

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE LEGISLATURE OF THE
STATE OF NEVADA; THE STATE
OF NEVADA DEPARTMENT OF
TAXATION; and THE STATE OF
NEVADA DEPARTMENT OF
MOTOR VEHICLES,

Appellants/Cross-Respondents,

vs.

THE HONORABLE JAMES A.
SETTELMAYER; THE HONORABLE
JOE HARDY; THE HONORABLE
HEIDI SEEVERS GANSERT; THE
HONORABLE SCOTT T. HAMMOND;
THE HONORABLE PETE
GOICOECHEA; THE HONORABLE
BEN KIECKHEFER; THE
HONORABLE IRA D. HANSEN; THE
HONORABLE KEITH F. PICKARD, in
their official capacities as members of the
Senate of the State of Nevada and
individually; GREAT BASIN
ENGINEERING CONTRACTORS,
LLC, a Nevada limited liability company;
GOODFELLOW CORPORATION, a
Utah corporation qualified to do business
in the State of Nevada; KIMMIE
CANDY COMPANY, a Nevada
corporation; KEYSTONE CORP., a
Nevada nonprofit corporation;
NATIONAL FEDERATION OF
INDEPENDENT BUSINESS, a
California nonprofit corporation qualified
to do business in the State of Nevada;
NEVADA FRANCHISED AUTO
DEALERS ASSOCIATION, a Nevada

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Case No. 81924

Appeal from First Judicial District
Court, Carson City, Nevada,
Case No. 19 OC 00127 1B

**APPELLANTS/CROSS-
RESPONDENTS' JOINT REPLY
TO RESPONDENTS/CROSS-
APPELLANTS' RESPONSE TO
ORDER TO SHOW CAUSE**

nonprofit corporation; NEVADA TRUCKING ASSOCIATION, INC., a Nevada nonprofit corporation; and RETAIL ASSOCIATION OF NEVADA, a Nevada nonprofit corporation,

Respondents/Cross-Appellants.

**APPELLANTS/CROSS-RESPONDENTS' JOINT REPLY TO
RESPONDENTS/CROSS-APPELLANTS' RESPONSE TO
ORDER TO SHOW CAUSE**

KEVIN C. POWERS

General Counsel
Nevada Bar No. 6781
LEGISLATIVE COUNSEL BUREAU,
LEGAL DIVISION
401 S. Carson St.
Carson City, NV 89701
Tel: (775) 684-6830
Fax: (775) 684-6761
Email: kpowers@lcb.state.nv.us
Attorneys for Appellant/Cross-Respondent Legislature of the State of Nevada and Pending Cross-Respondents Nicole Cannizzaro, in her official capacity as Senate Majority Leader of the Senate of the State of Nevada, and Claire J. Clift, in her official capacity as Secretary of the Senate of the State of Nevada

AARON D. FORD

Attorney General
CRAIG A. NEWBY
Deputy Solicitor General
Nevada Bar No. 8591
OFFICE OF THE ATTORNEY GENERAL
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
Tel: (702) 486-3420
Fax: (702) 486-3768
Email: CNewby@ag.nv.gov
Attorneys for Appellants/Cross-Respondents State of Nevada Department of Taxation and State of Nevada Department of Motor Vehicles and Pending Cross-Respondents Steve Sisolak, in his official capacity as Governor of the State of Nevada, and Kate Marshall, in her official capacity as Lieutenant Governor of the State of Nevada and President of the Senate of the State of Nevada

REPLY

Appellant/Cross-Respondent Legislature of the State of Nevada (“Legislature”), along with pending Cross-Respondents Nicole Cannizzaro, in her official capacity as Senate Majority Leader of the Senate of the State of Nevada, and Claire J. Clift, in her official capacity as Secretary of the Senate of the State of Nevada, by and through their counsel the Legal Division of the Legislative Counsel Bureau under NRS 218F.720 (“LCB Legal”), and Appellants/Cross-Respondents State of Nevada Department of Taxation and State of Nevada Department of Motor Vehicles, along with pending Cross-Respondents Steve Sisolak, in his official capacity as Governor of the State of Nevada, and Kate Marshall, in her official capacity as Lieutenant Governor of the State of Nevada and President of the Senate of the State of Nevada, by and through their counsel the Office of the Attorney General, hereby file this Joint Reply to Respondents/Cross-Appellants’ Response to the Order to Show Cause directing them to show cause why their cross-appeal should not be dismissed for lack of appellate jurisdiction.

BACKGROUND

Respondents/Cross-Appellants (hereafter “Plaintiffs”) brought this action for declaratory and injunctive relief in the district court as a constitutional challenge to Senate Bill No. 542 (SB 542) and Senate Bill No. 551 (SB 551) of the 2019

legislative session. SB 542, 2019 Nev. Stat., ch. 400, § 1, at 2501-02; SB 551, 2019 Nev. Stat., ch. 537, §§ 2, 3, 37, 39, at 3273, 3275, 3294. The Department of Motor Vehicles is empowered by state law with statewide administrative functions under the provisions of SB 542, and the Department of Taxation is empowered by state law with statewide administrative functions under the challenged provisions of SB 551.

In their first amended complaint, Plaintiffs claimed that the bills were unconstitutional because the Senate did not pass the bills by a two-thirds supermajority vote under Article 4, Section 18(2) of the Nevada Constitution. (*Pls.’ Resp. Ex. A at ¶¶ 36-54.*) That constitutional provision requires a supermajority vote of two-thirds of the members elected to each House of the Legislature to pass a bill which “creates, generates, or increases any public revenue in any form, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates.” Nev. Const. art. 4, § 18(2).

