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

APPELLANT'S REPLY BRIEF

Appeal from Eighth Judicial District Court, Clark County
The Honorable David M. Jones, District Judge
District Court Case No. A-17-758501-W

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I. INTRODUCTION

Appellant Las Vegas Review-Journal, Inc. (the "Review-Journal") had to litigate for over four years to prevail in obtaining unredacted copies of juvenile autopsy reports from the Clark County Office of the Coroner / Medical Examiner (the "Coroner"). As noted by the original district court judge who presided over every hearing in this matter except the hearing on the fees motion which is the subject of this appeal, the Review-Journal had to overcome the Coroner's resistance[1] at every turn. Far from fulfilling its duty to permit public access to public records, the Coroner fought tooth-and-nail. As the district court noted, the Coroner "dragged its heels and [has] been brought before the [district court] kicking and screaming over objections that are frivolous, featherweight, and fallacious" over and over again. (4 JA0716; *see generally* 4 JA0706-0723.) The herculean efforts the Review-Journal made to get access naturally entailed expending significant fees and costs, and NRS 239.011 entitles it to compensation.

To convince this Court otherwise, the Coroner boldly misinterprets the Review-Journal's arguments in an apparent attempt to distract the Court. The Review-Journal is not attempting to eliminate the "reasonable" qualifier from the plain language of NRS 239.011 as the Coroner implies (AB, pp. 2-3); rather, the

[1] As the district court put it, "the heel dragging that's gone on as a member of the community, it's just upsetting to see that there's this kind of heel dragging that would go on in a public records case, but it has. And so, here we are today." (3 JA607-08.)

Review-Journal plainly argued that it was entitled to all of its fees and costs expended in this matter because they were reasonable.

The district court abused its discretion by significantly reducing those fees and costs. The Coroner's attempts to divine the district court's intent in reducing the fees and costs awarded are not consistent with the record and do not constitute "substantial evidence." This Court should therefore reverse the district court's holding and direct the district court to award the Review-Journal all its requested fees and costs in this matter, all of which are reasonable and compensable under the NPRA.

II. REPLY TO METRO'S FACTS

The Coroner misstates the record in numerous respects.

For example, the Coroner claims that the Review-Journal did not "substantiate the basis" for each copy made or legal research[2] performed and claims that the Review-Journal instead merely provided a table of costs. (AB, p. 12.) This is false. The Memorandum of Costs provides extensive documentation of the costs. (5 JA0774-1000.) The Memorandum of Costs also includes a declaration certifying that

[2] While the Coroner appeared to challenge whether copying charges were substantiated, their response was silent regarding the costs incurred in performing legal research. (6 JA1155-56.) Thus, the Coroner has waived challenges to legal research costs. *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.").

the "costs are true and correct to the best of my knowledge and belief, and that these costs have been necessarily incurred and paid in this action." (5 JA0775.) Further, in her declaration supporting the fees motion, Ms. McLetchie also substantiated these costs. (6 JA1026.) Further, as discussed below, the district court did not reduce the costs because they were unsubstantiated but, like the fees, he found that a reduction was needed "to ensure the costs were reasonable" but failed to provide an explanation. (7 JA1281 at ¶ 91.)

Similarly, the Coroner argues that the "District Court explained that it reviewed counsel's bills line-by-line and determined a reasonable amount of time expended on certain issues." (AB, p. 12 (citing 6 JA 1220).) The transcript does not reflect that the district court went "line-by-line" over each billing entry, nor does the district court's written order reflect this analysis. Rather, the district court claimed it spent "about three and a half hours going through the bills," "looked at certain issues and said, okay, is this an amount that [the Court] believe[s] should have been" and cross-checked the length of the hearings as reflected by the court record against the billing records. (6 JA1220-21.) The record does not reflect that the district court did any analysis regarding the time expended by counsel on non-hearing billing entries, which were the vast majority of the Review-Journal's billing entries in this matter.

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III. ARGUMENT

A. The NPRA Entitles the Review-Journal to an Award of All the Reasonable Attorney's Fees and Costs It Incurred in the Proceeding.

The Coroner devotes a substantial portion of its Answering Brief rebutting an argument the Review-Journal never made: that a requester "is entitled to **all** of its attorney's fees and costs as a prevailing requester pursuant to the NPRA." (AB, p. 15.) In fact, consistent with the NPRA, the Review-Journal sought its **reasonable** fees and costs in the proceeding. The Coroner did not (and cannot) cite to any portion of the Review-Journal's Opening Brief (or the record) in which the Review-Journal argues it is entitled to all fees under the NPRA regardless of their reasonableness. That is because the Review-Journal acknowledges that awards of fees and costs must be reasonable.

