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

No. 69961

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

RESPONDENT PUBLIC EMPLOYEES RETIREMENT SYSTEM'S AND PETITIONERS W. CHRIS WICKER AND WOODBURN AND WEDGE'S REPLY BRIEF

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Docket 69208 Document 2016-25804

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 18th day of August, 2016.

WOODBURN AND WEDGE

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I. ARGUMENT

The Public Employees Retirement System ("PERS") and Petitioners, W. Chris Wicker and Woodburn and Wedge, by and through their counsel of record, reply to the Answering Brief as follows:

A. De Novo Review Should be Applied to the District Court's Award of Attorneys' Fees and Expert Witness Fees.

In their Answering Brief, Respondents, SHAE E. GITTER, and JARED SHAFER, as Special Administrator of the Estate of Kristine Jo Freshman ("Gitter"), argues that a review of the district court's award of attorneys' fees is reviewed for manifest abuse of discretion. Appellant PERS recognized in its Opening Brief that "[a]n award of fees and costs is generally reviewed for abuse of discretion." (Op. Brief at p. 8) (citing *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 the question is subject to de novo review. *Id.*; *In re Estate & Living Trust of Miller*, 125 Nev. 550, 552-53, 216 P.3d 239, 241 (2009).

Gitter's claim for attorneys' fees is based on NRS 18.010(2)(b) and NRS 7.085. There is no factual evidence of intent to harass or vexatious conduct of the litigation. Thus, the eligibility for fees is purely a legal question, one of statutory construction. The question at issue is whether PERS' defenses based on its

interpretation and application of statutes were frivolous or vexatious or brought without reasonable ground to harass Gitter so as to justify an award of fees under NRS 18.010(2)(b) and NRS 7.085. Consequently, because this review involves purely legal questions, de novo review must be applied.

The same is true as to the award of expert fees as a cost. It is a purely legal question whether a non-disclosed expert, who did not testify, make a report or submit an affidavit can be the subject of an expert cost award under NRS 18.005(5).

B. The Slayer Statute Is Not Applicable To This Matter.

PERS has a fiduciary obligation to administer the PERS trust fund in accordance with the PERS Act (NRS 286.010, *et seq.*). NRS 286.220. Where a married, currently employed PERS member dies, the member's spouse is entitled to spousal benefits. *See*, NRS 286.674, 286.676, 286.6766. A PERS member may designate a survivor beneficiary and one or more additional payees to receive the payment of benefits; however, payments may be made to a survivor beneficiary only "if the member is unmarried on the date of the member's death." NRS 286.6767(1). PERS' position is that even though Gitter was identified as a survivor beneficiary, because Ms. Freshman was married at the time of her death, the PERS Act does not permit the payment of PERS benefits to her designated survivor beneficiary Shae Gitter.

The Slayer Statute (NRS 41B.010, *et seq.*) is not applicable because no PERS spousal benefit devolved to Mr. Freshman. NRS 286.669. The Slayer Statute only applies if an interest would devolve to a killer; therefore, the Slayer Statute would never be applicable in regard to PERS benefits when a potential beneficiary is convicted of murder or voluntary manslaughter because no PERS benefit would ever devolve to a killer. In addition, the survivor beneficiary interest claimed by Gitter is a statutorily created interest that is different from the spousal benefit that the spouse of a deceased member would normally receive. By law, the two benefits are mutually exclusive. NRS 286.676, 286.6767.

Gitter outlines three principal arguments in rebuttal to PERS' position that the Slayer Statute is not applicable to the present matter. First, Gitter asserts the Slayer Statute requires PERS to consider Ms. Freshman's spouse to have predeceased her, thus making Ms. Freshman "married" at the time of her death. Next, Gitter argues that PERS is not entitled to deference in its administration of PERS benefits. Finally, Gitter suggests that PERS' interpretation of an implementation, would lead to absurd results. As explained below, each of Gitter's rebuttals fail, as the Slayer Statute does not apply to the case at hand.

