute Does Not Affect Gitter’s Eligibility as Survivor Beneficiary.*

The purpose of the Slayer Statute, enacted by the Nevada legislature in 1999, is to prevent a killer from profiting from his or her wrongful actions. NRS 41B.200. NRS Chapter 286 contains a statute, enacted in 1979, 22 years earlier than the Slayer Statute, which prevents any person convicted of killing a member of PERS from receiving an interest under the PERS Act. NRS 286.669.

When the legislature enacts new legislation, “[i]t is presumed that enacting a statute the legislature acts with full knowledge of existing statutes relating to the same subject.” *City of Boulder City v. General Sales Drivers*, 101 Nev. 117, 118-

19, 694 P.2d 498, 500 (1985). Additionally, “it is an accepted rule of statutory construction that a provision which specifically applies to a given situation will take precedence over one that applies only generally.” *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 60, 63 P.3d 1147, 1150 (2003).

When the 1999 legislature enacted NRS Chapter 41B, it could have repealed NRS 286.669, altered Chapter 286 so its language mirrored that of Chapter 41B, or included a specific reference to PERS in the scope of Chapter 41B. The legislature did not take any of those actions. This fact, coupled with the rule of statutory construction that specific provisions apply over general provisions, leads to the logical conclusion that the legislature intended the provisions of NRS 286.669 and Chapter 286 to govern payment of PERS benefits where a PERS member is murdered by a spouse.

To disregard the specific action required by NRS 286.669 would violate the basic tenets of statutory construction, as well as specific instruction from the legislature. If the language of NRS Chapter 41B is applied, as in this case, the provisions of NRS 286.669 would be rendered meaningless and superfluous. See *Rodgers v. Rodgers*, 110 Nev. 1370, 1373, 887 P.2d 269, 271 (1994) (“[N]o part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly be avoided”) (quoting *Paramount*

Ins. V. Rayson & Smitley, 86 Nev. 644, 649, 472 P.2d 530, 533 (1970) (internal quotations omitted)).

3. *PERS interpretation of the PERS Act is entitled to deference.*

The interpretation of a statute by an agency charged with its interpretation and enforcement is entitled to substantial weight, and courts will generally not depart from such an interpretation unless it is clearly erroneous. “Great deference will be afforded to an administrative body’s interpretation when it is within the statutory language; moreover, the Legislature’s acquiescence in an agency’s reasonable interpretation indicates that the interpretation is consistent with legislative intent.” *Meridian Gold Co. v. State ex rel. Department of Taxation*, 81 P.3d 516, 520, 119 Nev. 630, 637 (Nev. 2003). In this case, PERS must determine how to handle its responsibility only to pay survivor beneficiary benefits allowed by the PERS Act in light of its fiduciary duty to the trust fund as a whole. PERS interpretation is reasonable and should be upheld. *See, Nevada PERS v. Smith*, 129 Nev. Adv. Op. 65, 310 P.3d 560, 565 (2013). Under the applicable law of NRS 286.669, it is clear that Mr. Freshman was not entitled to receive PERS spousal benefits. However, no statute can be used as a basis to then confer survivor beneficiary benefits on Gitter. As described above, the only statute providing that a PERS member may designate survivor beneficiary benefits is NRS 286.6767. That statute specifies that it is only effective if the

member is unmarried at the time of death. Since Ms. Freshman was married at the time of her death, no PERS benefits are payable to her survivor beneficiary as a matter of law. Ms. Freshman was murdered by Mr. Freshman so Mr. Freshman was not entitled to any spousal benefits. The unassailable fact remains that Kristine Freshman was married at the time of her death, and that the PERS benefit distribution statutes do not allow payments of PERS benefits to survivor beneficiaries of an individual who is married at the time of her death.

