Nos. 76198 and 77007

IN THE SUPREME COURT OF THE STATE OF NEVADA

TRUDI LEE LYTLE AND JOHN ALLEN LYTLE, TRUSTEES OF THE LYTLE TRUST,
Appellants,

vs.

SEPTEMBER TRUST, DATED MARCH 23, 1972; GERRY R. ZOBRIST AND JOLIN G. ZOBRIST, AS TRUSTEES OF THE GERRY R. ZOBRIST AND JOLIN G. ZOBRIST FAMILY TRUST; RAYNALDO G. SANDOVAL AND JULIE MARIE SANDOVAL GEGEN, AS TRUSTEES OF THE RAYNALDO G. AND EVELYN A. SANDOVAL JOINT LIVING AND DEVOLUTION TRUST DATED MAY 27, 1992; AND DENNIS A. GEGEN AND JULIE S. GEGEN, HUSBAND AND WIFE, AS JOINT TENANTS,
Respondents.

On Appeal from an Order of the Eighth Judicial District Court, Clark County, Nevada; The Honorable Mark Bailus, District Court Judge; District Court Case No. A-17-765372-C

RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

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

Respondents September Trust dated March 23, 1972, Gerry R. Zobrist and Jolin G. Zobrist, as Trustees of the Gerry R. Zobrist and Jolin G. Zobrist Family Trust, Raynaldo G. Sandoval and Julie Marie Sandoval Gegen, as Trustees of the Raynaldo G. and Evelyn A. Sandoval Joint Living and Devolution Trust Dated May 27, 1992, and Dennis A. Gegen and Julie S. Gegen, Husband and Wife, as Joint Tenants, are individuals and trusts that are not affiliated with any corporation.

The only law firm that has appeared or is expected to appear for Respondents in this case is Christensen James & Martin, 7440 W. Sahara Ave., Las Vegas, Nevada 89117.

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RESPONDENTS' OPENING BRIEF

I. JURISDICTIONAL STATEMENT

Respondents accept the Appellants' Jurisdictional Statement.[1]

II. ROUTING STATEMENT

Respondents accept the Appellants' Routing Statement.

III. STATEMENT OF THE ISSUES

Respondents accept the Appellants' Statement of the Issues.

IV. STATEMENT OF THE CASE

Respondents accept the Appellants' Statement of the Case.

V. STATEMENT OF THE FACTS

The Respondents generally accept the facts alleged by the Appellants, but many pages are spent discussing irrelevant facts pertaining to dealings between the Appellants and the Association to which the Respondents were not a party. On December 4, 2018, this Court entered an Order of Affirmance in Case No. 73039 involving the same Appellants, the same community association, the same subdivision, similarly situated homeowners, and the same legal issues. *Lytle v. Boulden*, No. 73039, 432 P.3d 167, 2018 WL 6433005 (Nev. Dec. 4, 2018) (unpublished).[2] The Appellants concede that the Order of Affirmance resolves the

[1] Pursuant to the Order Consolidating Appeals and Reinstating Briefing filed January 28, 2019, this Answering Brief addresses both Opening Briefs filed by the Appellants in these consolidated appeals on January 15, 2019 and May 16, 2019, respectively.

[2] *See* NRAP 36(c)(2) ("An unpublished disposition, while publicly available, does not establish mandatory precedent *except* in a subsequent stage of a case in which the unpublished disposition was entered, in a related case, or in any case for

issues related to recording of the NRED 1 and 3 Judgments against the Respondents' properties. *See* Appellants' Opening Brief, No. 76198, January 15, 2019, at 21 ("Appellants will not address herein the matters already determined by the Supreme Court in Docket 73039. As set forth above, this docket applies to the NRED 1 Litigation, but the reasoning can equally apply to the NRED 3 Litigation."). Therefore, any facts relating to NRED 1 and NRED 3 are not relevant and need not be discussed here. Further, the Appellants mischaracterize and misconstrue the numerous Orders below and from prior cases (i.e. NRED 1, 2, and 3). The Orders speak for themselves and to the extent that Appellants have mischaracterized or misconstrued the facts or procedural history, the same should be taken as argument and not fact.

A. Additional facts pertaining to the NRED 2 Litigation

The NRED 2 Litigation (just as the NRED 1 and NRED 3 litigation) was against the Association and not the Respondents. The Respondents were not parties to that case. Any judgments obtained and motions won by the Appellants were against the Association and not the individual homeowners.

Paragraph 11 of the NRED 2 litigation Complaint states, "Pursuant to a stipulation and/or agreement between the Plaintiff TRUST and the Defendant ASSOCIATION in the NRED action, the parties to the NRED action agreed that the Amended CC and R's and Bylaws of the Defendant ASSOCIATION was valid

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purposes of issue or claim preclusion or to establish law of the case."). This case is a subsequent stage of a consolidated case, is closely related in fact and law, and is subject to issue and claim preclusion, as detailed herein.

and enforceable only for the purpose of the NRED action and because this is a trial de novo of the NRED action the Plaintiff TRUST once again agrees for the purpose of this litigation only that the Amended CC and R's and Bylaws of the Defendant ASSOCIATION are valid and enforceable" *See* NRED 2 Complaint, AA-76198, Vol. 6, Part 1 at AA000436-437. Thus, as explained in the Complaint filed by the Lytle Trust, the Stipulation stating that the Amended CC&Rs were valid was exclusively for the purposes of that case only.

Not only was it limited to that litigation only, but it did not even survive final judgment in the case. The language of the NRED 2 Summary Judgment Order, prepared by the Lytle Trust's attorney and entered on November 15, 2016, directly contradicts the Stipulation. The "Conclusions of Law" Section states:

> 6. The Lytles' Seventh Cause of Action seeks Declaratory Relief and assumes, therein, **that the Amended CC&Rs are void ab initio, as they indeed are**.[1] [FN 1. Plaintiffs believe that a determination as to the Seventh Cause of Action first, which alleges that the liens are void ab initio and must be revoked **because the District Court already has determined that the Amended CC&Rs are void ab initio is the appropriate starting point for the Court's determination of this matter**.] See First Amended Complaint ("FAC"), ¶¶ 32 -39. Specifically, the Lytles seek this Court to declare that the Liens based on the assessments at issue are invalid because they were based on the Amended CC&Rs, which were void *ab initio* - meaning that there was never any right prescribed by the Amended CC&Rs as they were void from their inception and recording.
>
> 7. *Void ab initio* means that the documents are of no force and effect, *i.e*. it does not legally exist. Washoe Medical Center v. Second Judicial Dist. Court of State of Nev., 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006); see also Black's Law Dictionary, 2d ed.. The phrase *ab initio* comes from Latin and has the literal translation "from the start" or "from the beginning." If a court declares something void ab initio, it typically means that the court's ruling applies from the very beginning, from when the act occurred. **In other words, the**

> **court declares the documents, in this case, the Amended CC&Rs, invalid from the very inception.**
>
> 8. Here, this Court has **declared the Amended CC&Rs void *ab initio***, meaning that they never had any force and effect. The liens in questions are all based on assessments that were levied pursuant to the Amended CC&Rs. As a result, the assessments and resulting liens are invalid and must be **similarly declared void *ab initio***
>
> . . .
>
> 13. As set forth above in this Order, **the Amended CC&Rs and the liens based thereon are all void *ab initio***. The recording of the Amended CC&Rs and the liens all were a cloud on title, and summary judgment granting Plaintiffs Quiet Title cause of action is warranted and granted.
>
> . . .
>
> 22. This Court already found that the Association had no lawful right to record and enforce the Amended CC&Rs. As such, the **Amended CC&Rs were declared *void ab initio***….
>
> . . .
>
> 53. The Association's Counterclaim merely seeks to enforce actions taken against the Lytles via the **Amended CC&Rs, which are *void ab initio*** as set forth herein….

See NRED 2 Summary Judgment Order, AA-76198, Vol. 6, Part 1 at AA000468-477 (emphasis added). The Court declared that the Amended CC&Rs are void *ab initio* at least six (6) times in the Summary Judgment Order. This completely obliterated the Stipulation, conclusively determined that the Amended CC&Rs are void from the very beginning, and undermines any argument to the contrary.

