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 REPLY BRIEF

AARON D. FORD
Attorney General
JAMES N. BOLOTIN
Senior Deputy Attorney General
Nevada Bar No. 13829
State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
T: (775) 684-1231
E: jbolotin@ag.nv.gov
Attorney for Appellant,
State Engineer

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I. INTRODUCTION

St. Clair inaccurately simplifies the State Engineer's arguments to an allegation that the district court erred in awarding attorney fees "solely because he was the prevailing party in the *King v. St. Clair* case." Answering Brief, p. 10. However, the State Engineer, in both the Opening and this Reply Brief, focuses on: (1) the inapplicability of NRS 18.010(2)(b) to actions brought under NRS 533.450; (2) the inapplicability of NRS 18.010(2)(b) to this case even if attorney fees were allowed under NRS 533.450; (3) the untimeliness of St. Clair's Motion for Attorneys' Fees (hereafter "St. Clair's Motion"); and (4) the district court's absence of authority to award attorney fees incurred at the Supreme Court. *See* Opening Brief. While the State Engineer did discuss "prevailing parties," it was nowhere near the central theme of his Opening Brief. *See* Opening Brief, pp. 17, 19, 37. Yet, it is clear that the district court did incorrectly utilize a prevailing party analysis to award fees, in addition to the other errors concerning statutory authority and untimeliness.

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II. ARGUMENT

A. The District Court Erred in Awarding Attorneys' Fees to St. Clair Because They Are Not Authorized by 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 v. City of N. Las Vegas*, 122 Nev. 82, 91, 127 P.3d 1057, 1063 (2006). St. Clair relies only on NRS 18.010(2)(b); however, St. Clair cannot recover attorney fees in the absence of express statutory authorization. *See State Indus. Ins. Sys. v. Wrenn*, 104 Nev. 536, 539, 762 P.2d 884, 886 (1988). Thus, St. Clair also cannot rely on implied authority.

1. NRS 533.450 is the Exclusive Means to Appeal the State Engineer's Decisions and it Does Not Authorize Attorney Fees

NRS 533.450 neither provides, nor even mentions, attorney fees, and it is the only vehicle to seek judicial review of the State Engineer's decisions. St. Clair argues fees are impliedly allowed, stating that "NRS 533.450 *does not prohibit* the district court from granting attorneys' fees requested pursuant to NRS 18.010(2)(b)." *See* Answering Brief, p. 14. However, St. Clair makes no affirmative showing that

NRS 533.450 *allows* for attorney fees under NRS 18.010(2)(b). Water law is unique in character and the Legislature has never expressly authorized an award of attorney fees in actions challenging decisions of the State Engineer pursuant to NRS 533.450.

St. Clair attempts to allege statutory authorization for attorney fees under NRS 533.450 by citing the provisions of NRS 533.450(8), stating that "[t]he practice in civil cases applies to the informal and summary character of such proceedings, as provided in this section." Answering Brief, pp. 14–15. In doing so, St. Clair alleges that NRS 18.010(2)(b) is a "procedural rule," conflating the Nevada Revised Statutes with the Nevada Rules of Civil Procedure. The State Engineer does not dispute that, per NRS 533.450(8), the NRCP applies to actions under NRS 533.450 insofar as they do not conflict. However, the argument that NRS 18.010, a statute, is also a "procedural rule" that the Legislature intended to apply to actions under NRS 533.450 lacks merit. This is especially true in light of the fact that the language applying the practice in civil cases to proceedings challenging decisions of the State Engineer predates NRS 18.010(2)(b) by approximately 72 years. *See* AB 185, 63rd Sess. (1985).

St. Clair does not dispute that agencies operating under Nevada's Administrative Procedure Act ("APA") are not subject to the provisions of NRS 18.010. Answering Brief, p. 16. Noticeably, the APA includes direction by the Legislature to utilize the NRCP and that appeals "shall be taken as in other civil cases." *See* NRS 233B.110(3); NRS 233B.140; NRS 233B.150. Yet, despite these statutes, the Supreme Court clearly established that, absent specific legislative authorization for attorney fees, attorney fees are not recoverable under NRS 18.010 in actions challenging agency determinations under the APA. *See Zenor v. State, Dep't of Transp.*, 134 Nev. Adv. Op. 14, 412 P.3d 28, 30 (2018). Thus, St. Clair's reasoning is fatally flawed.

Just as those legislative directives in the APA[1] to utilize the

[1] St. Clair also inaccurately distinguishes other aspects of the APA from NRS 533.450, arguing that service of notice on interested parties is mandatory and jurisdictional under the APA, while broadly stating that the same is not true under NRS 533.450. *See* Answering Brief, p. 18.

