IN THE SUPREME COURT OF THE STATE OF NEVADA

TRUDI LEE LYTLE; AND JOHN ALLEN LYTLE, AS TRUSTEES OF THE LYTLE TRUST,

Appellants,

v.

SEPTEMBER TRUST, DATED MARCH 2 1972; GERRY R. ZOBRIST AND JOLIN G ZOBRIST, AS TRUSTEES OF THE GERR ZOBRIST AND JOLIN G. ZOBRIST FAMI TRUST; RAYNALDO G. SANDOVAL AN JULIE MARIE SANDOVAL GEGEN, AS TRUSTEES OF THE RAYNALDO G. AND EVELYN A. SANDOVAL JOINT LIVING AND DEVOLUTION TRUST DATED MA 27, 1992; and DENNIS A. GEGEN AND JU S. GEGEN, HUSBAND AND WIFE, AS JO TENANTS,

Respondents .

Supreme Court Nos.: 76198, 77007
District Court Case No.: A-17-765372-C

REPLY BRIEF

Appellants' Reply Brief

(Docket Nos. 76198, 77007)

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Appellants' Reply Brief

I. INTRODUCTION

In 2017, the district court, Department 32, granted summary judgment in favor of Appellants TRUDI LEE LYTLE; AND JOHN ALLEN LYTLE, AS TRUSTEES OF THE LYTLE TRUST ("Appellants") and against Rosemere Estates Property Owners' Association as to several issues related to the interpretation and enforcement of the Amended Covenants, Conditions and Restrictions ("Amended CC&Rs") governing the Rosemere Estates community. Since 2007, the Association enforced the Amended CC&Rs against Appellants in various ways that were tantamount to harassment and fraud (as found by the district court). Order Granting Summary Judgment in NRED 2 Litigation, ¶¶ 16 – 27, 44 - 50, AA000471 – 000473, 000476.

After summary judgment was granted, the district court then awarded Appellants' attorneys' fees. Order Granting Attorneys' Fees in NRED 2 Litigation, ¶ 5, AA000480 - 000483. It did so pursuant to the same Amended CC&Rs. *Id.* However, the district court also made this award knowing at this time the Amended CC&Rs had been declared void ab initio in another, unrelated litigation pursued by Appellants. *See generally* Order Granting Summary Judgment in NRED 1 Litigation, AA000401 - 000412. The district court citing *Mackintosh v. Cal. Fed. Sav. & Loan Ass'n.*, 113 Nev. 393, 935 P.2d 1154 (1997), found Appellants should be afforded the same relief (*i.e.* attorneys' fees) that the Association would have been afforded had it prevailed. Order

Granting Attorneys' Fees in NRED 2 Litigation, AA000480 - 000483. Further, the district court found that because the parties' stipulated at the outset of the litigation that the Amended CC&Rs was the governing document (together with the entirety of Chapter 116), Appellants should be entitled to enforce the attorney fee provision within the Amended CC&Rs. *Id.* at ¶¶ 4, 5, AA000481 - 000482.

The ruling at issue herein, however, counters the equity previously provided to Appellants. While Appellants are entitled to an award of attorneys' fees pursuant to the Amended CC&Rs (Amended CC&Rs, § 16.1(a), AA000481), the ruling at issue in Docket No. 76198 denies Appellants the right to enforce the collection measures provided in the Amended CC&Rs. *See* Amended CC&Rs, § 10.2(c), AA000381. In other words, the collective rulings provide Appellants with a remedy but no meaningful measure to collect it.

Appellants do not contend 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 (collectively, "Respondents") are "personally liable" for the judgment and attorneys'

fees awarded to Appellants and against the Association. Rather, Appellants ask this Court to enforce the same equitable measures afforded to Appellants by the district court in the NRED 2 Litigation. The attorneys' fee provision within the Amended CC&Rs provided Appellants with an award of attorneys' fees despite the fact that it was declared void ab initio at the time of the award. Extending the equitable reasoning of the district court in the NRED 2 Litigation, Section 10.2(c), enabling a creditor to collect against each unit within the Association pro rata, would provide Appellants with a means to collect.

With respect to the district court's award of attorneys' fees pursuant to NRS 18.010(2)(B) (Docket No. 77007), the district court errored when the it found Judge Timothy Williams' prior order granting partial summary judgment in favor of other parties in a consolidated case was *law of the case*. More specifically, the district court errored in applying Judge Williams' prior order to the present matter with respect to the NRED 2 Litigation[1] when the parties in that litigation stipulated the Amended CC&Rs and the entirety of Chapter 116 applied and governed the conduct of the parties.

Settled Nevada case law is clear that Judge Williams' order granting partial summary judgment (in district court Case No. A-16-747900-C) was not law of the case, and the district court's application of the doctrine in this case in both granting summary

[1] Judge Williams' order granting partial summary judgment only applied to the NRED 1 Litigation, as the parties had not asserted any allegations with respect to the NRED 2 or NRED 3 Litigation at the time the order was entered.

judgment and awarding attorneys' fees was in error. A trial court's ruling finding only partial summary judgment, which order is on appeal, does not constitute law of the case. *Byford v. State* 116 Nev. 215, 232, 994 P.2d 700, 711-12 (2000).

The district court's erroneous finding served as the foundation for which the district court awarded attorneys' fees and costs to Respondents pursuant to NRS 18.010(2)(b). The district court incorrectly concluded Appellants essentially ignored the law of the case and continued to defend the underlying action without reasonable grounds. Yet, the district court itself initially believed, and correctly so, that Judge Williams' order was **not** law of the case:

> Obviously, another district court's ruling is not binding. There was a lot of briefing on the issue of preclusion, res judicate, law of the case. I don't think it's law of the case, it hasn't gone up to the Supreme Court and then been decided.

Transcript of Proceedings, March 21, 2018, 12:22-25, AA000909.

While Appellants' arguments ultimately did not prevail and Judge Williams' order granting partial summary judgment was affirmed (*see* Docket No. 73039), Appellants did not lack reasonable grounds to maintain their defenses as they presented novel issues, which, if successful, could have resulted in the expansion or, at the minimum, a clarification of Nevada's law regarding the interpretation and application of NRS, Chapter 116 as it relates to limited purpose associations. Judge Williams even

commented on the unique arguments presented to him, calling the discourse "interesting" and uncertain. Once more, as set forth in Appellants' briefing in Docket 76198, the stipulation entered into between the parties in the NRED 2 Litigation distinguishes that case from the NRED 1 Litigation, admittedly decided by the Order of Affirmance in Docket 73039.

