



**NRAP 26.1 DISCLOSURE**

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed.

DATED this 13th day of April, 2022.

Respectfully submitted,

/s/ Michael J. McAvoyAmaya  
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Attorney for Respondent

**TABLE OF CONTENTS**

TABLE OF CONTENTS AND AUTHORITIES.....i-v

STATEMENT OF JURISDICTION.....1

ROUTING STATEMENT.....1-2

STATEMENT OF ISSUES.....2

STATEMENT OF THE CASE.....2-6

SUMMARY OF THE ARGUMENT.....7-8

ARGUMENT.....9

**I. IF THIS COURT IS INCLINED TO ADDRESS THIS MATTER AS AN ISSUE OF FIRST IMPRESSION IN STATUTORY INTERPRETATION IT SHOULD FIND THAT THE TIME LIMITATIONS IN NRCP 54(b) APPLY TO PLAINTIFF’S POST-JUDGMENT MEMORANDUM.....9-28**

**II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING ATTORNEYS’ FEES BECAUSE PLAINTIFF MISSED THE DEADLINE TO FILE THE MEMORANDUM IMPOSED BY THE DISTRICT COURT.....24-27**

**III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN REFUSING TO GRANT PLAINTIFF ATTORNEYS’ FEES AS SANCTIONS INSTEAD OF FEES PURSUANT TO NRCP 54.....27-29**

**IV. IV. THE DISTRICT COURT DID NOT HAVE AUTHORITY OR JURISDICTION TO ALTER OR AMEND**

<b>THE JULY 26, 2021 JUDGMENT AFTER THE NOTICE OF APPEAL WAS FILED.....</b>	<b>30-36</b>
CONCLUSION.....	36-37
CERTIFICATE OF COMPLIANCE.....	38-39
CERTIFICATE OF SERVICE.....	40

## TABLE OF AUTHORITIES

### **Statutes and Rules**

NRS § 2.090.....	1
NRAP § 3A(b).....	1
NRAP § 17.....	1-2
NRCP 54.....	5, 7, 9-30
NRAP 4.....	6, 33, 34
NRCP 52.....	6, 8, 15, 24, 31, 33, 34, 37
NRCP 59.....	6, 8, 15, 24, 31, 33, 34, 37
NRCP 50.....	31
NRCP 60.....	32
NRCP 6.....	32, 33

### **Nevada Supreme Court Cases**

<i>Miller v. Wilfong</i> , 121 Nev. 619, 623-24 (2005).....	10
<i>Collins v. Murphy</i> , 113 Nev. 1380, 1384 (1997).....	10
<i>Brunzell v. Golden Gate National Bank</i> , 85 Nev. 345 (1969).....	11
<i>Casey v. Wells Fargo Bank, N.A.</i> , 128 Nev. 713, 715 (2012).....	16, 17
<i>Solid v. Eighth Judicial Dist. Court</i> , 133 Nev. 118, 121 (2017).....	17
<i>In re Estate of Black</i> , 132 Nev., Adv. Rep. 7 (2016).....	17
<i>Young v. Nev. Gaming Control Bd.</i> , 473 P.3d 1034, 1036 (Nev. 2020)...	17
<i>State ex rel. Thatcher v. Reno Brewing Co.</i> , 42 Nev. 397 (1919).....	19
<i>Harvey v. State</i> , 136 Nev. Adv. Op. 61, __, 473 P.3d 1015, 1019 (2020).	19

<i>Coronado Med. Ctr. Owners Ass'n v. United Ins. Co. of Am.</i> , 475 P.3d 776 (Nev. 2020).....	22, 23, 26
<i>Bo Yang v. Haiming Pan</i> , 437 P.3d 1053 (Nev. 2019).....	26
<i>Arnold v. Kip</i> , 123 Nev. 410, 416, 168 P.3d 1050, 1053 (2007).....	26
<i>Nev. Corp. Headquarters, Inc. v. Weinstein</i> , 2019 Nev. App. Unpub. LEXIS 247, *2-3, 2019 WL 1244662.....	26
<i>Culinary &amp; Hotel Serv. Workers Union v. Haugen</i> , 76 Nev. 424 (1960).....	32, 34
<i>Oelsner v. Charles C. Meek Lumber Co.</i> , 92 Nev. 576, 577, 555 P.2d 217, 217 (1976).....	32, 34
<i>Stapp v. Hilton Hotels Corp.</i> , 108 Nev. 209, 212 (1992).....	32, 33
<i>Morrell v. Edwards</i> , 98 Nev. 91, 93, 640 P.2d 1322, 1324 (1982).....	34
<i>Mack-Manley v. Manley</i> , 122 Nev. 849 (2006).....	35, 36
<i>Rust v. Clark Cty. Sch. Dist.</i> , 103 Nev. 686 (1987).....	35
<i>Mahaffey v. Investor's Nat'l Security</i> , 102 Nev. 462 (1986).....	35, 36
<i>Zugel v. Miller</i> , 99 Nev. 100, 659 P.2d 296 (1983).....	36
<i>Wilmurth v. District Court</i> , 80 Nev. 337, 393 P.2d 302 (1964).....	36
<i>O'Donnell v. State</i> , 134 Nev. 990 n.2, 427 P.3d 124 (2018).....	36
<i>Foster v. Dingwall</i> , 126 Nev. 49, 52-53 (2010).....	36, 37

**Federal Cases**

<i>Sonnenblick-Goldman Corp. v. Nowalk</i> , 420 F.2d 858 (3rd Cir. 1970).....	34
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**Other Sources**

In the Matter of Amendments to the Nevada Rules of Civil Procedure,  
ADKT No. 426, 2008 Nev. LEXIS 2064.....10

COMES NOW, the Appellant, CRAIG MUELLER, by and through his counsel, Michael J. Mcavoyamaya, Esq., of MCAVOY AMAYA & REVERO ATTORNEYS, files the instant Response Brief.

### **STATEMENT OF JURISDICTION**

Jurisdiction before the Nevada Supreme Court is proper because this is a direct appeal from a final judgment entered by the Family Court in Clark County, which is “an action or proceeding, commenced in” the Eighth Judicial District Court of Nevada. Nev. Rev. Stat. § 2.090; *see also* NRAP 3A(b); *see also* Nev. Rev. Stat. Chapter 125.