On January 6, 2016, the attorneys for the Association filed their Motion to Withdraw as Attorney of Record on an Order Shortening Time. *See* Details of Case No. A-10-631355-C, Respondent's Appendix ("RA"), Vol. 1, Part 1 at RA0031-40. On February 12, 2016, the District Court granted the Motion. *Id*. Thereafter, the Association was not represented by counsel and all subsequent motions and filings were unopposed, as follows: 1. On March 8, 2016, the Lytle Trust filed a Motion for Leave to File a First Amended Complaint, which was granted on June

3, 2016; 2. On September 14, 2016, the Lytle Trust filed a Motion for Summary Judgment which included punitive damages and was granted on November 14, 2016; 3. On January 16, 2017, the Lytle Trust filed a Motion for Attorney's Fees which was granted on April 18, 2017; 4. On February 23, 2017, the Lytle Trust filed a Motion to Prove-Up Damages which was granted on May 15, 2017; and 5. On July 20, 2017, the District Court signed an Abstract of Judgment in the amount of $1,103,158.12. *Id*.

B. Additional facts pertaining to procedural history below

The Appellants have engaged in multiple disputes with the Rosemere Estates Property Owners' Association, and have obtained at least three judgments, which the Appellants have commonly referred to as NRED 1, NRED 2, and NRED 3. *See generally* Respondents' Complaint, AA-76198, Vol. 1, Part 7 at AA000066-75. There are 9 residential lots within the Rosemere Estates subdivision, each owned by different individuals or trusts. *See* AA-76198, Complaint, Vol. 1, Part 7 at AA000069. None of the individual lot owners are judgment debtors on any of these judgments. *See* Motion for Summary Judgment, Or, In the Alternative, Motion for Judgment on the Pleadings, AA-76198, Vol. 2, Part 1 at AA000094-95. The Appellants unlawfully recorded the abstracts of judgment against each of the residential lots, giving rise to the consolidated cases below. *See Generally* Respondents' Complaint, AA-76198, Vol. 1, Part 7 at AA000066-75.

The Lytle Trust recorded two different abstracts with the Clark County Recorder's office for the Judgment obtained in the NRED 1 litigation against the Association for their attorney's fees and costs in the amount of $361,238.59. *See*

Motion for Summary Judgment, Or, In the Alternative, Motion for Judgment on the Pleadings, AA-76198, Vol. 2, Part 1 at AA000090-91. The first Abstract specifically listed the parcel numbers of the Respondents' Properties as properties to which the NRED 1 Judgment was to attach, but pursuant to the records of the Clark County Recorder's Office only attached to one (1) of the Respondents' Properties-the Sandoval Property. *Id*. However, the first recorded Abstract appears on a Title Report for the Zobrist Property. *Id*. The second Abstract (filed in September) only listed one parcel number but attached to three (3) of the Respondents' Properties. *Id*. The District Court signed an Abstract of Judgment for the NRED 2 Judgment against the Association in the amount of $1,103,158.12, which has not been recorded. *Id*. at AA000092. The Judgment obtained by the Appellants in the NRED 3 litigation has not been recorded. *Id.* at AA000093.

On December 8, 2016, two of the lot owners, Boulden and Lamothe, filed a case against the Appellants in the Eighth Judicial District Court, Case No. A-16-747800-C, to remove the Abstracts of Judgment and plead causes of action for Quiet Title, Declaratory Relief and Slander of Title. Complaint, AA-76198, Vol. 1, Part 1 at AA00001-10. On July 25, 2017, the District Court granted Partial Summary Judgment in favor of Boulden/Lamothe on the quiet title and declaratory relief causes of action (the slander of title claim was not decided). *See* Partial Summary Judgment Order, AA-76198, Vol. 1, Part 6 at AA000051-58. That Partial Summary Judgment Order was appealed and affirmed by this Court in Case No. 73039.

The Respondents also own lots in the Rosemere Estates subdivision, title to which was clouded by Appellants. Following entry of the Partial Summary Judgment Order in favor of Boulden/Lamothe, on September 26, 2017, Respondents sent a demand letter to Appellants' attorney requesting that the Abstracts of Judgment be expunged from Respondents' Properties as well, based on the Court's Order and the identical factual and legal circumstances of the Respondents' properties. *See* Plaintiffs' Motion for Attorney's Fees and Costs ("Attorney's Fees Motion"), Exhibit 4, RA, Vol. 1, Part 3 at RA0156-157. On several occasions, Respondents' attorneys also spoke to the Lytle Trust's attorney requesting that the Abstracts of Judgment be removed. *See* Smith Decl. ¶ 8 in Support of Attorney's Fees Motion, RA, Vol. 1, Part 4 at RA0160-166**.** The Respondents requested to be placed in the same position as Boulden/Lamothe. The Respondents requested that the Lytle Trust stipulate to the same relief accorded to Boulden/Lamothe in the District Court, and then the Lytle Trust could add their claims against the Respondents to the already filed Appeal or retain their appeal rights. *See* Declaration of Counsel in Support of Reply to Defendants' Opposition to Plaintiffs' Motion for Attorney's Fees and Costs, RA, Vol. 2, Part 2 at RA0298 - 0300. In other words, the Respondents offered to be subject to any decision by this Court in Case No. 73039.

Despite this offer, the Lytle Trust refused to release the Abstracts of Judgment as to the Respondents' properties. *Id*. Respondents were forced to file their own action against the Appellants on November 30, 2017, Case No. A-17-765372-C, requesting that the Lytle Trust's Abstracts of Judgment be removed

from their Properties, just as the Court had ordered for Boulden/Lamothe. *See* Respondents' Complaint, AA-76198, Vol. 1, Part 7 at AA000066-75. The Respondents' case was similar to the Boulden/Lamothe case, except it did not include a Slander of Title cause of action. *Id*.

After their Complaint was filed, Respondents reached out to the parties to request consolidation of their case with the Boulden/Lamothe case, since both involved the same parties, the same and substantially similar facts, and the same legal issues. However, not all parties would agree to the consolidation. Smith Decl. ¶ 9 in Support of Attorney's Fees Motion, RA, Vol. 1, Part 4 at RA0160-166. Thereafter, on January 16, 2018, Respondents filed a Motion to Consolidate. *See* Attorney's Fees Motion, RA, Vol. 1, Part 3 at RA0057. After several changes of Departments and continuances, the Motion to Consolidate was set for hearing. *Id*. At the first hearing, the Lytle Trust's attorney orally objected to the Motion (for the first time, despite extensive time to file written objections) and the Court granted the Lytle Trust time to file an opposition. *Id*. However, no opposition was filed. *Id*. The two cases were consolidated on February 21, 2018. *See* Order Consolidating Cases, AA-76198, Vol. 1, Part 10, AA000081-86.

On May 24, 2018, the District Court, following the Order previously entered in favor of Boulden/Lamothe, granted complete summary judgment in favor of Respondents on all issues and claims asserted in Respondents' case. *See* Order Granting Motion, AA-76198, Vol. 10, Part 3 at AA000780-793. Following entry of judgment in favor of Respondents, the District Court awarded fees and costs to Respondents. *See* Notice of Entry of Order Regarding Motion for Attorney's Fees

and Costs and Memorandum of Costs and Disbursements, etc., Appellants' Appendix in Case No. 77007 ("AA-77007"), Vol. 11, Part 3, AA000831-843.

The Appellants filed three separate appeals from the District Court's Orders in the consolidated cases below. The first appeal is from the order granting partial summary judgment to Boulden/Lamothe, Case No. 73039. The second appeal is from the order granting complete summary judgment to Respondents, Case No. 76198. The third appeal is from the award of fees and costs in favor of Respondents, Case No. 77007. Appeal Nos. 76198 and 77007 are consolidated.

On December 4, 2018, this Court entered its Order of Affirmance in Case No. 73039 affirming the District Court's Order in the Boulden/Lamothe case. There, this Court found that the Appellants had no legal basis on which to record the abstracts of judgment against the individual properties in the Rosemere Estates subdivision. The Court's legal analysis is binding and dispositive in this consolidated Case because the relevant facts and circumstances are exactly the same.

Following entry of the Order of Affirmance, Respondents requested that Appellants withdraw these appeals. *See* Letter from Wesley J. Smith, Esq. to Richard Haskins, Esq., RA, Vol. 2, Part 7 at RA0406-407.

