IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, Appellant, vs. THE CENTER FOR INVESTIGATIVE REPORTING, INC., A CALIFORNIA NONPROFIT ORGANIZATION, Respondent.	Supreme Court Case Nos.: 77617/77965 Appeal from the Eighth Judicial District Court, the Honorable Elizabeth Gonzalez Presiding

APPELLANT LVMPD'S REPLY BRIEF

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I. INTRODUCTION

The Las Vegas Metropolitan Police Department's ("LVMPD") opening brief presents several arguments for the reversal of the District Court's order awarding the Center for Investigative Reporting, Inc. ("CIR") attorney fees and costs pursuant to the Nevada Public Records Act ("NPRA"), including: (1) vacating the order in its entirety because the lower court failed to apply the prevailing party standard announced in *Blackjack Bonding*, and had the District Court applied the appropriate standard, CIR did not prevail; (2) NRS 239.011(2) cannot be read in isolation, but must be construed together with NRS 239.012, along with the legislative history, which provides that LVMPD is immune from an award of attorney fees and costs because it acted in good faith in refusing to disclose information; and (3) alternatively, the Court should vacate $5,310.00 awarded as attorney fees for worked performed prior to litigation.

In its answering brief ("RAB"), CIR urges this Court to ignore this Court's jurisprudence and apply the catalyst theory standard, which has never been utilized in Nevada. CIR asserts that the catalyst theory is appropriate because the Legislature adopted the term "prevails" rather than utilizing the term "prevailing party" within NRS 239.011. Despite recognizing this immaterial difference when referencing the Legislature, CIR ignores the legislative history, wherein it would have discovered that the term "prevails" over "prevailing party" was used because

the Legislature wanted to preclude the government entity from recovering its attorney fees and costs in lawsuits brought under the NPRA. Thus, the deviation from "prevailing party" to "prevails" does not warrant an entirely different standard. Indeed, this Court expressly ruled that the prevailing party standard applied to NRS 239.011. There is simply no basis to overrule this Court's precedent. Had the Legislature intended to apply the catalyst theory, it could have easily amended the NPRA and specifically NRS 239.011—but it has not—like Congress amended the Freedom of Information Act ("FOIA").

CIR's illogical interpretation is not supported by any authority in Nevada. This is quite telling considering the fact that many other statutes, other than NRS 239.011, reference the term "prevails." *See* NRS 383.190; 357.180; 31.2945; 41.134; 597.8197. As such, CIR's reliance on rulings from other states is misguided. To be sure, the authorities cited by CIR from other jurisdictions explicitly reject the application of *Buckhannon*. On the other hand, this Court has relied on the United States Supreme Court decision in *Buckhannon* when analyzing Nevada's prevailing party standard. This Court's precedent, as well as the legislative history regarding NRS 239.011, demonstrates that Nevada does not apply the catalyst theory in determining when a party prevails.

CIR also asks this Court to disregard established rules of statutory construction and interpret NRS 239.011(2) in isolation and with complete

disregard for NRS 239.012. The arguments CIR presents for its theory that NRS 239.012 is not be rendered meaningless solely relies on the language addressing third parties and not requesters. As such, CIR's flawed reasoning discounts the standing principle that, in particular instances, attorney fees are considered damages. *See Pardee Homes of Nev. v. Wolfram*, 135 Nev. Adv. Op. 22, __ P.3d __, n.3 (July 3, 2019) (listing the instances in which attorney fees may be considered damages, including in declaratory actions and actions for equitable relief). CIR's support for the catalyst theory is an admission that damages includes fees. CIR contends that the adoption of the catalyst theory is necessary because there are no other damages recoverable by a requester other than attorney fees. RAB 18-22, n.5. That is, there is but one instance in which a requester could obtain monetary damages against a government entity in relation to a public records request—an award for attorney fees and costs. Accordingly, the term "damages" within NRS 239.012 encompasses attorney fees and costs in NRS 239.011.

CIR's contention that NRS 239.012 applies to a public official or employer and not a government entity is also misguided. The plain language of NRS 239.012 explicitly provides that a public employee or its employer is immune from damages. *See Edington v. Edington*, 119 Nev. 577, 582-83, 80 P.3d 1282, 1286 (2003) ("[W]hen a statute's language is clear and unambiguous, the apparent

intent must be given effect, as there is no room for construction."). A public employee's employer is the government entity. CIR further argues that immunity under NRS 239.012 would conflict with the underlying policy of the NPRA. The NPRA requires exemptions and exceptions, which address access to public records, to be narrowly construed—not the immunity clause that does not affect access to records.