### **ROUTING STATEMENT**

This matter is presumptively assigned to the Nevada Court of Appeals to hear and decide because this appeal involves “family law matters other than termination of parental rights or NRS Chapter 432B proceedings.” NRAP 17(b)(10). Respondent disagrees that the issues raised in Cross-Appellant’s appeal of the District Court’s order denying attorney’s fees is an issue of first impression involving interpretation of a court rule. Respondent also disagrees that this Court has been assigned “to the Nevada Supreme Court per NRAP 17(a)(12)” as determinations regarding which Court will address an appeal are

resolved post-briefing, which is why routings statements are required. Respondent does, however, believe that the appeal that this matter was consolidated with involves issues that may warrant review by the Nevada Supreme Court pursuant to NRAP 17(a), including an issue of first impression regarding whether a court may grant attorney's fees and costs to a party that was held to have breached the decree first because the party admitted to the breach before and evidentiary hearing was held. As such, jurisdiction before the Nevada Supreme Court may be proper.

### **STATEMENT OF THE ISSUES**

1. Did the District Court abuse its discretion when it denied Plaintiff's request for attorney's fees for missing the District Court's deadline for filing the memorandum of fees and costs?

### **STATEMENT OF THE CASE**

On July 27, 2021, the District Court in this matter entered its order regarding the evidentiary hearing held on April 1, 2021 and May 10, 2021. *See* HINDS-VIII-RA001379-1416. The parties filed cross-requests for attorneys' fees in their numerous pre-hearing motions/filings that were the subject of the evidentiary hearing in this

matter. *Id.* The Court denied both parties' requests for attorneys' fees in the prior motions as they were filed, but noted under the heading "Attorney Fees" in the Order:

that Cristina has been successful in obtaining enforcement of the property equalization obligation, *but Cristina breached the MSA by taking funds that belong to Craig.* Eventually, Cristina admitted that Craig is entitled to an offset against his property equalization obligation for those funds. Accordingly, Cristina is entitled to *an award of her reasonable attorney fees and costs that she incurred only after her concession that Craig is entitled to an offset in the amount of \$36,871.*

*Id.* at 001413:1-7 (emphasis added).

The Court's order clearly denied Defendants' request for all her attorneys' fees for the entire action because of Plaintiff's initial breach of the MSA, and determined that she was the prevailing party apparently because she admitted to the breach after litigation was necessary, but before the evidentiary hearing in this matter was held. *Id.* The Court's attorneys' fees order was clearly rooted in the attorneys' fees provision of the MSA and predicted on the fact that the Court found Christina to be a prevailing party under the MSA despite granting Defendant the relief requested and denying Plaintiff the full amount of the equalization payment she initially moved for in this matter because

she admitted to taking Defendant's money before the hearing was held. *Id.* The Court ruled that "no later than August 10, 2021, Cristina shall file a *Memorandum of Fees and Costs* to include a *Brunzell Affidavit* and accompanied by her attorney's billing statement which shall expressly set out only those attorney fees and costs consistent with the findings herein." *Id.* at RA001415:18-1416:6 (emphasis added). Defendant was given "No later than August 25, 2021,...to file a response, together with his own attorney's billing statement for comparison purposes." *Id.*

Despite the Court's clear order that Plaintiff's Memorandum of Fees and Costs be filed "no later than August 10, 2021" (*id.*) Plaintiff filed their memorandum/motion late, as noted in Plaintiff's memorandum itself: "Our calendar indicates that this Memorandum of Fees and Costs was actually due yesterday; unfortunately, the paralegal who was actually going to file the document was out of the office. We respectfully request the Court grant us a one-day enlargement of time to file the document; we do not believe anyone would be prejudiced in any way." *See* HINDS-VIII-RA001420:26-28.

On August 25, 2021, the District Court, *sua sponte* correctly and preemptively entered an order denying attorney fees and costs to Plaintiff finding that in its order on July 26, 2021 it ordered Plaintiff file the memorandum of fees and costs “no later than August 10, 2021.” *Id.* at RA001473:17-1474:10. The Court further found “that on August 11, 2021, Christina untimely filed her *Plaintiff’s Memorandum of Fees and Costs.*” *Id.* The Court cited NRCP 54(d) noting that it could not extend the time for filing the motion for attorneys’ fees after the deadline expired, and denied the request. *Id.*

Plaintiff’s counsel, refusing to accept the consequences of his own lack of diligence, then filed an untimely Motion to Reconsider, Set Aside, Alter or Amend the Order Denying Attorney’s Fees and Costs on September 7, 2021. *Id.* at RA001475-1490. Plaintiff’s Motion was rooted in self-serving interpretations of numerous Nevada Rules of Civil Procedure that were wholly unsupported by the plain language of the rules themselves and precedent interpreting them. *Id.*

Plaintiff argues that it appeals only the “order denying any award of attorney’s fees, following prior order in which district court determined that fees were owed under both prevailing party grounds

and as a sanction, Hon. Rebecca Burton, district court judge, presiding.”

*See* Hinds Op. Brief, at 3. The order denying Plaintiff attorneys’ fees was filed on August 25, 2021, pursuant to the prior order filed on July 26, 2021 that determined fees were owed. *Id.* Plaintiff does not appear to mention the District Court’s Order denying the Motion for Reconsideration in the section referencing what Plaintiff is actually appealing. *Id.* Plaintiff’s docketing statement, however, appears to indicate that the order being appealed is the Order denying reconsideration. *See* Hinds Docketing Statement, at 8 ¶16. To the extent that Plaintiff is appealing the District Court’s July 26, 2021 judgment that included the fee deadline, this appeal is untimely because the Notice of Appeal was filed after the 30 day deadline to appeal that order. *See* Nev. R. App. P. 4. It should further be noted that the relief sought in Plaintiff’s Motion to Reconsider, Alter or Amend, the denial of which is appealed here, was brought pursuant to NRCP 52 and 59. *See* HINDS-VIII-RA001475-1492. As such, the Motion to Reconsider was also untimely filed outside the ten (10) day deadlines in both NRCP 52 and 59 and jurisdictionally barred.

## SUMMARY OF THE ARGUMENT

Plaintiff argues that her appeal involves a question of statutory construction regarding “the meaning and scope of a provision,” which they assert is reviewed *de novo*. See Hinds Op. Brief, at 15. Plaintiff is incorrect. “This court reviews a district court's award [or denial] of attorney fees for an abuse of discretion.” *Bynan v. Bynan*, 2021 Nev. App. Unpub. LEXIS 314, \*3, 487 P.3d 394, 2021 WL 2177067 *citing Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005). While Plaintiff argues that *de novo* review of this matter is required because this matter seeks interpretation of a statute, the District Court’s order denying Plaintiff attorneys’ fees does not actually rely on any erroneous interpretation and application of NRCP 54.