B. The Slayer Statute Is Not Applicable.

The purpose of the Slayer Statute, NRS 41B.010, *et seq.*, enacted by the Nevada legislature in 1999, is to prevent a killer from profiting from his or her wrongful actions. NRS 41B.200. In pertinent part, that statute provides:

1. Notwithstanding any other provision of law, the provisions of this chapter apply to any appointment, nomination, power, right, property, interest or benefit that accrues or devolves to a killer of a decedent based upon the death of the decedent. If any such appointment, nomination, power, right, property, interest or benefit is not expressly covered by the provisions of this chapter, it must be treated in accordance with the principle that a killer cannot profit or benefit from his or her wrong.
[Emphasis added]

NRS 41B.200(1).

By its clear language, Chapter 41B only applies to an “interest or benefit that accrued...to a killer of a decedent based on the death of the decedent.” NRS 41B.200(1). In this case, Mr. Freshman was not entitled to any interest or benefit

based on his killing of Ms. Freshman. Application of the PERS Act mandates that Mr. Freshman had no interest or benefit from PERS. At this point in time, all benefits, whether to a contingent survivor beneficiary or otherwise, are lost. This is in stark contrast to intestate succession or a 401k plan where a contingent beneficiary may end up with an interest after application of the Slayer Statute.

Also, Gitter is not entitled to any interest based on the death of Ms. Freshman. The survivor beneficiary benefit requested by Gitter is quite different from the benefit a spouse might be entitled to. It is a separately defined benefit with its own rules. It is not a benefit that Mr. Freshman was eligible for or an interest he could have obtained by the death of Ms. Freshman. NRS 286.6767-286.6769. The interest addressed by the Slayer Statute is an interest that might flow to a killer. The survivor beneficiary benefit claimed by Gitter is not one that could have gone to Mr. Freshman. Again, this situation is different from probate, defined contribution pension plans or even insurance policies where an asset may exist and ultimately goes to someone. The survivor beneficiary benefit only exists if the conditions for its existence are met.

Gitter asserts that application of NRS 41B.310(3) requires PERS to deem Ms. Freshman unmarried at the time of her death. APP1, pp. 53-55, at 10:12-12:2. As described above, NRS Chapter 41B is not applicable at all. The statute relied on by Gitter states “If a killer of a decedent forfeits any...interest or benefit

pursuant to this section the provisions of the governing instrument affected by the forfeiture must be treated as if the killer has predeceased the decedent” [Emphasis added]. NRS 41B.310(3). In this case, it has been argued that the PERS Act is a governing instrument as defined in NRS 41B.090(9)(a). However, Mr. Freshman did not forfeit any benefit pursuant to NRS 41B.310. After application of the PERS Act, there was no interest or benefit to forfeit pursuant to 41B.310. In addition, the benefit payable to Mr. Freshman is not a benefit payable to anybody else. It is quite different from someone dying intestate as probated property generally goes to someone else. In these circumstances, the spousal benefit statutorily ends. The survivor beneficiary benefit claimed by Gitter is a separate and distinct benefit from a spousal benefit. The language of 41B.310(3) is directed at the spousal benefit, not any other provisions of the PERS Act such as survivor beneficiary benefits. Therefore, NRS 41B.310(3) is not a basis to ignore 286.6767, thus Gitter is not entitled to survivor beneficiary benefits.

C. No Prejudgment Interest Should Have Been Awarded.

Following the trial court’s granting of Gitter' Motion for Partial Summary Judgment on their Declaratory Relief claim, Gitter moved for an award of pre-judgment interest. APP1, pp. 180-197. Gitter identified three potential statutory bases, NRS 99.040(1)(a), 99.040(1)(c), and 17.130, which they argued gave them an entitlement to pre-judgment and post-judgment interest. APP1, pp. 180-197.

PERS opposed the motion, asserting that Gitter was not entitled to pre-judgment interest under the PERS statutes. APP1, pp. 198-207. However, if Gitter was in fact entitled to pre-judgment interest, PERS argued that pre-judgment interest must be limited to that provided for in NRS 17.130. APP1, pp. 198-207. In its October 16, 2015 Order Granting Gitters' Motion for Pre-Judgment and Post-Judgment Interest and Final Judgment, the trial court awarded Gitter pre-judgment and post-judgment interest pursuant to NRS 99.040(1)(a), applying an interest rate of 12%. APP1, pp. 222-227. The trial court erred both in awarding interest pursuant to NRS 99.040(1)(a) and in ordering that interest be paid at a rate of 12%.

