IN THE SUPREME COURT OF THE STATE OF NEVADA

THE LAS VEGAS REVIEW JOURNAL, Appellant, vs. CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Respondent.	Case No.: 82908 Electronically Filed Oct 28 2021 10:04 a.m. Elizabeth A. Brown Clerk of Supreme Court Appeal from the Eighth Judicial District Court, the Honorable David M. Jones Presiding

RESPONDENT CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER'S ANSWERING BRIEF

Marquis Aurbach Coffing
Craig R. Anderson, Esq.
Nevada Bar No. 6882
Jackie V. Nichols, Esq.
Nevada Bar No. 14246
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
canderson@maclaw.com
jnichols@maclaw.com
Attorneys for Respondent Clark County Office of The Coroner/Medical Examiner

MAC:15090-001 4479082_2

NRAP 26.1 DISCLOSURE

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

1. The Clark County Office of the Coroner/Medical Examiner ("Coroner") is a governmental entity and has no corporate affiliation.

2. The Coroner is represented in the District Court and this Court by the Clark County District Attorney/Civil Division and Marquis Aurbach Coffing.

Dated this 28th day of October, 2021.

MARQUIS AURBACH COFFING

By: /s/ Jackie V. Nichols
Craig R. Anderson, Esq.
Nevada Bar No. 6882
Jackie V. Nichols, Esq.
Nevada Bar No. 14246
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Respondent Clark County
Office of The Coroner/Medical Examiner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES#

OTHER AUTHORITIES#

RULES#

STATUTES#

I. STATEMENT OF THE CASE AND SUMMARY OF THE ARGUMENT

This a case where, after this Court reversed and remanded the lower court's prior disclosure decision and vacated the award of attorney fees and costs, the District Court was charged with conducting a balancing test in accordance with *Clark Cnty. School Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 707-08, 429 P.3d 313, 320-21 (2018) to determine whether confidential and sensitive information contained in the autopsy reports should be redacted. *See Clark Cnty. Office of the Coroner/Medical Examiner v. Las Vegas Review-Journal*, 136 Nev. 44, 458 P.2d 1048 (2020). On remand, the District Court concluded that the nontrivial privacy interests asserted by the Coroner were outweighed by the public's interest in the records and required the Coroner to disclose nearly 700 juvenile autopsy reports in unredacted form. 3 Joint Appendix ("JA") 619-37. The Coroner acknowledges that, based on the disclosure order on remand, the Las Vegas Review-Journal ("LVRJ") is considered the prevailing party on remand. *See Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 82, 343 P.3d 608, 610 (2015).

Upon obtaining the disclosure order on remand from the District Court, LVRJ submitted an application for its attorney fees and costs throughout the entire litigation, including for work performed on appeal. 6 JA 774-1000. Initially,

LVRJ sought over $280,000 in fees and costs; however, LVRJ subsequently amended its application to remove unrelated entries, modifying the total sought to $275,640.00 in attorney's fees and $3,581.48 in costs. 7 JA 1222-67. After reviewing the briefing and analyzing the fees sought in accordance with the *Brunzell* test, the District Court concluded, that of the attorney fees and costs sought, $167,200 in fees and $2,472.99 in costs was reasonable.

On appeal, LVRJ asks this Court to conclude that the District Court abused its discretion in issuing the fee award because it reduced LVRJ fees and costs. First, LVRJ contends that the Nevada Public Records Act ("NPRA") required the District Court to award LVRJ **all** of its attorney's fees and cost. Next, LVRJ argues that the District Court did not sufficiently analyze its application under the *Brunzell* test and neglected to make concise and clear findings to support the reduction in fees and costs. Finally, LVRJ asks this Court to make factual findings and enter an award in its favor for **all** of its attorney's fees and costs.

LVRJ's arguments are not only unpersuasive, but run contrary to the NPRA and Nevada precedent on fee and cost awards for the following reasons:

A. The NPRA does not entitle a requester to an award of **all** attorney's fees and costs sought in an application. First and foremost, in construing NRS 239.011, the Court must look to the plain language of the statute. And, nothing in NRS 239.011 requires a district court to award a requester ***all*** attorney

fees and costs sought. In fact, the qualifying language within NRS 239.011 is that a requester is entitled to recover "reasonable" attorney fees. The plain language of the statute is consistent with Nevada public policy and common law—which requires an award of fees and costs to be reasonable. *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

In an attempt to circumvent this standard, and the plain language of the statute, LVRJ directs this Court to its previous decision in *Clark Cnty. Office of the Coroner/Medical Examiner v. Las Vegas Review-Journal*, 136 Nev. 44, 458 P.2d 1048 (2020), wherein the Court interpreted the term "entitled" within NRS 239.011. LVRJ's position ignores the context of the Court's decision. There, the Court was asked to determine whether NRS 239.012 immunized a public entity from attorney fees and costs provided in NRS 239.011. The Court concluded that the statutory provisions, NRS 239.011 and NRS 239.012, could be interpreted separately. In so doing, the Court reasoned that the language of "entitled" within NRS 239.011 permitted a requester to seek attorney fees and costs upon prevailing and the term "damages" within NRS 239.012 only applied to civil damages. Thus, the Court's analysis in determining that a requester is "entitled" to recover attorney fees and costs under NRS 239.011 does not automatically warrant, let alone guarantee, an award of **all** fees and costs sought. Accordingly, the District Court's

order awarding reasonable fees and costs is consistent with—not contrary to—the statutory language of the NPRA.

B. The District Court appropriately exercised its discretion in reducing LVRJ's attorney's fees and costs. LVRJ urges this Court to ignore well-established precedent and adopt the Ninth Circuit's standard in awarding fees—requiring a district court to clearly and concisely spell out its findings on fee awards. In contrast, this Court has held that while express findings under each of the *Brunzell* factors are preferred, it is not a requirement. *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015). "Instead, the district court need only demonstrate that it considered the required factors, and the award must be supported by substantial evidence." *Id*. The fee award issued by the District Court specifically analyzed each individual *Brunzell* factor in accordance with Nevada precedent. While the District Court found that all factors weighed in favor of a fee and cost award, it specifically noted that counsel for LVRJ dedicated a substantial amount of time to the litigation. 7 JA 1280. During the hearing, the District Court further explained it reviewed each individual entry, and, although it found the blended rate to be reasonable, it determined that the amount of time spent on certain issues was not. 6 JA 1220. Therefore, the Court must affirm the District Court's award as it did not abuse its discretion in reducing LVRJ's attorney's fees and costs.

