Case No. 85850

In the Supreme Court of Nevada

A CAB SERIES LLC f/k/a A CAB, LLC,

Appellant,

vs.

MICHAEL MURRAY; and MICHAEL RENO, individually and on behalf of others similarly situated,

Respondents.

APPEAL
from the Eighth Judicial District Court, Clark County
The Honorable MARIA GALL, District Judge
District Court Case No. A-12-669926-C

APPELLANT'S OPENING BRIEF

ESTHER C. RODRIGUEZ (SBN 6473)
RODRIGUEZ LAW OFFICES, P.C.
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
(702) 302-8400

DANIEL F. POLSENBERG (SBN 2376)
ABRAHAM G. SMITH (SBN 13,250)
LAUREN D. WIGGINTON (SBN 15,835)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Appellant

NRAP 26.1 DISCLOSURE

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

Appellant A Cab Series LLC f/k/a A Cab, LLC is a limited liability company. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

Appellant has been represented by attorneys at Rodriguez Law Offices, P.C. and Lewis Roca Rothgerber Christie LLP.

Dated this 26th day of January, 2024.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*
DANIEL F. POLSENBERG (SBN 2376)
ABRAHAM G. SMITH (SBN 13,250)
LAUREN D. WIGGINTON (SBN 15,835)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

ESTHER C. RODRIGUEZ (SBN 6473)
RODRIGUEZ LAW OFFICES, P.C.
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
(702) 302-8400

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Constitutional Provisions

Treatises

Other Authorities

JURISDICTION

The district court entered a final judgment on remand on November 17, 2022. A Cab Series LLC f/k/a A Cab LLC timely appealed on December 21, 2022.

ROUTING STATEMENT

This matter is not presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17.

The issues presented are answered by existing law. The entire appeal can be resolved by assessing whether plaintiffs prevailed in the action. A Cab submits that they did not, under established Nevada law. Given that, A Cab further submits that plaintiffs' demand for attorney fees can be rejected outright. The Court of Appeals would be an appropriate forum to issue that relief.

If the question of the availability of appellate attorney fees under the Minimum Wage Act needs to be reached, however, the Supreme Court is better positioned to decide the appeal. In that case, the question presented is a matter of first impression in Nevada and

requires a survey of federal and state minimum wage laws and their fee-shifting provisions.

ISSUES PRESENTED

1. Did the district court err by awarding attorney fees to a putative class of plaintiffs where that class should have been decertified?

2. Alternatively, did the district court err by not proportionally reducing the award of attorney fees given the putative class's limited success?

3. In the second alternative, did the district court err by refusing to reduce the fee award by sanctions for the putative class's excessive litigation in direct violation of a stay order?

STATEMENT OF THE CASE

The attorney fees appeal now before this Court is the tail that wags the dog. Plaintiffs brought the purported class action that preceded it (*A Cab, LLC v. Murray*, 137 Nev. 805, 501 P.3d 961 (2021) ("*Murray I*")) under the Minimum Wage Amendment (MWA) a decade ago. Since then, the dispute between appellant A Cab, LLC and its drivers has reached near unanimous settlement in a companion case, *Murray v. Dubric*, No. 83492, 2022 WL 3335982 (Nev. Aug. 11, 2022) (unpublished disposition) (*Dubric*). Vis-à-vis that settlement, all but three plaintiffs released the claims for which the district court awarded attorney fees.

What roared in as a class of almost nine hundred slinks out as a handful of plaintiffs whose claims that could be feasibly joined. Pooled together, the claims by the three non-settling plaintiffs in *Murray I* are worth less than $12,000. Indeed, the claims would hardly be appeal-worthy but for plaintiffs' counsel's current award of attorney fees (22 App. 5408).

The award is an abuse of discretion. Following the *Dubric* settlement, the class certified in *Murray I* should have been decertified

on remand (*Murray II*). Plaintiffs are no longer "prevailing" and are not entitled to attorney fees under the MWA. And even if plaintiffs had prevailed in *Murray II*, the award should have been reduced, either in proportion to plaintiffs' limited successes in *Murray I* or via sanctions for plaintiffs' inappropriate litigation tactics. In either event, the award of appellate fees under the MWA was legal error.

This Court should reverse the erroneous orders outlined above and vacate its attorney fee award.

FACTS

The Original Class Action

Michael Murray and Michael Reno (collectively, "plaintiffs") filed a class action against A Cab Taxi Service LLC and A Cab, LLC (collectively, "A Cab"). (1 App. 2; 1 App. 32; 1 App. 146 ¶ 3.)[1] Plaintiffs alleged that A Cab failed to pay a putative class of taxi cab drivers (the *Murray* class) the minimum wage the MWA requires.[2] (*Id.* at ¶ 6.) Of

[1] Plaintiffs also sued Creighton J. Nady as A Cab's owner, adding claims against him as an individual. Those claims were severed from those made against A Cab, and not relevant to this appeal. (7 App. 1615.)

