

In the Supreme Court of the State of Nevada

IN THE MATTER OF THE CHRISTIAN)
FAMILY TRUST u.a.d. 10/11/16)
~~~~~ )

SUSAN CHRISTIAN-PAYNE, )  
ROSEMARY KEACH AND )  
RAYMOND CHRISTIAN, JR. )

Appellants, )

-vs- )

ANTHONY L. BARNEY, LTD. and )  
JACQUELINE UTKIN, )

Respondents. )

~~~~~ )

ANTHONY L. BARNEY, LTD.,)
Cross-Appellant,)

-vs-)

SUSAN CHRISTIAN-PAYNE,)
ROSEMARY KEACH AND)
RAYMOND CHRISTIAN, JR.)

Cross-Respondents,)

and)

JACQUELINE UTKIN,)

Respondent.)

~~~~~ )

Electronically Filed  
Jan 10 2019 08:08 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Case No.: 75750

**APPELLANT/CROSS-RESPONDENTS' APPENDIX - VOLUME 11**

*Filed by:*

*/s/ Cary Colt Payne, Esq.*

---

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| <i><b>DATE</b></i>               | <i><b>DOCUMENT</b></i>                                                                                                                                                          | <i><b>NUMBERED</b></i> |
|----------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------|
| <i><b>APPENDIX VOLUME 1:</b></i> |                                                                                                                                                                                 |                        |
| 7/13/17                          | Petition to Assume Jurisdiction of Trust;<br>Confirm Trustees; Instructions, etc.                                                                                               | APP-ROA--001-72        |
| 8/17/17                          | Notice of Motion and Motion to Dismiss<br>Pursuant to NRCP 12(b)(1) and NRCP 12 (b)(5)                                                                                          | APP-ROA—73-97          |
| 8/22/17                          | Errata to Notice of Motion and Motion to<br>Dismiss Pursuant to NRCP 12(b)(1) and<br>NRCP 12(b)(5)                                                                              | APP-ROA—98-101         |
| 9/15/17                          | Supplement and Addendum to Petition to Assume<br>Jurisdiction of Trust; confirm Trustees'<br>Instructions, etc. Alternatively to Reform<br>Trust Agreement                      | APP-ROA--102-105       |
| 9/15/17                          | Petitioner's Opposition to Motion to Dismiss                                                                                                                                    | APP-ROA--106-115       |
| <i><b>APPENDIX VOLUME 2:</b></i> |                                                                                                                                                                                 |                        |
| 10/4/17                          | Reply to Petitioner's Opposition to Motion<br>to Dismiss                                                                                                                        | APP-ROA--116-156       |
| 10/13/17                         | Response to Petition to Assume Jurisdiction<br>of Trust; Confirm Trustees; Instrutions, Etc.<br>and Joinder in Motion to Dismiss Pursuant<br>to NRCP 12(b)(1) and NRCP 12(b)(5) | APP-ROA--157-165       |
| 10/25/17                         | Accounting                                                                                                                                                                      | APP-ROA--166-173       |
| 10/25/17                         | Inventory and Record of Value                                                                                                                                                   | APP-ROA--174-184       |
| 10/31/17                         | Notice of Entry of Order                                                                                                                                                        | APP-ROA--185-193       |

| <i><b>DATE</b></i>                | <i><b>DOCUMENT</b></i>                                                                                                                                                                                                                                                                                                                           | <i><b>NUMBERED</b></i> |
|-----------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------|
| <i><b>APPENDIX VOLUME 3:</b></i>  |                                                                                                                                                                                                                                                                                                                                                  |                        |
| 11/3/17                           | Joint Petition for Review of Former Trustees<br>Refusal to Provide a Proper Accounting<br>Pursuant to NRS 165.143                                                                                                                                                                                                                                | APP-ROA--194-222       |
| <i><b>APPENDIX VOLUME 4a:</b></i> |                                                                                                                                                                                                                                                                                                                                                  |                        |
| 11/13/17                          | Joint Objection to Petition Jurisdiction Etc.<br>Part 1                                                                                                                                                                                                                                                                                          | APP-ROA--223-298       |
| <i><b>APPENDIX VOLUME 4b:</b></i> |                                                                                                                                                                                                                                                                                                                                                  |                        |
| 11/13/17                          | Joint Objection to Petition Jurisdiction Etc.<br>Part 2                                                                                                                                                                                                                                                                                          | APP-ROA--299-373       |
| <i><b>APPENDIX VOLUME 5:</b></i>  |                                                                                                                                                                                                                                                                                                                                                  |                        |
| 12/4/17                           | Petitioner's Opposition to Motion for<br>Review/Proper Accounting                                                                                                                                                                                                                                                                                | APP-ROA--374-413       |
| 12/14/17                          | Petitioner's Opposition to Joint Counterpetition<br>to Confirm/Breach of Fiduciary Duty, Etc.<br>Request for Discovery                                                                                                                                                                                                                           | APP-ROA--414-428       |
| <i><b>APPENDIX VOLUME 6:</b></i>  |                                                                                                                                                                                                                                                                                                                                                  |                        |
| 12/12/17                          | Motion for Compliance with and Enforcement<br>of Court Order, and for Sanctions Relating<br>Thereto, for Order to show cause why Former<br>Trustees should not be held in Contempt,<br>for Order Compelling Former Trustees to<br>Account, and for Access to and Investment<br>Control of Trust Funds Belonging to the<br>Christian Family Trust | APP-ROA--429-452       |

| <b><i>DATE</i></b> | <b><i>DOCUMENT</i></b>                                                                                                                                                      | <b><i>NUMBERED</i></b> |
|--------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------|
| 1/4/18             | Notice of Suggestion of Death                                                                                                                                               | APP-ROA--453-454       |
| 1/11/18            | Opposition to Motion for Compliance, Enforcement Sanctions, Contempt, Etc.; Counterpetition for Distribution and Vacating all Pending Matters and Dismiss Trust Proceedings | APP-ROA--455-508       |

***APPENDIX VOLUME 7a:***

|         |                                                 |                  |
|---------|-------------------------------------------------|------------------|
| 1/26/18 | Petition to Confirm Successor Trustee<br>Part 1 | APP-ROA--509-539 |
|---------|-------------------------------------------------|------------------|

***APPENDIX VOLUME 7b:***

|         |                                                 |                  |
|---------|-------------------------------------------------|------------------|
| 1/26/18 | Petition to Confirm Successor Trustee<br>Part 2 | APP-ROA--540-569 |
|---------|-------------------------------------------------|------------------|

***APPENDIX VOLUME 8:***

|         |                                                                                                            |                  |
|---------|------------------------------------------------------------------------------------------------------------|------------------|
| 2/6/18  | Amended Notice of Entry-Omnibus Order                                                                      | APP-ROA--570-576 |
| 2/8/18  | Petition for Fees and Costs                                                                                | APP-ROA--577-659 |
| 2/23/18 | Notice of Non-Opposition and Limited Joinder to the Petition for Fees and Costs for Anthony L. Barney, LTD | APP-ROA--660-663 |
| 2/23/18 | Opposition to Petition to Confirm Successor Trustee; Counterpetition for Reinstatement of Petitioners      | APP-ROA--664-735 |
| 3/8/18  | Monte Reason's Application for Reimbursement of Administrative Expenses                                    | APP-ROA--736-741 |

| <i><b>DATE</b></i>                | <i><b>DOCUMENT</b></i>                                                                                                                    | <i><b>NUMBERED</b></i> |
|-----------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------|------------------------|
| <i><b>APPENDIX VOLUME 9:</b></i>  |                                                                                                                                           |                        |
| 3/9/18                            | Petitioners Combined Opposition to (1) Barney Firm Petition For Fees, Etc. (2) Monte Reason's Application for Reimbursement               | APP-ROA--742-840       |
| <i><b>APPENDIX VOLUME 10:</b></i> |                                                                                                                                           |                        |
| 3/12/18                           | Reply to Opposition to Petition to Confirm Successor Trustee; and Opposition to Counter-Petition for Reinstatement of Petitioners         | APP-ROA--841-848       |
| 3/13/18                           | Response to Opposition to Monte Reason's Application for Reimbursement of Administrative Expenses                                         | APP-ROA--849-863       |
| 3/13/18                           | Reply to Petitioner's Combined Opposition to (1) Barney Firm Petition for Fees, Etc., (2) Monte Reason's Application for Reimbursement    | APP-ROA--864-894       |
| 3/15/18                           | Minutes of Hearing – 4/4/18                                                                                                               | APP-ROA--895-898       |
| 3/29/18                           | Motion (1) to Expunge Lis Pendens and/or Strike Pleading; and (2) for Preliminary Injunction                                              | APP-ROA--899-921       |
| <i><b>APPENDIX VOLUME 11:</b></i> |                                                                                                                                           |                        |
| 3/30/18                           | Petitioner's Supplemental Response to Opposition to Petition for Fees (Barney Firm); Request for Evidentiary Hearing, Reopening Discovery | APP-ROA--922-960       |

| <i><b>DATE</b></i>                 | <i><b>DOCUMENT</b></i>                                                                                                                                                                                                                                                                                               | <i><b>NUMBERED</b></i> |
|------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------|
| <i><b>APPENDIX VOLUME 12:</b></i>  |                                                                                                                                                                                                                                                                                                                      |                        |
| 4/2/18                             | Motion for Turnover of Assets and to Dissolve the Injunction Over Christian Family Trust Assets                                                                                                                                                                                                                      | APP-ROA--961-998       |
| 4/3/18                             | Countermotion 1) to Strike Petitioner's Supplemental Response to Opposition to Petition for Fees (Barney Firm); request for Evidentiary Hearing, and Reopening Discovery; 2) To Find the Former Trustees to be Vexatious Litigants, and 3) For sanctions Against Cary Colt Payne Pursuant to NRS 7.085 and EDCR 7.60 | APP-ROA--999-1036      |
| <i><b>APPENDIX VOLUME 13a:</b></i> |                                                                                                                                                                                                                                                                                                                      |                        |
| 4/4/18                             | Hearing Transcript Part 1                                                                                                                                                                                                                                                                                            | APP-ROA-1037-1061      |
| <i><b>APPENDIX VOLUME 13b:</b></i> |                                                                                                                                                                                                                                                                                                                      |                        |
