IN THE SUPREME COURT OF THE STATE OF NEVADA

TKNR, INC., a California Corporation, Appellant, v. W L A B INVESTMENT GROUP, LLC, Respondent.	SC Case No. 85620 DC Case No.: A-18-785917-C

From the Eighth Judicial District Court
The Honorable Linda Marie Bell, District Judge
District Court Case No. A-18-785917-C

APPELLANT'S OPENING BRIEF

Michael B. Lee, Esq. (NSB 10122)

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1(a) and must be disclosed.

Appellant: TKNR, INC., a California Corporation

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There are no parent corporations and/or publicly held companies owning 10 percent or more of the party's stock to be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 11th day of July, 2023.

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I. STATEMENT OF ISSUES

WHETHER THE DISTRICT COURT ERRED IN DENYING APPELLANT TKNR'S ("Appellant" or "TKNR") MOTION FOR ATTORNEYS' FEES.

II. STATEMENT OF THE CASE

After granting TKNR's motion for summary judgment, then-presiding judge, Honorable Judge Adrianna Escobar, found that TKNR was entitled to attorneys' fees and costs pursuant to Rule 11 and under the abuse of process counterclaim. (AA III, 000577-620; AA IV, 000734-776). The district court directed TKNR to submit an affidavit in support of the requested attorneys' fees and cost ("Affidavit"). (AA III, 618). TKNR filed a timely Affidavit in support of the awarded fees and costs in the amount of $128,166.78. (AA IV, 000621-733). Notably, WLAB did not file an opposition and/or an objection thereto, so the Affidavit was unopposed. (AA V, 1054:22-23). Although the district court later unilaterally amended the order granting summary judgment, it left in place the fee award. (AA IV, 000774).

WLAB filed a motion for reconsideration related to the summary judgment and fee order. (AA V, 00822-1000). However, the district court specified that the ruling was correct and awarded TKNR attorneys' fees and costs in the amount of $128,166.78. (AA V, 1052-1059). Notably, WLAB never disputed the reasonableness of the fees and costs requested by TKNR. (AA V, 1054:22-23).

WLAB appealed the entry of summary judgment and award of attorneys' fees. (AA V, 001060-1067). While the entry of summary judgment was affirmed, the Court reversed the award of attorneys' fees and costs for procedural concerns. *Id.* However, the district court created the procedural issues, not TKNR. (AA III, 000577-620; AA IV, 000734-776; AA V, 001060-1067; AA IX, 001589-1593). Following that decision by the Court, Appellant filed a timely motion for attorneys' fees, which was denied by the Honorable Judge Linda Marie Bell. The court's Decision & Order entered on October 25, 2022, denying Defendants' Motion for Attorneys' Fees ("Order") is the subject of the instant appeal. (AA VIII, 1579-1588).

III. STATEMENT OF FACTS

On December 11, 2018, WLAB initiated this action by filing the complaint against Defendants TKNR, Wong, Lin, Investpro, and Nickrandt for: (1) Recovery under NRS Chapter 113 [Defendants TKNR and WONG]; (2) Constructive Fraud [Defendants Investpro and Nickrandt]; (3) Common Law Fraud [Defendants Investpro, Nickrandt, and Lin]; and (4) Fraudulent Inducement [All Defendants]. (AA I, 000001-8).

On March 4, 2019, WLAB filed the Amended Complaint to include all Defendants identified in the caption of this pleading, also adding causes of action for: (5) Fraudulent Concealment [Defendants TKNR, Wong, Investpro, Investpro