[2]Plaintiffs also sought the penalties owed pursuant to NRS 608.040 for violations of NRS 608.020 and 608.030, which relate to payment of

particular relevance here, plaintiffs also sought an award of attorney fees, interests, and costs. (*Id.* at 152, 153 – 60 ¶¶ 21, 25-45.)

The district court certified the *Murray* class, excluding driver Jasminka Dubric, who had filed a separate class action against A Cab on the same claims in *Dubric v. A Cab, LLC*, Case No. A-15-721063-C.[3] (2 App. 424:8–9.)

Ultimately the district court granted summary judgment for plaintiffs in *Murray I.* (7 App. 1606.) Plaintiffs were awarded $1,033.027.81, plus interest. (*Id.* at 1614–15, 1618–46.) In part those damages included claims on which the statute of limitations would have expired, but for the district court's equitable tolling for supposed failure of notice.[4]

The district court further awarded plaintiffs $568,071 in attorney fees "pursuant to the mandatory fee-shifting provision of Article 15, Section 16 of the Nevada Constitution." (11 App. 2536.) It also

---

wages to employees that are discharged or those that resign or quit. (*See id.* 153 ¶¶ 25–26.)

[3] The district court made its ruling under the pre-2019 version of the Nevada Rules of Civil Procedure.

[4]The district court initially held that A Cab's publicly posted notice was insufficient to start the statute of limitations.

awarded $46,528.07 in costs, the entirety of plaintiffs' request. (*Id.* at 2539.)

Plaintiffs then obtained a writ of execution to garnish the "[b]ank [a]ccounts or monies on deposit with Wells Fargo Bank that are owned by judgment debtors A Cab LLC or A Cab Taxi Service LLC." (8 App. 1762.)[5] A Cab moved to quash the writ, and the other companies in the A Cab Series LLC filed claims for exemption from execution based on their separate corporate forms. (8 App. 1981–9 App. 2016; 7 App. 1750–8 App. 1751 (noting that the companies "have their own books, records and accountings, and do not share assets" with A Cab, LLC).) The district court denied that motion. (10 App. 2484–88.)

The Murray I *Appeal*

A Cab appealed the orders (1) granting summary judgment, (2) amending the judgment to add A Cab Series LLC as a defendant; (3) denying A Cab's motion to quash writ of execution; and (4) granting plaintiffs' attorney fees and costs. (11 App. 2550.) The Nevada

[5]A Cab Series LLC had not been initially named, but the district court amended the judgment on plaintiffs' motion, "so that it was also against A Cab Series LLC." (9 App. 2045.)

Supreme Court subsequently took the matter under consideration and issued its opinion in *Murray I*, 137 Nev. at 501 P.3d 961 (2021).

Murray I reversed the district court's tolling decision. *Murray I*, 137 Nev. at 813, 501 P.3d at 971. And in light of that holding, *Murray I* also reversed and remanded the award of damages, attorney fees, and costs, for reassessment. *See Murray I*, 137 Nev. at 812, 813, 820, 501 P.3d at 970, 971, 975-76. This Court further reversed the district court's denial of A Cab's motion to quash, with instructions to hold an evidentiary hearing on the A Cab entities' corporate separateness. *Murray I*, 137 Nev. at 824-25, 501 P.3d at 978-79.

Dubric *Reaches a Settlement*
Despite Plaintiffs' Obstructionism

While the *Murray* parties negotiated remand proceedings in *Murray II*, the parallel *Dubric* class action settled. (14 App. 3469; 12 App. 2794–802; 22 App. 5262.) The *Dubric* settlement provided that any person settling a claim would release any related claim in *Murray II*. (22 App. 5287; 22 App. 5276.)[6]

[6] The relevant language is discussed in greater detail herein. In sum, under the agreement every settling plaintiff in *Dubric* agreed to release all claims "related to, arising out of, or which could have been asserted,

Watching his putative class slip through his fingers, *Murray* class counsel filed multiple motions on behalf of the *Murray* class to intervene in [*Durbic*] and disrupt the settlement agreement's approval. (*Id.*) The district court rejected these attempts, approving the settlement to bind "all . . . members of the Class," with limited exceptions for *Murray* plaintiffs including Michael Murray, Michael Reno, and Michael Sargeant (the *Murray II* plaintiffs).[7] (16 App. 3836 *see also* 22 App. 5285.) The *Murray II* plaintiffs, as intervenors, appealed the *Dubric* settlement. (14 App. 3387.)