Finally, CIR asserts that NRS 239.012 is not applicable because LVMPD allegedly did not act in good faith. RAB 33. In support of its position, CIR falsely claims that LVMPD withdrew its confidentiality assertions in the face of an adverse ruling after the District Court determined that LVMPD did not meet its burden. RAB 33. This is simply not true and entirely belied by the record. The District Court determined that although LVMPD's initial response was insufficient, an evidentiary hearing was necessary because LVMPD's claims of confidentiality and privileges did carry weight. As a result, the District Court did not enter an order requiring LVMPD to produce all records, and instead, wanted testimony regarding the privileges and confidentiality claims being asserted. The record demonstrates that LVMPD acted in good faith in initially refusing to disclose records of an open and active investigation and ultimately entering into an agreement with CIR to produce portions of records to CIR. As a result, LVMPD asks this Court to confirm the safe harbor language in NRS 239.012 and apply the

rules of statutory construction to interpret NRS 239.011(2) and NRS 239.012 together and in harmony. *See Leven v Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007) (determining that this Court has a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized). In doing so, this Court should determine that NRS 239.012 immunizes LVMPD from CIR's award of attorney fees and costs because LVMPD acted in good faith in refusing to disclose information.

In summary, this Court should vacate the District Court's order awarding attorney fees and costs to CIR because the District Court erred in rejecting the prevailing party standard announced by this Court and CIR did not "prevail." If the Court determines CIR did prevail or adopts the catalyst theory as suggested by CIR, it should construe NRS 239.011(2) and NRS 239.012 together, along with the legislative history, and determine that LVMPD is immune from CIR's award of attorney fees and costs because it acted in good faith. Alternatively, this Court should eliminate the District Court's award of $5,310.00 in attorney fees because such fees pertained to pre-litigation work.

II. LEGAL ARGUMENT

A. A REQUESTER MUST PREVAIL, INCLUDING OBTAINING A JUDGMENT IN ITS FAVOR, TO OBTAIN ATTORNEY FEES AND COSTS.

CIR attempts to persuade this Court to adopt the catalyst theory in NPRA actions by citing to other states that have accepted the catalyst theory to interpret the term "prevails." CIR, however, neglected to explain that in each of the states that adopted the catalyst theory, the United States Supreme Court decision in *Buckhannon*[1] was expressly rejected. *See Mason v. City of Hoboken*, 951 A.2d 1017 (N.J. 2008)[2] (relying on *Singer v. State*, 472 A.2d 138 (N.J. 1984) (adopting the catalyst theory in New Jersey prior to *Buckhannon*) and *Packard-Bamberger & Co., Inc. v. Collier*, 771 A.2d 1194, 1204 (N.J. 2001) (affirming New Jersey's adoption of the catalyst theory after *Buckhannon*); *Uptown People's Law Ctr. v. Dep't of Corr.*, 7 N.E.3d 102, 104-107 (Ill. Ct. App. 2014) (expressly recognizing that the *Buckhannon* decision was "in contrast to Illinois jurisprudence" and that *Buckhannon* was limited to federal statutes and was not binding on states) (relying

[1] *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001) (determining that a party prevails when one has been awarded some relief by the court and expressly rejecting the catalyst theory).

[2] New Jersey also does not limit the catalyst theory to public record cases. Indeed, it has adopted the catalyst theory as its prevailing party standard and has applied it to civil rights, discrimination, and attorney misconduct cases. *See Mason*, 951 A.2d 1030-1031.

on *City of Elgin v. All Nations Worship Ctr.*, 868 N.E.2d 385 (Ill. Ct. App. 2007)); *Belth v. Garamendi*, 232 Cal.App.3d 896, 901 (Cal. Ct. App. 1991) (prior to *Buckhanno*n, recognizing that California law dictates that a party prevails or is successful when there is a casual connection between the lawsuit and the relief obtained and not requiring a final judgment) (citing *Wallace v. Consumers Cooperative of Berkeley, Inc.*, 170 Cal.App.3d 836, 844 (Cal. Ct. App. 1985)).[34]

The District of Columbia Court of Appeals case cited by CIR is also distinguishable. The court identified several reasons for declining to follow the Supreme Court's decision in *Buckhannon*. *Frankel v. Dist. of Columbia Office for Planning and Econ. Dev.*, 110 A.3d 553, 557-58 (D.C. Ct. App. 2015). First, the court recognized that the language codified in the D.C. statute includes "prevails in

[3] California also permits settlement offers to be considered for purposes of determining whether a party prevails. *California Common Cause v. Duffy*, 200 Cal.App.3d 730, 742 (Cal. Ct. App. 1987). In contrast, Nevada explicitly refused to follow this application. *Northern Nev. Homes, Inc. v. GL Construction*, 134 Nev. Adv. Op. 60, 422 P.3d 1234, 1237-38 (2018).