C. Additional facts pertaining to Respondents' Motion for Attorney's Fees.

In their Motion for Attorney's Fees and Costs, Respondents asserted that they should be awarded their attorney's fees and costs pursuant to Section 25 of the

Original CC&Rs. Attorney's Fee Motion, RA, Vol. 1, Part 3 at RA0060-63. The District Court did not reach this ground. Section 25 of the Original CC&Rs contains a provision that requires the losing party to pay attorney fees reasonably incurred by the prevailing party in any action brought to enforce the CC&Rs or to restrain their violation, as follows:

> In any legal or equitable proceeding for the enforcement of or to restrain the violation of the Declaration of Covenants, Conditions and Restrictions or any provision thereof, the losing party or parties shall pay in such amount as may be fixed by the court in such proceeding.

Attorney's Fees Motion, Ex. 3, RA, Vol. 1, Part 3 at RA0151-0154.

The Respondents restrained violation of the Original CC&Rs by requiring the Lytle Trust to expunge the Abstracts of Judgment improperly recorded against their Properties. Appellants relied on the Original CC&Rs as alleged authorization for recording the liens. Appellants argued that the terms of the Original CC&Rs allowed a lien or judgment against the Association to attach to each lot within the Association. *Id*. at RA0060-61.

In bringing the underlying case, Respondents asserted that the Abstracts of Judgment obtained against the Association could not be recorded against the individual homeowners pursuant to the terms of the Original CC&Rs. The Respondents prevailed in enforcing the Original CC&Rs by obtaining injunctive relief prohibiting Appellants from recording any Judgments against Respondents' properties that were obtained against the Association.

Accordingly, the Respondents are entitled to an award of attorney fees, pursuant to the terms of the Original CC&Rs. *Id*. at 0061-62. Respondents

requested their fees and costs under this contractual provision, but the District Court did not reach the issue. See Notice of Entry of Order Regarding Plaintiffs' Motion for Attorney's Fees and Costs and Memorandum of Costs and Disbursements and Defendants' Motion to Retax and Settle Memorandum of Costs, AA-77007, Vol. 11, Part 3 at 000838.

Boulden/Lamothe were recently awarded their fees and costs by the District Court under Section 25 of the Original CC&Rs. *See* Reporters Transcript of May 16, 2019 Hearing on Boulden/Lamothe and Disman's Motions for Attorney's Fees and Costs, RA, Vol. 2, Part 5 at RA0323-403.

VI. STATEMENT OF THE STANDARD OF REVIEW

Respondents accept Appellants' Statement of the Standard of Review for Case No. 76198 with regard to the Order Granting Summary Judgment, which is *de novo*. With regard to the District Court's post-judgment Order granting Respondents' Motion for Attorneys' Fees and Costs in Case No. 77007, Appellants argue that the standard of review should be *de novo* because the fee award was based on the law of the case doctrine. This is incorrect.

This Court "generally review[s] the district court's decision regarding attorney fees for an abuse of discretion." *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 417, 132 P.3d 1022 (2006) (*citing Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 993, 860 P.2d 720, 722 (1993)); *Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005). The same standard applies for awards under NRS 18.010(2)(b), upon which the District Court awarded fees to the Respondents. *Mack–Manley v. Manley*, 122 Nev. 849, 860, 138 P.3d 525, 532-33 (2006). Abuse

of discretion is the proper standard of review in this case as to the fee award. The abuse of discretion standard inquires if the district court "ignore[d] legal principles and act[ed] without justification." *Collins v. Murphy*, 113 Nev. 1380, 1383, 951 P.2d 598, 600 (1997).

VII. SUMMARY OF ARGUMENT

Each of the Respondents owns a lot located in the Rosemere Estates subdivision ("Subdivision"), title to which was clouded by Appellants when they recorded against the Respondents' property judgments which they had obtained against the Rosemere Estates Property Owners' Association ("Association"). On December 4, 2018, this Court entered its Order of Affirmance in Case No. 73039 affirming the District Court's granting of summary judgment to the Boulden/Lamothe homeowner plaintiffs in Case No. A-16-747900-C. There, the Court found that Appellants had no legal basis on which to record the abstracts of judgment against the individual properties in the Subdivision. The Court's legal analysis is binding precedent and dispositive of the summary judgment issues presented in this case. The relevant facts and circumstances are exactly the same and the Order of Affirmance addresses all such issues on this Consolidated Appeal.

The law of the case doctrine was correctly applied by the District Court. Despite the Appellants' arguments, law of the case can be applied by a lower court to its own prior rulings. Of course, a district court may revisit a prior ruling before it becomes final, but also may choose not to disturb matters that have already been decided. This allows the district court to promote judicial economy and avoid

inconsistent rulings for similarly situated parties. Even if law of the case did not apply then, it would certainly apply now after the Order of Affirmance.

The stipulation in the NRED 2 litigation is a distinction without a difference. Every judgment relevant to this case, including the NRED 2 Judgment, declares the Amended CC&Rs void ab initio and the Association to be a limited purpose association subject to limited application of NRS 116. The District Court's prior order, and now the Order of Affirmance, apply equally to all judgments obtained by the Appellants against the Association. These judgments could not and cannot be recorded against the Respondents real property.

As to the award of fees and costs, the Lytle Trust lacked reasonable grounds to maintain its defenses in this case. The District Court entered an Order discarding with the Lytle Trusts' legal arguments. The facts and circumstances of Respondents were remarkably similar – the only difference being the lot number in the same Subdivision. Prior to litigation, Respondents requested to be put in the same position as Boulden/Lamothe, even offering for the Lytle Trust to retain its appeal rights or add the Respondents to their already pending appeal in Case No. 73039. The District Court properly concluded that the defenses were maintained without reasonable grounds under these circumstances. Alternatively, the Court can affirm the award of fees pursuant to the fee provision of the Original CC&Rs.

Following entry of the Order of Affirmance, the Lytle Trust has continued this pattern and practice by continuing these appeals, despite clear and binding precedent from this Court on these matters. The Respondents warned the Lytle Trust that they would pursue their fees and costs if Appellants continued these

appeals. *See* Letter from Wesley J. Smith, Esq. to Richard Haskins, Esq. dated December 10, 2018, RA, Vol. 2, Part 7, RA0406-407. Therefore, Respondents request that the Court exercise its discretion and award attorney's fees to Respondents pursuant to NRAP 38.

VIII. ARGUMENT

A. Law of the case was properly applied by the District Court

Consistent with Nevada law, the Appellants have conceded that law of the case doctrine applies to the Order issued in Supreme Court Docket 73039 with regard to the NRED 1 and NRED 3 Litigation and any issues related to such. *See* Appellants' Opening Brief, Docket 76198, at 21, Section III.A; *see Bejarano v. State*, 122 Nev. 1066, 1074-75, 146 P.3d 265, 271-72 (2006) ("[t]he law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same."). However, Appellants argue that the law of the case doctrine was misapplied by the District Court. This argument undermines the District Court's ability to manage its docket and exercise discretion to not relitigate issues. "The discretion of a court to review earlier decisions should be exercised sparingly so as not to undermine the salutary policy of finality that underlies the rule." *Moore v. James H. Matthews & Co.*, 682 F.2d 830, 833–34 (9th Cir. 1982) (*citing Lathan v. Brinegar*, 506 F.2d 677, 691 (9th Cir. 1974) (en banc); *United States v. Fullard-Leo*, 156 F.2d 756, 757 (9th Cir. 1946)). As explained below, the District Court properly exercised its discretion to refrain from revisiting issues that were already decided.

1. Law of the Case applies to decisions of the same court.

Law of the case is not limited to decisions by higher courts. "The law-of-the-case doctrine 'refers to a family of rules embodying the general concept that a court involved in later phases of a lawsuit should not re-open questions decided (i.e. established as law of the case) by that court or a higher one in earlier phases.'" *Recontrust Co. v. Zhang*, 130 Nev. 1, 317 P.3d 814, 818 (2014) (*quoting Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995)). Neither *Zhang* nor *Crocker* state that the *law of the case* only applies to appeals. *Zhang* expressly states that it can be applied to "questions decided … **by that court** or a higher one." *Id*. For the doctrine to apply, an earlier decision must have actually addressed the issue explicitly or by necessary implication. *Id*. Here, the District Court's earlier decision explicitly and necessarily addressed the issues. After the case was transferred to Judge Bailus, he exercised his discretion to not re-open questions already decided by Judge Williams. This was a proper exercise of discretion.

