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. SETTELMEYER; 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 SURREPLY BRIEF ON CROSS-APPEAL

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 SURREPLY BRIEF ON CROSS-APPEAL

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

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JURISDICTIONAL STATEMENT

On February 4, 2021, Appellants/Cross-Respondents' ("Defendants") filed their Joint Reply to Respondents/Cross-Appellants' ("Plaintiffs") Response to the Order to Show Cause, arguing that this Court should dismiss Plaintiffs' cross-appeal for the following reasons.

First, 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 assuming that 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 in an attempt to recover attorney's fees as special damages because the Individual Legislative and Executive Defendants cannot be held liable for such attorney's 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.

ROUTING STATEMENT

For purposes of appellate assignment, this cross-appeal should be heard and decided by the Supreme Court under NRAP 17(a) and should not be assigned to the Court of Appeals under NRAP 17(b). The principal issues raised by this cross-appeal present questions of state law that are of first impression in Nevada under NRAP 17(a)(10) and questions of state law that are of statewide public importance under NRAP 17(a)(11).

STATEMENT OF THE ISSUES

In this cross-appeal, the issues are did the district court correctly: (1) conclude that Plaintiffs are not entitled to recover attorney's fees as special damages for bringing their claims for declaratory and injunctive relief; and (2) dismiss the Individual Legislative and Executive Defendants ("Individual Defendants").

INTRODUCTION

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 ("LCB Legal") under NRS 218F.720, 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 Surreply Brief on Cross-Appeal pursuant to this Court's order on March 4, 2021, setting an expedited briefing schedule in the appeal and cross-appeal and scheduling oral argument before the en banc court on May 3, 2021.

In the appeal, the Legislature and the Department of Taxation and Department of Motor Vehicles are asking this Court to reverse that portion of the district court's order: (1) granting summary judgment in favor of Plaintiffs on their claims for declaratory and injunctive relief; (2) declaring that SB 542 and SB 551 were

bills which create, generate or increase any public revenue in any form and were passed in violation of the two-thirds requirement; (3) invalidating the provisions of SB 542 and sections 2, 3, 37 and 39 of SB 551 as unconstitutional; and (4) enjoining the Department of Motor Vehicles and Department of Taxation from collecting and enforcing the fees and taxes under the invalidated provisions and ordering an immediate refund of those fees and taxes to the affected fee payers and taxpayers with interest at the legal rate of interest from the date collected. (*JA6:001188, ¶¶ 1-2.*)[1]

If this Court reverses that portion of the district court's order and upholds the constitutionality of the provisions of SB 542 and the challenged provisions of sections 2, 3, 37 and 39 of SB 551, then Plaintiffs' cross-appeal is rendered moot. However, if this Court finds that the provisions of SB 542 or the challenged provisions of sections 2, 3, 37 and 39 of SB 551 are unconstitutional because they were enacted in violation of the two-thirds requirement, then Defendants ask this Court to affirm that portion 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 Defendants. (*JA6:001188-89, ¶¶ 3-4.*)

[1] Citations to "*JA*" are to volume and page numbers of the joint appendix.

STATEMENT OF THE CASE AND FACTS

I. The passage of SB 542 and SB 551 at the 2019 Legislature upon the advice of LCB Legal.

During the 2019 Legislature, legislative leaders requested and received a written legal opinion from LCB Legal regarding the Supermajority Provision's applicability to these two types of bills. *See* May 8, 2019 Memorandum (*JA3:000647-70*). The lengthy memorandum addressed the legal question by: (1) applying several rules of construction followed by Nevada courts; (2) examining extrinsic evidence of the purpose and intent of the Supermajority Provision; and (3) considering case law interpreting similar constitutional provisions from other states. *Id.* In the opinion, LCB Legal concluded that:

> Nevada's two-thirds majority requirement does not apply to a bill which extends until a later date – or revises or eliminates – a future decrease in or future expiration of existing state taxes when that future decrease or expiration is not legally operative and binding yet, because such a bill does not change – but maintains – the existing computation bases currently in effect for the existing state taxes.

(*JA3:000670.*)

Additionally, LCB Legal earlier in the session provided a memorandum regarding the applicability of the Supermajority Provision to Senate Bill 201, which authorized hiring of a vendor to collect fees to pay for the vendor's implementation of a title loan database. *See* April 16, 2019 Memorandum (*JA2:000376-81*). There, LCB Legal opined that the Supermajority Provision is

applicable for "legislative action that directly brings into existence, produces or enlarges public revenue in the **first instance**." (*JA2:000380*) (emphasis added). Defendants are unaware of how Senate Bill 551 or Senate Bill 542 "directly brings into existence, produced, or enlarges public revenue in the first instance," given that both bills continue existing taxes and fees at existing rates from one fiscal year to the next. In any event, because the Legislature's interpretation is reasonable and consistent, it is entitled to deference. *Nev. Mining Ass'n v. Erdoes*, 117 Nev. 531, 540 (2001).

Further consideration of Senate Bill 551's committee and floor testimony highlight the failed efforts by these parties to avoid litigation. For instance, Plaintiffs attempt to distort colloquy with the Legislative Counsel Bureau at committee by emphasizing the word "generate," ignoring "the assumption of the lower rates occurring" and the "**maintain**[ing of] current rates" preceding it. *See* Senate Finance Committee Minutes (5/29/2019) (*JA3:000487*) (emphasis added). Because the "lower rates" were never effective as a matter of law, no new taxes were "brought into existence."

Further, at committee, Plaintiff Nevada Trucking Association, Inc.'s lobbyist stated that "Just because you can do something does not mean that you should do something." (*JA3:000493.*) In this context, Senator Cannizzaro said that "[c]onstitutional questions do not exist if they are moot." (*JA3:000495.*) In

response, Plaintiff Senator Kieckhefer expressed concern over passing Senate Bill 551without a two-thirds stamp by a two-thirds majority, such that it sets "the precedent, going forward, that the Legislature acknowledges that a two-thirds was not necessary." (*JA3:000496.*) In response to Senator Kieckhefer's position, Senator Cannizzaro testified to her belief that it was "an illusory Constitutional question . . . [that] is merely speculative." *Id.*

It is in this context, recognizing Senator Kieckhefer's concern, that Senator Cannizzaro proposed amendments to meet this concern "halfway" by adding a two-thirds stamp on Senate Bill 551, even where LCB Legal had advised it was not required. *See* June 2, 2019 Senate Finance Committee Minutes (*JA2:000368*); Senate Daily Journal (6/3/2019) (*JA3:000544-45*).[2] When Plaintiff Senators rejected this "halfway" compromise, the Senate passed Senate Bill 551 by majority vote, consistent with the Supermajority Provision as interpreted by LCB Legal.

Under such circumstances, given that Defendants were relying on legal advice of counsel, the district court correctly concluded that there was no bad faith on behalf of Defendants when proceeding on this basis. Accordingly, there is no basis

[2] The parties to this case disagreed on the Senate Floor as to the wisdom of passing Senate Bill 551. However, the "appropriateness" of the Senate's decision as a matter of policy is separate and distinct from interpreting the supermajority provision as adopted in 1996.

under Nevada law for an award of attorney's fees as damages to Plaintiffs and the cross-appeal must be rejected by this Court.

