IN THE SUPREME COURT OF THE STATE OF NEVADA

TIM WILSON, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Appellant,

vs.

RODNEY ST. CLAIR,

Respondent.

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Case No. 77651

APPELLANT'S OPENING BRIEF

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I. JURISDICTIONAL STATEMENT

This is an appeal from the final order of the Sixth Judicial District Court granting Respondent Rodney St. Clair's (hereafter "St. Clair") Motion for Attorneys' Fees in the amount of $50,025. The final order was filed on November 26, 2018, with St. Clair serving the Notice of Entry of Order on November 29, 2018. Joint Appendix ("JA") Vol. V at 1094–1109. Jurisdiction is proper pursuant to Nevada Rule of Appellate Procedure ("NRAP") 3A(a), NRAP 3A(b)(1), NRAP 3A(b)(8) and NRS 533.450(9). Appellant, Tim Wilson, P.E., the Acting State Engineer, in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (hereafter "State Engineer") timely filed his Notice of Appeal with the district court on December 6, 2018. JA Vol. V at 1110–1111. Accordingly, the State Engineer's appeal is timely pursuant to NRAP 4(a)(1).

II. ROUTING STATEMENT

This case is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(8) as this is an administrative agency case involving water and an order of the State Engineer.

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III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether the district court erred in granting St. Clair's Motion for Attorneys' Fees, where the underlying action was a petition for judicial review of a decision of the State Engineer pursuant to NRS 533.450 and NRS 533.450 does not contain any specific language authorizing the award of attorney fees?

B. If attorney fees are permitted in actions under NRS 533.450, whether the district court nonetheless erred in granting St. Clair's Motion for Attorneys' Fees where:

1. The State Engineer maintained his defense of Ruling No. 6287 in good faith and based on his reasonable interpretation of the law and facts;

2. St. Clair filed his Motion for Attorneys' Fees more than two (2) years after serving the notice of entry of judgment on the underlying action; and

3. The district court's award of attorneys' fees included fees incurred on appeal at the Nevada Supreme Court?

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IV. STATEMENT OF THE CASE

This appeal arises from the district court's November 26, 2018, Order granting St. Clair's Motion for Attorneys' Fees. Therein, the district court found that the State Engineer, in an action pursued pursuant to NRS 533.450, maintained claims against St. Clair, both at the district court and the Supreme Court, without reasonable grounds such that attorneys' fees were proper pursuant to NRS 18.010(2)(b) and that St. Clair's Motion for Attorneys' Fees was timely notwithstanding Nevada Rule of Civil Procedure ("NRCP") 54(d)(2).

V. STATEMENT OF FACTS

On July 25, 2014, the State Engineer issued Ruling No. 6287, declaring Proof of Appropriation V-010493 abandoned, and therefore denying Application No. 83246T as there was no unappropriated water available under the water right associated with Application No. 83246T and that granting a change application based on an abandoned water right would threaten to prove detrimental to the public interest. JA Vol. I at 19–25. On August 21, 2014, St. Clair filed and served his Petition for Judicial Review (hereafter "Petition") and Notice of Appeal, seeking judicial review and ultimately remand of the State Engineer's Ruling

No. 6287 to reverse the finding of abandonment and grant Application No. 83246T. JA Vol. I at 5–10.

After full briefing, the Court held oral arguments on the underlying matter on January 5, 2016. *See* JA Vol. III at 595. Following arguments from both parties, the Court affirmed the State Engineer's Ruling No. 6287 to the extent he determined that St. Clair had a vested water right under V-010493, but overruled Ruling No. 6287 to the extent he declared V-010493 abandoned and ordered the State Engineer to grant Application No. 83246T. *See* JA Vol. IV at 800–811. The Court signed the Order on April 22, 2016, and St. Clair filed the Notice of Entry of Order on April 29, 2016. *See id.*; *see also* JA Vol. IV at 813–829. The State Engineer appealed this Order on May 23, 2016. JA Vol. IV at 831–832.

On appeal, following a full briefing and oral argument, this Court, in Case No. 70458, issued its Opinion affirming the District Court's Order Overruling State Engineer's Ruling No. 6287 on March 29, 2018. *King v. St. Clair*, 134 Nev. Adv. Op. 18, 414 P.3d 314 (2018). The Court issued its Remittitur affirming the District Court's Order on April 24, 2018,

which was returned by the District Court clerk and filed with the Nevada Supreme Court on May 4, 2018. JA Vol. IV at 853–854.

On July 2, 2018, St. Clair filed his Notice of Motion and Motion for Attorneys' Fees pursuant NRS 18.010(2)(b), arguing that the State Engineer maintained claims at the district court and the Supreme Court without reasonable ground. *See* JA Vol. IV at 855–870. On July 16, 2018, the State Engineer filed his Opposition to St. Clair's Motion for Attorneys' Fees, arguing that St. Clair's Motion was untimely pursuant to NRCP 54(d)(2)(B), that attorneys' fees are not permitted in actions against the State Engineer brought pursuant to NRS 533.450, and that the State Engineer maintained his defense of Ruling No. 6287 and his appeal of the district court's Order in good faith and based on his reasonable interpretation of the law and facts. *See* JA Vol. IV at 871–884. St. Clair caused to be served his Reply in Support of Motion for Attorneys' Fees on July 20, 2018, along with his Request for Submission. *See* JA Vol. IV at 885–901.

