

CASE NO. 76636

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONETTE PATUSH, Appellant

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Elizabeth A. Brown
Clerk of Supreme Court

v.

LAS VEGAS BISTRO, LLC, Respondent

APPEAL FROM THE
EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

1. The Appellant, ANTONETTE PATUSH (not a pseudonym) is a natural person and is the only person or entity that is an Appellant in this case;
2. The undersigned counsel of record for Ms Patush is the only attorney who has appeared on her behalf in this matter in this Court. The undersigned and Victoria L. Neal, Esq. both appeared on behalf of Ms. Patush before the District Court.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 26th day of December 2018.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter under NRAP 3A(b)(1) because the matter arises from a final order of the District Court and no other proceedings remain below on the discreet issues raised in this appeal.

This appeal is timely as the Notice of Entry of Order (AA 17-20) was served by regular U.S. Mail by the Appellant on August 1, 2018 and the Notice of Appeal (AA 21-22) was filed in the District Court on August 3, 2018 less than 30 days after the written Notice of Entry of Order.

ROUTING STATEMENT NRAP 28(a)(5)

This matter is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(8) as it arises out of a postjudgment order in a civil case awarding attorney fees and costs. However, the Supreme Court should consider keeping this case and consolidating it for decision with the appeal in No. 76062 which is the appeal of the underlying judgment of dismissal. No. 76062 involves an important issue of first impression in that the District Court dismissed the action ruling that the Plaintiff's claim of Retaliatory Discharge in Violation of Public Policy was barred by the two year limitation of actions set forth in NRS 11.190(4)(e), the personal injury and wrongful death statute of limitations, rather than four years under NRS 11.220 the catch-all statute of limitations. The Supreme Court of Nevada has never addressed the correct statute of limitations applicable to

Retaliatory Discharge in Violation of Public Policy claims under the common law of Nevada. Thus, the issue in No. 76062 is one of first impression presumptively assigned to the Supreme Court of Nevada pursuant to NRAP 17(a)(10). For purposes of judicial economy the Supreme Court should decide both appeals.

STATEMENT OF ISSUES PRESENTED

1. Whether the District Court erred in granting attorney fees to the Respondent in contradiction of the “American Rule” where the issue involved was not frivolous or brought in bad faith because it involves an issue of first impression under Nevada law, specifically what statute of limitations applies to the retaliatory discharge from employment cause of action.
2. Whether the District Court’s order granting attorney fees to Respondent is in error and must be reversed where the District Court did not make any requisite findings of fact under NRS 18.010(2)(b) to support the order, had no evidence upon which to base the order, and did not follow the law in Nevada which requires consideration of the factors set forth in cases such as *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31(1969)

STATEMENT OF THE CASE

This matter is a companion case to No. 76062 and should be considered in tandem with that matter. The issues in No. 76062 relate to whether the District Court erred when it granted the Defendants’ NRCP Rule 12(b)(5) motion and

dismissed Antonette Patush's Complaint alleging Retaliatory Discharge in Violation of Public Policy. The District Court ruled that the statute of limitations for that claim is set forth in NRS 11.190(4)(e), even though that statute (or any other in NRS Chapter 11) does not mention the employment retaliatory discharge claim, and even though under the plain language of NRS 11.220 the Retaliatory Discharge in Violation of Public Policy claim should fall under the catch-all four year limitations period. Antonette filed her Complaint less than four years after she was fired by Las Vegas Bistro, LLC (which operates Larry Flynt's Hustler Club in Las Vegas) because she had been hurt on the job and filed a workers' compensation claim.

Antonette has appealed the dismissal of her case and alleges that it was an error of law to conclude that the personal injury and wrongful death limitations statute at NRS 11.190(4)(e) is applicable to a wrongful termination of employment case. Moreover, to apply the two year limitations period set forth in NRS 11.190(4)(e) is a denial of due process under the Nevada and U.S. Constitutions because no reasonable person or average Nevadan reading NRS 11.190(4)(e) would understand it to apply to Retaliatory Discharge in Violation of Public Policy claims because being fired unlawfully from a job is not a personal injury or death.