In their first amended complaint, Plaintiffs named the Department of Motor Vehicles and the Department of Taxation as Defendants. (*Pls.’ Resp. Ex. A at ¶¶ 20-21.*) Plaintiffs also named the following state officers of the legislative and executive branches as Defendants: (1) Nicole Cannizzaro, in her official capacity as Senate Majority Leader; (2) Claire Clift, in her official capacity as the Secretary

of the Senate; (3) Kate Marshall, in her official capacity as Lieutenant Governor and President of the Senate; and (4) Steve Sisolak, in his official capacity as Governor (hereafter “Individual Legislative and Executive Defendants”). (*Pls.’ Resp. Ex. A at ¶¶ 16-19.*) The Legislature intervened as a Defendant-Intervenor to defend the constitutionality of SB 542 and SB 551.

On October 7, 2020, the district court entered an order and final judgment adjudicating all the claims of all the parties and granting final judgment in favor of Plaintiffs on their claims for declaratory and injunctive relief. (*Pls.’ Resp. Ex. B at 11-12, ¶¶ 1-7.*) The district court declared that SB 542 and SB 551 were bills which create, generate, or increase any public revenue in any form and were subject to the two-thirds supermajority requirement under Article 4, Section 18(2) of the Nevada Constitution. (*Pls.’ Resp. Ex. B at 11, ¶ 1.*) Because the Senate did not pass the bills by a two-thirds supermajority under Article 4, Section 18(2) of the Nevada Constitution, the district court declared that SB 542 and Sections 2, 3, 37, and 39 of SB 551 are unconstitutional and invalid, and the district court enjoined their enforcement. (*Pls.’ Resp. Ex. B at 11, ¶¶ 1-2.*) However, the district court declared that, under the severance doctrine, the remaining provisions of SB 551 are severed and remain in effect. *Id.*

In its order, the district court also concluded that “Plaintiffs are not entitled to recover attorney’s fees as special damages because there was not bad faith in

regard to this matter.” (*Pls.’ Resp. Ex. B at 10.*) As a result, the district court ordered that “Plaintiffs are not entitled to recover attorney’s fees as special damages for bringing their claims for declaratory and injunctive relief and summary judgment is granted in favor of Defendants on any claims to recover attorney’s fees as special damages.” (*Pls.’ Resp. Ex. B at 11, ¶ 3.*)

In its order, the district court also concluded that “as to an award of attorney’s fees and costs, the individual Executive and Legislative Defendants should be dismissed.” (*Pls.’ Resp. Ex. B at 10.*) As a result, the district court ordered that “the individual Executive and Legislative Defendants, the Honorable Nicole Cannizzaro, the Honorable Kate Marshall, the Honorable Claire J. Clift, and the Honorable Steve Sisolak, are dismissed from this action.” (*Pls.’ Resp. Ex. B at 12, ¶ 4.*)

On October 9, 2020, the Legislature filed a notice of appeal, and the Department of Taxation and Department of Motor Vehicles filed a notice of appeal to seek appellate review of the district court’s order which declared SB 542 and Sections 2, 3, 37, and 39 of SB 551 to be unconstitutional and invalid and which enjoined their enforcement.

On October 23, 2020, Plaintiffs filed a notice of cross-appeal to seek appellate review of the district court’s order which: (1) concluded that Plaintiffs are not entitled to recover attorney’s fees as special damages for bringing their claims for

declaratory and injunctive relief; and (2) dismissed the Individual Legislative and Executive Defendants.

On December 7, 2020, this Court entered an Order to Show Cause directing Plaintiffs to show cause why their cross-appeal should not be dismissed for lack of appellate jurisdiction. On January 6, 2021, Plaintiffs filed their Response to the Order to Show Cause.

SUMMARY OF THE ARGUMENT

In their Response, Plaintiffs contend that they have jurisdictional standing to cross-appeal the district court's order because the order denied their rights to recover attorney's fees as special damages against all Defendants. (*Pls.' Resp. at 13-14.*) However, because Plaintiffs did not properly invoke and preserve their rights in the district court to claim attorney's fees as special damages, Plaintiffs waived those rights in the district court and therefore lack jurisdictional standing to pursue a cross-appeal against all Defendants claiming a denial of those rights by the district court. Therefore, this Court should dismiss Plaintiffs' cross-appeal against all Defendants for lack of appellate jurisdiction.

Plaintiffs also contend that they have jurisdictional standing to cross-appeal the district court's order dismissing the Individual Legislative and Executive Defendants because the order "leaves the Plaintiff Senators with no redress for the attorney's fees they incurred as damages based upon the declared unconstitutional

exercise of legislative and executive power by the Individual Defendants.” (*Pls.’ Resp. at 12-13.*) However, as discussed previously, Plaintiffs did not properly invoke and preserve their rights in the district court to claim attorney’s fees as special damages against all Defendants, thereby waiving those rights in the district court. Nevertheless, even if Plaintiffs had not waived their rights in the district court to claim attorney’s fees as special damages, Plaintiffs lack jurisdictional standing to pursue a cross-appeal against the Individual Legislative and Executive Defendants attempting to recover attorney’s fees as special damages because the Individual Legislative and Executive Defendants cannot be held liable for such fees as a matter of law.

