IN THE SUPREME COURT OF THE STATE OF NEVADA

WASTE MANAGEMENT OF NEVADA, INC.

Appellant,

vs.

WEST TAYLOR STREET, LLC

Respondent.

_____/

Supreme Court
Case No.: 80841

Second Judicial District Court
Case No. CV12-02995

RESPONDENT'S ANSWERING BRIEF

C. NICHOLAS PEREOS, ESQ.
Nevada Bar No. 13
C. NICHOLAS PEREOS, LTD.
1610 Meadow Wood Lane, Suite 202
Reno, Nevada 89502
T: (775) 329-0678
F: (775) 329-6618
Email: cnpereos@gmail.com
Attorney for Respondent

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

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I. NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusal.

Respondent West Taylor Street, LLC is a Limited Liability Company.

The undersigned counsel C. NICHOLAS PEREOS, LTD. appears in these proceeding on behalf of West Taylor Street, LLC.

DATED this 28th day of July, 2020

BY: _____

C. Nicholas Pereos, Esq.
Nevada Bar No. 13
C. NICHOLAS PEREOS, LTD.
1610 Meadow Wood Lane, Suite 202
Reno, Nevada 89502
(775) 329-0678
Attorney for Respondent

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

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1610 MEADOW WOOD LANE
RENO, NV 89502

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1610 MEADOW WOOD LANE
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C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

NEVADA REVISED STATUTES

SECONDARY SOURCE

IV. RESPONSE TO ROUTING STATEMENT

This appeal does not involve a question of first impression. Appellant is seeking to have this Court substitute its discretion for that of the Trial Court

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

denying an award of attorney fees and cost to Appellant. Unfortunately, Appellant is also trying to raise multiple other issues that should have been the subject of the prior appeal. These issues do not belong within the scope of this Appeal. Despite argumeent of Appellant, the statute regarding collection of garbage liens is not clear on its face as discussed herein. In fact, WM acknowledges the same in its opening brief on Appeal #74876 Appendix Vol 4, Pg 886. However, WM would require this Court to re-visit the statute once again in this appeal, even though the only Order appealed from is that of the denial of an award of attorney fees to WM.

This Appeal seeks to bypass the discretion of the Trial judge that lived with a case for years and impose a new standard under the pretense that the Court should have declared that this statute is not ambiguous as a matter of law, even though this appeal, or the prior appeal, is not focused on the language of the statute, and misstates the previous ruling. In the previous appeal, this Court addressed the applicability of the mechanic's lien statutes to the garbage liens (an issue of first impression); however, it didn't make any ruling concerning the "plain language" of the statute, nor did it dismiss

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

Respondent's case as a result of its decision. Is this Court now going to revisit the first appeal and address the language of the statute? For instance, the statute does not address the window time frame from the delinquency of the debt to the recording of the lien but does state that the lien is not perfected until the Notice is recorded and mailed! NRS 444.520. The Supreme Court never addressed the issue concerning the impact of the delinquency on a subsequent purchaser without notice prior to the perfection of the lien. Nor did it hold that WTS' lawsuit contradicted the plain language of the statute or that WTS's claims were not brought in good faith, either at the time of filing of its Complaint or as a result of the Court's ruling in the prior Appeal. WM seeks a ruling on statutory interpretation to be applied retroactively (also ignoring no such prior argument by WM and that Respondent acted in bad faith by the filing of the Complaint or refusing the Offer of Judgment. There is no law to support such a retroactive application, or to support a finding that the District Court abused its discretion by failing to make a retroactive application. The sole issue on appeal is whether the Trial Court abused its discretion in refusing to award attorney fees now appealed.

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

V. STATEMENT OF ISSUES

1. Was there an abuse of discretion at the Trial Court in failing to award attorney fees based upon its historical knowledge of the case?

2. Was the Offer of Judgment deficient thereby failing to support an award of attorney fees under NRCP 68?

3. Was Waste Management over-reaching in connection with its claim for attorney fees?

4. Can Waste Management recover attorney fees without securing a judgment?

5. Does the substantial benefit doctrine support a denial of the award of attorney fees?

VI. STATEMENT OF THE CASE

This action was started in 2012 based on the recording of liens by WM on the property of West Taylor Street, LLC (referred as WTS). The action attacked the legitimacy of the liens. WM filed additional liens against the property precipitating a Second Amended Complaint (SAC). Appendix Vol 1, Pg 048. The SAC sought to adjudicate the legitimacy of the liens, the

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

recording of the liens, and for Slander of Title. Meanwhile, there were repeated discrepancies regarding the billings for the amounts owed. Appendix Vol 1, Pg 227-229; Appendix Vol 3, Pg 561-568. WTS argued that the liens were improper, questioning the amounts and WM's practices pursuing recovery for the alleged debts. It is undisputed that WM was billing for service to residences that were vacant. Appendix Vol 3, Pg 562-563; Vol 3, Pg 556-558; Vol 4, Pg 739-740. WM never filed a counterclaim to foreclose the liens and the Trial Court never adjudicated the amounts of the lien based on affirmation by WM's counsel that WM was abandoning its money claims and would not pursue the claims on a go forward basis. Appendix Vol 5, Pg 983-988. The Court issued an Order (not Judgment) dismissing the action without adjudicating the amount of any liens or other claimed monies due. Appendix Vol 5, Pg 1006.