Manager LLC, and Lin]; (6) Breach Of Fiduciary Duty [Defendants Investpro and Nickrandt and Chen]; (7) RICO [Defendants Lin, Cheng, Investpro Manager LLC and Investpro Investments I LLC]; (8) Damages Under NRS 645.257(1) [Defendant Chen, Lin, Investpro and Nickrandt]; (9) Failure To Supervise, Inadequate training and Education [Defendant Investpro, Zhang, and Nickrandt]; (10) Fraudulent Conveyance [TKNR]; (11) Fraudulent Conveyance [Investpro Investments I LLC]; (12) Civil Conspiracy [As To Defendant Man Chau Cheng, Lin, Investpro, Wong, TKNR, Investpro Investments I LLC and Investpro Manager LLC]; (13) Breach Of Contract [As To Defendant Investpro]; and (14) Breach Of Implied Covenant of Good Faith and Fair Dealing [As To Defendant Investpro]. (AA I, 000009-38).

On November 19, 2020, TKNR served an Offer of Judgment on WLAB that offered to allow judgment to be taken against TKNR in the amount of $5,000. (AA I, 000039-43). Notably, the Offer of Judgment included a detailed recitation of the relevant facts and circumstances illustrating the reasonableness of the offer. *Id.*

On November 23, 2020, WLAB filed its second amended complaint ("SAC") to include an additional cause of action for: (15) Abuse of Process [All Defendants]. (AA I, 000044-81). Notably, the amendment seemed not to be based in law or fact, but as retaliation following TKNR inclusion of the counterclaim for abuse of process against Plaintiff. In large part, the SAC completely failed to

acknowledge the waivers by Ms. Zhu related to the inspection of the Property and/or the open and obvious nature of the alleged defects in the then 63-year-old Property at the time of purchase.

On December 15, 2020, TKNR filed their Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment ("MSJ"), which was originally set for hearing on January 28, 2021, but was eventually continued to March 11, 2021. (AA I, 000082-222). WLAB filed its Opposition to Defendant's Motion for Summary Judgment Countermotion for Continuance Based on NRCP 56(f) and Countermotion for Imposition of Monetary Sanctions ("Opposition"). (AA II, 000223-388). On January 21, 2021, TKNR filed a Reply to the Opposition ("Reply") [(AA II, 000389-426)] and, on January 29, 2021, provided a Supplement to the MSJ ("Supplement") on January 29, 2021. (AA III, 000427-576).

On March 11, 2021, a hearing was held on TKNR's MSJ and the Opposition. (AA IV, 000734-776). The district court determined that summary judgment was appropriate and granted the MSJ as to all claims and attorney's fees. (Id.). Notably, the original order that was proposed filed on March 30, 2021, as proposed by TKNR, included a provision related to the filing of an Order to Show Cause pursuant to NRCP §11(c)(3). (AA III, 000617-618). However, that language was removed unilaterally by Honorable Judge Escobar, who then filed the Amended Order.

On April 2, 2023, TKNR sent to the court "the proposed Order to Show." (AA IX, 001589-1593). Therein, the proposed order related an "Order to Show Cause Pursuant to Nevada Rule of Civil Procedure 11(c)(3) on Plaintiff and Plaintiff's Prior Counsel, Benjamin Childs, Esq., for Violation of Nevada Rule of Civil Procedure11(b)." (Id.).

On April 6, 2021, TKNR filed an Affidavit in Support of Attorneys' Fees requested in the MSJ and granted by the March 30, 2021, Order. (AA IV, 000621-733)).

On April 7, 2021, Honorable Judge Escobar filed the Amended Order, which removed the order to show cause language that was included in the March 30, 2021, Order pursuant to NRCP 11(c)(3). (AA IV, 000734-776). Most likely, this related to the proposed Order to Show Cause [(AA IX, 001589-1593)] Appellant proffered related to the Rule 11 violation as the district court did not understand this was necessary to effectuate that award.

On March 16, 2021, WLAB filed a Motion to Reconsider the Amended Order. (AA V, 00822-1000). TKNR filed an Opposition to the Motion for Reconsideration on April 30, 2021. (AA V, 001001-1027). WLAB filed its reply to that opposition on May 11, 2021, and the hearing was held on May 17, 2021, in chambers. (AA V, 001028-1051). Notice of Entry of the Judgment was entered on May 25, 2022. (AA V, 001052-1059).