In particular, under NRS 41.071 and the separation-of-powers provision of the Nevada Constitution, the Individual Legislative and Executive Defendants are entitled to absolute legislative immunity from liability for all actions relating to the passage and approval of SB 542 and SB 551. As a result, Plaintiffs lack jurisdictional standing to pursue a cross-appeal against them attempting to recover attorney’s fees as special damages because they cannot be held liable for such fees as a matter of law.

Additionally, under NRS 41.032, the Individual Legislative and Executive Defendants are entitled to discretionary-function immunity from liability for all actions relating to the passage and approval of SB 542 and SB 551. Consequently,

Plaintiffs lack jurisdictional standing to pursue a cross-appeal against them attempting to recover attorney's fees as special damages because they cannot be held liable for such fees as a matter of law.

Finally, under NRS 218F.720, the Individual Legislative Defendants are entitled to governmental immunity from liability for the attorney's fees or any other fees, costs or expenses of any other parties. Therefore, Plaintiffs lack jurisdictional standing to pursue a cross-appeal against them attempting to recover attorney's fees as special damages because they cannot be held liable for such fees as a matter of law.

ARGUMENT

I. Jurisdictional standard for cross-appeals.

Generally under NRAP 3A(a), when the party who was defeated in the district court appeals from the district court's order or judgment, the party who prevailed in the district court does not have jurisdictional standing to pursue a cross-appeal unless the prevailing party is independently "aggrieved" by the district court's order or judgment. *Ford v. Showboat Operating Co.*, 110 Nev. 752, 755-57 (1994). Under this jurisdictional standard, the prevailing party is independently "aggrieved" under NRAP 3A(a) and may pursue a cross-appeal only "when either a personal right or right of property is adversely and substantially affected" by the district court's order or judgment. *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440,

446 (1994) (quoting *Estate of Hughes v. First Nat'l Bank*, 96 Nev. 178, 180 (1980)).

Ordinarily, the prevailing party can satisfy this jurisdictional standard when the district court's order or judgment "imposes an injustice, or illegal obligation or burden, on the party, or denies the party an equitable or legal right." *Matter of T.L.*, 133 Nev. 790, 792 (2017). However, the prevailing party cannot satisfy this jurisdictional standard when the prevailing party does not properly invoke and preserve the party's equitable or legal rights in the district court. *See id.* at 792-94 (holding that a parent who did not properly preserve her parental rights in the district court lacked jurisdictional standing to appeal the district court's order placing her child with an adoptive family instead of with her relatives as she had requested at the placement hearing). When the prevailing party fails to properly invoke and preserve the party's equitable or legal rights in the district court, the prevailing party waives those rights and therefore lacks jurisdictional standing to pursue a cross-appeal claiming a denial of those rights.

II. Because Plaintiffs did not properly invoke and preserve their rights in the district court to claim attorney's fees as special damages, Plaintiffs waived those rights in the district court and therefore lack jurisdictional standing to pursue a cross-appeal against all Defendants claiming a denial of those rights by the district court.

In its order, the district court concluded that "Plaintiffs are not entitled to recover attorney's fees as special damages because there was not bad faith in

regard to this matter.” (*Pls.’ Resp. Ex. B at 10.*) As a result, the district court ordered that “Plaintiffs are not entitled to recover attorney’s fees as special damages for bringing their claims for declaratory and injunctive relief and summary judgment is granted in favor of Defendants on any claims to recover attorney’s fees as special damages.” (*Pls.’ Resp. Ex. B at 11, ¶ 3.*)

Plaintiffs contend that they have jurisdictional standing to cross-appeal the district court’s order because the order denied their rights to recover attorney’s fees as special damages against all Defendants. (*Pls.’ Resp. at 13-14.*) However, in the district court, Plaintiffs failed as a matter of law to meet the threshold requirements to plead and recover attorney’s fees as special damages against all Defendants. As a result of that failure, Plaintiffs did not properly invoke and preserve their rights in the district court to claim attorney’s fees as special damages against all Defendants, thereby waiving those rights in the district court. Because of that waiver, Plaintiffs are not aggrieved by the district court’s order, and they lack jurisdictional standing to pursue their cross-appeal claiming a denial of their rights to recover attorney’s fees as special damages against all Defendants. Therefore, this Court should dismiss Plaintiffs’ cross-appeal against all Defendants for lack of appellate jurisdiction.

In actions for declaratory or injunctive relief, this Court has determined that parties may plead and recover attorney’s fees as special damages “when the actions

were necessitated by the opposing party's bad faith conduct." *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 958 (2001), *disapproved on other grounds by Horgan v. Felton*, 123 Nev. 577 (2007), and *Pardee Homes of Nev. v. Wolfram*, 135 Nev. 173, 177 (2019). However, this Court has also determined that parties cannot, as a matter of law, recover attorney's fees as special damages in such actions if they do not properly plead and present evidence of "fraud, malice or wantonness." *City of Las Vegas v. Cragin Indus.*, 86 Nev. 933, 941 (1970), *disapproved on other grounds by Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948 (2001); *Bd. of Cnty. Comm'rs v. Cirac*, 98 Nev. 57, 59-60 (1982), *disapproved on other grounds by Martinez v. Maruszczak*, 123 Nev. 433 (2007).