II. ARGUMENT

A. The District Court Errored In Applying Law Of The Case

There is no question under Nevada law, the district court errored in its application of *law of the case*. Order Granting MSJ, COL N0. 1, AA000786; May 2, 2018 Tran., 4:23-24, AA000774 ("I found that Judge Williams' order was law of the case."), *see also* Order Re: Fees and Costs, AA000901.

The district court reasoned as follows in granting attorneys' fees and costs:

> The Motion and Countermotion came on for hearing on March 21, 2018 and May 2, 2018, where the Court decided in the favor of the Plaintiffs, adopting Judge Williams' prior Order as the "law of the case."
>
> ***
>
> The Defendants had notice of the Order entered by Judge Williams …After the Order was entered and prior to this Case being filed by the Plaintiffs, the Defendants were given the 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(2) 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. Order Re: Fees and Costs, AA000865.

Context and timing are important in this case. Judge Williams signed the Amended Order Granting Partial Summary Judgment on June 29, 2017 ("Williams Order"). Amended Order, AA000059 – 65. That order was immediately appealed on May 9, 2017 (in Docket No. 73039). Respondents filed their lawsuit on November 30, 2017, after the appeal was filed. Complaint in District Court Case No. A-17-765372-C, AA000066 – 75. District Court Judge Bailus issued his Order Granting Respondents' Motion for Summary Judgment on May 22, 2018. *See* Order Granting Motion, AA000780. The Supreme Court issued its Order Re Affirmance as to Judge Williams Order on December 4, 2018, six (6) months **after** the Order Granting Respondents' Motion for Summary Judgment.

The operative question here, especially with respect to the award of attorneys' fees under NRS 18.010(2)(b), is not whether Judge Williams Order, affirmed by this Court, is law of the case *now* with respect to the NRED 1 Litigation.[2] The question is whether Judge Williams Order was law of the case (1) at the time Respondents filed their Complaint, (2) at the time Respondents filed their Answer, and (3) at the time the district court entered summary judgment in Respondents' favor.

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[2] The Williams Order is not law of the case with respect to the NRED 2 Litigation because of the distinguishing factors, as set forth herein and in the Opening Brief in Docket 76198. The case before Judge Williams did not include the NRED 2 and NRED 3 Litigation, and the district court in that case never considered any matters related thereto.

1. Pursuant To The Law of the Case Doctrine, an Order Must be Final

Nevada law is clear that Judge Williams' Amended Order in Case A-16-747800-C is **not** binding on the district court because that order was for partial summary judgment and was on appeal. The Order Granting Motion for Partial Summary Judgment in favor of Respondents was entered on May 22, 2018. *See* Judge Williams Order, AA000780. The Supreme Court's Order of Affirmance related to Judge Williams' Amended Order was entered nearly six (6) months later, on December 4, 2018. Thus, when Respondents' Motion for Summary Judgment was entered, Judge Williams' order was not final.

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." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C.Cir.1995).

Nevada law is clear – "a trial court ruling does not constitute law of the case." *Byford,* 116 Nev. at 232, 994 P.2d at 711. The issue must be adjudicated on appeal. *Id.* At the time Respondents filed their lawsuit against Appellant, the only ruling was Judge Williams' granting of partial summary judgment which was on appeal.

"Under the law of the case doctrine an issue that has already been decided on the merits by the Nevada Supreme Court is law of the case and the holding will not be

revisited." *State v. Walker*, 2017 Nev. Dist. LEXIS 2150 (citing *Pellegrini v. State*, 117 Nev. 860, 879, 34 P.3d 519, 532; *McNelton v. State*, 115 Nev. 396, 415, 990 P.2d 1263, 1276 (1999); *Valerio v. State*, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996); *Hall v. State*, 91 Nev. 214, 315-16, 535 P.2d 797, 798-99). In *Pelligrini*, *supra*, the Nevada Supreme Court repeated its long-standing rule that "'the law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." *Pellegrini v*, 117 Nev. at 879, 34 P.3d at 532 (citing *Hall*, 91 Nev. at 315-16, 535 P.2d at 798-99).

Further, "[u]nder the doctrine of the law of the case, where an appellate court states a principal or rule of law in deciding a case, that rule becomes the law of the case and is controlling both in the lower courts and on subsequent appeals, so long as the facts remain substantially the same." *Geissel v. Galbraith*, 105 Nev. 101,103, 769 P.2d 1294, 1296 (1989). Thus, the doctrine precludes a party "from raising claims based substantially on the same set of facts that have been raised, reviewed and **decided by the Nevada Supreme Court in earlier proceedings**." [emphasis added] *Rogers v. McDaniel*, 1999 Nev. Dist. LEXIS 1356 (citing *McKague v. Whitley*, 112 Nev. 159 (1996)).

Indeed, a district court has the discretion to revisit prior rulings in the same case, provided such rulings and issues decided therein have not been decided by the appeal or Supreme Court. *Bejarano v. State*, 122 Nev. 1066, 1074-75, 146 P.3d 265, 271-72

(2006). Thus, in *Dictor*, *supra*, the Supreme Court held that a district court could entertain a renewed motion for summary judgment based on new and alternative statutory defenses that were not raised in a prior summary judgment motion.

In the present case, the district court had the jurisdiction and discretion to revisit all prior rulings, specifically Judge Williams' Amended Order. And initially, the district court indicated that it would revisit the Amended Order, noting Judge Williams order was subject to scrutiny. March 21, 2018 Tran. 12:22 – 13:2, AA000909 - 910. The district court, for reasons unknown, then reversed course and held Judge Williams' order was *law of the case*. This finding is clear error. Judge Williams' Amended Order was not *law of the case* and not binding on the district court in this matter because the order was for partial summary judgment, was on appeal, and the Order of Affirmance related to the Amended Order was not entered (and the appeal not decided by this Supreme Court) until December 4, 2018, well after the district court granted Respondents summary judgment and awarded fees and costs pursuant to NRS 18.010(2).

2. The Cases Cited By Respondents Promote Appellants' Argument

Respondents cite *Reconstrust Co., N.A. v. Zhang*, 130 Nev. 1, 317 P.3d 814, 818 (2014) to somehow support an argument that a district court may apply law of the case to issues pending on appeal. *Zhang* does not support this proposition.