II. Plaintiffs' state constitutional claims and the proceedings in the district court.

On July 19, 2019, Plaintiffs filed their original complaint. (*JA1:000001*.) Before serving their original complaint, the Plaintiffs filed their first amended complaint on July 30, 2019. (*JA1:000015*.) In their first amended complaint, Plaintiffs claimed that SB 542 and SB 551 were each subject to the two-thirds requirement and that each bill is unconstitutional because the Senate passed each bill by a majority of all the members elected to the Senate, instead of a two-thirds majority of all the members elected to the Senate. (*JA1:000023-30*.)

Plaintiffs consist of: (1) eight members of the Senate ("Plaintiff Senators") who voted against SB 542 and SB 551 during the 2019 legislative session; and (2) several private businesses, associations and other entities that pay—or whose members pay—certain fees and taxes associated with SB 542 and SB 551 ("Plaintiff Businesses"). (*JA1:000016-20, ¶¶ 1-13*.) Plaintiffs named several state officers and agencies of the executive branch and legislative branch as defendants in their official capacities. (*JA1:000020-21, ¶¶ 16-21*.)

As named in the first amended complaint, the executive branch defendants are: (1) the Honorable Kate Marshall, in her official capacity as Lieutenant Governor of the State of Nevada and President of the Senate; (2) the Honorable

Steve Sisolak, in his official capacity as Governor of the State of Nevada; (3) the Nevada Department of Taxation; and (4) the Nevada Department of Motor Vehicles (collectively "Executive Defendants"). (*JA1:000020-21*, ¶¶ *17, 19, 20, 21*.) The Department of Taxation is empowered by state law with statewide administrative functions under the challenged provisions of 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 challenged provisions of SB 542. 2019 Nev. Stat., ch. 400, § 1, at 2501-02. The Executive Defendants are represented in their official capacities by the Office of the Attorney General.

As named in the first amended complaint, the legislative branch defendants are: (1) the Honorable Nicole Cannizzaro, in her official capacity as Senate Majority Leader; and (2) Claire Clift, in her official capacity as the Secretary of the Senate. (*JA1:000020-21*, ¶¶ *16, 18*.) Senator Cannizzaro and Secretary Clift are represented in their official capacities by LCB Legal under NRS 218F.720.[3]

[3] On December 19, 2019, the district court granted Plaintiff Senators' motion to disqualify LCB Legal as counsel for Senator Cannizzaro and Secretary Clift. On January 10, 2020, this Court stayed the district court proceedings while LCB Legal sought mandamus review of the disqualification order. On June 26, 2020, this Court issued an opinion and writ of mandamus overturning the disqualification order and lifting the stay. *State ex rel. Cannizzaro v. First Jud. Dist. Ct.*, 136 Nev. Adv. Op. 34, 466 P.3d 529, 534 (2020).

On December 19, 2019, the district court granted the Legislature's motion to intervene as a Defendant-Intervenor and denied Plaintiff Senators' motion to disqualify LCB Legal as counsel for the Legislature. (*JA2:000433*.) The Legislature sought intervention to defend the constitutionality of SB 542 and SB 551 and its reasonable interpretation of the two-thirds requirement.

At a hearing on September 21, 2020, the district court received oral arguments on the following dispositive motions: (1) motion to dismiss filed by Executive Defendants; (2) motion for summary judgment filed by Plaintiffs; (3) counter-motion for summary judgment filed by Legislative Defendants and Defendant-Intervenor Legislature; and (4) Executive Defendants' joinder to Legislative Defendants' counter-motion for summary judgment. (*JA6:001107-08; JA6:001179*.)

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. (*JA6:001188-89, ¶¶ 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 requirement. (*JA6:001188, ¶ 1*.) Because the Senate did not pass the bills by a two-thirds majority vote, the district court declared that the provisions of SB 542 and sections 2, 3, 37 and 39 of SB 551 are unconstitutional and invalid,

and the district court enjoined the Department of Motor Vehicles and Department of Taxation from collecting and enforcing the fees and taxes under the invalidated provisions and ordered an immediate refund of those fees and taxes to the affected fee payers and taxpayers with interest at the legal rate of interest from the date collected. (*JA6:001188, ¶¶ 1-2.*) However, the district court declared that, under the severance doctrine, "the remaining provisions of SB 551 can be severed and shall remain in effect." (*JA6:001188, ¶ 1.*)

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." (*JA6:001188, ¶ 3.*) 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." (*JA6:001188, ¶ 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." (*JA6:001187.*) 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." (*JA6:001189, ¶ 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. (*JA6:001214; JA6:001218.*)

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 Defendants. (*JA6:001319.*)

On November 13, 2020, the district court granted Executive Defendants' and Defendant-Intervenor Legislature's joint motion for stay pending appeal. (*JA7:001391.*)

ARGUMENT

I. Plaintiffs are not entitled to recover attorney's fees as special damages for bringing their claims for declaratory and injunctive relief.

A. Standards for reviewing the district court's order granting summary judgment in favor of Defendants on claims to recover attorney's fees as special damages.

In this cross-appeal, the standard of review depends on the issues presented by the district court's order denying attorney's fees as special damages. This Court reviews the district court's resolution of issues of law de novo without deference to

the district court's decision. *Pardee Homes of Nev. v. Wolfram*, 135 Nev. 173, 177 (2019). However, this Court reviews the district court's decision "awarding or denying attorney fees for a manifest abuse of discretion." *Id.*

Because Defendants are asking this Court to affirm the district court's order denying attorney's fees as special damages, Defendants may advance any arguments in support of affirmance, "even if the district court rejected or did not consider the argument." *Ford v. Showboat Operating Co.*, 110 Nev. 752, 755 (1994). Therefore, regardless of the district court's reasoning, this Court will "affirm the order of the district court if it reached the correct result, although for different reasons." *Blackjack Bonding v. City of Las Vegas Mun. Ct.*, 116 Nev. 1213, 1222 (2000).

B. 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 as a matter of law.

In Defendants' joint reply to the show-cause order, Defendants properly argued that Plaintiffs are not aggrieved by the district court's order and lack jurisdictional standing to pursue their cross-appeal because, 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. (*Joint Reply 8-12.*) In their response, Plaintiffs contend that Defendants were not making an argument regarding lack of appellate jurisdiction but were making an argument regarding the merits of the cross-appeal, thereby conceding appellate jurisdiction over the cross-appeal. (*Resp. 13-14.*) Plaintiffs are wrong as a matter of law.

Under this Court's case law, a party is not "aggrieved" by the district court's order denying alleged rights and cannot claim appellate jurisdiction for an appeal or cross-appeal when the party does not properly invoke and preserve the party's rights in the district court. *Matter of T.L.*, 133 Nev. 790, 792-94 (2017). Thus, when the party fails to properly invoke and preserve the party's rights in the district court, the party waives those rights and therefore lacks jurisdictional standing to pursue an appeal or cross-appeal claiming a denial of those rights. *Id.*

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*, 135 Nev. at 177. 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*, 117 Nev. at 955 n.7; *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). Finally, 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.