After Summary Judgment, Appendix Vol 1, Pg 130, coupled with the denying Reconsideration Motions, Appendix Vol 6, Pg 1249, WM appeals. The appeal was denied. Appendix Vol 5, Pg 1041. After that dismissal, WM filed a Writ of Mandamus attacking that same decision. Appendix Vol 5, Pg

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

1043/1120/1153. Clearly, WM was seeking to appeal the decision of the Trial Court that mandated compliance with Chapter 108 of NRS. The Rule 68 offer never addressed any appeal activities. It was clear that WM intended to continue litigation, and that the case would not have been resolved by its acceptance. Appendix Vol 5, Pg 1059. During the proceeding, WM filed a Motion for Summary Judgment on the Slander of Title claim. Appendix Vol 2, Pg 305+. The motion was denied because of the dispute on the alleged debt. Appendix Vol 3, Pg 562+.

WTS is a corporation owned by a Trust created by its attorney to whom there is no beneficial interest. During the course of the litigation the Trust was billed for fees and costs. These fees and costs became the basis for the Slander of Title which was later abandoned after disqualification of counsel. A Cost Memorandum was never filed by WTS given the agreements of counsel leading up to the dismissal of the Slander of Title claim.

Following the Supreme Court's decision, WM filed Motions to vacate and judgment requests. Appendix Vol 5, Pg 0981. The Court held oral arguments at which point in time WM declared it was abandoning its claims

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

and not pursuing any recovery thereunder. Accordingly, the Court concluded the debt was moot and need not adjudicate the amount of the debt or the liens and also ruled that a judgment would not be issued. Instead, the Trial Court dismissed the case.

On Christmas Eve WM filed a Memorandum of Costs requiring a response within two calendars days (NRS 18.110) and seeking to collect non-recoverable costs for its earlier appeals. Appendix Vol 5, Pg 1035/1043. In other words, WM sought to collect costs and fees that had already been denied and knew not to be collectable. (See Rules of Professional Conduct 3.3/3.4) The Court retaxed costs. Appendix Vol 6, Pg 1209. On the day after Christmas, WM filed a Motion for Attorney Fees and Costs. Appendix Vol 5, Pg 1045. The Trial Court denied the Motion for Attorney Fees having presided over the case since inception. Appendix Vol 5, Pg 1215. WM appeals.

VII. STATEMENT OF THE FACTS

Before filing the lawsuit, WTS sought unsuccessfully to resolve the issues with WM. After WTS acquired the property, it realized it was not receiving bills for garbage. WTS contacted WM whereupon WM

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

acknowledged mailing to an incorrect address. The account was then settled with WM; however, WM proceeded to later lien the property for amounts that were part of the settlement, and also sought to collect late fees and interest thereon. Appendix Vol 5, Pg 1223/1125-1132. Two years later, with no explanation, WM recorded its first lien. Appendix Vol 5, Pg 1134. WTS sent requests for explanation as to the basis for the liens. Appendix Vol 5, Pg 1136/1138. Eventually, WM provided a much delayed response , whereupon WTS provided WM with a full accounting with checks numbers showing payment. Appendix Vol 5 Pg 1140. In response, WM recorded another lien on the property for twice the amount of the first lien. Appendix Vol 5, Pg 1146. Given the law as <u>now</u> defined by this Court, WM has an indefinite amount of time to file an action to collect on the lien as the lien exists in perpetuity! (See 135 Nev Adv Op 21) Obviously, any resolution of this dispute requires a lawsuit! Clearly, WM had no intent of correcting its records, addressing the legitimacy of the liens, or seeking a resolution short of a lawsuit. The liens were $488.47 and $859.78. Appendix Vol 5, Pg 1134/1147.

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

Initially, WTS assumed the account was cleared and resolved, but, WM continued to carry the account delinquent. Appendix Vol 5, Pg 1132. After explanation letters WTS assumed the matter was resolved (May 2010), but WM filed another lien precipating a second letter. Appendix Vol 5, Pg 1136. After the lawsuit was pending, WM filed a third lien. The amount due on the liens date back to 2007. WM was billing for disposal services to a vacant property contrary to the terms of its own franchise agreement. Appendix Vol 5, Pg 1150-1151. Since the amount due WM was never adjudicated, the Trial Court never addressed the franchise agreement that provided that garbage service would not accrue when the property was vacant, Appendix Vol 5, Pg 1150-1151, WM subsequently abandoned its liens and claims of monies against WTS. Obviously, they did not want the Court to adjudicate the issue concerning billing for vacant property.

After October 2015 ruling by the Trial Court WM sought to appeal that Order. The appeal was dismissed and each party was to bear its own costs and attorney fees. Appendix Vol 5, Pg 1152. Unhappy with the decision on perfection of the lien, and the first appeal dismissed, WM filed a Writ of

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
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C. NICHOLAS PEREOS, LTD.
1610 Meadow Wood Lane, Suite 202
Reno, Nevada 89502
T: (775) 329-0678
F: (775) 329-6618
Email: cnpereos@gmail.com
Attorney for Respondent

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

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Mandamus which was also dismissed by this Court. Appendix Vol 5, Pg 1155. It should be noted that it served WTS' agenda to have the Supreme Court resolve these issues of first impression before proceeding any further with the Slander of Title case, as a reversal by this Court would have impacted any positive jury findings. The case went forward on the Slander of Title claim, WM did not discharge the debt. Appendix Vol 5, Pg 1158-1164. WM did not acknowledge the debt was discharged until it filed its last pleadings with the Court. Eventually, WM acknowledged that the debt was discharged, which convinced the Court to issue an Order of Dismissal without adjudicating the legitimacy of the debt or the practices of WM!