Rather, the District Court denied Plaintiff attorneys’ fees because it ordered Plaintiff to file its memorandum of attorney fees “no later than August 10, 2021.” See HINDS-VIII-RA001415:18-1416:6. That is, the District Court did not deny Plaintiff attorneys’ fees for missing the deadline to file a motion for attorneys’ fees in NRCP 54, but because Plaintiff missed the firm deadline set by the District Court to file the memorandum of fees and costs in the Court’s July 26, 2021

judgment/order. *Id.* For that reason, this Court reviews the denial of the attorneys' fees for abuse of discretion, rather than *de novo*. *Miller*, 121 Nev. at 622.

Here, it is undisputed that Plaintiff missed both the deadline set by the District Court to file the memorandum of fees and costs and the deadline to alter or amend that judgment. *See* HINDS-VIII-RA001415:18-1416:6; *see also* Nev. R. Civ. P. 59(e); *see also* Nev. R. Civ. P. 52. Plaintiff also missed the deadline to appeal the July 26, 2021 judgment/order, and to the extent this appeal seeks an order from this Court directing the lower court to amend that judgment, the appeal is untimely and should be denied.

The District Court did not abuse its discretion in denying Plaintiff attorneys' fees and costs for missing the District Court's set deadlines. As such, Plaintiff's appeal should be denied and the denial of attorneys' fees affirmed should the Court reach this issue on appeal after review of Defendant's appeal of the July 26, 2021 judgment/order.<sup>1</sup>

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<sup>1</sup> Defendant finds it prudent to note that this brief was ordered due on April 13, 2022, not April 4, 2022. Plaintiff has made a habit of raising objections that are contradicted by this Court's prior orders, like the complaint that Defendant's appeal relies on audio/video files when this

## LEGAL ARGUMENT

### **I. IF THIS COURT IS INCLINED TO ADDRESS THIS MATTER AS AN ISSUE OF FIRST IMPRESSION IN STATUTORY INTERPRETATION IT SHOULD FIND THAT THE TIME LIMITATIONS IN NRCP 54(b) APPLY TO PLAINTIFF’S POST-JUDGMENT MEMORANDUM.**

Defendant maintains that this matter should not be treated as a matter of first impression regarding statutory interpretation. However, should this Court address this matter as one of first impression regarding statutory interpretation of NRCP 54 it should find that pre-judgment motions for attorneys’ fees are not motions within the meaning of NRCP 54(d)(2) because such motions cannot satisfy the mandatory requirements for such motions prescribed by the rule. *See* Nev. R. Civ. P. § 54(b). This Court has repeatedly clarified that:

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Court authorized submission of the audio/video files in the appendix. *See* Order, 9/21/21, at 1 (stating that “Appellant may also provide this court with a certified copy of the sound recording as part of the appendix. (SC).”) Defendant anticipates a potential objection to the timeliness of Defendant’s Answering brief. Plaintiff filed her response brief on April 4, 2022, likely believing the brief needed to be filed 21 days after the filing of the Opening brief pursuant to NRAP 31(a)(2). However, this Court’s Feb. 24, 2022 order makes clear that the briefing schedule “shall proceed in accordance with NRAP 31(a)(1),” which gives 30 days to file response and reply briefs, making answering briefs due on April 13, 2022.

our jurisprudence in family law cases to require trial courts to evaluate the *Brunzell* factors when deciding attorney fee awards. Additionally, in *Wright v. Osburn*, this court stated that family law trial courts must also consider the disparity in income of the parties when awarding fees. Therefore, parties seeking attorney fees in family law cases *must support* their fee request with affidavits or other evidence that meets the factors in *Brunzell* and *Wright*.

*Miller v. Wilfong*, 121 Nev. 619, 623-24 (2005) (emphasis added).

This Court has also held that a non-prevailing party is prejudiced when they receive no notice that the prevailing party intends to seek fees until after the deadline for filing an appeal has passed. *Collins v. Murphy*, 113 Nev. 1380, 1384, 951 P.2d 598, 600-01 (1997); *In the Matter of Amendments to the Nevada Rules of Civil Procedure*, ADKT No. 426, 2008 Nev. LEXIS 2064 (Order Amending Nevada Rule of Civil Procedure 54, July 8, 2008) (explaining that NRCP 54(d)(2) codifies the holding in *Collins*).

Here, it is important to stress that this Court is not dealing with a situation where the district court granted a prior motion for attorneys' fees filed in compliance with NRCP 54(d)(2) as Plaintiff argues. Rather, Plaintiff filed numerous requests for attorneys' fees contained in other

motions that did not comply with NRCP 54(d)(2). Because the motions did not comply with NRCP 54(d)'s mandatory requirements the District Court directed Plaintiff to file the requisite attorney affidavit in support, a memorandum addressing the *Brunzel* factors, the amount of fees requested in accordance with the judgment/order, and billing statements supporting the fees actually and necessarily incurred "no later than August 10, 2021." *See* HINDS-IX-RA001609.

This case does not even involve the 21 day time limitation in NRCP 54(d)(2)(B)(i) as Plaintiff repeatedly suggests. Rather, the District Court's order denying Plaintiff attorneys' fees implicates: (1) the language of the statute preceding the time limitation: "Unless a statute or a court order provides otherwise." (*See* NRCP 54(d)(2)(B)); and (2) the language in the following section expressly barring a court from "extend[ing] the time for filing the motion after the time has expired." *See* Nev. R. Civ. P. 54(d)(2)(C). NRCP 54 is clear in its indication that the district court has the discretion to set a deadline to file a request for attorneys' fees, by motion or otherwise, and such deadlines are enforceable. *Id.* NRCP 54 includes no limitation on the enforceability of a court set deadline earlier than the 21 day default

deadline. *Id.* NRCP 54 is similarly clear in its limitation on a court's ability to extend a deadline to seek fees after the deadline expires. *See* Nev. R. Civ. P. 54(d)(2)(E).