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1. The Slayer Statute Does Not Apply Because After Application of the PERS Act, the Killer was not Entitled to Spousal Benefits

The Slayer Statute is based on "the principle that a killer cannot profit or benefit from his or her wrong," by divesting him or her of any "interest or benefit that accrues or devolves to a killer of a decedent based upon the death of the decedent." NRS 41B.200(1). PERS has explained that the Slayer Statute does not apply in the case at hand because, by virtue of the PERS Act, there was no benefit that accrued or devolved to Mr. Freshman, the killer. The PERS Act states:

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

NRS 286.669. Upon his conviction, NRS 286.669 eliminated any interest Mr. Freshman could have claimed by reason of Ms. Freshman's death.

In a convoluted legal argument, Gitter seeks to assert the applicability of the Slayer Statute, arguing that NRS 286.669 does not prevent benefits from accruing or devolving to a killer, and that the Slayer Statute must therefore apply. Gitter argues that survivor benefits "accrue" upon the death of the PERS member and that NRS 286.669 applies to benefits already "conferred." Gitter further argues that because NRS 286.669 allows the withholding of benefit payments for

a person charged with the death of a PERS member pending a final determination, and such a person becomes ineligible to receive benefits only after conviction, that statute does not prevent a benefit from accruing. Answering Brief, pp. 26-28.

The Slayer Statute does not define accrue or devolve. Black's Law Dictionary defines accrue as "1. To come into existence as an enforceable claim or right; to arise…2. To accumulate periodically." Black's Law Dictionary, *Accrue* at 22 (8th ed. 2004). Similarly, devolve is defined as "1. To transfer (rights, duties, or powers) to another. 2. To pass (rights, duties, or powers) by transmission or succession." Black's Law Dictionary, *Devolve* at 484 (8th ed. 2004).

There is no question that NRS 286.669 prevented the accrual or devolution of PERS spousal benefits to Mr. Freshman. Upon Mr. Freshman's conviction, he became ineligible to receive any spousal benefits. As a result, Mr. Freshman did not come into the existence of an enforceable claim to PERS spousal benefits, nor did Ms. Freshman's benefits transfer or pass to Mr. Freshman for his use and enjoyment.

Respondent's position that NRS 286.669 does not prevent a killer from profiting from his or her wrongful actions or divest a killer of any interest or benefit that accrues or devolves to a killer because such a person becomes

ineligible to receive benefits only after conviction, is untenable. NRS 41B.250 provides that a person is deemed to be a killer of a decedent when a court enters a criminal conviction finding the individual to have been "a culpable actor in the felonious and intentional killing of a decedent." Similarly, NRS 41B.260 provides that a person is deemed to be a killer of a decedent when a civil court determines by a preponderance of the evidence that a person "was a culpable actor in the felonious and intentional killing of a decedent." Accordingly, like NRS 286.669, the Slayer Statute also requires a judicial determination that a person is a killer before the interest at question is disallowed. The Slayer Statute never becomes applicable to these facts because it depends on a benefit devolving to Mr. Freshman, which does not occur under the PERS Act.

The Slayer Statute and PERS Act, NRS 286.669, should not be read together. The PERS slayer statute (NRS 286.669) is specific to PERS and applies to a criminal conviction. The Slayer Statute is general and allows a civil determination with a preponderance standard. The specific PERS statute should prevail. *City of Reno v. Reno Gazette Journal,* 119 Nev. 55, 60, 63 P.3d 1147, 1150 (2003).

2. PERS is Entitled to Deference in its Administration of PERS Benefits.

Gitter argues that PERS is not entitled to deference in its determinations regarding the payment of PERS benefits. First, Gitter argues that PERS is not

entitled to deference because it does not administer the Slayer Statute. The administration of the Slayer Statute is irrelevant to whether PERS is entitled to deference. PERS is entitled to deference in its decisions related to the determination of eligibility for PERS benefits not because it administers the Slayer Statute, but because it administers the PERS Act.

Accordingly, the determination reached by PERS in its administration of the PERS Act is entitled to deference, and the district court erred in substituting its judgment for that of PERS.