During the pendency of the action, WM served a Rule 68 Offer on July 27, 2017. Meanwhile, WM had already sought on two prior occasions to appeal. The Offer of Judgement failed to address the decision of the Trial Court relating to the perfection of the lien and thus could only be read as a partial settlement, not a global one, leaving WM free to appeal the decision of the Trial Court, particularly given its course of conduct to date. Accordingly, the Offer of Judgment did not bring an end to the litigation. The Slander of

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

Title was voluntarily dismissed by agreement on November 10, 2017 after disqualification of trial counsel with an understanding that each party would bears it own costs and fees. Appendix Vol 5, Pg 1166. WM failed to disclose it would seek relief despite the parties understanding.

With WM's abandoning its claim for collection of monies, WTS did secure a benefit through the pursuit of this action. Finally, WM has since abandoned its long-term practice of seeking collection for garbage fees for vacant units that are not "producing garbage", at least in regard to WTS; it is WTS's hope and intent that this lawsuit deters WM from continuing to levy illegal costs, fees and liens against other property and homeowners in the City of Reno and other areas served by WM's franchise agreement. Given the impact of the lower court decision on WM, it solicited the aid of Republic Disposal to intervene in the first appeal, confirming this argument that the acceptance of the offer would not have ended this litigation!

VIII. ARGUMENT

A. Introduction

In a desperate attempt to recover non-recoverable costs that this

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

Supreme Court ruled were to be absorbed by each party, WM filed a Cost Memorandum on 12/23/19 Christmas Eve. After being "called out" on this conduct, they modified their costs demand. Consistent with its ongoing "scorched-earth" tactics, WM then filed its application for attorney fees on 12/26/19, seeking to collect attorney fees for work beyond the window period permitted for recovery. The Court denied the attorney fees. WM now complains that the Trial Court abused its discretion alleging the statute is not ambiguous, even though the statute does not explain the perpetuity of the lien as it impacts a subsequent purchaser without notice, and that issue was never adjudicated! Furthewrmore, WM does not want anyone to challenge their practices and seeks to have this Court substitute its judgment for the Trial Court.

This legal action is one of first impression. Clearly, NRS 444.520 incorporates mechanic lien statutes-Chapter 108-relating to foreclosure of the garbage lien. At the time of the Complaint, it was not clear how Chapter 108 applies. It was only after this Court ruling that a distinction between the concept of "perfection of lien" versus "foreclosure of the lien" was applied to

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

the statute. The attorneys for WM never made that distinction in any argument or brief. Appendix Vol 1, Pg 76-117; Vol 4 Pg 877. This case also involved other issues of first impression concerning the State delegating its enforcement powers to a profit-making corporation.

The initial success in this lawsuit benefitted more than WTS, WM is a private corporation hired for garbage collection that holds a monopoly over the entire community of garbage users, most of whom have not enough power or money to contest improperly imposed charges, fees, or liens, which is why WM enlisted the help of Republic Disposal Vol 5, Pg 979. Republic Disposal raised new issues. WM now seeks to have this Court substitute its judgment and discretion for that of the Trial Court, further impeding the ability of property owners, homeowners and tenants who are required by law to use WM's services to challenge its inaccurate and excessive bills, late fees, and other improper business practices.

1. Language of the Statute

WM argues that the clear language of the statutes can only lead to the conclusion that the filing of this lawsuit was baseless. Although this

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

factor is not solely determinative, addressing the statute may be informative. Before this Court can conclude that the lawsuit was baseless, one would have to decide if any money was owed to WM supporting their numerous liens. Given the fact that WM elected not to have the lower Court make that decision as it abandoned its claim for money owed coupled with discharging the liens, one can only now guess if the liens were legitimate and the lawsuit baseless?? After all, no one can contest the fact that the Trial Court could strike down the liens if money was not owed! Notwithstanding, there are problems with the statute that would necessitate judicial intervention. The statute indicates that the unpaid fees represent a "perpetual lien" but the statute does not address the priority of this perpetual lien before its perfection! NRS 444.520. The statute does not address the impact of this lien on bona fide purchaser without notice. The statute states that the garbage lien is superior to other liens but then goes on to require its perfection. How do you reconcile this statute's language of superiority with NRS 111.315 - 111.325, which also reqires recording of liens for perfection, or the provisions of NRS 105, which provides for recording of public utilities' liens in order to perfect them. The statute is silent! The statute

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

does discuss the necessity for perfecting the lien. The statute indicates that the lien in not "effective" until it is perfected. How is that language reconciled with the earlier language stating that it is superior to all liens or NRS 111.315, etc., or NRS 105? Therein lies inconsistencies in the statute. In one paragraph it indicates the lien can not be extinguished by the foreclosure of an earlier lien but another paragraph indicates the lien is not effective until it is perfected. In other words, inherent in the language of the statute exists ambiguities.

The Supreme Court held that the notice and filing requirements for mechanic's liens under NRS 108 did not apply to NRS 444, but did not indicate what notice or filing requirements should be applied. WM tries to argue that WM's liens are both perpetual and have priority over all other liens regardless of whether they are recorded or perfected under NRS 444.520(4), which would be unprecedented for any types of liens and inconsistent with the need to perfect! As noted above, NRS 105 requires the filing of public utility liens in order to establish their priority and effectiveness.

NRS 105.040 Effective Date of Perfection or Notice.