This Court's decision in *Desert Valley Water Co.*, 104 Nev. 718, 720, 766 P.2d 886, 887 (1988), did not hold that NRS 533.450(3)'s notice provision "is not jurisdictional." *Id.* Rather, this Court found that where water right applications were not protested and where no hearing was held, "Desert Valley met the jurisdictional requirements of the statute when it timely served a copy of its appeal on the [S]tate [E]ngineer." *Desert Valley Water Co.*, 104 Nev. at 721, 766 P.2d at 887. Given those facts, the Court determined that notice of petition for judicial review is not required to be given to *every* person affected, which could possibly include

NRCP did not imply the applicability of NRS 18.010, NRS 533.450(8)'s language applying the practice in civil cases to actions challenging State Engineer decisions does not imply the applicability of NRS 18.010(2)(b). NRS 18.010 is not applicable for the recovery of fees under either type of judicial review proceeding.

2. NRS 233B Demonstrates the Legislature's General Inclination to Disallow Fees in Appeals of the Decisions of State Agencies

This Court often looks to NRS 233B for assistance in conducting judicial review of decisions of the State Engineer under NRS 533.450. *See Sierra Pac. Indus. v. Wilson*, 135 Nev. Adv. Op. 13, 440 P.3d 37, 40 (2019) (citing NRS 233B.135 to establish the standard of review for decisions of the State Engineer); *Bailey v. State*, 95 Nev. 378, 382, 594 P.2d 734, 737 (1979) (using NRS 233B to analyze whether the State Engineer is required to provide notice of a final decision or order); *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 265 (1979) (citing NRS 233B.125

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every resident of Clark County, "impos[ing] a burden on the appellant which might be impossible to overcome." *Id.*, 104 Nev. at 720, 766 P.2d at 887. The Court went on, stating that where other parties *did* participate in the administrative proceeding, notice is required to the State Engineer and, "at a minimum, upon those parties who have participated in the proceedings." *Id.*, 104 Nev. at 720, 766 P.2d at 887.

to determine the type of findings of fact required of State Engineer decisions).

St. Clair argues that, because the State Engineer is exempted from Nevada's APA per NRS 233B.039(j), any authorities related to NRS 233B are irrelevant. *See* Answering Brief, pp. 6–7, 16–19. The argument focuses on the words "exclusive means" found in NRS 233B.130(6). *See* Answering Brief, pp. 16–19. St. Clair asserts that because NRS 533.450 does not include these words, the statutes are so dissimilar that case law analyzing NRS 233B cannot be used as persuasive authority here. *See id*. In this overgeneralization, St. Clair ignores the reasons why *Zenor*, 134 Nev. Adv. Op. 14, 412 P.3d 28 (2018), and *State, Dep't of Human Res., Welfare Div. v. Fowler*, 109 Nev. 782, 858 P.2d 375 (1993), are persuasive authority in the instant case.

It is "settled in this state that 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). NRS 533.450 does not specifically include the words "exclusive means." However, NRS 533.450 *is* the exclusive means of judicial review

of the State Engineer's decisions, per *Application of Filippini*, case law predating the formal enactment of the Nevada Revised Statutes in 1957, both of which predate the enactment of the Nevada APA in 1965 and the adoption of the "exclusive means" language into the APA in 1989.

The analysis in *Zenor* and *Fowler* is directly relevant here. In those cases, this Court determined that the APA is the exclusive means of judicial review of decisions of applicable state agencies and therefore the fee provisions of NRS 18.010 do not apply. Here, NRS 533.450 is the exclusive means of judicial review of State Engineer decisions and therefore the same rationale prohibits attorney fees in this case.

This Court conducted a similar analysis in the unpublished water law decision *Rand Props., LLC v. Filippini*, 2016 WL 1619306, Docket No. 66933, filed Apr. 21, 2016 (unpublished disposition) (hereafter "*Rand*"). While the State Engineer cited *Rand* as supporting his case, St. Clair contorts the *Rand* decision beyond recognition to argue that it "supports St. Clair's position." Answering Brief, p. 19. Again, per *Application of Filippini*, water law is special in character such that its provisions "not only lay down the method of procedure but strictly limits it to that provided." In *Rand*, this Court reiterated that "under Nevada

law, attorney fees are not considered costs." *Rand*, 2016 WL 1619306 at *6 (citing *Smith v. Crown Fin. Serv. of Am.*, 111 Nev. 277, 287, 890 P.2d 769, 776 (1995)). The Court went on to find that the district court erred in awarding fees pursuant to NRS 533.190(1) and NRS 533.240(3) as these statutes specifically provide for costs but "attorney fees are not mentioned anywhere in the statute." *Id.*

The *Rand* Court held that under NRS 533.190 and NRS 533.240 "this district court may award costs, but not fees." Answering Brief, pp. 19–20. Contrary to this Court's precedent, St. Clair then argues the "inverse is also true." *Id.*, p. 20. Arguing that because NRS 533.450 does not prohibit fees, this implies that attorney fees are available. *Id.* Not only does this defy this Court's decision in *Rand*, but it defies this Court's distaste for "implied exception" arguments, as "it is not the business of this court to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done." *McKay v. Bd. of Cty. Comm'rs of Douglas Cty.*, 103 Nev. 490, 492, 746 P.2d 124, 125 (1987). This Court "repeatedly refuse[s] to imply provisions not expressly included in the legislative scheme." *Wrenn*, 104 Nev. at 539, 762 P.2d at 886. The fact that NRS 533.450(7) authorized costs in certain

circumstances, but is silent regarding fees, shows a specific intent by the Legislature not to authorize the recovery of attorney fees in NRS 533.450 cases. This intent is further bolstered by the fact that, even under NRS 533.450(7), costs must be paid as in civil cases in the district court, "*except* by the State Engineer or the State." (emphasis added). NRS 533.450 is devoid of any authorization for an attorney fees award against the State Engineer.