Notably, WLAB never opposed the specific amounts requested in the Affidavit in Support of Attorneys' Fees filed by TKNR on April 6, 2021. (AA V, 1054:22-23).

On April 26, 2021, WLAB filed its first Notice of Appeal, appealing the Amended Order granting summary judgment in favor of TKNR and the awarding attorneys' fees.

On June 8, 2021, WLAB filed its second Notice of Appeal, appealing the Judgment related to the Amended Order and TKNR's Affidavit in support of Attorneys' Fees.

On December 21, 2021, following the Court's approval of the Petition for Writ of Mandamus, this Honorable Court entered an Order indicating that the Judgment is amended to vacate the portion of the Judgment that imposed sanctions against WLAB's former counsel, Benjamin Childs, Esq. Notably, there were some other procedural hurdles leading to the Order Amending the Judgment, but the facts and circumstances related thereto are not relevant to the instant Appeal.

On May 12, 2022, the Court entered its decision affirming the district court's decision to grant summary judgment in favor of TKNR on all of WLAB's claims and TKNR's counterclaims, but reversing the Judgment based on procedural concerns. (AA V, 001060-1067). The Court concluded that, "the district court correctly found that no genuine issue of material fact existed to justify denying

summary judgment." *Id.* However, the Court did note that the district court-imposed sanctions without first giving the offending party "notice and reasonable opportunity to respond." *Id*. As such, the Court reversed the award of Defendants' attorney's fees. *Id.* However, as noted above, TKNR timely submitted the proposed Order to Show Cause on April 2, 2021, to the district court [(AA IX, 1589-1593)], and the district court unilaterally erred in failing to issue the Order to Show Cause. This illustrates that the district court created procedural error, which was not the fault of TKNR.

On June 14, 2022, WLAB petitioned the Court for rehearing of the Appeal, which was subsequently denied by the Court on June 29, 2022. (AA V, 001068-1069).

On July 26, 2022, the Nevada Supreme Court Clerk's Certificate/Remittitur Judgment was filed with the district court. (AA VI, 001070-1083).

On August 10, 2022, TKNR filed its Motion for Attorneys' Fees following the remittitur filed in district court. (AA VI, 1084-1103; AA VII, 1104-1335). WLAB filed its opposition to the motion for attorneys' fees on August 24, 2022. (AA VIII, 001336-1496). TKNR filed a supplement to the motion for attorneys' fees on August 25, 2022, [(AA VIII, 001497-1514)] and a Reply on September 7, 2022 [(AA VIII, 001515-1578)].

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A hearing on TKNR's Motion for Attorneys' Fees was held on September 14, 2022. The Decision & Order was entered on or about October 18, 2022, and notice of entry was filed on October 25, 2022. (AA IX, 001579-1588).

IV. STANDARD OF REVIEW

This court reviews a district court's decision regarding whether to award attorney fees for an abuse of discretion. See *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016). "Although the award of attorney fees is generally entrusted to the sound discretion of the district court, when a party's eligibility for a fee award is a matter of statutory interpretation, as is the case here, a question of law is presented, which we review de novo." See *In re Est. & Living Tr. of Miller*, 125 Nev. 550, 553, 216 P.3d 239, 241 (2009).

V. SUMMARY OF ARGUMENTS

The court's decision to deny the Motion for Attorneys' Fees and costs as untimely was an abuse of discretion / clearly erroneous based on the timely filing of the Affidavit in Support of Attorneys' Fees on April 6, 2023, which was within 14 days of the March 30, 2021 Order, and one-day before the filing of the Amended Order that removed the "order to show cause" provision from the March 30, 2021 Order. (AA IV, 000621-733). In the Affidavit, Appellant included a list of all attorneys' fees and costs sought by Appellant as a result of the successful Motion for Summary Judgment, which gave WLAB's a fair and reasonable

opportunity to challenge the fees and costs sought prior to the court awarding the same. *Id.* Notably, WLAB did not oppose any of the fees and costs sought in the Affidavit. (AA V, 1054:22-23). As such, the date of the Motion should relate back to the timely Affidavit filed by Appellant's counsel.