| 4/4/18                             | Hearing Transcript Part 2                                                                                                                                                                                                                                                                                            | APP-ROA-1062-1186      |
| <i><b>APPENDIX VOLUME 13c:</b></i> |                                                                                                                                                                                                                                                                                                                      |                        |
| 4/4/18                             | Hearing Transcript Part 3                                                                                                                                                                                                                                                                                            | APP-ROA-1087-1111      |
| <i><b>APPENDIX VOLUME 13d:</b></i> |                                                                                                                                                                                                                                                                                                                      |                        |
| 4/4/18                             | Hearing Transcript Part 4                                                                                                                                                                                                                                                                                            | APP-ROA-1112-1134      |

| <i><b>DATE</b></i>                 | <i><b>DOCUMENT</b></i>                                                                                                                                                                                                                                                                                                    | <i><b>NUMBERED</b></i> |
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| <b><i>APPENDIX VOLUME 14a:</i></b> |                                                                                                                                                                                                                                                                                                                           |                        |
| 4/10/18                            | Motion for (1) Fees Pursuant to NRS 165.148<br>(2) Compliance with and Enforcement of<br>Court Order and Sanctions; (3) for Order<br>to Show Cause Why Former Trustees<br>Should Not be Held in Contempt, and<br>(4) for Extension of Discovery<br>Part 1                                                                 | APP-ROA-1135-1279      |
| <b><i>APPENDIX VOLUME 14b:</i></b> |                                                                                                                                                                                                                                                                                                                           |                        |
| 4/10/18                            | Motion for (1) Fees Pursuant to NRS 165.148<br>(2) Compliance with and Enforcement of<br>Court Order and Sanctions; (3) for Order<br>to Show Cause Why Former Trustees<br>Should Not be Held in Contempt, and<br>(4) for Extension of Discovery<br>Part 2                                                                 | APP-ROA-1180-1224      |
| <b><i>APPENDIX VOLUME 15:</i></b>  |                                                                                                                                                                                                                                                                                                                           |                        |
| 4/12/18                            | Notice of Entry of Order (Barney Petition Fees)                                                                                                                                                                                                                                                                           | APP-ROA-1225-1232      |
| 4/19/18                            | Petitioner's Combined Opposition to (1) Motion<br>to Turnover Assets and Dissolve Injunction over<br>Trust Assets; (2) Motion to 1. Expunge Lis<br>Pendens and 2. Preliminary Injunction and<br>Counter-motion for Distribution/ Termination of Trust;<br>Alternatively for Stay/ Set Bond and Set Evidentiary<br>Hearing | APP-ROA-1233-1254      |
| 4/19/18                            | Opposition to Motion for (1) fees, (2) compliance,<br>(3) for Order to Show Cause and (4) Extension<br>of Discovery, counter-motion to Distribute Trust<br>Property (2nd request)                                                                                                                                         | APP-ROA-1255-1292      |

| <i><b>DATE</b></i>                | <i><b>DOCUMENT</b></i>                                                                                                                                                                                                                                                                                                          | <i><b>NUMBERED</b></i> |
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| <i><b>APPENDIX VOLUME 16:</b></i> |                                                                                                                                                                                                                                                                                                                                 |                        |
| 5/8/18                            | Response to Combined Opposition to (1) Motion to Turnover Assets and Dissolve Injunction Over Trust Assets; (2) Motion to 1. Expunge Lis Pendens and 2. Preliminary Injunction and Opposition to Countermotion or Distribution/Termination of Trust; Alternatively for Stay, Set Bond and Set Evidentiary Hearing               | APP-ROA-1293-1333      |
| 5/11/18                           | Supplement to response to Combined Opposition to (1) Motion to Turnover Assets and Dissolve Injunction Over Trust Assets; (2) Motion to 1. Expunge Lis Pendens and 2. Preliminary Injunction and Opposition to Countermotion for Distribution/Termination of Trust; Alternatively for Stay/Set Bond and Set Evidentiary Hearing | APP-ROA-1334-1337      |
| 5/16/18                           | Hearing Transcript                                                                                                                                                                                                                                                                                                              | APP-ROA-1338-1390      |
| <i><b>APPENDIX VOLUME 17:</b></i> |                                                                                                                                                                                                                                                                                                                                 |                        |
| 6/1/18                            | Notice of Entry of Order (Utkin suspension)                                                                                                                                                                                                                                                                                     | APP-ROA-1391-1401      |
| 10/8/18                           | Notice of Entry – Probate Commissioner R&R (Hearing re Utkin removal)                                                                                                                                                                                                                                                           | APP-ROA-1402-1408      |
| 11/13/18                          | Notice of Entry – Order Affirming Probate Commissioner R&R (Utkin removal)                                                                                                                                                                                                                                                      | APP-ROA-1409-1414      |



*Steven D. Grierson*

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Attorney for Petitioner

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

|                        |   |            |               |
|------------------------|---|------------|---------------|
| In the Matter of       | ) | Case No.:  | P-17-092512-T |
|                        | ) | Dept. No.: | S (Probate)   |
| THE CHRISTIAN FAMILY   | ) |            |               |
| TRUST u.a.d. 10/11/16  | ) | Date:      | 4/4/18        |
|                        | ) | Time:      | 2:00 p.m.     |
| ~~~~~                  | ) |            |               |
| SUSAN CHRISTIAN-PAYNE, | ) |            |               |
| ROSEMARY KEACH AND     | ) |            |               |
| RAYMOND CHRISTIAN      | ) |            |               |
| Petitioners,           | ) |            |               |
| -vs-                   | ) |            |               |
| NANCY I CHRISTIAN and  | ) |            |               |
| MONTE REASON and       | ) |            |               |
| JACQUELINE UTKIN       | ) |            |               |
| Respondents.           | ) |            |               |
| ~~~~~                  | ) |            |               |

**PETITIONER'S SUPPLEMENTAL RESPONSE TO  
OPPOSITION TO PETITION FOR FEES (BARNEY FIRM);  
REQUEST FOR EVIDENTIARY HEARING, AND REOPENING DISCOVERY**

COMES NOW Petitioners, SUSAN CHRISTIAN-PAYNE, ROSEMARY KEACH and RAYMOND CHRISTIAN, original co-trustees and primary beneficiaries of The Christian Family Trust u.a.d. 10/11/16, by and through their attorney, CARY COLT PAYNE, ESQ., of the lawfirm of CARY COLT PAYNE, CHTD., hereby submits this Response/Supplement to the Combined Opposition to: (1) Barney Firm Petition for Fees, Etc. (2) Monte Reason's Application for Reimbursement; in the unlikelihood that the court finds the Barney firm has standing, Petitioner's request an Evidentiary Hearing and to Reopen Discovery, which is made and based upon the attached Points and Authorities, Exhibits,



1 pleadings on file to date, and any oral argument that the Court may allow at the time of  
2 the hearing.

### 3 4 POINTS & AUTHORITIES

5  
6 The Barney firm ("ALB") filed an unverified petition for fees and costs on February  
7 8, 2018, wherein they admit the firm was a creditor of their now-deceased client, Nancy  
8 Christian. They have no standing in these proceedings. ALB cannot now change the  
9 facts. In ALB's 20 page Reply (filed 3/13/18), they fail to fully address pertinent  
10 application of Nevada law. See NRS 163.417, 163.5559, 166.040. They cannot run  
11 from the facts or the law regarding spendthrift provisions. See Brock v. Premier Trust,  
12 Inc. (In re Frei Irrevocable Trust Dated Oct. 29, 1996), 390 P.3d 646 (Nev., 2017)

13  
14 The entire point of our "adversarial" legal system is two opposing points of view,  
15 legally and/or factually, having said opposing points of view ruled upon by the court.  
16 ALB is of the opinion that any opposing counsel, who is representing the viewpoint of their  
17 own clients, and who disagrees with their posture, position, point of view, opinion, or legal  
18 interpretation of statute or law, is subject to their personal affront and wrath, subjecting  
19 opposing counsel personal attack and/or ridicule (Rule 11 motions, bar complaints, etc.)  
20 or accused of misrepresentation to the court.

21  
22 ALB's current Rule 11 threat (VI, page 23) is specious and unsupported by the  
23 allegations. Starting on page 4, line 24, ALB states there are at least 36 blatant  
24 misrepresentations of law and/or fact by Mr. Payne. It is interesting to note its author  
25 Tiffany Barney, Esq., then goes on to reference the works of Joseph Powell, Esq. or  
26 Jerimy Kirschner, Esq., but without any direct references to the alleged misstatement of  
27 fact or supporting law, or one piece of admissible evidence. In a review of many of the  
28 alleged "misstatements", ALB's apparent posture in his assertions is that a judge is not to



1 be the determining factor as to which party's posture is correct, but rather that everyone  
2 should only follow the posturing of ALB, and if not they should be subject to sanctions.

3  
4 Rule 11 motions should be the exception, not the rule, and ALB is a repeated  
5 serial filer of Rule 11 motions, misusing the purpose of Rule 11, and has turned Rule 11  
6 practice into an improper hardball/retaliatory day-to-day operational pattern of litigation,  
7 which is sanctionable in and of itself. See EDCR 7.60. Also see Bergman v. Boyce, 109  
8 Nev. 670, 856 P.2d 560 (1993) Threats of Rule 11 sanctions are out of line where the  
9 adversary's arguments and/or position is plausible (even if incorrect). Seeking sanctions  
10 under such circumstances is in itself sanctionable conduct: "The use of Rule 11... has  
11 become part of the so-called "hardball" litigation techniques espoused by some firms and  
12 their clients. Those practitioners are cautioned that the invite retributions from the courts  
13 which are far from encumbered with such abusive conduct." See Giardo v. Ethyl Corp.,  
14 835 F.2d 479, 485 (3<sup>rd</sup> Cir. 1987)  
15

16 Since ALB raises the issue (pg 16, line 18), undersigned counsel has been the  
17 subject of two ALB Rule 11 motions and multiple sanctions in another matter, due to ALB  
18 taking "personal affront", and not for any valid legal position on behalf of a client-litigation  
19 in terrorem.  
20

21 ALB has sought to blur the lines between an attorney who represents a client into  
22 another litigant in the case, in an attempt to have the attorney considered a vexatious  
23 litigant. To date, not a single one of ALB's claims has resulted in an actual district court  
24 order.  
25

26 Again since ALB has now raised the issue in this case, ALB is on Judge William  
27 Potters' permanent recusal list, the order for which states ALB practices as a cause.  
28 (Exhibit "A") Such conduct has raised the bar on outrageous claims. Apparently,  
sending out Bar complaints against opposing counsel (or an attorney who is a witness) is



1 also a common practices. One of the three opposing counsel in this matter filed a such an  
2 unsupported bar complaint against the undersigned in this matter.  
3

4 On multiple occasions throughout this litigation process, the original trustees  
5 confirmed the source of all the trust assets as belonging to the Settlor, Raymond  
6 Christian, Sr.'s separate property. (**Exhibit "B"** and **Exhibit "C"**) Mr. Christian and  
7 Nancy Christian married in 2009, and Nancy had her own separate property (funds and  
8 condo), which was not transferred into the trust. The Dancing Vines property is not  
9 included in this calcularion, as separate provisions under the trust were made as to the  
10 distribution of the net proceeds of sale of this property. This position has not been  
11 refuted by ALB during Nancy's lifetime, and ALB and/or any trustee cannot now seek to  
12 move forward on this claim.  