1. *PERS Has No Obligation to Pay Pre-Judgment or Post-Judgment Interest, as the PERS Statutes do not Provide for the Payment of Interest.*

Nevada statutes mandate that the PERS Board create and maintain a fund “established to afford a degree of security to long-time public employees of the State and its political subdivisions.” NRS 286.220(2). Money contributed by and on behalf of PERS members is held in trust for the entire PERS membership. Payments from the trust fund affect the trust res and therefore affect all PERS members. Accordingly, PERS is mandated with safeguarding the trust res for the benefit of all PERS members.

In order to preserve the trust fund, statutory provisions outline how PERS funds may be expended. NRS 286.220(4). Specifically,

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

- (a) Service retirement allowances;
- (b) Disability retirement allowances;
- (c) Postretirement allowances;
- (d) Benefits for survivors;
- (e) Authorized refunds to members and their beneficiaries;
- (f) Amounts equivalent to disability retirement allowances to be used by employers for rehabilitation; and
- (g) Allowances to beneficiaries, and for the payment of expenses authorized by law to be paid from the Fund.

NRS 286.220(4).

The payment of pre-judgment and post-judgment interest from the PERS trust fund is neither anticipated by nor permitted under NRS Chapter 286. The legislature has not authorized interest payments as an acceptable use of PERS funds. If the legislature had intended PERS funds to be available to pay interest, it could have listed interest as an expense payable by PERS under NRS 286.220(4), or elsewhere in Chapter 286.

PERS contributions are set aside specifically to pay retirement allowances and benefits, not to pay interest to a party obtaining those benefits. To allow the expenditure of trust funds for uses not authorized by the PERS statutes would be to deplete the fund, and thereby adversely affect all PERS members, through the

payment of extraneous expenses. Because interest is not identified in the PERS statutory scheme as an expense which may be paid from the PERS trust fund, PERS has a duty not to pay interest, and the trial court erred in ordering that PERS pay interest to Gitter.

2. *NRS 99.040(1)(a) is Not Applicable to This Case.*

NRS 99.040(1)(a) provides for an award of interest “[w]hen there is no express contract writing fixing a different rate of interest...[u]pon contracts, express or implied, other than book accounts.” Gitter argued that NRS 99.040(1)(a) applies because Ms. Freshman’s right to her pension benefits arose out of an employment contract with a public employer. However, PERS was not Ms. Freshman’s employer, nor was PERS contractually connected to Gitter. Furthermore, the obligation of PERS to pay benefits is a purely statutory obligation, not a contractual one. Gitter was not a party to any contract, so Gitter’s right to benefits can only be based on statutes, not any contract.

This Court has previously recognized that the right to participate in PERS is a part of the employment contract between the employee and public employer. *Nicholas v. State*, 116 Nev. 40, 992 P.2d 262 (2000). However, that finding has never been extended to a finding that the determination of eligibility for benefits or the amount of benefits is contractual. Those matters are clearly a matter of interpretation of the PERS Act.

Despite this, the trial court found as a conclusion of law that a claim for PERS benefits is a case “upon a contract”. That is an error of law. Just as PERS cannot be found liable on a breach of contract claim based on a contract entered into between an employer and an employee, interest cannot be assessed against PERS under NRS 99.040(1)(a) based on a contractual relationship to which PERS and Gitter were not parties. Accordingly, even if Gitter was entitled to interest from PERS, because the underlying obligation was not based upon a contract with PERS, NRS 99.040(1)(a) is not applicable to the case at hand, and the trial court erred by awarding interest under that statute.