Additionally, the Remand [AA VI, 001070-1083)] following this Honorable Court's decision on the earlier appeal [(AA V, 001060-1067)] reset the filing deadline included in NRCP 54(d)(2) related to Appellant's request for fees and costs pursuant to the offer of judgment rejected by WLAB [(AA I, 000039-43)] and the Residential Purchase Agreement provided by Appellant to WLAB on November 19, 2023. Here, the Remittitur altered the final judgment in this matter, but still failed to improve on the offer of judgment sent by Appellant. *Id.* As such, Appellant was afforded the right to file a new Motion for Attorneys' Fees and costs that were incurred not only at the district court level, but also the appellate level. See *In re Est. & Living Tr. of Miller*, 125 Nev. 550, 553-54, 216 P.3d 239, 242-43 (2009).

VI. LEGAL ARGUMENTS

A. Legal Standards

1. *Motion for Attorneys' Fees*

A court may not award fees unless authorized by statute, rule, or contract. *Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd*., 124 Nev. 1206, 1219,

197 P.3d 1051, 1059 (2008). When awarding fees in a civil pursuant to a statute or rule, the court must consider various factors, including: the quality of the advocate; the character and difficulty of the work performed; the work actually performed by the attorney; and the result obtained. *Miller v. Wilfong*, 121 Nev. 619, 623, 119 P.3d 727, 730 (2005) (citing *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969)).

2. *Rule 11*

Pursuant to Nevada Rule of Civil Procedure 11(c), the court may order a party to show cause why it has not violated the mandates of Rule 11. Rule 11 prevents a party from bringing a lawsuit for an improper purpose, which includes: (1) harassment, causing unnecessary delay, or needless increasing the cost of litigation; or (2) making frivolous claims. NEV. R. CIV. PRO. 11(b)(1)-(2). Rule 11 sanctions should be imposed for frivolous actions. *Marshall v. District Court*, 108 Nev. 459, 465, 836 P.2d 47, 52.

A frivolous claim is one that is "both baseless and made without a reasonable and competent inquiry." *Bergmann v. Boyce*, 109 Nev. 670, 676, 856 P.2d 560, 564 (1993) (quoting *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir.1990); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1537 (9th Cir.1986)). A determination of whether a claim is frivolous involves a two-pronged analysis: (1) the court must determine whether the

pleading is "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law"; and (2) whether the attorney made a reasonable and competent inquiry. *Bergmann*, 109 Nev. at 676, 856 P.2d at 564. A sanction imposed for violation of Rule 11 shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. *Id.* at 11(c)(2).

"A claim is groundless if 'the allegations in the complaint . . . are not supported by any credible evidence at trial.'" *Barozzi v. Benna*, 112 Nev. 635, 639, 918 P.2d 301, 303 (1996) (quoting *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo.1984)).

3. *NRS §§ 18.010 and 18.020*

"[T]he court may make an allowance of attorney's fees to a prevailing party[, w]hen the prevailing party has not recovered more than $20,000." See NEV. REV. STAT. 18.010(2)(a).

Also, a court may award attorneys' fees to a prevailing party when it finds that the claim was brought or maintained without reasonable ground or to harass the prevailing party. See NEV. REV. STAT. § 18.010(2)(b); see also *Rodriguez v. Primadonna Co., LLC*, 216 P.3d 793, 800 (Nev. 2009). "The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations." *Id.* The Nevada Legislature explained that:

> [i]t is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

Id.