B. The District Court Incorrectly Utilized a Prevailing Party Analysis

Even if this Court determines a district court may award fees under NRS 18.010 in an NRS 533.450 action, as argued by St. Clair, the district court failed to find a claim or defense lacking reasonable ground or an intent to harass as required by NRS 18.010(2)(b), thus the award must be reversed.

It is obvious from the record that the district court *did* utilize a prevailing party analysis. The October 19, 2018, hearing transcript on St. Clair's Motion for Attorneys' Fees makes this clear. JA Vol. V at 1073–75. Nowhere in the ruling from the bench did the district court go through a specific analysis with regards to the items upon which St. Clair requested fees (the State Engineer's Opposition to St. Clair's

Request for Judicial Notice, the State Engineer's Objection to the Proposed Order, or the State Engineer's subsequent appeal to the Supreme Court). *Id.* Rather, the district court, both on the record and in the written order, stated that it utilizes a "what did each side spend?" analysis, an analysis that is absent from both NRS 533.450 and NRS 18.010(2)(b). JA Vol. V at 1073, 1106.

Then, the district court boiled the case down to its *merits*, stating that "Mr. St. Clair was appealing a decision by the State Engineer where there was no intent to abandon . . . just the State Engineer took a position that a right was abandoned." JA Vol. V at 1074. The district court continued reciting language from NRS 18.010(2)(b) regarding where "the defense of the opposing party was brought or maintained without a reasonable ground" then finding that "[the district court] said it, Supreme Court said it, it wasn't reasonable. The State Engineer should have just said, 'There was no intent. It wasn't . . . abandoned.'" *Id.* The district court then concluded that "[t]his was a meritorious claim on the part of Mr. St. Clair" and awarded St. Clair his full requested amount plus preparation time for that hearing. JA Vol. V at 1075. Notably, the

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district court found that the State Engineer did not "harass and harangue" St. Clair via his defense of his decision. *Id.*

The district court very plainly, on the record, conducted a prevailing party analysis that included the aforementioned "what did each side spend?" inquiry. The district court did this without any formal analysis as to the propriety of the amount awarded, without any mention of the fact that the majority of the awarded fees were incurred at the Nevada Supreme Court, and without St. Clair even requesting the fees associated with the briefing and hearing on his Motion for Attorneys' Fees. Not only are attorney fees under NRS 18.010(2)(b) not authorized in actions brought pursuant to NRS 533.450, but the district court ruled from the bench utilizing a flawed, "prevailing party"-style analysis not authorized by NRS 18.010(2)(b).

C. The District Court Erred by Failing to Limit Fees to Those Incurred at the District Court

1. Fees Related to the State Engineer's Opposition to the Judicial Notice Request and the Objection to the Proposed Order are Improper

The district court omitted any analysis on the record during the October 19, 2018, hearing regarding either the State Engineer's Opposition to St. Clair's Request for Judicial Notice (hereafter "the

Opposition") or the State Engineer's Objection to the Proposed Order (hereafter "the Objection"). JA Vol. V at 1073–75. Nonetheless, these points were addressed in the briefing of St. Clair's Motion and the district court signed the written proposed order addressing these issues. JA Vol. V at 1105–06.

These specific issues do not change the calculus in this case: this case originated as a challenge to the State Engineer's Ruling No. 6287, a water law case brought pursuant to NRS 533.450 such that the proceedings were strictly limited to the provisions of NRS 533.450 and relevant jurisprudence. *See Application of Filippini*, 66 Nev. at 27, 202 P.2d at 540. Nowhere in NRS 533.450 does it provide for the award of attorney fees; therefore NRS 18.010(2)(b) is inapplicable to this action and St. Clair was not entitled to fees.

Furthermore, as discussed in the Opening Brief and again below, even if NRS 18.010(2)(b) did apply to actions under NRS 533.450, St. Clair filed his Motion for Attorneys' Fees egregiously late in violation of NRCP 54(d)(2)(B).

Lastly, assuming *arguendo* that NRS 18.010(2)(b) applies to actions under NRS 533.450 and that NRCP 54(d)(2)(B)'s timing requirement

does not, the district court nonetheless erred by finding that St. Clair was entitled to attorney fees related to the Opposition and the Objection.

a. NRS 18.010(2)(b) applies only to a case's underlying claims and defenses

NRS 18.010(2)(b) specifically applies only to an action's underlying claims or defenses, with the goal of punishing litigants for and deterring frivolous or vexatious claims or defenses. *See In re 12067 Oakland Hills, Las Vegas, Nev.*, 134 Nev. Adv. Op. 97, 435 P.3d 672, 676 (Nev. App. 2018) (NRS 18.010(2)(b) permits an award of fees only if, during the litigation, a defense is "brought or maintained" that was "either groundless or intended to harass."); *see also Frantz v. Johnson*, 116 Nev. 455, 472, 999 P.2d 351, 361–62 (2000) ("The plain language of NRS 18.010(2)(b) and our case law interpreting it do not permit an award of attorney fees for acting maliciously or engaging in unacceptable discovery tactics" but rather "NRS 18.010(2)(b) allows an award of attorney fees to the prevailing party when a party has alleged a groundless claim that is not supported by any credible evidence at trial").