3. *Assuming an Award of Interest Was Warranted Such Award Must Be Limited to the Interest Provided For By NRS 17.130.*

Where no rate of interest is provided for in a contract or by another law, NRS 17.130 provides for interest from the time of service of the summons and complaint until satisfied. PERS maintains that the legislature has determined that interest is not a payment that can be paid from the trust fund. However, to the extent Gitter may be entitled to an award of interest, any such award is limited to interest available under NRS 17.130. The more applicable rate is set forth in NRS 17.130, which is the prime rate plus 2 percent. The rate in effect on the date proceeding judgment was 5.25%.

Because there is no contract or contractual obligation between Gitter and PERS, the rate provided for under NRS 17.130 must be applied if Ms. Gitter are

entitled to an award of interest. After judgment, under NRS 17.130(2), interest may accrue from the time of judgment until satisfied at the interest rate provided for under NRS 17.130, which has ranged from 5.25% to 5.50%.²

D. The Trial Court Abused Its Discretion and Erred as a Matter of Law in Awarding Attorney’s Fees Under 18.010(2)(b).

In order to punish and deter frivolous or vexatious claims or defenses, a trial court *may* award attorney’s fees under NRS 18.010(2)(b) to a prevailing party when it finds that claims or defenses were “brought without reasonable ground to harass the prevailing party.” *See Rodriguez v. Primadonna Co.*, 125 Nev. 578, 588, 216 P.3d 793, 800 (2009). A frivolous or baseless claim or defense is one that is “[not] well grounded in fact [or is not] warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.” *Simonian v. Univ. & Cmty. Coll. Sys.*, 122 Nev. 187, 128 P.3d 1057, 1063 (2006).

Although the decision to award attorney’s fees under NRS 18.010(2)(b) is within the sound discretion of trial courts, fees should be awarded under 18.010(2)(b) only in “appropriate situations.” *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 995, 860 P.2d 720, 724 (1993); 18.010(2)(b). “Determining whether

² *See* <https://www.washoecourts.com/index.cfm?page=interest> for a list of applicable interest rates under NRS 17.130.

attorney fees should be awarded under NRS 18.010(2)(b) requires the court to inquire into the actual circumstances of the case rather than a hypothetical set of facts favoring Plaintiff's averments." *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 967-68, 194 P.3d 96, 106-07 (2008) (internal quotations omitted).

An award of attorney's fees is appropriate only where there is "evidence in the record supporting the proposition that the [defense] was brought without reasonable grounds or to harass the other party." *Kahn v. Morse & Mowbray*, 121 Nev. 464, 479, 117 P.3d 227, 238 (2005). For example, where the trial court did not set forth any basis for the award of attorney's fees in its findings, and a review of the record did not clearly indicate that the defense imposed was "without reasonable ground or to harass the prevailing party," the Nevada Supreme Court found that attorney's fees should not be awarded. *Trident Const. Corp. v. W. Elec., Inc.*, 105 Nev. 423, 429, 776 P.2d 1239, 1243 (1989).

In the present matter, the trial court abused its discretion in awarding attorney's fees under NRS 18.010 because the defense maintained by PERS and its counsel was well-grounded. In essence, this case boiled down to whether Nevada's Slayer Statute applied to the determination of benefits under the PERS Act. The application of the Slayer Statute to the PERS Act is crucial to this case, because if it were not applicable, Ms. Gitter would have no claim to PERS

benefits pursuant to NRS 286.6767(1). Because Ms. Freshman was married at the time of her death, no survivor beneficiary designation could have been effective to provide benefits. Despite the trial court's assertions about the intention of the legislature, an application of the explicit provision of Chapter 286, mandates that PERS cannot provide benefits pursuant to NRS 286.6767. Application of the Slayer Statute to determine PERS benefits is a novel issue of law.