C. Substantial evidence supports the District Court's reduction in attorney's fees and costs. "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015); *In re Estate of Bethurem*, 129 Nev. 869, 876, 313 P.3d 237, 242 (2013) (internal quotation marks omitted). Of the $275,640.00 in attorney fees sought, approximately $108,000 related to fees incurred for appellate work. After the District Court ordered disclosure of the autopsy records in unredacted form, the Coroner appealed the order and sought an emergency stay from this Court. *See* Supreme Court Case No. 82229. This Court denied the stay, and the Coroner moved to voluntarily dismiss the appeal. *Id*. The Coroner's motion was granted, and the Court ordered each party to bear its own fees and costs. *Id*. Despite this order, LVRJ sought over $17,000 in attorney fees from the remand appeal as part of its fee application. The District Court was bound by this Court's order and was prohibited from awarding LVRJ its attorney's fees from that appellate proceeding. *See Bd. of Gallery of History, Inc. v. Datecs Corp.*, 116 Nev. 286, 288, 994 P.2d 1149, 1150 (2000) ("Furthermore, this court's order dismissing the original appeal specifically held that Gallery's conduct on appeal did not merit sanctions. This is the law of the case and the district court was without authority to make a contrary finding.").

More importantly, however, LVRJ is precluded from recovering any appellate fees and costs incurred in the instant matter. It is well-established that attorney's fees and costs are not recoverable absent a statute, rule or contractual provision to the contrary. *Rowland v. Lepire*, 99 Nev. 308, 315, 662 P.2d 1332, 1336 (1983) (citations omitted). At the time of the instant case, the NPRA did not permit recovery of appellate fees and costs. *Compare* NRS 239.011 (2017) *with* NRS 239.011 (2019). Because the 2017-version of the NPRA was silent as to appellate fees and costs, LVRJ is precluded from recovering its fees and costs related to the appeals. *See, e.g., Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 971 P.2d 383 (1998) (interpreting NRS 18.010 as precluding appellate fees and costs). This Court should affirm the District Court as it reached the right result, even if it did so for the wrong reason, because substantial evidence supports the fee award. *See Albios v. Horizon Communities, Inc*., 122 Nev. 409, 426 n. 40, 132 P.3d 1022, 1033 n. 40 (2006).

D. In the event the Court concludes that the District Court erred, or the record is unclear, the matter should be remanded to the District Court to conduct the *Brunzell* analysis on the record. LVRJ contends that the District Court erred because: (1) the NPRA *guarantees* a requester **all** of its attorney's fees and costs and (2) the District Court failed to explain line-by-line which entries were unreasonable—a method not required by Nevada law. It is the District Court that

is in the best position to value the services rendered by counsel, not this Court. *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 350, 455 P.2d 31, 35 (1969). Thus, if the District Court erred, the matter must be remanded with instructions.

In summary, the District Court properly exercised its discretion when it reduced LVRJ's award for attorney's fees and costs pursuant to NRS 239.011. Contrary to LVRJ's fatally flawed position, nothing within the NPRA entitles or guarantees a requester to **all** of its attorney's fees and costs in the litigation. Rather, the plain language of NRS 239.011 permits an award of reasonable fees, which is consistent with Nevada law and public policy. Furthermore, the record reflects that the District Court analyzed each *Brunzell* factor. Although the District Court concluded that the factors weighed in favor of a fee and cost award, it determined that the substantial amount of time expended in the litigation was not entirely reasonable. Thus, in weighing the factors, the District Court properly concluded that $167,200.00 was reasonable. Even if it is unclear from the record how the District Court specifically reduced the award, substantial evidence supports the reduction. In its fee application, LVRJ sought approximately $108,000.00 in appellate fees. Because the 2017 NPRA did not permit LVRJ to recover its appellate fees and costs, the record supports the District Court's award. Alternatively, if the Court concludes that the District Court committed an error,

this matter should be remanded with instructions as the District Court is in the best position to value the services rendered by counsel.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. THE SUPREME COURT REVERSED AND REMANDED THE DISTRICT COURT'S DECISION ON DISCLOSING JUVENILE AUTOPSY REPORTS IN UNREDACTED FORMAT.

In April 2017, the LVRJ made a records request to the Coroner for autopsy reports of juvenile deaths dating back to January 2012. *See Clark Cty. Off. of Coroner/Med. Exam'r v. Las Vegas Rev.-J.*, 136 Nev. 44, 46, 458 P.3d 1048, 1051 (2020). After providing LVRJ with various spreadsheets that identified the decedents and their related cause and manner of death, the Coroner proposed to provide the LVRJ with the juvenile autopsy reports in redacted form. *Id.* That is, the Coroner sought to redact the personal health and medical information of the decedents that were unrelated to the cause and manner of death. *Id.* On July 17, 2017, the LVRJ filed its Petition for access to autopsy reports of juvenile deaths dating back to January 2012. *Id*. Ultimately, the District Court ordered disclosure of the juvenile autopsy reports in unredacted format. *Id*. The Coroner appealed the District Court's decision. *Id*.

On appeal, this Court concluded that the *CCSD* balancing test pertaining to individuals' privacy interests applied to the instant case. *Id. at* 54, 458 P.3d at

1056. In applying the balancing test, this Court ruled that the Coroner satisfied its obligation under the *CCSD* balancing test in demonstrating that the juvenile autopsy reports contained personal health and medical information that involves a nontrivial privacy interest. *Id.* The Court then remanded the matter back to the District Court for the LVRJ to prove that the information sought, i.e., the personal health and medical information unrelated to the cause and manner of death, advanced significant public interest. *Id.*

It is imperative to recognize that the Supreme Court reversed the District Court's decision that the Coroner waived a legal basis for withholding the records and concluded that waiver is not a remedy provided for in the NPRA. *Id*. at 49, 458 P.3d at 1053 (citing *Rep. Attorneys General Assoc. v. Las Vegas Metropolitan Police Department*, 136 Nev. Adv. Op. 3, 136 Nev. 28, 30, 458 P.3d 328, 331 (2020).

B. THE SUPREME COURT VACATED LVRJ'S FEE AWARD.

After the District Court directed the Coroner to disclose the unredacted juvenile autopsy reports, LVRJ filed a motion for fees and costs in the amount of $32,377.52. 2 JA 454-69. The District Court granted LVRJ's motion. *Id*. Subsequently, the Coroner sought a stay of the order, which the District Court denied. This Court issued a published opinion and concluded that a government agency is entitled to a stay pending appeal as a matter of right from a monetary

judgment. *See Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 134 Nev. 174, 415 P.3d 16 (2018).

On appeal, the Coroner argued that the award of fees and costs must be vacated if the Supreme Court ruled in favor of the Coroner. Because the Court concluded that the *CCSD* balancing test applied and the matter was remanded to the District Court, the Supreme Court vacated the fee and cost award in its entirety, reasoning that LVRJ was not the prevailing party. *Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 136 Nev. 44, 62, 458 P.3d 1048, 1062 (2020).