In this case, when pleading their claims for attorney's fees in the district court, 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." (*JA1:000027-30, ¶¶ 67, 71, 79, 87*.) Beyond their general allegations, Plaintiffs did not specially plead fraud, malice or wantonness in their first amended complaint as required to recover attorney's fees as special damages. 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, 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.

C. Plaintiffs cannot, as a matter of law, recover attorney's fees as special damages because they failed to provide Defendants with proper or sufficient notice of their claims and they failed to present any competent evidence of fraud, malice or wantonness to support their claims.

As discussed previously, this Court has determined that parties cannot, as a matter of law, recover attorney's fees as special damages if they do not properly plead and present evidence of "fraud, malice or wantonness." *Cragin Indus.*, 86 Nev. at 941; *Cirac*, 98 Nev. at 59-60. Plaintiffs contend that Defendants waived any argument that they did not properly plead attorney's fees as special damages because Defendants were on notice and knew that Plaintiffs claimed attorney's fees as special damages. (*Resp. 50-51.*) Plaintiffs are wrong as a matter of law.

First, as already noted, Plaintiffs did not specially plead fraud, malice or wantonness in their first amended complaint as required to recover attorney's fees as special damages. (*JA1:000027-30*, ¶¶ *67, 71, 79, 87.*) Therefore, Plaintiffs failed to provide Defendants with proper or sufficient notice of their claims for attorney's fees in their first amended complaint.

Second, in their summary-judgment motion, Plaintiffs did not make any arguments regarding attorney's fees as special damages, and Plaintiffs did not submit any evidence regarding attorney's fees as special damages. (*JA2:000225-*

381.) In fact, Plaintiffs failed to argue in their summary-judgment motion that they were entitled to attorney's fees at all. *Id.* Such a failure to argue the issue on summary judgment can be presumed as a waiver of the issue. *See Copart, Inc. v. Sparta Consulting, Inc.*, 339 F. Supp. 3d 959, 974 (E.D. Cal. 2018) ("At summary judgment, a party can waive an argument . . . by failing to brief an issue."). Therefore, by failing to argue the attorney's fees issue on summary judgment, Plaintiffs presumptively waived the issue and thereby failed to provide Defendants with proper or sufficient notice of their claims for attorney's fees in their summary-judgment motion.

Third, Plaintiffs belatedly argued that they were entitled to attorney's fees in their reply in support of their motion for summary judgment and opposition to the counter-motion for summary judgment. (*JA4:000713-14*.) However, even at that late stage in the case, Plaintiffs did not argue that there was evidence of fraud, malice or wantonness to support their claims for attorney's fees as special damages, and Plaintiffs also did not submit any competent evidence of fraud, malice or wantonness to support their claims for attorney's fees. *Id.* Therefore, Plaintiffs failed to provide Defendants with proper or sufficient notice of their claims for attorney's fees in their reply in support of their motion for summary judgment and opposition to the counter-motion for summary judgment.

Fourth, Plaintiffs compounded their failure to provide Defendants with proper or sufficient notice of their claims for attorney's fees by submitting a single affidavit that could not, as a matter of law, constitute evidence of fraud, malice or wantonness. Specifically, with regard to attorney's fees, the only evidence submitted by Plaintiffs was Senator Settelmeyer's affidavit in which he states that "[p]rior to and since the filing of the above-captioned action, I and the other Plaintiffs in this action have incurred and continue to incur attorney's fees and costs in the pursuit of our claims set forth in our Amended Complaint." (*JA4:000723, ¶ 4.*) However, Senator Settelmeyer's affidavit could not, as a matter of law, constitute evidence of fraud, malice or wantonness 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.

Despite their failure to provide Defendants with proper or sufficient notice of their claims for attorney's fees and their failure to present any competent evidence of fraud, malice or wantonness to support their claims for attorney's fees, Plaintiffs contend that their claims for attorney's fees were somehow litigated at **trial** and that, as a result, motions to amend the pleadings under NRCP 15(b)(2) "may be appropriate mechanisms for resolving a conflict between the pleadings and the trial evidence." (*Resp. 40-41.*) Plaintiffs are wrong as a matter of law.

First, because Plaintiffs did not file any motions in the district court to amend the pleadings under NRCP 15(b)(2), Plaintiffs cannot ask for that relief on appeal. *See Webb v. Ky. State Univ.*, 468 F. App'x 515, 520 (6th Cir. 2012) (holding that parties who fail to file motions to amend in the district court cannot use Rule 15(b)(2) to amend their pleadings "belatedly on appeal."); *Siler v. Webber*, 443 F. App'x 50, 58 (6th Cir. 2011) (same). Second, because this case was decided on summary judgment and not at trial, Plaintiffs cannot utilize NRCP 15(b)(2) to amend their pleadings for issues "tried" by consent because "[b]y its plain terms, Rule 15(b)(2) only applies to claims that are **tried**, and this case was disposed of on summary judgment." *McColman v. St. Clair Cnty.*, 479 F. App'x 1, 6 (6th Cir. 2012) (emphasis added). Third, Plaintiffs cannot utilize NRCP 15(b)(2) to amend their pleadings because Plaintiffs did not present any competent evidence of fraud, malice or wantonness to justify such an amendment. *See Sprouse v. Wentz*, 105 Nev. 597, 603-04 (1989). In fact, there is no evidence of fraud, malice or wantonness associated with Defendants' conduct acting upon the advice of counsel.

Plaintiffs also contend that their claims for attorney's fees were somehow litigated at **trial** and that they can be awarded attorney's fees under this Court's decision in *Summa Corp. v. Greenspun*, 96 Nev. 247, 255-56 (1980), *modified on*

reh'g on other grounds, 98 Nev. 528 (1982), *and disapproved on other grounds by Sandy Valley*, 117 Nev. at 958-60. However, in *Sandy Valley*, this Court stated:

> *Summa Corp.* merely stands for the proposition that failure to properly plead special damages pursuant to NRCP 9(g) does not necessarily bar an award of attorney fees when evidence of attorney fees as damages has been litigated at **trial**. In such a case, motions under NRCP 54(c) or NRCP 15(b) may be appropriate mechanisms for resolving a conflict between the pleadings and the **trial** evidence. *Summa Corp.* does not, however, permit the award of post-trial attorney fees in contravention of *Young*.

Sandy Valley, 117 Nev. at 959 (emphasis added); *Pardee Homes*, 135 Nev. at 177 (stating that in *Sandy Valley*, this Court "stressed that future litigants could not obtain attorney fees as special damages without complying with NRCP 9(g).").