Consequently, for parties to properly invoke and preserve their rights in the district court to claim attorney's fees as special damages, their claim "must be pleaded as special damages in the complaint pursuant to NRCP 9(g) and proved by competent evidence just as any other element of damages." *Sandy Valley*, 117 Nev. at 956; *Horgan*, 123 Nev. at 586. The parties cannot meet this special pleading requirement based on general allegations that they were required to hire attorneys to bring the lawsuit because "the mere fact that a party was forced to file or defend a lawsuit is insufficient to support an award of attorney[']s fees as damages." *Sandy Valley*, 117 Nev. at 957. For example, this Court has found that

“[t]he mention of attorney[’s] fees in a complaint’s general prayer for relief is insufficient to meet this requirement.” *Id.* at 956-57.

Under these standards, this Court has determined that parties fail to meet the special pleading requirement when their complaint alleges only the necessity for the services of counsel and simply requests the recovery of attorney’s fees and does not specially plead fraud, malice or wantonness. *Young v. Nev. Title Co.*, 103 Nev. 436, 442 (1987); *Cirac*, 98 Nev. at 59-60; *Cragin Indus.*, 86 Nev. at 941. When parties fail to meet the special pleading requirement, they waive their right to recover attorney’s fees as special damages, which means that they cannot recover attorney’s fees as special damages as a matter of law. *United Indus. v. Simon-Hartley, Ltd.*, 91 F.3d 762, 764 (5th Cir. 1996) (“Our sister circuits routinely classify attorney’s fees as special damages that must be specifically pleaded under Federal Rule of Civil Procedure 9(g). **Failure to plead waives the right to attorney[’s] fees.**” (emphasis added and citations omitted)); *Maidmore Realty Co. v. Maidmore Realty Co. (Nat’l Bank of N. Am.)*, 474 F.2d 840, 843 (3d Cir. 1973) (“Claims for attorney[’s] fees are items of special damage which must be specifically pleaded under Federal Rule of Civil Procedure 9(g). In the absence of allegations that the pleader is entitled to attorney’s fees, therefore, such fees cannot be awarded.” (citations omitted)); *Lawry v. Palm*, 192 P.3d 550, 569 (Colo. Ct. App. 2008) (“Here, plaintiffs’ complaint contained no identification of

attorney[’s] fees as special damages incurred as a result of defendant’s conduct, and, thus, plaintiffs are precluded from recovering those fees as damages.”).

In this case, when pleading their claims for attorney’s fees, Plaintiffs included only general allegations in their first amended complaint that they “have been required to engage the services of counsel to pursue their rights and are entitled to reasonable attorney[’s] fees and costs of suit.” (*Pls.’ Resp. Ex. A at ¶¶ 67, 71, 79, 87.*) Beyond their general allegations, Plaintiffs did not specially plead fraud, malice or wantonness in their first amended complaint, which is required to recover attorney’s fees as special damages for bad faith conduct. As a result, Plaintiffs failed as a matter of law to meet the threshold requirements to plead and recover attorney’s fees as special damages against all Defendants.

Consequently, Plaintiffs did not properly invoke and preserve their rights in the district court to claim attorney’s fees as special damages against all Defendants, thereby waiving those rights in the district court. Because of that waiver, Plaintiffs are not aggrieved by the district court’s order, and they lack jurisdictional standing to pursue their cross-appeal claiming a denial of their rights to recover attorney’s fees as special damages against all Defendants. Therefore, this Court should dismiss Plaintiffs’ cross-appeal against all Defendants for lack of appellate jurisdiction.

III. Even if Plaintiffs did not waive their rights in the district court to claim attorney’s fees as special damages, Plaintiffs lack jurisdictional standing to pursue a cross-appeal against the Individual Legislative and Executive Defendants attempting to recover attorney’s fees as special damages because the Individual Legislative and Executive Defendants cannot be held liable for such fees as a matter of law.

In its order, the district court concluded that “as to an award of attorney’s fees and costs, the individual Executive and Legislative Defendants should be dismissed.” (*Pls.’ Resp. Ex. B at 10.*) As a result, the district court ordered that “the individual Executive and Legislative Defendants, the Honorable Nicole Cannizzaro, the Honorable Kate Marshall, the Honorable Claire J. Clift, and the Honorable Steve Sisolak, are dismissed from this action.” (*Pls.’ Resp. Ex. B at 12, ¶ 4.*)

Plaintiffs contend that they are aggrieved by the dismissal of the Individual Legislative and Executive Defendants because “Plaintiff Senators seek attorney[’s] fees as special damages as a result of the unconstitutional dilution and nullification of their votes by the Individual Defendants who approved SB 542 and SB 552 into law.” (*Pls.’ Resp. at 7.*) Plaintiffs thus contend that they have jurisdictional standing to cross-appeal the district court’s order dismissing the Individual Legislative and Executive Defendants because the order “leaves the Plaintiff Senators with no redress for the attorney’s fees they incurred as damages based upon the declared unconstitutional exercise of legislative and executive power by the Individual Defendants.” (*Pls.’ Resp. at 12-13.*)

As discussed previously, Plaintiffs did not properly invoke and preserve their rights in the district court to claim attorney's fees as special damages against all Defendants, thereby waiving those rights in the district court. Nevertheless, even if Plaintiffs did not waive their rights in the district court to claim attorney's fees as special damages, Plaintiffs lack jurisdictional standing to pursue a cross-appeal against the Individual Legislative and Executive Defendants attempting to recover attorney's fees as special damages because the Individual Legislative and Executive Defendants cannot be held liable for such fees as a matter of law.