C. PROCEEDINGS ON REMAND.

LVRJ filed its Opening Brief on Remand on August 27, 2020. 3 JA 472-506. The Coroner filed its Answering Brief on October 7, 2020. 3 JA 507-36. The LVRJ filed its Reply in Support of its Opening Brief on Remand on October 22, 2020. 3 JA 537-78. The District Court conducted a hearing on the parties' briefs on remand on October 29, 2020. 3 JA 579-80. Ultimately, the District Court ruled in favor of LVRJ and directed the Coroner to produce the unredacted juvenile autopsy reports by November 20, 2020. 3 JA 619-37. Subsequently, the Coroner filed a motion to stay pending an appeal, but the District Court denied the motion. 4 JA 747-62. LVRJ filed a motion for order to show cause why the Coroner should not be held in contempt on December 8, 2020, which the District Court also

denied based on the Coroner's good faith attempt in seeking a stay prior to the disclosure deadline. 4 JA 763-68.

The Coroner filed a notice of appeal on December 15, 2020. 4 JA 724-46. At the same time, the Coroner sought an emergency stay from this Court with a deadline of December 30, 2020, the same date that the records were ordered to be produced. *See* Supreme Court Case No. 82229. This Court, however, denied the Coroner's emergency request for a stay. *Id.* As a result, the Coroner sought to voluntarily dismiss the appeal. *Id*. On January 12, 2021, this Court granted the Coroner's motion and ordered each party to bear its own attorney fees and costs. *Id*.

D. LVRJ'S APPLICATION FOR ATTORNEY FEES AND COSTS.

LVRJ filed an Amended Motion for Attorney's Fees and Cost on February 2, 2021. 6 JA 1001-1132. Notably, LVRJ incorporated its previous motion filed before the initial appeal that sought $32,377.50 in fees and costs. 6 JA 1004. LVRJ dedicated a significant portion of its brief to arguing that the NPRA permitted appellate fees and costs.[1] 6 JA 1008-13. From the appeal process forward, LVRJ expended nearly 700 hours in litigating the matter. 6 JA 1015. LVRJ simply intended to pass-on the cost of its unsuccessful and unreasonable

[1] Despite addressing this with the District Court, LVRJ did not raise this issue in its Opening Brief ("OB").

work to the Coroner, including work related to the initial motion for attorney fees (which was expressly vacated by this Court), work regarding contempt research on the day the records were required to be disclosed and were actually provided, nearly $3,000 worth of work that occurred post-judgment and unrelated to accessing public records, and over $7,000 for a duplicate fee application. 6 JA 1140-43. LVRJ also sought $3,581.48 in costs, which included: $551.44 for photocopies[2]; $540.50 for filing fees; $2,144.448 in legal research[3]; $22.39 for postage; and $322.67 for transcript fees. 5 JA 774-1000.

The Coroner filed an opposition to the Amended Motion for Attorney's Fees and Costs, contending that LVRJ's fees and costs were unreasonable and any appellate fees and costs were not recoverable under NRS 239.011. 6 JA 1133-62. The District Court held a hearing on March 2, 2021. 6 JA 1206-21. During the hearing, the District Court determined that $167,200 in attorney fees and $2,472.99 in costs was reasonable. 6 JA 1220. The District Court explained that it reviewed counsel's bills line-by-line and determined a reasonable amount of time expended on certain issues. *Id*.

[2] LVRJ neglected to substantiate the basis for each copy. 5 JA 774-1000.

[3] LVRJ failed to substantiate the basis for legal research. 5 JA 774-1000.

Subsequently, the Court entered an order where it expressly addressed each *Brunzell* factor. 7 JA 1283-1300. Specifically, the Court made the following conclusions:

> 79. As to the first *Brunzell* factor, the "qualities of the advocate," the Court finds that the rates sought for the Review-Journal's counsel and support staff are reasonable in light of their ability, training, education, experience, professional standing and skill. . . .
>
> 80. The Court also finds that the second *Brunzell* factor, the "character of the work" performed in this case, *Brunzell,* 85 Nev. at 349, 455 P.2d at 33, weighs in favor of a full award of fees and costs to the Review-Journal. . . .
>
> 81. As to the third factor, the work actually performed by counsel . . . [a]s demonstrated by the record of this case and the fees detail provided by the Review-Journal, counsel for the Review-Journal dedicated substantial time and resources to thoroughly researching and briefing each issue in this matter at both the district court and appellate levels and demonstrated substantial skill in the work performed. This factor therefore weighs in favor of awarding the Review-Journal attorney's fees and costs.
>
> 82. The final *Brunzell* factor requires this Court to consider "the result: whether the attorney was successful and what benefits were derived." *Brunzell,* 85 Nev. at 349, 455 P. 2d at 33.
>
> 83. As set forth above, the Review-Journal is the prevailing party in this public records litigation, and as a result of its counsel's efforts, obtained an order from this Court directing the Coroner's Office to produce all of the requested autopsy records.
>
> 84. Thus, this final factor weighs in favor of an award of fees and costs to the Review-Journal.
>
> 85. Based upon the Court's review of the documentation provided by the Review-Journal and the Court's experience in insurance litigation,

> the Court finds the Review-Journal is awarded $167,200.00 in attorneys' fees.

7 JA 1279-80. Although the District Court concluded that the factors weighed in favor of an award, it recognized that the substantial amount of time expended in the litigation was unreasonable and, therefore, reduced the award. *Id*. The District Court also reduced the costs sought from $3,581.48 to $2,472.99. LVRJ now appeals the Court's fee and cost award. 7 JA 1281.

III. STANDARDS OF REVIEW

This Court will not disturb a district court's findings of fact unless they are clearly erroneous and not supported by substantial evidence. *Sheehan & Sheehan v. Nelson Malley and Co.*, 121 Nev. 481, 486, 117 P.3d 219, 223 (2005).

This Court reviews decisions awarding or denying attorney fees with an abuse of discretion standard. *Frantz v. Johnson*, 116 Nev. 455, 471, 999 P.2d 351, 361 (2000). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). Since an award of attorney fees is fact intensive, this Court will affirm an award of attorney fees if it is based upon substantial evidence. *See Logan v. Abe*, 350 P.3d 1139, 1143 (Nev. 2015). When the attorney fees matter implicates questions of law, the proper review is de

novo. *In re Estate and Trust of Rose Miller*, 125 Nev. 550, 553, 216 P.3d 239, 241 (2009).

The determination of allowable costs is within the sound discretion of the trial court. *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998).

IV. LEGAL ARGUMENT

A. THE NPRA DOES NOT ENTITLE LVRJ TO *ALL* OF ITS ATTORNEY'S FEES AND COSTS.

LVRJ wrongfully asserts that it is entitled to **all** of its attorney's fees and costs as a prevailing requester pursuant to the NPRA. However, this Court need not reach this issue because LVRJ did not raise this argument below. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (Issues not argued below are "deemed to have been waived and will not be considered on appeal."). Because this argument was not urged before the District Court, this Court cannot now consider this argument.

LVRJ's interpretation of the attorney fee statute is overly broad and unsupported by the plain language of the statute. *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998) ("[S]tatutes permitting the recovery of costs are to be strictly construed because they are in derogation of the common law."); *Cromer v. Wilson*, 126 Nev.