As discussed previously, this case was decided on summary judgment and not at trial. In the absence of a trial, this Court's decision in *Summa Corp.* is not applicable because this case does not involve a situation where "evidence of attorney fees as damages has been litigated at **trial**." *Sandy Valley*, 117 Nev. at 959 (emphasis added). To the contrary, at every stage of the district court proceedings, Plaintiffs failed to provide Defendants with proper or sufficient notice of their claims for attorney's fees, and they failed to present any competent evidence of fraud, malice or wantonness to support their claims for attorney's fees. Under such circumstances, Plaintiffs cannot, as a matter of law, recover attorney's fees as special damages. Therefore, this Court should affirm the district court's order denying attorney's fees as special damages against all Defendants.

D. Under Nevada's Uniform Declaratory Judgments Act in NRS Chapter 30, Plaintiffs cannot, as a matter of law, recover attorney's fees as compensatory or money damages based on the supplemental-relief provisions in NRS 30.100.

Plaintiffs brought their action for declaratory relief under Nevada's Uniform Declaratory Judgments Act ("Uniform Act") in NRS Chapter 30. (*JA1:000028*, ¶ *73*.) The Legislature has provided that the Uniform Act must be interpreted and construed in order to effectuate its purpose to make the law uniform among the states which have enacted the Uniform Act. NRS 30.160.

The Uniform Act provides that in actions for declaratory relief, "the court may make such award of **costs** as may seem equitable and just." NRS 30.120 (emphasis added). However, the Uniform Act does not similarly authorize the court to award attorney's fees in actions for declaratory relief. In other states that have enacted the Uniform Act, courts have held that "[t]he plain language of the [Uniform] Declaratory Judgment Act . . . 'does not authorize a court to make an award of attorney's fees.'" *Bd. of Sup'rs v. Windmill Meadows, LLC*, 752 S.E.2d 837, 845 (Va. 2014) (quoting *Russell Cnty. Dep't of Soc. Servs. v. O'Quinn*, 523 S.E.2d 492, 492-93 (Va. 2000)); *Swaps, LLC v. ASL Prop., Inc.*, 791 S.E.2d 711, 712-14 (N.C. Ct. App. 2016) ("Other states interpreting this same provision in their own versions of this uniform law have held that the term 'costs' does not include attorneys' fees.") (collecting cases); *see also Clark v. Exch. Ins. Ass'n*, 161 So.2d

817, 820 (Ala. 1964) ("The supplementary relief provision of [the Uniform Act] is not authority for the allowance of attorney's fees in declaratory judgment action.").

By contrast, although Texas has enacted the Uniform Act, it has revised the Uniform Act to provide that in actions for declaratory relief, "the court may award costs and reasonable and necessary **attorney's fees** as are equitable and just." Tex. Civ. Prac. & Rem. Code Ann. § 37.009 (emphasis added). In the absence of a similar provision in Nevada, the plain language of the Uniform Act does not authorize recovery of attorney's fees in actions for declaratory relief.

Even though the plain language of the Uniform Act does not authorize recovery of attorney's fees in actions for declaratory relief, Plaintiffs contend that they can nevertheless recover attorney's fees under the Uniform Act as compensatory or money damages based on the supplemental-relief provisions in NRS 30.100. (*Resp. 29-33.*) Plaintiffs are wrong as a matter of law.

First, this Court has never interpreted the supplemental-relief provisions in NRS 30.100 to allow parties to recover attorney's fees as compensatory or money damages in actions for declaratory or injunctive relief. To the contrary, under this Court's case law in *Sandy Valley* and its progeny, this Court has repeatedly determined that parties cannot, as a matter of law, recover attorney's fees as special damages in such actions unless they properly plead and present evidence of fraud, malice or wantonness and prove bad faith conduct. *Sandy Valley*, 117 Nev. at 958;

Pardee Homes, 135 Nev. at 177-78 n.3. As recognized by this Court, "[t]hese decisions now hold positions of permanence in this court's jurisprudence—precedent that, under the doctrine of *stare decisis*, [it] will not overturn absent compelling reasons for so doing. Mere disagreement does not suffice." *Miller v. Burk*, 124 Nev. 579, 597 (2008) (footnotes omitted). In this case, Plaintiffs have not established any "weighty and conclusive" reasons for this Court to overturn its precedent. *Id.* (quoting *Kapp v. Kapp*, 31 Nev. 70, 73 (1909)).

Furthermore, courts in other states enacting the Uniform Act have held that "[t]he supplementary relief provision of [the Uniform Act] is not authority for the allowance of attorney's fees in declaratory judgment action." *Clark*, 161 So.2d at 820. This Court should follow this long-standing judicial interpretation by the Alabama Supreme Court because the Uniform Act must be interpreted and construed in order to effectuate its purpose to make the law uniform among the states which have enacted the Uniform Act. NRS 30.160.

Finally, Plaintiffs cite several federal cases interpreting the supplemental-relief provisions in 28 U.S.C. § 2202 of the Federal Declaratory Judgments Act. (*Resp. 31.*) However, those cases do not address the issue of whether the federal supplemental-relief provisions authorize an award of attorney's fees in declaratory judgment actions. Nevertheless, there are federal cases which address that issue, and those federal cases have consistently held that the federal supplemental-relief

provisions do not authorize an award of attorney's fees in declaratory judgment actions. As explained by the Tenth Circuit:

> We have never recognized § 2202 as an independent basis to award attorneys fees-*viz.*, as an additional ground for such fees beyond the four well-recognized exceptions to the American Rule. Moreover, when our sister circuits have considered the question, they have concluded that § 2202 does not give an independent power to award attorneys' fees.

Schell v. OXY USA Inc., 814 F.3d 1107, 1127 (10th Cir. 2016) (footnotes omitted and collecting cases); *Nat'l Merch. Ctr. v. MediaNet Grp. Techs.*, 893 F.Supp.2d 1054, 1057-58 (C.D. Cal. 2012).

Accordingly, based on long-standing and well-established case law, Plaintiffs cannot, as a matter of law, recover attorney's fees as compensatory or money damages based on the supplemental-relief provisions in NRS 30.100. Therefore, this Court should affirm the district court's order denying attorney's fees as special damages against all Defendants.

E. Even if Plaintiffs had properly pled attorney's fees as special damages, the district court did not manifestly abuse its discretion in denying attorney's fees as special damages because none of the Defendants engaged in any bad faith conduct.

Plaintiffs have not alleged or argued that the Department of Taxation or Department of Motor Vehicles engaged in any bad faith conduct in the passage and approval of either SB 542 or SB 551. (*Resp. 41-46.*) Instead, Plaintiffs contend that the Individual Defendants engaged in bad faith conduct based on various

actions taken by them in their official capacities in the passage and approval of SB 551. *Id.*

In particular, Plaintiffs contend that the Individual Defendants engaged in bad faith conduct because: (1) there was a disagreement among the Senators whether SB 551 was subject to the two-thirds requirement; (2) the Senate and its members voted for the first time on SB 551 and the bill was declared lost because it was not approved by a two-thirds majority of all the members elected to the Senate; (3) under well-established rules of parliamentary law, the Senate and its members reconsidered the body's first vote on SB 551 and reconsidered the body's interpretation of the two-thirds requirement; (4) after reconsideration, the Senate and its members relied on the advice of counsel, concluded that SB 551 was not subject to the two-thirds requirement, voted a second time on SB 551 and declared that the bill passed by a majority of all the members elected to the Senate; and (5) the bill was signed by Secretary Clift, Lt. Governor Marshall and Governor Sisolak in their official capacities. (*Resp. 42-46.*) As described previously, Individual Defendant Cannizzaro attempted to avoid this litigation where Plaintiff Senators disagreed with the advice of counsel regarding interpretation of the two-thirds requirement. All of this conduct consisted of the regular and reasonable exercise by the Individual Defendants of official authority and discretion. None of this conduct consisted of bad faith conduct as a matter of law.