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While *Zhang* does quote Nevada's long standing principal that "[t]he 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.'" (quoting *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739, 311 U.S. App. D.C. 1 (D.C. Cir. 1995)), it goes on to pronounce "for the law-of-the-case doctrine to apply, the appellate court must actually address and decide the issue explicitly or by necessary implication." *Dictor v. Creative Mgmt. Servs., L.L.C.*, 223 P.3d 332, 334 (2010). The *Zhang* court adds, in quoting *Wheeler Springs Plaza, L.L.C. v. Beemon*, 119 Nev. 260, 266, 71 P.3d 1258, 1262 (2003), "[t]he doctrine only applies to issues previously determined, not to matters left open by the appellate court." When Respondents filed their lawsuit and when the district court granted their motion for summary judgment, the issues were still subject to appeal, and an Order of Affirmance was not entered until six months after the district court erroneously applied law of the case and granted their motion for summary judgment. As set forth in *Byford*, *supra*, "a trial court order does not constitute law of the case." *Byford*, 116 Nev. at 232, 994 P.2d at 711.

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3. *Byford* is Accepted Nevada Law with Respect to the Law of the Case Doctrine

The language of *Byford* could not be more clear - "a trial court ruling does not constitute law of the case." *Byford,* 116 Nev. at 232, 994 P.2d at 711. *Byford* is standing and accepted Nevada Supreme Court law.

In arguing that this Court questioned *Byford*, Respondents cite to *Soussana v. Shaposhnikov*, 2011 Nev. Unpub. LEXIS 1388 (2011), an unpublished decision. However, Respondents' argument is misplaced. In *Soussana*, the Court did not even consider or discuss the law of the case doctrine as it was inapplicable to that case. *See generally id.* The only mention of the *law of the case doctrine* was in a footnote, wherein the Supreme Court questions the appellant's argument that the law of the case doctrine somehow does not apply to district court decisions, only to appellate decisions. *Id.* at fn 1. The S*oussana* court then, in an aside, states that it does not need to revisit *Byford* because the lack of appeal in S*oussana* makes collateral estoppel applicable, not law of the case. *Id.*

4. Other Jurisdictions Mirror Nevada Law, Holding the Law of the Case Requires Final, Appellate Determination

In *Scott v. State*, 150 Md. Appl 468 (2003), the Maryland appellate court found that law of the case is established by the appellate court and can be established by a lower court "when no appeal is taken…" *Id.* at 474 (citing *Ralkey v. Minnesota Mining*

and Mfg. Co., 63 Md. App. 515, 521, 492 A.2d 1358 (1985); *Baltimore Police Dept. v. Cherkes*, 140 Md. App. 282, 301-02, 780 A.2d 410 (2001) ("recognizing the law of the case doctrine but holding it to be inapplicable 'between courts of coordinate jurisdiction before entry of a final judgment.'"). The Scott court reasoned "[w]hile the 'law of the case' doctrine is not an inexorable command, a decision of a legal issue or issues by an appellate court establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial or on a later appeal in the appellate court." *Id.* at 475-76.

In *People v. Cooper*, 149 Cal.App.4th 500 (2007), the California Appeals Court held that "[T]he law-of-the-case doctrine governs only the principles of law **laid down by an appellate court**, as applicable to a retrial of fact, and it controls the outcome on retrial only to the extent the evidence is substantially the same." *Id.* at 526 (quoting *People v. Boyer,* 38 Cal.4th 412, 442 (2006)); *see also People v. Whitt*, 51 Cal.3d 620, 638-39 (1990).

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5. The Purpose of the Law of the Case Doctrine Is Finality Through Appeal

The principal of the law of the case doctrine was expressed by the California Supreme Court in *Whitt*, supra, wherein the court stated:

> "'The primary purpose served by the law-of-the-case rule is one of judicial economy." It prevents the parties from seeking appellate reconsideration of an already decided issue in the same case absent some significant change in circumstances. *Whitt*, 51 Cal.3d at 638 (quoting *Searle v. Allstate Life Ins. Co.*, 38 Cal.3d 425, 435 (1985); citing *People v. Shuey*, 13 Cal.3d 835, 840-841 (1975)).

Nevada certainly follows this principal. "The law of the first appeal is the law of the case on all subsequent appeals…" *Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797 (1975), *see also Walker v. State*, 85 Nev. 337, 343, 455 P.2d 34 (1969); *Graves v. State*, 84 Nev. 262, 439 P.2d 476 (1968); *State v. Loveless*, 62 Nev. 312, 150 P.2d 1015 (1944). Thus, "under the law of the case doctrine an issue that has already been decided on the merits by the Nevada Supreme Court is law of the case and the holding will not be revisited." *Walker*, 2017 Nev. Dist. LEXIS 2150 (citing *Pellegrini*, 117 Nev. at 879, 34 P.3d at 532). The purpose of the rule is finality. In Nevada, and indeed all jurisdictions, a ruling is not final until appeals have been exhausted or the time for appeal has expired. *Mid-Century Ins. Co. v. Pavilkowski*, 94 Nev. 162, 576 P.2d 748 (1978), *see also Hallicrafters Co. v. Moore*, 102 Nev. 526, 528, 728 P.2d 441, 442 (1986).

In the present case, Judge Williams ruling was not final and was on appeal at the time Respondents filed their Complaint and when summary judgment was granted.

B. The District Court Erred In Granting Summary Judgment In Favor Of Respondents

1. The Order of Affirmance Did Not Resolve The Distinct Issues Related To The NRED 2 Litigation

The Supreme Court's Order of Affirmance settles those matters related to the NRED 1 Litigation. However, there is an important factual and legal distinction with respect to the NRED 2 Litigation that was not included within the Williams' Order and the Order of Affirmance in Docket No. 73039. The district court herein did not even note the distinguishing feature of the case in its order.

In the NRED 2 Litigation (and underlying Chapter 38 arbitration), Appellants and the Association stipulated the Amended CC&Rs were valid and enforceable for the purpose of the NRED 2 Litigation. Stipulation, AA000425 - 430. Indeed, Appellants included the following language in their Complaint in the action:

> 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 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.

Complaint in NRED 2 Litigation, ¶ 11, AA000436.

When this litigation was before the Supreme Court (after Appellants appealed an adverse ruling), the Supreme Court noted the importance of the foregoing Stipulation, stating that its ruling was "premised in part on [Appellants'] stipulation as to the Amended CC&Rs validity." Supreme Court Order Re: NRED 2 Litigation, AA000521 – 000522.