106, 109, 225 P.3d 788, 790 (2010) (When the statute's language is clear and unambiguous, the Court gives effect to its plain meaning.).

"If the plain meaning of a statute is clear on its face, then [the court] will not go beyond the language of the statute to determine its meaning." *Chur v. Eighth Judicial Dist. Court*, 136 Nev. 68, 71, 458 P.3d 336, 339 (2020). Indeed, the Court will give the language its ordinary meaning. *City Council of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989). The NPRA explicitly provides:

> If the requester prevails, the requester is entitled to recover from the governmental entity that has legal custody or control of the record **his or her costs and reasonable attorney's fees** in the proceeding.

NRS 239.011(2). The qualifying language is that the fees must be reasonable. *Id*. Notably, nothing within NRS 239.011(2), or the NPRA, suggests that a requester is entitled to recover every single dollar it expended in the lawsuit. Thus, this Court should decline to read an additional remedy into the NPRA. *See Builders Ass'n of Northern Nevada v. City of Reno*, 105 Nev. 368, 370, 776 P.2d 1234, 1235 (1989) ("If a statute expressly provides a remedy, courts should be cautious in reading other remedies into the statute."); *Stockmeier v. Nev. Dep't of Corrections Psychological Review Panel*, 124 Nev. 313, 317, 183 P.3d 133, 136 (2008) ("declin[ing] to engraft any additional remedies therein."). This Court has previously established that "[w]here a statute gives a new right and prescribes a

particular remedy, such remedy must be strictly pursued, and is exclusive of any other." *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220, 225 (1879).

LVRJ's flawed logic further contradicts Nevada's public policy and common law regarding an award of attorney's fees and costs. That is, LVRJ demands that it be awarded **all** of its attorney's fees and costs—regardless of the reasonableness of the award sought. "[S]tatutes permitting the recovery of costs are to be strictly construed because they are in derogation of the common law." *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998). Awarding fees is also in derogation of the common law under the American Rule. Thus, it follows that any statutory scheme allowing for an award of attorney fees must be construed narrowly, against attorney fees. *See Hardisty v. Astrue*, 592 F.3d 1072, 1077 (9th Cir. 2010). Moreover, Nevada precedent establishes that a fee award must always be analyzed under the *Brunzell* test. *See Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015) ("In determining the amount of fees to award, the [district] court is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount, so long as the requested amount is reviewed in light of the *Brunzell* factors.") (citation and internal quotations omitted). LVRJ's interpretation that it must be awarded **all** of its fees is not only

contrary to the plain language of the statute but conflicts with Nevada precedent interpreting fee statutes.

To support its position, LVRJ directs the Court to its prior decision in *Clark Cnty. Office of the Coroner/Medical Examiner* ("Coroner") *v. Las Vegas Review-Journal*, 136 Nev. 44, 458 P.3d 1048 (2020). LVRJ's reliance on this case is misleading. In *Coroner*, the Court was tasked with determining whether NRS 239.012 provided immunity to a government agency from an award of attorney fees codified at NRS 239.011. *Id*. at 1060-61. Applying the principles of statutory construction, the Court concluded that the statutes at issue, NRS 239.011 and NRS 239.012 could be read independently. *Id*. The Court reasoned that the term "entitled" within NRS 239.011 meant that as long as the requester prevailed, it could recover fees. *Id*. In contrast, NRS 239.012's language of "damages" was limited to civil damages and did not encompass attorney fees. Nothing in the opinion states, or even insinuates, that a requester *must* receive **all** of its attorney's fees and costs.

Contrary to LVRJ's insistence, the NPRA does not contemplate making a requester "whole." The purpose of the NPRA is to "provide members of the public with prompt access to inspect, copy, or receive a copy of public books and records to the extent permitted by law." NRS 239.001(1). In order to carry out this purpose—access to records—the provisions of NRS 239 must be construed

liberally. NRS 239.001(2). LVRJ's argument that attorney's fees allows a requester access to records is too attenuated. For instance, this contention ignores the plain statutory language that a requester is only entitled to attorney's fees if it *prevails*. Stated differently, there mere filing of a lawsuit against a government entity does not entitle a requester to a fee award—let alone **all** of its attorney's fees and cost. Even if the Court was to liberally construe NRS 239.011, the fact remains that any award is subject to a reasonableness standard. NRS 239.011(2).

LVRJ suggests that applying the reasonableness standard to NRS 239.011 will somehow create a "litigation tax" when attempting to access public records. This logic ignores the fact that without the reasonableness analysis under *Brunzell*, and required by the statute, requesters could charge a ridiculous hourly rate and perform unnecessary work to the litigation—resulting in, like this case, hundreds of thousands of dollars in attorney fees.

Accordingly, the District Court's order awarding **reasonable** fees and costs is consistent with—not contrary to—the statutory language of the NPRA.

B. THE DISTRICT COURT APPROPRIATELY EXERCISED ITS DISCRETION IN ANALYZING THE *BRUNZELL* FACTORS AND REDUCING THE FEE AWARD.

After granting a request for attorney fees a district court must then consider the factors outlined in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), to decide whether the fee requested is reasonable. While express

findings under each of the *Brunzell* factors are preferred, it is not a requirement. *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015). "Instead, the district court need only demonstrate that it considered the required factors, and the award must be supported by substantial evidence." *Id*.

The district court is not limited in its approach for determining the amount of attorney fees to award, but it must conduct its analysis in light of the *Brunzell. Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 427, 132 P.3d 1022, 1034 (2006). The lodestar approach involves multiplying "the number of hours reasonably spent on the case by a reasonable hourly rate." *Herbst v. Humana Health Ins. of Nevada*, 105 Nev. 586, 590, 781 P.2d 762, 764 (1989). The equitable calculation of the fees is a matter traditionally reserved to the trial court. *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 863, 124 P.3d 530, 548 (2005). Nevada appellate courts have ruled on several occasions that the district court does not abuse its discretion when it applies the Lodestar method and reduces the fee award to an amount less than requested. *See Shuette*, 121 Nev. at 864-65, 124 P.3d at 548-49 (noting that "the method upon which a reasonable fee is determined is subject to the discretion of the court" and that, "whichever method the court ultimately uses, the result will prove reasonable as long as the court provides sufficient reasoning and findings in support of its ultimate determination" in accordance with *Brunzell*); *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550,

557-58, 429 P.3d 664, 670-71 (Ct. App. 2018) (acknowledging that, although a district court need not consider billing records or hourly statements in determining a reasonable amount of fees, such consideration may nevertheless contribute to a reasonable method); *see also 145 East Harmon II Tr. v. The Residences at MGM Grand – Tower A Owners' Association*, 136 Nev. 115, 122, 460 P.3d 455, 460 (2020) (noting that the district court's reduction of the fee award to an amount less than what was requested "shows the district court carefully considered the third [*Brunzell*] factor [concerning the actual work performed by the lawyer] in determining a reasonable amount of fees").