As a general rule, "a client's reliance upon advice of his attorney prevents a finding of bad faith." *Mann Agency, LLC v. Miss. Dep't of Pub. Safety*, 306 So. 3d 656, 663 (Miss. 2020) (quoting *Liberty Mut. Ins. v. McKneely*, 862 So. 2d 530, 536 (Miss. 2003)). For example, in *Mann*, the Mississippi Supreme Court held that a state department had not acted in bad faith by retroactively applying a new interpretation to an existing contract with the plaintiff where "staff attorneys for the [department] reviewed the contract and applied a reasonable interpretation of the contractual term 'reimburse.'" *Id.*

In this case, given the genuine legal dispute before this Court, the Individual Defendants' reliance on counsel's advice was reasonable and not bad faith conduct. This is true even if this Court ultimately sides with Plaintiffs on the constitutional question. The district court correctly recognized the lack of bad faith upon the record before the lower court. This Court, at minimum, should do the same. It was not bad faith conduct for the Individual Defendants to rely on counsel's advice and the reasonable legal interpretation that SB 551 was not subject to the two-thirds requirement. Under such circumstances, the Individual Defendants' reliance on counsel's advice prevents a finding of bad faith.

In Nevada, under well-established rules of constitutional interpretation, this Court is the final interpreter of the meaning of the Nevada Constitution. *Nevadans for Nev. v. Beers*, 122 Nev. 930, 943 n.20 (2006) ("A well-established tenet of our

legal system is that the judiciary is endowed with the duty of constitutional interpretation."); *Guinn v. Legislature (Guinn II)*, 119 Nev. 460, 471 (2003) (describing this Court's justices "as the ultimate custodians of constitutional meaning."). Nevertheless, even though the final power to decide the meaning of the Nevada Constitution ultimately rests with the judiciary, "[i]n the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." *United States v. Nixon*, 418 U.S. 683, 703 (1974).

Accordingly, this Court has recognized that a reasonable construction of a constitutional provision by the Legislature should be given great weight. *State ex rel. Coffin v. Howell*, 26 Nev. 93, 104-05 (1901); *State ex rel. Cardwell v. Glenn*, 18 Nev. 34, 43-46 (1883). This is particularly true when a constitutional provision concerns the passage of legislation. *Id.* Thus, when construing a constitutional provision, "although the action of the legislature is not final, its decision upon this point is to be treated by the courts with the consideration which is due to a co-ordinate department of the state government, and in case of a reasonable doubt as to the meaning of the words, the construction given to them by the legislature ought to prevail." *Dayton Gold & Silver Mining Co. v. Seawell*, 11 Nev. 394, 399-400 (1876).

The weight given to the Legislature's construction of a constitutional provision involving legislative procedure is of particular force when the meaning of the constitutional provision is subject to any uncertainty, ambiguity or doubt. *Nev. Mining Ass'n v. Erdoes*, 117 Nev. 531, 539-40 (2001). Under such circumstances, the Legislature may rely on an opinion of its counsel which interprets the constitutional provision, and "the Legislature is entitled to deference in its counseled selection of this interpretation." *Id.* at 540. For example, when the meaning of the term "midnight Pacific standard time"—as formerly used in the constitutional provision limiting legislative sessions to 120 days—was subject to uncertainty, ambiguity and doubt following the 2001 legislative session, this Court explained that the Legislature's interpretation of the constitutional provision was entitled to deference because "[i]n choosing this interpretation, the Legislature acted on Legislative Counsel's opinion that this is a reasonable construction of the provision. We agree that it is, and the Legislature is entitled to deference in its counseled selection of this interpretation." *Id.*

Consequently, in determining whether the two-thirds requirement applies to a particular bill, the Legislature has the power to interpret the two-thirds requirement—in the first instance—as a reasonable and necessary corollary power to the exercise of its expressly granted and exclusive constitutional power to enact laws by the passage of bills. *See* Nev. Const. art. 4, § 23 (providing that "no law

shall be enacted except by bill."); *State ex rel. Torreyson v. Grey*, 21 Nev. 378, 380-84 (1893) (discussing the power of the Legislature to interpret constitutional provisions governing legislative procedure). Moreover, because the two-thirds requirement involves the exercise of the Legislature's lawmaking power, any uncertainty, ambiguity or doubt regarding the application of the two-thirds requirement must be resolved in favor of the Legislature's lawmaking power and against restrictions on that power. *See In re Platz*, 60 Nev. 296, 308 (1940) (stating that the language of the Nevada Constitution "must be strictly construed in favor of the power of the legislature to enact the legislation under it.").

Finally, when the Legislature exercises its power to interpret the two-thirds requirement in the first instance, the Legislature may resolve any uncertainty, ambiguity or doubt regarding the application of the two-thirds requirement by following an opinion of its counsel which interprets the constitutional provision, and this Court will typically afford the Legislature deference in its counseled selection of that interpretation. *Nev. Mining*, 117 Nev. at 40.

In this case, Plaintiffs acknowledge that there was a disagreement among the Senators whether SB 551 was subject to the two-thirds requirement. (*Resp. 44.*) In light of that disagreement, the interpretation of the two-thirds requirement was subject to uncertainty, ambiguity or doubt. When the Senate and its members voted for the first time on SB 551, the body resolved that uncertainty, ambiguity or

doubt by rejecting the advice of counsel, and the body determined that the bill was subject to the two-thirds requirement.

At this stage in the legislative process, Plaintiffs contend that it was bad faith conduct for the Senate and its members to reconsider the first vote on SB 551. However, it is a well-established rule of parliamentary law that "every legislative body has the inherent right to reconsider a vote on an action previously taken by it." *Mason's Manual of Legislative Procedure* § 450(1) (2020) ("*Mason's Manual*").[4] As further explained in *Mason's Manual*, "all legislative bodies have a right during the session to reconsider action taken by them as they think proper, and it is the **final result only** that is to be regarded as the thing done." *Mason's Manual* § 450(2) (emphasis added).