2. This Court has questioned *Byford*

The Appellants cite to *Byford v. State*, 116 Nev. 215, 232, 994 P.2d 700, 711-12 (2000), for its argument that law of the case could not be applied to Judgment Williams' decision. There, this Court stated that the law of the case does not apply to a trial court's ruling. *Id.* However, this Court questioned whether *Byford* had confused law of the case with law of the mandate, as follows:

> Citing *Byford v. State*, 116 Nev. 215, 232, 994 P.2d 700, 711–12 (2000), Soussana argues that in Nevada, the law-of-the-case doctrine does not apply to district court decisions, only to appellate decisions. **Whether Byford conflated the much narrower law-of-the-mandate doctrine, which only applies to appellate determinations,**

> **with conventional law-of-the-case doctrine, which conventionally applies to trial court determinations**, see 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4478.1 (2d ed.2002), **need not be decided on this appeal**, since the NRCP 54(b) certification and lack of an appeal make collateral estoppels, now known as issue preclusion, applicable.

Soussana v. Shaposhnikov, No. 56117, 373 P.3d 962, 2011 WL 6916452, at *2, n.1 (Nev. Dec. 27, 2011) (unpublished) (emphasis added). It is likely that *Byford* was actually referring to the law-of-the-mandate doctrine, not law of the case, when it pronounced it only applied to appellate decisions. Although this Court did not have to reach a conclusion on whether *Byford* actually made that mistake, it clearly stated that law of the case "conventionally applies to trial court determinations."

The case which *Byford* cites to, *Walker v. State*, 85 Nev. 337, 455 P.2d 34 (1969), does not limit the doctrine to appellate decisions only. While factually the law of the case doctrine is applied to an appellate decision in that case, there is no language limiting law of the case to only that circumstance. 85 Nev. at 343.

3. The Ninth Circuit and other federal courts do not limit the law of the case doctrine to appellate court decisions.

The Ninth Circuit and other federal courts, including the District of Nevada, have consistently applied law of the case to district court decisions. *See Moore*, 682 F.2d at 833 (Under the "law of the case" doctrine, the Court is precluded from re-examining an issue that was previously decided by the same court in the same case); *Harkins Amusement Enterprises, Inc. v. Gen. Cinema Corp.*, 850 F.2d 477, 491 (9th Cir. 1988) (under law of the case, earlier decision of the district court is applied to similar issues for different defendants); *Milne v. Stephen Slesinger, Inc.*, No. CV 02-08508 FMC PLAX, 2007 WL 7646410, at *12 (C.D. Cal. Feb. 15,

2007) ("the 'law of the case' doctrine is not solely an 'appellate' doctrine—a district court may apply it as a matter of discretion."); *First Interstate Bank of Nevada v. United States*, 874 F. Supp. 286, 289 (D. Nev. 1994), *rev'd on other grounds* 108 F.3d 1185 (9th Cir. 1997) (district court applied law of the case doctrine to its prior ruling on a Motion to Dismiss on a subsequent Motion for Summary Judgment); *Newcomb v. Cambridge Home Loans, Inc*., 2011 WL 13350270, *2 (D. Haw. Oct. 27, 2011) (citing the "law of the case" doctrine as a basis to dismiss a substantively identical complaint in the same proceeding). Allowing a District Court to apply law of the case to its own prior orders promotes judicial economy, efficiency, and speedy relief to the parties. The District Court here accomplished those goals in this case.

4. Applying the law of the case promotes justice.

"[T]he law of the case rule does not bind a court as absolutely as res judicata, and should not be applied woodenly when doing so would be inconsistent with considerations of substantial justice." *Moore*, 682 F.2d at 833 (internal quotation and citation omitted). "A court may depart from the previous decision if (1) the first decision was clearly erroneous; (2) an intervening change in the law has occurred; (3) the evidence on remand is substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result." *United States v. Cuddy*, 147 F.3d 1111, 1114 (9th Cir. 1998). "Failure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of discretion." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997). Here, none of these factors existed to warrant the District Court entering a

different decision. There was no new evidence, no new authority, and no changed circumstances. This Court upheld the District Court's Order, so there is no manifest injustice. Further, the Appellants have conceded that this Court's Order of Affirmance has decided all issues with regard to the NRED 1 and 3 Litigations. In short, applying the law of the case serves the interests of justice.

5. The Order of Affirmance mooted the law of the case arguments asserted here.

Even if law of the case was erroneously applied, this issue is moot because this Court has now affirmed the decision in its Order of Affirmance. If this case were remanded back to the District Court, law of the case will apply based on the Order of Affirmance. The result will be the same.

Issue preclusion will also apply. In *Executive Mgmt. v. Ticor Title Ins. Co*., 114 Nev. 823, 835-36, 963 P.2d 465, 473-74 (1998), the Court clarified the three-part test for issue preclusion as follows: "(1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; and (3) the party against whom the judgment is asserted must have been a party in privity with a party to the prior litigation." "Unlike claim preclusion, issue preclusion 'does not apply to matters which could have been litigated but were not.' " *Id*. at 473 *quoting Pomeroy v. Waitkus*, 183 Colo. 344, 517 P.2d 396, 399 (1974). Here, all claims and issues presented are identical. The initial Partial Summary Judgment was on the merits and all issues below have now been decided. The Lytle Trust was party

to all decisions at issue in this case. Thus, even if this case were remanded, issue preclusion will now apply.

Call it what you will, law of the case, issue preclusion, or simply that the Court had already ruled on it, the Court should find that the District Court properly entered its Order in accordance with what it had already decided for Boulden/ Lamothe and which this Court has affirmed.

B. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT AND ORDERING A PERMANENT INJUNCTION AS TO THE NRED 2 LITIGATION

1. The Order of Affirmance settled all legal issues on the merits in this case.

Appellants correctly concede that this Court's Order of Affirmance settles all legal issues relating to the NRED 1 and 3 Litigations. However, the Appellants are incorrect in asserting that because they and the Association stipulated the Amended CC&Rs were valid and enforceable early in the NRED 2 litigation for limited purposes, this makes the NRED 2 litigation unique and should change the way the Court's Order of Affirmance is applied. However, the NRED 2 Judgment states that the Amended CC&Rs are void ab initio, directly contrary to and superseding the Stipulation. The Stipulation has no affect and does not make a difference to the outcome of this case.

2. The Stipulation in the NRED 2 Litigation was limited in purpose and the NRED 2 Judgment contains opposite findings of fact and conclusions of law.

The Stipulation stating that the Amended CC&Rs were valid was exclusively for the purposes of that case. A judgment pursuant to a stipulation of the parties does not have a res judicata effect. *Geissel v. Galbraith*, 105 Nev. 101, 104, 769 P.2d 1294, 1296 (1989) (*citing United States v. Int'l Bldg. Co.*, 345 U.S. 502, 505–506 (1953)). It follows that any stipulations between the Association and the Appellants is not dispositive in this case. It would be improper to hold anything in the NRED 2 Litigation against the Respondents because they were not parties. The defaulting actions of the Association cannot be imputed to the property owners. *Gearhart v. Pierce Enters., Inc*., 105 Nev. 517, 520, 779 P.2d 93, 95 (1989) (refusing to impose liability for one defendant's default against another).

More importantly, the NRED 2 Judgment[3] superseded and completely obliterated the stipulation, finding that the Amended CC&Rs were void ab initio

[3] The Appellants mischaracterize the language of the NRED 2 Judgment claiming that it states that Appellants could recover attorneys fees under the Amended CC&R's "because that document, while declared *void ab initio* by the district court, was in effect and enforced by the Association against the Appellants at all times during the underlying litigation." *See* App. Br. 76198 at 19. There is no such language in the NRED 2 Judgment nor is such language implied. *See* AA-76198, Vol. 2, Part 1, at AA000186-189. The NRED 2 Judgment cites to specific provisions of the CC&R's, Amended CC&R's and quotes *Mackintosh*, but never comes to the conclusion that attorneys fees were granted to Appellants because the Amended CC&R's "were in effect and enforced by the Association during the Underlying Litigation." Therefore, coming after the fact and declaring that the NRED 2 Judgment says something different than it actually says is self serving and inconsistent with the actual findings of the Court.

and that the Association was a limited purpose association. This brings the NRED 2 Judgment in line with the NRED 1 and NRED 3 Judgments and eliminates the distinction that the Lytle Trust advocates in this appeal.