13

14 In Estate of Schrager v. Solomon Dwiggin & Freer, Ltd. (Nev., 2015), while an  
15 unpublished decision, may be used for guidance, in which the Supreme Court stated:  
16 "While the district court did not abuse its discretion in awarding SDF attorney fees  
17 because it properly considered NRS 150.060, NRS 150.061, and the Brunzell factors, it  
18 did abuse its discretion in awarding SDF \$12,426 in attorney fees that arose out of a  
19 separate action that did not benefit the estate, citing Albios v. Horizon Communities, Inc.,  
20 132 P.3d 1022, 122 Nev. 409 (Nev., 2006) wherein the Supreme court stated "The district  
21 court is not limited in its approach for determining the amount of attorney fees to award,  
22 but it must conduct its analysis in light of the Brunzell v. Golden Gate National Bank  
23 factors, "namely, the advocate's professional qualities, the nature of the litigation, the  
24 work performed, and the result." [Emphasis added] (courtesy copies attached)  
25

26 As stated in the Combined Opposition, ALB argued that basically all it did was to  
27 "further the interests of the trust", which is overreaching, when analyzing ALD's own billing  
28 statements.



1 In fact, the court, during the most recent hearing held March 15, 2018, the court  
2 stated the court is not considering the issue of fees until the issue of whether or not  
3 Monte Reason was properly the trustee is decided. (Exhibit "D")  
4

### 5 CONCLUSION

6 As to the timeliness of any sort of opposition to any unverified petition, the Court  
7 has already stated that the issue of fees will not be decided if and until there is a decision  
8 on the Monte Reason appointment. (Exhibit "D")  
9

10 The Barney firm are not interested parties nor do they have standing in these  
11 proceedings as a personal creditor of Nancy Christian. The Christian Family Trust made  
12 no provision(s) for the payment of any of Nancy Christian's creditors. Nevada law  
13 expressly prohibits same. NRS 163.417

14 The Barney firm' has insisted they are Nancy's creditor. The Petition for Fees is  
15 mired in hearsay, inaccuracies, misstatements of fact, and despite claiming they were  
16 furthering the interest of the trust, have, by their own billing indicated that the opposite is  
17 true.  
18

19 The Barney firm is a mere creditor of Nancy Christian, or her personal probate  
20 estate, not The Christian Family Trust. There has been no showing of why ALB is  
21 precluded from pursuing Nancy's personal estate. The Trust does not permit the  
22 payment of Nancy's personal debts. Her personal estate has that obligation. The  
23 majority of the beneficiaries have objected.  
24

25 Monte's "Application" should also be denied. Monte was never formally confirmed  
26 by the court as a valid trustee. Monte's attorney stated he did nothing in the firm's  
27 representation of Monte. The Petition does not contain any backup documentation, i.e.,  
28 attorney's billings, receipts statements, or *Brunzell* factors, etc., and is only a request for  
attorney's fees in "sheep's clothing". The Application should be denied.



1 The Petition for fees should be denied in it's entirety, and that Nancy Christian's  
2 creditors seek payment from her estate.  
3

4 Alternatively, should the court find that ALB has standing, then an Evidentiary  
5 hearing as to ALB's application for fees should be held and to open discovery on this  
6 issue.

7 Dated: March 30, 2018.

CARY COLT PAYNE, ESQ.  
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 30, 2018, a true and correct copy of the foregoing was served to the following at the their last known address(es), facsimile numbers and/or e-mail/other electronic means, pursuant to:

☒ **BY MAIL:** N.R.C.P 5(b), I deposited for first class United States mailing, postage prepaid at Las Vegas, Nevada;

Tommy L. Christian  
245 South Lemon, Apt C  
Orange, CA 92566

Christopher A. Christian  
560 W. 20th Street #12  
San Bernardino, CA 92405

☒ **BY E-MAIL AND/OR ELECTRONIC MEANS:** Pursuant to Eighth Judicial District Court Administrative Order 14-2, Effective June 1, 2014, as identified in Rule 9 of the N.E.F.C.R. as having consented to electronic service, I served via e-mail or other electronic means (Wiznet) to the e-mail address(es) of the addressee(s).

Jerimy Kirschner, Esq.  
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Attorney for Nancy I. Christian (deceased)

An employee of CARY COLT PAYNE, CHTD.



**CARY COLT PAYNE, CHTD.**

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**Courtesy Copy  
Schrager v. SDF**



IN THE MATTER OF THE ESTATE OF  
ROSLYN SCHRAGER, DECEASED,

ARNOLD SCHRAGER, Appellant,

v.

SOLOMON DWIGGINS & FREER,  
LTD.; AND CLARK COUNTY PUBLIC  
ADMINISTRATOR JOHN CAHILL,  
ADMINISTRATOR  
OF THE ESTATE OF ROSLYN  
SCHRAGER, Respondents.

No. 67442

SUPREME COURT OF THE STATE OF  
NEVADA

December 18, 2015

**An unpublished order shall not be  
regarded as precedent and shall not be  
cited as legal authority. SCR 123.**

*ORDER AFFIRMING IN PART, REVERSING  
IN PART AND REMANDING*

This is a pro se appeal from a district court order awarding attorney fees in a probate action.<sup>1</sup> Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Appellant's twin sister converted assets from their mother's estate. As a result, the administrator of the estate and appellant had to employ attorneys to assist in tracking down and attempting to recover those assets. Thereafter, the estate earned a \$3,427,692 judgment against appellant's twin sister and her accomplices. After an interim account of the estate was filed stating that the estate had \$191,524.30 in liquid

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assets, appellant's previous attorneys, Solomon Dwiggins & Freer, Ltd. (SDF) and the estate's administrator, respondents in this appeal, requested payment of their attorney fees. Appellant opposed those requests, but

ultimately consented to the payment of the administrator's attorney fees during the February 14, 2014, and January 28, 2015, hearings. The district court ordered the estate to pay the administrator's attorney \$115,588.61 and SDF \$46,166.13. This appeal followed.

Having considered the parties' arguments and the record on appeal, we conclude that the district court properly considered NRS 150.060, NRS 150.061, and the *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349-50, 455 P.2d 31, 33 (1969), factors in awarding the administrator's attorney fees.<sup>2</sup> Because appellant consented to the payment of the administrator's attorney fees, he has waived any challenge to those attorney fees on appeal. See *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that a point not challenged before the district court is waived on appeal). Thus, we affirm the district court's order directing the estate to pay the administrator's attorney fees.

Nevertheless, we conclude that the district court abused its discretion in calculating the amount of fees to be paid to SDF. *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1027-29 (2006) (explaining that this court reviews an award of attorney fees for an abuse of discretion). While the district court did not abuse its discretion in awarding SDF attorney fees because it properly considered NRS 150.060,

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NRS 150.061, and the *Brunzell* factors, it did abuse its discretion in awarding SDF \$12,426 in attorney fees that arose out of a separate action that did not benefit the estate. *Albios*, 122 Nev. at 417, 132 P.3d at 1027-29. The separate action involved the decedent's payable upon death bank accounts and because such bank accounts generally do not pass into the estate, any case dealing with these accounts could not have benefitted the

estate. See NRS 111.795(2) (providing that the funds in a bank account with a payable upon death designation belong to the payable upon death beneficiary after the account holder's death and the funds will only belong to the account holder's estate if the beneficiary does not survive); NRS 111.799 (explaining that a transfer to a payable upon death beneficiary "is not testamentary or subject to estate administration").

Thus, the district court abused its discretion in awarding SDF \$12,426 in attorney fees incurred in relation to this separate action and we reverse that portion of the attorney fees awarded to SDF. *Albios*, 122 Nev. at 417, 132 P.3d at 1027-29. Because it is unclear whether the \$12,426 was included in the \$46,166.13 already paid by the estate or is part of SDF's remaining judgment against the estate, we remand to the district court for further proceedings.

It is so ORDERED.

/s/ \_\_\_\_\_, J.  
Saitta

/s/ \_\_\_\_\_, J.  
Gibbons

/s/ \_\_\_\_\_, J.  
Pickering

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cc: Hon. Gloria Sturman, District Judge  
Arnold Schrager  
Solomon Dwiggin & Freer, Ltd.  
Shawn L. Morris, Ltd.  
Eighth District Court Clerk

appellant has an interest in the reduction of the estate's assets by the payment of attorney fees, *Matter of Estate of Herrmann*, 100 Nev. 1, 26, 677 P.2d 594, 610 (1984) ("heirs whose legacies would be reduced by an award of attorneys' fees were interested in such order, and thus aggrieved thereby, and therefore were entitled to pursue a timely appeal"), and NRS 155.190(j) (2013) (amended 2015) permits an appeal from the underlying order.

<sup>2</sup> We note that because appellant did not appeal from the January 12, 2015, order awarding the administrator's attorney the majority of the attorney fees he has received from the estate, appellant's challenge to that award is not properly before this court.

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Footnotes:

<sup>1</sup> While respondent Clark County Public Administrator argues that this court lacks jurisdiction to consider this appeal, we conclude that we have jurisdiction because





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**Courtesy Copy  
Albios v Horizon**

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**132 P.3d 1022**  
**Dionicio ALBIOS and Kathryn Albios,**  
**Appellants/Cross-Respondents,**  
**v.**  
**HORIZON COMMUNITIES, INC.,**  
**Respondent/Cross-Appellant.**  
**No. 41589.**  
**Supreme Court of Nevada.**  
**April 27, 2006.**

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Law Office of Donna Lee Schubert and  
Donna Lee Schubert, Henderson, for  
Appellants/Cross-Respondents.

Bennion & Clayson and Kenneth M.  
Marias, Las Vegas; Guenther and Castronova  
LLP and Stephen G. Castronova, Las Vegas;  
Lemons Grundy & Eisenberg and Robert L.  
Eisenberg, Reno, for Respondent/Cross-  
Appellant.

Before the Court En Banc.<sup>1</sup>

*OPINION*

ROSE, C.J.

Appellants Dionicio Albios and Kathryn  
Albios sued respondent Horizon  
Communities, Inc., for construction defects  
in their single-family residence located in  
Clark County, Nevada. Prior to trial, Horizon  
served the Albioses with three successive  
offers of judgment, which the Albioses  
rejected. Following a jury trial, the jury found  
in favor of the Albioses and awarded them  
\$100,000, which was reduced by 5 percent  
for their comparative negligence. The

Albioses filed a post-trial motion for attorney  
fees and costs under NRS 40.655. Horizon  
opposed the motion, arguing that, under  
NRCP 68 and NRS 17.115, the Albioses were  
not entitled to attorney fees because they did  
not recover a more favorable verdict at trial  
than the rejected offers of judgment. The  
district court awarded the Albioses costs and  
partial attorney fees pursuant to NRS 40.655.  