Because the parties to that litigation stipulated that the Amended CC&Rs governed, the following provisions governed the rights, duties and, ultimately, the liabilities of the parties. The Amended CC&Rs provide, in pertinent part, as follows:

> Section 1.1. "'Act' shall mean and refer to the State of Nevada's version of the **Uniform Common-Interest Ownership Act, codified in NRS Chapter 116**, as it may be amended from time to time, or any portion thereof."
>
> Section 1.14(e). "…**the Property is a common interest community pursuant to the Act**."
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> Section 1.38. "'Property' shall refer to the Property as a whole, including the Lots and Common Elements, as restricted by and marketed and sold to third parties in accordance with this Declaration."
>
> Section 1.24. "'Governing Documents includes the Amended CC&Rs.
>
> Article 2: "The Association is charged with the duties and vested with the powers prescribed by law and set forth in the Governing Documents."

Amended CC&Rs, AA000366, 367 – 368, 370 - 371.

Finally, the Amended CC&Rs prescribe a remedy equal to NRS 116.3117 within Section 10.2, specifically, that any judgment against the Association is a judgment

against each unit within the Association on a pro rata basis. Amended CC&Rs, § 10.2(c), AA000381. Appellants now seek to collect that judgment pursuant to Section 10(e) of the Amended CC&Rs.

The Amended CC&Rs, which were, without question, the document governing the rights, duties and liabilities of Appellants and the Association in the NRED 2 Litigation, incorporate and apply the entirety of Chapter 116, including NRS 116.3117. For the purposes of the NRED 2 Litigation, only, the Amended CC&Rs unquestionably define the rights, liabilities and obligations of the parties. Appellants obtained a judgment in the NRED 2 Litigation, which was awarded pursuant to the Amended CC&Rs and NRS, Chapter 116. Indeed, the district court's Order Granting Summary Judgment in the NRED 2 Litigation cites the Association's persistent violations of the Amended CC&Rs and various sections of Chapter 116 (that do not apply to limited purpose associations) because the district court concluded the Amended CC&Rs and the entirety of Chapter 116 applied. *See generally* Order Granting Summary Judgment in NRED 2 Litigation, AA000464 - 000478.[3]

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[3] The district court cites the Amended CC&Rs and various provisions of Chapter 116 inapplicable to limited purpose associations, e.g. NRS 116.3115 (adopting annual budget), 116.31162(1)(2) (required notice and hearing prior to levying assessments and recording liens), 116.31086 (requiring three (3) bids before hiring a collection agency), 116.1183 (prohibition against retaliatory action).

This judgment also included an award of attorneys' fees which was awarded by the district court pursuant to the Amended CC&Rs **after** the Amended CC&Rs were declared *void ab initio* by the district court in the NRED 1 Litigation.

The district court granted judgment pursuant to the Amended CC&Rs and several provisions of Chapter 116 that do not apply to limited purpose associations and subsequently granted Appellants' attorneys' fees pursuant, in part, to the Amended CC&Rs. So, while Appellants were afforded relief pursuant to the Amended CC&Rs, the district court in this case stripped the collection rights provided by the Amended CC&Rs.

2. Appellants Can Enforce The Benefits Of The Amended CC&Rs Even If They Were Declared *Void Ab Initio*

In this case, the Amended CC&Rs were declared *void ab initio* by the district court in the NRED 1 Litigation. Declaring an agreement or document void ab initio is similar to rescinding the agreement. *Long v. Newlin*, 144 Cal.App.2d 509, 512 (1956), *see also DuBeck v. California Physicians' Service*, 234 Cal.App.4th 1254 (2015), *Little v. Pullman*, 219 Cal.App.4th 558, 568 (2013) (holding that once a contract has been rescinded it is void ab initio, as if it never existed).

Respondents incorrectly contend a party cannot enforce the benefits of a contract declared *void ab initio*. This matter was dealt with in two Nevada Supreme Court cases. In *Bergstrom v. Estate of DeVoe*, 109 Nev. 575, 854 P.2d 860 (1993), a plaintiff filed suit for rescission or, in the alternative, for damages from breach of

contract. *Id.* at 578, 854 P.2d at 862. The district court found in favor of the plaintiff and rescinded the contract, declaring it void *ab initio*. *Id.* The district court also awarded the plaintiff breach of contract damages. *Id.* The Nevada Supreme Court disagreed and ultimately precluded the plaintiff from recovering damages for breach of contract together with rescission. *Id.* The Supreme Court stated that under general common law legal principles, it could not award both rescission and breach of contract damages because doing so would be double recovery. *Id.*

In *Mackintosh,* 113 Nev. 393, 935 P.2d 1154, however, the Supreme Court overturned a district court's refusal to award attorneys' fees on a rescinded contract declared void *ab initio*. *Id.* at 405, 406, 935 P.2d at 1162. The *Mackintosh* court found that an award of attorneys' fees to a grieving party following rescission was not akin to double recovery, as opposed to an award of breach of contract damages. *Id.* The key principal at issue is that a court should not treat a void contract as if it never existed. *Id.*

The issue before this Court is not a matter of double recovery that would implicate *Bergstrom*. Rather, the equitable principal in play is the same as *Mackintosh* – the Court should not disregard the fact that the Amended CC&Rs were enforced by the Association against Appellants (and all other members) from 2007 through July 29, 2013.[4] Once more, in the NRED 2 Litigation, the parties stipulated

[4] In 1997, two Rosemere Estates homeowners and the Plaintiffs in the consolidated

that the Amended CC&Rs were valid and enforceable, so the "legal fiction" did not even exist, rather the legality of the Amended CC&Rs was agreed to and enforceability was actual.

3. Principals Of Equity Demand Appellants Should Be Able To Collect The Judgments Awarded Pursuant To The Amended CC&Rs And Chapter 116

While the district court in the NRED 1 Litigation held that the Association was a *limited purpose association*, the district court in that case also found that from July 3, 2007, through July 29, 2013, when the court granted Appellants' summary judgment in that case, the Association acted as a full-blown unit owners' association governed by the Amended CC&Rs, subject to and taking advantages of all rights, privileges and remedies afforded by the entirety of Chapter 116, including the right to initiate Chapter 116 foreclosure proceedings for failure to pay assessments, which is exactly what the Association did to Appellants. *See generally* Order Granting Summary Judgment in NRED 1 Litigation, AA000401 – 000412. In the NRED 2 Litigation, the parties

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case, Linda Lamothe and Marge Boulden, acting on behalf of all owners, filed Non-Profit Articles of Incorporation (the "Articles") pursuant to Nevada Revised Statutes ("NRS") 82, which formalized the property owners' committee from the Original CC&Rs and named it "Rosemere Estates Property Owners Association" (the "Association"). The owners' committee was established in the Original CC&Rs, and the properties were conveyed by the Developer subject to the owners' committee because the properties were conveyed subject to the recorded Original CC&Rs. The Association and the owners' committee are the same.

stipulated to the enforceability of the Amended CC&Rs.[5] *See* Complaint in NRED 2 Litigation, AA000433 - 000448; *see also* Stipulation, AA000425 - 000430. The district court granted Appellants' judgment pursuant to those same Amended CC&Rs. Order Granting Summary Judgement in NRED 2 Litigation, AA000464 – 000478.