3. The NRED 2 arguments are barred by judicial estoppel.

Judicial estoppel bars Appellants' argument that the Amended CC&Rs and NRS 116 empowered the Appellants to record the Abstracts of Judgment against the properties in the Subdivision. Under the doctrine of judicial estoppel, "[i]f a party has taken a position before a court of law, whether in a pleading, in a deposition, or in testimony, judicial estoppel may be invoked to bar that party, in a later proceeding, from contradicting his earlier position." Rand G. Boyers, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw. U. L. Rev. 1244, 1244–45 (1986). "The independent doctrine of judicial estoppel precludes a litigant from playing fast and loose with a court of justice by changing his position according to the vicissitudes of self-interest…." *Porter Novelli, Inc. v. Bender*, 817 A.2d 185, 188 (D.C. 2003). In Nevada, judicial estoppel applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." *Marcuse v. Del Webb Communities, Inc*., 123 Nev. 278, 288, 163 P.3d 462 (2007).

Here, Appellants sought and received a declaration in the NRED 1, 2, and 3 Judgments that the Amended CC&Rs are void *ab initio*. The language of the

Judgments came directly from the Appellants. Everything argued here is directly contradictory to those prior positions and is not taken as a result of ignorance, fraud, or mistake. Judicial estoppel applies here to bar these inconsistent positions.

4. Equity requires that Appellants live with the result they freely and knowingly sought and obtained.

Appellants argue that equity requires the Court to declare that Appellants are permitted to record the NRED 2 Judgment against the Respondents' properties because any other result is absurd. Yet, the entire reason why the Appellants cannot record the NRED 2 Judgment against the Respondents' properties is a result of their own voluntary and deliberate action. The Appellants sought to have the Amended CC&Rs declared void ab initio and the Association to be a limited purpose association under NRS 116, spending hundreds of thousands of dollars in attorney's fees and litigating at least three separate cases to do obtain this result. It is this result that has limited the applicability of NRS 116 and reverted the Association to a limited purpose association subject to the Original CC&Rs.

Now that the Appellants have obtained the result that they so keenly desired, they realize the folly of their actions and want this Court to save them from themselves. The only absurdity would be if the Court did what the Appellants are requesting – allow the Appellants to have their cake and eat it too. In reality, equity favors the Respondents. They were not parties to the Lytle Trust's myriad legal battles with the Association. They played no role in the Appellants' litigation strategy. Further, they gave the Appellants several opportunities to avoid this litigation while retaining their right to advance their allegedly novel legal

arguments to this Court in Case No. 73039. However, Appellants refused and Respondents were forced to file the underlying action and now respond to this Appeal, even after this Court told the Appellants their legal arguments were incorrect in Case No. 73039.

The cases cited by Appellants regarding the principle of equity are not applicable to this litigation. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. ENC Corp*., 464 F.3d 885, 891 (9th Cir. 2006), the Court was considering the words "equity and good conscience" in context of FRCP 19(b), which requires that the court "determine whether, in equity and good conscience, the action should proceed among the existing parties . . . ." The word "equity" actually appeared in the Rule governing the situation. This is not present here.

In *Adams v. Champion*, 294 U.S. 231, 237 (1935), the concept of equity was considered in regard to an actual trust that could have been set up by the bank. There, the Court reasoned "We do not need to consider whether effect would be given to such an agreement . . .if the bank at that time had been under a present duty to set up a trust . . .Equity fashions a trust with flexible adaptation to the call of the occasion." Similarly common law principles of trusts are not applicable here.

In *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 132 Nev. Adv. Op. 5, 366 P.3d 1105 (2016), the Court affirmed that a court can grant equitable relief from a defective HOA lien foreclosure sale when there is grossly inadequate price plus fraud, unfairness, or oppression. The Appellants have not demonstrated that any

similar injustices are present here. The legal conclusions in the NRED Judgments are a result of the Appellants' own advocacy, not the Respondents.

Nor does the reasoning in the *Mackintosh v. California Fed. Sav. & Loan Ass'n*, 113 Nev. 393, 405–06, 935 P.2d 1154, 1162 (1997) change this matter. The Court may recall that Appellants attempted to use the reasoning in *Mackintosh* in Case No. 73039, which the Court rejected, stating:

> Nothing in *Mackintosh* suggests that [it] applies beyond the context of contractual agreements and the circumstances of that case, and we are not persuaded that it otherwise provides a basis for expanding the application of NRS 116.3117.

Lytle v. Boulden, No. 73039, Slip Op. at 6, 432 P.3d 167, 2018 WL 6433005, *2 (Nev. December 4, 2018). The Appellants' attempt to use *Mackintosh* again to convince the Court that equity requires a different result is surprising given the Court's opinion. The Court stated that it will not use *Mackintosh* to expand the liability of the homeowners or the meaning of NRS 116.3117, and Appellants have not presented anything new to change that result.

Void ab initio contracts, like the Amended CC&Rs, are completely unenforceable. In *Golden Pisces, Inc. v. Fred Wahl Marine Constr., Inc*., 495 F.3d 1078 (9th Cir. 2007), a ship owner who prevailed in a breach of contract action by showing that the underlying contract was void sought to enforce an attorney's fee provision from the void contract. After analyzing many state and federal cases including *Mackintosh*, the Ninth Circuit determined that "[t]he principle that emerges from our survey of federal and state case law is that, consistent with the American Rule, a party who prevails by demonstrating that a contract is entirely

void, as opposed to divisible, voidable, or rescindable, cannot then seek the benefit of an attorney' fees provision from that contract." *Id*. at 1083.

Contrary to Appellants' arguments, the Ninth Circuit stated the *Macintosh* case "distinguished between a void contract and a rescinded contract . . . and enforced an attorneys' fees provision in favor of the party who prevailed by showing that the contract at issue was rescinded." *Id*. (emphasis added). The Ninth Circuit Court reasoned that the doctrine of judicial estoppel, "which precludes a party from gaining an advantage by taking contradictory positions at different stages of a judicial proceeding," applied to the shipowner's attempt to claim attorney's fees because the shipowner "first argued to [its] advantage that the written contract was void ... and now seek[s], again to [its] advantage, to enforce a term from that same contract." *Id*. at 1084 (internal quotation marks omitted).

In *Katz v. Van Der Noord*, 546 So. 2d 1047 (Fla. 1989), upon which *Mackintosh* relies and which Appellants quote, the Court makes clear that the holding is about a contract that is rescinded, not a contract that is *void ab initio*, as follows:

> The legal fictions which accompany a judgment of rescission do not change the fact that a contract did exist. It would be unjust to preclude the prevailing party to the dispute over the contract which led to its rescission from recovering the very attorney's fees which were contemplated by that contract. **This analysis does no violence to our recent opinion in *Gibson v. Courtois* in which we held that the prevailing party is not entitled to collect attorney's fees under a provision in the document which would have formed the contract where the court finds that the contract never existed.**

Id. at 1049 (emphasis added). The last sentence makes clear that *Mackintosh* does not apply since the Appellants had the Amended CC&R's declared *void ab initio*

(void from the beginning, never existed), and not just rescinded, in the NRED cases. Equity cannot save them from this result.

5. The Order of Affirmance is clear that the plain meaning rule applies to the Court's analysis of Chapter 116.

Appellants argue that the plain meaning rule should not apply to Chapter 116 with respect to limited purpose associations even though this Court emphasized in its Order of Affirmance that NRS 116 is clear with regard to limited purposed associations:

> Thus, the plain language of the statute is clear that limited purpose associations are not subject to NRS 116.3117's lien provisions. By listing exactly which provisions within NRS Chapter 116 apply to limited purpose associations, NRS 116.1201 does not leave any room for question or expansion in the way the Lytles urge.