In the instant matter, the Review-Journal argues that the fees and costs requested were reasonable for this difficult and lengthy public records litigation, and that the district court erred in reducing them without sufficient explanation. (*See* OB, p. 27.)

The Coroner's argument that "the NPRA does not contemplate making a requester 'whole'" (AB, p. 18) misses the point. The real issue is whether a requester can be denied reasonable fees it incurred because an intransigent governmental entity repeatedly forced its hand and required the requester to expend effort before

the district court and appellate courts to obtain the requested records. Far from "ignoring" that "the plain statutory language that a requester is only entitled to attorney's fees if it *prevails*" (AB, p. 19), the Review-Journal acknowledges that the award of attorney's fees can be conditioned on prevailing in an underlying NPRA matter, which, as the Coroner admits, the Review-Journal did. (AB, p. 1.)

The Coroner claims that the Review-Journal "suggests that applying the reasonableness standard to NRS 239.011 will somehow create a "'litigation tax' when attempting to access public records" which "ignores the fact that without the reasonableness analysis under *Brunzell*, and required by statute, requesters could charge a ridiculous hourly rate and perform unnecessary work to this litigation." (AB, p. 19.) However, the Review-Journal is not arguing to abrogate the reasonableness requirement or for a deviation from the approach established in *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 455 P.2d 31 (1969); rather, the Review-Journal is simply noting that the liberal award of attorney's fees to prevailing requesters is an essential element of the NPRA. The connection between a robust award of attorney's fees and ensuring that the public has access to records is not "too attenuated," as the Coroner claims. (AB, p. 19.) The NRA expressly contemplates that a requester's decision to go to court may be necessary to get access to records—and transparency through access is the whole point of the NPRA. Indeed, the Coroner does not even dispute the Review-Journal's argument that

attorney's fees often serve as a large financial barrier for members of the public and will often force them to forego potentially meritorious litigation to access records.

B. The District Court Erred in Reducing the Review-Journal's Award.

The district court erred in reducing the Review-Journal's fees by one-third, even though its discussion of the *Brunzell* factors all supported an award of all of the fees sought. The *only* justification the district court provided was a vague reference to a review of the documentation and its irrelevant experience in insurance defense. (6 JA1220.) In light of the application of the *Brunzell* factors to the extensive, difficult, and complex work the Review-Journal was required to perform to overcome the Coroner's recalcitrance and protect its right to access records, this was error—and as detailed below, there is no substantial evidence to support the reduced award, despite the Coroner's effort to argue otherwise.

The parties do not appear to dispute that *Brunzell* applies or that the lodestar calculation is the starting place. (AB, p. 20.) However, what the district court ignored and the Coroner ignores is that the lodestar is the "guiding light" and there is a strong presumption that "the lodestar represents the reasonable fee." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 606, 172 P.3d 131, 137 (2007). In this case, as detailed below, there was no basis to deviate from the lodestar and the "strong presumption" that the lodestar was the reasonable fee.

In addition to ignoring the strong presumption in favor of the lodestar, the

Coroner ignores that this is not just any fee matter—it is one under the NPRA. While the Coroner asks the Court to ignore the context of this matter, like any other provision of the NPRA, in applying the fees and costs provision, the district court must take heed of the Legislature's express direction to apply NRS 239.011(2) liberally in favor of access. While it is correct that the method used to calculate the fee is generally subject to the discretion of the district court, here, the district court—like the Coroner—ultimately ignored that this case is a public records matter and instead relied on its recent experience in insurance defense (an area of practice distinct from public records litigation) in its review of the records. (6 JA1220.)

Moreover, not only did the district court fail to recognize the context of this case and its obligation to apply NRS 239.011 liberally, it did not recognize that the landscape of the case required the Review-Journal to expend significant time to overcome the Coroner's recalcitrance. It is notable that while the newly assigned district court implied at the hearing on the fees motion that the Review-Journal's time spent on this matter was excessive (6 JA1220-21), the prior district court explicitly found that the fees and costs in the initial district court proceedings reasonable. (2 JA0466-68.) Further, the prior district court that presided over every other hearing in the matter explicitly recognized the recalcitrance of the Coroner and the hurdles the Review-Journal had to overcome. (*See, e.g.*, 4 JA0756-58.)