In granting Appellants' Motion for Attorneys' Fees in the NRED 2 Litigation, the court cited *Mackintosh,* 113 Nev. at 405-406, 935 P.2d at 1162, and held Appellants could recover attorneys' fees under the Amended CC&Rs because that document, while declared *void ab initio* by the district court, was in effect and enforced by the Association against Appellants at all times during the underlying litigation. *See generally* Order Granting Attorneys' Fees in NRED 2 Litigation, ¶ 5, AA000480 - 000483. In *Mackintosh*, the Court declared a contract to, essentially, have never existed, yet the Court found it would be inequitable for only the party seeking to enforce the contract to be afforded an award of attorneys' fees. *Id.* at 1049. Out of fairness to the prevailing party who had the contract rendered *void ab initio*, the remedy had to be mutual. *Id.*

The very same reasoning should be applied in this case, not only to the award of attorneys' fees, but the collection policy set forth in the Amended CC&Rs, Section

[5] The district court in the NRED 1 Litigation originally confirmed an arbitrator's decision allowing the Amended CC&Rs to be enforced and denying Appellants' claims for relief in that case. This district court order essentially confirmed the Amended CC&Rs as the governing document until the district court reversed its own ruling and declared the Amended CC&Rs void ab initio.

10.2(c). In the present case, the Amended CC&Rs were enforced by the Association from July 3, 2007, through July 29, 2013, often to the detriment of Appellants. Once more, in the NRED 2 Litigation, the parties stipulated that the Amended CC&Rs were valid and enforceable. During this time when the Amended CC&Rs were being enforced by the Association, the Association used them to prevent Appellants from building their dream home in the Rosemere Estates community and thrust Appellants into years of litigation that exhausted the Lytles' retirement savings and created emotional turmoil. Order Granting Summary Judgment in NRED 1 Litigation, FOF Nos. 25 – 31, AA000405 - 000406. Indeed, Appellants were the only targets of the Amended CC&Rs and the prohibitive building restrictions because Appellants were the only vacant (undeveloped) lot in the community at that time. *Id.*

The Association also filed a countersuit against Appellants in the NRED 2 Litigation, something a limited purpose association is not permitted to do. NAC 116.090(1)(c)(1), (prohibiting a limited purpose association from enforcing restrictions against unit owners). The Association moved to dismiss and had the Complaint dismissed in the NRED 1 Litigation, purportedly as a result of a failure to timely file under Chapter 38, which does not apply to limited purpose associations. The Association was initially awarded attorneys' fees in the NRED 2 Litigation pursuant to the Amended CC&Rs and provisions of Chapter 116. *See* Order Awarding Attorneys' Fees in NRED 2 Litigation, AA000451 - 000457; *see also* Supplemental Order

Awarding Attorneys' Fees in NRED 2 Litigation, AA000459 - 000462.

Appellants obtained judgments against the Association due to the Association's actions taken in order to both defend and impose its position as a unit owners' association. Of importance, the judgments, attorneys' fees and costs were awarded in the NRED 2 Litigation pursuant to the Amended CC&Rs **after** the Amended CC&Rs were declared *void ab initio* (in the NRED 1 Litigation). During the entire pendency of the NRED 2 Litigation (and indeed well before), the Association operated pursuant to the statutory luxuries afforded to it as a litigant by NRS Chapter 116. Had the Association, and not Appellants, prevailed in the NRED 2 Litigation, the Association would enjoy all of the benefits as a judgment creditor against Appellants, including the right to lien Appellants property and foreclose thereon.

The district court's order on appeal herein severely hampers Appellants' ability and right to collect the judgment and counters the equitable principals laid out in *Mackintosh* as well as the plethora of cases affording equitable relief to parties where legal relief is not afforded. *See e.g. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. ENC Corp.*, 464 F.3d 885, 891 (9th Cir. 2006) (finding that the court has flexible discretion to apply Federal rule of Civil Procedure 19 for the sake of equity, to achieve an appropriate, fair and equitable result) (citing, in part, *Montana v. Crow Tribe of Indians*, 523 U.S. 696, 707, 118 S. Ct. 1650, 140 L. Ed. 2d 898 (1998).) As stated by the United States Supreme Court, "[e]quity fashions a trust with flexible adaptation to call of the

occasion." *Adams v. Champion*, 294 U.S. 231, 237 (1935); *Shadow Wood Homeowners Ass'n v. New Your Comty. Bancorp.*, Inc. 366 P.3d 1105, 1114 (citing *In re Petition of Nelson*, 495 N.W.2d 200, 203 (Minn. 1993).) While the district court afforded the Association all of the benefits of assessment, foreclosure and collection pursuant to the Amended CC&Rs and Chapter 116 through July 2013, it now blocks Appellants from the remedies provided by the Amended CC&Rs and Chapter 116 simply because Appellants were successful in voiding the governing document used by the Association to financially oppress them. The result is, at the very least, inequitable, and perhaps even absurd.

4. Respondents' Actions Gave Rise To The Judgments Against The Association, And Respondents Are Not Merely Unrelated, Innocent Parties In This Action

As an initial matter, Appellants are not claiming they have or obtained a judgment against Respondents, individually. To be clear, Appellants argue that because they were granted judgment and attorneys' fees in the NRED 2 Litigation pursuant to the Amended CC&Rs and based on the equitable principals set forth in *MacKintosh*, supra, they should be afforded the collection measures in the Amended CC&Rs (Section 10.2(c)) and Chapter 116 (NRS 116.3117)). Those collection measures allow a

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creditor to place a lien on any unit within the Association and collect thereon. Amended CC&Rs, Section 10.2(c), AA000381; *see also* NRS 116.3117.

However, the record deserves some clarity with respect to claims made by Respondents. Respondents portray themselves as innocent, unrelated, non-parties to the underlying litigation giving rise to the judgments. In fact, with the sole exception of Gegen[6], Respondents, and each of them, were members of the Association during the entirety of the NRED 1, NRED 2 and NRED 3 Litigation, and four (4) of the Respondents sat on the Board of Directors during various periods of the underlying litigation – Gerry Zobrist, Sherman Kearl and Karen Kearl[7] and Reynaldo G. Sandoval. Mssrs. Zobrist and Kearl were primarily responsible for the unlawful passage of the Amended CC&Rs, while Mr. Sandoval persistently promoted litigation against Appellants. Further, each of these former Board members paid $47,000.00 to continue the litigation defending the Amended CC&Rs and foreclosing on Appellants' property.