Here, the District Court entered its July 26, 2021 judgment against Defendant imposing "a 15-day deadline" to file the memorandum of fees and costs. *See* HINDS-VIII-RA001415:18-1416:6; *see also* Hinds Op. Brief, at 23. It is undisputed that Plaintiff missed that "no later than" deadline set by the District Court. *Id.* Indeed, the District Court's order denying Plaintiff's Motion to Reconsider, which is the only order Plaintiff has timely appealed, the District Court ruled as follows:

COURT FINDS that Cristina's motion for attorney's fees was timely made because they were made prior to the evidentiary hearing. **The issue is that the Court set a deadline to submit the *Memorandum of Fees and Costs* to August 10, 2021 and Cristina filed it late on August 11, 2021.**

COURT FINDS that on August 25, the Court denied Plaintiff's request for attorney fees and costs **because the Court's July 26, order expressly directed the memorandum be filed "No later than August 10, 2021," and Plaintiff filed the memorandum on August 11, 2021.**

COURT FINDS that, as it previously ruled, NRCP 54(d)(2)(C) provides that "[t]he court may not extend

the time for filing the motion after the time has expired."

...

COURT FINDS that Plaintiff's request to reconsider the prior order denying Plaintiff's request for fees and costs and to amend the July 26, 2021 judgment pursuant to NRCP 52, NRCP 59, NRCP 60 and EDCR 5.512 fails to identify sufficient basis for reconsideration of the Court's August 25, 2021 order and the July 26, 2021 order.

*See* HINDS-IX-RA001609 (emphasis added).

At the hearing on the Motion for Reconsideration the District Court advised Plaintiff that "because basically the request is saying that, you know, the Court has set an order with a time frame and you're asking the Court to disregard its orders and that becomes rather a slippery slope for the Court is to disregard its orders, particularly, in an area where the legislature has said that the Court isn't to extend the deadlines." *Id.* at RA001632:22-1633:4. The District Court explained to Plaintiff that it:

wasn't imposing the 21 day deadline because the Court had -- the Court's determining that the motion itself was filed timely. The req -- or the request for fees was filed timely because it was filed in the motion and in the replies. It was repeatedly requested. So it's -- it's -- the motion itself was timely. The request for fees is

timely. It's the request for additional information, the memorandum of fees and costs, which wasn't timely. Again, **I'm taking my cue from the rule itself under 54D that makes it very strict about not extending deadlines.**

*Id.* at RA001631:12-21 (emphasis added).

The Court's reasoning in this regard is incredibly important because it makes clear that the District Court was not actually applying the NRCP 54(d)(2)(B) deadline, but the deadline in its own order. *Id.* The District Court was taking its cue from the policy behind Rule 54(d) when deciding that it would not change the deadline it set for Plaintiff to file the memorandum of fees and costs after the deadline had passed. *Id.* Because the District Court used Rule 54(d) as simply part of its reasoning why it would not exercise discretion to disregard the deadline in its own order to render Plaintiff's memorandum of fees and costs timely, this Court would be correct to simply ignore the statutory interpretation argument all together.

Here, the District Court was not actually applying the rule Plaintiff requests this Court to interpret, but instead, the policy behind NRCP 54(d) when deciding not to exercise discretion to alter the July 26, 2021 judgment's language to change the deadline to file the

memorandum to August 11, 2021. *Id.* Indeed, while Plaintiff advances many red-herring arguments throughout her brief, the ultimate conclusion Plaintiff wants this Court to come to is that the District Court not only had the “authority to change [the] 15-day deadline to a 16-day deadline” in the July 26, 2021 judgment after the deadline expired, but also that it was error/abuse of discretion not to do so. *See Hinds Op. Brief*, at 23. Ultimately, it was well within the District Court’s discretion not to amend the July 26, 2021 deadline had the request to alter or amend the judgment pursuant to NRCP 52 and 59 been timely. Plaintiff’s Motion, however, was filed after the 10 and 28 day deadlines to file motions pursuant to NRCP 52 and 59, which similarly cannot be extended.

In the off chance this Court decides to accept Plaintiff’s invitation to interpret NRCP 54(d) and clarify its meaning and application it should find, consistent with the plain language of the rule, that motions for attorneys’ fees filed prior to entry of a judgment are not motions contemplated by NRCP 54(d) because they do not and cannot meet the mandatory requirements for NRCP 54 attorney fee motions. NRCP 54(d)(2) clearly states, that:

(A) Claim to Be by Motion. *A claim for attorney fees must be made by motion.* The court may decide a postjudgment motion for attorney fees despite the existence of a pending appeal from the underlying final judgment.

(B) Timing and Contents of the Motion. Unless a statute or a court order provides otherwise, *the motion must:*

(i) be filed no later than 21 days after written notice of entry of judgment is served;

(ii) *specify the judgment and the statute, rule, or other grounds entitling the movant to the award;*

(iii) *state the amount sought or provide a fair estimate of it;*

(iv) disclose, if the court so orders, the nonprivileged financial terms of any agreement about fees for the services for which the claim is made; and

(v) *be supported by:*

(a) *counsel's affidavit swearing that the fees were actually and necessarily incurred and were reasonable;*

(b) *documentation concerning the amount of fees claimed; and*

(c) *points and authorities addressing the appropriate factors to be considered by the court in deciding the motion.*

See N.R.C.P. 54(d) (emphasis added).

Like statutory interpretation, this Court “review[s] de novo [the district court's] legal conclusions regarding court rules.” *Casey v. Wells*

*Fargo Bank, N.A.*, 128 Nev. 713, 715 (2012). “This court only looks beyond the plain language of a court rule if it is ambiguous or silent on the issue in question.” *See Solid v. Eighth Judicial Dist. Court*, 133 Nev. 118, 121, 393 P.3d 666, 671 (2017); *see also In re Estate of Black*, 132 Nev., Adv. Rep. 7, 367 P.3d 416, 418 (2016).

Here, Plaintiff invites this Court to interpret NRCP 54(d)(2)(B) to mean that it only applies to post-judgment “motions,” and that because their post-judgment request for attorneys’ fees was styled as a “post-hearing Memo” that NRCP 54(d)(2) does not apply. *See Hinds Op. Brief*, at 16-17. Defendant notes that such an interpretation is rife with potential abuse, as anyone could simply style their post-judgment attorneys’ fees pleading as a memorandum to avoid the time limitations in the rule. This Court interprets statutes, regulations and rules in a manner that avoids absurd results, and allowing a party to avoid the time limitations of NRCP 54(d)(2) by styling their pleading as a memorandum is certainly an absurd result. *Young v. Nev. Gaming Control Bd.*, 473 P.3d 1034, 1036 (Nev. 2020).