This case, unlike the cases relied on by the Coroner, simply does not reflect

that the district court had a reasonable basis for its reduction. The Coroner's reliance on *Cooke v. Gove*—a personal injury case that predates *Brunzell* by 28 years—to defend the district court's reduction is misplaced.[3] First and perhaps most centrally, *Cooke* is distinguishable because it does not address even a remotely analogous matter: that case involved a claim against an estate for fees and costs provided to the decedent in a separate quiet title matter. *Cooke,* 61 Nev. 55, 56, 114 P.2d 87. Thus, the case has little relevance to this public records litigation. Second and relatedly, in *Cooke*, the attorney submitted relatively little support for the request. *Id.* at 57, 88 ("the evidence consisted chiefly of the file…nearly 50 letters and postals...and the depositions of two Reno attorneys who testified concerning the value of plaintiff's service"). In contrast here, there are volumes of evidence—including fee detail that accurately reflects time such as the time preparing for and being in court for hearings—supporting the request (*See*, *e.g.*, 6 JA1028-66.) Indeed, while a new judge had been recently assigned, this long-fought public records case reflects extensive support for the fees and costs the Review-Journal had incurred in the case—including the determination of the prior judge (who was intimately involved in the case) that the Review-Journal was entitled to all its fees and costs before the

[3] In *Cooke*, the Court rejected appellant's request to increase the fees awarded by the trial court, noting that the trial court evaluated "the reasonable value of plaintiff's services from all the facts and circumstances" in the underlying case. *Cooke v. Gove*, 1 Nev. 55, 61, 114 P.2d 87, 89 (1941).

first appeal by the Coroner[4] and who found that the Coroner engaged in "actions with regard to the production of these records [that] border[s] on the scandalous and impertinent." (4 JA0716.) As the prior judge recognized, overcoming the resistance of the Coroner was an uphill battle from the start due to the litigation tactics employed by the Coroner and the multiple "hoops" that the Coroner "manufactured." (4 JA0717.)

Third, while the Coroner does not mention it, the *Cooke* Court had another strong piece of evidence to support the reduction there: appellant's own statement in open court that the fees awarded by the trial court—$2,500—"may not have been out of the way." *Id*. at 61, 90. The Court construed this as "tantamount to an admission on his part that the compensation fixed by the district court was reasonable." *Id*. at 62, 90. Here, by contrast, the Review-Journal has never suggested the district court's reduction of fees in this matter was reasonable. Thus, *Cooke* does not support the district court's reduction.

The Coroner also argues that *145 East Harmon II Tr. v. The Residences at MGM Grand – Tower A Owners' Association*, 136 Nev. 115, 460 P.3d 455 (2020)

[4] While that was Order was vacated by this Court's February 27, 2020, decision in *Clark Cty. Office of the Coroner / Medical Examiner v. Las Vegas Review-Journal*, 458 P.3d 1048 (2020), that was to allow the district court to this Court's newly adopted privacy balancing test. *Id*. at 1062. Once the Review-Journal prevailed on remand, it was entitled to all its past (and future) reasonable fees and costs in the proceeding as the prevailing requester. NRS 239.011(2).

stands for the proposition that a district court's reduction of fees demonstrates that the district court "carefully considered the third factor in determining a reasonable [fee award]." (AB, pp. 21-22.) However, *145 East Harmon* is distinguishable from this matter, as the district court there gave some indication of which billing entries it objected to in reducing the "requested [fee award] from $10,987.50 to $9,431.25." *Id*. at 460. Specifically:

> In determining attorneys fees, I applied the *Brunzell* factors, quite frankly, Mr. Larsen. I did take out a couple of entries, things such as conferences with your partner or telephone conferences or meetings with co-counsel, Lisa Wild, things of that nature, in determining what would be reasonable attorneys fees in this matter.

(Case No. 79520, Doc. No. 19-04580 at p. 40 (TRUST430), lines 14-18.)[5] By contrast, in the instant matter, the district court vaguely asserted that it "looked at certain issues and said, okay, is this an amount that I believe should have been." (6 JA1220.) This falls well short of a "concise but clear explanation" of the district court's reasons for its fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Moreover, the district court's reductions were made even though it was not aware of how long hearings lasted, as the judge was newly assigned to the case when the fees motion was heard.

To distract from the fact that the district court did not have a reasonable basis

[5] The Court may take judicial notice of this document. See *Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009); NRS 47.130(2)(b).