Under the Federal Constitution, each state is an independent sovereign which enjoys inherent sovereign immunity from lawsuits and liability for damages and attorney's fees in its own state courts. *Alden v. Maine*, 527 U.S. 706, 711-29 (1999). Thus, in Nevada, "[t]he law is well settled that a state, which in the eye of the law is recognized as a sovereign, cannot without its consent be sued by a citizen." *Hill v. Thomas*, 70 Nev. 389, 401 (1954). In other words, "the sovereign is immune from suit in the absence of a waiver of immunity." *Id.*

Under the Nevada Constitution, the State's sovereign immunity can be waived only by the Legislature through the enactment of general laws. Nev. Const. art. 4, § 22 ("Provision may be made by general law for bringing suit against the State as to all liabilities originating after the adoption of this Constitution."); *Hardgrave v. State ex rel. Hwy. Dep't*, 80 Nev. 74, 76-78 (1964)

(“We construe the words ‘general law’ as used in Section 22 to mean a general law passed by the legislature.”). Accordingly, “[i]t is the legislature alone which has the power to waive immunity or to authorize such waiver.” *Taylor v. State*, 73 Nev. 151, 153 (1957). Consequently, “[i]t is not within the power of the courts . . . to strip the sovereign of its armour.” *Id.*

When a legislative body waives sovereign immunity, “the terms of its consent to be sued in any court define that court’s jurisdiction to entertain the suit.” *U.S. Dep’t of Treasury v. Hood*, 101 Nev. 201, 204 (1985). As a result, “it is well settled that costs and attorney’s fees cannot be awarded against the [sovereign] absent a specific waiver of sovereign immunity.” *Id.*

In Nevada, by enacting NRS 41.0305 to 41.039, inclusive, the Legislature has provided for the conditional waiver of the State’s sovereign immunity under certain circumstances. *Hagblom v. State Dir. Mtr. Vehs.*, 93 Nev. 599, 601-04 (1977) (“The legislature has exposed the State of Nevada to liability by conditionally waiving in certain instances governmental immunity from suit.”). However, the Legislature has also limited this conditional waiver of the State’s sovereign immunity because the waiver does not apply to “any statute which expressly provides for governmental immunity.” NRS 41.031(1).

In this case, because the Individual Legislative and Executive Defendants are protected from liability by several statutes which expressly provide for

governmental immunity, they cannot be held liable for attorney's fees as special damages as a matter of law. Because of that governmental immunity, Plaintiffs lack jurisdictional standing to pursue a cross-appeal against the Individual Legislative and Executive Defendants attempting to recover attorney's fees as special damages because they cannot be held liable for such fees as a matter of law. Therefore, this Court should dismiss Plaintiffs' cross-appeal against the Individual Legislative and Executive Defendants for lack of appellate jurisdiction.

A. Under NRS 41.071 and the separation-of-powers provision of the Nevada Constitution, the Individual Legislative and Executive Defendants are entitled to absolute legislative immunity as a matter of law for all actions relating to the passage and approval of SB 542 and SB 551.

By enacting the legislative immunity statute in NRS 41.071, the Legislature has expressly provided legislators and all other persons who perform legislative functions with absolute legislative immunity for "any actions, in any form, taken or performed within the sphere of legitimate legislative activity." NRS 41.071(5). This absolute legislative immunity protects legislators and such other persons from "having to defend themselves, from being held liable and from being questioned or sanctioned in administrative or judicial proceedings for speech, debate, deliberation and other actions performed within the sphere of legitimate legislative activity." NRS 41.071(1)(c).

In applying the doctrine of absolute immunity in Nevada, this Court has found that "[a]bsolute immunity is a broad grant of immunity not just from the imposition

of civil damages, but also from the burdens of litigation, generally.” *State v. Second Jud. Dist. Ct. (Ducharm)*, 118 Nev. 609, 615 (2002). As a result, this Court has determined that “issues of absolute governmental immunity implicate the subject-matter jurisdiction of Nevada courts.” *City of Boulder City v. Boulder Excavating, Inc.*, 124 Nev. 749, 754 (2008).

In enacting the legislative immunity statute in NRS 41.071, the Legislature expressly stated that the statute is a codification of “the constitutional doctrines of separation of powers and legislative privilege and immunity.” NRS 41.071(1)(h). The Legislature also expressly provided that in interpreting and applying legislative immunity in Nevada, the interpretation and application given to the constitutional doctrines of separation of powers and legislative immunity under federal law “must be considered to be persuasive authority.” NRS 41.071(3). Under federal law, the U.S. Supreme Court has generally “equated the legislative immunity to which state legislators are entitled under [federal law] to that accorded Congressmen under the Constitution.” *Supreme Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 733 (1980). As further explained by the Court:

The purpose of this immunity is to insure that the legislative function may be performed independently without fear of outside interference. To preserve legislative independence, we have concluded that legislators engaged in the sphere of legitimate legislative activity should be protected not only from the consequences of litigation’s results but also from the burden of defending themselves.

Id. at 731-32 (internal quotations and citations omitted).