In this case, when the Senate and its members decided to reconsider the first vote on SB 551, there was no binding precedent from this Court addressing whether a bill like SB 551 was subject to the two-thirds requirement. As a result, the application of the two-thirds requirement to SB 551 was an open and

[4] In determining the rules of parliamentary law applicable to its proceedings under Article 4, Section 6 of the Nevada Constitution, the Senate has adopted *Mason's Manual* as parliamentary authority. *See* Senate Standing Rule No. 90. In addition, courts have found that "*Mason's Manual* is a widely recognized authority on state legislative and parliamentary procedures." *Gray v. Gienapp*, 727 N.W.2d 808, 811 (S.D. 2007). In this brief, all citations to *Mason's Manual* are to the 2020 edition, which is the most recent edition published by the National Conference of State Legislatures (NCSL).

unresolved question of law. At this stage in the legislative process, the Senate and its members had unlimited authority and discretion to reconsider the body's prior determination of the constitutional question and exercise "the right of the body to change its mind." *Mason's Manual* § 450(2). Thereafter, the Senate and its members had every right to rely on the advice of counsel, conclude that SB 551 was not subject to the two-thirds requirement, vote a second time on SB 551, and declare that the bill passed by a majority of all the members elected to the Senate. After such passage, Secretary Clift, Lt. Governor Marshall and Governor Sisolak also had every right to perform their official duties and sign the bill.

All of this conduct consisted of the regular and reasonable exercise by the Individual Defendants of official authority and discretion. None of this conduct consisted of bad faith conduct as a matter of law. Therefore, even if Plaintiffs had properly pled attorney's fees as special damages, the district court did not manifestly abuse its discretion in denying attorney's fees as special damages because none of the Defendants engaged in any bad faith conduct. Accordingly, this Court should affirm the district court's order denying attorney's fees as special damages against all Defendants.

F. Plaintiffs cannot, as a matter of law, recover attorney's fees as compensatory or money damages for an alleged state constitutional tort because: (1) Plaintiffs failed to raise this issue in the district court; (2) Plaintiffs failed to plead such claims for attorney's fees; and (3) Nevada has never recognized such claims for attorney's fees.

For the first time in this case, Plaintiffs contend that they can recover attorney's fees as compensatory or money damages for an alleged state constitutional tort. However, because Plaintiffs failed to raise this issue in the district court, it is "deemed to have been waived and will not be considered on appeal." *City of Boulder City v. Boulder Excavating, Inc.*, 124 Nev. 749, 755 n.12 (2008) (quoting *Britz v. Consol. Casinos Corp.*, 87 Nev. 441, 447 (1971)).

Furthermore, Plaintiffs failed to plead any claims in their first amended complaint to rrecover attorney's fees as compensatory or money damages for an alleged state constitutional tort. As a result, Plaintiffs failed to provide Defendants with proper or sufficient notice of such claims. Plaintiffs also failed to present any competent evidence to support such claims.

Finally, Article 4, Section 18(2) of the Nevada Constitution does not provide for a private cause of action to recover compensatory or money damages for a violation of its provisions. In addition, the Legislature has not enacted a statute that authorizes a private cause of action to recover compensatory or money damages for a violation of Article 4, Section 18(2). Therefore, Plaintiffs cannot, as a matter of law, recover attorney's fees as compensatory or money damages for an alleged state constitutional tort unless this Court recognizes an implied private cause of action to recover compensatory or money damages for a violation of

Article 4, Section 18(2). *See* Annotation, *Implied Cause of Action for Damages for Violation of Provisions of State Constitutions*, 75 A.L.R.5th 619 (2000).

As a general rule, when the state legislature has not enacted a statute that authorizes a private cause of action to recover compensatory or money damages for a violation of a state constitution provision but has provided other remedies, such as declaratory and injunctive relief, to vindicate state constitutional rights, state courts should be hesitant to recognize an implied private cause of action to recover compensatory or money damages. *See Kelley Prop. Dev. v. Town of Lebanon*, 627 A.2d 909, 922 (Conn. 1993) ("[W]e should not construe our state constitution to provide a basis for the recognition of a private damages action for injuries for which the legislature has provided a reasonably adequate statutory remedy," such as injunctive relief); *Herrick's Aero-Auto-Aqua Repair Serv. v. State Dep't of Transp. & Pub. Facilities*, 754 P.2d 1111, 1116 (Alaska 1988) (finding that injunctive relief was an adequate statutory remedy to preclude an implied private damages action for state constitutional violations). The reason for this rule is that such judicial restraint protects "the constitutional principle of separation of powers and its requirement for judicial deference to legislative resolution of conflicting considerations of public policy." *Kelley Prop. Dev.*, 627 A.2d at 922.

In this case, by enacting Nevada's Uniform Declaratory Judgments Act in NRS Chapter 30, the Legislature has provided an adequate statutory remedy to vindicate state constitutional rights through declaratory and injunctive relief. For example, if this Court finds that the provisions of SB 542 or the challenged provisions of sections 2, 3, 37 and 39 of SB 551 are unconstitutional because they were enacted in violation of the two-thirds requirement, Plaintiffs will be entitled to declaratory and injunctive relief enjoining the Department of Motor Vehicles and Department of Taxation from collecting and enforcing the fees and taxes under the invalidated provisions and ordering an immediate refund of those fees and taxes to the affected fee payers and taxpayers with interest at the legal rate of interest from the date collected. (*JA6:001188, ¶¶ 1-2.*) Given the availability of such declaratory and injunctive relief, the Legislature has clearly provided an adequate statutory remedy to vindicate Plaintiffs' state constitutional rights. Under such circumstances, this Court should exercise judicial restraint, and it should decline Plaintiffs' invitation to recognize an implied private cause of action to recover compensatory or money damages for a violation of Article 4, Section 18(2). In doing so, this Court will be protecting "the constitutional principle of separation of powers and its requirement for judicial deference to legislative resolution of conflicting considerations of public policy." *Kelley Prop. Dev.*, 627 A.2d at 922.

G. Plaintiffs cannot, as a matter of law, recover attorney's fees under the substantial benefit doctrine or the private attorney general doctrine because: (1) Plaintiffs failed to raise those doctrines in the district court; and (2) those doctrines should not be considered under the circumstances of this case.

For the first time in this case, Plaintiffs contend that they can recover attorney's fees under the substantial benefit doctrine or the private attorney general doctrine. However, because Plaintiffs failed to raise those doctrines in the district court, those doctrines are "deemed to have been waived and will not be considered on appeal." *Boulder Excavating*, 124 Nev. at 755 n.12.

This Court has adopted the substantial benefit doctrine for Nevada. *Jesseph v. Digital Ally, Inc.*, 136 Nev. Adv. Op. 59, 472 P.3d 674, 675 (2020). However, this Court has noted that, as a general rule, the substantial benefit doctrine does not apply to lawsuits against the Federal Government and state governments. *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 92 & n.20 (2006). Given that Plaintiffs failed to raise the substantial benefit doctrine in the district court, this Court should not create new exceptions to this general rule in a case where Defendants were not given the opportunity to litigate the issue in the district court.

This Court has not adopted the private attorney general doctrine for Nevada. Given that Plaintiffs failed to raise the private attorney general doctrine in the district court, this Court should not adopt a new doctrine for Nevada in a case

where Defendants were not given the opportunity to litigate the issue in the district court.