for the deductions, the Coroner again distorts the Review-Journal's position and argues that the Review-Journal's "appeal is cemented on the sole fact that the District Court did not itemize the unreasonable time entries line-by-line." (AB, p. 23.) This mischaracterizes the Review-Journal's argument and this Court's holding in *NCP Bayou 2, LLC v. Medici*. While a full line-by-line explanation may not be necessary to justify the district court's downward adjustment of attorney's fees, the district court must still provide "thoughtful analysis of all the *Brunzell* factors and a specific finding that one of the factors was not met." *NCP Bayou 2 v. Medici*, Case No. 73820, 437 P.3d 173, 2019 Nev. Unpub. LEXIS 324, *12 (Nev. 2019) (unpublished disposition). In *NCP Bayou*, the district court made specific findings that "the number of hours spent defending the counterclaim was unreasonable" and, upon review of the record, this Court agreed that fee-seeking party "conflated and did not distinguish between fees that were generated defending the counterclaims and fees that were generated prosecuting its own claims." *Id*. Here, by contrast, only $2,675 in fee reductions can be attributed to specific causes enumerated in the written order. (7 JA1280.) The district court gave no explanation for why the time expended in litigating this complex NPRA matter was so unreasonable as to merit over one hundred thousand dollars in further reductions. (7 JA1276-80.)

Defying NRAP 36(c)(3)[6], the Coroner also cites to *Riga v. McNabb*, No.

[6] "Except to establish issue or claim preclusion or law of the case as permitted by

81310-COA, 487 P.3d 27, 2021 Nev. App. Unpub. LEXIS 298 (Nev. 2021) (unpublished disposition) for the proposition that "the lower court did not abuse its discretion by significantly reducing the fee award." (AB, p. 23.) Even if this Court could consider *Riga*, it is distinguishable from the instant matter. In *Riga*, the appellant requested that the Court "further determine that such fees are unreasonable, or indeed reverse the fee award altogether." *Id.* at *10. No party in *Riga* argued that the district court abused its discretion by cutting respondents' requested fees by more than half. Rather, appellant argued that fees were not sufficiently reduced, and respondents argued the opposite, essentially conceding that the district court had discretion to make the reductions it did, but not more. (*See, e.g.*, Case No. 79520, Doc. No. 20-45281, p. 30 ("The District Court's award of $35,000 in attorney's fees was reasonable…").) Here, the Review-Journal makes no such concession.

After endeavoring to distort the Review-Journal's arguments and detailing archaic, inapplicable, and uncitable cases, the Coroner, without support or discussion, claims that the district court properly applied the factors set forth in *Brunzell* and found that the time litigating the case was unreasonable. But the record does not support that conclusion—and even if it did, the district court abused its discretion because every single one of the *Brunzell* factors support a high award in

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subsection (2), unpublished dispositions issued by the Court of Appeals may not be cited in any Nevada court for any purpose."

this long fight for access—as the district court itself recognized.

In attempting to divine the district court's rationale for slashing the requested fees, the Coroner implicitly concedes that the district court failed to articulate a sufficient basis for reducing any district court fees. That is, had the district court sufficiently articulated the bases for its decision, the Coroner would not need to "fill in the blanks" by suggesting legal arguments to retroactively justify the district court's decision. Indeed, the Coroner argues that the district court's reduction was based on a legal determination that the district court never articulated: that appellate fees are not compensable under the NPRA. As discussed below, the law and the record support that appellate fees expended by requesters are compensable.

C. The Reduced Fee Award Is Not Supported by Substantial Evidence.

The Coroner correctly asserts that fee awards supported by substantial evidence should not be disturbed, and that substantial evidence is "evidence that a reasonable mind might accept as adequate to support a conclusion." (AB, p. 24.) In the instant matter, the only evidence to support the district court's conclusion is the court's statement that he spent "three and a half hours" reviewing the billing and substituting his beliefs of what the amounts "should have been." (6 JA1220.) This is far short of what this Court should consider "substantial evidence."

The Coroner's purported substantial evidence consists mainly of contorted legal arguments attempting to divine the reasons the district court reduced the fees

and costs awarded in this matter. This does not suffice. *See Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 957, 338 P.3d 1250, 1255 (2014) ("Arguments of counsel are not evidence and do not establish the facts of the case.") Had the district court intended to bar appellate costs from recovery under the NPRA, it could have said so explicitly on the record. It did not, and the Coroner cannot simply speculate as to the district court's intentions without providing evidence in the record to support it.

1. The Review-Journal Is Not Barred from Recovering Fees and Costs Related to the Remand Appeal.

While the Coroner pretends otherwise, nothing in the record reflects that the district court denied fees based on the fact that this Court, in its order dismissing the Coroner's most recent appeal in this case, found that each party would bear its own costs on appeal.

Moreover, the law of the case doctrine would not apply here because this Court, in it order of dismissal, did not in any way address whether the Review-Journal was entitled to fees under the NPRA—nor could it have because the issue was not ripe. Instead, the Court was only able to address NRAP 42 costs.