The District Court, after dismissing the action under NRCP Rule 12(b)(5) granted the Respondent's postjudgment motion for attorney fees under NRS

18.010(2)(b). That statute requires findings that the District Court did not make and for which the District Court lacked any evidence upon which to base findings that either Ms. Patush brought her civil action “without reasonable ground” or that she brought the action merely to “harass the prevailing party.” Las Vegas Bistro, LLC (dba Larry Flynt’s Hustler Club) did not provide evidence or proof sufficient to invoke the penalty provisions of NRS 18.010(2)(b), which is a statute in derogation of the common law and must be strictly construed. *See Albios v. Horizon Communities, Inc.*, 132 P.3d 1022, 1036-37, 122 Nev. 409 (2006) *citing Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 565-66 (1993) (considering an award of costs under NRS 18.020 which is likewise in derogation of the common law “American Rule” with respect to costs, just as attorney fee awards under NRS 18.010(2)(b) is an exception to the “American Rule.”)

Accordingly, the District Court’s decision to award attorney fees under NRS 18.010(2)(b) is an error of law because the pre-requisite findings under the statute were not made, there is no evidence to support a finding of a lack of reasonable ground on an issue of first impression, and there is no evidence to support a finding of an intent to harass Larry Flynt’s Hustler Club. Thus, the District Court also abused its discretion because there is no evidence to support its award of fees in this case. Further, it is an abuse of discretion and reversible error to award fees without performing the analysis of the factors set forth in *Brunzell v. Golden Gate*

National Bank, 85 Nev. 345, 349-50, 455 P.2d 31, 33 (1969). *Albios v. Horizon Communities, Inc.*, 132 P.3d 1022, 1034, 122 Nev. 409 (2006). On the face of the order (AA 16-17) and the record before this Court, there is no consideration of or analysis of the *Brunzell* factors by the District Court. Accordingly, the District Court abused its discretion and the order granting Respondent attorney fees under NRS 18.010(2)(b) must be reversed.

STATEMENT OF FACTS

The basic facts are set forth in detail in the Complaint (AA 1-6) which is incorporated here in its entirety. The key facts are as follows and are numbered to correspond to the paragraphs of the Complaint:

6. Plaintiff began her employment with Defendant on February 6, 2013 as an Office Manager. Her employment was terminated by Defendant on or about July 4, 2014.
7. Plaintiff sustained a serious on-the-job industrial injury to her knee, cervical spine, lumbar spine, and other body parts on April 10, 2014. On that date the Claimant was working as an Office Manager/Payroll person for Defendant, which may have then been known as National Association of Entertainers, which operates Larry Flynt's Hustler Club in Clark County, Nevada.
8. On the date of injury the Claimant was walking down a hallway near her office in Defendant's premises. She tripped over a rug on the floor in the

hallway and fell hard to the floor. A video recording of the accident was submitted and is part of the record.

9. Plaintiff timely filled out a C-4 form claim for workers' compensation.

10. Plaintiff's workers' compensation claim was duly accepted on May 8, 2014 and benefits were paid on the claim

11. At the time of her termination, set forth herein, Plaintiff was working full duty.

12. Plaintiff was terminated on or about July 3, 2014.

13. Plaintiff was terminated by the General Manager Kelly Jones.

14. General Manager Kelly Jones was hostile, rude, and intimidating when he told Plaintiff that she had too many doctor's appointments. Plaintiff told Jones that the doctor appointments were to treat her workers' compensation injury. Jones said, in a hostile manner, that he did not care and then he fired her. Jones also told Plaintiff that her termination was ordered by Jason Mohny who was the owner of Defendant.

15. The true reason for Plaintiff's termination is retaliation because she was injured on the job and filed and pursued a workers' compensation claim under the Nevada Industrial Insurance Act.

16. Plaintiff, as a manager for Defendant, had attended training where she and others were instructed that they should "say something else" as the reason for

terminating employees with workers' compensation claims even though the real reason was the workers' compensation claim. In other words, the management employees were instructed to come up with pre-textual reasons for terminating workers' compensation claimants in order to be able to avoid liability for retaliatory discharge.

17. Plaintiff was given the false and pre-textual reason of being a "no call/no show" on certain days and with stealing a cell phone from the "lost & found" items held by Defendant (items left by customers). These reasons were false and malicious.

18. Plaintiff's employment was terminated by Defendant in retaliation for her being injured on the job and her filing of a valid Workers Compensation claim and, thus, exercising her rights under the Nevada Industrial Insurance Act.