In *Cooke v. Gove*, the Nevada Supreme Court upheld an attorney fees award based on "the reasonable value" of the attorney's services, even though the case was taken on a contingency fee basis with no formal agreement. 61 Nev. 55, 61, 114 P.2d 87, 89 (1941). The "evidence" to support the fee was the case file from the successful matter, some of the letters between the client and attorney, and two depositions from other attorneys about the value of the appellant's services. *Id*. at 57, 114 P.2d at 88. The Court noted that the reasonable fee was based on the trial court's evaluation of "the reasonable value of plaintiff's services from all the facts and circumstances" after the court considered how the plaintiff's "work, thought and skill contributed" to the successful outcome. *Id.* at 61, 114 P.2d at 89 (internal quotation marks omitted).

Specifically on point, in the case of *145 East Harmon*, counsel provided a detailed time schedule and billing statement of the work performed in conjunction with the motion for attorney fees. 136 Nev. at 122, 460 P.3d at 460. In reducing the award sought, the lower court rejected some of the entries on the billing statement. *Id*. This Court upheld the award and determined that the deductions showed that the district court carefully considered the third factor in determining a reasonable amount. *Id*.

The District Court appropriately exercised its discretion in reducing the attorney fees and costs sought by LVRJ. Reviewing the record as a whole, it is clear what the District Court's intent and findings were in reaching its decision. *See Wynn v. Smith*, 117 Nev. 6, 13, 16, P.3d 424, 428-29 (2001) (reviewing the record as a whole, including the transcript, to determine whether the district court made findings regarding attorney fees as required by statute). The record reflects that in its fee award, the District Court specifically analyzed each individual *Brunzell* factor in accordance with Nevada precedent. While the District Court found that all factors weighed in favor of a fee award, it specifically noted that counsel for LVRJ dedicated a substantial amount of time to the litigation. 7 JA 1280. During the hearing, the District Court further explained it reviewed each individual entry, and, although it found the blended rate to be reasonable, it determined that the amount of time spent on certain issues was not. 6 JA 1220.

LVRJ's appeal is cemented on the sole fact that the District Court did not itemize the unreasonable time entries line-by-line. To support its erroneous position, LVRJ cites a plethora of non-precedential and inapplicable Ninth Circuit cases. LVRJ urges this Court to adopt the Ninth Circuit standard and require lower courts to provide a concise, clear explanation in analyzing the *Brunzell* factors. OB at 30-32. This Court has expressly rejected such an inquiry and only requires lowers courts to ensure that the *Brunzell* factors are *considered*. *See Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015) (rejecting the necessity of express findings for a fee award). Even so, the District Court specifically addressed and analyzed each *Brunzell* factor and expressly concluded that LVRJ's counsel expended a substantial amount of time in litigating the case. Simply put, the lower court found that amount of time expended in the case, over 700 hours, was unreasonable.

While not binding on this Court, a recent decision by the Court of Appeals is nonetheless persuasive. In *Riga v. McNabb*, the district court weighed the appropriate factors and made specific findings that the factors weighed in favor of an award of attorney fees and costs. 487 P.3d 27 (Nev. App. 2021) (unpublished disposition). Despite this conclusion, the district court reduced the award by over half to $35,000 from $79,573.80. *Id*. The Court of Appeals concluded that the lower court did not abuse its discretion by significantly reducing the fee award. *Id*.

More on point is this Court's unpublished decision in *NCP Bayou 2, LLC v. Medici*, 437 P.3d 173 (Nev. 2019). There, the appellant contended that the lower court abused its discretion when it reduced—by 50 percent—the attorney fees awarded for prevailing on its counterclaim. *Id*. The lower court concluded that, while the *Brunzell* factors generally weighed in favor of a fee award, the amount of time spent by the attorneys was unreasonable. *Id*. The Supreme Court affirmed the reduction without requiring a line-by-line reasoning. *Id*.

The District Court's order reflects that it conducted a thorough *Brunzell* analysis. Although the District Court concluded that the factors weighed in favor of an award of attorney fees, it determined that the amount of time expended in litigating the matter was not reasonable. Thus, this Court should affirm the District Court's fee award because the District Court did not abuse its discretion in reducing LVRJ's attorney's fees and costs.

C. THE FEE AWARD IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

A fee award will not be disturbed so long as it is supported by substantial evidence. *Logan*, 131 Nev. at 266-67, 350 P.3d at 1143. "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *In re Estate of Bethurem*, 129 Nev. 869, 876, 313 P.3d 237, 242 (2013) (internal quotation marks omitted). Because substantial evidence supports the fee award,

this Court should affirm the District Court as it reached the right result, even if it did so for the wrong reason. *See Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 426 n. 40, 132 P.3d 1022, 1033 n. 40 (2006).

1. LVRJ is Barred from Recovering Fees and Costs Related to the Remand Appeal.

The record demonstrates that LVRJ applied for $17,182.50 in attorney's fees for work performed related to the Coroner's appeal from the remand order, despite this Court's order directing that each party bears its own attorney's fees and costs. 6 JA 1001-1132; *see also* Supreme Court Case No. 82229. Under the doctrine of the law of the case, where an appellate court states a principal or rule of law in deciding a case, that rule becomes the law of the case and is controlling both in the lower courts and on subsequent appeals, so long as the facts remain substantially the same. *State Dep't Hwys. v. Alper*, 101 Nev. 493, 496, 706 P.2d 139, 141 (1985). Thus, if a judgment is reversed on appeal, the court to which the cause is remanded can take only such proceedings as conform to the appellate court's judgment. *LoBue v. State ex rel. Dep't Hwys.*, 92 Nev. 529, 532, 554 P.2d 258, 260 (1976).

Rule 42(b) of the Nevada Rules of Appellate Procedure provides that, "[a]n appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court." NRAP 42(b) draws its language from Rule 42(b) of

the Federal Rules of Appellate Procedure. Almost without exception, federal courts have rejected the argument that, in allowing voluntary dismissal "on terms ... fixed by the court," federal Rule 42(b) authorizes an award of attorney fees against the party moving to dismiss. *See, e.g., Am. Auto. Mfrs. Ass'n v. Comm'r, Mass. Dep't of Envtl. Prot.*, 31 F.3d 18, 28 (1st Cir. 1994); *Waldrop v. U.S. Dep't of Air Force*, 688 F.2d 36, 37 (7th Cir. 1982). Like NRAP 38, Rule 38 of the Federal Rules of Appellate Procedure authorizes fee-shifting but limits the authorization to frivolous filings.