"Costs must be allowed of course to the prevailing party against any adverse party against whom judgment is rendered […] in an action for the recovery of money damages, where the plaintiff seeks to recover more than $2,500." See NEV. REV. STAT. 18.020(3).

"[T]he term 'prevailing party' is broadly construed so as to encompass plaintiffs, counterclaimants, and defendants." *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005) (*citing Smith v. Crown Financial Services*, 111 Nev. 277, 284, 890 P.2d 769, 773 (1995)). "To be a prevailing party, a party need not succeed on every issue." *LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608, 615 (2015), reh'g denied (May 29, 2015), reconsideration en banc denied (July 6, 2015) (*citing Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (observing that "a plaintiff [can be] deemed 'prevailing' even though he succeeded on only some of his claims for relief")).

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4. *Offer of Judgment*

"At any time more than 10 days before trial, any party may serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions." Nev. R. Civ. Pro 68(a). "If the offer is not accepted within 10 days after service, it shall be considered rejected by the offeree and deemed withdrawn by the offeror." *Id.* at § 68(e). "If the offeree rejects an offer and fails to obtain a more favorable judgment,"

> (2) "the offeree shall pay the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer. If the offeror's attorney is collecting a contingent fee, the amount of any attorney's fees awarded to the party for whom the offer is made must be deducted from that contingent fee."

Id. at § 68(f)(2)

In exercising its discretion to award attorneys' fees under NRCP 68, the Court must evaluate the following factors: (1) whether the plaintiff's claim was brought in good faith; (2) whether the offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the offeree's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount. *Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001) (citing *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983)).

5. *Residential Purchase Agreement*

"Parties are free to provide for attorney fees by express contractual provisions." *Davis v. Beling*, 128 Nev. Adv. Op. 28, 278 P.3d 501, 515 (2012) (*citing Musso v. Binick*, 104 Nev. 613, 614, 764 P.2d 477, 477 (1988)). "The objective in interpreting an attorney fees provision, as with all contracts, 'is to discern the intent of the contracting parties.' " *Id*. (*quoting Cline v. Rocky Mountain, Inc*., 998 P.2d 946, 949 (Wyo. 2000)). " '[T]raditional rules of contract interpretation [are employed] to accomplish that result.' " *Id*.

"[T]he term 'prevailing party' is broadly construed so as to encompass plaintiffs, counterclaimants, and defendants." *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005) (*citing Smith v. Crown Financial Services*, 111 Nev. 277, 284, 890 P.2d 769, 773 (1995)). "To be a prevailing party, a party need not succeed on every issue." *LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608, 615 (2015), reh'g denied (May 29, 2015), reconsideration en banc denied (July 6, 2015) (*citing Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (observing that "a plaintiff [can be] deemed 'prevailing' even though he succeeded on only some of his claims for relief")).

Additionally, a plaintiff may be the prevailing party "if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing the suit." *Women's Fed. Sav. & Loan Ass'n v. Nevada Nat'l Bank*, 623 F.

Supp. 469, 470 (D. Nev. 1985); *see also Chowdhry v. NLVH, Inc*., 851 P.2d 459, 464 (Nev. 1993). This includes litigation involving claims and counterclaims, where the "net winner" is considered to be the prevailing party. *Parodi v. Budetti*, 115 Nev. 236, 984 P.2d 172, 1999 Nev. LEXIS 48 (Nev. Aug. 27, 1999).

Moreover, if a party successfully defended against a breach of contract actions, the successful party is entitled to recover reasonable attorney fees incurred in defense of those particular claims pursuant to the clear language of agreement. *Davis*, 278 P.3d at 515–16 (2012) (citing *Valley Elec. Ass'n*, 121 Nev. at 10, 106 P.3d at 1200 (explaining that parties "prevail" if they succeed on any substantial aspect of the case and noting that the term "prevailing party" "is broadly construed so as to encompass plaintiffs, counterclaimants, and defendants")).