[4] CIR further contends that public policy requires the application of the catalyst theory because refusal to adopt this standard would incentivize government entitled to withhold public records and only turn them over in the face of an impending court order. This is simply not true. Adopting the catalyst theory would encourage requesters to bring premature lawsuits and collect attorney fees and costs when the government entity produces records prior to a Court ordering disclosure. In other words, the catalyst theory would promote litigation by requesters without giving the government entity an opportunity to provide the records.

whole or in part," which was different than the prior D.C. case rejecting the catalyst theory. *Id.* Second, and more importantly, the D.C. Court of Appeals determined that the prior D.C. case had been abrogated by Congress' amendment to FOIA. *Id.* To that end, the *Frankel* court concluded that *Buckhannon* did not apply to federal FOIA suits, and, therefore, the court interpreted the D.C. FOIA similarly. *Id.* In reaching its conclusion, the court relied on the legislative history in crafting D.C.'s FOIA provision, which, unlike the legislative history of NRS 239.011, clearly adopted the catalyst theory. *Id.* ("When drafting FOIA, the D.C. Council stated its intent to craft enforcement sanctions mirroring the federal model.") (internal quotations omitted) (citing D.C. Council Report on Bill 1–119 at 10 (Sept. 1, 1976); *Vt. Low Income Advocacy Council, Inc. v. Usery*, 546 F.2d 509, 513 (2d Cir.1976) (attorney's fees proper if FOIA action is "reasonably ... regarded as necessary" and has "substantial causative effect on the delivery of the information")).

In contrast to the cases improperly relied on by CIR, this Court has cited to *Buckhannon* when determining whether a party prevails under Nevada's prevailing party standard. *See Northern Nev. Homes*, 422 P.3d at 1237 (citing to *Buckhannon* in relation to private settlement agreements and prevailing party); *Azzarello v. Humboldt River Ranch Association*, 2016 WL 6072420, *1, Case No. 68147 (October 14, 2016) (unpublished disposition) (affirming the lower court's denial of

attorney fees because it was not a "judicially sanctioned changed in the legal relationship of the parties."). Even if this Court were to construe *Buckhannon* merely as persuasive authority, this Court has already required a prevailing party to win, i.e., obtain a judgment, on at least one of its claims. *Golightly & Vannah, PLLC v. TJ Allen, LLC*, 132 Nev. Adv. Op. 41, 373 P.3d 103, 107 (2016).[5]

CIR further contends that this Court's decision in *Blackjack Bonding* does not control. RAB 16, n.2. CIR reasons that the issue in *Blackjack Bonding* was limited to whether NRS 239.011, by its plain meaning, granted the requester the right to recover attorney fees and costs if it prevails. *Id.* The issue this Court addressed was whether the district court erred by denying Blackjack Bonding's attorney fees and costs because LVMPD was entitled to the costs of production of records. *LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608, 615 (2015). To determine whether the district court abused its discretion in declining to award attorney's fees and costs, this Court was first required to establish whether Blackjack Bonding prevailed in the lower court. *Id.* The Court concluded

[5] CIR attempts to distinguish these cases and others LVMPD relied on in its Opening Brief by claiming that the cases are limited to NRS 18.010. However, this argument ignores the very fact that this Court in *Blackjack Bonding* relied on *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005) (interpreting NRS 18.010) in determining that the standard applied to NRS 239.011 is the prevailing party standard, which requires a prevailing party to succeed on any significant issue in litigation which achieves some of the benefit it sought in bringing suit. *See Blackjack Bonding*, 343 P.3d at 615.

that because Blackjack Bonding obtained a writ compelling disclosure, i.e., a judgment on the merits, Blackjack Bonding prevailed. *Id.* In other words, this Court applied the well-established prevailing party standard to NRS 239.011. Importantly, *Blackjack Bonding* was decided in 2015, 14 years after the *Buckhannon* decision. This Court could have adopted the catalyst theory in 2015 but failed to even address the catalyst theory. Likewise, the Legislature could have amended the NPRA, like Congress did with FOIA, to reflect the catalyst theory. As discussed in greater detail below, the legislative history supports LVMPD's interpretation of NRS 239.011 an application of the prevailing party standard.[6]

Finally, CIR's arguments ignore the fact that many other statutes within Nevada utilize the term "prevails" rather than "prevailing party." If this Court were to follow CIR's logic, it would essentially establish different standards for various statutes that the Legislature never intended to apply. *See* NRS 383.190(2) ("If the plaintiff prevails in the action, the court may award reasonable attorney fees to the plaintiff"); NRS 357.180 ("a private plaintiff prevails in or settles an action pursuant to NRS 357.080, the private plaintiff is entitled to a reasonable amount for expenses that the court finds were necessarily incurred, including

[6] The legislative history demonstrates that the term "prevails" over "prevailing party" was used so that the government entity could not recover its attorney fees and costs in an NPRA action if it prevailed. 4 JA 733-34.

reasonable costs, attorney's fees and the fees of expert consultants and expert witnesses"); NRS 31.2945(2) ("If the judgment debtor prevails in an action brought under this section, the court must award reasonable attorney's fees and costs to the plaintiff"); NRS 41.134 (If the person who suffered injury prevails in such an action, the court shall award the person costs and reasonable attorney's fees"); and NRS 597.8197(2) ("In addition to the relief authorized by this section, the court may award reasonable attorney's fees and costs to a plaintiff that prevails under this section").