19. Termination of Plaintiff's employment was in violation of strong public policy of the state of Nevada.

The District Court granted an NRCP 12(b)(5) motion to dismiss which is under appeal in No. 76062. Subsequently it granted Respondent's motion for attorney fees under NRS 18.010(2)(b)¹; however, the District Court did not make

¹ It must be pointed out that the District Court's Order Granting Defendant's Motion for Attorney Fees (AA 16-17) fails to even cite any authority for granting the fees which is error in and of itself. However, there is no dispute that the only

any of the pre-requisite findings necessary to award fees under that statute. Specifically there is no finding that Ms. Patush lacked reasonable ground to bring her retaliatory discharge claim, especially given the detailed factual allegations set forth in the Complaint (AA 1-6). Also there is no finding that Ms. Patush brought the action against Respondent for the purpose of harassing it, indeed there is not a scintilla of evidence in the record to suggest that Ms. Patush was only seeking to harass Larry Flynt's Hustler Club and NOT legitimately seeking damages for retaliatory discharge. The issue was and is the important legal question of first impression as to what statute of limitations applies to Ms. Patush's claim. As noted extensively in the briefing in No. 76062, the statute of limitations issue is one never before addressed by this Court, certainly not in a published binding decision.

SUMMARY OF THE ARGUMENT

The Supreme Court of Nevada has never ruled what the statute of limitations should be for a claim of Retaliatory Discharge in Violation of Public Policy. Thus, the matter is a question of first impression and Ms. Patush's case was clearly seeking to establish the law, specifically that a four year statute of limitations applies to the claim pursuant to NRS 11.220.

statute that Defendant cited in its motion as authority for awarding fees was NRS 18.010(2)(b).

Where there is a legitimate dispute over the law on a matter of first impression, it is error to award attorney fees to a prevailing party under the standard of NRCP Rule 11 which is incorporated by reference into NRS 18.010(2)(b). Cases cited herein, as well as the commentary and notes to the federal rule, FRCP Rule 11, upon which Nevada's NRCP Rule 11 is based, establish the absurdity of punishing a party for seeking to clarify the law or establish new law. Where this Court has not set precedent on a legal matter like what statute of limitations applies to a particular claim, there can be no Rule 11 violation and there can be no finding that a person brought a claim without "reasonable ground" as required under NRS 18.010(2)(b) to establish an exception to the "American Rule" that each party to a civil action pays its own attorney fees and costs. Statutes like NRS 18.010(2)(b) that are in derogation of the common law "American Rule" must be strictly construed. *See Albios v. Horizon Communities, Inc.*, 132 P.3d 1022, 1036-37, 122 Nev. 409 (2006) citing *Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 565-66 (1993) (considering an award of costs under NRS 18.020 which is likewise in derogation of the common law "American Rule" with respect to costs, just as attorney fee awards under NRS 18.010(2)(b) is an exception to the "American Rule.")

Additionally, there is no evidence on the record in this case that Ms. Patush brought her case to harass Larry Flynt's Hustler Club rather than to seek recovery

of her money damages for having been illegally fired from her job. Accordingly, neither of the possible factual pre-requisites to an award of attorney fees under NRS 18.010(2)(b) have been met and the District Court Order granting attorney fees to Respondent was both an error of law and an abuse of discretion.

Finally, this Court has been very clear that it is a reversible abuse of discretion for the District Court to award attorney fees in a case without conducting the required analysis of the *Brunzell* factors. *Albios v. Horizon Communities, Inc.*, 132 P.3d 1022, 1034, 122 Nev. 409 (2006). On the face of the order under appeal in this matter there is no analysis of the *Brunzell* factors. The order, therefore, rests upon an abuse of discretion and must be reversed.

ARGUMENT

I. STANDARD OF REVIEW

The Supreme Court of Nevada reviews *de novo* all issues of statutory interpretation and questions of law. *Bank of America v. Sfr Investments Pool 1*, 427 P.3d 113, 119, 134 Nev. Adv. Op. 72, 134 Nev. (2018); *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1028 (2006). This case requires the Court to interpret and construe NRS 18.010(2)(b) with respect to whether fees may be awarded under that statute in cases where a plaintiff is pursuing a novel legal issue and matter of first impression with regard to a statute of limitations. Therefore, the determination regarding whether the order in which attorney fees was awarded in

this case was proper under the statute as it pertains to a case where a plaintiff is pursuing a matter of first impression and attempting to establish new law or have the law clarified is a matter for this Court to review *de novo*.²