Throughout this case, PERS relied on the explicit language of the PERS Act, and argued that NRS Chapter 41B was not applicable to Ms. Freshman's benefits, and that Ms. Gitter was not a beneficiary recognized under the PERS Act. The purpose of the Slayer Statute, enacted by the Nevada legislature in 1999, is to prevent a killer from profiting from his or her wrongful actions. NRS 41B.200. However, the PERS Act contains a statute similar to NRS 41B.200, providing that a "person convicted of the murder or voluntary manslaughter of a member of the System is ineligible to receive any" benefit arising from the death of that member. NRS 286.669. The PERS statute predates NRS 41B.200 by 22 years, having been enacted in 1979.

Recognizing that the legislature did not repeal NRS 286.669, amend Chapter 286 so that its language mirrored that of Chapter 41B, or include a specific reference to specific provisions of the PERS Act in the scope of Chapter 41B upon the subsequent enactment of NRS Chapter 41B, the argument set forth

by PERS that the Slayer Statute did not apply to the PERS Act was well-grounded, even if not ultimately successful in the trial court. This is especially true in light of the fact that the PERS Act contains its own statute, which functions similarly to the Slayer Statute.

Furthermore, the express language of the Slayer Statute indicates that NRS 41B was not applicable to the case at hand. Pursuant to NRS 41B.200(1) the Slayer Statute only applies to benefits that “accrues or devolves to a killer of a decedent based on the death of the decedent.” However, under NRS 286.669, Mr. Freshman was already precluded from any benefits resulting from the death of Ms. Freshman. Accordingly, there were no benefits available for Mr. Freshman to profit from as a result of his wrongful actions, so as to trigger the Slayer Statute.

The reasonable nature of PERS’ defense is further bolstered by rules of statutory construction. For example, the Nevada Supreme Court has explained that when the legislature enacts new legislation, “[i]t is presumed that in enacting a statute the legislature acts with full knowledge of existing statutes relating to the same subject.” *City of Boulder City v. General Sales Drivers*, 101 Nev. 117, 118-19, 694 P.2d 498, 500 (1985). Additionally, “it is an accepted rule of statutory construction that a provision which specifically applies to a given situation will take precedence over one that applies only generally.” *City of Reno v. Reno*

Gazette-Journal, 119 Nev. 55, 60, 63 P.3d 1147, 1150 (2003). It stands to reason then, that the PERS Act provisions which predated the Slayer Statute, and which applied specifically to the distribution of PERS benefits would take preference over the Sayer Statute.

The reasonable nature of PERS' defense is demonstrated by the fact that PERS' statutory interpretation of the PERS Act and its conclusions regarding whether benefits could be paid to Ms. Gitter, were supported by the Office of the Attorney General. The Attorney General and duly appointed deputies of the Attorney General are "legal advisors on all state matters arising in the Executive Department of the State Government." NRS 228.110(1). The Office of the Attorney General serves prosecutorial functions, (NRS 228.125; NRS 228.130; NRS 228.140) and is tasked with providing written opinions "upon any question of law relating to their respective offices, departments, agencies, boards or commissions." NRS 228.150.

PERS, whose eligibility decisions are entitled to deference, together with the Office of the Attorney General, determined that Ms. Gitter was not entitled to survivor beneficiary benefits under the PERS Act. APP3, pp. 553-554; APP4, pp. 588-589. The fact of the Office of the Attorney General's concurrence with PERS' application of relevant law is evidence that PERS' defense was not frivolous, baseless, vexatious, or made without a reasonable and competent

inquiry, but was a reasonable application of applicable law. Without any Nevada case law determining that the Slayer Statute of Chapter 41B applied to the PERS Act, the position determined by PERS and Office of the Attorney General was well grounded.