Moreover, this Court has recognized that Nevada legislators enjoy absolute legislative immunity as a state constitutional right under the separation-of-powers provision of Article 3, Section 1 of the Nevada Constitution. *Guinn v. Legislature (Guinn II)*, 119 Nev. 460, 472 & n.28 (2003). In describing the source of this constitutional legislative immunity, this Court was unmistakably clear: “Under the **separation of powers doctrine**, individual legislators cannot, nor should they, be subject to fines or other penalties for **voting** in a particular way.” *Id.* (emphasis added). In making this statement, this Court relied upon federal cases, including the U.S. Supreme Court’s decision in *Consumers Union, supra*, which reaffirmed the importance of absolute legislative immunity to separation of powers. Thus, absolute legislative immunity under Nevada law is equivalent to absolute legislative immunity under federal law.

Under federal law, the U.S. Supreme Court has held that executive officials “outside the legislative branch are entitled to legislative immunity when they perform legislative functions.” *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998); *Baraka v. McGreevey*, 481 F.3d 187, 196 (3d Cir. 2007) (holding that the New Jersey Governor was entitled to absolute legislative immunity for all actions relating to the passage and approval of legislation); *Burnette v. Bredesen*, 566 F.Supp.2d 738, 744-45 (E.D. Tenn. 2008) (holding that all members of the Tennessee Legislature and the Tennessee Governor were entitled to absolute

legislative immunity for all actions relating to the passage and approval of legislation). Consistently with federal law, NRS 41.071 extends the protection of absolute legislative immunity to every member of the Nevada Senate or Assembly and every other person “who takes or performs any actions within the sphere of legitimate legislative activity that would be protected if taken or performed by any member of the Senate or Assembly, including, without limitation, any such actions taken or performed by any current or former officer or employee of the Legislature.” NRS 41.071(7)(d).

The seminal case on the broad protection afforded by absolute legislative immunity is *Coffin v. Coffin*, 4 Mass. 1, 27 (1808). In discussing the *Coffin* case, the U.S. Supreme Court has stated that “[t]his is, perhaps, the most authoritative case in this country on the construction of . . . freedom of debate in legislative bodies, and being so early after the formation of the Federal Constitution, is of much weight.” *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881). In *Coffin*, the Chief Justice of the Supreme Judicial Court of Massachusetts, writing for a unanimous court, provided the following broad interpretation of absolute legislative immunity:

These privileges [and immunities] are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be

answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; **but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office;** and I would define the article as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules.

Coffin, 4 Mass. at 27 (emphasis added). This broad interpretation of absolute legislative immunity has remained virtually unchanged for over two centuries. *Tenney v. Brandhove*, 341 U.S. 367, 372-76 (1951); *United States v. Helstoski*, 442 U.S. 477, 491-93 (1979). And the U.S. Supreme Court has consistently held that absolute legislative immunity “will be read broadly to effectuate its purposes.” *United States v. Johnson*, 383 U.S. 169, 180 (1966).

Under the broad protection of absolute legislative immunity, legislators and all other persons who perform legislative functions are immune from liability for all actions that fall within the sphere of legitimate legislative activity, regardless of whether the plaintiffs allege in their lawsuit that the challenged actions were unconstitutional. *Bogan*, 523 U.S. at 54-56; *Consumers Union*, 446 U.S. at 731-34; *Tenney*, 341 U.S. at 372-76. Moreover, the application of absolute legislative immunity for particular conduct does not turn on the subjective motivations or intent behind the conduct because it is “not consonant with our scheme of government for a court to inquire into the motives of legislators.” *Tenney*, 341

U.S. at 377. This is true regardless of whether there are allegedly improper motives underlying the conduct because “[t]he claim of an unworthy purpose does not destroy the privilege.” *Id.* Consequently, “[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it.” *Bogan*, 523 U.S. at 54. The determinative question is “whether, stripped of all considerations of intent and motive, [the official’s] actions were legislative.” *Id.* at 55.

In *Bogan*, the U.S. Supreme Court held that absolute legislative immunity protects all actions that are “integral steps in the legislative process.” *Id.* at 55. This protection applies to all actions relating to voting on legislation and all other actions that “directly affect drafting, introducing, debating, passing or rejecting legislation.” *Baraka*, 481 F.3d at 196; NRS 41.071(5)(a). This includes actions of executive officials who sign legislation. *Bogan*, 523 U.S. at 55. The protection of absolute legislative immunity applies to all such legislative actions, even when the plaintiffs allege in their complaint that the challenged legislative actions were unconstitutional. *Bogan*, 523 U.S. at 54-56; *Consumers Union*, 446 U.S. at 731-34; *Tenney*, 341 U.S. at 372-76.

For example, in *Consumers Union*, the U.S. Supreme Court held that the members of the Virginia Supreme Court were entitled to absolute legislative immunity for all actions taken by them in their legislative capacity to adopt rules of

professional conduct governing attorneys, even though the rules being challenged were unconstitutional on their face. *Consumers Union*, 446 U.S. at 731-34. The Court held that the protection of absolute legislative immunity extended to all claims made by the plaintiffs for damages, declaratory and injunctive relief, and attorney's fees and costs. *Id.* at 731-39.