On October 19, 2018, the district court held oral arguments in Carson City on St. Clair's Motion for Attorneys' Fees. JA Vol. IV at 907–908. After hearing arguments, and receiving PowerPoint

presentations from both St. Clair and the State Engineer, the sitting Senior District Court Judge ruled from the bench, granting St. Clair's Motion for Attorneys' Fees, finding that the State Engineer is subject to attorneys' fees motions, that the State Engineer maintained his defense without reasonable ground at the district court and the Nevada Supreme Court, and that there is no time limit to file an attorneys' fees motion under NRS 18.010(2)(b), and requested a proposed order. JA Vol. IV–V at 909–1076. After conferring with the State Engineer, St. Clair submitted a proposed order on or about November 16, 2018. JA Vol. V at 1080–1095. The district court signed the order, filing it on November 26, 2018, and St. Clair filed its Notice of Entry of Order on December 3, 2018. JA Vol. V at 1096–1111. The State Engineer timely filed his Notice of Appeal with the district court on December 6, 2018, along with his Case Appeal Statement. JA Vol. V at 1112–1136.

Simultaneously with his Notice of Appeal, the State Engineer filed a Motion for Stay of Attorneys' Fees Judgment Pending Appeal, along with an Ex Parte Motion for Order Shortening Time on the Motion for Stay. JA Vol. V at 1137–1143. On December 7, 2018, St. Clair filed his Notice of Non-Opposition to Motion for Stay of Attorneys' Fees Judgment

Pending Appeal. JA Vol. V at 1144–1146. Based on St. Clair's non-opposition, the district court granted the State Engineer's Motion for Stay of Attorneys' Fees Judgment Pending Appeal, filing its Order on December 18, 2018. JA Vol. V at 1147–1150. On December 26, 2018, the State Engineer filed the Notice of Entry of Order Granting Motion for Stay of Attorneys' Fees Judgment Pending Appeal. JA Vol. V at 1151–1158. Therefore, the district court's order at issue in this appeal is stayed during the pendency of this appeal.

VI. SUMMARY OF THE ARGUMENT

The underlying proceedings in this case were brought pursuant to NRS 533.450 as a petition for judicial review of the State Engineer's Ruling No. 6287. Nevada adheres to the American rule regarding attorney fees, meaning that "attorney fees may not be awarded absent a statute, rule, or contract authorizing such award." *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 91, 127 P.3d 1057, 1063 (2006). There is no statute authorizing attorney fees in these types of petition for judicial review proceedings under NRS 533.450, and therefore the district court exceeded its authority and erred by awarding attorneys' fees in this matter.

Additionally, even if attorney fees could be awarded in these types of proceedings, the State Engineer at all times maintained a reasonable basis for the defense of Ruling No. 6287, both before the district court and this Court, such that attorney fees were not warranted pursuant to NRS 18.010(2)(b). Furthermore, St. Clair's Motion for Attorneys' Fees was untimely by more than two (2) full years, pursuant to the version of NRCP 54(d)(2)(B) in effect at the time, and the district court was not permitted to extend that deadline after the fact. Lastly, the district court lacked authority to award attorneys' fees incurred at the Supreme Court under NRS 18.010(2)(b); therefore, while the State Engineer argues that the entire order should be reversed, the portion attributable to litigation at the Nevada Supreme Court should certainly be overturned.

VII. ARGUMENT

A. Standard of Review

Ordinarily, Nevada's appellate courts review an award or denial of attorney fees under NRS 18.010(2)(b) for an abuse of discretion. *Mack-Manley v. Manley*, 122 Nev. 849, 860, 138 P.3d 525, 533 (2006). However, a district court may not award attorney fees unless authorized by statute, rule or contract. *State, Dep't of Human Res., Welfare Div. v.*

Fowler, 109 Nev. 782, 784, 858 P.2d 375, 376 (1993) (*citing Nev. Bd. of Osteopathic Med. v. Graham*, 98 Nev. 174, 175, 643 P.2d 1222, 1223 (1982)). This case requires the interpretation of NRS 533.450, and issues of statutory interpretation are questions of law reviewed *de novo*. *Zenor v. State, Dep't of Transp.*, 134 Nev. Adv. Op. 14, 412 P.3d 28, 30 (2018) (*citing Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1028 (2006)).

B. Parties Challenging Decisions or Orders of the State Engineer Pursuant to NRS 533.450 Cannot Be Awarded Attorneys' Fees

The water law and all proceedings thereunder are special in character, and the provisions of such law not only lay down the method of procedure but strictly limits it to that provided. *Application of Filippini*, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949). Accordingly, NRS 533.450 provides the exclusive means for challenging an order or decision of the State Engineer, and nowhere in NRS 533.450 is there any provision providing for an award of attorney fees. *See* NRS 533.450. Therefore, parties challenging decisions or orders of the State Engineer, even if successful, are not entitled to an award of attorney fees.

To the best of the State Engineer's knowledge, this Court has never addressed whether attorney fees are permitted in actions brought pursuant to NRS 533.450. However, this Court has addressed attorney fees awards under other portions of NRS Chapter 533 as well as the Nevada Administrative Procedure Act, NRS Chapter 233B.[1] *See Rand Props., LLC v. Filippini*, 2016 WL 1619306, Docket No. 66933, filed April 21, 2016 (unpublished disposition) (hereafter "*Rand*"); *see also Zenor*, 134 Nev. Adv. Op. 14, 412 P.3d 28; *see also Fowler*, 109 Nev. 782, 858 P.2d 375. The analysis performed by this Court in *Rand*, *Zenor* and *Fowler* applies directly to the case, and implores the same result regarding NRS 533.450: attorney fees awards are not authorized.