Ultimately, the scope of NRS 18.010(2)(b) is defined "by the words of the statute itself" and "[w]hat matters is whether the proceedings were *initiated* or *defended* 'with improper motives or without reasonable

grounds.'" *In re 12067 Oakland Hills, Las Vegas, Nev.*, 134 Nev. Adv. Op. 97, 435 P.3d at 676–677 (citing *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998)).

Here, the underlying claims and defenses concerned the State Engineer's finding of abandonment based on evidence of extended nonuse dating back to the prior owner. *See* Opening Brief, pp. 20–23. While the State Engineer was ultimately unsuccessful, and this Court affirmed the overruling of Ruling No. 6287, credible evidence in the record of nonuse dating back to 1924 supported the State Engineer's abandonment analysis, and this Court did not deem the appeal frivolous. *See King v. St. Clair*, 134 Nev. Adv. Op. 18, 414 P.3d 314 (2018). Further, for the first time, the Supreme Court found that "assuming a prior owner has taken actions consistent with abandonment, it is that owner's intent that controls." *Id.*, 134 Nev. Adv. Op. 18, 414 P.3d at 316–17. While the Legislature enacted NRS 18.010(2)(b) desiring "to deter frivolous lawsuits, this must be balanced with the need for attorneys to pursue novel legal issues or argue for clarification or modification of existing

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law." *Frederic & Barbara Rosenberg Living Trust v. MacDonald Highlands Realty, LLC*, 134 Nev. Adv. Op. 69, 427 P.3d 104, 113 (2018).

The State Engineer is unaware of any case law in Nevada holding that NRS 18.010(2)(b) applies to procedural issues and objections arising during the course of litigation such as the Opposition and the Objection in this case. Thus, the district court erred by awarding St. Clair's requested attorneys' fees incurred on these issues.

b. The district court nonetheless erred in awarding fees

Even if NRS 18.010(2)(b) is broad enough to encompass more than claims and defenses, the district court nonetheless erred in awarding fees related to the Opposition and the Objection. First, as discussed above, the district court did not conduct an actual analysis on the record to address these two filings from the State Engineer. *See* JA Vol. V at 1073–75. Rather, the district court essentially conducted a prevailing party analysis, deeming the State Engineer's defense of Ruling No. 6287 unreasonable because the State Engineer lost the case. *Id.*

Additionally, the district court's written order contained an erroneous analysis of these two filings. Regarding the Opposition, the district court's order found that because the State Engineer's Opposition

was untimely, attorney fees were appropriate pursuant to NRS 18.010(2)(b). Untimeliness is not the standard for fees under NRS 18.010(2)(b). Rather, that statute requires a determination of whether a claim or defense is frivolous or vexatious by examining whether it is groundless or intended to harass.

In *King*, this Court found that the Opposition was untimely and was therefore not properly preserved for appeal. 134 Nev. Adv. Op. 18, 414 P.3d at 318. This untimeliness alone does not render the Opposition frivolous or vexatious for purposes of fees under NRS 18.010(2)(b). This Opposition, filed on November 19, 2015, was an effort by the State Engineer, prior to the district court oral argument on January 5, 2016, to preserve his arguments concerning St. Clair's attempt to augment the administrative record. JA Vol. III at 570–74. In the Opposition, the State Engineer included reasonable grounds for opposing St. Clair's submission of extrinsic evidence outside of the administrative record, including case law and statutes. *Id.*

Ultimately, the district court did not address the judicial notice issue at the January 5, 2016, hearing but did so at the April 11, 2016, hearing regarding the Proposed Orders. JA Vol. IV 778–83. During the

April 11, 2016, hearing, counsel for the State Engineer again presented reasonable grounds for opposing the Request for Judicial Notice. *Id.* However, the district court, on the record, ultimately granted St. Clair's Request for Judicial Notice. *Id.* In its written order, the district court denied the State Engineer's Opposition as untimely, while also finding that it was proper to take judicial notice of the requested documents. JA Vol. IV at 844.

Although the Opposition was ultimately found untimely, this does not automatically constitute a frivolous or vexatious claim or defense for purposes of NRS 18.010(2)(b). The State Engineer's Opposition was based upon reasonable grounds and there was a good faith basis both for the State Engineer filing his Opposition and for restating his arguments at the hearing on April 11, 2016. The Opposition was based on reasonable grounds, and was not frivolous or intended to harass St. Clair. Therefore, the district court erred by awarding attorney fees pursuant to NRS 18.010(2)(b) concerning the Opposition.