LVRJ failed to object to or otherwise oppose the Coroner's motion to voluntarily dismiss the case under NRAP 42 and thereby waived any right to its appellate fees and costs. *See* Supreme Court Case No. 82229; s*ee also Breeden v. Eighth Jud. Dist. Ct.*, 131 Nev. 96, 343 P.3d 1242 (2015). The Coroner specifically asked the Court to order that each party bear its own fees and costs. *See* Supreme Court Case No. 82229. Subsequently, the Court entered the Order dismissing the appeal and directing each party to bear its own fees and costs. *Id*. Accordingly, there is substantial evidence to support the District Court's appropriate reduction of $17,182.50 in attorney's fees from the award. *See Bd. of Gallery of History, Inc. v. Datecs Corp.*, 116 Nev. 286, 288, 994 P.2d 1149, 1150 (2000) ("Furthermore, this court's order dismissing the original appeal specifically

held that Gallery's conduct on appeal did not merit sanctions. This is the law of the case and the district court was without authority to make a contrary finding.").

2. LVRJ is Not Entitled to Recover Appellate Fees and Costs Under NRS 239.011.

LVRJ also sought to recover its fees and costs that it incurred on the initial appeals in the amounting to over $92,000. The District Court properly recognized that NRS 239.011 did not provide for the recovery of appellate fees and costs and reduced LVRJ's award accordingly. The plain language of the NPRA, however, is silent on appellate fees and costs. It is well-established that in order for a prevailing party to recover their fees and costs, there must be a statute that explicitly authorizes an award. Because the NPRA is silent on appellate fees and costs, LVRJ is prohibited from recovering the same. Alternatively, if the Court is not convinced that the plain language of the NPRA is silent on appellate fees and costs, then it must resort to legislative history as the term "proceeding" within NRS 239.011 is susceptible to two meanings, rendering it ambiguous. In reviewing the legislative history, it is clear that prior to the 2019 amendments, the Legislature did not intend for a requester to recover their fees and costs on appeal. Thus, LVRJ cannot overcome the heavy presumption that the 2019 amendment to NRS 239.011 should be applied prospectively. Accordingly, this Court must affirm the District

Court's award as substantial evidence supports the reduction of attorney's fees and costs.

a. The Plain Language of NRS 239.011 does not Permit LVRJ to Recover Appellate Fees and Costs.

In general, "attorney's fees are not recoverable absent a statute, rule or contractual provision to the contrary." *Rowland v. Lepire*, 99 Nev. 308, 315, 662 P.2d 1332, 1336 (1983) (citations omitted). When interpreting a statute, the court must first look to its plain language. *Dep't of Bus. & Indus., Fin. Institutions Div. v. TitleMax of Nevada, Inc.*, 135 Nev. 336, 340, 449 P.3d 835, 839 (2019). The NPRA does not permit a prevailing party to recover attorney fees and costs on appeal.

Prior to the 2019 amendments, NRS 239.011 provided, in part:

> 2. The court shall give this matter priority over other civil matters to which priority is not given by other statutes. If the requester prevails, the requester is entitled to recover his or her costs and reasonable attorney's fees in the proceeding from the governmental entity whose officer has custody of the book or record.

Nothing in the statute permits a prevailing party to recover appellate fees and costs. Rather, it limits the party to recover costs and reasonable attorney's fees in the proceeding. Thus, the NPRA is silent on an award of fees and costs on appeal. The Supreme Court previously addressed this issue in *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 971 P.2d 383 (1998).

In that case, *Berosini* prevailed at trial, but the judgment was reversed on appeal. On remand, PETA requested and was awarded fees incurred during the prior appeal. This was reversed by the Nevada Supreme Court, which held:

> [T]he text of NRS 18.010 is silent with respect to attorney's fees on appeal. Pursuant to NRAP 38, attorney's fees and costs on appeal are permitted only in those contexts where "an appeal has frivolously been taken or been processed in a frivolous manner." Accordingly, because NRS 18.010 does not explicitly authorize attorney's fees on appeal, and because NRAP 38(b) limits attorney's fees on appeal to those instances where an appeal has been taken in a frivolous manner, we conclude that PETA is not entitled to attorney's fees incurred through its appeal of Berosini's favorable trial judgment.

Berosini, 114 Nev. 1348, 1356-57, 971 P.2d 383, 388. While LVRJ will attempt to limit the *Berosini* ruling to only NRS 18.010(2)(b), the Court specifically interpreted the entire statute and not just the particular subsection. *Id.* ("In the instant case, we note that the **text of NRS 18.010** is silent with respect to attorney's fees on appeal) (emphasis added). The Court reiterated this decision two years later in *Bd. of Gallery of History, Inc. v. Datecs Corp.*, 116 Nev. 286, 994 P.2d 1149 (2000) (concluding that appellate fees must be authorized by statute, rule or contractual provision and there is no statutory provision authorizing fees incurred on appeal).

Like NRS 18.010, NRS 239.011 does not explicitly authorize attorney's fees on appeal, and LVRJ cannot demonstrate that the appeal was taken in a frivolous manner. In support of its position, LVRJ will rely on *In re Estate and Living Trust*

of Miller, 125 Nev. 550, 216 P.3d 239 (2009). There, the Supreme Court interpreted NRCP 68, a fee-shifting provision. At the time, NRCP 68 provided fee-shifting penalties to be assessed against an offeree who "rejects an offer and fails to obtain a more favorable judgment." *Id.* at 242; *see also* NRCP 68. In particular, the Court concluded that the term "judgment" within NRCP 68 meant a final judgment and included appellate proceedings. *Id.* The Court then concluded that the fee-shifting provisions apply to the judgment that determines the final outcome in the case, allowing recovery of fees incurred on and after appeal. *Id.*

Below, LVRJ directed the District Court to *Musso v. Binick*, 104 Nev. 613, 764 P.2d 477 (1988), a contract case. In that case, the Nevada Supreme Court adopted the majority view that attorney fees provisions in contracts presumably include attorney's fees incurred on appeal unless provided otherwise. *Id.* at 614, 764 at 477. This case, however, is not governed by a contract but, rather, a statue. Therefore, the rules of statutory construction apply—not contracts.

LVRJ is not seeking attorney fees pursuant to a contract, thus, *Musso* is entirely inapplicable. Furthermore, NRS 239.011 is not a fee-shifting statute like NRCP 68, eviscerating the application of *In re Miller*. Rather, it is a "prevailing" party statute that is more akin to NRS 18.010. Thus, consistent with its counterpart NRS 18.010, the Court should interpret NRS 239.011 consistently with *Berosini* and conclude that LVRJ is not entitled to recover their appellate fees and costs.

In addition to the $17,182.50 from the remand appeal, the District Court properly excluded $91,257.50 in attorney's fees and $1,108.49 in costs that were related to the initial appeals. LVRJ, for the most part, indicates the work performed on appeal, which amounts to $91,257.50 in attorney's fees. 6 JA 1029-46. Although the costs are more difficult to differentiate, costs incurred between May 2018 and February 2020 are entirely related to the appeals as there was no work performed within the District Court at that time. 5 JA 774-1000; 7 JA 1303-06. Thus, the substantial evidence in the record supports the reduction awarded by the District Court as LVRJ is precluded from recovering its appellate fees and costs.

b. Alternatively, the Legislative History Demonstrates that NRS 239.011 does not Include Appellate Fees and Costs.