Nevada law is clear—to prevail, a party must win on at least one of its claims, this includes a judicially sanctioned change in the legal relationship of the parties, not by a private settlement. *Northern Nev. Homes, Inc. v. GL Construction*, 134 Nev. Adv. Op. 60, 422 P.3d 1234, 1237-38 (2018); *Golightly & Vannah, PLLC v. TJ Allen, LLC*, 132 Nev. Adv. Op. 41, 373 P.3d 103, 107 (2016); *Azzarello v. Humboldt River Ranch Association*, 2016 WL 6072420, *1, Case No. 68147 (October 14, 2016) (unpublished disposition). CIR has failed to provide any basis why this Court should depart from its long-standing principles and adopt a new standard that, based on CIR's logic, would require the Court to apply the new standard to several statutes and not just the NPRA. Therefore, the Court should reject CIR's arguments misconstruing the law on prevailing parties.

B. THIS COURT SHOULD READ NRS 239.011(2) AND NRS 239.012 IN HARMONY WITH ONE ANOTHER.

CIR ignores the fact that the statutory provisions within the NPRA statutory scheme must be read as a whole and in harmony with one another. *See Leven v Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007) (determining that courts have a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized). Instead, CIR urges this Court to read NRS 239.011(2) in isolation and, contrary to Nevada law, construe such a provision liberally. *See Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998) (strictly construing statutes permitting the recovery of costs because they are in derogation of the common law).

The Legislature has declared that provisions within the NPRA must be construed to promote its purpose, which is access to records. *See* NRS 239.001. Without any supporting authority or evidence, CIR asserts in blanket fashion that LVMPD's interpretation would discourage actions to enforce the NPRA. CIR argues that NRS 239.011 must be read extensively to "encourage[] governmental entities . . . to comply with the law." RAB 31. This assertion simply misses the mark. To the contrary, a requester does not automatically get attorney fees and costs for filing a lawsuit. A requester must prevail. *See* NRS 239.011(2).

Furthermore, government entities are entitled to withhold information that is either confidential or privileged. NRS 239.010. In essence, CIR's reasoning would require the government to pay attorney fees and costs for frivolous lawsuits. This flawed reasoning also encourages requesters to be unreasonable in the pre-litigation stages of a public records request, just to get a case into litigation. But, the filing of a lawsuit itself does not guarantee that records will be disclosed or that the requester prevails. In other words, NRS 239.011 has no effect on the public's access to records. The Legislature intended that provisions concerning access to records, such as NRS 239.010, be construed liberally and statutes concerning exemptions and exceptions be construed narrowly. *See* NRS 239.001. To be sure, if this Court were to follow CIR's logic of construing provisions of the NPRA liberally, the same construction would necessarily apply to NRS 239.012.

Accordingly, since NRS 239.011(2) concerns the rights of a prevailing party, and not access to records, the Court should construe NRS 239.011(2) and NRS 239.012 together and, to the extent practicable, reconciled and harmonized. *See Leven*, 123 Nev. at 405, 168 P.3d at 716. Hence, the District Court erred when it interpreted NRS 239.011(2), without considering NRS 239.012, and this Court should now reverse.

C. LVMPD IS IMMUNE FROM ATTORNEY FEES AND COSTS BECAUSE IT ACTED IN GOOD FAITH.

1. NRS 239.012 Clearly Extends Immunity to the Government Entity from Attorney Fees and Costs.

a. The applicable provisions of NRS 239.012 extend immunity for refusing to disclose information in good faith.

In its answering brief, CIR focuses on language within NRS 239.012 that is not applicable here. Specifically, CIR claims that NRS 239.012 would not be rendered meaningless because it provides immunity to a public employee in particular scenarios. RAB 32, n.8. For purposes of this appeal, however, that language is irrelevant because NRS 239.012 joins the provision with "or." Instead, this Court must decide whether NRS 239.012 immunizes LVMPD, an employer, from attorney fees and costs because it acted in good faith when the parties entered into an agreement and only disclosed portions of the requested records. CIR further contends that, because of this language, NRS 239.012 is more broad than NRS 239.011(2) and, thus, not applicable. RAB 31. To the contrary, the mere fact that NRS 239.012 is broader than NRS 239.011(2) supports LVMPD's interpretation that NRS 239.012 is meant to encompass the "narrow circumstance" of NRS 239.011. Therefore, whether NRS 239.012 also provides immunity to the public official and the government entity in disclosing records is of no consequence and irrelevant to this Court's determination of whether NRS 239.012

immunizes a government entity from attorney fees and costs when it acts in good faith in refusing to disclose records.

b. NRS 239.012 applies to government entities.