Regarding the Objection, the district court awarded fees under NRS 18.010(2)(b) on the basis that it found that "St. Clair's proposed order was accurate," thus "the positions relating to the proposed order

that the State Engineer maintained were without reasonable ground in light of the proceedings." JA Vol. V at 1105–06. Again, the standard for attorney fees under NRS 18.010(2)(b) is not a prevailing party analysis. The district court erred by awarding attorney fees simply because it overruled the State Engineer's objections. *See* JA Vol. V at 1073–75, 1105–06. Despite overruling the State Engineer's Objections, at no time during the April 11, 2016, hearing did the district court find that the State Engineer raised objections without reasonable ground or to harass St. Clair such that they were vexatious or frivolous. JA Vol. IV at 766–98. Without such a finding, attorney fees may not be awarded under NRS 18.010(2)(b).

In fact, during the oral argument, the district court specifically envisioned the State Engineer objecting to St. Clair's proposed order, stating that "if the State has any [objections] in regards to the order, go ahead and send it to me, and I'll look at it, and we might have a hearing if there's an issue that needs to be resolved on the record." JA Vol. III at 677. Then, as predicted by the district court, the State Engineer did have objections to the proposed order and, on April 11, 2016, the district court held a hearing on the objections. JA Vol. III at 680–720; JA Vol. IV

at 721–57, 766–98. While the district court overruled the State Engineer's objections, the district court stated that it "respect[ed]" the reasoning behind the State Engineer's objections, in that the State Engineer sought to ensure that the proposed order consisted of how the "court actually would have ruled." JA Vol. IV at 785–86. The district court noted specifically that the State Engineer's objections "do not even attempt to change my mind or anything on what I thought was the primary issue. And I respect that." JA Vol. IV at 786. While it "certainly [did not] want to offend," the district court ultimately overruled the objections and signed the proposed order submitted by St. Clair. JA Vol. IV at 796–97.

St. Clair emphasizes the length of the Objection, characterizing it as a "six-exhibit mammoth of a document." Answering Brief, p. 3. In reality, the State Engineer's Objection was a little over four pages long, and while it contained six exhibits, these exhibits consisted of communications between counsel, drafts of proposed orders, audio recording of the oral argument, and the district court's minute order, all of which should have been familiar to St. Clair's attorneys. JA Vol. III at 680–720; JA Vol. IV at 721–57. At no time during either the April 11,

2016, hearing on the Objection or the October 19, 2018, hearing on the Motion for Attorneys' Fees did the district court mention the length of the State Engineer's Objection as a factor contributing to the Court's award of fees related to the Objection. *See* JA Vol. IV at 764–99, JA Vol. V at 990–1076. While the district court's Order notes the length of the exhibits, this was not a factor used by the Court in ultimately finding that the State Engineer's Objection was "without reasonable ground." JA Vol. V at 1123, 1125–26. The State Engineer is unaware of binding authority finding length alone supports fees under NRS 18.010(2)(b).

At no point was there any indication by the district court, prior to signing the [Proposed] Order Granting Motion for Attorneys' Fees, that it found the Objection to be without reasonable ground or to harass St. Clair such that it was vexatious or frivolous under NRS 18.010(2)(b). In fact, prior proceedings in the district court indicated that the district court invited objections to the proposed order. While the district court ultimately disagreed with the State Engineer's position, it treated the objections as reasonable and allowed both sides to put on argument during a hearing on April 11, 2016.

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However, on November 26, 2018, the district court filed its order awarding St. Clair fees incurred as a result of the Objection under NRS 18.010(2)(b), stating that "the positions relating to the proposed order that the State Engineer maintained were without reasonable ground in light of the proceedings." JA Vol. V at 1106. The district court did not conduct any formal analysis on this point, but determined that because it found St. Clair's proposed order accurate, and it overruled the State Engineer's objections, St. Clair was entitled to attorney fees pursuant to NRS 18.010(2)(b). *Id.*

This type of prevailing party analysis is erroneous under NRS 18.010(2)(b), as this statute "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." *In re 12067 Oakland Hills, Las Vegas, Nev.*, 134 Nev. Adv. Op. 97, 435 P.3d at 679 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 443 n.2, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)). Rather, under NRS 18.010(2)(b), the district court must determine "whether the losing party's defense went beyond merely unsuccessful into becoming 'vexatious' *and* 'without reasonable ground.'" *Id.* (emphasis added). Here, the State Engineer submitted objections to St. Clair's

proposed order based on reasonable grounds, such that even the district court, at that time, "respect[ed]" the State Engineer's reasoning. JA Vol. IV at 786. Thus, the district court erred in determining that because it overruled the State Engineer's objections over two years earlier, St. Clair was then entitled to attorney fees under NRS 18.010(2)(b) as a result. JA Vol. V at 1105–06.

2. The District Court Erred in Awarding Attorney Fees to St. Clair Incurred at the Supreme Court

Like the district court in its Order Granting Motion for Attorneys' Fees, St. Clair reasons that it is entitled to attorney fees incurred at the Supreme Court based on an incorrect analysis concerning "fee shifting." Answering Brief, pp. 27–31. As discussed in detail in the Opening Brief, NRS 18.010(2)(b) is *not* a fee-shifting statute and therefore any analysis or case law regarding fee-shifting is irrelevant to this case. Opening Brief, pp. 35–39.