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[6] DENNIS A. GEGEN AND JULIE S. GEGEN, HUSBAND AND WIFE, AS JOINT TENANTS. Julie S. Gegen is the daughter of Reynaldo Sandoval.

[7] SEPTEMBER TRUST, DATED MARCH 23, 1972. Sherman Kearl filed a fraudulent lien against Appellants and the Board pursued foreclosure against that fraudulent lien, which led to a finding of slander of title and an award of punitive damages by the district court in the NRED 2 Litigation against the Association and in favor of Appellants. Order Granting Summary Judgment in NRED 2 Litigation, ¶¶ 16 – 27, 44 - 50, AA000471 – 000473, 000476.

Mr. Sandoval, together with two other Board members, suddenly abandoned their positions on the Board once Appellants obtained a judgment against the Association in the NRED 1 Litigation. Mr. Sandoval and the other Board members failed to conduct an election or take any other meaningful and dutiful action required of them given the substantial debts owed to Appellants. *See* NRS 82.221 (imposing fiduciary duties upon association Board members as well as a duty to act in good faith and in the honest belief that their actions are in the best interest of the association). They have attempted to fraudulently absolve themselves of their duties in order to prevent Appellants from collecting on their judgments. As a result, the Association currently is in default status with the secretary of state.

5. The NRED Litigation Was Substantial, Contentious, And Respondents' Argument That The Association Was Unrepresented Is Disingenuous

In an effort to somehow discredit Appellants' judgments against the Association, Respondents argue that the judgments are akin to defaults. The facts demonstrate otherwise.

The Court can easily quantify how contentious and lengthy the NRED Litigation was by virtue of the $586,508.44 in attorneys' fees awarded to Appellants (in the various NRED Litigation). The litigation commenced in 2007 and concluded in 2016. During this time, the case proceeded from arbitrations, to district court litigation, to the

Nevada Supreme Court on three occasions, to remands to the district court, and then to conclusion in Appellants' favor. It should also be noted that the Association, not Appellants, appealed the NRED 1 Litigation to the Nevada Supreme Court. The Association was represented the entire time. The Association's prior counsel withdrew in 2016, **after** Appellants prevailed before the Nevada Supreme Court in the NRED 1 and NRED 2 Litigation.

C. The District Court Erred In Awarding Attorneys Fees Pursuant To NRS 180.020(2)(b)

1. The District Court Erroneously Concluded Appellants Maintained A Defense Without Reasonable Ground

To support an award of attorney fees without regard to recovery sought, there must be evidence in the record supporting the proposition that claims were brought without reasonable grounds or to harass the other party. *Semenza v. Caughlin Crafted Homes*, 1995, 901 P.2d 684, 111 Nev. 1089. Although a district court has discretion to award attorney fees against a party for unreasonably maintaining a lawsuit, there must be evidence supporting the district court's finding that the claim or defense was unreasonable or brought to harass. *Bower v. Harrah's Laughlin, Inc.*, 2009, 215 P.3d 709, 125 Nev. 470.

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a. Appellants' defenses were reasonable because there was no *law of the case* dictating what defenses were unavailable

As an initial matter and as set forth above, the Williams Order was not law of the case as held by the district court.[8] As set forth above, at all times, Appellants maintained defenses of the claims asserted by Respondents, Judge Williams' Order was not *law of the case*.

The sole basis supporting the district court's order granting attorneys' fees and costs pursuant to NRS 18.020(2)(b) is that Appellants knew their defenses to Respondents' lawsuit were unreasonable given the Williams Order. However, as set forth above, that order was not final and was on appeal at the time summary judgment was granted. Indeed, the Supreme Court did not affirm the order until nearly six (6) months after the district court granted Respondents' summary judgment. Believing steadfastly Appellants could prevail before the Supreme Court, they maintained their defense to Respondents' action.

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[8] As the district court explained, "the Court finds that the Defendants' defense to this action was maintained without reasonable ground" because Judge Williams had previously established the *law of the case*. Order Re: Fees and Costs, AA000865.

Once more, even assuming the law of the case doctrine applies in this case, the district court was initially confused with respect to the law of the case doctrine, first holding that the Williams Order was not law of the case.

> Obviously, another district court's ruling is not binding. There was a lot of briefing on the issue of preclusion, res judicate, law of the case. I don't think it's law of the case, it hasn't gone up to the Supreme Court and then been decided.

Transcript of Proceedings, March 21, 2018, 12:22-25, AA000909.

Indeed, the district court after a lengthy hearing on the summary judgment motions took the matter under submission, stating that it would review the matter independently and make its own determination. Transcript of Proceedings, March 21, 2018, 12:22-25, 13:3 – 12; 19:16 – 19; AA000909 – 000910, 000916.

Yet, in awarding attorneys' fees under NRS 18.010(2)(b), the district court holds Appellants to a higher standard than even the court, essentially mandating Appellants needed to abandon their defenses in light of the Williams Order despite the district court's own confusion. It is grossly inequitable to hold Appellants to this higher standard.

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b. While many of Appellants' defenses were defeated by the Order of Affirmance in Docket No. 73039, Appellants had a reasonable basis for maintaining its defenses to Respondents' lawsuit prior to that Order of Affirmance

NRS 18.010(2)(b) provides a court may make an allowance of attorney's fees to a prevailing party when the court finds the claim, counterclaim, or defense was brought "without reasonable ground or to harass the prevailing party." A court must find evidence that Appellant's defenses were maintained without reasonable grounds or to harass the other party. *Semenza v. Caughlin Crafted Homes*, 1995, 901 P.2d 684, 111 Nev. 1089; *see also Bower v. Harrah's Laughlin, Inc.*, 2009, 215 P.3d 709, 125 Nev. 470. Pursuant to the language of NRS 18.010(2)(b), "a claim is frivolous or groundless if there is no credible evidence to support it." *Rodriguez v. Primadonna Company*, 125 Nev. 578, 587, 216 P.3d 793, 800 (2009).

Of the utmost importance in this analysis is the court's balancing of a party's right to advocate and maintain a defense in an action with the court's deterring frivolous lawsuits. *Frederic & Barbara Rosenberg Living Trust v. MacDonald Highlands Realty, LLC*, 427 P.3d 104, 134 Nev. Adv. Rep. 69 (2018). An answer is "frivolous" when it is so clearly insufficient on its face that it does not controvert the material points of the complaint and is interposed for the mere purpose to delay or to embarrass the plaintiff. *Ervin v. Lowery*, 64 N. C. 321; *Strong v. Sproul*, 53 N. Y. 499; *Gray v. Gidiere*, 4 Strob.