In reviewing the statutory provision providing for judicial review of decisions of state agencies subject to NRS Chapter 233B, this Court noted that "NRS 233B.130 does not contain any specific language authorizing the award of attorney's fees in actions involving petitions for judicial

[1] While pursuant to NRS 233B.039(j), the State Engineer is expressly excluded from the Nevada Administrative Procedure Act, the Nevada Supreme Court's legal analysis of NRS 233B.130 governing judicial review of an agency decision is applicable to the analysis demonstrating that an award of attorney fees in a petition brought pursuant to NRS 533.450 is not authorized.

review of agency action." *Fowler*, 109 Nev. at 785, 858 P.2d at 377. The action in *Fowler* was brought pursuant to NRS Chapters 284 and 233B, and "[b]ecause neither of these chapters authorized an award of attorney's fees" and because NRS 18.010(2)(a) was inapplicable, this Court held that the district court erred in awarding attorney's fees. *Id.*, 109 Nev. at 788, 858 P.2d at 379.

This holding was taken even further in *Zenor*, where this Court held specifically that NRS 233B.130 prohibited attorney fees in petitions for judicial review of agency determinations, including those attorney fees requested pursuant to NRS 18.010(2)(b). 134 Nev. Adv. Op. 14, 412 P.3d at 30. This Court based its holding on the fact that the Legislature expressly stated that NRS Chapter 233B is "the exclusive means of judicial review of" an agency determination. *Id.* (*citing* NRS 233B.130(6)). The Court found that it was not the business of the courts "to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done." *Id.* (*citing McKay v. Bd. of Cty. Comm'rs of Douglas Cty.*, 103 Nev. 490, 492, 746 P.2d 124, 125 (1987)).

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This Court has "repeatedly refused to imply provisions not expressly included in the legislative scheme." *State Indus. Ins. Sys. v. Wrenn*, 104 Nev. 536, 539, 762 P.2d 884, 886 (1988). In *Wrenn*, the Court declined to award attorney fees because "the legislature has not expressly authorized an award of attorney's fees in worker's compensation cases. . . . [and] we decline to allow a claimant recovery of attorney's fees in a worker's compensation case absent express statutory authorization." *Id.*

Furthermore, and importantly, in *Rand*, a case dealing with water law, albeit a different statute, this Court declined to award attorney fees under NRS 533.190(1) and NRS 533.240(3). 2016 WL 1619306, Docket No. 66933, filed April 21, 2016, *6 (unpublished disposition). In doing so, this Court reasoned that "[t]hese statutes specifically provide for an award of costs, but under Nevada law, attorney fees are not considered costs." *Id.* (*citing Smith v. Crown Fin. Serv. of Am.*, 111 Nev. 277, 287, 890 P.2d 769, 776 (1995)). Additionally, the Court found that attorney fees were not mentioned anywhere in the statute, and therefore attorney fees could not be sustained under NRS 533.190(1) or NRS 533.240(3). *Id.*

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NRS 533.450(1) provides that "any person feeling aggrieved by any order or decision of the State Engineer . . . may have the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an appeal . . . ." Further, NRS 533.450(7) provides for the payment of costs, but does not provide for the payment of fees, and even the payment of costs only applies to parties *other than* the State Engineer. NRS 533.450(7) ("Costs must be paid as in civil cases brought in the district court, *except by the State Engineer or the State*." (Emphasis added)).

It is significant that NRS 533.450 does not include a provision for awarding attorney fees, but does include a provision regarding the recovery of costs. Even more significant is that this costs provision specifically exempts the State Engineer and the State. Nowhere in NRS 533.450, let alone elsewhere in Nevada's water law (NRS Chapters 532, 533, 534 and 540), is there any provision authorizing the award of attorney fees against the State Engineer. Where Nevada water law mentions attorney's fees, it either authorizes only the State Engineer to collect attorney's fees or expressly prohibits the use of certain State General Fund accounts for the payment of attorney's fees. For example,

NRS 533.481(2) and NRS 534.193(3) allow the State Engineer to require the payment of attorney's fees where an administrative fine is imposed against a person or the person is ordered to replace any water. On the other hand, NRS 532.200(2) expressly prohibits the use of the Adjudication Emergency Account for the payment of attorney's fees, while NRS 534.360(5) explicitly prohibits the use of funds from the Water Rights Technical Support Account for attorney's fees.

As stated previously, water law and all proceedings thereunder are special in character, and the provisions of such law not only lay down the method of procedure but strictly limits it to that provided. *Application of Filippini*, 66 Nev. at 27, 202 P.2d at 540. Thus, while NRS 533.450 does not include the same specific limiting language of NRS 233B.130(6), NRS 533.450 is in fact the exclusive means of judicial review of orders or decisions of the State Engineer. Therefore, this Court's finding in *Zenor* is directly applicable to the instant case.

In *Zenor*, the Court found that because NRS Chapter 233B is "the exclusive means of judicial review of" an agency determination, and because it did not provide for attorney fees, attorney fees under NRS 18.010(2)(b) were prohibited. 134 Nev. Adv. Op. 14, 412 P.3d at 30.

Here, attorney's fees under NRS 18.010(2)(b) are similarly barred under NRS 533.450 as the statute does not contain language authorizing attorney's fees and is the exclusive means of judicial review of the State Engineer's decisions.

Likewise, this Court previously reversed an award of attorney fees in *Rand*, a water law case, because "attorney fees are not mentioned anywhere in the statute." 2016 WL 1619306, Docket No. 66933, filed April 21, 2016, *6 (unpublished disposition). This same reasoning supports the reversal of the district court's attorneys' fee award in this case.

Similarly, there is support for the proposition that the Legislature intended to omit attorney fees awards from actions brought under NRS 533.450. This Court "repeatedly refuse[s] to imply provisions not expressly included in the legislative scheme" and "it is not the business of this court to fill in alleged legislative omissions based on the conjecture as to what the legislature would or should have done." *Zenor*, 134 Nev. Adv. Op. 14, 412 P.3d at 30 (internal citations omitted). The Legislature has enacted statutes authorizing the payment of attorney fees in other certain, and limited, circumstances involving state agencies. For

example, the Legislature authorized the district court to order costs *and* fees for filing a frivolous petition of hearing officer decisions involving industrial injuries. *See* NRS 616C.385.