Gitter argues that PERS is not entitled to deference because courts may decide pure legal questions without deference to an agency determination. In support of Gitter' position, *City of Reno v. Bld. & Constr. Trades Counsel of N. Nev.*, 12 Nev. Adv. Op. 2, 251 P.3d 718, 721 (2011) is cited. Although *City of Reno* does generally provide that courts may decide pure legal questions, Gitter's analysis of this issue is incomplete. The quote from *City of Reno* cited by Gitter originally comes from *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986), which states in full:

> While it is true that the district court is free to decide pure legal questions without deference to an agency determination, the agency's conclusions of law, which will necessarily be closely related to the agency's view of the facts, are entitled to deference, and will not be disturbed if they are supported by substantial evidence. *See Barnum v. Williams,* 84 Nev. 37, 42, 436 P.2d 219, 222 (1968) (district court erred in reversing agency because "the findings of fact and conclusions of law

> submitted by the appeals referee were supported by the evidence presented at the hearings").

Here, PERS' conclusion of law that Gitter was not entitled to the payment of survivor beneficiary benefits under the PERS Act was based on PERS' analysis of the unique facts of this case and its experience administrating the PERS Act. Accordingly, PERS' interpretation of law related to the eligibility for PERS benefits in this matter are entitled to deference.

3. Refusing to Apply the Slayer Statute Would Not Lead to an Absurd Result.

Gitter argues that if the Slayer Statute is not applied to the case at hand an absurd result would follow, but Gitter's position ignores the plain language of the PERS Act.

Although there may be circumstances, such as those present in this case, under which PERS benefits are ultimately not paid out to a PERS member or a beneficiary, it does not mean an absurd result has been reached. For example, Gitter points out that prior to 2001, although an unmarried PERS member could designate a beneficiary at the time of retirement, those benefits were forfeited if the member died while still employed. (Answering Brief, pp. 24-25). The fact that at that time the PERS Act did not permit the designation of a survivor beneficiary for unmarried workers and that certain benefits may therefore not be subject to distribution, is unquestioned. Nevertheless, that fact that no one would

receive benefits did not render the PERS Act absurd, nor did PERS have the ability to endow an unmarried member's PERS benefits on a beneficiary not authorized by the PERS Act at that time in defiance of the proscribed law. To remedy that situation, the PERS Act was revised by S.B. 349 to permit unmarried PERS members to designate survivor beneficiaries.

Similarly, here, if the scope of benefit payments is to be broadened or altered so as to avoid the circumstance presently at issue, it is up to the legislature to revise the PERS Act to reflect desired benefit distribution changes. Neither PERS nor the judiciary may usurp the legislature's authority to create and amend the distribution of benefits under the PERS Act.

4. The Fiction of Mr. Freshman Predeceasing Ms. Freshman Does Not Apply

Gitter asserts that pursuant to NRS 41B.310, the PERS Act must be read as though the killer, Mr. Freshman, predeceased Ms. Freshman, thus making Ms. Freshman married at the time of her death. Answering Brief, pp. 28-29. The express language of the Slayer Statute does not support this claim. It clearly states that the fiction of the killer predeceasing the PERS member only applies if the killer forfeited a benefit that the governing instrument devolved to the killer based on the PERS member's death. As described above, the governing instrument, in this case the PERS Act, provided no benefit to the killer. As the killer did not

forfeit a benefit pursuant to NRS 41B.310(1), the fiction of predeceasing described in NRS 41B.310(3) does not apply.