Lytle v. Boulden, No. 73039, Slip Op. at 4, 432 P.3d 167, 2018 WL 6433005, *2 (Nev. December 4, 2018). Despite this language from the Court, the Lytles are still trying to urge this Court to expand NRS 116.3117 to include limited purpose associations by arguing that the statute is incomplete and ambiguous in the way it deals with the Board of Directors, insurance and a reserve study. However, none of these apparent ambiguities have anything to do with interpreting NRS 116.3117 to include limited purpose associations.

If a statute is clear on its face a court cannot go beyond the language of the statute in determining the legislature's intent. *White v. Warden, Nevada State Prison*, 96 Nev. 634, 614 P.2d 536 (1980). These few examples that the Lytles have provided showing that the statute might be ambiguous have nothing to do with whether NRS 116.3117 should apply to limited purpose associations and have

not demonstrated any ambiguity to the issues in this case. The Court has spoken on this issue and has found that the statute is clear on its face. The Appellants have not provided any reason to waste the Court's time on further analysis.

Consider also that in the Appellants made the exact opposite argument in their Reply to Opposition to Countermotion for Summary Judgment. In fact, several of the headings in the Reply state, "A Plain Reading Of NRS 116 Permits The Lytles To Lien Plaintiffs Property, Even As A Limited Purpose Association" and "NRS 116.4117 And NRS 116.3111 Are Clear And Unambiguous And Not Subject To Reference Beyond The Plain Meaning of The Statutes." *See* AA-76198, Vol. 8, Part 2 at AA000633-689.

6. NRS 116.3117 does not permit the Appellants to record liens against the Respondents' properties.

The Appellants assert that if this Court were to apply equity then the Appellants would be allowed to record the NRED 2 Judgment against the Respondents' Properties pursuant to NRS 116.3117. However, the Court already rejected this argument in its Order of Affirmance. *Lytle v. Boulden*, No. 73039, Slip Op. at 3-6, 432 P.3d 167, 2018 WL 6433005, *2 (Nev. December 4, 2018).

There are no Nevada cases supporting the Appellants' tortured arguments. The cases cited by the Appellants are from other jurisdictions and concern condominium units only. *See Ensberg v. Nelson*, 178 Wash. App. 879, 320 P.3d 97, 102 (2013) ("[B]y statute, a judgment against a condominium association is a lien in favor of the judgment lienholder against all of the units in the condominium. But this case does not involve a condominium association, the statute does not

apply."); *Summit House Condominium v. Com.*, 514 Pa. 221, 523 A.2d 333, 336 (1987) ("a judgment against the Council would have constituted a lien against each individual condominium unit owner"); *Interlaken Service Corp. v. Interlaken Condominium Ass'n, Inc.*, 222 Wis. 2d 299, 588 N.W.2d 262, 266 (Wisc. Ct. App. 1998) ("A judgment for money against an association shall be a lien against any property owned by the association, and against each of the condominium units..."). This case does not involve condominium units. None of these cases provide any basis to contradict clear statutory language that NRS 116.3117 does not apply to limited purpose associations and does not allow the Appellants to record their Judgments against the Respondents' properties.

C. THE DISTRICT COURT DID NOT ERR IN FINDING APPELLANTS MAINTAINED THE ACTION WITHOUT REASONABLE GROUND.

"The decision whether to award attorney's fees is within the sound discretion of the district court." *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006). Attorney fees should be awarded when authorized by statute, rule, or agreement. *First Interstate Bank of Nev. v. Green*, 101 Nev. 113, 116, 694 P.2d 496, 498 (1985).

Following entry of Judgment in their favor, the Respondents moved for an award of attorney's fees and costs under both the fees provision of the Original CC&Rs and 18.010(2) because the Lytle Trust's defense was maintained without reasonable ground. Attorney's Fees Motion, RA, Vol. 1, Part 3 at RA0062-64. The District Court granted the Respondents' fees under NRS 18.010(2) and did not

reach the contractual argument. This Court may affirm under both NRS 18.010(2) and the Original CC&Rs.

1. The District Court Correctly Held that the Lytle Trust Maintained their Defense without Reasonable Grounds under NRS 18.010(2).

NRS 18.010(2) provides that:

> the court may make an allowance of attorney's fees to a prevailing party: … (b) Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or *defense of the opposing party* was brought or *maintained without reasonable ground* or to harass the prevailing party. *The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations.* It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure *in all appropriate situations* to *punish for and deter frivolous or vexatious claims and defenses* because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

(emphasis added); *see also Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 968, 194 P.3d 96, 107 (2008); *Trustees of Plumbers & Pipefitters Union Local 525 Health & Welfare Tr. Plan v. Developers Sur. & Indem. Co.*, 120 Nev. 56, 63, 84 P.3d 59, 63 (2004) (discussing legislative intent to "liberalize" attorney fee awards). A claim is groundless if "the allegations in the complaint ... are not supported by any credible evidence at trial." *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 996, 860 P.2d 720, 724 (1993) (*quoting W. United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984)). The court may exercise its discretion in determining the amount to award to the prevailing party and may allocate fees

between grounded and groundless claims. *Bergmann v. Boyce*, 109 Nev. 670, 676, 856 P.2d 560, 563-64 (1993).

Respondents approached the Lytles on several occasions and through several different means prior to filing the district court lawsuit requesting resolution based the Boulden/Lamothe Order. Attorney's Fees Motion, RA, Vol. 1, Part 3 at RA0063. The Respondents were similarly situated to Boulden/Lamothe. There were no material differences between the parties; they just owned different lots on the same residential street. After the District Court Order was entered, the Lytle Trust's defenses were groundless because the District Court had already decided that the Abstracts of Judgment should be removed. There were no facts specific to the Respondents that would justify a different result. The exact relief the Respondents requested from the Lytle Trust was granted by the District Court, but only after costly litigation.

Appellants rely on *Frederic and Barbara Rosenberg Living Trust v. MacDonald Highlands Realty, LLC*, 427 P.3d 104, 134 Nev. Adv. Op. 69 (2018), where the Court overturned a district court's decision to award attorney's fees reasoning that, "Though we agree that the evidence produced and Nevada's current jurisprudence does not fully support the Trust's suit, we disagree that the Trust lacked reasonable grounds to maintain the suit, as it presented a novel issue in state law ... [there is a] need for attorneys to pursue novel legal issues or argue for clarification or modification of existing law." *Id.*, 472 P.3d at 113. The *Frederic* case does not apply here because Appellants' arguments were not novel to the District Court proceedings – the exact arguments had already been heard and

rejected by the District Court when it awarded partial summary judgment to Boulden/Lamothe. In its Order awarding fees, the District Court concluded that Appellants had the opportunity to avoid litigation and maintain appeal rights but chose not to do so, the exact scenario for which NRS 18.010(2)(b) was enacted, as follows:

> The Defendants had notice of the Order entered by Judge Williams in Case No. A-16-747900-C in favor of substantially similarly situated property owners as the Plaintiffs. After the Order was entered and prior to this Case being filed by the Plaintiffs, the Defendants were given opportunity to avoid this litigation and to preserve their legal arguments for appeal. As this Court has already held, Judge Williams' Order is law of the case and binding on this Court. Therefore, given the directive in NRS 18.010(b) to liberally construe the paragraph in favor of awarding attorney's fees, the Court finds that the Defendants' defense to this action was maintained without reasonable ground.

See Order Regarding Plaintiffs' Motion for Attorney's Fees and Costs, AA-77007, Volume 11, Part 3 at 5:11-21 at AA000838.

There is substantial "evidence supporting the district court's finding that the claim or defense was unreasonable or brought to harass." *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 687-88 (1995). The facts and issues discussed above clearly remove this case from the *Frederic* reasoning. In *Frederic*, the district court determined that the Trust's claims were not frivolous when initially filed but after receiving the motion for summary judgment, the Trust lacked reasonable grounds to maintain the litigation because of the facts and law. *Frederic*, 427 P.3d at 112. The district court only awarded attorney fees incurred from the time the summary judgment was filed. *Id*.