In its effort to conflate NRAP 42 fees and costs with the fees and costs available under the NPRA, the Coroner relies on *Breeden v. Eighth Jud. Dist. Ct.*, 131 Nev. 96, 343 P.3d 1242 (2015). However, *Breeden* is distinguishable from this matter, as recovery of the fees expended by the Review-Journal are not being sought

pursuant to NRAP 42. Rather, recovery of fees is being sought pursuant to NRS 239.011, which, as argued below, implicitly permitted recovery of appellate costs before it was amended to explicitly do so in 2019. Thus, the Review-Journal is not precluded from an award of fees and costs expended in the Coroner's remand appeal.[7]

2. The Review-Journal Is Entitled to Recover Appellate Fees and Costs Under the Pre-SB287 Version of NRS 239.011.

a. The Plain Language of NRS 239.011 Permits Recovery of Appellate Fees and Costs.

The Coroner argues that 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." (AB, p. 27.) Of course, no such rationale appears in either the hearing transcript or written order reflecting the district court's decision to reduce the Review-Journal's fees.[8]

Even if the district court had held that fees incurred on appeal were not

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[7] This case is also distinguishable from *Bd. Of Gallery of History, Inc. v. Datecs Corp.*, 116 Nev. 286, 288, 994 P.2d 1149, 1150 (2000). There, "this court's order dismissing the original appeal specifically held that Gallery's conduct on appeal did not merit sanctions." Here, in contrast, this Court did not address the entitlement to NPRA fees in its dismissal order.

[8] Indeed, the District Court noted that "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" which "weighs in favor of awarding the Review Journal attorney's fees and costs." (7 JA1280.)

compensable under the pre-SB287 version of NRS 239.011, it would have done so in error. The NPRA has always broadly required district court to award all of a requester's reasonable fees and costs in "the proceeding." NRS 239.011. As argued below, "proceeding" includes appeal, as ample authority supports—and as is required to further the purposes of the NPRA.[9]

To work around this reality, the Coroner goes to great lengths to argue that a fee-shifting statute's silence on fees and costs on appeal means that such fees and costs are non-compensable. (*See generally* AB, pp. 28-30.) While the Coroner is correct that this Court relied on the silence of NRS 18.010 with regard to appellate fees to deny the same in *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1356-57, 971 P.2d 383, 388 (1998), that does not mean that such silence is an absolute bar to recovery of fees and costs expended on appeal under NRS 239.011.

The Coroner blithely argues that *Musso v. Binick*, 104 Nev. 613, 764 P.2d 477

[9] This Court has recognized that its precedents conflict regarding the award of fees incurred on appeal, but has not had an opportunity to determine this matter with finality. *See Tulelake Horseradish, Inc. v. Santa Margarita Ranch, LLC*, 132 Nev. 1038, 2016 WL 3433040, *1, n.1 (2016) ("To the extent that the rationale in [*Bd. of Gallery of History Inc. v. Datecs Corp*., 116 Nev. 286, 994 P.2d 1149 (2000)] and *Bobby Berosini* is at odds with the rationale in *In re Estate and Living Trust of Miller*, 125 Nev. 550, 555, 216 P.3d 239, 243 (2009), and *Musso v. Binick*, 104 Nev. 613, 614–15, 764 P.2d 477, 477 (1988), we need not harmonize those cases in this appeal, as appellant has not cogently argued the issue.")

(1988), which found fees compensable on appeal, is "entirely inapplicable" because this case is "not governed by a contract but, rather, a statue [sic]." (AB, p. 30.) The Coroner further offers the (unsupported) argument that "NRS 239.011 is not a fee-shifting statute like NRCP 68 … it is a 'prevailing party' statute that is more akin to NRS 18.010." (*Id*.) However, NRS 18.010 is entirely unrelated to the NPRA because it only governs fees and costs in cases where there is no express statute. NRS 18.010(2). Moreover, it is not a prevailing party statute; it is a statute that primarily provides for fees and costs where claims are brought without reasonable grounds. *Id.*[10] In fact, NRS 239.011 is more like Rule 68. Because the intent behind NRCP 68 is to encourage settlement, the Rule provides that if the offeror has a statutory entitlement to attorney's fees, the rejecting offeree is on the hook for fees or costs incurred after the rejection of the offer that would have resolved the case. NRCP 68(f)(1)(B). Likewise, to encourage access to public records and promote transparency, the NPRA requires courts to order governmental entities to pay all a requester's reasonable fees and costs in the proceeding. Indeed, NRS 239.011 is broader than both statutes because it specifically requires compensation for all

[10] The Coroner's argument that the Review-Journal is not entitled to fees and costs because it "cannot demonstrate that the appeal was taken in a frivolous manner" (AB, p. 29) is out of place. The fees and costs in this case were not sought under NRS 18.010; under the NPRA, the requester is entitled to all its reasonable fees and costs in the proceeding if it prevails, and therefore whether the government's arguments were frivolous is irrelevant.

reasonable fees and costs "in the proceeding," not merely those incurred after an offer of judgment was made or those incurred in litigating against claims "brought or maintained without reasonable ground or to harass the prevailing party" under NRS 18.010(2)(b).