5. Gitter Failed to Address the Fact That the Spousal Benefit and the Survivor Beneficiary Benefit are Different Interests

Not addressed by Gitter is the fact that the spousal benefit that would have gone to Mr. Freshman is a benefit separate and distinct from the survivor beneficiary benefit that Gitter claims. The spousal benefit that Mr. Freshman would have received is found under the heading of "Spouses" in the PERS Act. NRS 286.674, 286.676, 286.6766. The benefit sought by Gitter appears under the heading of "Survivor Beneficiaries and Additional Payees." NRS 286.6767. Since PERS is a defined benefit plan, Ms. Freshman's contributions are not an asset that a PERS member can will to an heir. Rather, each potential benefit payable to survivors are separate and defined. Thus, the spousal benefit which would be affected by the Slayer Statute, if Gitter's analysis is accepted, does not devolve to Gitter if the killer is deemed predeceased by Ms. Freshman. Since the survivor beneficiary benefit, which is the benefit claimed by Gitter, is not an interest that could have devolved to Mr. Freshman, it is not affected by any forfeiture of the spousal benefit. NRS 41.310(3) cannot be read to affect the survivor beneficiary benefit. NRS 286.6767 is not a provision of the governing instrument (PERS Act) affected by the forfeiture of the spousal benefit.

C. Interest

PERS has appealed the district court's determination that PERS is obligated to make prejudgment and postjudgment interest to Gitter. In the event PERS is obligated to pay interest to Gitter, PERS also appeals the district court's determination that interest should be awarded pursuant to NRS 99.040(1)(a). PERS also rebuts Gitter's assertion that if interest is not available pursuant to NRS 99.040(1)(a), it is available under NRS 99.040(1)(c).

1. Gitter' Should Not Have Been Awarded Prejudgment Interest

PERS' position is that the legislature has outlined the acceptable uses of PERS funds in the PERS Act. Because interest is not identified as an accepted use of PERS funds, PERS is not obligated to pay prejudgment interest. Gitter asserts three main arguments as to why prejudgment interest should be awarded. Each of Gitter' arguments is addressed in turn.

a. The PERS Act does not identify interest payments as an authorized expenditure of PERS Funds.

In their Answering Brief, Gitter argue that the lack of an express statutory provision stating that PERS is not obligated to pay interest, is evidence that the legislature intended PERS to pay interest. Answering Brief, p. 29, lns. 17-21. The payment of pre-judgment and post-judgment interest from the PERS trust res is neither anticipated by nor permitted under NRS Chapter 286. The legislature has outlined the acceptable uses of PERS funds so as not to deplete the fund, and

thereby adversely affect all PERS members, through the payment of extraneous expenses. Interest is not one of the expenses identified by the legislature. NRS 286.220(4).

b. The Payment of Interest Would Harm the PERS Trust Fund.

Gitter argues that paying interest from the PERS trust fund would not be harmful to the fund or other PERS members. Gitter explains that the PERS Act requires the fund to be invested, and that any interest and income on the invested funds are credited to the PERS fund. Accordingly, Gitter reasons that "requiring PERS to pay interest on back payments would not have a detrimental effect on the Fund because the Fund earned money by investing the payments that should have been paid to Shae [Gitter]." Answering Brief, p. 38. Gitter cherry picks the fund's 2014 return on investment of 17.6% to argue that the payment of interest would not have a detrimental effect on the PERS fund. Answering Brief, p. 31, lns. 18-22. It should be noted that Gitter is using evidence not in the record to assert a rate of return and should not be considered.

Gitter seeks interest on payments which they allege should have been made as long ago as January 2010. However, instead of looking at the overall rate of return since that date, Gitter put forward the outlying 2014 return on investment to suggest that PERS has made substantial gains through its investment of Ms. Freshman's contributions. If the Court is inclined to consider these matters not in

the record, PERS asserts that the 2015 report points out that the 2015 return on investment was 4.2% and the annualized total returns over the last 10 years is 6.9%. *See* Comprehensive Annual Financial Report of the Public Employees' Retirement System of Nevada, at 64 (June 30, 2015), *available at* https://www.nvpers.org/public/publications/FY15CAFR.pdf (last visited August 4, 2016). Accordingly, the rate of investment return obtained by PERS is much less than that suggested by Gitter, and less than the 12% rate awarded below.

c. NRS 286.190(3)(a) Does Not Authorize PERS to Pay Interest.