CIR next disregards the plain language of NRS 239.012 and contends that the immunity provision cannot be harmonized with NRS 239.011 because the immunity provision pertains to a "public officer or employer" whereas NRS 239.011 expressly references a "government entity." RAB 29-30. The plain language in this statute "employer of the public officer" demonstrates the Legislature's intent to provide immunity to the government entity. *See Edington v. Edington*, 119 Nev. 577, 582-83, 80 P.3d 1282, 1286 (2003) ("[W]hen a statute's language is clear and unambiguous, the apparent intent must be given effect, as there is no room for construction.").

NRS 239.012 explicitly provides:

> A public officer or employee who acts in good faith in disclosing or ***refusing to disclose information*** and ***the employer*** of the public officer or employee are ***immune from liability for damages***, either ***to the requester*** or to the person whom the information concerns

(emphases added). There is no doubt that the "employer of the public officer" is, in fact, the government entity. The statute provides immunity to the entity from attorney fees and costs if its employee acted in good faith in refusing to disclose records. The language of the statute first addresses the actions of an individual—

refusing to disclose information in good faith. The next portion of the statute identifies the entity that enjoys immunity—the employer of the public officer or employee.

If there is any doubt that the language within NRS 239.012 pertains to a government entity, the legislative history must be consulted to clarify any ambiguity. *See Nuleaf CLV Dispensary, LLC v. State Dep't of Health and Human Servs.*, 134 Nev. Adv. Op. 17, 414 P.3d 305, 309 (2018). As initially drafted, the language of Assembly Bill 365 ("AB 365") (1993) did not include the employer language that is now codified in NRS 239.012. 4 JA 693. During the legislative hearings, testimony was given addressing "agency" language within the statute. 4 JA 730. At the subcommittee hearing, Chairman Rick Bennett ensured that AB 365 was amended to include the "agency" language discussed at the previous hearing. 4 JA 734. This bill was amended and codified to include "and the employer" as reference to the agency. *Id.* Thus, the legislative history further supports LVMPD's position that immunity is extended to the government entity. The District Court's conclusion, and CIR's interpretation, is simply inconsistent with the plain language of the statute and the legislative history and cannot be followed.

c. NRS 239.012 encompasses attorney fees and costs contemplated by NRS 239.011(2).

CIR's final argument that the broad language of "damages" does not encompass "fees" is contrary to the plain language of NRS 239.012. There is but one instance where a requester may seek monetary damages from a government entity related to a public records request—attorney fees and costs. Thus, CIR's logic that a requester's fees and costs in an NPRA action are excluded from NRS 239.012 is flawed.

First, CIR's reliance on *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 957-58, 35 P.3d 964, 970 (2001), *clarified by Horgan v. Felton*, 123 Nev. 577, 584, 170 P.3d 982, 986 (2007) is misplaced. The *Sandy Valley* decision was issued several years prior to the enactment of NRS 239.011 and NRS 239.012. Furthermore, the instances enumerated within *Sandy Valley* concerning attorney fees as damages are not exhaustive. While the NPRA provides a statute that permits a requester to seek attorney fees, the analysis in *Sandy Valley* does not address statutory interpretation of such statutes nor does it address good faith exceptions or immunity to attorney fee statutes. LVMPD's citation to *Sandy Valley* was merely to demonstrate that this Court has previously recognized that damages can encompass attorney fees in certain circumstances and should in this instance as well. *See Liu v. Christopher Homes, LLC*, 321 P.3d 875

(Nev. 2014) (clarifying scope of attorney fees as special damages); *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 427, 132 P.3d 1022, 1034 (2006) (construing NRS 40.655 authorizing attorney fees to be treated as an element of "damages").