In a case that does not involve a matter of first impression or a clear attempt to establish new law or clarify the law, the District Court does have discretion on whether or not to award fees under NRS 18.010(2)(b). *Semenza v. Caughlin Crafted Homes*, 901 P.2d 684, 687, 111 Nev. 1089 (1995), citing *Foley v. Morse & Mowbray*, 109 Nev. 116, 124, 848 P.2d 519, 524 (1993). However, to properly exercise the discretion to award fees, “there must be evidence in the record supporting the proposition that the complaint was brought without reasonable grounds or to harass the other party.” *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 486, 851 P.2d 459, 464 (1993). It is an abuse of discretion and the District Court must be reversed where it makes an award under NRS 18.010(2)(b) without including reasoning and findings in the order that support its ultimate conclusions of groundlessness or harassment. *Public Employees' retirement Sys. v. Gitter*, 393 P.3d 673, 682 (Nev. 2017). A claim is without reasonable grounds 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 721, 724 (1993), citing

² Noting again that the Order (AA 16-17) does not cite ANY authority for granting fees, but that it is undisputed that the Respondent’s motion below cited to NRS 18.010(2)(b) as its authority.

and quoting *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo.1984). This Court has never held that a claim is brought without reasonable grounds where there is a dispute over the correct statute of limitations. A determination that a claim has been brought to harass a defendant requires *some evidence* in the record to support such a finding. *Bower v. Harrah's Laughlin*, 215 P. 3d 709, 714 (Nev. 2009); *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 687 (1995).

Also, the District Court has discretion over what amount of attorney fees to award and so the determination as to the amount of fees is reviewed by this Court for abuse of discretion. *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349-50, 455 P.2d 31, 33 (1969); *Albios v. Horizon Communities, Inc.*, 132 P.3d 1022, 1034, 122 Nev. 409 (2006). It is a reversible abuse of discretion for the District Court to not perform an analysis of the *Brunzell* factors in making an award of attorney fees.

Statutes that are in derogation of the common law are strictly construed by the Court. *Albios v. Horizon Communities, Inc.*, 132 P.3d 1022, 1036-37, 122 Nev. 409 (2006).

II. THE STATUTE OF LIMITATIONS ISSUE IN THIS CASE IS A MATTER OF FIRST IMPRESSION AND A NOVEL LEGAL ISSUE WHICH PRECLUDES AN AWARD OF FEES UNDER NRS 18.010(2)(b) AND THE “AMERICAN RULE.”

The principal error of the District Court in awarding attorney fees under NRS 18.010(2)(b) in this case is that it punishes the Plaintiff/Appellant for pursuing a novel issue of first impression under Nevada law as to what statute of limitations applies to a Retaliatory Discharge employment claim. None of this Court’s jurisprudence or the comments and notes to FRCP Rule 11 (which NRCPP Rule 11 is derived from) suggests that it is proper for a court to punish a litigant for pursuing a novel legal issue. A statute or rule that provides for awarding a civil litigant attorney fees against its adversary is in derogation of the common law “American Rule” that each party pays its own fees and costs. And, although NRS 18.010(2)(b) encourages the courts to liberally construe the statute in favor of awarding fees, the statute limits awards to only “appropriate situations” and incorporates by reference Rule 11 considerations. When prior cases and Rule 11 are reviewed, it is clear that the District Court erred in awarding fees in this case.

The error in the Order in this case (AA 16-17) is that it is utterly devoid of any reasoning or findings to support the conclusion that 1) Ms. Patush was out to harass Larry Flynt’s Hustler Club instead of seeking to recover damages for her illegal termination from employment, or 2) that Ms. Patush brought or maintained her action without reasonable grounds. This is a reversible abuse of discretion.

Public Employees' Retirement Sys. v. Gitter, 393 P.3d 673, 682 (Nev. 2017). Moreover, there is no evidence in the record of this case upon which the District Court could have based any findings of intent to harass or making groundless claims and that is also a reversible abuse of discretion under this Court's clear precedents. *Bower v. Harrah's Laughlin*, 215 P. 3d 709, 714 (Nev. 2009); *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 687 (1995).

A. THE AMERICAN RULE IS THAT EACH PARTY PAYS ITS OWN ATTORNEY FEES IN THE ABSENCE OF A CONTRACT, COURT RULE, OR STATUTE THAT PROVIDES FOR AN AWARD OF FEES.