Gitter argues that NRS 286.190(3)(a) authorizes PERS to pay interest on payments wrongfully withheld. That statute provides that the Board may:

> Adjust the service or correct the records, allowance or benefits of any member, retired employee or beneficiary after an error or inequity has been determined, and require repayment of any money determined to have been paid by the System in error, if the money was paid within 6 years before demand for its repayment.

NRS 286.190(3)(a). While it is true that PERS is authorized to correct records and benefit allowances where errors have been made, NRS 286.190(3)(a) does not support Gitter' contention that PERS is authorized to pay interest on benefit payments wrongfully withheld. That statute provides that where an error is discovered, benefits may be adjusted to conform to the benefits the member, retired employee, or beneficiary should have received pursuant to the PERS Act.

NRS 286.190(3)(a) does not, however, state or imply that interest, or any other payment not expressly allowed by the PERS Act, may be paid upon the discovery of an error.

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 in writing fixing a different rate of interest…[u]pon contracts, express or implied, other than book accounts." Here, Gitter is not party to any contract with PERS, and PERS had no contract with Ms. Freshman. Accordingly, interest may not be awarded based upon a contract.

Gitter' argues that interest under NRS 99.040(1)(a) is warranted regardless of whether the case at issue involves a contract between the parties. Gitter reasons that because Ms. Freshman's PERS membership arose out of her employment contract with the Clark County School District, Gitter is entitled to interest under NRS 99.040(1)(a) based on Ms. Freshman's contract regardless of whether PERS' obligation to Ms. Freshman and potential survivor beneficiaries was purely statutory.

The Nevada Supreme Court has explained that interest under NRS 99.040(1)(a) is available "in actions upon contracts, express or implied." *Paradise Homes, Inc. v. Cent. Sur. & Ins. Corp.*, 84 Nev. 109, 116, 437 P.2d 78, 83 (1968). This is not an action in contract. *Estate of Kern, Matter of*, 107 Nev.

988, 994, 823 P.2d 275, 278 (1991). This is not a case about Ms. Freshman's contract or whether Ms. Freshman had PERS membership based on a contractual relationship. Instead, this case is about whether PERS has a statutory requirement to pay Ms. Gitter the PERS benefits she seeks. The summary judgment in favor of Gitter was based soley on statutes, not any contract claim. APP1, p. 178.

3. NRS 99.040(1)(c) is Not Applicable to This Case

NRS 99.040(1)(c) provides for an award of interest "[w]hen there is no express contract writing fixing a different rate of interest…[u]pon money received to the use and benefit of another and detained without his or her consent." Gitter asserts that if this Court determines that an award of interest under NRS 99.040(1)(a) is not appropriate, interest should be awarded under NRS 99.040(1)(c). PERS did not address this in its Opening Brief because it was not the basis of the interest award by the district court. As is the case with NRS 99.040(1)(a), NRS 99.040(1)(c) is not applicable to this case, and Gitter may not be awarded interest under that statute.

The inapplicability of NRS 99.040(1)(c) to this case is evident from the two cases Gitter cites in discussion of this statute. Gitter cites to *Carter v. Barbash*, 82 Nev. 289, 417 P.2d 155 (1966) and *First Interstate Bank of Nevada v. Green*, 101 Nev. 113, 694 P.2d 496 (1985). In both of the cited cases, an individual or entity received funds to which they were not entitled, and then

wrongfully retained said funds to the exclusion of the rightful and undisputed owner of the funds. The receipt and wrongful retention of funds identified in *Carter* and *First Interstate Bank of Nevada* are prerequisites to an award of interest under NRS 99.040(1)(c). Those circumstances are not present in the instant matter.