The trial court, instead of basing its decision regarding attorney's fees on whether PERS had a reasonable statutory basis for its position, reasoned that PERS should have ignored the plain language of the PERS Act. APP4, pp. 598-601; 605-606; 609. The trial court suggested that PERS should have issued benefits on the basis that PERS members would have an expectation that benefits would be paid under the circumstances of the underlying case. APP4, pp. 598-601; 605-606; 609. Indeed, the trial court dismissed out of hand any discussion of the relevant statutes and whether PERS' reliance on those statutes was warranted. Specifically, in the hearing on Gitter's motion for attorney's fees, each time PERS' counsel attempted to explain why the Slayer Statute did not apply, the court declared that the Slayer Statute was not an issue. APP4, pp. 597-598; 607-608. To the contrary, summary judgment was entered in Gitter's favor because the court concluded that Chapter 41B applied to PERS benefits for survivors of a deceased PERS member. APP1, p. 169. Accordingly, a discussion of the Slayer Statute is directly relevant to whether PERS' defense was well grounded.

The fact that the legislature did not alter, amend, or repeal NRS 286.669 upon the passage of Chapter 41B, that rules of statutory construction prefer specific provisions apply over general provisions, that the Office of the Attorney General supported the positions taken by PERS, and that no Nevada case law has addressed the applicability of the Slayer Statute to the PERS Act, demonstrate at the very least that PERS' defense does not give rise to attorney's fees under NRS 18.010. Accordingly, the trial court's award of attorney's fees under NRS 18.010 must be reversed.

Furthermore, there is nothing in the trial court's Order Granting Gitter's Motion for Pre-Judgment and Post-Judgment Interest and Final Judgment indicating that PERS' defense was brought without reasonable ground or to harass Gitter. The findings of fact in that order outline Gitter's entitlement to survivor beneficiary benefits, but do not include any findings which suggest harassing or vexatious conduct by PERS or which could support an award of attorney's fees. APP1, pp. 165-170. The record is devoid of any such evidence. Accordingly, the trial court's order granting attorney's fees under NRS 18.010 was an abuse of discretion and erroneous as a matter of law and must be reversed.

E. The Trial Court Abused its Discretion by Awarding Attorney's Fees Under NRS 7.085.

NRS 7.085 allows for an award of attorney's fees to be paid by an opposing attorney only when that attorney has maintained or defended an action

not well-grounded in fact or warranted by law, or has unreasonably or vexatiously extended a civil action.

NRS 7.085 is related to NRCP 11 which provides for the sanctioning of a party upon the filing of a pleading or paper for an improper purpose, to assert claims or defenses which are not warranted by law, or to make factual contentions having no evidentiary support. NRCP 11(b). Under NRS 7.085 and NRCP 11, attorney's fees may be imposed for frivolous actions or defenses. *Bergmann v. Boyce*, 109 Nev. 670, 676, 856 P.2d 560, 564 (1993).

“A frivolous claim is one that is ‘both baseless and made without a reasonable and competent inquiry.’” *Id.* (quoting *Townsend v. Holman Consulting Corp*, 929 F.2d 1358, 1362 (9th Cir. 1990)). A determination of whether a claim is frivolous requires a two-pronged analysis: (1) whether the pleading is “well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law” and (2) “whether the attorney made a reasonable and competent inquiry.” *Id.* The trial court must examine “the actual circumstances surrounding the case” to determine whether claims or defenses had reasonable grounds. *Id.*

The mere fact that a party ultimately does not prevail on its claims or defenses “is not in itself a sufficient justification for the assessment of fees.” *U.S. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1058 (10th Cir. 2004) (quoting

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). If that were the case, the American Rule that attorney fees may not be awarded absent a statute, rule, or contract authorizing such award, would be completely undermined. *See Centex Corp. v. United States*, 486 F.3d 1369, 1372 (Fed. Cir. 2007); *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 313 F.3d 385, 390-91 (7th Cir. 2002); *Martin v. Arkansas Blue Cross & Blue Shield*, 299 F.3d 966, 971 (8th Cir. 2002). This issue is addressed in PERS' counsel's Petition for Writ of Mandamus consolidated with this appeal.