In this case, Plaintiffs' claims against each of the Individual Legislative and Executive Defendants in their first amended complaint are based entirely on legislative actions taken by the Defendants in their official capacities in the passage and approval of SB 542 and SB 551. (*Pls.' Resp. Ex. A at ¶¶ 16-19.*) In particular, Plaintiffs' claims against Senator Cannizzaro are based on the allegations that she was the Senate Majority Leader during the 2019 legislative session and that she "was the sponsor of SB 551, and allowed a vote of less than two-thirds of the Senate to approve both SB 542 and SB 551 in violation of the Nevada Constitution." (*Pls.' Resp. Ex. A at ¶ 16.*)

Plaintiffs' claims against Secretary Clift are based on the allegations that she was the Secretary of the Senate during the 2019 legislative session, that her "official responsibilities include[d] transmitting to the [LCB] Legal Division for enrollment bills passed by the Senate in conformity with the Nevada Constitution," and that she "deemed SB 542 and SB 551 constitutionally passed with less than a

vote of two-thirds of the Senate necessary to approve both SB 542 and SB 551 under the Nevada Constitution.” (*Pls.’ Resp. Ex. A at ¶ 18.*)

Plaintiffs’ claims against Lieutenant Governor Marshall are based on the allegations that she was the President of the Senate during the 2019 legislative session, that her “official duties include[d] signing bills that have been passed by the Senate in conformity with the Nevada Constitution,” and that she “deemed SB 542 and SB 551 constitutionally passed with less than a vote of two-thirds of the Senate necessary to approve both SB 542 and SB 551 under the Nevada Constitution.” (*Pls.’ Resp. Ex. A at ¶ 17.*)

Finally, Plaintiffs’ claims against Governor Sisolak are based on the allegations that he was the Governor during the 2019 legislative session, that his “official responsibilities include[d] approving and signing bills passed by the Legislature in conformity with the Nevada Constitution and [seeing] that the laws of the State of Nevada are faithfully executed,” and that he “approved and signed SB 542 and SB 551 into law with a vote of less than two-thirds of the Senate in violation of the Nevada Constitution.” (*Pls.’ Resp. Ex. A at ¶ 19.*)

Because Plaintiffs’ claims against each of the Individual Legislative and Executive Defendants are based entirely on legislative actions taken by them in their official capacities in the passage and approval of SB 542 and SB 551, they are

entitled to absolute legislative immunity. As explained by the Colorado courts when applying absolute legislative immunity under state law:

Here, plaintiff's complaint is grounded upon the legislators' sponsorship and consideration of, or their vote upon, legislation that pertained to ad valorem taxation. Nothing could involve the legislative function more directly. Hence, the individual legislators who were joined as party defendants in this litigation enjoyed an **absolute immunity** from suit based upon the actions complained of. The trial court properly dismissed any claim that plaintiff attempted to state against them.

Lucchesi v. State, 807 P.2d 1185, 1193 (Colo. Ct. App. 1990) (emphasis added).

Accordingly, because the Individual Legislative and Executive Defendants are protected from liability by absolute legislative immunity, they cannot be held liable for attorney's fees as special damages as a matter of law. This would be true even if Plaintiffs had properly pled allegations of fraud, malice or wantonness in their first amended complaint in an attempt to establish bad faith conduct because "a grant of absolute immunity applies even when [the] officer has been accused of acting maliciously and corruptly." *Ducharm*, 118 Nev. at 615. Furthermore, because any attempt by Plaintiffs to establish bad faith conduct through allegations of fraud, malice or wantonness would require the courts to inquire into the subjective motivations behind the conduct of the Individual Legislative and Executive Defendants, Plaintiffs' claims for attorney's fees as special damages are also barred by absolute legislative immunity because it is "not consonant with our

scheme of government for a court to inquire into the motives of legislators.”
Tenney, 341 U.S. at 377.

Consequently, because the Individual Legislative and Executive Defendants are protected from liability by absolute legislative immunity under NRS 41.071 and the separation-of-powers provision of the Nevada Constitution, Plaintiffs lack jurisdictional standing to pursue a cross-appeal against them attempting to recover attorney’s fees as special damages because they cannot be held liable for such fees as a matter of law. Therefore, this Court should dismiss Plaintiffs’ cross-appeal against the Individual Legislative and Executive Defendants for lack of appellate jurisdiction.

B. Under NRS 41.032, the Individual Legislative and Executive Defendants are entitled to discretionary-function immunity as a matter of law for all actions relating to the passage and approval of SB 542 and SB 551.

Under NRS 41.032, which provides discretionary-function immunity, state agencies and officers acting in their official capacities are immune from liability for any actions that are “[b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved is abused.” NRS 41.032(2). Discretionary-function immunity protects state agencies and officers from liability for any actions that involve an element of official discretion or judgment and are grounded in the formulation or execution of social, economic or political policy. *Martinez v. Maruszczak*, 123

Nev. 433, 445-47 (2007); *Scott v. Dep't of Commerce*, 104 Nev. 580, 583-86 (1988). The protection afforded by discretionary-function immunity bars claims for damages and claims for attorney's fees and costs. *County of Esmeralda v. Grogan*, 94 Nev. 723, 725 (1978); *Travelers Hotel v. City of Reno*, 103 Nev. 343, 346 (1987).

In this case, Plaintiffs' claims against the Individual Legislative and Executive Defendants in their first amended complaint are based entirely on legislative actions taken by the Defendants in their official capacities in the passage and approval of SB 542 and SB 551. (*Pls.' Resp. Ex. A at ¶¶ 16-19.*) All those legislative actions involve elements of official discretion or judgment and are grounded in the formulation or execution of social, economic or political policy. Therefore, the Individual Legislative and Executive Defendants are entitled to discretionary-function immunity under NRS 41.032 as a matter of law for all actions relating to the passage and approval of SB 542 and SB 551.