In the instant case, Appellants had the opportunity to avoid the litigation altogether and preserve their legal arguments for appeal, which they rejected in favor of litigation. The District Court had already entered its Order before Respondents filed suit. Appellants' defenses did not have reasonable grounds at the time suit was filed, or at any stage in the proceeding. This Court provided further evidence of this in its Order of Affirmance in Case No. 73039, wherein all of Appellants' arguments were rejected. *See, generally, Lytle v. Boulden*, No. 73039, 432 P.3d 167, 2018 WL 6433005 (Nev. December 4, 2018).

Further, in *Frederic* the plaintiffs were seeking an expansion of Nevada law regarding restrictive covenants. The Court cited to a prior case, *Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 588, 216 P.3d 793, 801 (2009), where the claim presented the potential expansion of common law liability. *Frederic*, 427 P.3d at 113. Here, Appellants are not seeking an expansion of case law or common law but are seeking to change statutory construction principles by requesting that this Court not abide by the plain meaning of the statute. The Court specifically rejected this attempt: "Thus, the plain language of the statute is clear that limited purpose associations are not subject to NRS 116.3117's lien provisions. By listing exactly which provisions within NRS Chapter 116 apply to limited purpose associations, NRS 116.1201 does not leave any room for question or expansion in the way the Lytles urge." *Lytle v. Boulden*, No. 73039, Slip Op. at 4, 432 P.3d 167, 2018 WL 6433005, *2-3 (Nev. December 4, 2018). Thus, the Lytles' arguments are not novel and do not present a realistic argument for expansion of Nevada law.

Finally, *Stubbs v. Strickland*, 129 Nev. 146, 153-154, 297 P.2d 326 (2013), is not on point here because the case is about specific issues related to the anti-SLAPP statute. Further, in *Stubbs*, the Court found that the Plaintiff had not brought his complaint for an improper purpose because he argued for a change or clarification in existing law. *Id*.

In this case, Appellants argue for a change or clarification in existing law, but ignore the fact that they had *already made those arguments* to the District Court and *lost*. They also ignore that they had *already filed an appeal* presenting those arguments to this Court. They also ignore that the Respondents offered them the chance to continue that appeal and preserve their rights. The Appellants were offered everything they could possible want or need to get the change or clarification of the law that was allegedly so important here. Instead, the Appellants would not remove the judgment liens and would not put the Respondents in the same position as the other homeowners. Respondents incurred significant fees and costs to finally receive the same relief as Boulden/Lamothe. The Lytle Trust knew the law of the case in this case months ago when they released the Abstracts of Judgment against the Boulden/Lamothe properties. Their continued efforts to reargue issues already decided and require Respondents to jump through hoop after hoop to receive the same relief as Boulden/Lamothe is simply unacceptable and unreasonable. The attorney's fee award should be affirmed.

2. The Court may affirm the fees award under the express terms of the Original CC&Rs.

In their Motion for Attorney's Fees and Costs, Respondents asserted that they should be awarded their attorney's fees and costs pursuant to Section 25 of the Original CC&Rs. Attorney's Fee Motion, RA, Vol. 1, Part 3 at RA0060-63. Although the District Court did not reach this argument in its Order, this Court can affirm on this alternative ground since it was raised below. *In re Amerco Derivative Litig.*, 127 Nev. 196, 217, 252 P.3d 681, 697 (2011); *Pack v. LaTourette,* 128 Nev. 264, 267, 277 P.3d 1246, 1248 (2012) (recognizing that this Court will affirm the district court's judgment if the district court reached the right result, albeit for different reasons).

The fees provision of the Original CC&Rs, found at Section 25, provides as follows:

> In any legal or equitable proceeding for the enforcement of or to restrain the violation of the Declaration of Covenants, Conditions and Restrictions or any provision thereof, the losing party or parties *shall pay* in such amount as may be fixed by the court in such proceeding.

Attorney's Fees Motion, Ex. 3, RA, Vol. 1, Part 3 at RA0151-0154. The Respondents restrained violation of the Original CC&R's by requiring the Appellants to expunge the Abstracts of Judgment improperly recorded against their Properties, the recording of which the Appellants argued was permitted by the Original CC&Rs.

Specifically, the Appellants argued that "[t]he attorneys' fee award in both the NRED 1 and NRED 2 Litigation, in relevant part, specifically find the Lytles'

lien or judgment is established under the Original CC&Rs" (citations omitted). *See* Opposition to Motion for Summary Judgment, Or, In the Alternative, Motion for Judgment on the Pleadings and Countermotion for Summary Judgment, Section E, AA-76198, Vol. 5, Part 1, AA000350 at 17-21. Once the Appellants obtained their judgments pursuant to the Original CC&Rs, they argued that the terms of the Original CC&Rs allowed the judgments against the Association to attach to each lot within the Association. *Id.* at AA000335-336. And taking it a step further, the Appellants argue that the language in the Original CC&Rs allowed them to record their liens against the individual units within the Association. *Id.* at AA000336-337. Clearly, the Appellants relied on the alleged authority of the Original CC&R's in recording their Abstracts of Judgment against the Respondents' properties.

As this Court has already determined, the Original CC&Rs do not grant this authority. *Lytle v. Boulden*, No. 73039, Slip Op. at 8 n.3, 432 P.3d 167, 2018 WL 6433005, *3 n.3 (Nev. December 4, 2018) ("[W]e conclude that [the Original CC&Rs] does not create a mechanism by which the Lytles could record their judgment against the Association as a lien on member properties."). Thus, because the Lytle Trust had violated the Original CC&Rs by recording the judgments against the Respondents' properties, the case below was made necessary to restrain such violation. In bringing this case, the Respondents asserted that the Abstracts of Judgment obtained against the Association could not be recorded against the individual homeowners pursuant to the terms of the Original CC&Rs. Further, the Respondents prevailed in enforcing the Original CC&Rs by obtaining injunctive relief prohibiting the Appellants from recording any Judgments against

Respondents' properties obtained against the Association. Accordingly, the Respondents are entitled to an award of attorney fees, pursuant to the terms of the Original CC&Rs.

The District Court recently considered this issue and agreed when it awarded the Boulden/Lamothe parties attorney's fees and costs pursuant to the Original CC&Rs, as follows:

> The Court has ruled that the CC&Rs control the award of attorney's fees in this matter. Pursuant to paragraph 25 of the CC&Rs regarding attorney's fees, the losing party or parties shall pay in such amount as may be fixed the court. Applying the language of the CC&Rs the Court determined that the Boulden and Lamothe Plaintiffs and Disman Counter Defendants are the winning parties, the Lytle Defendants are the losing party and the language is mandatory regarding the assessment of attorney fees against the losing party.

See Minute Order Re: Motions for Attorney's Fees, RA, Vol. 2, Part 6 at RA0404-405. At the hearing on the Boulden/Lamothe Motion for Attorney's Fees, the Court explained:

> …the thrust, focus, and essence of all this litigation stemmed from the original CC&Rs, I mean, they did, and going back to Judge Leavitt and her determination, what I did, the comments by the Nevada Supreme Court, and the affirmance. And so what I'm going to do is this. There's two things. Number one, I feel fairly clear in this regard that paragraph 25 of the CC&Rs control, and specifically as it relate to the award of attorney's fees.... I'm going to rule as a matter of law that based upon the current posture of the case and the decisions by this Court, that the -- I just want to make sure I get the proper parties here. That the Dismans -- and let me make sure I got it -- and the plaintiff Marjorie Boulden B. – I'm sorry, Marjorie B. Boulden, Trustee of the Marjorie B. Boulden Trust, they're the prevailing -- not the prevailing party. They're the winners under the statute.

Reporters Transcript of May 16, 2019 Hearing on Boulden/Lamothe and Disman's Motions for Attorney's Fees and Costs, RA, Vol. 2, Part 5 at RA0384-385.