Nevada follows the "American Rule" which holds that each party must bear its own attorney fees absent a contract, a court rule, or a statute that provides for the shifting of fees onto the other party. *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1356, 971 P.2d 383 (1998). In this case there is no contract providing for fee shifting. The Respondent cited only to NRS 18.010(2)(b) which incorporates the standard for NRCP Rule 11 by reference. The statute states as follows:

NRS 18.010 Award of attorney's fees.

...

2. In addition to the cases where an allowance is authorized by specific statute, 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)

Thus, the standard incorporates NRCP Rule 11 and requires a finding by the court that the CLAIM of Ms. Patush was brought to harass Larry Flynt's Hustler Club (Defendant Las Vegas Bistro, LLC's operating name) or without reasonable ground. Ms. Patush was fired from her job for trumped up, untrue, and pretextual reasons when the real purpose of discharging her from her employment was to retaliate against her for filing and pursuing a workers' compensation claim when she was hurt on the job. This is a valid cause of action seeking damages and compensation. *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984). Thus it was not brought or maintained without reasonable ground. The statute of limitations defense brought by Respondent is just that, a defense, which the

Defendant may have waived. See NRCP Rule 8 (defense or matter in avoidance such as statute of limitations must be affirmatively raised). There is simply no evidence to suggest that Ms. Patush wanted merely to improperly harass Larry Flynt's Hustler Club. She didn't. She wants her money damages caused by the illegal actions of the Defendant.

More importantly, as set forth below and in the briefing of No. 76062, Ms. Patush is seeking to clarify, extend, modify, or reverse the law. She is pursuing an appeal of the underlying dismissal of her action to the Supreme Court of Nevada (No. 76062) for that very purpose. Where such action is brought in good faith on a matter of first impression, the sanction provision NRCP Rule 11 and NRS 18.010(2)(b) is expressly not applicable. *See infra* citation and quotation of *Rosenberg LT v. Macdonald Highlands*, 427 P.3d 104, 134 Nev. Adv. Op. 69 (2018).

The District Court had no grounds in this case to deviate from the "American Rule." The District Court's order granting attorney fees in this case (AA 16-17) rests upon an abuse of discretion, constitutes an error of law, and must be reversed by this Court.

B. THE DEFENDANT FAILS TO MEET THE STANDARD FOR THE ALLOWANCE OF FEES UNDER NRS 18.010 (2)(B) IN THAT THE PLAINTIFFS' CLAIMS WERE NOT BROUGHT OR MAINTAINED WITHOUT REASONABLE GROUND OR TO HARASS THE DEFENDANTS.

This Court has recently, September 13, 2018 while this appeal was pending, expressly held that an award of fees under NRS 18.010(2)(b) is improper where a party is pursuing novel issues of law or seeking to modify or change the law:

Though we understand the Legislature's desire to deter frivolous lawsuits, this must be balanced with the need for attorneys to pursue novel legal issues or argue for clarification or modification of existing law. *See, e.g., Stubbs v. Strickland*, 129 Nev. 146, 153-54, 297 P.3d 326, 330-31 (2013) (determining that a party did not file suit for an improper purpose because he argued for a change or clarification in existing law).

Rosenberg LT v. Macdonald Highlands, 427 P.3d 104, 134 Nev. Adv. Op. 69 (2018). It is undisputed that Ms. Patush is seeking to have the Supreme Court of Nevada address the novel issue of what statute of limitations applies to her Retaliatory Discharge claim. Because she is pursuing this novel legal issue it is improper for the District Court to have awarded fees to her adversary in this case. She is clearly not merely trying to harass Larry Flynt's Hustler Club, either. There is no evidence to support such a finding and the District Court's order on this matter, as noted, is improperly devoid of any facts and cites to no evidence that would support any findings or conclusions that would permit an award of fees under NRS 18.010(2)(b).

Where a complaint raises legal issues involving statutory interpretation and legislative intent on reasonable grounds and without any purpose to harass, it is an abuse of discretion to award attorney fees pursuant to NRS 18.010 (2) (b). *Key Bank v. Donnels*, 106 Nev. 49, 53, 787 P.2d 382 (1990) In the *Key Bank* case the plaintiff's complaint was dismissed for failure to state a claim under NRCP 12 (b)(5). Because the case dealt with some complex issues of statutory interpretation and legal intent regarding the statutes in question and the statutory intent was not entirely clear or "free from doubt" the Nevada Supreme Court held that it was improper to award attorney fees pursuant to NRS 18.010 (2)(b).