NRS 533.450 specifically provides for an award of costs, but omits any mention of fees. NRS 533.450(7). As stated previously, under Nevada law, attorney fees are not considered costs. *See Smith*, 111 Nev. at 287, 890 P.2d at 776. Furthermore, even the statute providing for costs, NRS 533.450(7), exempts the State Engineer and the State of Nevada from its provisions. Where the Legislature intended for the State Engineer to be exempt from paying costs, it follows rationally that the Legislature also intended to exempt the State Engineer (or anyone else for that matter) from paying attorney fees by omitting any mention of attorney fees from NRS 533.450. This rationale is strengthened by the fact that the Legislature explicitly authorized and prohibited attorney fees in specific circumstances elsewhere in Nevada's water law. *See* NRS 532.200(2); NRS 533.481(2); NRS 534.193(3); NRS 534.360(5).

Based on the foregoing, the Legislature has not authorized attorney fees in challenges to decisions of the State Engineer brought pursuant to NRS 533.450. Absent any express statutory authorization, attorney fees

in NRS 533.450 actions are prohibited. Therefore, the district court erred in awarding attorneys' fees, and the State Engineer respectfully requests reversal of the district court's order.

C. The State Engineer Reasonably Maintained His Defense of Ruling No. 6287 at Both the District Court and the Nevada Supreme Court

Notwithstanding that litigants cannot be awarded attorney fees in an action under NRS 533.450, as discussed above, even if *arguendo* NRS 18.010(2)(b) applied to NRS 533.450, St. Clair is still not entitled to attorneys' fees. Under NRS 18.010(2)(b), the ultimate inquiry is "whether a claim or defense was brought or maintained 'without reasonable ground or to harass the prevailing party,' with the stated goal of 'deter[ring] frivolous or vexatious claims and defenses.'" *In re 12067 Oakland Hills, Las Vegas, Nev.*, 134 Nev. Adv. Op. 97, *4, ___ P.3d ___ (Nev. App. 2018). "What matters is whether the proceedings were initiated or defended 'with improper motives or without reasonable grounds.'" *Id.* (*citing Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998)).

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Simply because a defense is unsuccessful does not mean it is automatically "unreasonable," "frivolous," or "vexatious." *In re 12067 Oakland Hills, Las Vegas, Nev.*, 134 Nev. Adv. Op. 97, at *6. Losing on the merits "does not mean that the losing defense was utterly 'without reasonable ground' for purposes of awarding attorney fees" and NRS 18.010(2)(b) "does not create an automatic 'loser pays' system, of the kind found in England, in which the unsuccessful party always pays fees to the winning party." *Id.* (*citing Hensley v. Eckerhart*, 461 U.S. 424, 443 n.2, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)). Rather, the district court must make a decision of "whether the losing party's defense went beyond merely unsuccessful into becoming 'vexatious' *and* 'without reasonable ground.'" *Id.* (emphasis added).

NRS 18.010(2)(b) requires "evidence in the record supporting the proposition that the complaint was brought without reasonable grounds or to harass the other party." *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 486, 851 P.2d 459, 464 (1993). A claim is groundless if allegations in the complaint are not supported by any credible evidence at trial, it is brought in bad faith, or it is fraudulent. *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1095, 901 P.2d 687, 688 (1995). Such an analysis

depends upon the actual circumstances of the case rather than a hypothetical set of facts favoring plaintiff's averments. *Id*.

Here, while the State Engineer was ultimately not the prevailing party in either his defense of Ruling No. 6287 or his appeal to the Supreme Court, the State Engineer at all times maintained his defense of Ruling No. 6287 in good faith, based on a reasonable, albeit ultimately incorrect, interpretation of law and fact. There is no evidence in the record indicating otherwise. Prior to St. Clair's Motion for Attorneys' Fees, neither the district court nor this Court found that the State Engineer maintained his defense of Ruling No. 6287 frivolously, vexatiously, or otherwise to harass St. Clair.

Rather, the State Engineer's decision in Ruling No. 6287 had multiple elements, all of which were based on a reasonable view of the evidence in front of him, though some conclusions were deemed arbitrary and capricious by both the district court and this Court, and ultimately reversed. Notably, a finding that the State Engineer acted arbitrarily and capriciously, and/or that one of his decisions is unsupported by substantial evidence, is not the standard for attorney's fees under NRS 18.010(2)(b); rather, this is the standard required to overturn a

decision of the State Engineer. *King v. St. Clair*, 134 Nev. Adv. Op. 18, 414 P.3d 314, 316–18 (2018) (*citing Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 751, 918 P.2d 697, 702 (1996)).

As described by this Court, the State Engineer correctly found that Crossley (St. Clair's predecessor in interest) "had appropriated water and put it to beneficial use prior to March 25, 1939, thus vesting a pre-statutory right to appropriate underground water pursuant to NRS 534.100." *King*, 134 Nev. Adv. Op. 18, 414 P.3d at 315–16. The State Engineer also found that the prior owner abandoned the water right, based upon "the decayed state of the casing, [St. Clair's] admission the water has not been used continuously coupled with the admission [St. Clair is] without knowledge of when it was, or was not used, in addition to the failure of evidence of continuous beneficial use of the water." JA Vol. I at 23.

Specifically, and as noted by this Court, the State Engineer found that "the water was not used continuously from 1924 to the present and that there was 'no evidence pointing to a *lack* of prior owners' intent to abandon the water right.'" *King*, 134 Nev. Adv. Op. 18, 414 P.3d at 316. It was this finding of abandonment that was ultimately deemed incorrect,

as "[a]n extended period of nonuse of water does not in itself establish clear and convincing evidence that a property owner intended to abandon a water right connected to the property" and here "there was no evidence indicating an intent to abandon, so the State Engineer's finding of abandonment was unsupported by substantial evidence." *King*, 134 Nev. Adv. Op. 18, 414 P.3d at 318. The Court also found that the State Engineer made three other claims that it ultimately did not address, as they lacked merit for varying reasons. *Id*.