In any case, with regard to recovering appellate fees, whether fees are apportioned under a "fee shifting" statute as opposed to a "prevailing party" statute is a distinction without a difference. In resolving whether appellate fees are available under the NPRA, the Court should look not to the Coroner's imagined differences in "fee-shifting" versus "prevailing party" fee award statutes, but rather to the plain language of the NPRA. In any case, an examination of the rationales underlying the Court's decisions in these matters supports finding that appellate fees are compensable under the NPRA.

The Coroner correctly predicts that the Review-Journal "will rely on *In re Estate and Living Trust of Miller*, 125 Nev. 550, 216 P.3d 239 (2009)." (AB, p. 29.) This is because *Miller* is directly on point. While the Coroner attempts to portray this Court's decision in *Miller* as hinging on a linguistic breakdown of the meaning of the word "judgment," (AB, p. 30) that does not capture the Court's rationale for concluding that fee-shifting awards under NRCP 68 apply to appellate proceedings. This Court concluded that "the policy of promoting settlement does not end in district court but ***continues until the case is resolved***." *Miller*, 125 Nev. at 553, 216

P.3d at 242 (emphasis added). Likewise, the NPRA's explicit policy mandates embodied in NRS 239.001 do not lose their effect when an NPRA matter goes from trial court to appellate court. And it is axiomatic that a case is not "resolved" while it remains pending before an appellate court. Moreover, the purpose of the NPRA—promoting democracy in our state by securing access to records—is not met until the end of a proceeding when the right is made clear. NRS 239.001(1). Thus, fees incurred on appeal by requesters must be compensable.

Likewise, the Coroner fails to look beyond the mere fact that *Musso v. Binick*, 104 Nev. 613, 764 P.2d 477 (1988), pertained to fee-shifting under a contract rather than a statute. In *Musso*, this Court concluded that respondents were "entitled to an additional award of attorney's fees pursuant to [a contractual agreement that was silent regarding fees incurred on appeal] for having successfully defended their judgment on appeal." *Id.* at 614, 477. This Court noted that the underlying purpose of "such contractual provisions, to indemnify the prevailing party for the full amount of the obligation, is defeated and a party's contract rights are diminished if the party is forced to defend its rights on appeal at its own expense." *Id*. Here, the underlying purposes of the NPRA—explicitly laid out in NRS 239.001—and its fee-shifting provision is to ensure that governmental entities are responsive to public records requests and that ordinary citizens can afford to obtain, through litigation if necessary, the public records to which they are entitled. These important purposes

would be defeated if requesters were forced to defend their rights on appeal at their own expense; the Legislature remedied this by amending NRS 239.011 to permit recovery of fees incurred when the governmental entity appeals. However, these purposes would also be defeated if requesters were forced to foot the bill in persuading this Court to overturn an erroneous denial of an NPRA petition.

The Coroner further argues that because this case "is not governed by a contract … the rules of statutory construction apply." (AB, p. 30.) The Review-Journal agrees. The rules of statutory construction mandate that statutes "be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory." *Mangarella v. State*, 117 Nev. 130, 133, 17 P.3d 989, 991 (2001); *see also 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). Here, non-compensation of attorney's fees incurred on appeal renders the explicit legislative mandates of promoting transparency embodied in NRS 239.001 nugatory. Here, if the Review-Journal had not been able to continue to litigate this matter after the Coroner appealed (multiple times), it never would have obtained access to records, which would wholly frustrate the legislative mandates of the NPRA.

b. The Legislative History Demonstrates that Appellate Fees and Costs Are Compensable Under NRS 239.011.

The Coroner argues that "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 [it]." (AB, p. 31.) As a threshold matter, "in the proceeding" is not ambiguous. The Coroner effectively admits as much: "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.'" (AB, p. 32 (citing *Icenhower v. SAIF Corp*., 180 Or. App. 297, 301–02, 43 P.3d 431, 433 (2002)).)