The U.S. District Court cases relied upon by Respondent in the court below are not binding on the state trial courts or the Supreme Court of Nevada. The doctrine is more succinctly stated in the following case:

Decisions of the federal district court and panels of the federal circuit court of appeals are not binding upon this court. Even an en banc decision of a federal circuit **743 court does not bind Nevada courts.

Custom Cabinet Factory of New York, Inc. v. Eighth Judicial Dist. Court ex rel. County of Clark 119 Nev. 51, *54, 62 P.3d 741,**742 - 743 (Nev.,2003) (Overruled on Other Grounds by *Winston Products Co. v. DeBoer*, 134 P.3d 726 (Nev. May 25, 2006)) (Footnotes and Citations Omitted)

The applicable statute of limitations to Plaintiff's claim is an open questions with no controlling state appellate court decisions directly addressing these issues of statutory interpretation and legislative intent, just like in the *Key Bank* case *supra*.

Having established that this is an issue of first impression, the Defendant cannot establish that the Plaintiff's case was brought without reasonable grounds as required by NRS 18.010 (2) (b).³

The standard and purpose of NRS 18.010 (2) (b) is similar to NRCP Rule 11 which is referenced in the statute. NRCP 11 is based upon and evolved from FRCP 11 and the Nevada Supreme Court often looks to Federal court decisions for guidance, although the Federal decisions are not binding:

Federal cases interpreting the Federal Rules of Civil Procedure "are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts."

Executive Mgmt. v. Ticor Title Ins. Co., 118 Nev. 46, 53, 38 P.3d 872 (2002) (quoting *Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990))

Where a case involves an issue of first impression in the jurisdiction, sanctions under Rule 11 are inappropriate:

³ The Respondent below did not appear to seriously contend that the Plaintiff brought this action merely to harass it. Plaintiff brought the case to seek money damages for her lost wages and other remedies provided by law. There is absolutely no evidence to the contrary.

The plaintiff failed to establish a prima facie case. It does not follow, however, that sanctions are appropriate. This is particularly true here, where the legal issue is one of first impression in this circuit, and where the parties did not agree on the elements of the plaintiff's prima facie case.

Jones v. Slater Steels Corp. 660 F.Supp. 1570, *1577 (N.D.Ind.,1987)
(Footnotes and Citations Omitted)

As the issue of which statute of limitations period will apply to a case of Retaliatory Discharge from Employment in Violation of Public Policy is a complex question and an issue of first impression in the Nevada state courts, no sanctions would be appropriate under NRCP Rule 11 and consequently attorney fees may not be awarded under NRS 18.010 (2) (b).

The legal and factual questions and issues in this case were not, and are not, “free from doubt.” In accordance with *Key Bank v. Donnels*, 106 Nev. 49, 53, 787 P.2d 382 (1990), the Defendants’ Motion for Attorney’s Fees Pursuant to NRS 18.010 (2) (b) should have been denied. The District Court erred in granting the motion and awarding fees to Respondent.

Below the Respondent relied upon *Bergmann v. Boyce*, 109 Nev. 670, 856 P.2d 560 (1993) but such reliance is misplaced. The case on point where a Rule 12 (b) (5) motion is granted is *Key Bank*. *Bergmann* was a situation where the defendant’s Rule 12 (b) (5) motion was denied and then plaintiffs failed to produce at trial evidence to support their factual claims stated in the complaint resulting in

dismissal during trial and raising, according to the Supreme Court of Nevada, the issue of groundlessness. Here, the issue is far more straightforward as the applicable statute of limitations period is purely a question of law and the underlying merits, what evidence is available, etc. is all irrelevant at this juncture.