Just recently, this Court issued an opinion determining that attorney fees and costs in relation to a breach of contract action were improperly awarded as special damages. *See Pardee Homes of Nev. v. Wolfram*, 135 Nev. Adv. Op. 22, __ P.3d __, (July 3, 2019). The Court identified several instances where attorney fees may be awarded as special damages, including in actions for declaratory, injunctive, and equitable relief where the actions are "compelled by the opposing party's bad faith conduct." *Id.* at n.3 (citing *Sandy Valley Assocs.*, 117 Nev. at 958, 35 P.3d 970.) Another example of this Court construing attorney fees and costs as damages includes the interpretation of NRS 40.655(1). *See Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 427, 132 P.3d 1022, 1034 (2006) (construing NRS 40.655 authorizing attorney fees to be treated as an element of "damages"). Further, NRS 239.012 is similar to NRS 41.032. NRS 41.032 grants immunity to an officer or employee of the State or any of its agencies or political subdivisions in certain circumstances. Notably, NRS 41.032 does not mention attorney fees and costs, however, this Court has determined that the State and its agencies are statutorily immune from all damages, including attorney fees. *See Esmeralda County v. Grogran*, 94 Nev. 723, 725, 587 P.2d 34, 36 (1978). Following this

Court's analysis and interpretation of NRS 41.032, the only logical conclusion that can be reached is that NRS 239.012 also includes immunity from all damages, including attorney fees and costs permitted under NRS 239.011(2).

CIR has failed to explain in what instances a requester may have a state law cause of action against an entity for failing to disclose public records pursuant to the NPRA.[7] That is because the NPRA does not provide a cause of action or claim for relief for which damages may be awarded, resulting in attorney fees and costs being the only damages a requester can seek. NRS 239.011; *Cariega v. City of Reno*, No. 316CV00562MMDWGC, 2017 WL 3299030, at *2 (D. Nev. Aug. 2, 2017) (declining to exercise supplemental jurisdiction over plaintiff's amended claims because the NPRA does not provide a "claim for relief"). This holding is further supported by this Court's ruling in *Von Ehrensmann v. Lee*, 98 Nev. 335, 647 P.2d 377 (1982), which concluded that in equitable actions, attorney fees are damages.

To further support its untenable position, CIR relies on Hawaii's irrelevant authority concerning public records and immunity. RAB 32, n.8. Contrary to

[7] CIR asserts that NRS 239.012 would only come into play when a party could conceivably sue a public employee for defamation or a privacy tort if the employee disclosed public records there were alleged to contain false or private information. RAB 32, n.8. Of course, this example fails to address instances where a requester can obtain damages against a governmental entity for refusing to disclose records.

CIR's portrayal, the issue presented before the *Molfino* court concerned a negligence claim against the county for breach of a legal duty to use reasonable care in maintaining a file. *See Molfino v. Yuen*, 339 P.3d 679, 681 (Haw. 2014). Thus, the *Molfino* case is not applicable because it did not arise out of a request for public records. More importantly, the *Molfino* court did not make any determination as to the application of Hawaii's immunity provision. *Id.* at 685. Rather, the court ruled that Hawaii "does not create a statutory legal duty, flowing from the Planning Department to Molfino, to maintain a property's TMK file in accurate, relevant, timely, and complete condition at all times." *Id.* Indeed, the court acknowledged that it did not "express [an] opinion as to whether HRS Chapter 92F imposes tort liability for bad faith disclosures or nondisclosures of government records, as bad faith nondisclosure was not alleged in this case, nor does the record show that the absence of the May 2000 letter from the Planning Department's TMK files was in bad faith." *Id.* at 685 n.3. Furthermore, the liability statute in Hawaii is significantly different than NRS 239.012 because it provides immunity from "any liability, criminal or civil." HRS § 92F-16. Accordingly, the *Molfino* court would never get to the issue of damages because the statute precludes liability generally.

Therefore, this Court should reach the conclusion that "damages" within NRS 239.012 encompasses attorney fees and costs provided in NRS 239.011(2).[8] *See Glosen v. Barnes*, 724 F.2d 1418, 1421 (9th Cir. 1984) ("It would be anomalous to require the state to pay attorney's fees when the Eleventh Amendment and [case law] bar recovery of damages from the state.").[9] Thus, the District Court erroneously concluded that "damages" within NRS 239.012 does not include fees and costs, and this Court should reverse.

2. The Legislative History and Nevada's Public Policy Support LVMPD's Interpretation of NRS 239.011 and NRS 239.012.

CIR asserts that LVMPD's reliance on legislative history is improper because this Court is limited to construing the plain language of NRS 239.011. RAB 32. Generally, when examining a statute, this Court should ascribe the plain

[8] Indeed, if this Court were to follow CIR's reasoning in applying the catalyst theory, it would necessarily follow that attorney fees and costs includes damages. In support of its position that the catalyst theory applies, CIR argues that "unlike other fee-shifting statutes, the [NPRA} does not provide for damage's." RAB 22, n.5. Because a requester cannot recover damages, NRS 239.012 must be interpreted to include attorney fees and costs or the language "immune from liability for damages . . . to the requester" would be rendered meaningless.