However, noticeably absent from this Court's decision was any finding that the State Engineer's defense of Ruling No. 6287, at either the district court or the Supreme Court, was frivolous, vexatious, without reasonable ground, or meant to harass St. Clair, as required for attorney's fees under NRS 18.010(2)(b). In fact, despite the State Engineer ultimately being unsuccessful on appeal, this Court did create new precedent in Nevada water law based on one of the State Engineer's arguments.

Specifically, the Court found that the State Engineer was correct, in contravention of the district court, that "assuming a prior owner has taken actions consistent with abandonment, it is that owner's intent that

controls." *King*, 134 Nev. Adv. Op. 18, 414 P.3d at 316–17. The Court noted that "[o]therwise, water rights could be abandoned by one property owner and then revived 50 years later by a subsequent owner, potentially resulting in over-appropriation of water." *Id.*, 134 Nev. Adv. Op. 18, 414 P.3d at 317 (*citing Haystack Ranch, LLC v. Fazzio*, 997 P.2d 548, 554 (Colo. 2000)). However, the Court ultimately upheld the district court's reversal of the State Engineer's finding of abandonment, holding that the State Engineer acted arbitrarily and capriciously "by presuming abandonment based on nonuse evidence alone," despite a lengthy period of nonuse "evidenced by the property's inoperable well and unirrigated land." *Id.*

Thus, in this case, there was extensive evidence of nonuse dating back to St. Clair's predecessor in interest, and the State Engineer concluded that this nonuse was so severe that it constituted an intent to abandon. This resulted in precedent from this Court to instruct further decisions of the State Engineer, including that a prior owner's intent controls in abandonment proceedings but that nonuse alone, regardless of its egregiousness, is insufficient to make out a claim of abandonment. The State Engineer's defense of Ruling No. 6287, at both the district court

and the Supreme Court, was reasonable and was not vexatious, frivolous, or meant to harass St. Clair. While the State Engineer was ultimately reversed by the district court, a finding that was upheld by this Court, the litigation resulted in new precedent that clarifies important aspects of Nevada water law.

Therefore, while attorney fees are not available in actions under NRS 533.450, even if they were, *arguendo*, the district court erred in finding that the State Engineer maintained his defense of Ruling No. 6287 without reasonable ground for purposes of NRS 18.010(2)(b).

D. St. Clair's Motion for Attorneys' Fees Was Untimely, and the District Court was Prohibited from Extending the Deadline After it Had Expired

NRCP 54(d) governs claims for attorney fees. Per this rule, as in effect at the time of the district court's ruling,[2] a claim for attorney fees must be made by motion and the "district court may decide the motion despite the existence of a pending appeal from the underlying final

[2] As of March 1, 2019, the Nevada Rules of Civil Procedure underwent an exhaustive amendment. *See* Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, ADKT 0522 (Nev. Dec. 31, 2018).

judgment." NRCP 54(d)(2)(A), Nev. Rev. Stat. Court Rules Vol. I (2017) (amended 2019). Unless provided otherwise by statute, such a motion "must be filed no later than 20 days after notice of entry of judgment is served; specify the judgment and the statute, rule, or other grounds entitling the movant to the award; state the amount sought or provide a fair estimate of it; and be supported by counsel's affidavit." NRCP 54(d)(2)(B), Nev. Rev. Stat. Court Rules Vol. I (2017) (amended 2019). Importantly, a district court is prohibited from extending the time for filing a motion for attorney fees after the 20 days has expired. *See id*.

On December 31, 2018, this Court entered an Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules. ADKT 0522 (Nev. Dec. 31, 2018). These amendments "restyle the rules and modernize their text to make them more easily understood" however "[t]he stylistic changes are not intended to affect the substance of the former rules." *Id*. at Exhibit A, p. 1.

NRCP 54(d)(2) is one of the many rules restyled under the 2019 amendments. As a result of the amendments to the NRCP, this Court made it clear that the exceptions for "claims for attorney fees and

expenses as sanctions or when the applicable substantive law requires attorney fees to be proved at trial as an element of damages" does not apply to the prohibition against the court extending the time for filing a motion for attorney fees after the time has expired. NRCP 54(d)(2)(C), (D). More simply stated, the 2019 amendments to NRCP 54(d)(2) only strengthen the rule that the time period to file a motion for attorney fees is strict and cannot be extended after the fact by the court.

In this case, there is absolutely no calculation of time whereby St. Clair's Motion for Attorneys' Fees was timely filed pursuant to the applicable rule requiring a motion for attorney fees to be filed no later than 20 days after notice of entry of judgment is served. NRCP 54(d)(2)(B), Nev. Rev. Stat. Court Rules Vol. I (2017) (amended 2019). St. Clair's Motion was served on or about June 28, 2018, and filed on July 2, 2018. *See* JA Vol. IV at 855–870. The plain reading of NRCP 54(d)(2)(B), as in effect at the time the district court rendered its decision, mandated that St. Clair's Motion be filed "no later than 20 days after notice of entry of judgment [was] served," or May 17, 2016.[3] More

[3] St. Clair served the Notice of Entry of Order on the State Engineer on April 27, 2016. *See* JA Vol. IV at 813–830. Adding 20 days to April 27, 2016, established the deadline to file his Motion as May 17, 2016.

than two (2) full years passed between the time St. Clair served the notice of entry of judgment on the underlying merits and the time St. Clair filed his Motion for Attorneys' Fees. *See* JA Vol. IV at 813–830; *see also* JA Vol. IV at 855–870. This two-year period far exceeded the 20-day time period provided by NRCP 54(d)(2)(B), making the Motion untimely. The district court was not permitted to extend the time after it had already expired, and therefore erred by entertaining and granting St. Clair's Motion for Attorneys' Fees.