The Court further noted the juxtaposition, on the one hand Appellants had been awarded fees and costs in the NRED litigations based upon the Original CC&Rs, and on the other hand Appellants opposed the homeowners from utilizing the same fee provision. *Id*. at RA0336 (" I have a question for defense counsel, but if fees and costs could have been awarded pursuant to those CC&Rs, why wouldn't I award them pursuant to the CC&Rs in this case?"). This Court has ruled that contractual attorney fees provisions providing for the award of fees to one party are reciprocal as a matter of law *See McCrary v. Bianco*, 122 Nev. 102, 108–09, 131 P.3d 573, 577 (2006). Respondents are not only entitled to their attorney's fees and costs because of the unreasonableness of the Appellants' conduct, they are also entitled to them pursuant to the express terms of the CC&Rs. The Court may affirm the fee award on these alternative grounds.[4]

3. Whether Boulden/Lamothe were awarded Rule 38 fees is irrelevant.

Appellants assert that because this Court did not exercise its right pursuant to NRAP 38 to grant attorney's fees and costs to Boulden/Lamothe, that Appellants' actions were reasonable and fees should not have been awarded to

[4] As a matter of judicial economy, the Court should reach and address the issue of whether fees can be awarded to Respondents under the Original CC&Rs. Whereas the other homeowners just received a fee award under the Original CC&Rs, and given the Lytle Trust's demonstrated proclivity to litigation, appeals, and general multiplication of proceedings, it is highly likely that this Court will see this issue very soon. Additionally, should this Court remand for a determination on that issue, the fee award for Boulden/Lamothe demonstrates that the District Court will rule in favor of the Respondents on this issue. Addressing it now could deter future appeals.

Respondents by the District Court. First and foremost, the Order of Affirmance did not address NRAP 38 or fees on appeal at all. There is no evidence that it was even an issue in the case or considered by the Court. It cannot be interpreted as a pronouncement by this Court as to the merits of attorney's fees in case.

However, the Order of Affirmance did address the Appellants' legal arguments and rejected them. It can certainly be interpreted as this Court's pronouncement that the Appellants' legal arguments do not have merit. Appellants' argument is essentially that because this Court did not state that the first appeal was frivolous, there is no way that the Court can state that this appeal raising the same already defeated legal arguments is frivolous. The Court should reject the Appellants' effort to put words in its mouth.

If anything is frivolous, it's this appeal. Boulden/Lamothe and the Respondents are in different positions in this regard. At the time the Lytle Trust appealed the Boulden/Lamothe summary judgment, this Court had not yet directly considered the Appellants' legal arguments. Here, the Court rejected Appellants legal arguments prior to the filing of opening briefs in these appeals, *see Lytle v. Boulden*, No. 73039, 432 P.3d 167, 2018 WL 6433005 (Nev. December 4, 2018), putting the Appellants on notice that their legal arguments had no merit and would not succeed. *See Carroll v. Carroll*, No. 73534-COA, 2019 WL 2027208, at *5 (Nev. App. May 7, 2019) (awarding fees under NRAP 38 because "The record shows that the district court spent significant time at the hearing on Ruby's motion for reconsideration correctly explaining [the law], thereby putting Ruby on notice

that the argument is utterly meritless."). The Court would be justified to award fees to the Respondents in this case under these circumstances.

The Appellants' argument also conflates two different fee standards under NRS 18.010 and NRAP 38. Pursuant to NRAP 38, attorney's fees and costs on appeal may be assessed as costs where "an appeal has frivolously been taken or been processed in a frivolous manner." This is not the same standard as NRS 18.010, as discussed above.

Although this Court did not award fees and costs to Boulden/ Lamothe under NRAP 38, they were awarded fees and costs, including those incurred on appeal, by the District Court under the Original CC&Rs. *See* Minute Order, RA, Vol. 2, Part 6 at RA0404-405. This Court has specifically stated that the District Court is in the best position to address such fee requests. *Musso v. Binick*, 104 Nev. 613, 615, 764 P.2d 477, 478 (1988) ("These questions should be addressed, in the first instance, by the district court with its greater fact-finding capabilities, subject to our review."); *Canyon Const. Co. v. City of Elko*, No. 62956, 2015 WL 3938569, at *2 n.2 (Nev. June 25, 2015) (denial of motion for fee on appeal without prejudice to the party's ability to seek fees and costs on remand as the nonbreaching party). Thus, declining to award fees under NRAP 38 does not preclude a post-appeal award of fees and costs based on a different statute, rule, or contract by the District Court. It most certainly does not make it improper for the District Court to have awarded fees pre-appeal.

4. The District Court's statements are misconstrued.

The Appellants cite to some statements at a hearing in January 2017 to prove that the issues in this case were novel and complex, thus supporting the reasonable of their defense. Under no circumstance were the District Court's comments findings of fact or conclusions of law. If they were, they would be in the Order.

The District Court's comments were also early in the case, stating "I don't know the answer. I'm looking forward to being fully briefed on it." *See* January 19, 2017 Hearing Tran., AA-77007, Vol. 11, Part 6, 9:24-10:2 at AA000887-888. Merely because the Judge had not been presented all of the point and authorities to make an informed decision is not evidence that the issues were novel or complex. If anything, it only demonstrates measured and reasonable decision making. Upon being fully briefed, the District Court unequivocally decided in favor of Boulden/ Lamothe. Counsel for Appellants made these same arguments to the District Court during the recent hearing on Boulden/Lamothe's attorney's fee motion, which gave the District Court occasion to explain:

> Number one, in this case I granted summary judgment, and it was reviewed by the Nevada Supreme Court. And prior to -- I remember when this case first came to me. And there's no doubt I thought it was quite interesting. But I wanted to make sure that a full record was developed prior to granting any summary judgment motion. Secondly, I think it's important to point out that when I look at summary judgment motions, I'm very cautious. I always want to make sure we have a complete record. I want to take any issues regarding the procedural potential problems in the case off the record, or I want to take them out of play. And so under very limited circumstances, and I don't mind saying this, I do grant summary judgment motions, but I only do under a circumstance where I have a high degree of confidence; right? And so, yes, this wasn't routine. This isn't something I saw every day. For example, I have a tort-based case in front of me. There is a lot of issues that are so routine to me,

> sometimes I feel I don't even have to review the briefing. But in this case I had to dig a little deep. But once I got a handle and got my arms around the law, I thought it was fairly straightforward; right? We had a limited purpose association, and as a result, there's limited statutory rights under Nevada law. And that, ultimately, guided my decision.

See Reporters Transcript of May 16, 2019 Hearing on Boulden/Lamothe and Disman's Motions for Attorney's Fees and Costs, RA, Vol. 2, Part 5 at RA0383-384. In other words, the Judge who actually decided the issues in the first instance completely disagrees with the Appellants' characterizations of the novelty and complexity of this case.

More importantly, Appellants could have pursued all these claims against Respondents in the Boulden/Lamothe Appeal. Respondents offered to allow Appellants to retain their appeal rights, to be subject to this Court's ruling in the Boulden/Lamothe Appeal, or to be added to that case as parties. This reasonable request was rebuffed in favor of multiplying the proceedings and forcing the Respondents to litigate and incur substantial attorney's fees to protect their real property. Those facts demonstrate the unreasonableness of the Appellants' defense below. Continuing these appeals after entry of the Order of Affirmance demonstrates the frivolity of this appeal.

IX. CONCLUSION

This Court's Order of Affirmance should be applied to the identical facts and circumstances of this case. There is no notable distinction with regard to the NRED 2 Litigation. The Respondents were properly awarded their attorney's fees and costs because of the unreasonableness of the Appellants' conduct. It would have also been proper to award their fees and costs under the terms of the Original

CC&Rs. Based upon the foregoing, the Respondents respectfully request that this Court affirm the decisions of the District Court in their entirety.

DATED this 19th day of June, 2019.

CHRISTENSEN JAMES & MARTIN

By: _____

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Respondents' Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because:

   ☒ The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, Times New Romans, size 14-point font; or

   ☐ The brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

2. I further certify that this Respondents' Answering Brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it either:

   ☐ Does not exceed 30 pages; or

   ☒ Proportionately spaced, has a typeface of 14 points or more and contains 11,798 words; or

   ☐ Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text.

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

DATED this 19th day of June, 2019.

CHRISTENSEN JAMES & MARTIN

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this date, the 19th day of June 2019, I submitted the foregoing **RESPONDENTS' ANSWERING BRIEF (Docket 76198 and 77007)** for filing and service through the Court's eFlex electronic filing service. According to the system, electronic notification will automatically be sent to the following:

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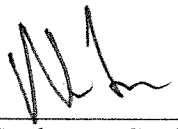

Wesley J. Smith, Esq.