B. The Issue arises from a Procedural Error caused by the District Court, not TKNR.

It is undisputed that WLAB's decision to bring and maintain this action against TKNR was frivolous and subject to sanctions under Rule 11. (AA V, 1060-1067). However, there is a dispute as to whether the court followed the appropriate procedure prior to awarding fees and costs as a sanction under Rule 11. Notably, TKNR did not create this procedural deficiency, nor did they have a reasonable avenue to correct the mistake as it timely sent a proposed Order to Show Cause to the district court on April 2, 2021. (AA IX, 001589-1593). Rather, the district court created the error by unilaterally amending the order granting

summary judgment to remove the language related to the show caused hearing as procedurally required by Rule 11(c). (AA III, 000577-620; AA IV, 000734-776).

Following the amendment, the district court awarded fees included in the affidavit in support of attorneys' fees and costs filed by TKNR's counsel within the 21 days following the entry of summary judgment. (AA V, 001052-1059). At that time, TKNR had an award for the entire amount fees and costs sought by it, the amount of the award was not challenged at any point by WLAB, and there was already an appeal pending related to the summary judgment and whether there was a basis to award fees as a sanction pursuant to Rule 11. *Id.* As such, TKNR did not have a reasonable basis to challenge the procedural issue created by the district court. Doing so would have required TKNR to expend additional resources for fees and costs already awarded, potentially creating an issue related to double recovery. See *Elyousef v. O'Reilly & Ferrario, LLC,* 126 Nev. 441, 444, 245 P.3d 547, 549 (2010); see also *Davis v. Beling*, 128 Nev. 301, 322, 278 P.3d 501, 516 fn. 9 (2012) ("the court should ensure that the Doughertys do not receive a double recovery of attorney fees."). In that light, the district court's decision to deny the motion for attorneys' fees following the remittitur unfairly prejudices TKNR.

C. Decision to Grant Fees under Rule 11 but not NRS 18.010(2)(b) was Harmless Error.

The underlying motion for summary judgment sought recovery of attorneys' fees pursuant to Rule 11 and NRS 18.010(2)(b). (AA I, 00082-222). While the

court made its award pursuant to Rule 11 without first adhering to procedural requirements of Rule 11(c)(3), that should not bar recovery under NRS 18.010(2)(b), which provides the legislature's intent to award attorneys' fees when a party brings or maintains an action without reasonable ground to do so. NRS 18.010(2)(b) allows for sanctions when a party engages in conduct that violates Rule 11 without the parties or the court to go through the procedural requirements included in Rule 11. See NRCP 11(c) and NRS 18.010(2)(b). Appellant had timely sent a proposed Order to Show Cause as required by Nevada Rule of Civil Procedure 11 to the district court on April 2, 2021, but the district court created the error in failing to issue it related to the award for attorneys' fees and cost. (AA IX, 001589-1593).

Similar to NRS 7.085, the award of attorneys' fees under NRS 18.010(2)(b) is independent from, and does not require the same procedural hurdles as, Rule 11. In that light, awarding fees under Rule 11, despite the procedural defects, should be considered harmless error because the fees could have been awarded under NRS 18.010(2)(b), as argued for in the underlying Motion for Summary Judgment. See *Watson Rounds v. Eighth Jud. Dist. Ct.*, 131 Nev. 783, 788, 358 P.3d 228, 232 (2015) (holding that NRCP 11 and NRS 7.085 are treated as independent sanctioning mechanisms).

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Here, Appellant believes that the court's decision to award fees under Rule 11 and not NRS 18.010(2)(b) was harmless error. As provided in the statute, the court should "liberally construe the provisions of this section in favor of awarding costs, expenses and attorney's fees in all appropriate situations." See NRS 18.010(2)(b). As made clear by the Amended Order, and this Honorable Court's affirmation of the court's decision to grant summary judgment in favor of Appellant, WLAB frivolously brought and/or maintained this action, which is the type of conduct the legislature has intended to restrict by providing various statutes and rules, i.e., NRS 18.010(2)(b); NRS 7.085, and Rule 11, indicating that conduct will be met with an award of attorneys' fees [NRS 18.010(2)(b)] and/or sanctions [Rule 11(c)].