> 1. The perfection or notice provided by a security instrument filed pursuant ot NRS 105.030 is effective from the date of presentation for filing until the interest granted as security is released by the filing of a termination statement or a release or

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

> reconveyance of all or a part of the property signed by the secured party or trustee. No renewal, refiling or continuation statement is required to continue this effectiveness.
>
> 2. Perfection or notice provided by a security instrument covering real or personal property located in this state which was filed with the Secretary of State or recorded in the office of a county recorder before October 1, 1995, or which was filed or recorded before March 1, 1967, in compliance with the law in effect at the time of its filing or recordation, remains effective for the period provided by7 the law in effect at the time of its filing or recordation.
>
> 3. Such an instrument may be filed anew pursuant to NRS 105.030, and if so filed has the effect given to security instruments originally filed pursuant to NRS 105.010 to 105.080, inclusive. The priority of such a filing dates from the time that the security interest was first filed with the Secretary of State or recorded in the office of a county recorder and not from the date the instrument is filed anew pursuant to NRS 105.030.

In *Leven v Frey,* 168 P.3d 712, 716 (2007), the Court held:

> When construing an ambiguous statutory provision, this court determines the meaning of the words used in a statute by "examining the context and the spirit of the law or the causes which induced the Legislature to enact it. The entire subject matter and policy may be involved as an interpretive aid."[18] Thus, in interpreting a statute, this court considers the statute's multiple legislative provisions as a whole.[19] Additionally, statutory interpretaition should not render any part of a statute meaningless, and a statute's language "should not be read to produce absurd or unreasonable results."[20]

The fact that the Supreme Court ruled that the rules for perfection of a mechanics lien under NRS 108 does not apply to a garbage lien under NRS 444 does not remove any and all requirement for the perfection of such a lien in order to enforce it. Such an interpretation would render NRS 444.520(4) null and void.

In discussing the effectiveness of a late-filed tax lien, the court in

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

State Dep't of Taxation v Kawahara, 131 Nev. Adv. Op. 42, 351 P.3d 746, 748 (2015) held:

> At common law, lien priority depends upon the time that liens attach or become perfected: "first in time, first in right." 51 Am.Jr.2d *Liens* § 70 (2011). Statutes may modify or abolish the "first in time, first in right" rule. *Id.* Under NRS 360.473(2), a tax "lien has the effect and priority of a judgment lien."[2] This court has acknowledged that "a judgment creditor is not within the class designated by the recording statute for protection against an unrecorded conveyance." *Sturgill v Indus. Painting Corp. of Nev.,* 82 Nev. 61, 64, 410 P.2d 759, 761 (1966). Here because the Department's tax lien is fiven the effect of a judgment lien, NRS 360.473(2), the Department is not protected by Nevada's recording statutes, *Sturgill,* 82 Nev. At 64, 410 P.2d at 761. Because Nevada's recording statutes do not protect the Department against unrecorded vonveyances, the rule applicable to this case if the common-law rule of "first in time, first in right." The Kawaharas' deed of trust was valid and attached in 2009, when their interest was created.[3] The Department's tax lien certificates were filed, and thereby attached, in 22010. See NRS 360.473(2). Therefore, the Kawaharas' deed of trust has priority over the Department's tax lien.

There is nothing in NRS 444, or in Nevada's statutory scheme in general, that would allow Waste Management to claim priority of a lien without first requiring the perfection of such lien. The fact that NRS 444 did not specify an existing statutory method of perfection does not mean that Waste Management, like the Department of Taxation, is not bound by the general statutes regulating the filing of real property liens.

The facts demonstrate the account was resolved in July 2007. Appendix Vol 5, Pg 1123/1125-1130. Notwithstanding this resolution, WM

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

recorded a lien. WM also sought to collect garbage fees when the unit was vacant. Appendix Vol 5, Pg 1150-1151. The Court never addressed these issues given the later abandonment of WM to pursue garbage fees. In other words, there has been no adjudication of these issues nor has WM demonstrated a lack of merit concerning the legitimacy of these factual issues. In fact, WM acknowledges that a dispute existed. Appendix Vol 1, Pg 108-109. The argument that the filing of the lawsuit was baseless ignores the facts of this case but WM seeks to have the Court focus on arguments of counsel and penalize counsel seeking judicial intervention for a resolution of this dispute. In other words, the case involves more than just the issue concerning the language of the statute but also the facts giving rise to the recording of the lien.

WM's position in this Appeal is that the statute is clear and unambiguous. However, that is inconsistent with its prior position to the Court. The net effect of the Supreme Court decision is to provide WM with an indefinite period in which to pursue a lawsuit to collect the debt. WM never took that position. Appendix Vol 1, Pg 0092. The decision of the Supreme Court was that the statute only incorporated foreclosure requirement of NRS

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

108.239. WM position to the Trial Court was that NRS 444.520 incorporated the manner of foreclosure set forth in the Mechanic's Lien Statutes. Appendix Vol 1, Pg 0093. The decision of this Court concludes there is no deadline under the statute to file its lien. However, WM acknowledged to the Trial Court they were not arguing "no deadline" to file the garbage lien. Appendix Vol 1, Pg 0094. In other words, WM's counsel did not previously share the perception today that the statute was clear and unambiguous! More importantly, how does this "no deadline" reconcile with NRS 111.315, etc!