Plaintiff, understanding this glaring problem with their argument, asserts that the actual Rule 54(d)(2) motion was including

“in Cristina’s pre-hearing filings,” and asserts that “All contents described in NRCP 54(d)(2) had been provided.” *See* Hinds Op. Brief, at 16. However, Plaintiff’s pre-hearing filings did not include all the “contents described in NRCP 54(d)(2),” which is why the Court ordered Plaintiff to “file a *Memorandum of Fees and Costs* to include a *Brunzell Affidavit* and accompanied by her attorney's billing statement which shall expressly set out only those attorney fees and costs consistent with the findings herein.” *See* HINDS-VIII-RA001415-1416. The reason the Court needed to direct Plaintiff to file the memorandum to include the affidavit, the billing statement, the amount of fees consistent with the actual judgment and the amount of the fees sought is because none of Plaintiff’s prior requests for attorneys’ fees included that information. *See* HINDS-I-RA000060-62.

Plaintiff fails to expressly acknowledge what the contents described in NRCP 54(d)(2) actually are in their brief because they know that their prior requests did not include that information. Specifically, the pre-hearing filings did not have a counsel affidavit, a billing statement, no specific amount or estimated amount of the fees were included, and Plaintiff did not specify the actual judgment the fees

that were subject to the request because the judgment had not yet been entered yet. *See* N.R.C.P. 54(d)(2).

This Court does not “ignore as meaningless” words and clauses in a statute or law. *State ex rel. Thatcher v. Reno Brewing Co.*, 42 Nev. 397, 405, 178 P. 902, 903 (1919). Rather, there is a presumption that the framers of our laws intended “to give force and effect, not only to the main legislative intent of the act but also to its several parts, words, clauses, and sentences, and chose appropriate language to express their intention.” *Id.* That “presumption is removed only when it appears, from a construction of a statute as a whole, effect cannot be given to the paramount purpose unless particular words or clauses are rejected, or without limiting or expanding their literal import.” *Id.* That is, this Court “construe[s] the words in a statute as a whole, such that no words or phrases become superfluous or nugatory.” *Harvey v. State*, 136 Nev. Adv. Op. 61, \_\_\_, 473 P.3d 1015, 1019 (2020).

Plaintiff’s requested interpretation of NRCP 54(d)(2) would require this Court to ignore or render superfluous or nugatory numerous words and requirements for the motion described in NRCP 54(d)(2). This is because the plain language of NRCP 54(d)(2) makes

clear that there must always be a post-judgment request for attorneys' fees. A party cannot "*specify the judgment...entitling the movant to the award*" before that judgment is actually entered. *See Nev. R. Civ. P. 54(d)(2)(B)(ii)*. Similarly, a party cannot "state the amount sought or provide a fair estimate of it" before a judgment is entered because the amount of attorneys' fees incurred by the party is not able to be estimated until the proceedings have concluded and a judgment entered. *See Nev. R. Civ. P. 54(d)(2)(B)(iii)*. A party cannot support their request with "counsel's affidavit swearing that the fees were actually and necessarily incurred and were reasonable" before the fees sought are actually and necessarily incurred. *See Nev. R. Civ. P. 54(d)(2)(B)(v)(a)*. A party cannot provide "documentation concerning the amount of fees claimed" without the fees actually and necessarily being incurred. *See Nev. R. Civ. P. 54(d)(2)(B)(v)(b)*. All of this language is rendered nugatory or superfluous if this Court were to find that a pre-judgment motion that, by its nature, cannot include this information somehow qualifies as a Rule 54(d)(2) motion.

This fact is rendered clear when the amendment history of NRCP 54(d) is reviewed, as this Court amended NRCP 54 to include the

motion requirement for the purpose of establishing clear guidelines for what a Court must consider before granting an award of attorneys' fees. *See In the Matter of Amendments to the Nevada Rules of Civil Procedure*, ADKT No. 426, 2008 Nev. LEXIS 2064. Prior to entry of a judgment, the only actual mandatory information that a party can provide is "the statute, rule, or other grounds entitling the movant to the award," and general argument of the *Brunzel* factors because all the other information required by NRCP 54(d)(2) is too indefinite to ascertain until a judgment is entered. It is for this very reason that Plaintiff's pre-hearing filings only included the statutes and rules entitling Plaintiff to the fees, and general arguments relating to the *Brunzel* factors. *See HINDS-I-RA000060-62*. It is also for this very reason that the Court directed the filing of the memorandum, because it could not grant Plaintiff their fees without first considering all the necessary information delineated in NRCP 54(d)(2)(B). That is, the District Court acknowledged that the law justified a granting of fees in the July 26, 2021 order, but could not actually grant said fees until Plaintiff provided the District Court with the information required by NRCP 54(d)(2)(B).

“This court has previously stated that ‘[t]he word 'shall' is a term of command; it is imperative or mandatory, not permissive or directory.” *Blaine Equip. Co. v. State*, 122 Nev. 860, 867, 138 P.3d 820, 824 (2006). The term “must” is considered to be equivalent to “shall” in its mandatory meaning. *Black v. Pension Ben. Guar. Corp.*, 973 F.3d 576, 583 (6th Cir. 2020) (“The repeated use of the permissive verb "may" in subsection (c)(1)—as opposed to mandatory words like shall or must—indicates that a trustee appointed under subsection (b) is permitted, but not required, to intervene”); *see also Royale Green Condo. Ass'n v. Aspen Specialty Ins. Co.*, No. 07-CIV-21404, 2007 U.S. Dist. LEXIS 97338, at \*10 (S.D. Fla. July 28, 2007); *Richland Cty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 297, 811 S.E.2d 758, 761 (2018). NRCP 54(d) states that unless the Court directs otherwise, the motion must be filed no later than 21 days of filing of the Notice of Entry of Judgment, and “must” include each of the enumerated subject matter in the rule. *See Nev. R. Civ. P. 54(d)(2)(B)*.

This Court just recently held that the 21 day time limitation, which follows the mandatory “must” language in NRCP 54(d)(2), is mandatory. *Coronado Med. Ctr. Owners Ass'n v. United Ins. Co. of Am.*,

475 P.3d 776 (Nev. 2020). This Court has also held that when a party fails to support their motion for attorneys' fees with requisite information in NRCP 54(d)(2)(B) that failure warrants denial of the attorney fee request:

And here, the documents before us on appeal do not show that appellants supported their motion with an affidavit or declaration. Instead, appellants assert that counsel's signature pursuant to NRCP 11 verified the information in the motion. But these affidavit requirements are separate from the NRCP 11 signature requirement and appellants provide no support for the implicit contention that counsel's signature per NRCP 11 fulfills the affidavit requirement...As appellants failed to support the *Brunzell* factor arguments and factual contentions in their motion for fees and costs with an affidavit or declaration, the district court did not abuse its discretion in denying the motion.