Further, the State Engineer's appeal in Case No. 70458 did not toll the 20-day time period for St. Clair to file his motion for attorneys' fees. The applicable version of NRCP 54(d)(2)(A) was explicit in that a motion for attorney fees may be decided by a district court "despite the existence of a pending appeal from the underlying final judgment." NRCP 54(d)(2)(A), Nev. Rev. Stat. Court Rules Vol. I (2017) (amended 2019). Reading NRCP 54(d)(2)(A) and NRCP 54(d)(2)(B) together, it was clear that a motion for attorney fees *must* be filed within 20 days of service of the notice of entry of judgment, and a pending appeal does not toll or otherwise have any effect on this deadline. In this case, this is especially true as the State Engineer's Notice of Appeal was filed on

May 23, 2016, and was therefore filed *after* St. Clair's 20-day deadline to file a motion for attorney fees had passed. JA Vol. IV at 831–852. As the time period to seek recovery of any attorney fees passed more than two (2) full years before St. Clair filed his Motion for Attorneys' Fees, St. Clair's Motion was untimely. The district court was prohibited from extending this deadline, and erred in granting St. Clair's Motion at that late stage.

During the briefing and argument before the district court, St. Clair argued that timeliness of a motion for attorneys' fees is a matter left to the district court and that there was no deadline for such a motion, citing *Farmers Ins. Exch. v. Pickering*, 104 Nev. 660, 662, 765 P.2d 181, 182 (1988), and *State, Dep't of Human Res., Welfare Div. v. Fowler*, 109 Nev. 782, 858 P.2d 375 (1993), respectively. *See* JA Vol. IV at 887, 892; *see also* JA Vol. IV–V at 909–1076. However, by citing these cases, St. Clair ignored the fact that these cases were essentially abrogated, insofar as they discussed timing of an attorney fees motion, in 2008 when this Court amended NRCP 54 to codify the 20-day deadline. On July 8, 2008, this Court, in ADKT No. 426, issued its Order Amending Nevada Rule of Civil Procedure 54. *See* Order Amending Nevada Rule of Civil Procedure 54,

ADKT No. 426 (Nev. July 8, 2008). In ADKT No. 426,[4] the Supreme Court expressly codified its holding in *Collins v. Murphy*, 113 Nev. 1380, 1384, 951 P.2d 598, 601 (1997), that an attorney's fees motion must be filed prior to the deadline for submitting a notice of appeal.

In ADKT No. 426, this Court expressly stated that "[i]t appears that codification of this court's holding in *Collins* in the form of a rule will result in broader awareness of the timing requirement for attorney fees motions, as well as more uniform application of the requirement" and therefore "amendment of the Nevada Rules of Civil Procedure is warranted." *See* Order Amending Nevada Rule of Civil Procedure 54, ADKT No. 426 (Nev. July 8, 2008). As a result, NRCP 54(d) was added to the Nevada Rules of Civil Procedure, including the requirement that a motion for attorney fees "must be filed no later than 20 days after notice of entry of judgment is served." *Id.* Thus, the 1988 case of *Farmers*

[4] After being advised that the July 8, 2008, order amending NRCP 54 was in conflict with NRS 2.120(2), as it was made effective thirty (30) days after entry of the order rather than the required sixty (60) days after entry of the order, on February 6, 2009, the Supreme Court vacated the July 8, 2008, order in ADKT No. 426, and issued an order with the same amendment to NRCP 54, with an effective date of May 1, 2009. *See* Order Amending Nevada Rule of Civil Procedure 54, ADKT No. 426 (Nev. Feb. 6, 2009).

Insurance Exchange, that St. Clair cited for the proposition that timeliness of an attorneys' fees motion is left to the discretion of the trial court, and the 1993 case of *Fowler*, that St. Clair cited for the proposition that there is no deadline for an attorneys' fees motion, have both been clearly overruled by this Court through its amendments in 2008/2009 expressly codifying the 20-day deadline found at NRCP 54(d)(2)(B), Nev. Rev. Stat. Court Rules Vol. I (2017) (amended 2019). *See* JA Vol. IV at 887, 892.

It is true that in *Farmers Insurance Exchange*, in 1988, this Court found that "[a]bsent a specific statutory provision governing the time frame in which a party must request attorney's fees, the timeliness of such requests, we conclude, is a matter left to the discretion of the trial court." 104 Nev. at 662, 765 P.2d at 182. However, this "specific statutory provision" now exists in NRCP 54(d)(2)(B), and has for approximately ten years by virtue of this Court's Order in ADKT No. 426. It is clear that St. Clair filed his Motion for Attorneys' Fees more than two years after the written notice of entry of judgment was served on the underlying district court decision in this case. This is far beyond the time limit provided by NRCP 54(d)(2)(B), a time limit that had already expired

such that district court was prohibited from extending it. NRCP 54(d)(2)(B), Nev. Rev. Stat. Court Rules Vol. I (2017) (amended 2019).

The only exception to the timing requirement in NRCP 54 is "unless a statute provides otherwise." *Id.* The statute upon which St. Clair based his Motion, NRS 18.010(2)(b), is silent as to timing and therefore does not provide otherwise; thus, the timing requirement in NRCP 54(d)(2)(B) applies to motions brought pursuant to NRS 18.010(2)(b). This is clear, as NRS 18.010, albeit a different subpart, was also at issue in *Collins v. Murphy*, the case that was the catalyst behind this Court's adoption of the deadline found in NRCP 54(d)(2)(B). In summation, St. Clair's Motion for Attorneys' Fees was untimely by more than two years, and as a result the district court erred in granting the Motion. The district court's Order Granting Motion for Attorneys' Fees should be vacated and reversed.