This Court went on to observe that the lower Court relied upon the case of *State v Yellow Jacket Silver Mining Company*, 14 Nev 220 (1879). In its decision, this Court declared the Yellow Jacket decision was outdated and no longer precedent observing that Nevada now has one action rule. There are no prior decisions of this Court distancing itself from Yellow Jacket or overruling it based on the one action rule, but WM would have this Court now believe that use of Yellow Jacket case for precedent was also baseless. In *Nev. Yellow Cab Corp. v. Eight Judicial District Court,* 132 Nev. Adv. Op. 77, 383 P.3d 246, 252-3 (2016), the court noted that "[i]t is not the duty of this court

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

to determine whether rules adopted in statutory amendments apply retroactively based on equitable factors." WM has cited no factors, equitable or otherwise, that show that WTS acted improperly in citing the Yellow Jacket case in analyzing the language of NRS 444.520.

In summary, WM argues the filing of the lawsuit was baseless given the decision of this Court as "WTS claimed the statute of limitation applied to enforcement of WM's garbage lien even though the liens were expressly stated as perpetual liens". Opening Brief, Pg 4, Line 12. The issue isn't the perpetual nature of the lien but its effectiveness (perfection) and that statute declares the lien is not effective until it is perfected. How does this impact intervening lien claimants or a bona fide purchasers without notice? It is disturbing that we are now going to revisit NRS 444.520 when the issue before the Court is the discretion of the Trial Judge! The issue in the case below was also the debt if any!

2. Appellant Must Demonstrate Abuse of Discretion

In the Trial Court's Order Denying Attorney Fees, the Trial Court clearly and concisely examined the application for NRCP 68 and the factors set

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
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forth in *Beatty v Thomas*, 99 Nev. 579 (1983) to determine whether an award of attorney fees was warranted, and the factors set forth in *Brunzell v Golden Gate Nat. Bank*, 85 Nev. 345 (1969) to determine whether the amount of fees sought were reasonable. The judge noted that "the District Court has broad discretion to grant the request for attorney fees, so long as all appropriate factors are considered. *Yamaha Motor Co. U.S.A. v ArnoultI*, 114 Nev. 233, 252, fn. 16 (1998)." The Trial Court first concluded that "Unlike most private parties, WTS was able to afford litigation and successfully fought to have the liens removed. As such the Court finds that WTS's claim was brought in good faith after discussing the attempts to resolve the issue without litigation.

In regard to the second Beatty factor, the Court concluded that "WTS did not have to accept the Offer as settlement is voluntary. WTS's decision to reject the offered amount, after years of ongoing litigation, does not appear to be unreasonable or made in bad faith." The Court also concluded an award was not justified under the circumstances of the case which was played out by the numerous appeal attempts! While WTS disagrees with the Trial Court's analysis concerning the amount of the fees, there is no question that

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

the Court's analysis was made after considering all the appropriate factors in this case.

In *MEI-GSR Holdings, LLC v Peppermill*, 416 P.3d 249 (2018), this Court noted that upon appeal, it will examine the District Court's analysis and application of the *Beattie* and *Brunzell* factors.

> "Although explicit findings with respect to these factors are preferred, the District Court's failure to make explicit findings is not a per se abuse of discretion." *Wynn v Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001). "Instead, the District Court need only demonstrate that it considered the required factors, and the award must be supported by substantial evidence." *Logan v Abe*, 131 Nev. 260, 266, 350 P. 3d 1139, 1143 (2015).
>
> Here, the District Court's order awarding attorney fees to Peppermill commented favorably on the quality of the work by the attorneys for both parties, recognized that the case involved complex issues regarding the NTSA, and provided that it has considered the necessary documents and enumerated factors under *Beattie* and *Brunzell*. The parties also extensively argued the factors below. Finally, Peppermill submitted documentation of its attorneys' invoices. Accordingly, we conclude that the District Court demonstrated that it considered the required factors. See *Logan*, 131 Nev. At 266-67, 350 P.3d at 1143; *Uniroyal Goodrich Tire Co. v Mercer*, 111 Nev. 318, 324, 890 P.2d 785, 789 (1995), *superseded by statute on other grounds as stated in RTTC Commc'ns, LLC v Saratoga Flier, Inc.* 121 Nev. 34, 110 P.3d 24 (2005), Upon review of the record, we further conclude that the District Court's award of attorney fees is supported by substantial evidence. See *Yamaha Motor Co. v Arnoult*, 114 Nev. 233, 252 n.16, 955 P.2d 661 (1998) (providing that "no one factor under *Beattie* is determinative"); see also *Schwartz v Estate of Greenspun*, 110 Nev. 1042, 1049, 881 P.2d 638, 642 (1994) (providing that the District Court "need not ... make explicity findings as to all of the factors where support for an implicit ruling regarding one or more of the factors is clear on the record").

Id at 258-9.

"(A) District Court's award of attorney fees will not be overturned

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
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absent a manifest abuse of discretion." *Bartmettler v Reno Air, Inc.,* 114 Nev. 441, 452, 956 P.2d 1382, 1389 (1998). In awarding attorney fees, the District Court must state its basis for the amount. *Henry Prods., Inc. v Tarmu*, 114 Nev. 1017, 1020, 967 P.2d 444, 446 (1998). Here, the District Court's Order clearly sets forth its reasoning for denying the award of attorney fees under NRCP 68. WM attempts to have this Court substitute its own discretion for the of the District Court by claiming that this Court's ruling in WM's prior appeal creates an issue of law requiring de novo review and mandating an award! However, WM does not and can not show how the Supreme Court decision (entered after the Offer of Judgment was refused) can be retroactively applied as proof that WTS failed to act in good faith either in filing its claims or refusing to accept the Offer of Judgment.