(S. C.)442; *Peacock v. Williams* (C. C.) 110 Fed. 910. Thus, it is not enough that a party fails to prevail on a defense or in an action. The standard is far higher. A defense is frivolous when it is groundless or without any conceivable basis in the law.

Hence, in *Freidson v. Cambridge Enters.*, 2010 Nev. LEXIS 116 (2010), the Supreme Court found that a plaintiff's citation to California law inapplicable in Nevada as supporting his position on the statute of limitations was not "groundless given an absence of Nevada caselaw interpreting the statute." *Id.*

Similarly, in *Frederic & Barbara Rosenberg Living Trust*, 427 P.3d at 112, the Court found that the Barbara Rosenberg Living Trust did not lack "reasonable grounds to maintain the suit, as it presented a novel issue in state law, which, if successful, could have resulted in the expansion of Nevada's caselaw regarding restrictive covenants." *Frederic & Barbara Rosenberg Living Trust*, 427 P.3d at 21. The Court reasoned there is a need to deter frivolous lawsuits, but this "must be balanced with the need for attorneys to pursue novel legal issues or argue for clarification or modification of existing law." *Id.*

In the case of *Stubbs v. Strickland*, 129 Nev. 146, 297 P.3d 326 (2013), the court refused to award attorneys' fees pursuant to NRS 18.010(2)(b) where the plaintiff pursued a case seeking a "change or clarification in existing law." *Id.*

The Supreme Court has long followed its own precedent that attorneys' fees will not be awarded under NRS 18.010(2)(b) where a party is pursuing a novel legal issue or

seeking clarification of the law. Here, there can be no argument regarding the novel and complex concepts involved. The ultimate issue before the district court was whether Appellants had *reasonable grounds* to *believe* that they had a right to record the abstracts of judgments against Respondents' properties given that the Amended CC&Rs were the very basis for the award of the judgment.[9]

While the plethora of reasoning is set forth in Appellants' opening briefs, the Court should examine the unquestionable gaps and vagueness in Chapter 116 as the backdrop upon which Appellants' defenses were made. NRS 116.3117, "liens against the association," provides as follows:

> 1. In a condominium or planned community:
>
> (a) Except as otherwise provided in paragraph (b), a judgment for money against the association, if a copy of the docket or an abstract or copy of the judgment is recorded, is not a lien on the common elements, but is a lien in favor of the judgment lienholder against all of the other real property of the association and all of the units in the common-interest community at the time the judgment was entered. No other property of a unit's owner is subject to the claims of creditors of the association.

In this case, Rosemere Estates is a *limited purpose association*. Appellants contended because they were granted a monetary judgment, attorneys' fees and costs pursuant to the entirety of Chapter 116 as well as the Amended CC&Rs, the lien statute

[9] Appellants only recorded abstracts of judgment with respect to the NRED 1 Litigation. Appellants never recorded abstracts of judgment with respect to the NRED 2 Litigation. However, Appellants opposed and maintained defenses to Respondents' declaratory relief cause of action with respect to Appellants right to do so.

set forth in NRS 116.3117 and Section 10.2(c) of the Amended CC&Rs, mirroring NRS 116.3117, similarly should apply for both legal and equitable reasons, as more fully described above. In other words, Appellants contended, and still maintain with respect to the NRED 2 Litigation, they should be afforded the same rights that the Association was afforded.

Appellants also argue the principals of equity are better served with a broad interpretation of Chapter 116 that would permit Appellants to recover as a creditor against a limited purpose association. Where a statute is not clear or is ambiguous, the plain meaning rule has no application. *Thompson v. District Court*, 100 Nev. 352, 354, 683 P.2d 17, 19 (1984); Robert E. v. Justice Court, 99 Nev. 443, 664 P.2d 957 (1983); *see also McKay v. Board of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441, 1986 Nev. LEXIS 1609, 13 Media L. Rep. 2066. An ambiguous statute can be construed "in line with what reason and public policy would indicate the legislature intended." *Robert E. v Justice Court of Ren Township*, 99 Nev.443, 445 (1983).

Appellants primary contention is that because they were awarded attorneys' fees pursuant, in part, to the equitable principals in *MacKintosh* where the district court allowed Appellants to enforce the attorneys' fee provision in the voided Amended CC&Rs, the equity should be further extended to permit Appellants to collect pursuant to Section 10.2(c) of the same contract. Specifically, Section 10.2(c) permits Appellants to lien each unit within the Association. Unfortunately, despite a diligent

search, there is no case law directly on point with this legal issue either confirming or denying such an equitable resolution. This case is the quintessential example of *unique*.

In addition to the foregoing, prior to this Court's Order of Affirmance in Docket No. 73039, Appellants maintained a good faith and reasoned belief that a collection remedy was afforded to creditors of a limited purpose association via Chapter 116. The belief was based, in substantial part, upon the incomplete, ambiguous and often confusing aspects to Chapter 116 and the inclusion (or exclusion) of limited purpose associations. There are a number of examples of the gaps in the statutory framework for common interest developments, and below is a sampling of just some major gaps:

- A limited purpose association must have a Board of Directors, there is no statutory mechanism for elections. NRS 116.1201, 116.31083, 116.31152.
- A Board must conduct noticed meetings at least once every quarter, review pertinent financial information, discuss civil actions, revise and review assessments for the common area expenses, establish adequate reserves, conduct and publish a reserve study, and maintain the common areas as required. NRS 116.31083 – 116.31152, 116.31073. But electing this Board for a limited purpose association is absent from Chapter 116.
- Members of a limited purpose association are not permitted under Chapter 116 to see financial records, so the Board can operate in secrecy. This has the potential to allow a rogue Board to embezzle community funds.

- Members of a limited purpose association are not required to solicit bids from vendors, so Board members could hire family members or unqualified contractors without having any financial oversite.
- A limited purpose association is required to complete a reserve study and maintain adequate reserves (NRS 116.31152), but there are no provisions related to the funding of the reserves.