Notably, Nevada Rule of Civil Procedure 61 provides:

> [u]nless justice requires otherwise, no error in admitting or excluding evidence — or any other error by the court or a party — is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

As such, the failure to include the award of attorney's fees under Rule 11, despite the procedural defects, and not to include them under NRS 18.010(2)(b), which was pled in the underlying Motion for Summary Judgment, is harmless error. In support, and as stated in the preceding section, WLAB did not oppose or otherwise

challenge the amount of the fees and costs that TKNR alleged. (AA V, 1054:22-23). A simple way to remedy the error created by the district court is to remand with direction to issue the Order to Show Cause originally proffered by Appellant on April 2, 2021, or award attorneys' fees as timely requested by Appellant following the original remitter of this case.

D. Motion for Summary Judgment included a Motion for Attorneys' Fees, and an Affidavit of the Fees and Costs sought was timely filed following the entry of the Order granting summary judgment in favor of TKNR.

The Decision & Order denying TKNR's request for Attorneys' Fees pursuant to NRS 18.010(2)(b) is based on the flawed premise that the request was not timely made following the Amended Order. (AA IX, 001579-1588). Unfortunately, the district court overlooked the motion for attorneys' fees that was included in the underlying motion for summary judgment. (AA I, 000082-222). Moreover, following the court granting the Motion, Appellant's counsel filed an affidavit of attorneys' fees within the timeframe provided by NRCP 54(d)(2)(a). (AA IV, 000621-733). Although WLAB filed a motion to reconsider the entry of summary judgment and whether Rule 11 sanctions should apply, WLAB did not object, oppose, or otherwise challenge the amount of attorneys' fees and costs that TKNR included in the affidavit. (AA V, 1054:22-23). As such, the district court awarded the fees and costs sought by TKNR following the entry of summary judgment and timely application for the same. (AA V, 001052-1059).

E. WLAB Failed to Oppose or Object to TKNR's Fees and Costs

Here, the amount of fees and costs incurred by TKNR following successful defense against the frivolous action brought by WLAB is undisputed and cannot be challenged. See *Emmons v. State*, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991) (Generally, failure to raise an issue below bars consideration on appeal.) As stated above, WLAB had ample opportunity to challenge the fees and costs included in the affidavit filed by TKNR's counsel but chose not to. (AA V, 001052-1059). Instead, WLAB decided that it would only challenge whether there was a factual basis to support summary judgment and the imposition of sanctions pursuant to Rule 11, not whether the fees and costs were reasonable, actually incurred, etc. *Id*.

F. Motion for Attorneys' Fees was timely filed following the Remand.

1. *Fees pursuant to Offer of Judgment*

WLAB's original appeal led to a remand of the district court's previous award of attorneys' fees in this matter. (AA VI, 1070-1083). As such, the 21-days for Appellant to file its motion for attorneys' fees pursuant to Rule 54(d)(2)(a) was reset. See *In re Est. & Living Tr. of Miller*, 125 Nev. 550, 553-54, 216 P.3d 239, 242-43 (2009). Notably, "[t]he trial and appellate stages are naturally related, and if an appeal is taken, the final outcome may change depending on the outcome on appeal." *Id.* at 553, 242. As such, "the reversal and remittitur comprise the

judgment by which the parties and the district court are thereafter bound." *Id.*; see also NRS 17.160; and NRAP 36(a).