3. The Offer of Judgment is Deficient and Does Not Support an Award of Attorney Fees Under NRCP 68

The purpose of an Offer of Judgement is to resolve litigation. In reviewing the subject Offer of Judgement, there is no indication that it would constitute final settlement of all claims in this case. There is nothing in this document that prevents WM from pursuing an appeal to the judgements

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

IN THE SUPREME COURT OF THE STATE OF NEVADA

WASTE MANAGEMENT OF NEVADA, INC.

Appellant,

vs.

WEST TAYLOR STREET, LLC

Respondent.

_____/

Supreme Court
Case No.: 80841

Second Judicial District Court
Case No. CV12-02995

RESPONDENT'S ANSWERING BRIEF

C. NICHOLAS PEREOS, ESQ.
Nevada Bar No. 13
C. NICHOLAS PEREOS, LTD.
1610 Meadow Wood Lane, Suite 202
Reno, Nevada 89502
T: (775) 329-0678
F: (775) 329-6618
Email: cnpereos@gmail.com
Attorney for Respondent

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

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theretofore entered. In fact, the history shows that WM made two unsuccessful attempts to appeal. Meanwhile, the Stipulation drafted by WM confirmed the agreement with WTS's counsel that the matter would be dismissed with each party to bear its own costs and fees. WTS's counsel does not argue that the stipulation was not filed with the Court but this Court will observe no other document was filed showing a stipulated dismissal of the Slander of Title claims! (To avoid disparagement, counsel will not comment on the non-filing of the subject stipulation)

NRCP 68 allows the award of attorney fees when a party obtains a judgement greater than that which was set forth in the offer of judgement. The rule does not mandate there be an award of attorney fees. In this case, WM was successful on its appeal reversing the Trial Court. However, WM did not win an award or obtain a final judgement against WTS. Meanwhile, WTS was successful in discharging the debt at the last hearing thereby supporting the Trial Court decision. The fact the Offer failed to address the forward activity of WM as it related to appeals supports the Trial Court's specific analysis and conclusion in its Order that WTS did not act unreasonably in

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

refusing to accept the Offer of Judgment. The Nevada Supreme Court has consistently held that NRCP 68 is not to be used as a weapon so as to discourage one from pursing valid legal action.

In *Frazier v. Drake*, 357 P.3d 365, 372-73, 131 Nev 632 (2015), the Court concluded that a plaintiff who did not achieve a final judgment greater than a prior settlement offer was not liable for attorney fees under NRCP 68.

> If the party to whom the offer is made rejects it and then fails to obtain a more favorable judgment at trial, the district court may order that party to pay the offeror "reasonable attorney fees." NRCP 68(f)(2); NRS 17.115(4)(d)(3). Although the decision to award such fees lies within the district court's discretion, the Nevada Supreme Court has emphasized that, while Nevada's offer of judgment provisions are designed to encourage settlement, they should not be used as a mechanism to unfairly force plaintiffs to forego legitimate claims. *Beattie v. Thomas*, 99 Nev. 579, 588–89, 668 P.2d 268, 274 (1983).

(Emphasis added)

As the Nevada Supreme Court recognized, "(i)f the good faith of either party in litigating liability and/or damage issues is not taken in account, offers would have the effect of unfairly forcing litigants to forego legitimate claims." *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 252, 955 P.2d at 673 (1998). *Frazier v. Drake*, 357 P.3d 365, 131 Nev. Adv. Op. 64 (Nev. App.

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

2015). The fact that WTS was successful on the removal of the debt substantiates the Trial Court's decision that WTS's claims were brought in good faith, and that the Order denying attorney fees was not an abuse of discretion.

Three recent unpublished orders from the Nevada District Court and the Nevada Court of Appeals also hold that awarding attorney fees under NRCP 68 is improper absent evidence of lack of good faith or unreasonableness.

In *Assurance Co. of America v. Ironshore Specialty Ins. Co*, U.S. Dist. Ct (D. Nev. August 26, 2019) Case No.: 2:13-cv-2191-GMN-CWH, the court noted:

> Upon review of the (*Beatty* and *Brunzell*) factors, the Court declines to award attorney's fees in this case. Although Plaintiffs' offer of judgment was reasonable and brought in good faith, the court cannot conclude that Defendant's decision to reject the offer of judgment was "grossly unreasonable." *Beattie*, 668 P.2d at 247. This case presented difficult legal issues, which the parties were simultaneously litigating in two other parallel actions. At the time of Plaintiffs' offer of judgment, Defendant had obtained a favorable ruling in its California action and later obtained a similar ruling from a different judge in this district. The legal landscape between the parties' cases at the time Plaintiffs made their offer was far from settled. The Court therefore finds that Defendant litigated in good faith.

The analysis of this Court heeds true here!

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

> The Court finds that the *Beattie* factors on balance weigh against an award in this case. See *Gallagher v. Crystal Bay Casino, LLC*, No. 3:08-CV-00055-ECR, 2012 WL 1409244, at *5 (D. Nev. Apr. 20, 2012) (stating that when the factors weigh both for and against attorney's fees, "the Court is loath to award attorneys' fees in the absence of bad faith or unreasonableness . . .").

(Emphasis added.)

Had WM actually acted in good faith by following through with the Stipulation and Order as it had promised to do, this appeal would never have been necessary. Had WM proved up a debt, it would have more merit to a claim!