First, unlike in *Carter* and *First Interstate Bank of Nevada,* PERS did not "receive" any funds rightfully belonging to another. In *Carter*, funds were received through embezzlement, and in *First Interstate Bank of Nevada,* funds were received by way of a depositing error. In contrast, the funds at issue here were part of the PERS trust, rightfully deposited consistent with the PERS Act throughout the course of Ms. Freshman's employment. This case is further distinguishable from *Carter* and *First Interstate Bank of Nevada* because during the time PERS retained the benefits Gitter seek by way of this litigation, PERS did not have the use and benefit of the funds. In *Carter*, the embezzled funds were at Carter's disposal, and in *First Interstate Bank of Nevada* CRT and Associates had the use and benefit of the misallocated funds. Here, however, the funds sought by Gitter were not at the disposal of PERS subject to its discretion, but remained in the PERS trust for distribution to members and beneficiaries according to statute.

Consequently, because PERS did not receive money belonging to another, and did not wrongfully retain funds for its own use, an award of interest under NRS 99.040(1)(c) is not appropriate.

4. An Award of Interest, If Any, Is Limited to Interest Provided For by NRS 17.130

Where no rate of interest is provided for in a contract or by another applicable law, NRS 17.130 provides for interest from the time of service of the summons and complaint until satisfied. Gitter argues that if this Court finds that Gitter is not entitled to interest under NRS 99.040(1)(a) or 99.040(1)(c), interest should be awarded under NRS 17.130.

If this Court determines Gitter are entitled to an award of prejudgment interest, that award is limited to interest on past damages from the time of service of the summons and complaint, as provided for in NRS 17.130. *See Bongiovi v. Sullivan*, 122 Nev. 556, 579, 138 P.3d 433, 449 (2006) (stating that a judgment draws interest only for amounts representing past damages, not future damages).

D. Expert Fees

Pursuant to NRS 18.005(5), the trial court is allowed to award "[r]easonable fees of not more than five expert witnesses 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." (Emphasis added). By its own terms,

expert fees are limited to individuals who are (1) qualified as experts and (2) testify.

PERS has appealed the district court's award of $1,500 in expert fees to Gitter for an undisclosed consultant who was never identified as an expert during the case, was never qualified as an expert, provided no expert report, and did not testify. APP2, p. 345; APP3, pp. 523-524. Gitter asserts that the trial court was justified in awarding an expert fee of $1,500, asserting that an expert witness fee of up to $1,500 may be awarded on the basis that its consultant fees were reasonably necessary.

First, there is an admitted ambiguity as to whether expert witness fees of $1,500 or less may be awarded for an expert who does not testify. Interpreting NRS 18.005(5), the Nevada Supreme Court in *Mays v. Todaro* explained that a reasonable expert witness fee may be awarded only "to a party in whose favor judgment is rendered, if the witness had been sworn and testified." 97 Nev. 195, 199, 626 P.2d 260, 263 (1981). Although Nevada cases have uniformly required that an expert testify in order to recover more than $1,500 in expert fees, cases have not uniformly addressed whether fees of $1,500 or less may be awarded if an expert does not testify. In *Frazier v. Drake*, the Court of Appeals recognized "the apparent inconsistency" between cases. 131 Nev. Adv. Op. 64, 357 P.3d 365, 374 n.12 (2015) (declining to resolve the inconsistency because "Frazier

does not assert that any of the fees at issue here should be excluded due to the expert not being called to testify at trial").

Although it is PERS' position that an expert must testify in order for his/her fee to be awarded as costs, this case presents a circumstance in which not only did the expert not testify, but the "expert" was actually a consultant who was not even disclosed or identified as an expert, and prepared no report. Gitter admits that this Court "has never determined whether a party may recover fees paid to a consulting expert." (Answering Brief, p. 51). In addition, Gitter failed to tie the consultant's area of expertise, education, or training to the subject matter he was purportedly retained to address, namely PERS calculations of benefits and interest. APP2, pp. 317-320. Accordingly, Gitter should not be awarded a $1,500 expert fee for their undisclosed consultant.

E. Attorneys' Fees

The district court below awarded Gitter attorneys' fees. PERS and Petitioners Woodburn and Wedge and W. Chris Wicker, Esq. ("Petitioners") have appealed the award of attorneys' fees, asserting that there is no basis as a matter of law for a fee award, and that the trial court erred in awarding fees not supported by *Brunzell* factors.