Both parties appealed.

We first conclude that although NRS  
40.655 allows construction defect claimants  
to recover attorney fees and costs as an  
element of damages, NRS 40.655 does not  
preclude application of the penalty provisions  
of NRCP 68(f) and NRS 17.115(4). We next

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conclude that successive offers of judgment  
extinguish previous offers and, therefore,  
Horizon's last offer of judgment is controlling  
for purposes of NRCP 68 and NRS 17.115.  
When prejudgment interest is appropriately  
added to the Albioses' verdict,<sup>2</sup> the Albioses  
recovered more than Horizon's last offer.  
Thus, the Albioses were properly awarded  
their attorney fees and costs. But in awarding  
the Albioses only \$50,000 in attorney fees,  
the district court abused its discretion by not  
considering the factors set forth in *Brunzell v.*  
*Golden Gate National Bank*.<sup>3</sup> The district  
court also erred when calculating  
prejudgment interest and by disallowing  
prejudgment interest on costs and attorney  
fees. Thus, we affirm the judgment of the  
district court in part and reverse in part and  
remand for recalculation of attorney fees and  
prejudgment interest.

*FACTS*

The Albioses filed a complaint against  
Horizon, a property developer, alleging  
construction defects in their single-family  
residence located in Clark County, Nevada.  
Horizon answered the complaint and denied  
all of the substantive allegations. Horizon

then filed a third-party complaint, seeking indemnity and contribution from various subcontractors.

The parties engaged in three mediations. After each of the mediations, Horizon submitted an offer of judgment to the Albioses under NRCP 68 and NRS 17.115. The first offer of judgment was for \$150,000, inclusive of attorney fees and costs. The second offer of judgment was for \$200,001, inclusive of attorney fees and costs. The third offer of judgment was for \$100,000, exclusive of attorney fees and costs. None of the offers of judgment were apportioned between Mr. and Mrs. Albios. The Albioses rejected all three offers of judgment. The Albioses also served an offer of judgment on Horizon for \$187,000, exclusive of attorney fees and costs. Horizon rejected the Albioses' offer. After trial, the jury returned a general verdict in favor of the Albioses in the amount of \$100,000. The jury reduced the amount awarded to the Albioses by 5 percent for comparative negligence, resulting in a judgment of \$95,000.

The Albioses and Horizon then each sought attorney fees and costs through post-trial motions. Horizon filed a memorandum of costs in the amount of \$126,501.56 and a motion for attorney fees in the amount of \$233,287.50. Horizon argued that it was entitled to costs and attorney fees under NRCP 68 and NRS 17.115 because the Albioses had rejected an offer of judgment more favorable than the verdict that they ultimately received. The Albioses opposed both the memorandum of costs and motion for attorney fees. The Albioses also filed a memorandum of costs in the amount of \$192,707.85 and a motion for attorney fees in the amount of \$232,200, both of which Horizon opposed. At the district court's request, both parties supplemented their motions with additional documentation regarding costs and then filed amended memoranda of costs and fees.

During the hearing on the parties' motions for attorney fees and costs, the district court stated, "[I]t's amazing how plaintiffs and defendants are within a token of each other's fees. So, there's no way I can say the fees are not fair; fees are fair on both sides [be]cause both sides charged about the same thing." It also stated,

If I thought somebody had done something wrong or something bothered me, I'd be the first to say, gee, [Albioses], you know, you're wanting too much.

I think both sides did an admirable job considering this is a one-residence, Chapter 40 case ....

....

[Albioses], I think you did an admirable job. Congratulations to you and congratulations to the defense in this matter. You did the best you could under the circumstances.

The district court postponed its decision on the motions and ordered the parties to attend

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another settlement conference. The parties attended but were unable to resolve the matter through settlement. The Albioses then filed a supplemental request seeking \$861.82 in costs and \$11,500 in fees incurred as a result of post-trial matters. Horizon opposed these requests and filed its own supplement seeking additional fees in the amount of \$7,350.

The district court then issued its decision regarding fees and costs. It noted,

This is a tough call. I've thought about this case and thought about it, and I think that under—if you—a strict reading of *Beatt[ie]*, [99 Nev. 579, 668 P.2d 268 (1983)],

that certainly the offer of judgment, whether it be the first, second or third one, was not one that I would consider viable under the facts and—circumstances of this particular case. These are unusual cases, these construction defect, single home, cases.

Horizon asked for clarification regarding the district court's ruling on the offers of judgment, to which the district court responded,

Under *Beatt[ie]* they weren't—they weren't applicable. They weren't—they weren't right. I mean they just weren't appropriate. There's no way she could have taken those offers of judgment, not with the costs and the— . . . and the cost of repairs.

The district court granted the Albioses' motion, awarding them \$50,000 in attorney fees and \$179,000 in costs. With regard to the \$50,000 attorney fees award, the district court stated,

I'm going to give plaintiff \$50,000 in attorney's fees .... So I've cut down on the attorney's fees substantially and I think that it's one of those situations where having been a flat fee criminal lawyer part of my career, that sometimes we get into cases that we don't get full value for our services. But I certainly think that \$50,000 is a fair amount under the facts and circumstances of this case.

The district court also awarded interest on the judgment but denied interest on the attorney fees and costs and denied the request for post-trial fees and costs. The district court calculated prejudgment interest under NRS 17.130(2) and fixed the interest rate at 11.5 percent, the rate in effect during July 2000, the period immediately preceding service of the Albioses' summons and complaint.

Horizon filed a motion to alter the judgment, arguing that prejudgment interest

should be calculated by applying the interest rate provided by the State of Nevada, Division of Financial Institutions. The Albioses opposed the motion and sought to increase the interest rate used in the court's calculation, arguing that interest should have been calculated in accordance with NRS 99.040. Horizon then withdrew its motion. After Horizon withdrew its motion, both parties filed notices of appeal from the judgment.

The Albioses argue on appeal that the district court erred by: (1) awarding only \$50,000 in attorney fees when the reasonable amount of fees incurred amounted to \$234,200; (2) disallowing prejudgment interest on costs; (3) calculating prejudgment interest under NRS 17.130, rather than NRS 99.040(1)(a); (4) failing to award the Albioses actual and reasonable costs; and (5) denying the Albioses' requests for post-trial attorney fees and costs.<sup>4</sup>

On cross-appeal, Horizon argues that NRS Chapter 40 should not prevail over NRCP 68 and NRS 17.115 and, therefore, the district court improperly awarded the Albioses attorney fees and costs because Horizon tendered offers of judgment more favorable than the Albioses' verdict. Horizon also argues that the district court erred by awarding prejudgment interest on future damages and in determining the amount of prejudgment interest.

## DISCUSSION

### *Standard of review*

We generally review the district court's decision regarding attorney fees for

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an abuse of discretion.<sup>5</sup> However, the district court may not award attorney fees absent authority under a statute, rule, or contract.<sup>6</sup> But even when a statute authorizes an award



of attorney fees, if an offeree rejects an offer of judgment more favorable than the verdict obtained, the offeree shall not receive attorney fees and costs. In that situation, the offeror may be awarded attorney fees and costs.<sup>7</sup> Statutory interpretation presents a question of law, subject to de novo review.<sup>8</sup>

*NRS Chapter 40 versus NRCP 68 and NRS 17.115*

The Albioses asked for attorney fees under NRS 40.655, which applies to plaintiffs in constructional defect cases. Horizon served the Albioses with offers of judgment pursuant to NRCP 68 and NRS 17.115. We have not previously addressed whether NRS 40.655 precludes application of the penalty provisions of NRCP 68 and NRS 17.115.

NRS 40.655 provides for attorney fees as damages in a constructional defect case:

1. Except as otherwise provided in NRS 40.650, in a claim governed by NRS 40.600 to 40.695, inclusive, the claimant may recover only the following damages to the extent proximately caused by a constructional defect:

(a) Any reasonable attorney's fees;

....

2. The amount of any attorney's fees awarded pursuant to this section must be approved by the court.

Horizon argues that its offers of judgment were more favorable than the verdict obtained by the Albioses, and therefore, NRCP 68 and NRS 17.115 preclude the Albioses from recovering attorney fees and costs under NRS 40.655. The district court, while not expressly deciding whether NRS Chapter 40 overrides NRCP 68 and NRS 17.115, apparently agreed with the Albioses' contention that NRCP 68 and NRS 17.115 did not preclude them from recovering attorney

fees under NRS 40.655, as it awarded attorney fees "in accordance with Chapter 40." We conclude, however, that NRS 40.655 does not preclude application of the penalty provisions of NRCP 68 and NRS 17.115.

"Whenever possible, this court will interpret a rule or statute in harmony with other rules and statutes."<sup>9</sup> And when possible, we construe statutes such that no part of the statute is rendered nugatory or turned to mere surplusage.<sup>10</sup> Under NRS 40.655, an award of attorney fees is not mandatory. Instead, NRS 40.655(1) provides that a claimant "may recover" attorney fees, and thus, recovery of attorney fees is permissible. Further, the amount of attorney fees awarded "must be approved by the court."<sup>11</sup> Additionally, NRS 40.650(1) states that the court "may" deny the claimant's attorney fees and instead award attorney fees to the contractor "[i]f a claimant unreasonably rejects a reasonable written offer of settlement made as part of a response pursuant to paragraph (b) of subsection 2 of NRS 40.6472." Thus, NRS Chapter 40 has left discretionary the award of attorney fees, as well as providing a penalty for failure to accept a settlement made under the constructional defect statutes.

In contrast, NRCP 68 and NRS 17.115 impose a mandatory penalty against a party who rejected a more favorable offer of judgment. NRCP 68 states that in such a situation "the offeree cannot recover any costs or attorney's fees" and NRS 17.115(4)(a) states that the court "[m]ay not award to the party any costs or attorney's fees."