In fact, the very issue in the NRED 3 Litigation, in which Appellants prevailed, was compelling the Association to conduct a Board election. *See* Complaint in NRED 3 Litigation, AA000490 – 497. On September 13, 2017, the district court granted Appellants' Motion for Summary Judgment in the NRED 3 Litigation, and ordered an election take place before a neutral third party. *See* Order Granting Summary Judgment in NRED 3 Litigation, AA000499 – 506. The district court entered the order despite Chapter 116's silence on the issue of conducting elections in limited purpose associations, referring in substantial part to NRS, Chapter 82 related to non-profit corporations. *Id.* Simply stated, Chapter 116 is, in some respects, poorly drafted and incomplete as it relates to limited purpose associations.

c. The answer was not frivolous because the Williams Order was not affirmed until after summary judgment was granted

In *Barozzi v. Benna*, 112 Nev. 635, 639, 918 P.2d 301, 303 (1996), the Supreme Court, in analyzing fees pursuant to NRS 18.010(2)(b), explained that "'if an action is

not frivolous when it is initiated, then the fact that it later becomes frivolous will not support an award of [attorney's] fees.'" (quoting *Duff v. Foster*, 110 Nev. 1306, 1309, 885 P.2d 589, 591 (1994)).

In *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals,* 114 Nev. 1348 (1998), the plaintiff brought defamation and related claims against the People for the Ethical Treatment of Animals ("PETA"). *Id.* The complaint sought damages from PETA related to a video it took of Berosini beating his stage animals. *Id.* at 1350-51. At the time Berosini filed the complaint, Nevada law was unsettled as to whether a video of an incident could be considered "false" for the purposes of a defamation claim. *Id.* at 1354. Berosini prevailed during a jury trial, but the Supreme Court overturned the ruling, finding Berosini failed to present sufficient evidence at trial to support the jury's verdict. *Id.* at 1351. After remand, the district court awarded PETA attorneys' fees and costs pursuant, in part, to NRS 18.010(2)(b). *Id.* at 1351-52. Berosini appealed and the Supreme Court held the district court's award of attorneys' fees under NRS 18.010(2)(b) was an abuse of the court's discretion because at the time the complaint was filed, Nevada law was "unclear" as to whether a videotape could be considered "'false' for the purposes of a defamation claim." *Id.* at 1354. Hence, the claims could not, by definition, be *frivolous*. *Id.*

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Here, the Supreme Court affirmed the Williams Order on December 4, 2018, more than six (6) months **after** the district courted entered summary judgment in Respondents' favor. Order Granting Motion for Summary Judgment, AA000780 – 793. Respondents entire argument is premised on Judge Williams' Order and its finality or applicability to Appellants. However, the order was not final and binding on Appellants until December 4, 2018, when this Supreme Court affirmed it. As such, Appellants maintained a good faith basis for its defenses to the underlying action because there simply was no finality.

Once Judge Williams' Order was affirmed, Appellants and the remaining parties to the case stipulated to a dismissal of the action in its entirety.

2. Respondents Failed To Appeal The District Court's Order Denying Them Attorneys' Fees Pursuant To The Original CC&Rs

Respondents improperly request this Court to either unilaterally grant them attorneys' fees pursuant to the Original CC&Rs or remand the matter to the district court for such a decision. Respondents already had the proverbial bite at the apple, seeking attorneys' fees pursuant to the Original CC&Rs in their Motion for Attorneys' Fees. Respondents Motion for Attorneys' Fees and Costs, RA0060 - 0061. The district court did not grant their request, only awarding fees pursuant to NRS 18.010(2)(b). *See generally* Order Granting Attorneys' Fees and Costs,

AA000831 - 000843. Respondents did not appeal the foregoing order or ask for a rehearing/reconsideration. Respondents cannot now seek relief from an order denying them fees under the Original CC&Rs. NRAP 4(a); *see also Alvis v. State*, 99 Nev. 184, 185-86, 660 P.2d 980 (1983) (holding that the Supreme Court lacks jurisdiction to entertain an appeal if timely notice of appeal is not filed); *Campos-Garcia v. Johnson*, 331 P.3d 890 (2014) (holding that a fee order is independently appealable as a special order after final judgment, if it is timely appealed.).

III. CONCLUSION

For the reasons set forth above, in Docket 76198, Appellants request this Court reverse the district court's order granting Respondents' Motion for Summary Judgment, or in the Alternative, for Judgment on the Pleadings and set aside the permanent injunction. Specifically, Appellants request this Court find Appellants are entitled to enforce Section 10.2(c) of the Amended CC&Rs in order to collect the judgment (including attorneys' fees) granted to them pursuant thereto.

In Docket 77007, Appellants respectfully contend the district court errored in granting attorneys' fees and costs to Respondents under NRS 18.010(2)(b). The district court set the stage for the error when it erroneously concluded Judge Williams' order granting partial summary adjudication was *law of the case*. This fundamental mistake then gave the district court reason to conclude Appellants continued their defense of Respondents' lawsuit without justification. Appellants

maintained good faith defenses to the claims brought against them, which defenses are rooted in equity as well as the novel issues and unique nature presented in this case. For those reasons, Appellants request this Court reverse the district court's award of attorneys' fees. No remand is appropriate as Respondents did not appeal the district court's denial of attorneys' fees and costs based on the Original CC&Rs.

DATED this 1st day of September, 2019.

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Certificate of Compliance

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:

[**X**] This brief has been prepared in a proportionally spaced typeface using **Microsoft Word 2010 Times New Roman 14—point font**.

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

[ ] Does not exceed 30 pages; or

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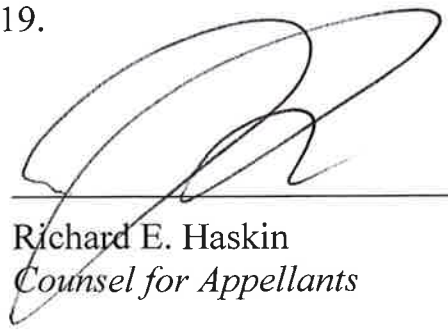
3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), 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 1st day of September, 2019.



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Certificate of Service

1. Electronic Service:

I hereby certify that on this date, the 1st day of September 2019, I submitted the foregoing **Appellant's Reply Brief (Dockets 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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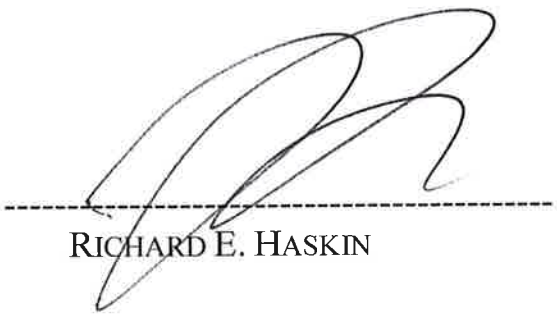

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