F. The Trial Court Abused its Discretion by Awarding Attorney's Fees Not Supported by Brunzell Factors.

Where an award of attorney's fees is appropriate, such an award is limited to the reasonable value of the attorney services provided. *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). Courts determining the reasonable value of attorney's fees must consider: (1) the qualities of the advocate: his ability, training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived. *Id.*

A party seeking attorney's fees must support its fee request with affidavits or other evidence supporting the *Brunzell* factors. *Miller v. Wilfong*, 121 Nev. 619, 623-24, 119 P.3d 727, 730 (2005). The trier of fact must consider each factor in light of the evidence provided, and no one element should predominate. *Id.* at 350, 455 P.2d at 33; *Logan v. Abe*, 131 Nev. Adv. Op. 31, 350 P.3d 1139, 1143 (2015). Any fee award must be supported by substantial evidence. *Logan*, 131 Nev. Adv. Op. 31, 350 P.3d at 1143; *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 865, 124 P.3d 530, 549 (2005) (the court must provide "sufficient reasoning and findings in support of its ultimate determination"). Fees charged for paralegals and law clerks may be included in an award of attorney's fees, but those charges are also subject to the *Brunzell* factors to "evaluate whether ... the office staff's hourly rates were reasonable under the circumstances." *LVMPD v. Yeghiazarian*, 129 Nev. Adv. Op. 81, 312 P.3d 503, 510 (2013).

Here, assuming that any award of attorney's fees was permissible under the law, the trial court abused its discretion by awarding fees which were not supported by the *Brunzell* factors or by substantial evidence. Accordingly, even if the award of attorney's fees was not wholly an abuse of discretion, the trial court's order awarding attorney's fees must be vacated to the extent fees were awarded which were not adequately supported by evidence.

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

Gitter requested certain attorney's fees and paralegal fees for which insufficient evidence was presented to support the *Brunzell* factors. For example, although Gitter provided the curriculum vitae and a supporting declaration for two of the attorneys who worked on the case, Dennis L. Kennedy and Kelly B. Stout, Gitter provided no such support for the four other attorneys for which Gitter sought an award of fees. As it pertains to fees incurred by those attorneys, Joshua M. Dickey, Mark Hesiak, Leon Gil, and Amanda L. Stevens, Gitter's motion for fees only identified whether each attorney is a partner or an associate, along with the number of hours billed by each attorney, and their applicable billing rates. APP3, p. 354. The Declaration of Dennis L. Kennedy provided only slightly more information, stating how long each attorney had been licensed to practice, along with a very cursory explanation of the work performed by that attorney -- for example, "assisted with various tasks throughout the course of this Matter." APP3, pp. 361-362.

Similarly, Gitter's motion and the Declaration of Dennis L. Kennedy made unsupported, blanket statements that the amount of time spent by legal counsel was reasonable and necessary given the scope of representation. APP3, p. 355; APP3, p. 362, at ¶ 11. However, Gitter did not disclose curricula vitae, or any

other information identifying the training, education, experience, professional standing or skill of Joshua M. Dickey, Mark Hesiak, Leon Gil, and Amanda L. Stevens. Similarly, Gitter did not address the difficulty, intricacy, importance, and skill required to perform any of the tasks assigned to these attorneys.

Gitter provided even less evidence in support of an award of Bailey Kennedy's paralegal fees. Gitter's motion and the Declaration of Dennis L. Kennedy identify only the billing rates and hours billed by two paralegals, Bonnie O'Laughlin and Linda Thomas. APP3, p. 354; 362. Gitter did not disclose the training, education, experience, professional standing or skill of these paralegals. Additionally, Gitter did not address the difficulty, intricacy, importance, and skill required to perform the tasks assigned to the paralegals.

Even though substantial evidence was not presented to support the fees billed by attorneys Joshua M. Dickey, Mark Hesiak, Leon Gil, and Amanda L. Stevens, the trial court concluded that all rates were reasonable "given each attorney's number of years in practice and the average rates charged by Las Vegas Attorneys." APP4, p. 641, at ¶ 29. Similarly, absent any information besides their billing rates, the trial court concluded the fees billed by paralegals Bonnie O'Laughlin and Linda Thomas were reasonable for paralegals in the Las Vegas market. APP4, p. 641, at ¶ 30. The trial court concluded it was able to rely

on billing descriptions to assess the difficulty, intricacy, importance, and skill required to perform each task billed for. APP4, p. 641, at ¶ 31.