Alternatively, should the Court determine that the language "in the proceeding" within NRS 239.011 is ambiguous, then it must look to the Legislature's intent as the primary consideration when interpreting an ambiguous statute. *See Cleghorn v. Hess*, 109 Nev. 544, 548, 853 P.2d 1260, 1262 (1993). When construing an ambiguous statutory provision, this Court determines the meaning of the words used in a statute by examining the context and the spirit of the law or the causes which induced the legislature to enact it. *See Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007). In conducting this statutory

analysis, "[t]he entire subject matter and policy may be involved as an interpretive aid." *Id.* Accordingly, this Court will consider "the statute's multiple legislative provisions as a whole." *Id.*

Courts have a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized. *Id.*; *S. Nev. Homebuilders v. Clark Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). In addition, this Court will not render any part of the statute meaningless, and will not read the statute's language so as to produce absurd or unreasonable results. *See Leven*, 123 Nev. at 405, 168 P.3d at 716. When "the words of the statute have a definite and ordinary meaning, this court will not look beyond the plain language of the statute, unless it is clear that this meaning was not intended." *Glover v. Concerned Citizens for Fuji Park*, 118 Nev. 488, 50 P.3d 546, 548 (2002) (stating that "[i]t is well established that when the language of a statute is unambiguous, a court should give that language its ordinary meaning"), overruled in part by *Garvin v. Dist. Ct.*, 118 Nev. 749, 59 P.3d 1180, 1191 (2002).

Here, the term "proceeding" is not defined. In common usage when referring to legal matters, "proceedings" means "the course of procedure in a judicial action or in a suit in litigation: legal action" or "a particular action at law or case in litigation." *Icenhower v. SAIF Corp.*, 180 Or. App. 297, 301-02, 43 P.3d 431, 433 (2002). In other words, not the appeal. However, the term can be

properly understood not just as a matter of common usage but also as a term of art. In that sense, Black's Law Dictionary, offers **two** pertinent definitions of "proceeding":

> 1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.
>
> . . .
>
> 3. An act or step that is part of a larger action.

(11th Ed. 2019). Accordingly, because "proceeding" is susceptible to more than one reasonable interpretation, the legislative history will determine legislative intent. *Leven v. Frey*, 123 Nev. 399, 404, 168 P.3d 712, 716 (2007).

To verify what the Legislature intended the term "proceeding" to mean, the Court should take into account the 2019 amendments to NRS 239.011. *See Woofter v. O'Donnell*, 91 Nev. 756, 762, 542 P.2d 1396, 1400 (1975) (when a former statute is amended or a doubtful interpretation of a former statute rendered certain by subsequent legislation, the amendment is persuasive evidence of what the legislature intended by the first statute). The 2019 amendment to NRS 239.011 provides:

> 2. The court shall give this matter priority over other civil matters to which priority is not given by other statutes. If the requester prevails, the requester is entitled to recover from the governmental entity that has legal custody or control of the record his or her costs and reasonable attorney's fees in the proceeding.

> ***3. If the governmental entity appeals the decision of the district court and the decision is affirmed in whole or in part, the requester is entitled to recover from the governmental entity that has legal custody or control of the record his or her costs and reasonable attorney's fees for the appeal.***

(Emphasis added). Notably, the Legislature did not amend any language within subsection 2 and, instead, added an entire provision allowing requesters to specifically recover appellate fees and costs. The amendment reflects the Legislature's intent to allow requesters to recover fees and costs for an appeal post 2019 amendments. Thus, the term "proceeding" as used in subsection 2 cannot possibly include appellate proceedings because it would render the 2019 amendments meaningless. *Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003) (no part of a statute should be rendered meaningless). Therefore, whether "proceeding" is ambiguous or not, the substantial evidence supports the District Court's reduction of attorney's fees and costs.

3. SB 287 Cannot Be Applied Retroactively.

Any argument that the 2019 amendments apply retroactively is belied by the legislative history and the Legislature's express intent that that the amendatory provisions apply only to matters filed on or after October 1, 2019.

Substantive statutes are presumed to only operate prospectively, **unless it is clear that the drafters intended the statute to be applied retroactively**. *Sandpointe Apts. V. Eighth Jud. Dist. Ct.*, 313 P.3d 849, 853 (2013) (citations

omitted) (emphasis added). Deciding when a statute operates retroactively is not always a simple or mechanical task. *Id.* at 854. Broadly speaking, courts take a commonsense, functional approach in analyzing whether applying a new statute would constitute retroactive application. *Id.* (citations omitted). Central to this inquiry are fundamental notions of fair notice, reasonable reliance, and settled expectations. *Id.* (citations omitted). Thus, a statute has a retroactive effect when it takes away or impairs vested rights acquired after existing laws creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already past. *Id.* (citations omitted).

The presumption against retroactive legislation is deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our republic. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Nevada has long viewed retroactive statues with disdain, noting that such laws are odious and tyrannical and have been almost uniformly discountenanced. *Sandpointe Apts.*, 313 P.3d at 858-59 (citing *Milliken v. Sloat*, 1 Nev. 573, 577 (1865)). Thus, a statute will not be applied retroactively unless:

> 1. The Legislature clearly manifests an intent to apply the statute retroactively; or
>
> 2. It clearly, strongly, and imperatively, appears from the act itself that the Legislature's intent cannot be implemented in any other fashion.

Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't, 124 Nev. 138, 154, 179 P.3d 542, 553 (2008). In applying the above standard, the *Sandpointe Apts*. court determined that the legislature did not intend for the statute to apply retroactively because: (1) the Legislature provided that the statute would become effective upon passage and approval, which was not enough to overcome the presumption; and (2) nothing in the statute itself demonstrated that the Legislature's intent can only be implemented by applying the statute retroactively. 313 P.3d at 858-59. With respect to the second prong, the court found that although application of the statute would have a broader effect and would vindicate its purpose more fully, that is not sufficient to rebut the presumption against retroactivity. *Id.* The court held the newly enacted statute still had the ability to reach a large portion of the population when applied prospectively. *Id.* at 859.

Below, LVRJ mistakenly relied on two cases in support of retroactive application. First, LVRJ improperly directed the District Court to *Badger v. Eighth Jud. Dist. Ct*., 373 P.3d 89 (2016) for the proposition that if a statutory amendment clarifies a law, the rule against retroactive application does not apply. To the contrary, in that case, the Supreme Court specifically rejected to apply a statutory amendment retroactively. *Id.* at 403, 373 P.3d at 94. ("This conclusion is consistent with the legislative history of NRS 40.455, which contemplated neither retroactive application of the 2015 amendment nor reversing this court's [prior]

holdings. . . .). Next, LVRJ contended that, because the additions to NRS 239.011 regarding appellate fees is a remedy, it must be applied retroactively, citing *Valdez v. Employers Ins. Co. of Nev.*, 146 P.3d 250 (2006).[4] In *Valdez*, the Supreme Court retroactively applied NRS 616C.090 on the basis that it contained procedural and remedial mechanisms for administering a vest entitlement. *Id.* at 257. The Court reasoned that "Legislative provisions to that effect are retroactive **in the absence of a clear statement of contrary legislative intent**." *Id.* (emphasis added). The Court is prohibited from retroactively applying the appellate fee provisions enumerated in NRS 239.011 based on the 2019 Amendment.