Indeed, this Court's use of the phrase "in the proceeding" encompasses the entirety of an action before trial and appellate courts. *See Gardner v. Eighth Judicial Dist. Court of Nev.*, 486 P.3d 1287, 2021 Nev. Unpub. LEXIS 385, *3-*4 (Nev. 2021) ("And in any event, the … claim of professional negligence against the brokers remains and will continue before the district court. As such, little judicial economy will be gained by considering the writ at this point in the proceeding.") Other courts interpreting "proceeding" in various contexts agree.[11] Thus, in the

[11] *See, e.g.*, *In the Interest of C.Z.*, 956 N.W.2d 113, 121-22 (Iowa 2021) ("The plain meaning of the term 'the proceeding' easily includes an appeal in the same case."); *State v. Pexa*, 574 N.W.2d 344, 347 (Iowa 1998) (for double jeopardy purposes, "[t]he district court's original decision, [the Supreme Court's] decision on appeal, and the district court's decision on remand is a continuous judicial examination of defendant's guilt in the same proceeding."); *Vas-Cath, Inc. v. Curators of the Univ. of Mo.*, 473 F.3d 1376, 1378 (Fed. Cir. 2007) (a state waives sovereign immunity when it initiates a patent action and cannot assert sovereign immunity in an appeal of that action because the appeal is "a later phase of a continuous proceeding"); *New Hampshire v. Ramsey*, 366 F.3d 1, 15-16 (1st Cir. 2004) (a state waives sovereign immunity when it subjects itself to an administrative proceeding and an appeal to

context of the NPRA, "proceeding" covers the entire scope of litigation, not merely litigation that takes place before the district court.

The Coroner nonetheless argues that this Court should "take into account the 2019 amendments to NRS 239.011" to "verify what the Legislature intended 'proceeding' to mean." (AB, p. 33.) To that end, the Coroner points to the 2019 amendment to NRS 239.011, which added the following subsection:

> 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.

(AB, p. 34 (quoting NRS 239.011(3).) This merely emphasizes to governmental entities the risks of appealing and delaying access if they appeal.[12]

Furthermore, interpreting the 2017 version of NRS 239.011 to authorize a prevailing requester to recover fees expended on appeal fully comports with the NPRA's explicit mandate that its provisions "be construed liberally" to further the important purpose of providing public records to the public. NRS 239.001(2). A

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federal district court because it is "one continuous proceeding").

[12]*See, e.g.,* https://www.leg.state.nv.us/Session/80th2019/Minutes/Senate/GA/Final/229.pdf at p. 5 (presenter of the bill explaining that "[t]he bill recognizes accountability is needed by decision makers who delay responses to requests and otherwise act in bad faith."); *id.* ("Currently, the only incentive is to avoid scrutiny and appeals because while a case is in appeal, the interest in the records at issue may expire while litigation drags on.")

"liberal construction" of the 2017 version of NRS 239.011 demands that such fees be compensable, because it did not forbid such fee-shifting on appeal. Although the Legislature saw fit to make fee-shifting on appeal explicit in 2019, that does not mean such relief was not available beforehand and does not implicate concerns of retroactive application; indeed, an award of appellate fees was available under this Court's holdings in *Miller* and *Musso*.

3. SB 287 Is Not Relevant and Does Not Support the Coroner's Position.

The Coroner argues that the addition of "an entire provision allowing requesters to specifically recover appellate fees and costs … reflects the Legislature's intent to allow requesters to recover fees and costs for an appeal post 2019 amendments." (AB, p. 34.) However, the subsequent amendment was only intended to clarify and strengthen the NPRA. It did not repeal NRS 239.011. In any case, the plain language of NRS 239.011(3) only evinces a Legislative intent to further discourage governmental from taking a "free shot" at prolonging litigation (and presumably, forestalling disclosure of public records) by appealing.

Simply put, governmental entities have ***never*** had the right to appeal the district court's NPRA decisions without risking fee-shifting on appeal. The addition of NRS 239.011(3) in SB 287 was designed to make clear that a governmental entity would still be liable for the requester's fees even if they achieved a *partial* win on appeal. Specifically, NRS 239.011(3) sought to help achieve the Act's purpose of

ensuring the "prompt" disclosure of public records by discouraging governmental entities from needlessly extending the litigation process with non-meritorious appeals. Thus, NRS 239.011(3) clarifies that if a governmental entity loses at district court, it will still be liable for the requester's fees if the appellate court affirms *any part* of the district court's ruling in favor of the requester. *See* NRS 239.011(3) (clarifying that if a governmental entity chooses to appeal a district court ruling in favor of the requester, the entity will be liable for the entirety of the requester's fees due to that appeal if the district court's decision is affirmed "in whole or *in part*." (emphasis added). The language plainly entitling a requester to all its fees and costs in the entire proceeding was untouched by SB287.