"[A]ttorney fees may not be awarded absent a statute, rule, or contract authorizing such award." *Thomas*, 122 Nev. at 91, 127 P.3d at 1063. The authority cited by St. Clair involves situations where either a statute or a contract explicitly allowed for the recovery of attorney fees incurred on appeal. To the contrary, NRS 18.010(2)(b), intended to deter

frivolous or vexatious claims, does not provide for the recovery of appellate attorney fees. NRAP 38 fulfills that role.

St. Clair draws this Court's attention to *In re Estate & Living Trust of Miller*, 125 Nev. 550, 216 P.3d 239 (2009). As discussed in detail in the Opening Brief, *Living Trust* involved the fee-shifting provisions under Nevada's offer of judgment rules, NRCP 68 and the now-defunct NRS 17.115. Opening Brief, pp. 35–37. Contrary to St. Clair's entire argument, NRS 18.010(2)(b) is not a fee-shifting statute and does not contain fee-shifting provisions. Black's Law Dictionary defines fee-shifting as "[t]he transfer of responsibility for paying fees, esp. attorney's fees, from the prevailing party to the losing party." Fee-Shifting Definition, *Black's Law Dictionary* (11th ed. 2019), *available at* Westlaw. While NRS 18.010(2)(b) is not a pure prevailing party fee statute, it only allows recovery of fees to the prevailing party and is therefore not a "fee-shifting" statute. *See* NRS 18.010(2)(b) ("In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees *to a prevailing party* . . . . [w]ithout regard to the recovery sought, when the court finds that the claim, counterclaim cross-claim or third-party complaint or defense

of the opposing party was brought or maintained without reasonable ground or to harass *the prevailing party*.") (emphasis added). NRS 18.010(2)(b) requires not only a prevailing party, but also an unreasonable claim or defense or intended harassment.

Despite this Court "repeatedly refus[ing] to imply provisions not expressly included in the legislative scheme," St. Clair argues that this Court's holding in *Living Trust* "implicitly acknowledg[ed]" a broader availability of appellate fees "beyond only offers of judgment." Answering Brief, p. 28; *see also Wrenn*, 104 Nev. at 539, 762 P.2d at 886. In doing so, St. Clair misquotes this Court's holding in *Musso v. Binick*, which did not address fee-shifting, but explicitly found that "[t]he purpose of such *contractual provisions*, to indemnify the prevailing party for the full amount of the obligation, is defeated and a party's *contract rights* are diminished if the party is forced to defend its rights on appeal at its own expense." 104 Nev. 613, 614, 764 P.2d 477, 477 (1988) (emphasis added). In fact, *Musso* dealt exclusively with an award of attorney's fees pursuant to a contractual agreement between the parties, resulting in Nevada joining the majority of states "recogniz[ing] that a contract provision for

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attorney's fees includes an award of fees for successfully bringing or defending an appeal." *Id.*

Nothing in *Living Trust* or *Musso* implies, as St. Clair argues, that the district court has carte blanche to award attorney fees on appeal in every case. To the contrary, both of these cases are well reasoned within the overarching guidance of the American rule, with a contract, rule, or statute providing for fees. *Musso* dealt explicitly with attorney fees based on contractual provisions and provided sound reasoning for allowing appellate attorney fees in those circumstances, whereas *Living Trust* dealt with fee-shifting provisions of Nevada's offer of judgment rules to which this Court concluded "that the policy of promoting settlement does not end in district court but continues until the case is resolved." *In re Estate & Living Trust of Miller*, 125 Nev. at 553, 216 P.3d at 242. Even within *Living Trust*, this Court determined that the fee-shifting provisions of NRCP 68 do not necessarily provide for appellate attorney fees in every case. Rather, the fee-shifting provisions, which apply where the offeree fails to obtain a more favorable judgment than offered, "apply to the judgment that determines the final outcome in the case which, in the event of an appellate reversal, may be different from the judgment

originally entered by the district court." *Id.*, 125 Nev. at 554, 216 P.3d at 243.

Additionally, St. Clair focuses on *Rosenaur v. Scherer*, a non-binding California case addressing California's Anti-SLAPP statute. *See* Answering Brief, p. 27 (citing 88 Cal. App. 4th 260 (Ct. App. 2001)). Unlike NRS 18.010(2)(b), which is not a pure prevailing party fee statute, California's Anti-SLAPP statute specifically provides for attorney fees to prevailing parties. *See Rosenaur*, 88 Cal. App. 4th at 282–87. Furthermore, California's appellate courts had already previously construed the Anti-SLAPP statute to include attorney fees incurred on appeal. *Id.*, 88 Cal. App. 4th at 287.