In *Green v. Buchanan*, Nev. Ct. App. December 11, 2017 (NV. Ct. App. 2017), the court stated:

> The record reflects that the district court did not abuse its discretion in determining that Green brought her claim in good faith. The parties stipulated that Buchanan was 100 percent at fault and the jury awarded Green $5,000, demonstrating that she suffered at least some damage; therefore, Green brought her claim in good faith. Additionally, because Green was not at fault and had incurred roughly $70,000 in past medical expenses, it was not grossly unreasonable to reject Buchanan's $35,000 offer and to choose to pursue additional damages claim before a jury. (Emphasis added.)

In a recent decision/order by the Court of Appeals only a few months ago, the Court addressed a case where attorney fees were denied in a case where the party claiming fees had filed multiple unnecessary motions and other actions that greatly increased costs and the course of the litigation. In

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

Berberich ex rel. 4499 Weitzman Place Tr. v. S. Highlands Cmty. Ass'n., Order Denying Petitions for Writ Relief No. 77640-COA, No. 78064-COA, No. 78069-COA, No. 78523-COA and No. 78541-COA (Nev. App. December 10, 2019), the court noted:

> Having reviewed the protracted history of the litigation below, we cannot conclude that no reasonable judge would have reached a similar decision to that of the district court under the circumstances of this case. *See Leavitt*, 130 Nev. at 509, 330 P.3d at 5. Multiple actions taken by Berberich and Brauer during the litigation evince an unreasonable and vexatious intent to multiply the proceedings from the outset of the case.

Id. at pp. 4-7. Emphasis added.

This Court will also observe that WTS did not file multiple and vexatious motions. This Court will also observe that WM sought to collect costs despite the Order of the Supreme Court indicating that the parties were to absorb their own costs and fees; that WM also sought to collect the refundable bond as Court fees; that WM sought to appeal on several occasions the decisions of this Court; and that WM released the liens and represented to the Court that it would not pursue further collection activities in order to secure an order for dismissal. Clearly, WM has failed to demonstrate a lack of good faith by WTS and is not entitled to attorney fees under NRCP 68.

4. Waste Management is Over-reaching in Seeking to Collect Fees and its Fees Were Unreasonable and Duplicative

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

In the case of *O'Connell v. Wynn Las Vegas, LLC*, 429 P.3d 664 (Nev. App. 2018), the court applied both the Beattie factors and the Brunzell factors (*Brunzell v. Golden Gate National Bank*, 85 Nev. 345455 P.2d 31 (1969), concerning the reasonableness of the award of fees), after a final judgment was entered in an amount less than a previous offer of judgment. The Court noted the Trial judge's discretion which discretion can support a no award decision.

> [D]istrict courts may take almost any sensible approach or apply any logical method to calculate "a reasonable fee" to award as long as the court weighs the *Brunzell* factors. *See Shuette,* 121 Nev. at 864-65, 124 P.3d at 548-49 (internal quotation marks omitted).
>
> . . .
>
> We note that the cases and methods used within this opinion to determine the amount of an attorney fees award are instructive and not exhaustive. Trial courts should also keep in mind that their awards of attorney fees should be made on a case-by-case basis by applying the considerations described herein to the evidence provided, and that an adequate record will be critical to facilitate appellate review. *Cf.* Logan v. Abe, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015) (noting that while the district court has discretion, "the award must be supported by substantial evidence").
>
> ....
>
> Additionally, O'Connell's claim for attorney fees is limited to those fees earned post-offer.[8] *See* NRCP 68(f)(2).

Id. at 671, 673.

The Trial Court herein never got to this issue!

5. Waste Management Lacks a Judgment

The Court expressly stated in open court it was not issuing a judgement.

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

The Supreme Court has defined a prevailing party in NRS 18.010 as being a party who secured a judgement in its favor. *Sun Realty v District Court*, 91 Nev 774, 542 P.2d 1072 (1975), *County of Clark v Blanchard Construction Co.*, 98 Nev 488, 653 P.2d 1217 (1982)

> "A party to an action can not be considered a prevailing party within the contemplation of NRS 18.010 while an action has not proceeded to judgement." *N. Nev. Homes, LLC v GL Construction, Inc.*, 422 P.3d 1234 (Nevada 2018)

Although the case does not involve NRS 18.010, these cases are demonstrative of the Supreme Court's thinking regarding a prevailing party.

6. Substantial Benefit Doctrine, Supports Denial of Attorney Fees Award

This lawsuit involve liens that initially amounted to $1,348.25. Even if the Court were to ignore the time involvement by WTS, the amount of attorney fees being sought by WM is indicative of the amount of work invested in this case. How many customers can afford to hire an attorney to pursue a case of this nature and hold WM accountable? It would be cost prohibitive! WM is banking on that concept! A review of the file will demonstrate scorched earth tactics pursued by WM that translate to the legal fees. The fact that WM declared that it is not going to pursue the debt and voluntarily

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

withdrew the liens is indicative of the positive effect that occurred by the filing of the lawsuit and supports the claims of this lawsuit. One can only imagine how many customers have "caved in" to the practices of WM beforehand. One can only imagine the number of "customers" that paid garbage fees for vacant homes during the recession! The actions by WTS in this lawsuit were a result of the questionable activities of WM who has now been notified that those activities will not be unchecked!

WM abandoned its liens and debt against WTS resulting in dismassal of this case. Therefore, there was a substantial benefit to WTS and its tenants who are part of a larger class of beneficiaries affected by WM's practices. It also results in WM changing its practices of improperly imposing fees, late fees and fines even when the property is vacant which extends the benefit to all property owners and renters in the WM service areas.