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To read NRS 40.655 as overriding NRCP 68 and NRS 17.115, as the Albioses contend and the district court arguably concluded, produces an absurd result. Under this reading, when a claimant in a constructional defect case rejects an offer and fails to obtain a more favorable judgment, although NRCP

68 and NRS 17.115 would mandate that the claimant be denied attorney fees and costs, NRS 40.655 would nevertheless allow the court to award the claimant attorney fees and costs. This reading renders NRCP 68 and NRS 17.115 nugatory in the context of constructional defect cases.<sup>12</sup> Additionally, much of the incentive to serve an offer of judgment would be removed, as NRCP 68 and NRS 17.115 would be essentially tooth-less. As such, the policy of NRCP 68 and NRS 17.115—to save time and money for the court system, the parties, and the taxpayer by rewarding the party who makes a reasonable offer and punishing the party who refuses to accept such an offer—would be thwarted.<sup>13</sup> This is an absurd result, and we do not interpret statutes in this manner.<sup>14</sup> Therefore, we conclude that, when a party is foreclosed from recovering costs and fees under the penalty provisions of NRCP 68 and NRS 17.115,<sup>15</sup> that party is likewise foreclosed from recovering costs and fees under NRS 40.655.<sup>16</sup>

#### *Validity of Horizon's offers of judgment*

Next, we must determine whether Horizon's offers of judgment were valid and, thus, precluded the Albioses from recovering attorney fees if their verdict was less favorable than Horizon's offers of judgment. The Albioses argue that Horizon's offers of judgment were invalid to trigger the penalty provisions of NRCP 68 and NRS 17.115 because

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the offers were made to both plaintiffs but were not apportioned among them.<sup>17</sup> We disagree.<sup>18</sup>

The pertinent provisions of NRCP 68(c)(3) state,

An offer made to multiple plaintiffs will invoke the penalties of this rule only if (A) the damages claimed by all the offeree plaintiffs are solely derivative, such as that the damages

claimed by some offerees are entirely derivative of an injury to the others or that the damages claimed by all offerees are derivative of an injury to another, and (B) the same entity, person or group is authorized to decide whether to settle the claims of the offerees.

Under NRS 17.115, unapportioned offers made to multiple plaintiffs are not considered valid to mandate the attorney fees and costs penalties unless certain requirements are met. As spelled out in NRS 17.115(9), those sanctions do not apply to:

(b) An offer of judgment made to multiple plaintiffs unless the same person is authorized to decide whether to settle the claims of all the plaintiffs to whom the offer is made *and*:

(1) There is a single common theory of liability claimed by all the plaintiffs to whom the offer is made;

(2) The damages claimed by one or more of the plaintiffs to whom the offer is made are entirely derivative of an injury to the remaining plaintiffs to whom the offer is made; *or*

(3) The damages claimed by all the plaintiffs to whom the offer is made are entirely derivative of an injury to another person.

(Emphases added.)

The Albioses argue that the offers of judgment do not fall within the scope of NRCP 68 and NRS 17.115 because neither spouse sustained damages that are entirely derivative of an injury to the other spouse, nor did they sustain damages that are entirely derivative of an injury to another person. Additionally, the Albioses argue that Horizon must also demonstrate that the same entity, person, or group was allowed to settle the case.



Addressing first the derivative damages argument, the Albioses are correct that under NRCP 68, an unapportioned offer of judgment made to multiple plaintiffs is invalid unless the damages are derivative; here the Albioses' damages are not derivative. NRS 17.115 has the same requirement, albeit worded slightly differently. However, NRS 17.115 includes an alternative requirement that can be met instead of the derivative damages requirement—an unapportioned offer is also proper if there is a single common theory of liability claimed by all plaintiffs. This language does not appear in NRCP 68.

"[A]pparent conflicts between a court rule and a statutory provision should be harmonized and both should be given effect if possible."<sup>19</sup> We have previously addressed differences between NRCP 68 and NRS 17.115 and concluded that when NRCP 68 is silent with respect to something addressed

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under NRS 17.115, "it should be interpreted harmoniously with the more specific provisions and legislative policy of NRS 17.115."<sup>20</sup> Additionally, when possible, we construe statutes such that no part of the statute is turned to mere surplusage.<sup>21</sup>

Under NRCP 68, the defendant must show that the plaintiffs' damages are derivative. NRS 17.115, on the other hand, allows the defendant to show that there is a single common theory of liability *or* that the damages are in some way derivative. To construe NRS 17.115 as requiring Horizon to show that the injuries were derivative would render NRS 17.115(9)(b)(1) mere surplusage. Therefore, reading NRCP 68 and NRS 17.115 in harmony and giving effect to both, we conclude that Horizon was required to demonstrate either that the Albioses asserted a single common theory of liability against Horizon *or* that the damages were derivative. Because the Albioses jointly sued Horizon

under the same constructional defect liability theory, Horizon satisfied the first requirement necessary for a valid offer of judgment involving multiple plaintiffs.

Horizon was also required to demonstrate that the same person was authorized to decide whether to settle the claims of all plaintiffs. The Albioses owned their property in joint tenancy, and they argue that, therefore, each had a separate interest in the property and that one joint tenant cannot act on behalf of the other joint tenant in controlling the other's interest.<sup>22</sup> However, if it can be shown that one plaintiff is authorized to decide whether to settle the claims for all plaintiffs, joint tenancy will not preclude service of an unapportioned offer of judgment under NRCP 68 and NRS 17.115.

In situations such as the case at bar, when a married couple jointly brings a claim under the same common theory of liability, concerning jointly owned property, we hold that as a matter of law, one plaintiff spouse is presumed to have authority to settle the claims for both plaintiff spouses. Thus, Horizon has satisfied the second requirement for serving an unapportioned offer, and its offers to the Albioses were valid.<sup>23</sup>

Accordingly, we must next examine whether the Albioses' verdict exceeded Horizon's offers.

### *Successive offers of judgment*

Horizon served the Albioses with three successive offers of judgment, all of which the Albioses rejected. Horizon argues that its second and third offers of judgment were more favorable than the Albioses' verdict and, therefore, the Albioses are not entitled to attorney fees under NRCP 68 and NRS 17.115. We have never addressed whether successive offers of judgment extinguish previous offers of judgment or whether all offers of judgment control.<sup>24</sup> Thus, before we can

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compare the Albioses' verdict to Horizon's offers, we must first decide which of Horizon's offers is controlling.

Both NRCP 68 and NRS 17.115 contain a provision that allows a party to serve more than one offer of judgment.<sup>25</sup> However, both are silent regarding the effect of successive offers.<sup>26</sup> Other states are split on whether successive offers of judgment extinguish previous offers of judgment or whether all offers served are controlling. Generally, it is a policy decision. After examining both positions, we conclude the better rule is that the most recent offer of judgment extinguishes all prior offers of judgment.

California adopts the position that successive offers extinguish previous offers. California's theory is that the "process of settlement and compromise is a contractual one, and the applicable principles are those relating to contracts in general."<sup>27</sup> The general contractual rule on offers is that "any new offer communicated prior to a valid acceptance of a previous offer, extinguishes and replaces the prior one."<sup>28</sup> Further,

there is an evolutionary aspect to lawsuits and the law, in fairness, must allow the parties the opportunity to review their respective positions as the lawsuit matures. The litigants should be given a chance to learn the facts that underlie the dispute and consider how the law applies before they are asked to make a decision that, if made incorrectly, could add significantly to their costs of trial.<sup>29</sup>

Most importantly, California concludes that the legislative purpose of offers of judgment statutes "is generally better served by a bright line rule in which the parties know that any judgment will be measured against a single valid statutory offer—i.e., the statutory offer most recently rejected—regardless of offers made earlier in the litigation."<sup>30</sup> And

interpreting the offer of judgment rule otherwise encourages a party to

maintain a higher settlement demand on the eve of trial and refuse to settle a case that should otherwise be settled if the [party] finds comfort in the knowledge that, even if [the party] receives an award less than his or her last demand, [the party] might still enjoy the cost reimbursement benefits ... so long as the award exceeded a lower demand made by the [party] some time during the course of the litigation.... "Rolling the dice" then becomes somewhat less risky and we note that lawsuits are not often settled by *reducing* the risk of trial.<sup>31</sup>

Notably, California's offer of judgment rule, California Code of Civil Procedure section 998, contains two important differences from NRCP 68 and NRS 17.115. First, section 998 does not expressly permit successive offers of judgment. Second, California has interpreted, again under general contract principles, that section 998 offers are revocable prior to acceptance.<sup>32</sup> Contrary to section 998, NRCP 68 and NRS 17.115 textually provide for successive offers and, converse to general contract principles, offers of judgment are irrevocable in Nevada.<sup>33</sup> These differences notwithstanding, we conclude that California's position regarding successive offers better effectuates the purpose of offers of judgment.

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We note that other courts conclude that successive offers of judgment do not extinguish previous offers, reasoning that once a plaintiff rejects an offer within the statutory time period, the defendant has acquired a statutory right to recover attorney fees and costs if the plaintiff does not obtain a more favorable verdict.<sup>34</sup> Although a valid position, California's policy lends greater finality to the offer-of-judgment process and is more easily applied. Additionally, we reject, for two reasons, other courts' reliance on

FRCP 68's advisory committee note,<sup>35</sup> which states that all offers remain valid, so that settlements are encouraged. First, our Rule 68 differs substantially from the federal rule. Second, as previously discussed, we conclude that reducing the risk of trial by allowing multiple offers of judgment to control does not encourage settlement.

Thus, we adopt the reasoning of our sister state California and hold that the most recent offer of judgment extinguishes all prior offers of judgment and is controlling for purposes of NRCF 68 and NRS 17.115.<sup>36</sup> Therefore, Horizon's third offer of judgment in the amount of \$100,000, exclusive of attorney fees and costs, is controlling.

The Albioses were awarded \$100,000, reduced by 5 percent for comparative negligence, resulting in a judgment of \$95,000. Although this amount does not exceed Horizon's third offer of judgment, we recently held that "pre-offer prejudgment interest must be added to the judgment when comparing it to the offer of judgment, unless the offeror clearly intended to exclude prejudgment interest from its offer."<sup>37</sup> When, as here, the offer is silent regarding prejudgment interest and the intent of the offeror cannot be determined, we will presume that the offer includes prejudgment interest.<sup>38</sup> Although Horizon's offer excluded attorney fees and costs, this exclusion was insufficient to alert the Albioses to the fact that prejudgment interest would also be excluded. However, because Horizon expressly excluded attorney fees and costs, only pre-offer prejudgment interest awarded on the \$95,000 damages awarded can be considered.

Thus, when \$12,983.46 in pre-offer prejudgment interest<sup>39</sup> is added to the \$95,000 verdict, the Albioses' trial recovery was more favorable than Horizon's third offer of judgment. As such, the Albioses were entitled to their attorney fees and costs.<sup>40</sup>

### *Award of attorney fees*

The Albioses argue that the district court abused its discretion when awarding them attorney fees because the actual fees they incurred were much higher than the amount awarded by the district court. We agree.