As argued in the next subsection, there is no authority supporting St. Clair's assertion that, following an appeal, he was entitled to attorneys' fees from proceedings before the Nevada Supreme Court. A party is not entitled to attorney fees on appeal absent a showing of

frivolity, and the district court lacks authority to award attorney fees incurred on appeal. *See* NRAP 38; *see also Bd. of Gallery of History, Inc. v. Datecs Corp.*, 116 Nev. 286, 288, 994 P.2d 1149, 1150 (2000). Assuming, *arguendo*, that there was some authority to this effect, St. Clair still exceeded the 20-day time period contemplated by NRCP 54(d)(2)(B). The Nevada Supreme Court issued its Opinion affirming the District Court's Order on March 29, 2018, with the Remittitur subsequently being issued on April 24, 2018, and returned by the District Court clerk and filed with the Nevada Supreme Court on May 4, 2018. *See King*, 134 Nev. Adv. Op. 18, 414 P.3d 314; *see also* JA Vol. IV at 853–854. St. Clair served his Motion for Attorneys' Fees on June 28, 2018, and filed it on July 2, 2018, more than 50 days after the filing of the Remittitur. *See* JA Vol. IV at 855–870. St. Clair's Motion was filed more than 20 days after the last conceivable date, making St. Clair's Motion untimely under any calculation or analysis.

St. Clair's Motion was untimely pursuant to NRCP 54(d)(2)(B), and the district court did not have authority to extend that deadline once it had expired. By not only entertaining St. Clair's late Motion, but by

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granting it, the district court abused its discretion. Therefore, the district court's Order granting St. Clair's Motion must be reversed.

E. The District Court Lacked Authority to Award Attorneys' Fees Incurred at the Nevada Supreme Court

There is no authority supporting St. Clair's assertion made at the district court that, following an appeal, he was entitled to attorneys' fees from proceedings before the Nevada Supreme Court. The district court erred in awarding fees incurred during the previous appeal, fees that make up the majority of those awarded by the district court. JA Vol. IV at 899; Vol. V at 1096–1111.

This Court has ruled that "NRS 18.010 does not explicitly authorize attorney's fees on appeal, and . . . NRAP 38(b) limits attorney's fees on appeal to those instances where an appeal has been taken in a frivolous manner." *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1356–57, 971 P.2d 383, 388 (1998). A party may not recover attorney's fees "absent a statute, rule, or contractual provision to the contrary." *Bd. of Gallery of History, Inc.*, 116 Nev. at 288, 994 P.2d at 1150 (*citing Rowland v. Lepire*, 99 Nev. 308, 315, 662 P.2d 1332, 1336 (1983)). "There is no provision in the statutes authorizing the

district court to award attorney's fees incurred on appeal." *Bd. of Gallery of History, Inc.*, 116 Nev. at 288, 994 P.2d at 1150. "NRAP 38(b) authorizes only [the Nevada Supreme Court and the Nevada Court of Appeals] to make such an award if it determines that the appeals process has been misused." *Id.*

NRAP 38 only supports an award of attorney fees on appeal in the event that "an appeal has frivolously been taken or been processed in a frivolous manner, when circumstances indicate that an appeal has been taken or processed solely for purposes of delay, when an appeal has been occasioned through respondent's imposition on the court below, or whenever the appellate processes of the court have otherwise been misused." NRAP 38(b). Further, such attorney fees are to be awarded on the court's "own motion," rather than a motion from one of the parties to the litigation. *Id.*

The Nevada Supreme Court, while ruling in favor of St. Clair, made no findings that the State Engineer's appeal was pursued frivolously, for purposes of delay, was based on imposition on the district court, or otherwise misused the appellate processes. *See King*, 134 Nev. Adv. Op. 18, 414 P.3d 314. Accordingly, this Court did not require the State

Engineer to pay attorney fees pursuant to NRAP 38(b). Rather, the Nevada Supreme Court found only that there was "not clear and convincing evidence that St. Clair's predecessor intended to abandon the water right," and that the State Engineer's other arguments on appeal lacked merit for varying reasons. *See King*, 134 Nev. Adv. Op. at 18, 414 P.3d at 317–18. In the prior appeal, this Court did not issue any findings consistent with the nefarious intent required for attorney fees under NRAP 38. Though the Court disagreed with the State Engineer as to the question of whether or not St. Clair's predecessor in interest intended to abandon the water right, that disagreement does not rise to the bad faith or frivolity necessary to support the award of attorneys' fees.

While the Nevada Supreme Court found that the State Engineer acted arbitrarily and capriciously as his decision was not supported by substantial evidence, this is the standard that is required to overturn agency decisions. *See King*, 134 Nev. Adv. Op. at 18, 414 P.3d at 316, 318 (*citing Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 751, 918 P.2d 697, 702 (1996)). This is not the same as a finding of frivolity, and at all times the State Engineer has proceeded in good faith based on a reasonable, albeit unsuccessful, view of the facts and the law.

In deciding not to follow the precedent of *Board of Gallery of History, Inc.*, the district court found that the case was a "seemingly competing ruling" with that found in *In re Estate and Living Trust of Miller*, 125 Nev. 550, 216 P.3d 239 (2009). JA Vol. V at 1108–1109. This finding was an error. The precedents of *Board of Gallery of History, Inc.* and *In re Estate and Living Trust of Miller* are distinguishable such that they can, and do, coexist harmoniously.