In *Thomas v. The City of North Las Vegas*, 127 P.3d 1057, 1063-65 (2006), two police officers sued the city for issues arising from collective bargaining agreements.

Substantial benefit doctrine

Nevada follows the American rule that attorney fees may not

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

> be awarded absent a statute, rule, or contract authorizing such award.[10] A judicially created exception to the American rule is the substantial benefit doctrine.[11] This doctrine allows recovery of attorney fees when a successful party confers "a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them.'"[12]
>
> To recover fees under the substantial benefit doctrine, a successful party must demonstrate that: "(1) the class of beneficiaries [is] `small in number and easily identifiable'; (2) `the benefit [can] be traced with some accuracy'; and (3) `the costs [can]... be shifted with some exactitude to those benefiting.'"[16]
>
> However, there have been instances where courts have held that the substantial benefit exception applies to a municipality, and Thomas and Armstrong rely on this line of authority. In *Ex parte Horn,*[21] the plaintiffs successfully prevented the operation of a garbage transfer station in their neighborhood. As a result of the large public interest caused by the plaintiffs' efforts, the City of Birmingham passed a new ordinance regulating and licensing all solid waste facilities in Birmingham. Therefore, the plaintiffs' efforts resulted in a benefit to all residents of the City of Birmingham, and the costs of litigation could be spread accordingly.[22]

(Emphasis added.)

Accordingly, the District Court did not abuse its discretion in holding that WTS's lawsuit conferred a substancial benefit upon a larger class of beneficiaries utilizing WM's garbage services.

It is obvious from the facts that WM was not responsive to a customer's complaints about billing which arises from a corporate attitude by WM that the legal expense to customers would not challenge them. Before this lawsuit, WTS sought a resolution of this dispute. Instead of resolving the problem, WM kept filing new liens and repeated Motions. Filing of these

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

papers speaks volumes to the business practices of WM, not only the timing of these motions but the excessive amounts sought, including attorney fees outside the window time frame from the date that the offer was served to the date of the dismissal of the Slander claim. In other words, the claim for Slander of Title was voluntarily dismissed so WM secured what it wanted at the time of the dismissal. Meanwhile, WM is seeking attorney fees for the Appeal. WM's attorney is also indicating it performed 151.7 hours of work on this matter but his billing from Offer date to Dismissal is 41.7 hours which is substantially less than 151.7 hours sought! Appendix Vol 5, Pg 1102.

After WTS counsel was disqualified as trial attorney, he agreed to dismiss the Slander of Title claims. At not time did WM counsel indicate that he would be reserving his claims for attorney fees under the Offer of Judgment at the time of the discussions leading up to the agreement to dismiss. In fact, a Stipulation was prepared by WM confirming the agreement to dismiss the Slander of Title claim with each party to pay its own costs and fees. Appendix Vol5, Pg 1166. The Stipulation was signed by counsel for WTS and returned to WM, but was never filed in the Trial Record. Appendix Volg, Pg

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

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WM claims it has prevailed in the present case. The reality is, however, that it withdrew its liens and debt; pursued a Writ of Mandamus of appeal that was dismissed; agreed to dismiss the action of Slander of Title without fees; sought a premature appeal which was dismissed. Even if a Court concludes that WM prevailed using these questionable methods, it would have to refile its liens against WTS to collect not only the lien amount but also the attorney fees that trail the lien amount. This is precisely the type of punitive claim that the substantial benefit doctrine and similar equitable analysis are intended to prevent, protecting a class of plaintiffs against the deep pockets of WM and its counsel's "scorched earth" tactics.

IX. SUMMARY OF ARGUMENTS

In summary, the Appeal should be rejected for the following reasons:

1. The pursuit of the case to include the appeal defense resulted in a substantial benefit to the customers as it checked the action of WM.

2. The lawsuit was filed given the attitude of indifference by WM

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

3. There has been no showing of lack of good faith by WTS.

4. WTS's claims were legitimate.

5. WTS was partly successful as the liens were released and the debt abandoned.

6. There is duplication in the attorney fees between pre-Rule 68 offer and post Rule 68 offer.

X. CONCLUSION

Given the foregoing information, how does WM claim there was an abuse of discretion by the Trial Court?

XI. CERTIFICATE OF COMPLIANCE

PURSUANT TO RULE 28.2

1. I hereby certify that this brief complies with the formatting requirement 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 ina proportionally spaced typeface using

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

WordPerfect in 14 font and Times New Roman type.

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 does not exceed 30 pages.

3. Finally, I certify that I have read this appellate brief, and 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 asppendix 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.

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///

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

DATED this 28th day of July, 2020

BY: _____

C. Nicholas Pereos, Esq.
Nevada Bar No. 13
C. NICHOLAS PEREOS, LTD.
1610 Meadow Wood Lane, Suite 202
Reno, Nevada 89502
(775) 329-0678

XII. CERTIFICATE OF SERVICE

PURSUANT TO NEVADA RULES OF APPELLATE PROCEDURE, I certify that I am an employee of C. NICHOLAS PEREOS, LTD., and that on the date listed below, I caused to be served a true copy of the RESPONDENT'S ANSWERING BRIEF on all parties to this action by electronically filing the foregoing with the Clerk of the Court by using the Supreme Court Electronic Filing System which served the following parties electronically:

SIMON LAW, PC
Mark G. Simons, Esq.
6490 S. McCarran Blvd., C-20
Reno, NV 89509

DATED this 28th day of July, 2020

_____
Iris M. Norton