[9] This past legislative session, the Legislature was initially faced with a proposal to clarify NRS 239.012 to not apply to attorney fees and costs. However, the Legislature expressly rejected that amendment. *See* SB 287, 80th Leg. (2019); This demonstrates the Legislature's intent to immunize government entities from attorney fees and costs when acting in good faith. *See McKay v. Bd. of Sup'rs of Carson City*, 102 Nev. 644, 650, 730 P.2d 438, 442 (1986) (an express rejection or deletion by the Legislature expresses legislative intent).

meaning to its words, unless the plain meaning was not clearly intended. *See A.J. v. Dist. Ct.*, 133 Nev. Adv. Op. 28, 394 P.3d 1209, 1213 (2017). "The plain meaning rule is not to be used to thwart or distort the intent of the Legislature by excluding from consideration enlightening material from the legislative history." *Id.* (quoting 2A Norman J. Singer & Shambie Singer, STATUTES AND STATUTORY CONSTRUCTION, § 48:1, at 555-56 (7th ed. 2014). Relying on the United States Supreme Court, this Court has recognized that "even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." *Id.* (citing *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690 (1974)). Thus, this Court should look to the legislative history of NRS 239.012 in determining that "damages" encompasses attorney fees and costs.

"Damages" within NRS 239.012 encompasses attorney fees and costs and is not limited to damages arising out of separate claims for relief. As noted by CIR, the term "damages" is broader than attorney fees. Had the Legislature substituted the language "attorney fees and costs" for damages, a third party would be able to seek damages against a government entity for disclosing information. On the other hand, by utilizing the term "damages," the Legislature intended to immunize a government entity from all monetary damages, including attorney fees and costs, where a public official or employee acted in good faith. Limiting liability from

damages, rather than from civil liability generally, is consistent with the NPRA because it allows a requester, or a third party, to seek equitable relief.

It is interesting that CIR maintains that the Legislature expressly utilized the term "prevails" rather than "prevailing party" without a single citation to the legislative history. RAB 24-26. Had CIR actually reviewed the legislative history, it would have learned the intent behind the statute. First, legislative history enlightens this Court as to why the term "prevails" rather than "prevailing party" was used. To that end, the Legislature wanted to ensure that a requester would not be forced to pay the government entity's attorney fees and costs if the requester was not successful in court. 4 JA 733-34. The Legislature was concerned that such a provision would dissuade the average requester from seeking court access. *Id.* Accordingly, NRS 239.011 limited the recovery of attorney fees and costs to the requester. It is clear that there was no intent by the Legislature to permit a requester to recover attorney fees and costs simply because it filed a lawsuit.

Second, the Legislators raised concerns that taxpayers would essentially be responsible for paying both attorney fees of the agency and the requester through tax dollars. 4 JA 730-31. Engleman explained that the requesters would not be able to recover attorney fees and costs "if it concerned a record everyone had thought to be confidential." *Id.* Rather, the recovery of attorney fees and costs is contingent upon a "denial of what was clearly a public record." *Id.* The legislative

history's reasoning supports the language within NRS 239.012 that immunizes a government entity for damages (i.e., attorney fees and costs) if it refuses to disclose information in good faith. In other words, if the public official or employee does not disclose information because he or she believes, in good faith, that the information is confidential, the government entity is immune from attorney fees and costs if a requester prevails.

CIR also asks this Court to set aside Nevada's well-settled law and public policy concerning awards of attorney fees and costs. Nevada's statutes on attorney fees, as well as public policy, may be used to determine the legislative intent. *See Nuleaf CLV Dispensary, LLC*, 414 P.3d at 309 (explaining that this Court "will evaluate legislative intent and similar statutory provisions" and "construe the statute in a manner that conforms to reason and public policy"); *City of Sparks v. Reno Newspapers, Inc.*, 399 P.3d 352, 356 (Nev. 2017) (a court will consider reason and public policy to determine legislative intent). Here, the Court should follow Nevada law and related precedent that has established that statutes concerning an award of fees and costs must be narrowly construed. *See Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998) (strictly construing statutes permitting recovery of costs because they are in derogation of the common law); *Hardisty v. Astrue*, 592 F.3d 1072, 1077 (9th Cir. 2010) (recognizing that the Supreme Court has

repeatedly interpreted attorney fees statutes narrowly and waivers of immunity must be constructed strictly in favor of the sovereign).

As LVMPD pointed out in its opening brief, the good faith exception to damages codified within NRS 239.012 is similar to several Nevada statutes concerning attorney fees and bad faith conduct. *See, e.g.*, NRS 7.085 (permitting award of fees when an attorney acts in bad faith); NRS 18.010(2)(b) (permitting award of fees when a litigant acts in bad faith); *see also* NRCP 68 and *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983) (granting courts the discretion to award fees when a party rejects an offer of judgment, but only after balancing the relative good faith of the parties). Thus, CIR's attempt to interpret NRS 239.011 in isolation is inconsistent with this Court's precedent on statutory construction.