This is the only reading of NRS 239.011(3) that comports with the purpose of SB287 and the preexisting language in NRS 239.011 making clear a requester is fully entitled to its reasonable fees in a proceeding. *See Paramount Ins. v. Rayson & Smitley*, 86 Nev. 644, 649, 472 P.2d 530, 533 (1970) ("no provision of a statute should be rendered nugatory by this court's construction, nor should any language be made mere surplusage, if such a result can be avoided); *see also McKay v. Bd. of Supervisors*, 102 Nev. 644, 650-51, 730 P.2d 438, 443 (1986) (holding that the NPRA's sister statute, the Open Meeting Law (OML), had to be interpreted in a manner that comported with the statutory schemes' policy expressed in the OML as well as the "spirit" of the OML). An amendment designed to underscore that

governmental entities would still be liable for requester's fees if they appealed and to clarify that this is so if any part of the district court's ruling was affirmed should not be interpreted as somehow precluding fees and costs incurred on appeal before the passage of the bill. Thus, the Review-Journal is entitled to its fees and costs expended on appeal under either version of the NPRA.

4. The Review-Journal's Costs Were Reasonable, Supported, and Compensable.

The Coroner argues that the district court properly reduced the Review-Journal's requested costs because it denied legal research costs on appeal and further reduced the costs the Review-Journal "merely provided a table of what costs were incurred" for copying and postage. (AB, p. 38.) This is a distortion of the district court's ruling. The district court did not reduce any costs because they pertained to the appeal or because the Review-Journal failed to provide substantiation. Instead, similar to how it ruled on fees, the district court vaguely found that a "reduction [in costs] is necessary to ensure that the costs are reasonable." (7 JA1299.)

In asserting that the Review-Journal merely submitted a table of costs, the Coroner also misrepresents the record. In fact, the Review-Journal provided all the evidence necessary to show that the costs were all "reasonable, necessary, and actually incurred." *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 120, 345 P.3d 1049, 1054 (2015). First, the Review-Journal provided a Memorandum of Costs attaching the proof the costs were "actually incurred. (5 JA0774-1000.)

Second, while the Coroner claims that the Review-Journal failed to submit any evidence of the costs' reasonableness, the Review-Journal also submitted sufficient evidence that the costs were "reasonable, necessary, and actually incurred." *Cadle*, 131 Nev. At 120, 345 P.3d at 1054. The Memorandum of Costs includes a declaration certifying that the "costs are true and correct to the best of my knowledge and belief, and that these costs have been necessarily incurred and paid in this action." (5 JA0775.) Further, with the fees motion, Ms. McLetchie provided a declaration in support of thee costs, in which Ms. McLetchie explains why the purpose of the costs and why they were needed. (6 JA1026.) For example, the declaration explains that "[t]he Transcript Costs reflected in the Memorandum of Costs and Disbursements were reasonably incurred in obtaining transcript for hearings held in 2020, which were critical to drafting written orders in this matter.". This more than meets the requirements.

A comparison to the case relied on by the Coroner is telling. In *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352-53, 971 P.2d 383, 386 (1998), the court rejected costs such as investigative fees, because the prevailing party "did not attempt to demonstrate how such fees were necessary to and incurred in the present action." Likewise, the *Berosini* court fund that a "memorandum of costs is completely void of any specific itemization." *Id.* 114 Nev. at 1353, 971 P.2d at 386. Here, the Review-Journal amply demonstrated

its entitlement to itemized costs.

D. This Court Should Determine the Appropriate Award of Reasonable Attorney's Fees and Costs.

The Coroner argues that, based on this Court's past instances of vacating the fees and costs orders and remanding for further analysis, the same should be done in this instance. (AB, pp. 39-40.) This completely ignores the Review-Journal's argument that this Court, "which has presided over multiple appeals arising from the litigation, has sufficient knowledge of the factual and procedural history of this case, as well as the quantity and quality of work performed by counsel for the Review-Journal" (OB, p. 38) and is therefore more capable of making an accurate determination in this matter than the district court is. This is particularly true because the judge presiding over the case in district court was changed shortly before the fees motion in this matter was adjudicated.

V. CONCLUSION

This Court should reverse the district court's order and hold that the Review-Journal should be awarded all of its requested fees and costs incurred in this matter.

DATED this 27th day of January, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 28.2:

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 APPELLANT'S REPLY BRIEF has been prepared in a proportionally spaced typeface (14-point Times New Roman font).

I further certify that this APPELLANT'S REPLY BRIEF complies with the type-volume limitation of NRAP 32(a)(A)(7)(ii) because it contains 6,988 words.

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

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing APPELLANT'S REPLY BRIEF was filed electronically with the Nevada Supreme Court on the 27th day of January, 2022. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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