II. Even if Plaintiffs had properly pled attorney's fees as special damages, the district court properly dismissed the Individual Defendants because they cannot be held liable for attorney's fees as a matter of law.

A. Standards for reviewing the district court's order dismissing the Individual Defendants.

This Court reviews de novo the district court's order dismissing the Individual Defendants. *Marvin v. Fitch*, 126 Nev. 168, 172-73 (2010). The issue of whether immunity is an appropriate defense is a question of law that this Court also reviews de novo. *Id.*

B. 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).[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

[5] NRS 41.071 is reproduced in the Addendum to this brief.

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).

Plaintiffs contend that legislative immunity is a qualified immunity, not an absolute immunity. (*Resp. 16-17.*) Plaintiffs are wrong as a matter of law. The U.S. Supreme Court has stated unequivocally: "**Absolute** legislative immunity attaches to all actions taken in the sphere of legitimate legislative activity." *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (emphasis added and internal quotations omitted). Therefore, legislative immunity is an absolute immunity, not a qualified immunity.[6]

Plaintiffs contend that the Individual Defendants are not entitled to legislative immunity because their actions were not taken in the sphere of legitimate legislative activity. (*Resp. 16-22.*) Plaintiffs are wrong as a matter of law. In *Bogan*, the U.S. Supreme Court held that absolute legislative immunity protects all actions that are "integral steps in the legislative process." *Bogan*, 523 U.S. at 55. As discussed previously, all of the Individual Defendants' conduct consisted of the

[6] Plaintiffs also suggest that legislative immunity involves issues of **personal** jurisdiction. (*Resp. 14-15.*) Plaintiffs are wrong as a matter of law because "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) (emphasis added).

regular and reasonable exercise of official authority and discretion during integral steps in the legislative process.

In order to pass **any** legislative measure, each House and its members must first determine how many votes are necessary to pass the measure. That is clearly an integral step in the legislative process because, without that step, the House and its members could never pass any legislative measure. Therefore, when the House and its members are determining whether a bill is subject to the two-thirds requirement, they are taking actions in the sphere of legitimate legislative activity because, without those actions, the legislative process would come to a standstill.

Plaintiffs attempt to circumvent the protection of absolute legislative immunity by contending that the Senate and its members acted outside the sphere of legitimate legislative activity when the body reconsidered the first vote on SB 551. However, as discussed previously, it is a well-established rule of parliamentary law that "every legislative body has the inherent right to reconsider a vote on an action previously taken by it." *Mason's Manual* § 450(1). At that integral step in the legislative process, the application of the two-thirds requirement to SB 551 was an open and unresolved question of law, and the Senate and its members had unlimited authority and discretion to reconsider the body's prior determination of the constitutional question and exercise "the right of the body to change its mind." *Mason's Manual* § 450(2). Thereafter, the Senate and

its members had every right to rely on the advice of counsel, conclude that SB 551 was not subject to the two-thirds requirement, vote a second time on SB 551, and declare that the bill passed by a majority of all the members elected to the Senate. After such passage, Secretary Clift, Lt. Governor Marshall and Governor Sisolak also had every right to perform their official duties and sign the bill. Because all of these actions consisted of the regular and reasonable exercise of official authority and discretion during integral steps in the legislative process, all of these actions were core legislative functions that were well within the sphere of legitimate legislative activity and protected by absolute legislative immunity.

Plaintiffs also attempt to circumvent the protection of absolute legislative immunity by trying to ascribe improper motives to the Senate and its members when the body reconsidered the first vote on SB 551. However, the application of absolute legislative immunity to 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 v. Brandhove*, 341 U.S. 367, 377 (1951). 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

alternative is never-ending litigation by the legislative minority on any substantive issue under such a guise, which effectively eliminates legislative immunity.

In this case, the nature of every act taken by the Individual Defendants in their official capacities in the passage and approval of SB 542 and SB 551 was purely legislative in nature and an integral step in the legislative process. Therefore, the Individual Defendants are entitled to absolute legislative immunity because their actions were taken in the sphere of legitimate legislative activity.

C. Under NRS 41.032, the Individual 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).

Plaintiffs contend that the Individual Defendants are not entitled to discretionary-function immunity because their official actions in the passage and approval of SB 542 and SB 551 were not based on considerations of social, economic or political policy. (*Resp. 23-26.*) However, the official actions taken by the Individual Defendants in the passage and approval of SB 542 and SB 551 are the exact types of policy-making actions by elected officials that discretionary-function immunity was intended to protect.

During each integral step in the legislative process, the Individual Defendants are required to exercise official discretion and judgment based on considerations of social, economic or political policy. The very reason for providing immunity under such circumstances is to protect the policy-making functions of the legislative and executive branches from "judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Martinez*, 123 Nev. at 446 (quoting *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984)). Consequently, because the Individual Defendants are protected from liability by discretionary-function immunity under NRS 41.032, the district court properly dismissed the Individual Defendants because they cannot be held liable for attorney's fees as a matter of law.

D. 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.

Under the governmental immunity in NRS 218F.720, 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). In addition, NRS 218F.720 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 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.

Plaintiffs contend that the Individual Legislative Defendants are not entitled to governmental immunity under NRS 218F.720 because they were not acting on behalf of the Legislature as a whole in the passage and approval of SB 542 and SB 551. (*Resp. 27-28.*) Plaintiffs' contention must fail because they attempt to carve an exception out of NRS 218F.720 that does not exist. Plaintiffs sued the Individual Legislative Defendants in their official capacities based on actions taken by them as members of the Legislature. *State ex rel. Cannizzaro v. First Jud. Dist. Ct.*, 136 Nev. Adv. Op. 34, 466 P.3d 529, 534 (2020). As such, the Individual Legislative Defendants are entitled to governmental immunity under

NRS 218F.720 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.

Plaintiffs also contend that NRS 218F.720 is an unconstitutional infringement upon the judiciary's separate powers. Plaintiffs are wrong as a matter of law. 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.* 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." *U.S. Dep't of Treasury v. Hood*, 101 Nev. 201, 204 (1985).

By enacting NRS 218F.720, the Legislature exercised its plenary and exclusive power under Article 4, Section 22 of the Nevada Constitution, and the Legislature decided not to waive its own sovereign immunity and the immunity of

its members from awards of attorney's fees and costs. Therefore, "[i]t is not within the power of the courts . . . to strip the sovereign of its armour." *Taylor*, 73 Nev. at 153. Accordingly, because the Individual Legislative Defendants are protected from liability for attorney's fees by the governmental immunity in NRS 218F.720, the district court properly dismissed the Individual Legislative Defendants because they cannot be held liable for attorney's fees as a matter of law.

E. The Individual Defendants are not necessary and proper party-defendants to this litigation as a matter of law given that they do not have any connection with enforcement of the challenged legislation.