This Court, however, has held that attorney fees incurred on appeal are not available under NRS 18.010(2)(b), the exact statute under which St. Clair sought fees. *Bobby Berosini, Ltd.*, 114 Nev. at 1356–57, 971 P.2d at 388; *see also Bd. of Gallery of History, Inc. v. Datecs Corp.*, 116 Nev. 286, 288, 994 P.2d 1149, 1150 (2000). Again, performing analysis under the American rule, this Court reasoned that "because NRS 18.010 does not explicitly authorize attorney's fees on appeal, and because NRAP 38(b) limits attorney's fees on appeal to those instances where an

appeal has been taken in a frivolous manner," the respondent was not entitled to attorney's fees incurred on appeal. *Bobby Berosini, Ltd.*, 114 Nev. at 1356–57, 971 P.2d at 388. Accordingly, in that case the district court correctly disallowed attorney's fees incurred on appeal. *Id.*

While the Legislature amended NRS 18.010(2)(b) in 2003, this does not change the Court's analysis. Under the current version of NRS 18.010(2)(b), there is still no provision that authorizes attorney fees incurred on appeal, which was the key finding in both *Bobby Berosini, Ltd.* and *Bd. of Gallery of History, Inc*. Further, the State Engineer's discussion of NRAP 38 is not irrelevant. Rather, NRAP 38 illustrates the limited circumstances under which appellate fees are *authorized* and only from Nevada's *appellate* courts. This Court conducted this same analysis in both *Bobby Berosini, Ltd.* and *Bd. of Gallery of History, Inc*., finding that NRAP 38(b) "limits attorney's fees on appeal to those instances where an appeal has been taken in a frivolous manner," thereby limiting the applicability and scope of NRS 18.010 to fees incurred at the district court. *See* 114 Nev. at 1356–57; *see also* 116 Nev. at 288–89, 994 P.2d at 1150.

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The district court erred in awarding attorney fees incurred by St. Clair on appeal as NRS 18.010(2)(b) does not provide for appellate fees, and NRAP 38(b) explicitly limits the availability of such appellate fees to frivolous appeals. This provides yet another ground upon which the district court's decision should be reversed.

D. The District Court Erred in Awarding Fees as St. Clair's Motion was Untimely Pursuant to NRCP 54(d)(2)(B)

St. Clair's Motion for Attorneys' Fees was untimely pursuant to NRCP 54(d)(2)(B). St. Clair fails to assert a cogent argument for why this unambiguous rule should not apply here. The fact is St. Clair filed his Motion for Attorneys' Fees exceedingly late, in violation of NRCP 54(d)(2)(B).

St. Clair's primary argument rests on the assertion that the State Engineer did not "make a claim of unfair prejudice." Answering Brief, pp. 21–22. Any prejudice to the litigants caused by an untimely motion for attorney fees is irrelevant.[2] NRCP 54(d)(2)(B), as in effect at the time of the district court's order, is absolutely devoid of any unfair prejudice

[2] Due to word limitations, the State Engineer does not address waiver and actual prejudice to the State Engineer. If requested, the State Engineer can address these arguments through additional briefing.

requirement in order for the 20-day deadline to apply. NRCP 54(d)(2)(B), Nev. Rev. Stat. Court Rules Vol. I (2017) (amended 2019). Rather, this deadline is unambiguous, requiring that a motion for attorney fees "must be filed no later than 20 days after notice of entry of judgment is served" unless a statute provides otherwise. *Id*.

This deadline (though changed from 20 days to 21 days) remains in the most recent amendments, under NRCP 54(d)(2)(B)(i). Under both the old and new versions of the Rule, a district court is prohibited from extending this deadline after the time has expired. *See* NRCP 54(d)(2)(B), Nev. Rev. Stat. Court Rules Vol. I (2017) (amended 2019); *see also* NRCP 54(d)(2)(C). St. Clair filed his Motion for Attorneys' Fees in clear violation of the timing requirement under NRCP 54, as he filed the motion on July 2, 2018, more than two full years after he served his Notice of Entry of Order on April 27, 2016. JA Vol. IV at 813–30, 855–70.

St. Clair's argument concerning prejudice finds its origins in *Farmers Ins. Exch. v. Pickering*, 104 Nev. 660, 662, 765 P.2d 181, 182 (1988). *See* Answering Brief, pp. 22–23; *see also* JA Vol. IV at 892–93. The *Farmers* case predates NRCP 54(d)(2)(B) by approximately 20 years. Opening Brief, pp. 27–30. At the time this Court issued *Farmers*, there

was no "specific statutory provision governing the time frame in which a party must request attorney's fees." *Farmers Ins. Exch.*, 104 Nev. at 662, 765 P.2d at 181–82. In the absence of a statutory time frame, this Court conducted an analysis in *Farmers* under the district court's discretionary power, and included unfair prejudice as part of that analysis. *Id*.

However, the specific provision governing time frames for fee motions now exists in NRCP 54, and has for over a decade. *See* Order Amending Nevada Rule of Civil Procedure 54, ADKT No. 426 (Nev. Feb. 6, 2009). Since the adoption of NRCP 54(d)(2)(B) in 2008/2009, a bright-line rule exists in Nevada requiring attorney fees motions to be brought within 20/21 days after service of a notice of entry of order. St. Clair clearly violated this rule, and therefore his Motion for Attorneys' Fees was untimely and the district court erred in finding otherwise.