*Nev. Corp. Headquarters, Inc. v. Weinstein*, 2019 Nev. App. Unpub. LEXIS 247, \*2-3, 2019 WL 1244662.

If NRCP 54(d)(2)(B)'s motion content requirements are mandatory as the plain language indicates, a pre-judgment motion can never comply with NRCP 54(d)(2)(B) and will always require a post-judgment filing that includes the full amount of fees requested, the judgment the fees are requested for, and the attorney affidavit that the fees were actually and necessarily incurred. *Id.* In sum, by the plain language of

NRCP 54(d)(2), the motion contemplated by the rule can never be satisfied by a pre-judgment motion because it is impossible for a party to include all the requisite information in said motion before the judgment or order is entered. Should the Court accept Plaintiff's invitation to interpret NRCP 54(d)(2) it should find that the motion contemplated by NRCP 54(d)(2) can only be filed after the judgment or order for which fees are sought has been entered by the plain language of the rule, and as such, Plaintiff's post-judgment memorandum was required to comply with NRCP 54(d)(2) as Defendant argued before the District Court. *See* HINDS-VIII-RA001502:14-28.

However, again, it must be stressed that this case does not actually involve interpretation and application of NRCP 54(d)(2). Instead, the District Court took its cue from NRCP 54(d)(2) when exercising its discretion not to set aside or amend the deadline it imposed on Plaintiff filing the memorandum of fees and costs in its July 26, 2021 judgment. Plaintiff's motion to alter or amend was also notably filed after the ten (10) day deadline to amend the judgment pursuant to NRCP 59, after the twenty-eight (28) day deadline to amend the findings of fact and conclusions of law pursuant to NRCP 52, and after

the 30 deadline to appeal the judgment had expired also making the motion untimely. *See* HINDS-VIII-RA001473-1475.

## **II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING ATTORNEYS' FEES BECAUSE PLAINTIFF MISSED THE DEADLINE TO FILE THE MEMORANDUM IMPOSED BY THE DISTRICT COURT.**

Plaintiff spills much ink trying to make the case that the District Court denied their request for attorneys' fees by applying the time limits found in NRCP 54. *See* Hinds Op. Brief, at 16-21. Plaintiff's position is, quite simply, untrue. While the Court cited to NRCP 54(d)(2) as part of its reasoning for denying Plaintiff's attorneys' fees, the actual reason that the District Court denied Plaintiff's request for attorneys' fees was because the Court set a deadline to file the memorandum of fees and costs in the July 26, 2021 judgment to "no later than August 10, 2021," and "on August 11, 2021, Christina untimely filed her *Plaintiff's Memorandum of Fees and Costs*." *See* HINDS-VIII-RA001473-1474.

As such, the actual issue in this appeal is not whether the District Court improperly interpreted or applied the deadlines in NRCP 54(d)(2). Instead, the issue is whether the District Court abused its discretion in enforcing the August 10, 2021 deadline set in the judgment. This Court does not disturb a court's decisions regarding discretionary deadlines

absent clear abuse of discretion. *Bo Yang v. Haiming Pan*, 437 P.3d 1053 (Nev. 2019). Enforcing deadlines is squarely within the court’s discretion. *Arnold v. Kip*, 123 Nev. 410, 416, 168 P.3d 1050, 1053 (2007). Here, it is not even disputed that the District Court had the discretion to set and enforce the August 10, 2021 deadline.

Instead, Plaintiff argues that the District Court had “authority to change a 15-day deadline to a 16-day deadline, when the outer limit of the rule is 21 days.” *See* Hinds Op. Brief, at 23. Plaintiff fails to support this argument with any cogent argument or relevant authority, and for that reason this Court need not even address it. *Nev. Corp. Headquarters, Inc. v. Weinstein*, 2019 Nev. App. Unpub. LEXIS 247, \*2-3, 2019 WL 1244662. More importantly, however, is the fact that even if the District Court had such authority despite the “no later than” language in both the District Court’s July 26, 2021 judgment and NRCP 54(d)(2)(B), and NRCP 54(d)(2)(C)’s express bar on extending deadlines for seeking fees after they expire, the fact is that the District Court simply declined to exercise such authority. *Id.* The District Court cannot be found to have abused its discretion for failing to exercise its discretion in the manner Plaintiff wanted it to. *Coronado Med. Ctr. Owners Ass’n*, 475 P.3d at 776.

Further, Plaintiff's argument that the NRCP 54(d)(2)(E)'s limitation on extending deadlines to file a motion for attorneys' fees applies only the 21 day deadline is inconsistent with the plain language of the rule. "The court *may not extend the time for filing the motion after the time has expired.*" Nev. R. Civ. P. 54(d)(2)(E)(emphasis added). When read together with the language "Unless a statute or a court order provides otherwise," the plain language of this rule indicates that once the deadline to move for attorneys' fees is set and expires it cannot thereafter be extended, regardless of whether the deadline is the default 21 day deadline in the rule, or a shorter or later deadline set by the Court. Defendant does not dispute that a district court has the authority to alter a deadline to file an attorney fees motion, whether the deadline is set by the Court specifically or the default 21 days deadline in NRCP 54(d)(2)(B), before it expires. Once either deadline expires, however, the court is barred from extending it. *See* Nev. R. Civ. P. 54(d)(2)(E).