Here, like *Sandpointe Apts.*, the Legislature unequivocally announced that the amendatory provisions throughout SB 287, including the subsection permitting a requester to recover attorney fees and costs, would become effective on all matters filed on or after October 1, 2019. *See* Senate Bill 287 (2019). Furthermore, nothing within NRS 239.011 "demonstrate[s] that the Legislature's intent can only be implemented by applying the statute retroactively." *Sandpointe Apts.*, 313 P.3d at 858-59. LVRJ cannot present any *valid* evidence or argument to rebut the heavy presumption against retroactivity. Because the Legislature's 2019

[4] It is also worth noting that this case was superseded by *Valdez v. Employers Ins. Co. of Nev.*, 123 Nev. 170, 162 P.3d 148 (2007) (finding that the amendment was not a substantive entitlement).

amendment to NRS 239.011 is substantive, the Court cannot retroactively apply the provision allowing a requester to recover their appellate fees and costs in this case. Therefore, substantial evidence supports the District Court's fee and cost award.

4. The District Court Properly Excluded Unreasonable and Unsupported Costs.

In addition to the $534.66 legal research costs[5] incurred on appeal, the District Court reduced LVRJ's costs by another $573.83 because those costs were not reasonable and unsupported by the record. Costs must be reasonable, necessary, and actually incurred. *The Cadle Co. v. Woods & Erickson, LLP*, 345 P.3d 1049, 1054 (2015). A party must "demonstrate how such [claimed costs] were necessary to and incurred in the present action." *Bobby Berosini*, 114 Nev. at 1352-53, 971 P.2d at 386. A district court must have before it **evidence** that the costs were reasonable, necessary, and actually incurred. *Cadle Co.*, 345 P.3d at 1054.

LVRJ has merely provided a table of what costs were incurred. For instance, LVRJ provided no reasoning regarding why $551.44 in copying charges were incurred. 5 JA 779-827. A date of each copy and the total amount charged for copies is insufficient to demonstrate reasonableness. *See Bobby Berosini*, 114

[5] *See* 5 JA 874-977.

Nev. at 1352-53, 971 P.2d at 386. Likewise, LVRJ sought reimbursement for $22.39 for postage, but postage is not necessary based on the electronic filing system, which allows you to file and/or serve documents in the case. Thus, the substantial evidence demonstrates that the District Court properly excluded these costs from its award.

D. ALTERNATIVELY, THE COURT MUST VACATE THE AWARD AND REMAND FOR INSTRUCTIONS TO THE DISTRICT COURT.

The record proves that the District Court properly analyzed the *Brunzell* factors and concluded that the time spent litigating the matter was unreasonable, and reduced the award accordingly. Even if the Court cannot discern the District Court's specific analysis, the award is supported by substantial evidence because LVRJ is not entitled to recover its appellate fees and costs under NRS 239.011. If the Court determines that the District Court erred or that the record is unclear, the matter must be remanded back to the District Court. *See Orozco v. Thornton Concrete Pumping*, 128 Nev. 923, 381 P.3d 647 (2012) (vacating award of attorney fees and remand for Court to conduct *Brunzell* analysis on the record); *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969) (ruling that the district court is in the best position to value the services of counsel).

In a case relied upon by LVRJ, the Supreme Court remanded the case back to the lower court for clarification on the award of attorney fees. *Branch Banking*

& Tr. Co. v. Lavi, 132 Nev. 949 (2016) (unpublished disposition). There, the appellant contended that the district court erred when it awarded fees and costs to the respondent because the fees and costs incurred by the respondent's first two law firms were not reasonable. The district court stated it considered the reasonableness of the requested attorney fees under the *Brunzell* factors and reduced the award by $25,000. Upon review of the record, the Court could not determine why that particular amount was unreasonable or which specific attorney had incurred that particular amount. Thus, because the Court could not conduct an adequate review, the Court remanded the matter back to the district court for clarification.

To the extent that this Court is unpersuaded by the record, including the Court's explanation during the hearing and the substantial evidence that supports the reduction of attorney fees and costs, the Court should remand the matter back to the District Court with instructions.

V. CONCLUSION

In summary, the District Court properly exercised its discretion when it reduced LVRJ's award for attorney's fees and costs pursuant to NRS 239.011. The NPRA does not entitle or guarantee a requester to **all** of its attorney's fees and costs in the litigation. Rather, the plain language of NRS 239.011 permits an award of reasonable fees, which is consistent with Nevada law and public policy.

Furthermore, the record reflects that the District Court analyzed each *Brunzell* factor. Although the District Court concluded that the factors weighed in favor of a fee and cost award, it determined that the substantial amount of time expended in the litigation was not entirely reasonable. Thus, in weighing the factors, the District Court properly concluded that $167,200.00 in attorney's fees and $2,472.99 in costs was reasonable. Even if it is unclear from the record how the District Court specifically reduced the award, substantial evidence supports the reduction. Because the 2017 NPRA did not permit LVRJ to recover its appellate fees and costs, the record supports the District Court's award. Alternatively, if the Court concludes that the District Court committed an error, this matter should be remanded with instructions, as the District Court is in the best position to value the services rendered by counsel.

Dated this 28th day of October, 2021.

MARQUIS AURBACH COFFING

By: /s/ Jackie V. Nichols
Craig R. Anderson, Esq.
Nevada Bar No. 6882
Jackie V. Nichols, Esq.
Nevada Bar No. 14246
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Respondent Clark County
Office of The Coroner/Medical Examiner

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 9,842 words; or

☐ does not exceed _____ pages.

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

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 28th day of October, 2021.

MARQUIS AURBACH COFFING

By: /s/ Jackie V. Nichols
Craig R. Anderson, Esq.
Nevada Bar No. 6882
Jackie V. Nichols, Esq.
Nevada Bar No. 14246
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Respondent Clark County
Office of The Coroner/Medical Examiner

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENT CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER'S ANSWERING BRIEF** was filed electronically with the Nevada Supreme Court on the 28th day of October, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Margaret A. McLetchie, Esq.
Alina M. Shell, Esq.
McLetchie Law
602 South 10th Street
Las Vegas, Nevada 89101
maggie@nvlitigation.com
alina@nvlitigation.com
Attorneys for Appellant Las Vegas Review-Journal

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

N/A

/s/ Krista Busch
An employee of Marquis Aurbach Coffing