NRS 239.012 further comports with other statutes granting immunity to government actors when acting in good faith. *Cf.* NRS 41.032 (providing immunity to State officials and its political functions for discretionary functions); *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009, 823 P.2d 888, 891 (1991) (determining that immunity does not attach for actions taken in bad faith). Given the Legislature's inclusion of NRS 239.012 within the NPRA demonstrates the Legislature's intent to follow Nevada's overwhelming authority for awarding attorney fees in instances where a party acts in bad faith, as well as providing immunity from damages to government actors.

3. LVMPD Acted in Good Faith and is Immune from CIR's Attorney Fees and Costs.

Should this Court conclude that NRS 239.012 immunizes a government entity from fees and costs, CIR argues that LVMPD is not entitled to immunity because it did not act in good faith. RAB 33-34. CIR bases its position on the District Court's alleged finding that LVMPD failed to meet its burden of proving confidentiality. CIR ignores the fact that the Court did not enter a written order to that effect, nor did it require LVMPD to produce all responsive records. That is because the District Court recognized that the confidential claims and privileges asserted by LVMPD were warranted and an *in camera* evidentiary hearing was necessary to determine the extent of the ongoing investigation and LVMPD's claims of confidentiality and privileges. The lack of an order from the District Court requiring LVMPD to produce confidential records precludes any finding of bad faith. Indeed, given the amount of records entirely withheld and records that were substantially redacted, it is likely that, had the District Court actually reached the merits of CIR's Petition, LVMPD's claims of privileges and confidential statutes would have been justified.

CIR also alleges that LVMPD's initial withholding of records was in bad faith. There is no evidence to support CIR's assertion. It is undisputed that the Tupac investigation is an unsolved, open and active criminal investigation. The

record demonstrates that LVMPD is still conducting interviews in relation to the investigation. CIR's flawed argument is simply based on the fact that LVMPD produced limited records. However, this contention ignores the fact that LVMPD and CIR entered into an agreement to resolve the litigation. LVMPD's agreement does not amount to a concession and was done to avoid the very issue this Court is now faced with—attorney fees and costs. Likewise, the fact that the parties entered into a private agreement could not be considered by the lower court. *See Northern Nev. Homes, Inc. v. GL Construction*, 134 Nev. Adv. Op. 60, 422 P.3d 1234, 1237-38 (2018). LVMPD maintains the position, which is supported by the Court of Appeals recent decision relied on in the Opening Brief and this Court's decision in *Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990), that records related to open, active criminal investigations are confidential. Thus, LVMPD acted in good faith, entitling it to immunity from CIR's attorney fees and costs.

D. CIR CANNOT RECOVER PRE-LITIGATION ATTORNEY FEES.

LVMPD previously argued that CIR's attorney fees, if awarded, must be reduced and apportioned. 2 JA 381-96. The record demonstrates that the Court awarded CIR attorney fees for services provided by CIR's counsel prior to litigation. 4 JA 373-74. CIR cannot recover attorney fees for services conducted

prior to litigation under the NPRA. NRS 239.011 unequivocally limits the recovery of attorney fees and costs to those incurred "in the proceeding" and not related to the proceeding. *See I. Cox Constr, Co., LLC v. CH2 Invs., LLC*, 129 Nev. 139, 142, 296 P.3d 1202, 1203 (2013) (this Court applies a statute's plain language); *Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009) (this Court may only look beyond the plain meaning if it is ambiguous). Here, CIR recovered attorney fees for services incurred prior to the instant litigation, including drafting the initial request and responding to LVMPD letters. While these services are *related to* the NPRA proceeding, they were not incurred "in the proceeding" or even as a result of the proceeding. As such, CIR is precluded from recovering the same. Thus, the District Court abused its discretion in awarding $5,310.00 to CIR for attorney fees that were incurred pre-litigation.

III. CONCLUSION

In summary, this Court should vacate the District Court's order awarding attorney fees and costs to CIR because the District Court neglected to apply the applicable prevailing party standard as announced in *Blackjack Bonding*. If the Court reaches the merits of this appeal, it should construe NRS 239.011(2) and NRS 239.012 together, along with the legislative history, and determine that LVMPD is immune from CIR's award of attorney fees and costs because it acted in good faith. Alternatively, this Court should eliminate the District Court's award

of $5,310.00 in attorney fees because the record demonstrates these fees occurred prior to litigation.

Dated this 29th day of July, 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman 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 either:

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3. Finally, I hereby certify that I have read this 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 29th day of July, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT LVMPD'S REPLY BRIEF** was filed electronically with the Nevada Supreme Court on the 29th day of July, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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