Thus, Plaintiff is not actually asking this Court to find that a court has inherent authority to change a deadline to file a motion for attorneys' fees as she proclaims in her brief. Plaintiff is actually requesting this Court render nugatory NRCP 54(d)(2)(E)'s clear bar on extending such

deadlines after they expire. It is undisputed that the District Court had the discretion and authority to “change a 15-day deadline to a 16-day deadline.” *See* Hinds Op. Brief, at 23. However, the Court must change that deadline itself or upon request of the moving party before the deadline expires. *See* Nev. R. Civ. P. 54(d)(2)(E). Once the deadline expires, so does the district court’s discretion to alter it. *Id.* Here, the deadline expired on August 10, 2021. Plaintiff filed her memorandum on August 11, 2021 late. The District Court had no discretion to alter the deadline after it expired. *Id.*

### **III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN REFUSING TO GRANT PLAINTIFF ATTORNEYS’ FEES AS SANCTIONS INSTEAD OF FEES PURSUANT TO NRCP 54.**

Plaintiff goes on to argue that the District Court had the discretion to instead grant them attorneys’ fees as sanctions instead of NRCP 54 attorneys’ fees after they missed the deadline to file the memorandum and the Court denied their request for fees. Again, Plaintiff ignores the District Court’s ruling rejecting the request for fees. “The issue is that the Court set a deadline to submit the *Memorandum of Fees and Costs* to August 10, 2021 and Cristina filed it late on August 11, 2021.” *See* HINDS-IX-1609. The District Court did not abuse its discretion by

declining Plaintiff's invitation to go back on two of its orders to excuse their failure to meet the deadline set by the Court by instead awarding them attorneys' fees as sanctions.

As with Plaintiff's entire argument on appeal, Plaintiff's position relies on an assumption that the District Court believed it had no other choice but to deny their request for fees because of NRCP 54(d). Such was not the case. The District Court instead took "guidance from the rule [54(d)(2)(E)] itself" that the courts are not supposed to extend attorney fee deadlines after they expire. *See* HINDS-IX-RA001632-1633. The Court also noted that Plaintiff was requesting "the Court to disregard its orders and that becomes rather a slippery slope for the Court is to disregard its orders, particularly, in an area where the legislature has said that the Court isn't to extend the deadlines." *Id.* The District Court explained clearly to Plaintiff that it was not looking for some loophole to exempt them from the deadline that Plaintiff missed because NRCP 54(d)(2)(E) prevented it from granting the fees. The District Court instead exercised appropriate discretion to decline Plaintiff's invitation to use sanctions as a loophole to meeting the deadline the Court had set for filing the memorandum.

Ultimately, the District Court was not required to extend the time for Plaintiff to file its memorandum of fees and costs. It is undisputed that the District Court had discretion to set the deadline to file the memorandum. It is undisputed that the District Court had discretion to enforce that deadline. The existence of a court's discretion to act does not entitle a party to a specific exercise of that discretion. The decision is discretionary and thus not mandatory. Here, even if this Court accepted as true Plaintiff's position that the District Court had the discretion and jurisdiction to award Plaintiff attorneys' fees as sanctions instead of NRCP 54 attorneys' fees, or discretion to "alter its 15-day order to a 16-day order" after Plaintiff missed the deadline, which it did not, that does not mean it was an abuse of that discretion for the District Court to deny Plaintiff's requests. Because Plaintiff has not identified any way the District Court abused its discretion, this appeal must be denied and the orders denying attorneys' fees affirmed.

**IV. THE DISTRICT COURT DID NOT HAVE AUTHORITY OR JURISDICTION TO ALTER OR AMEND THE JULY 26, 2021 JUDGMENT AFTER THE NOTICE OF APPEAL WAS FILED.**

Finally, regardless of whether the District Court had discretion to alter the deadline for filing the memorandum of attorneys' fees after it

expired, or to grant Plaintiff attorneys' fees as sanctions, by the time Plaintiff sought those remedies the time to file the motion had expired and the District Court had been divested of jurisdiction because a Notice of Appeal had been filed. NRCP 59(e) "allows a party to file a motion to alter or amend a judgment within 10 days of written notice of entry of the judgment." *See Nev. R. Civ. P. 59(e)*. Similarly, NRCP 52(b) provides that "a party's motion filed not later than 28 days after service of written notice of entry of judgment, the court may amend its findings or make additional findings and may amend the judgment accordingly." *See Nev. R. Civ. P. 52(b)*.

Plaintiff's Motion to Reconsider, Alter or Amend was filed on September 7, 2021. *See HINDS-VIII-RA001475*. The Judgment Plaintiff requested the District Court amend to make her request for attorney fees and costs timely was entered on July 26, 2021, and the Notice of Entry of Judgment filed and served by the Court on July 27, 2021. *Id.* at RA001377-1379. Plaintiff's Motion to Reconsider, Alter or Amend was undisputedly untimely under all the rules Plaintiff cited as a basis for reconsideration. NRCP 6(b) makes absolutely clear that "[a] court *must not extend the time to act* under Rules 50(b) and (d), 52(b), 59(b), (d), and

(e), and 60(c)(1), and must not extend the time after it has expired under Rule 54(d)(2).” See Nev. R. Civ. P. 6(b); see also *Culinary & Hotel Serv. Workers Union v. Haugen*, 76 Nev. 424, 426, 357 P.2d 113, 114 (1960).

The statutory bar on the district court to hear an untimely Motion pursuant to NRCP 52(b) and 59(e) is not substantive, but jurisdictional. “A ‘motion to amend’ filed under NRCP 59 ‘ . . . shall be served not later than 10 days after service of written notice of entry of the judgment.’ NRCP 59(e). Here, the ‘motion to amend’ was not filed within the required 10 day period; therefore, the district court *was without jurisdiction to consider it.*” *Oelsner v. Charles C. Meek Lumber Co.*, 92 Nev. 576, 577, 555 P.2d 217, 217 (1976) (emphasis added).

It is well established that a district court is without jurisdiction to consider an untimely NRCP 59(e) motion. *Oelsner v. Charles C. Meek Lumber Co.*, 92 Nev. 576, 577, 555 P.2d 217, 217 (1976). Because the motion to amend was not filed within the statutorily prescribed ten-day period, the amended judgment was entered without a jurisdictional foundation and is therefore void. *Id.* Therefore, the district court's order amending and offsetting the judgment must be reversed.

See *Stapp v. Hilton Hotels Corp.*, 108 Nev. 209, 212 (1992).

It is well established that the District Courts are without jurisdiction to entertain any motion pursuant to NRCP 52(b) and 59(e)

filed outside the ten (10) day and twenty-eight (28) day deadline to file such motions. *Id.* Plaintiff's Motion to Reconsider sought to alter or amend the July 26, 2021 Judgment was filed well outside the ten (10) day and twenty-eight (28) day deadlines despite citing the deadlines in their Motion and thus having clear knowledge of the time limitation. Like Plaintiff's request to extend the deadline to file the request for attorney's fees after the deadline has expired pursuant to NRCP 54(d)(2)(C), Plaintiff's Motion to Reconsider, Alter or Amend pursuant to NRCP 52(b) and 59(d) to extend the missed deadline in the July 26, 2021 Judgment or otherwise alter the terms of that Judgment to allow Plaintiff to recover fees was and is inexcusably late and the District Court lacked jurisdiction to grant the Motion. *See Stapp*, 108 Nev. at 212; *see also* Nev. R. Civ. P. 6.