Lastly, St. Clair misquotes unpublished case law in an attempt to support its argument that there is no deadline under NRS 18.010(2)(b). Importantly, by citing both *Barney v. Mt. Rose Heating & Air Conditioning*, 127 Nev. 1118, 373 P.3d 894, 2011 WL 378781, Docket No. 53971, filed Feb. 3, 2011 (unpublished disposition), and *Kajioka v. Kajioka*, 2015 WL 8020898, Docket No. 66560, filed Nov. 25, 2015, *6

(unpublished disposition), St. Clair violates NRAP 36(c)(3). Specifically, both cases predate 2016, and a party may only cite for persuasive value those unpublished dispositions issued by the Supreme Court on or after January 1, 2016. *See* NRAP 36(c)(3). Further, *Kajioka* is an unpublished Court of Appeals decision, and therefore "may not be cited in any Nevada court for any purpose." *Id.*

Nonetheless, *Barney* and *Kajioka* are readily distinguishable. In *Barney*, the Court found that Mt. Rose requested attorney fees in a diligent manner given the key finding on appeal that "judgment creditors may recover all postjudgment attorney fees and costs incurred to enforce a mechanic's lien under NRS 108.237(1)." *Barney* at *2. As discussed above, the district court is prohibited from awarding fees incurred at the Nevada Supreme Court under NRS 18.010(2)(b) and from awarding fees in actions brought pursuant to NRS 533.450. Additionally, Mt. Rose filed its motion on March 20, 2009, prior to final adoption of NRCP 54(d)(2)(B)'s 20-day time limit on May 1, 2009, and did so 7 days after a hearing on remand, thereby meeting the 20-day deadline. *Barney* at *2; *see also* Order Amending Nevada Rule of Civil Procedure 54, ADKT No. 426 (Nev. Feb. 6, 2009).

In *Kajioka*, the Court of Appeals actually found that the district court abused its discretion in awarding attorney fees. *Kajioka* at *6. St. Clair quotes the portion of the decision where the Court of Appeals concluded that the district court did not abuse its discretion in considering Rene Kajioka's motion for *costs* under NRS 18.110. Answering Brief, p. 24. As is undisputed, "under Nevada law, attorney fees are not considered costs." *Smith v. Crown Fin. Serv. of Am.*, 111 Nev. 277, 287, 890 P.2d 769, 776 (1995); *see also* Answering Brief, p. 15.

Specifically, the Court of Appeals held that "although we conclude that the district court did not abuse its discretion in considering Rene's untimely motion for costs, we conclude the district court abused its discretion in awarding costs, to the extent costs were included in the district court's award of fees." *Kajioka* at *6. The Court of Appeals found that the plain language of NRS 18.110(1) "permits the district court to consider a motion for costs after the expiration of the 5-day period." *Kajioka* at *6 (citing *Eberle v. State ex rel. Nell J. Redfield Trust*, 108 Nev. 587, 590, 836 P.2d 67, 69 (1992)). Conversely, in this case, NRCP 54(d)(2)(B) explicitly *prohibits* consideration of a motion for attorney fees after the time to file said motion has expired, and therefore

the district court erred by considering St. Clair's untimely motion for attorney fees. *See* NRCP 54(d)(2)(B), Nev. Rev. Stat. Court Rules Vol. I (2017) (amended 2019); *see also Barbara Ann Hollier Trust v. Shack*, 131 Nev. Adv. Op. 59, 356 P.3d 1085, 1091 (2015) ("Once the 20-day period expires, however, the extra sentence in Nevada's statute would then prohibit any type of extension.").

Importantly, under Nevada law, the district court may decide the motion 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). Pursuant to NRCP 54(d)(2)(A), the time for St. Clair to file an attorney fees motion was not tolled by virtue of the State Engineer's appeal. The State Engineer did not file a notice of appeal until after the 20-day deadline had expired. *See* JA Vol. IV at 831–52. Moreover, St. Clair filed his Motion for Attorneys' Fees more than 50 days after the filing of the Remittitur in the previous appeal, so even if tolled by appeal, the Motion was again improperly late after Remittitur. *Id.*, at 855–70.

Based on the foregoing, the district court erred by considering, and granting, St. Clair's Motion for Attorneys' Fees as it was untimely pursuant to NRCP 54(d)(2)(B).

III. CONCLUSION

Based on the foregoing, and on his Opening Brief, the State Engineer once again respectfully requests that this Court reverse the district court's order awarding attorney fees.

RESPECTFULLY SUBMITTED this 19th day of July, 2019.

AARON D. FORD
Attorney General

By: /s/ James N. Bolotin
JAMES N. BOLOTIN
Senior Deputy Attorney General

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 16 in 14 pitch Century Schoolbook.

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 6,996 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 19th day of July, 2019.

AARON D. FORD
Attorney General

By: /s/ James N. Bolotin
JAMES N. BOLOTIN
Senior Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 19th day of July, 2019, I served a copy of the foregoing APPELLANT'S REPLY BRIEF, by electronic filing to:

Paul G. Taggart, Esq.
Timothy D. O'Connor, Esq.
TAGGART & TAGGART, LTD.
Paul@legaltnt.com
Tim@legaltnt.com

/s/ Dorene A. Wright