Under the Uniform Declaratory Judgments Act, "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." NRS 30.130. In states that have enacted the Uniform Act, courts have held that in actions for declaratory relief challenging the constitutionality of state statutes, a state officer is not a proper-party defendant when "the duties of his office do not impose upon him any responsibilities for administering the statutes." *Lucchesi v. State*, 807 P.2d 1185, 1193 (Colo. App. 1990). Furthermore, such an improperly named state officer is entitled to be removed from the case as a matter of law. *Id.* at 1193-94. The reason for this rule is that "in actions for declaratory and injunctive relief challenging the constitutionality of state statutes, state officers with statewide administrative

functions under the challenged statute are the proper parties defendant." *Serrano v. Priest*, 557 P.2d 929, 941-42 (Cal. 1976). Thus, in states that have enacted the Uniform Act, courts follow the U.S. Supreme Court's rule in *Ex parte Young* that "[i]n making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act." *Ex parte Young*, 209 U.S. 123, 155-56 (1908).

In this case, because the Individual Defendants do not occupy positions as state officers with statewide administrative functions under the challenged provisions of SB 542 and SB 551, they are not necessary and proper party-defendants to this litigation as a matter of law. Therefore, the district court properly dismissed the Individual Defendants because they are not necessary and proper party-defendants and they cannot be held liable for attorney's fees as a matter of law.

CONCLUSION

If this Court upholds the constitutionality of the provisions of SB 542 and the challenged provisions of sections 2, 3, 37 and 39 of SB 551, then Plaintiffs' cross-appeal is rendered moot. However, if this Court finds that the provisions of SB 542 or the challenged provisions of sections 2, 3, 37 and 39 of SB 551 are unconstitutional because they were enacted in violation of the two-thirds

requirement, then Defendants ask this Court to affirm that portion 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 Defendants.

DATED: This **5th** day of April, 2021.

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

ADDENDUM

NRS 41.071 Legislative privilege and immunity for State Legislators.

1. The Legislature hereby finds and declares that:

(a) The Framers of the Nevada Constitution created a system of checks and balances so that the constitutional powers separately vested in the Legislative, Executive and Judicial Departments of State Government may be exercised without intrusion from the other Departments.

(b) As part of the system of checks and balances, the constitutional doctrines of separation of powers and legislative privilege and immunity facilitate the autonomy of the Legislative Department by curtailing intrusions by the Executive or Judicial Department into the sphere of legitimate legislative activities.

(c) The constitutional doctrines of separation of powers and legislative privilege and immunity protect State Legislators 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.

(d) Under the constitutional doctrines of separation of powers and legislative privilege and immunity, State Legislators must not be hindered or obstructed by executive or judicial oversight that realistically threatens to control their conduct as Legislators.

(e) Under the constitutional doctrines of separation of powers and legislative privilege and immunity, State Legislators must be free to represent the interests of their constituents with assurance that they will not later be called to task for that representation by the other branches of government.

(f) Under the constitutional doctrines of separation of powers and legislative privilege and immunity, State Legislators must not be questioned or sanctioned by the other branches of government for their actions in carrying out their core or essential legislative functions.

(g) Under the constitutional doctrines of separation of powers and legislative privilege and immunity, the only governmental entity that may question or sanction a State Legislator for any actions taken within the sphere of legitimate legislative activity is the Legislator's own House pursuant to Section 6 of Article 4 of the Nevada Constitution.

(h) Therefore, the purpose and effect of this section is to implement the constitutional doctrines of separation of powers and legislative privilege and immunity by codifying in statutory form the constitutional right of State Legislators to be protected 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.

2. For any speech or debate in either House, a State Legislator shall not be questioned in any other place.

3. In interpreting and applying the provisions of this section, the interpretation and application given to the constitutional doctrines of separation of powers and legislative privilege and immunity under the Speech or Debate Clause of Section 6 of Article I of the Constitution of the United States must be considered to be persuasive authority.

4. The rights, privileges and immunities recognized by this section are in addition to any other rights, privileges and immunities recognized by law.

5. This section applies to any actions, in any form, taken or performed within the sphere of legitimate legislative activity, whether or not the Legislature is in a regular or special session, and such actions include, without limitation:

(a) Any actions, in any form, taken or performed with regard to any legislative measure or other matter within the jurisdiction of the Legislature, including, without limitation, conceiving, formulating, investigating, developing, requesting, drafting, introducing, sponsoring, processing, reviewing, revising, amending, communicating, discussing, debating, negotiating, allying, caucusing, meeting, considering, supporting, advocating, approving, opposing, blocking, disapproving or voting in any form.

(b) Any actions, in any form, taken or performed with regard to any legislative investigation, study, inquiry or information-gathering concerning any legislative measure or other matter within the jurisdiction of the Legislature, including, without limitation, chairing or serving on a committee, preparing committee reports or other documents, issuing subpoenas or conducting disciplinary or impeachment proceedings.

(c) Any actions, in any form, taken or performed with regard to requesting, seeking or obtaining any form of aid, assistance, counsel or services from any officer or employee of the Legislature concerning any legislative measure or other matter within the jurisdiction of the Legislature, including, without limitation, any communications, information, answers, advice, opinions, recommendations, drafts, documents, records, questions, inquiries or requests in any form.

6. The provisions of subsection 5:

(a) Are intended to be illustrative;

(b) Are not intended to be exhaustive or exclusive; and

(c) Must not be interpreted as a limitation or restriction on the constitutional doctrines of separation of powers and legislative privilege and immunity.

7. As used in this section:

(a) "Any form" includes, without limitation, any oral, written, audio, visual, digital or electronic form.

(b) "Legislative measure" means any existing, suggested, proposed or pending bill, resolution, law, statute, ballot question, initiative, referendum or other legislative or constitutional measure.

(c) "Legislature" means:

(1) The Legislature or either House;

(2) Any committee of either House;

(3) Any joint committee of both Houses; or

(4) Any other committee, subcommittee, commission, agency or entity created or authorized by the Legislature to perform legislative functions at the direction of the Legislature, including, without limitation, the Legislative Commission, the Legislative Counsel Bureau or any other agency or entity of the Legislative Department of State Government.

(d) "State Legislator" or "Legislator" means:

(1) Any current or former member of the Senate or Assembly of the State of Nevada; or

(2) Any 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.

(Added to NRS by 2009, 1042; A 2015, 3193)

CERTIFICATE OF COMPLIANCE

1. We hereby certify that this joint surreply brief on cross-appeal complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point font and Times New Roman type.

2. We hereby certify that this joint surreply brief on cross-appeal complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of this brief exempted by NRAP 32(a)(7)(C), this brief is proportionately spaced, has a typeface of 14 points or more, and contains **10,369** words, which is less than the type-volume limit of 14,000 words.

3. We hereby certify that we have read this joint surreply brief on cross-appeal, and to the best of our knowledge, information and belief, it is not frivolous or interposed for any improper purpose. We 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 this brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. We understand that we may be subject to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: This **5th** day of April, 2021.

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 **5th** day of April, 2021, pursuant to NRAP 25 and NEFCR 9, I filed and served a true and correct copy of Appellants/Cross-Respondents' Joint Surreply Brief on Cross-Appeal, 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