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We must first address the fact that the Albioses sought and were awarded attorney fees under NRS 40.655 through a post-trial motion. Under NRS 40.655, attorney fees are an item of damages. Generally, "quantities of damages are determined by the jury ... [and] claimants who fail to submit the attorney fees issue to the jury, and instead simply request fees in a post-trial motion, waive their right to those fees."<sup>41</sup> Additionally, attorney fees requested as an element of damages must be specially pleaded and proved "just as any other element of damages."<sup>42</sup>

However, we recently stated in *Shuette v. Beazer Homes Holdings Corp.*<sup>43</sup> that recovery of attorney fees under NRS 40.655 is distinguishable from the limited special damages exception. Under NRS 40.655(1), attorney fees are recoverable "to the extent proximately caused by a constructional defect." Thus, we held that when "a jury determines that the claimant is entitled to recover damages proximately caused by a constructional defect, a court can presume that the claimant is entitled to the recovery of attorney fees, whether or not the jury verdict explicitly so states."<sup>44</sup> We then stated that the calculation of attorney fees is a matter traditionally reserved to the trial court.<sup>45</sup> Thus, although the Albioses filed their request for attorney fees in a post-trial motion, under *Shuette*, this was proper and does not preclude the Albioses from recovering attorney fees.

When determining the amount of fees to award, the district court has great discretion, to be "tempered only by reason and

fairness."<sup>46</sup> The district court is not limited in its approach for determining the amount of attorney fees to award, but it must conduct its analysis in light of the *Brunzell v. Golden Gate National Bank*<sup>47</sup> factors, "namely, the advocate's professional qualities, the nature of the litigation, the work performed, and the result."<sup>48</sup>

The district court abused its discretion by failing to consider the *Brunzell* factors in awarding the Albioses only \$50,000 in attorney fees. The district court commented that the Albioses' counsel had performed admirably in litigating the case. The district court also noted the difficulty of the case, considering that it was the first constructional defect case to be brought by a single homeowner. It noted how remarkable it was that each side had charged a similar amount in fees and concluded that the fees were fair considering the time expended on litigation. Finally, the Albioses' counsel produced a favorable result. Although the district court made those observations, it failed to consider them when determining the amount of attorney fees to award, setting an amount far below that actually incurred. The district court abused its discretion, and we therefore reverse that portion of the district court's judgment that pertains to attorney fees.

#### *Prejudgment interest*

#### *Award of prejudgment interest on entire verdict*

Horizon argues that the district court abused its discretion by awarding the Albioses prejudgment interest on the entire verdict because the general verdict form used did not distinguish between past and future damages, and the Albioses did not object to the use of this form. We review challenges to prejudgment interest awards for error.<sup>49</sup> Under NRS 17.130(2), "the judgment

draws interest from the time of service of the summons and complaint until satisfied, except for any amount representing future damages." The general rule is that it is error to award prejudgment interest on an entire verdict if "it is impossible to determine what part of the verdict represented past damages."<sup>50</sup> But when there is nothing in the record to suggest that future damages were included in the verdict, prejudgment interest on the entire verdict is allowed.<sup>51</sup>

Horizon argues that the future damages the Albioses sought included move-out expenses such as motel rooms, food expenses, moving expenses, storage expenses, and kennel expenses for their dogs. The Albioses argue that these damages are not future damages but, instead, stem from past injuries that have already occurred but have yet to be cured. We agree.

Our recent decision in *Shuette* provides analytical assistance. There, we stated that an award of prejudgment interest on an entire verdict in a constructional defect case could be proper because "the award represent[ed] only past damages[ ] ... because the damages occurred when the homes were built, regardless of when the homeowners actually made or will make necessary repairs."<sup>52</sup> Further, we opined that "unexpended costs to repair constructional defects, which necessarily occurred early on, should be treated as past damages, even though the defects will be repaired in the future. Thus, prejudgment interest should be applied to past 'abatement' damages."<sup>53</sup> To repair a home's constructional defects, it will often be necessary for the homeowners to first move out of the home and into temporary housing. Thus, move-out expenses, such as those sought by the Albioses, are a part of the abatement damages. Although the homeowners might not have yet repaired the home and, thus, not yet incurred move-out expenses, these damages "should be treated as past damages." The district court did not



err in awarding the Albioses prejudgment interest on the entire verdict.

*Prejudgment interest on costs and attorney fees*

The district court denied the Albioses prejudgment interest on their costs and attorney fees. We conclude that the denial of both was error. Under the plain language of NRS 17.130(1), prejudgment interest is recoverable on judgments awarding costs.<sup>54</sup> Prejudgment interest runs on costs from the time when the costs were incurred. Therefore, the recovering party must prove when the costs were incurred and, if the party fails to do so, interest on the costs is awarded only from date of the judgment.<sup>55</sup> As such, the Albioses are entitled to prejudgment interest on their costs but, on remand, the Albioses are required to prove when their costs were incurred. Should they fail to do so, they are entitled to interest from the date of the judgment only.

The parties do not raise an issue regarding whether the Albioses were entitled to prejudgment interest on attorney fees. However, we conclude that the failure to award prejudgment interest on attorney fees in this case was plain error, and we will address this issue sua sponte.<sup>56</sup>

This court has not yet addressed whether prejudgment interest is recoverable

Page 1036

on attorney fees when attorney fees are awarded as an element of damages, as in this case. The plain language of NRS 17.130(1) states that prejudgment interest is awarded on judgments "for any debt, damages or costs." Thus, when attorney fees are awarded as damages, they fall within the plain language of NRS 17.130(1). Accordingly, we hold that when attorney fees are awarded as an element of damages, the prevailing party is entitled to recover prejudgment interest on

the attorney fees. As the attorney fees are awarded as an element of past damages, attorney fees draw interest from the time of service of the summons and complaint, as specified in NRS 17.130(2). Therefore, we reverse that portion of the district court's decision denying the Albioses' prejudgment interest on costs and attorney fees and remand this matter for proceedings consistent with our decision.

*NRS 99.040(1) versus NRS 17.115*

The Albioses also argue that prejudgment interest should have been awarded under NRS 99.040(1), which provides the basis for an award of prejudgment interest in contract actions. According to the Albioses, they are entitled to interest from the time of the breach instead of from the time the complaint was served. We disagree.

The Albioses asserted two theories of liability—breach of contract and negligence. In reaching its general verdict, the jury did not differentiate between the two claims, but found that the Albioses had 5 percent comparative fault and reduced the verdict accordingly. This suggests that the jury based its award on negligence rather than on the breach of contract claim. Further, NRS 99.040(1) is inapplicable when "[t]he judgments awarded to [the plaintiff] have nothing to do with any amounts 'due' under the terms of the ... contract."<sup>57</sup> Here, because the jury's verdict reduced the award for comparative fault, we conclude that the judgment awarded was unrelated to the Albioses' contract claims. Thus, the district court properly awarded prejudgment interest under NRS 17.130.

However, Horizon argues that the district court erred by calculating the prejudgment interest at a flat rate of 11.5 percent per year. In determining the applicable rate, district courts are to use the base prime interest rate "as ascertained by the commissioner of Financial Institutions on January 1 or July 1,

as the case may be, immediately preceding the date of judgment, plus 2 percent."<sup>58</sup> Under NRS 17.130(2), prejudgment interest is calculated at "the single rate in effect on the date of judgment."<sup>59</sup> Therefore, although the district court correctly calculated the interest at a fixed rate, it erred by calculating the rate in effect when the summons and complaint were served, because it should have used the rate in effect at the date of the judgment. Accordingly, we reverse and remand the prejudgment interest award for recalculation.

#### *Award of costs*

The Albioses argue that the district court improperly refused to award all their costs. The court awarded them \$179,985 in costs, but they sought \$192,708 in costs. They argue that the district court should have awarded them costs for facsimile transmissions, out-of-pocket paralegal expenses, postage, hiring a special runner, and other items.

Under NRS 18.020, the prevailing party in an action alleging more than \$2,500 in damages is entitled to recover all costs as a matter of right.<sup>60</sup> Nevertheless, we have noted that "[t]he determination of which expenses are allowable as costs is within the sound discretion of the trial court."<sup>61</sup> Further, we have cautioned that because statutes permitting costs are in derogation of the common law, they should be strictly construed.<sup>62</sup>

Page 1037

It was well within the district court's discretion to find that certain of the Albioses' costs were not allowable, and we conclude that the district court did not abuse that discretion in its costs award.<sup>63</sup>

#### *CONCLUSION*

For the above reasons, we affirm the decision of the district court regarding the Albioses' entitlement to attorney fees and

costs, but we reverse in part and remand for a recalculation of attorney fees and prejudgment interest.

BECKER, MAUPIN, DOUGLAS,  
HARDESTY and PARRAGUIRRE, JJ.,  
concur.

#### Notes:

1. The Honorable Mark Gibbons, Justice, voluntarily recused himself from participation in the decision of this appeal.

2. *McCrary v. Bianco*, 122 Nev. \_\_\_, \_\_\_, 131 P.3d 573, 577 (2006); *State Drywall v. Rhodes Design & Dev.*, 122 Nev. \_\_\_, \_\_\_, 127 P.3d 1082, 1087 (2006).

3. 85 Nev. 345, 349-50, 455 P.2d 31, 33 (1969).

4. The Albioses also challenge the district court's refusal to assert jurisdiction and address Horizon's motion to amend the judgment and the Albioses' motion for additional time to file a motion to alter or amend the judgment to correct the prejudgment interest. As we conclude that the district court incorrectly calculated prejudgment interest, this issue is moot.

5. *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 993, 860 P.2d 720, 722 (1993).

6. *State, Dep't of Human Resources v. Fowler*, 109 Nev. 782, 784, 858 P.2d 375, 376 (1993).

7. NRCP 68(f); NRS 17.115(4).

8. *Banks v. Sunrise Hospital*, 120 Nev. 822, 846, 102 P.3d 52, 68 (2004).

9. *Allianz Ins. Co.*, 109 Nev. at 993, 860 P.2d at 723.

10. *Paramount Ins. v. Rayson & Smitley*, 86 Nev. 644, 649, 472 P.2d 530, 533 (1970).

11. NRS 40.655(2).

12. Additionally, we note that "[t]he judiciary, of course, has the inherent power to govern its own procedures; and that power includes the right to adopt and promulgate rules of procedure." *Whitlock v. Salmon*, 104 Nev. 24, 26, 752 P.2d 210, 211 (1988). We have also stated that this inherent power to make rules is "not only reasonable and necessary, but absolutely essential to the effective and efficient administration of our judicial system, and it is our obligation to insure that such power is in no manner diminished or compromised by the legislature." *Goldberg v. District Court*, 93 Nev. 614, 617, 572 P.2d 521, 523 (1977). Interpreting NRS 40.655 as superseding NRCP 68 would diminish and compromise our power to create rules of procedure; therefore, we do not adopt this interpretation.

13. *Dillard Department Stores v. Beckwith*, 115 Nev. 372, 382, 989 P.2d 882, 888 (1999); *Lentz v. I.D.S. Financial Services*, 111 Nev. 306, 308, 890 P.2d 783, 785 (1995) ("[T]he purpose of NRCP 68 is to encourage litigants who receive offers of judgment to settle their lawsuits by forcing the offeree to 'balance the uncertainty of receiving a more favorable judgment against the risk of receiving a less favorable judgment and being forced to pay the offeror's costs and attorney's fees.'" (quoting *Bergmann v. Boyce*, 109 Nev. 670, 678, 856 P.2d 560, 565 (1993))).