Consequently, because the Individual Legislative and Executive Defendants are protected from liability by discretionary-function immunity under NRS 41.032, Plaintiffs lack jurisdictional standing to pursue a cross-appeal against them attempting to recover attorney's fees as special damages because they cannot be held liable for such fees as a matter of law. Therefore, this Court should dismiss

Plaintiffs' cross-appeal against the Individual Legislative and Executive Defendants for lack of appellate jurisdiction.

C. Under NRS 218F.720, the Individual Legislative Defendants are entitled to governmental immunity as a matter of law and cannot be assessed or held liable in litigation for the attorney's fees or any other fees, costs or expenses of any other parties.

When an award of attorney's fees to a party is prohibited by statute or would otherwise conflict with a statutory scheme, the party cannot recover attorney's fees as a matter of law. *Zenor v. State, Dep't of Transp.*, 134 Nev. 109, 110-11 (2018); *City of N. Las Vegas v. 5th & Centennial, LLC*, No. 58530, 2014 WL 1226443, at *5-6 (Nev. Mar. 21, 2014) (unpublished disposition), *clarified on denial of rehearing by City of N. Las Vegas v. 5th & Centennial, LLC*, 130 Nev. 619 (2014).

Under NRS 218F.720, the Legislature and its members, officers and employees are protected by governmental immunity from being held liable in litigation for the attorney's fees or any other fees, costs or expenses of any other parties. The statute provides that in any action or proceeding before any court, the Legislature cannot be assessed or held liable for "[t]he attorney's fees or any other fees, costs or expenses of any other parties." NRS 218F.720(1). The statute also defines the term "Legislature" to include any "agency, member, officer or employee of the Legislature, the Legislative Counsel Bureau or the Legislative Department." NRS 218F.720(6)(c).

Thus, under the governmental immunity in NRS 218F.720, Plaintiffs are prohibited in this litigation from being awarded attorney's fees or any other fees, costs or expenses against the Legislature and its members, officers and employees as a matter of law. Consequently, because the Individual Legislative Defendants are protected from liability for attorney's fees by the governmental immunity in NRS 218F.720, Plaintiffs lack jurisdictional standing to pursue a cross-appeal against them attempting to recover attorney's fees as special damages because they cannot be held liable for such fees as a matter of law. Therefore, this Court should dismiss Plaintiffs' cross-appeal against the Individual Legislative Defendants for lack of appellate jurisdiction.

CONCLUSION

Because Plaintiffs did not properly invoke and preserve their rights in the district court to claim attorney's fees as special damages, Plaintiffs waived those rights in the district court and therefore lack jurisdictional standing to pursue a cross-appeal against all Defendants claiming a denial of those rights by the district court. Therefore, this Court should dismiss Plaintiffs' cross-appeal against all Defendants for lack of appellate jurisdiction.

However, even if Plaintiffs did not waive their rights in the district court to claim attorney's fees as special damages, Plaintiffs nevertheless lack jurisdictional standing to pursue a cross-appeal against the Individual Legislative and Executive

Defendants attempting to recover attorney's fees as special damages because the Individual Legislative and Executive Defendants cannot be held liable for such fees as a matter of law. Therefore, this Court should dismiss Plaintiffs' cross-appeal against the Individual Legislative and Executive Defendants for lack of appellate jurisdiction.

DATED: This 4th day of February, 2021.

Respectfully submitted,

By: /s/ Kevin C. Powers
KEVIN C. POWERS
General Counsel
Nevada Bar No. 6781
LEGISLATIVE COUNSEL BUREAU,
LEGAL DIVISION
401 S. Carson St.
Carson City, NV 89701
Tel: (775) 684-6830
Fax: (775) 684-6761
Email: kpowers@lcb.state.nv.us
Attorneys for Appellant/Cross-Respondent Legislature of the State of Nevada and Pending Cross-Respondents Nicole Cannizzaro, in her official capacity as Senate Majority Leader of the Senate of the State of Nevada, and Claire J. Clift, in her official capacity as Secretary of the Senate of the State of Nevada

By: /s/ Craig A. Newby
CRAIG A. NEWBY
Deputy Solicitor General
Nevada Bar No. 8591
OFFICE OF THE ATTORNEY GENERAL
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
Tel: (702) 486-3420
Fax: (702) 486-3768
Email: CNewby@ag.nv.gov
Attorneys for Appellants/Cross-Respondents State of Nevada Department of Taxation and State of Nevada Department of Motor Vehicles and Pending Cross-Respondents Steve Sisolak, in his official capacity as Governor of the State of Nevada, and Kate Marshall, in her official capacity as Lieutenant Governor of the State of Nevada and President of the Senate of the State of Nevada

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the 4th day of February, 2021, pursuant to NRAP 25 and NEFCR 9, I filed and served a true and correct copy of Appellants/Cross-Respondents' Joint Reply to Respondents/Cross-Appellants' Response to the Order to Show Cause, by means of the Nevada Supreme Court's electronic filing system, directed to:

KAREN A. PETERSON, ESQ.
JUSTIN TOWNSEND, ESQ.
ALLISON MACKENZIE, LTD.
402 N. Division St.
Carson City, NV 89703
kpeterson@allisonmackenzie.com
jtownsend@allisonmackenzie.com
Attorneys for Respondents/Cross-Appellants

/s/ Kevin C. Powers

An Employee of the Legislative Counsel Bureau