Specifically, the district court depended on the language from *In re Estate and Living Trust of Miller* providing that:

> States with fee-shifting rules or statutes similar to Nevada's have held they apply to appellate fees. Additionally, nothing in the language of NRCP 68 and NRS 17.115 suggests that their fee-shifting provisions cease operation when the case leaves trial court. We therefore hold that the fee-shifting provision in NRCP 68 and NRS 17.115 extend to fees incurred on and after appeal.

JA Vol. V at 1109 (*citing In re Estate and Living Trust of Miller*, 125 Nev. at 555, 216 P.3d at 243). The district court went on to state that "nothing in the language of NRS 18.010 suggests that its fee-shifting provisions cease operation when the case leaves district court." *Id.* The district court's reliance on *In re Estate and Living Trust of Miller* was misplaced, and its analysis was erroneous.

First of all, NRS 17.115 was repealed by the Nevada Legislature in 2015 and therefore should not have been part of the district court's calculus. A.B. 69, 78th Leg. (Nev. 2015). As for NRCP 68, this rule concerns offers of judgment. Specifically, concerning the "fee-shifting" provisions, as in existence at the time of the district court's order, NRCP 68 provided a penalty for a party who receives an offer of judgment, rejects the offer, and then fails to obtain a more favorable judgment:

> (A) the offeree cannot recover any costs or attorney fees and shall not recover interest for the period after the service of the offer and before the judgment; and
>
> (B) the offeree shall pay the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of judgment and reasonable attorney fees if any be allowed, actually incurred by the offeror from the time of the offer. If the offeror's attorney is collecting a contingent fee, the amount of any attorney fees awarded to the party for whom the offer is made must be deducted from that contingent fee.

NRCP 68(f), Nev. Rev. Stat. Court Rules Vol. I (2017) (amended 2019). This is very clearly a "fee-shifting" framework, as it penalizes the party who rejects an offer of judgment, but then fails to obtain a more favorable final judgment, by requiring the rejecting party to pay the offering party's

post-offer fees. In most cases where attorney fees are recoverable, they are recoverable by the prevailing party; NRCP 68(f) is a "fee-shifting" statute in that it provides for a situation where a party may ultimately prevail and yet be required to pay certain attorney fees to the non-prevailing party.

Here, St. Clair did not move for attorneys' fees under a fee-shifting statute, nor was there any fee-shifting statute that was applicable to this case. At no point in time was there an offer of judgment made in this case, nor does an offer of judgment under NRCP 68 make sense in the context of petitions for judicial review of decisions of the State Engineer under NRS 533.450.

Under NRCP 68(g), the fee-shifting penalties may only be invoked after the court determines that "the offeree failed to obtain a more favorable judgment." NRCP 68(g), Nev. Rev. Stat. Court Rules Vol. I (2017) (amended 2019). This determination is completely based upon the ultimate monetary judgment. *See id.* In a petition for judicial review proceeding under NRS 533.450, a party challenging an order or decision of the State Engineer desires either a reversal of or some alteration of the State Engineer's decision. There is no monetary judgment, and therefore

no ability for the court to determine whether "the offeree failed to obtain a more favorable judgment."

Furthermore, NRCP 68's fee-shifting penalty is limited to only allowing the offeror to receive reasonable attorney fees "if any be allowed." NRCP 68(f)(2), Nev. Rev. Stat. Court Rules Vol. I (2017) (amended 2019). As discussed in detail above at subsection B of this section, attorney fees are not allowed under NRS 533.450. Therefore, even if an offer of judgment was, for some reason, made under NRCP 68 in a petition for judicial review proceeding against the State Engineer, attorney fees would not be recoverable.

The district court erred in awarding St. Clair attorneys' fees based on the State Engineer's appeal to the Nevada Supreme Court, and such an award is not supported by any known legal authority. In fact, pursuant to *Board of Gallery of History, Inc.*, this Court has explicitly held that district court's lack such authority. The district court abused its discretion in granting St. Clair's Motion for Attorneys' Fees insofar as those fees awarded were incurred on appeal to this Court. Therefore, while the State Engineer argues that the entire award should be reversed

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for various reasons, the portion of the award attributable to the State Engineer's previous appeal should surely be overturned.

VIII. CONCLUSION

The district court erred in granting St. Clair's Motion for Attorneys' Fees for multiple reasons. Most importantly, as a threshold matter, the Legislature has not provided for the recovery of attorney fees in proceedings challenging decisions or orders of the State Engineer under NRS 533.450. Nevada follows the American rule, such that "attorney fees may not be awarded absent a statute, rule, or contract authorizing such award." *Thomas*, 122 Nev. at 91, 127 P.3d at 1063. As no such statute, rule, or contract existed in this matter, the district court erred in awarding St. Clair attorneys' fees.

Notwithstanding, even if judicial review proceedings against the State Engineer pursuant to NRS 533.450 did allow for attorney fees under NRS 18.010(2)(b), the State Engineer at all times reasonably maintained his defense of Ruling No. 6287 such that attorney fees were not warranted. Additionally, St. Clair's Motion for Attorneys' Fees was untimely, and filed far past the expiration of the 20-day deadline provided by NRCP 54(d)(2)(B), Nev. Rev. Stat. Court Rules Vol. I (2017)

(amended 2019). Once this deadline expired, the district court was prohibited from extending it. Lastly, the district court erred by including in its award of attorneys' fees those fees incurred during the appeal in the Supreme Court. The district court had no authority to award attorneys' fees incurred on appeal.

Based on the foregoing, the State Engineer respectfully requests that this Court reverse the district court's order.

RESPECTFULLY SUBMITTED this 30th day of April, 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 10 in 14 pitch Century Schoolbook.

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2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 8,254 words.

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

RESPECTFULLY SUBMITTED this 30th day of April, 2019.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 30th day of April, 2019, I served a copy of the foregoing APPELLANT'S OPENING BRIEF, by electronic filing to:

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