14. *General Motors v. Jackson*, 111 Nev. 1026, 1029, 900 P.2d 345, 348 (1995). The Albioses also argue that the offers of judgment are invalid because they did not include all of the damages that a successful constructional defect claimant is entitled to recover under NRS 40.655, the most important being prejudgment interest. However, the Albioses failed to raise this issue below, and therefore, we do not consider this issue on appeal. *Lentz*, 111 Nev. at 308 n. 2, 890 P.2d at 785 n. 2; *Montesano v. Donrey Media Group*, 99

Nev. 644, 650 n. 5, 668 P.2d 1081, 1085 n. 5 (1983).

15. Additionally, although not applicable in this action, the Legislature amended NRS Chapter 40 in 2003 to address offers of judgment. NRS 40.650(4) now provides that "[n]othing in this section prohibits an offer of judgment pursuant to Rule 68 of the Nevada Rules of Civil Procedure or NRS 17.115 if the offer of judgment includes all damages to which the claimant is entitled pursuant to NRS 40.655." We have said that "[w]here a former statute is amended, or a doubtful interpretation of a former statute rendered certain by subsequent legislation, it has been held that such [an] amendment is persuasive evidence of what the Legislature intended by the first statute." *Sheriff v. Smith*, 91 Nev. 729, 734, 542 P.2d 440, 443 (1975); accord *Beazer Homes Nevada, Inc. v. Dist. Ct.*, 120 Nev. 575, 580-81, 97 P.3d 1132, 1135-36 (2004). Although this statute has only a prospective effect and is inapplicable here, *Nevada Power v. Metropolitan Development Co.*, 104 Nev. 684, 686, 765 P.2d 1162, 1163 (1988), the amendment demonstrates that our interpretation of the interrelation between NRS 40.655, NRCP 68, and NRS 17.115 comports with legislative intent.

16. See *Bowyer v. Taack*, 107 Nev. 625, 627, 817 P.2d 1176, 1177 (1991) (holding similarly where appellant claimed that she was entitled to recover attorney fees under NRS 18.010, even though NRCP 68(f) and NRS 17.115(4) foreclosed such a recovery), *overruled in part on other grounds by McCrary v. Bianco*, 122 Nev. \_\_\_, 131 P.3d 573 (2006).

17. The district court did not address whether Horizon's offers of judgment were invalid because they were joint, unapportioned offers. Instead, the district court mistakenly addressed the validity of the offers of judgment under *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983). *Beattie* is inapplicable to determine whether an offer is valid to trigger the penalty

provisions of NRCP 68 and NRS 17.115. Instead, *Beattie* applies after a district court finds that an offeree failed to obtain a more favorable jury verdict than the offer tendered and merely guides the district court's discretion to award attorney fees.

18. Horizon relies on our decision in *Uniroyal Goodrich Tire v. Mercer*, 111 Nev. 318, 890 P.2d 785 (1995), *superseded by statute as stated in RTTC Communications v. Saratoga Flier*, 121 Nev. \_\_\_, 110 P.3d 24 (2005), and argues that offers of judgment need not be apportioned because the Albioses had a unity of interest, had jointly sued Horizon, had the same attorney, the same damages, and made their own joint offer of judgment. Horizon's reliance on *Uniroyal* is misplaced. *Uniroyal* was decided before we amended NRCP 68 in 1998 and before the Legislature amended NRS 17.115 in 1999. NRCP 68 (replaced effective October 27, 1998); 1999 Nev. Stat., ch. 258, §§ 1-3, at 1102-05 (amending NRS 17.115 effective May 24, 1999); *RTTC Communications*, 121 Nev. at \_\_\_, 110 P.3d at 29. Thus, we follow the requirements of NRCP 68 and NRS 17.115, and not *Uniroyal* when determining whether an unapportioned offer of judgment is valid.

19. *Bowyer*, 107 Nev. at 627-28, 817 P.2d at 1178.

20. *Id.* at 628, 817 P.2d at 1178.

21. *Paramount Ins. v. Rayson & Smitley*, 86 Nev. 644, 649, 472 P.2d 530, 533 (1970).

22. See *Fick v. Fick*, 109 Nev. 458, 461, 851 P.2d 445, 448 (1993) (stating that married couple may hold property as joint tenants and that property so held is separate property of each spouse); see also *Forrest v. Forrest*, 99 Nev. 602, 605, 668 P.2d 275, 277 (1983) (similar).

23. We view this case as distinguishable from our decision in *Lentz v. I.D.S. Financial Services*, 111 Nev. 306, 890 P.2d 783 (1995). In *Lentz*, we held an offer of judgment invalid

because, although apportioned between the spouses, the offer was impliedly conditioned upon both spouses' acceptance. *Id.* at 308-09, 890 P.2d at 784-85. However, *Lentz* was decided prior to the amendment of NRCP 68 and NRS 17.115 and, thus, did not involve the same factors for unapportioned offers as currently exist.

24. Although this court has never directly addressed this issue, in *Pombo v. Nevada Apartment Ass'n*, 113 Nev. 559, 563, 938 P.2d 725, 728 (1997), we concluded that a new, valid offer under NRCP 68 filed four days after a previous, invalid offer, was controlling for purposes of NRCP 68. However, our decision in *Pombo* was partially shaped by the fact that the new, valid offer was suggestive that the offeror desired to correct the defects of the first offer. *Id.* Seemingly contrary to *Pombo*, we concluded in *Nava v. Dist. Ct.*, 118 Nev. 396, 398, 46 P.3d 60, 62 (2002), that an offer of judgment is irrevocable and cannot be withdrawn or modified within the ten-day acceptance period of NRCP 68 and NRS 17.115. This contradiction further supports that *Pombo* was primarily based on the invalidity of the first offer. Laura T. Kidwell, J.D., *Construction of State Offer of Judgment Rule—Issues Concerning Revocation and Succession*, 116 A.L.R. 5th 433, § 16 (2004). Thus, *Pombo*, although supportive of our position today, is not wholly controlling and cannot be extended beyond situations where a successive offer of judgment is served to correct a prior, invalid offer of judgment.

25. NRCP 68(e); NRS 17.115(3).

26. NRS 17.115's legislative history is unenlightening on whether successive offers extinguish previous offers.

27. *Distefano v. Hall*, 263 Cal.App.2d 380, 69 Cal. Rptr. 691, 695 (1968).

28. *Id.*

29. *Wilson v. Wal-Mart Stores, Inc.*, 72



Cal.App.4th 382, 85 Cal.Rptr.2d 4, 9 (Ct.App.1999).

30. *Id.*

31. *Id.*

32. *T.M. Cobb Co., Inc. v. Superior Court*, 36 Cal.3d 273, 204 Cal.Rptr. 143, 682 P.2d 338, 340-41 (1984). Important in this decision, however, was the fact that because section 998 was silent with regard to irrevocability, "the general rule that offers may be revoked prior to acceptance should apply." *Id.*

33. *Nava v. Dist. Ct.*, 118 Nev. 396, 398, 46 P.3d 60, 62 (2002).

34. *Kaufman v. Smith*, 693 So.2d 133, 134 (Fla. Dist. Ct.App. 1997).

35. *E.g., Dickenson v. Regent of Albuquerque, Ltd.*, 112 N.M. 362, 815 P.2d 658, 659 (N.M.Ct.App. 1991) (determining that, based on the comments to FRCP 68, defendants were entitled to their costs from the date of their first offer of judgment, rather than their second offer of judgment).

36. Our holding today applies only to the post-trial determination of which offer is controlling for purposes of whether a party received a more favorable verdict at trial. It does not change or affect the fact that offers of judgment are irrevocable within the statutory ten-day period.

37. *State Drywall v. Rhodes Design & Dev.*, 122 Nev. \_\_\_, \_\_\_, 127 P.3d 1082, 1087 (2006); see also *McCrary v. Bianco*, 122 Nev. \_\_\_, \_\_\_, 131 P.3d 573, 577-78 (2006).

38. *State Drywall*, 122 Nev. at \_\_\_, 127 P.3d at 1087.

39. This figure was calculated solely for purposes of whether the Albioses recovered a more favorable verdict and does not represent the actual prejudgment interest the Albioses are entitled to. This figure represents prejudgment interest calculated at 6.25

percent (applicable period of interest is January 1, 2003, which is the period immediately preceding the judgment), for 798 days—the period between July 13, 2000 (service of the summons and complaint) and September 19, 2002 (service of Horizon's third offer of judgment).

40. Although the district court's reasoning in awarding the Albioses attorney fees and costs was erroneous, we will affirm the decision of the district court when it reaches the correct result, even if based on the wrong reason. *Sengel v. IGT*, 116 Nev. 565, 570, 2 P.3d 258, 261 (2000).

41. *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. \_\_\_, \_\_\_, 124 P.3d 530, 547 (2005).

42. *Sandy Valley Assocs. v. Sky Ranch Estates*, 117 Nev. 948, 956, 35 P.3d 964, 969 (2001).

43. 121 Nev. \_\_\_, 124 P.3d 530.

44. *Id.* at \_\_\_, 124 P.3d at 548.

45. *Id.*

46. *Id.* at \_\_\_, 124 P.3d at 548-49 (quoting *University of Nevada v. Tarkanian*, 110 Nev. 581, 591, 879 P.2d 1180, 1186 (1994)).

47. 85 Nev. 345, 349-50, 455 P.2d 31, 33 (1969).

48. *Shuette*, 121 Nev. at \_\_\_, 124 P.3d at 549.

49. See *Hazelwood v. Harrah's*, 109 Nev. 1005, 1011, 862 P.2d 1189, 1192 (1993) (stating that "[i]t is error for a trial court to award prejudgment interest for the entire amount of the verdict when it is impossible to determine what part of the verdict represented past damages"), *overruled on other grounds by Vinci v. Las Vegas Sands*, 115 Nev. 243, 984 P.2d 750 (1999).

50. *Id.*; see also *Stickler v. Quilici*, 98 Nev. 595, 597, 655 P.2d 527, 528 (1982) (concluding, in the context of a personal

injury case, that the jury's general verdict was insufficient for the court to determine what portion of the verdict was properly attributed to past damages).

51. *Farmers Home Mutual Ins. v. Fiscus*, 102 Nev. 371, 375, 725 P.2d 234, 236 (1986).

52. *Shuette*, 121 Nev. at \_\_\_\_, 124 P.3d at 550.

53. *Id.*

54. *Gibellini v. Klindt*, 110 Nev. 1201, 1209, 885 P.2d 540, 544 (1994).