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1. No Basis as a Matter of Law Exists For an Award of Attorneys' Fees

In order to punish and deter frivolous or vexatious claims or defenses, a trial court *may* award attorneys' 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). Similarly, NRS 7.085 allows for an award of attorneys' 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. A frivolous or baseless claim or defense is not merely an unsuccessful claim or defense, but 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).

PERS and Petitioners assert the Court erred as a matter of law and assert that the district court abused its discretion in awarding attorneys' fees under NRS 18.010(2)(b) and NRS 7.085 because the defenses maintained by PERS and its counsel were well-grounded in a reasonable interpretation of relevant statutes. Accordingly, the district court's award of attorneys' fees must be reversed.

a. Attorneys' Fees Are Not Warranted Related To Gitter Obtaining PERS Records.

Gitter argues that PERS made Gitter "jump over unjustified legal hurdles" to obtain necessary documents to support her claim, which "needlessly prolonged this case." (Answering Brief, p. 57).

PERS advised Gitter that she may be a survivor beneficiary and invited her to apply for benefits. APP3, p. 549. After Gitter applied, PERS determined that since Ms. Freshman was married at the time of her death, Gitter was not entitled to survivor beneficiary benefits. APP3, p. 551.

Gitter fails to address the fact that PERS was not needlessly putting up barriers to the receipt of records, but that the PERS Act makes certain records confidential, limiting access to the records unless a court order is obtained. Specifically, 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. Furthermore, since PERS determined Gitter was not a beneficiary, it required Gitter to obtain a court order. NRS 286.117. Having determined that Gitter was not entitled to survivor beneficiary benefits, it followed that under NRS 286.110(3) and NRS 286.117 Gitter also was not entitled to Ms. Freshman's confidential PERS member records. PERS was statutorily prohibited from disclosing Ms. Freshman's PERS account information absent a court order.

Consequently, no award of attorneys' fees may be made under NRS 18.010(2)(b) or NRS 7.085 based on PERS turning over Ms. Freshman's records only after Gitter obtained a court order.

In their Petition for Writ of Mandamus, in addition to the argument that attorneys' fees are not merited for Gitter's pursuit of Ms. Freshman's PERS records because PERS was statutorily prohibited from disclosing account information without a court order, Petitioners argue that the district court abused its discretion by assessing attorneys' fees incurred in obtaining Ms. Freshman's PERS records against Petitioners because Petitioners were not PERS' legal counsel at that time. Legal counsel for Gitter contacted the Office of the Attorney General in May 2012 requesting documents related to Ms. Freshman's PERS account and membership. However, at that time, and during the course of Ms. Gitter's probate matter requesting the production of PERS documents, Petitioners had not yet been retained to represent PERS. Petitioners first appeared on behalf of PERS on May 1, 2015. APP4, p. 641. To be clear, Petitioners assert that PERS properly required a court order.

Gitter does not address in their Answering Brief the assertion that Petitioners may not be assessed attorneys' fees incurred in connection with the obtaining of PERS records at a time when Petitioners were not representing PERS and were not involved in this case. Accordingly, on that basis alone, this Court

must reverse the district court's finding that Petitioners are liable for $17,963 in fees associated with the opening of Ms. Freshman's probate and obtaining her PERS member records. APP3, p. 537.

b. PERS Did Not Ignore the Plain Language of the Slayer Statute or Disregard Established Canons of Statutory Construction.

Gitter argues that PERS' defenses were frivolous or vexatious or maintained without reasonable ground to harass the prevailing party based on the assertion that PERS ignored the plain language of the Slayer Statute and disregarded established rules of statutory construction. The reality is that PERS did not ignore the plain language of the Slayer Statute, but determined, in consultation with the Office of the Attorney General, that NRS 286.669 applied to divest Mr. Freshman from any PERS spousal benefits, and that the Slayer Statute was not applicable to this case. PERS' determination was based on the plain language of PERS Act, the plain language of the Slayer Statute, and the fact that the legislature did not repeal NRS 286.669 upon passage of the Slayer Statute.