Further, Nevada Rule of Appellate Procedure ("NRAP") 4(a) is similarly clear that "a notice of appeal must be filed after entry of a written judgment or order, and no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served." *See* NRAP 4(a). NRAP 4(a) further provides that the deadline to file the notice of appeal is tolled upon the filing of a motion to amend pursuant to NRCP 52(b), or to alter or amend a judgment pursuant to NRCP 59, so

long as the “party timely files” the motion. *Id.* “Such a motion will toll the time for appeal; however, it must be timely made.” *See Morrell v. Edwards*, 98 Nev. 91, 93, 640 P.2d 1322, 1324 (1982) *citing* NRAP 4(a). If the motion “is not served within ten days after service of written notice of entry of the judgment, the time for appeal is not tolled.” *Id. citing Haugen*, 76 Nev. 424; *Browder v. Director, Ill. Dept. of Corrections*, 434 U.S. 257 (1978); *Sonnenblick-Goldman Corp. v. Nowalk*, 420 F.2d 858 (3rd Cir. 1970); *cf. Oelsner*, 92 Nev. 576 (district court without jurisdiction to consider untimely NRCP 59(e) motion).

The Notice of Entry of Order for the July 26, 2021 judgment was filed on July 27, 2021. The deadline for Plaintiff’s to file a notice of appeal was August 26, 2021. Plaintiff filed the present Rule 52(b) and Rule 59(e) motion on September 7, 2021, forty-two (42) days after the Notice of Entry of Judgment, ten (10) days after the deadline to amend pursuant to Rule 52(b), twelve (12) days after the deadline to file the notice of appeal, and thirty-two (32) days after the deadline to file a motion to amend the judgment under Rules 59 had expired. Plaintiff requests that this Court excuse its failure to meet all of these firm deadlines in this appeal. Not only was the District Court jurisdictionally barred from addressing

Plaintiff's Motion to Reconsider, Alter, or Amend, this Court is similarly jurisdictionally barred from addressing this matter because it seeks to alter the Court's judgment past the deadline to appeal, or file post-judgment motions pursuant to NRCP 52 and 59.

Finally, this Court "has consistently explained that 'a timely notice of appeal divests the district court of jurisdiction to act and vests jurisdiction in this court' and that the point at which jurisdiction is transferred from the district court" to the Nevada Supreme Court. *See Mack-Manley v. Manley*, 122 Nev. 849, 855, 138 P.3d 525, 529-30 (2006). "Although, when an appeal is perfected, the district court is divested of jurisdiction to revisit issues that are pending before this court, the district court retains jurisdiction to enter orders on matters that are collateral to and independent from the appealed order, *i.e.*, matters that in no way affect the appeal's merits." *Id.* This Court has noted that "the district court has no authority to rule on a post-judgment motion to modify a child custody arrangement while an appeal is pending and the custody issue is squarely before this court." *Id.* Indeed, "the proper and timely filing of a notice of appeal is jurisdictional." *See Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987) *citing Mahaffey*

*v. Investor's Nat'l Security*, 102 Nev. 462, 725 P.2d 1218 (1986); *Zugel v. Miller*, 99 Nev. 100, 659 P.2d 296 (1983). “Jurisdictional rules go to the very power of this court to act.” *Id.* “Indeed, a timely notice of appeal divests the district court of jurisdiction to act.” *Id. citing Wilmurth v. District Court*, 80 Nev. 337, 393 P.2d 302 (1964).

As Plaintiff noted in her Motion to Reconsider, Alter or Amend, “The court may decide a *postjudgment* motion for attorney fees despite the existence of a pending appeal from the underlying final judgment.” *See* HINDS-VIII-RA001482. This is because “after a notice of appeal is filed, the district court retains jurisdiction to decide matters collateral to or independent from the issues on appeal, to enforce orders that are before this court on appeal, and to hold hearings concerning matters that are pending before this court.” *See O'Donnell v. State*, 134 Nev. 990 n.2, 427 P.3d 124 (2018) *citing Foster v. Dingwall*, 126 Nev. 49, 52-53, 228 P.3d 453, 455 (2010); *Mack-Manley*, 122 Nev. 849, at 858 (providing that the district court has the authority to resolve matters that are collateral to and independent of the issues on appeal, ‘i.e., matters that in no way affect the appeal's merits,’ and explaining that a ‘district court has the power to enforce’ its order being challenged on appeal). “However, *the*

*district court is without jurisdiction to enter an order that modifies or affects the order being challenged on appeal.” Id. citing Foster, 126 Nev. at 52-53, 228 P.3d at 455 (emphasis added).*

The District Court cannot rule on a Rule 52 or 59 motion after the deadlines have expired, and cannot rule on matters that are being challenged on appeal. Here, Defendant filed a timely notice of appeal of the July 27, 2021 Judgment, and part of the subject matter appealed was the award of attorneys’ fees to Plaintiff as a prevailing party. As such, the order regarding fees was not a collateral matter and the District Court had no jurisdiction to alter it after the judgment had been entered. For these reasons, this Court should deny Plaintiff’s appeal and affirm the District Court’s denial of their Motion to Reconsider, Alter or Amend.

## CONCLUSION

For the reasons set forth above, Defendant/Appellant/Cross-Respondent requests that this Court DENY Plaintiff/Cross-Appellant's appeal, and affirm the District Court's Order denying the Motion to Reconsider.

Respectfully submitted,

MCAVOY AMAYA & REVERO ATTORNEYS

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**CERTIFICATE 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:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook; or

This brief has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

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:

Proportionately spaced, has a typeface of 14 points or more, and contains 7,994 words, less than the 14,000 word limit; or

Monospaced, has 10.5 or fewer characters per inch, and contains \_\_\_\_\_ words or \_\_\_\_\_ lines of text; or

Does not exceed 30 pages.

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.

Dated this **12th** day of **April 2022**.

/s/ Michael J. McAvoyAmaya  
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**CERTIFICATE OF SERVICE**

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 12th day of April, 2022. Electronic service of the foregoing document was made in accordance with the Master Service List as follows:

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Dated this 12th day of April 2022.

Respectfully submitted,

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