55. *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1355-56, 971 P.2d 383, 387-88 (1998); *Gibellini*, 110 Nev. at 1209, 885 P.2d at 544.

56. *See McNair v. Rivera*, 110 Nev. 463, 468 n. 6, 874 P.2d 1240, 1244 n. 6 (1994); *Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986); *Western Indus., Inc. v. General Ins. Co.*, 91 Nev. 222, 229-30, 533 P.2d 473, 478 (1975).

57. *BHY Trucking v. Hicks*, 102 Nev. 331, 333, 720 P.2d 1229, 1231 (1986).

58. NRS 17.130(2).

59. *Lee v. Ball*, 121 Nev. \_\_\_\_, \_\_\_\_, 116 P.3d 64, 67 (2005).

60. *Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 565 (1993) (citing NRS 18.020(3)).

61. *Id.* at 679, 856 P.2d at 565-66.

62. *Id.*

63. Additionally, upon review of the record and consideration of the parties' arguments, we conclude that the district court likewise did not abuse its discretion by denying the Albioses' request for post-trial attorney fees and costs.

-----



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**EXHIBIT "A"**

ORD

DISTRICT COURT

CLARK COUNTY, NEVADA

|                                |   |                        |
|--------------------------------|---|------------------------|
| In the Matter of the Trust of: | ) | Case No. P-17-090719-T |
|                                | ) | Dept. No. M            |
| McGuire Family Trust.          | ) |                        |
|                                | ) | Hearing Date: N/A      |
|                                | ) | Hearing Time: N/A      |

ORDER

The Court having reviewed the documents, and with good cause appearing, the Court finds the following:

This Court has three separate cases with the Barney law firm. Each of those cases has had at least one very heated exchange between attorneys for the aforementioned firm and the Court. This Court has openly questioned the tactics and practices of the firm and in one instance issued an Order accusing the firm of either fraud or negligence. Even though that Order was later stricken and replaced, its recent introduction as an exhibit in an unrelated case has caused this Court to reflect on its ability to preside over the firm's cases in an impartial and unbiased manner. Due to the extremely litigious turn each of these cases has taken this Court is very reluctant to recuse, but after deep reflection it has become clear that this Court cannot hear these matters in an unbiased manner.

IT IS THEREFORE ORDERED that the Court must recuse from hearing the above entitled case.

WILLIAM S. POTTER  
DISTRICT JUDGE

FAMILY DIVISION, DEPT. M  
LAS VEGAS NV 89101-2408

1  
2 IT IS FURTHER ORDERED that this Court will request that the  
3 Barney firm be placed on its recusal list.  
4

5 DATED this 9<sup>th</sup> day of February, 2018.  
6

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8 DISTRICT COURT JUDGE  
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WILLIAM S. POTTER  
DISTRICT JUDGE

FAMILY DIVISION, DEPT. M  
LAS VEGAS NV 89101-2408



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**EXHIBIT "B"**

*Steven D. Grierson*

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Attorney for Petitioners

DISTRICT COURT  
CLARK COUNTY, NEVADA

In the Matter of ) Case No.: P-17-092512-T  
) Dept. No.: S (Probate)  
THE CHRISTIAN FAMILY )  
TRUST u.a.d. 10/11/16 ) Date: 12/8/17  
) Time: 2:00 PM  
~~~~~ )

SUSAN CHRISTIAN-PAYNE,)
ROSEMARY KEACH and)
RAYMOND CHRISTIAN,)
Petitioners)

-vs-

NANCY I. CHRISTIAN and)
MONTE REASON,)
Objectors)
~~~~~ )

PETITIONER'S OPPOSITION TO MOTION FOR REVIEW/PROPER ACCOUNTING

COMES NOW Petitioners, SUSAN CHRISTIAN-PAYNE, ROSEMARY KEACH and  
RAYMOND CHRISTIAN, independent co-trustees and beneficiaries of The Christian Family  
Trust u.a.d. 10/11/16, by and through their attorney, CARY COLT PAYNE, ESQ., of the  
lawfirm of CARY COLT PAYNE, CHTD., hereby submits this Opposition to the Petition  
for Review/Proper Accounting, which is made and based upon the attached Points and  
Authorities, Exhibits, pleadings on file to date, and any oral argument that the Court may  
allow at the time of the hearing.

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## POINTS AND AUTHORITIES

Nancy Christian/Monte Reason, and their attorneys, wish to spend an inordinate amount of trust monies on meritless joint petitions. Their joint petition references NRS 165.143 (page 1 line 28). If so, then the process pursuant to said statute must be followed, e.g.: the demand was never rejected (NRS 165.143(1)).

As to any accounting, the trust, at Article 11.2, states:

11.2 Accounting. Upon the written request delivered or mailed to the Trustees by an income beneficiary hereunder, the Trustees shall render a written statement of the financial status of the Trust. Such statement shall include the receipts and disbursements of the Trust for the period requested or for the period transpired since the last statement and the principal of the Trust at the end of such period. Statements need not be rendered more frequently than annually. [Emphasis added]

This is a Discretionary Trust (NRS 163.4185(1)(c)), which according the above paragraph, any accounting need not be more than annually. (Also see Art. 11.1-Protection) The Trust was created October 11, 2016. Grantor Raymond Christian funded the trust with his own separate property. Although Nancy agreed to fund with her property, she failed and/or refused to do so. No accounting would be due until October 11, 2017. Alternatively, if the time frame was the date of execution of the trust or when the Grantor Raymond Christian died on January 30, 2017, then the accounting was due a year after that.

Notwithstanding, the Co-Trustees filed a beginning inventory and an initial accounting on October 25, 2017 (courtesy copies attached), covering the period of 10/27/16 - 9/30/17.

The October 21, 2017 "deadline", fell on a weekend, making that Monday, October 23<sup>rd</sup> as a deadline. The Petitioners filed and served their Inventory and Accounting on October 26, 2017.





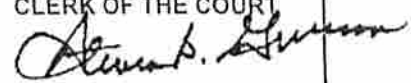
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**EXHIBIT "C"**



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carycoltpaynechtd@yahoo.com  
Attorney for Petitioners

DISTRICT COURT  
CLARK COUNTY, NEVADA

|                       |   |            |               |
|-----------------------|---|------------|---------------|
| In the Matter of      | ) | Case No.:  | P-17-092512-T |
|                       | ) | Dept. No.: | S (Probate)   |
| THE CHRISTIAN FAMILY  | ) |            |               |
| TRUST u.a.d. 10/11/16 | ) | Date:      | 12/15/17      |
|                       | ) | Time:      | 9:30 AM       |
| ~~~~~                 | ) |            |               |

PETITIONER'S OPPOSITION TO JOINT COUNTERPETITION TO  
CONFIRM/BREACH OF FIDUCIARY DUTY, ETC.  
REQUEST FOR DISCOVERY;

COMES NOW Petitioners, SUSAN CHRISTIAN-PAYNE, ROSEMARY KEACH and  
RAYMOND CHRISTIAN, independent co-trustees and beneficiaries of The Christian Family  
Trust u.a.d. 10/11/16, by and through their attorney, CARY COLT PAYNE, ESQ., of the  
lawfirm of CARY COLT PAYNE, CHTD., hereby submits this Opposition to the  
Counterpetition for Jurisdiction/Removal/ Conversion/Fraud Undue Influence/, which is  
made and based upon the attached Points and Authorities, Exhibits, pleadings on file to  
date, and any oral argument that the Court may allow at the time of the hearing.

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1 trust property, not the beneficiary's or the trustee's personal property. A trustee is a  
2 placeholder or pass-through holding trust assets for a class of people, to wit, the  
3 beneficiaries. Finally, because these are trust assets, which can be traced to Raymond  
4 Christian, Sr.'s separate property accounts, neither of them can claim exclusivity. If the  
5 trust did not have a spendthrift provision (pg 25, par 14.2), Nancy's creditors could make  
6 claims against the trust.

8 Since Nancy has been historically known to tell a large tale or embellish factual  
9 situations with additional information which is not true, it is curious that the allegations  
10 regarding being given sedatives, junk food being fed to decedent, isolation, drunken  
11 rages, etc. Such allegations should be pled with specific dates, times, etc., not just the  
12 words "once" or "Nancy believes". Such allegations are required to be pled with  
13 particularity, pursuant to NRCP 9.

15 Unless and until Nancy and/or her counsel can provide actual admissible evidence  
16 as to these spurious allegations and factual misrepresentations, all they can be  
17 considered are more of Nancy's fantasy and stories, and have no evidentiary value  
18 whatsoever. These are the bases for the allegations and should be dismissed and/or  
19 denied with prejudice.

21 Selling or buying properties. Grantor Raymond Christian, while he was alive, used  
22 his separate property funds to purchase the Bluff Point real property and title it to the  
23 trust. He sought to sell the Dancing Vines property as it was too far away from the  
24 children, Nancy was of no assistance, and needed repair, which could not be done with  
25 them residing in the residence. This was not the petitioner's decision. It was their father's  
26 decision.

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IT IS FURTHER ORDERED that this Court will request that the  
Barney firm be placed on its recusal list.

DATED this 9<sup>th</sup> day of February, 2018.

  
DISTRICT COURT JUDGE



**CARY COLT PAYNE, CHTD.**

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**EXHIBIT “D”**



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## **In the Matter of the Christian Family Trust**

### **Audio Transcription of Hearing**

**Date: 03/15/2018**

**Job #: 609298**

Court Reporting – Videoconferencing – Trial Presentation – Nationwide Networking

**1013 Garces Avenue | Las Vegas | 89101  
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1 trust language, unfortunately or fortunately, is  
2 clear that Nancy had the authority to do this.

3 MR. KIRSCHNER: Your Honor, for purposes  
4 of embodying it in the order --

5 THE COURT: But I'm not going forward  
6 today. I'm not going to make a decision on the  
7 attorneys' fees until we get a decision from the  
8 settlement judge or a final decision as to whether  
9 Monte Reason was the trustee properly.

10 MR. BARNEY: Your Honor, all we're at, I  
11 think all Mr. Kirschner is asking for is what  
12 you've already said, that you're confirming her as  
13 the trustee of the trust.

14 THE COURT: I did.

15 MR. BARNEY: That's it.

16 MR. KIRSCHNER: And to be able to put  
17 into the order, Your Honor, it's also this Court's  
18 findings that the terms of the trust are not  
19 ambiguous; is that correct?

20 THE COURT: No. I think everyone agrees  
21 that they're clear, but there may have been a word  
22 "not" missing.

23 MR. KIEFER: So is parol evidence of  
24 Nancy intent is now excluded, correct? Because  
25 there's no ambiguity to which --