Additionally, PERS did not disregard established canons of statutory construction in determining that the Slayer Statute did not apply to the issue at hand, but relied on canons of statutory construction to arrive at that determination. In this case, the primary rule of statutory construction, applying the plain language of the relevant statutes, is exactly what PERS and its counsel

relied on. If further construction is needed, 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). Also, "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).

Applying these canons of statutory construction, PERS was justified in concluding that the later codified Slayer Statute was enacted with full knowledge of the PERS Act, and did not alter NRS 286.669 or include a reference to the Slayer Statute in the PERS Act because NRS 286.669 governed the divestment of benefits from a killer under the PERS Act. Furthermore, PERS was justified in determining that the specific PERS Act statute addressing the divestment of benefits of a killer would apply over the more general provisions of the Slayer Statute.

As a matter of law, the district court erred in awarding fees against PERS and Petitioner, but the award was also a manifest abuse of discretion because PERS' defenses were well grounded in the law.

c. PERS Opposed Interest Based on a Reasonable Interpretation of Statute, Not to Harass Gitter.

Similar to their previous argument, Gitter argues that PERS ignored the plain language of statute and rules of statutory construction in refusing to pay prejudgment interest. To the contrary, PERS relied on the plain language of the PERS Act to determine that it was not obligated to pay interest.

The payment of pre-judgment and post-judgment interest from the PERS trust res is neither anticipated by nor permitted under NRS Chapter 286. Although the legislature has outlined the acceptable uses of PERS funds, interest is not a listed acceptable use. Certainly the legislature could list interest as an expense payable by PERS under NRS 286.220(4), or elsewhere in Chapter 286 if that is its intent. However, because legislature has not done so, PERS was justified in defending against Gitter's requests for interest.

Gitter's Motion for Prejudgment Interest, primarily requested a contract rate of interest. APP1, p. 180. The contract rate is erroneous and PERS reasonably opposed the Motion. Even if this Court finds that PERS is subject to prejudgment interest, due to Gitter's request based on NRS 99.040(1)(a), the litigation was not prolonged by PERS' opposition to prejudgment interest.

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2. The District Court Abused its Discretion by Awarding Attorneys' Fees Not Supported by Substantial Evidence.

Appellants have appealed the district court's award of attorneys' fees, arguing that the district court abused its discretion by awarding fees not supported by *Brunzell* factors. Gitter argues that billing invoices identifying the description of the work performed, the name of the person performing the work, and the time required to complete the work provide a sufficient basis for the court to evaluate the character of the work performed by each attorney and paralegal. (Answering Brief, p. 63). Gitter also argues that the mere fact of identifying whether a billing individual is an associate, partner or paralegal, and stating the number of years associates have been attorneys is sufficient information to establish each individual's training, education, experience, professional standing or skill. (Answering Brief, pp. 63-64).

Certainly some of the *Brunzell* factors can be satisfied by the billing invoices provided by Gitter. *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). However, other factors have been completely neglected. For example, although an invoice undoubtedly identifies the time dedicated to a task and perhaps the attention given to the work, it does not address the training, education, professional standing, and skill of an attorney or paralegal. Similarly, Gitter's invoices do not address the difficulty or intricacy of the work. Gitter has not provided substantial evidence to support the attorneys'

fees billed by four of its attorneys and two of its paralegals. Accordingly, the district court abused its discretion in awarding fees for which Gitter did not provide evidence supporting the *Brunzell* factors.

II. 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. At all times, Petitioners acted zealously to represent PERS, but every position asserted was based on reasonable statutory interpretations that petitioners fully expect to prevail on appeal,

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).

III. 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 6,358 words; or does not exceed 15 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

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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 18th day of August, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Woodburn and Wedge and that on this date, I caused to be sent via electronic mail a true and correct copy of the RESPONDENT PUBLIC EMPLOYEES RETIREMENT SYSTEM'S AND PETITIONERS W. CHRIS WICKER AND WOODBURN AND WEDGE'S REPLY BRIEF to:

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