The aforementioned case directly relates to a request for fees and costs following an offer of judgment. *Id.* In terms of a request for fees and costs following an offer of judgment, "[t]he judgment looked to […] is the final judgment in the case, which may or may not be the initial judgment entered by the district court." *Id.* at 554, 242. In support, the Court has concluded that "the policy of promoting settlement does not end in district court but continues until the case is resolved." *Id.* at 553, 242. When comparing the Court's ruling [(AA V, 001060-1067)] and the Offer of Judgment provided by Appellant [(AA 1, 000039-43)], it is clear that the offer was more favorable than what was actually awarded to Plaintiff allowing for Appellant to recover "post-rejection fees incurred at the district court and appellate levels both on this appeal and the prior appeal." *Id.* at 556, 243.

2. *Fees Pursuant to the Residential Purchase Agreement*

While the decision in *In re Miller* specifically discusses offers of judgment, Appellant believes that the legal theory and explanation as to why the final judgment encompasses both the district court and appellate levels applies to Appellant's request for attorneys' fees and costs pursuant to the terms and provisions included in the Residentials Purchase Agreement (AA II, 000147-148). Similar to the language related to recovery of fees and costs following rejection of

an offer of judgment, the terms of the Residential Purchase Agreement do not differentiate between whether recoverable fees are limited to the fees and costs incurred at the district court level versus the appellate level. *Id.* In fact, the terms of the Residential Purchase Agreement clearly illustrate that the "prevailing party shall be entitled to be reimbursed by the losing party for **all costs and expenses incurred thereby**[.]" *Id.* (emphasis added). As such, Appellant argues that the phrase "all costs and expenses" would include the fees and costs incurred on appeal.

Here, Appellant was clearly the prevailing party in this matter, despite the reversal of the attorneys' fees award. (AA V, 001060-1067). Appellant was the Defendant at the district court level and was able to obtain summary judgment on each of the fifteen (15) claims brought by WLAB. [(AA IV, 000734-776)]. Summary judgment in favor of Appellant on each of the fifteen (15) causes of action brought by WLAB was then affirmed by this Honorable Court following appeal of that ruling by WLAB. (AA V, 001060-1067). As such, it is undisputed that Appellant is the prevailing party in this matter at both the district court level and the appellate level, entitling Appellant to fees and costs accrued through district court and the first appeal. In that light, the court's ruling that the Motion for Attorneys' fees was untimely [(AA IX, 1579-1588)] was an abuse of discretion

/ clear error because the fees and costs sought by the Motion had not fully accrued until after the Court's determination on the first appeal filed by WLAB.

CONCLUSION

Based on the foregoing, Appellant respectfully requests the that the Decision & Order be reversed and remanded back to the district court awarding attorneys' fees to Appellant pursuant to either NRS 18.010(2)(b), NRS 17.117 / NRCP 68, and/or the terms of the Residential Purchase Agreement.

Dated this 11th day of July, 2023.

MICHAEL B. LEE, P.C.

/ s/ Michael Matthis

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VERIFICATION

Under penalty of perjury, of the laws of Nevada, the undersigned declares that he is the attorney for the Respondents named in the foregoing Respondents' Brief and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matters he believes them to be true. This verification is made by the undersigned attorney, pursuant to NRS § 15.010, on the ground that the matters stated, and relied upon, in the foregoing Respondent's Brief are all contained in the prior pleadings and other records of this Court and/or the District Court.

Dated this 11th day of July, 2023.

/s/ Michael Matthis
MICHAEL MATTHIS, ESQ.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Respondents' Answering Brief complies with the formatting, type-face, and type-style requirements of NRAP 32(a)(4-6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

I further certify that this Respondents' Answering 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:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 7,660 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed _____ pages.

DATED this 11th day of July, 2023.

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CERTIFICATE OF MAILING

I hereby certify, under penalty of perjury, that I am an employee of Michael B. Lee, P.C., and that I caused to be electronically filed on this date, a true and correct copy of the foregoing document with the Clerk of the Court using the ECF system, which will automatically e-serve the same on the attorneys of record set forth below.

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