The Respondent and the District Court in the present case make the same error that the trial court did in the *Bergmann* case by attempting to tie the analysis of whether an award of attorney fees is appropriate to what the court did in ruling on a NRCP Rule 12 (b) (5) motion. This the *Bergmann* court clearly disapproved of as the standards are different. The *Bergmann* case involved a situation where the matter had proceeded to trial. The trial court had denied an NRCP 12 (b)(5) motion early on in the case based on the standard requiring it to accept all allegations in the complaint as true. At trial, the court effectively dismissed all of the claims except negligent misrepresentation prior to the case going to the jury. The jury found for the defendant on the one remaining claim. The trial court denied attorney fees pursuant to NRS 18.010 (2) (b) on the basis that the claims were not groundless because they had survived dismissal under Rule 12. The Supreme Court of Nevada held this to be improper as the trial court should not accept the allegations of the complaint as true in ruling on an attorney's fees motion under NRS 18.010 (2) (b). The Supreme Court of Nevada noted that the standard under NRS 18.010 (2) (b) is similar to that of NRCP 11 when considering

whether or not the claim(s) are groundless. As discussed above, the Plaintiff's claims in Ms. Patush's case here involve issues of first impression such that her claims are "well grounded in fact and [are] warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." NRCP Rule 11. What happened in the NRCP Rule 12 (b)(5) motion is irrelevant, particularly in a case of first impression where a party cannot be certain which way the court will rule on the issue. Pursuing novel issues and attempting to advance the law in good faith would become a game of chance and would result in a chilling effect on attorneys and parties if, as the Respondent argued below, an award of attorney fees is practically mandatory when a party does not prevail on a NRCP Rule 12 (b) (5) motion to dismiss for failure to state a claim. The Respondent's argument is contrary to the law and sound public policy.

The District Court's order granting attorney fees to Respondent (AA 16-17) constitutes an error of law and an abuse of discretion and must be reversed.

III. THE DISTRICT COURT FAILED TO CONSIDER AND ANALYZE THE *BRUNZELL* FACTORS IN ITS ORDER WHICH CONSTITUTES A REVERSIBLE ABUSE OF DISCRETION.

Notwithstanding the legal error and abuse of discretion committed by the District Court due to the statute of limitations issue in the case being a novel legal question of first impression, the District Court also abused its discretion by not performing the analysis required under the *Brunzell* case. In determining what, if

any, attorney fees to award when a contract, statute, or rule provides an exception to the “American Rule,” the District Court is required to engage in an analysis of the *Brunzell* factors to determine whether or not the fees to be awarded are reasonable and proper:

We emphasize that...the court must continue its analysis by considering the requested amount in light of the factors enumerated by this court in *Brunzell v. Golden Gate National Bank*, namely, the advocate's professional qualities, the nature of the litigation, the work performed, and the result. In this manner, whichever method the court ultimately uses, the result will prove reasonable as long as the court provides sufficient reasoning and findings in support of its ultimate determination.

Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 864-65, 124 P.3d 530, 548-49 (2005). On its face, the District Court’s order under appeal (AA 16-17) did not undertake an analysis of the *Brunzell* factors. Therefore, the District Court did not properly exercise its discretion and this is reversible error. *See Miller v. Wilfong*, 121 Nev. 619, 623, 119 P.3d 727, 730 (2005) (District Court is required to consider the *Brunzell* factors when awarding attorney fees).

Thus, for the additional reason of the District Court’s failure to perform a *Brunzell* factor analysis or in any way address the *Brunzell* factors in the order (AA 16-17), the District Court’s order rests upon an abuse of discretion and must be reversed.

CONCLUSION

In accordance with the above, the District Court's Order Granting Defendant's Motion for Attorney Fees rests on an error of law and abuses of the District Court's discretion. This Court should reverse the District Court's order.

RESPCTFULLY SUBMITTED this 26th day of December 2018.

/s/ James P. Kemp
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**ATTORNEY’S CERTIFICATION IN COMPLIANCE WITH RULE 28.2 OF
THE NEVADA RULES OF APPELLATE PROCEDURE**

James P. Kemp, Attorney for Appellant, by signing below hereby certifies in compliance with Rule 28.2 of the Nevada Rules of Appellate Procedure that:

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

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman size 14 font;

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

Proportionately spaced, has a typeface of 14 points or more, and contains 5,661 words;

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

where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 26th day of December 2018

/s/ James P. Kemp
JAMES P. KEMP, ESQ., Bar No.6375

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 26, 2018, I filed the foregoing Appellant's Opening Brief through the Supreme Court of Nevada's electronic filing system along with the Appellant's Appendix. Electronic service of the foregoing shall be made through the Court's e-flex system in accordance with the Master Service List.

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DATED this 26th day of December 2018

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