Gitter' bore the burden of demonstrating the reasonableness of the fees billed by each attorney and paralegal by substantial evidence. Merely noting that an attorney or paralegal's hourly charge is not excessive compared to customary hourly charges in a geographical area, is not sufficient to support the reasonableness of the fees billed and does not satisfy the *Brunzell* factors.

Accordingly, the trial court abused its discretion in awarding the \$98.75 in fees billed by Joshua M. Dickey, the \$8,217.50 in fees billed by Mark Hesiak, the \$13,737.50 in fees billed by Leon Gil, the \$4,000.00 in fees billed by Amanda L. Stevens, the \$1,050.00 in fees billed by Bonnie O'Laughlin, and the \$43.75 in fees billed by Linda Thomas, for which Gitter did not provide evidence supporting the *Brunzell* factors.

G. The Trial Court Erred By Awarding Expert Witness Fees.

Gitter filed a Memorandum of Costs and Disbursements in which they requested expert witness fees of \$5,000. APP2, p. 239, at 17-18; 315-320. The expert consultant was never disclosed, never filed a report and never testified. As a result, PERS filed a Motion to Retax Costs. APP2, pp. 342-347. The trial court partially granted the Motion but still allowed \$1,500 in expert fees. APP4, pp. 651-653.

Pursuant to NRS 18.005(5), the trial court is allowed to award “[r]easonable fees of not more than five expert witness in an amount of not more than \$1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert’s testimony were of such necessity as to require the larger fee.” NRS 18.005(5).

The statute is clearly referring to expert witnesses. The trial court must first determine if the witness is a qualified expert. *Mulder v. State*, 116 Nev. 13, 992 P.2d 845, 852 (2000). In *Mays v. Todaro*, 97 Nev. 195, 199, 621 P.2d 260, 263 (1981) the Supreme Court allowed such fees if the witness had been sworn and testified. In *Bergmann v. Boyce*, 109 Nev. 670, 856 P.2d 560 (1993) there is language implying that calling an expert witness at trial was not a prerequisite to recover fees. Recently in *Frazier v. Drake*, 131 Nev. Adv. Op. 64, 357 P.3d 365, 374 n. 12 (2015) the court of appeals noted the potential discrepancy, but did not resolve it. However, the language of the statute clearly talks about a witness not an undisclosed consultant. Therefore, the trial court erred by awarding an expert witness fee of \$1,500.

IX. CONCLUSION

This is a sympathetic case, but one whose conclusion is mandated by statute. Ms. Gitter’s mother was murdered by her father. Ms. Freshman was a longtime PERS member, but under applicable statutes, PERS is mandated not to

pay benefits to Ms. Gitter. PERS is mandated to pay benefits when allowed by statute and deny them when prohibited by statute. PERS is not an entity that can simply ignore statutes when a sympathetic situation arises. PERS cannot pay benefits based on speculative legislative intent or members' expectations.

PERS requests this Court to reverse all orders that the trial court entered including the Order Granting Plaintiff's Motion for Partial Summary Judgment and Denying Defendant's Motion for Summary Judgment (APP1, pp. 165-170); Order Granting Plaintiffs' Motion for Pre-Judgmental and Post Judgment Interest and Final Judgment (APP1, pp. 222-227); Order Granting Plaintiff's Motion for Attorney's Fees (APP4, pp. 638-642); and Order Granting Motion to Retax Costs (APP4, pp. 651-653). PERS further requests this Court to remand with an order to grant PERS' Motion for Summary Judgment (APP1, pp. 30-43).

VII. ATTORNEY CERTIFICATE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted

by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 11,366 words; or does not exceed 30 pages.

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

DATED this 3rd day of June, 2016.

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