Plaintiffs Push* Murray II *to Premature Resolution, A Cab Moves for a Stay

While tapping the brakes in *Dubric*, plaintiffs took to their proceedings in *Murray II* full-throttle. Plaintiffs moved for entry of a modified judgment in *Murray II*, providing the court a proposed order and a "modified judgment list." (*See* 13 App. 3066.) The proposed modification would exclude claims predating October 8, 2010 (when the

---

inferred, implied, included, or connected in any way with" the claims in *Dubric*.

[7]Richard Clark released his claim in the consent judgment with the USDOL, discussed *infra at* § I.A.1.(d). So, only three plaintiffs retain their claims in *Murray II*.

statute of limitations ran without the advantage of the district court's tolling). (*See id.* at 3066:18–22, 3068:3–6.) Plaintiffs argued that *Murray I* otherwise affirmed the court's decisions in full. (*Id.* at 3066.)

A Cab cautioned the district court that plaintiffs were "rushing [the district court] to enter judgment" on an incomplete record. (15 App. 3522:11–12; 16 App. 3788.) One major outstanding issue was the then-pending appeal of the *Dubric* settlement, which the proposed order and modified judgment list ignored entirely. (*Id.*)

To appropriately slow plaintiffs' roll, A Cab moved to stay the district court's proceedings in *Murray II* until this Court issued its decision in *Dubric*. (14 App. 3385:24–28.) Plaintiffs countered that the *Dubric* judgment and appeal could not modify what plaintiffs claimed was still a final judgment from *Murray I*—notwithstanding the intervening appellate judgment reversing and remanding. (16 App. 3819.) Plaintiffs insisted that the *Dubric* judgment was void "to the extent it purports to modify or release any liability" of A Cab. (*Id.* at 2.)

The district court rejected plaintiffs' arguments and stayed *Murray II*. (16 App. 3902–16; *see also* 16 App. 3920:5–8.) Plaintiffs petitioned for writ relief on the district court's stay order. At the same

time, they ignored it—filing several motions in *Murray II* in direct violation of it.

This Court Affirms the Dubric *Settlement and the* Murray II *Stay is Lifted*

This Court affirmed the settlement in *Dubric*. *See Murray v. Dubric*, No. 83492, 2022 WL 3335982 (Nev. Aug. 11, 2022) (unpublished disposition). In so doing, this Court rejected plaintiffs' arguments that the district court could not have approved the settlement—either because the district court lacked jurisdiction or because the settlement was unfair to the non-settling plaintiffs. *Dubric*, 2022 WL 3335982, at *2 & n.5. As to the first argument, this Court found that plaintffs waive it won appeal. As to the second, this Court noted that the *Dubric* class reached the settlement "as the result of lengthy negotiations after conducting a significant amount of discovery and with the assistance of both a jointly retained expert and an experienced judicial officer." *Id.*

In light of *Dubric*'s affirmance, the district court lifted the *Murray* stay. (20 App. 4984:18–22.)

The District Court Ignores Dubric *in Awarding Attorney Fees*

The district court granted plaintiffs' motion for entry of a modified judgment. The court adjusted the class (and recalculated damages) to exclude expired claims. But the court refused to exclude class members who had settled in *Dubric*. (*See* 7 App. 1617; 22 App. 5352.) And the district court refused to exclude class members who had not yet cashed checks that A Cab had written pursuant to a consent judgment with the United States Department of Labor. (21 App. 5207.) The district court also refused to decertify the *Murray II* class. (22 App. 5341:24–28.)[8]

The district court then awarded plaintiffs' requested attorney fees, adjusting the attorney fees down only by the number of hours their counsel claimed to have worked on the tolling issue. The court added appellate fees to the award in the full amount plaintiffs requested. (22 App. 5380, 5382.)

A Cab asked that sanctions issue to offset plaintiffs' sizeable attorney fees award. Plaintiffs' counsel had continuously over-litigated

[8]The district court also acknowledged appellants had "the right to a further hearing upon remand on whether that judgment execution should be quashed" but declined to order such a hearing. (*See id.* at 5344.)

Murray I and *II*, defying a court-ordered stay. (16 App. 3919.) The court was forcing A Cab to foot that bill. (22 App. 5389.) Despite agreeing that plaintiffs "violated that stay order," the district court found it "harmless." (*Id.* at 5390.) It denied sanctions. (*Id.* at 5391.)

Finally, A Cab had been awarded "their costs in connection with the appeal of the final judgment order." (22 App. 5400.) Over appellants' objection, the district court ordered this award to be "offset against the total class judgment of $685,886.60, with the reduction apportioned pro rata amongst the class members." (*Id.; see* 17 App. 4094–110.)

A Cab appeals.

SUMMARY OF THE ARGUMENT

This Court should reject plaintiffs' counsel's demand for a six-figure attorney fees award on a judgment worth less than $12,000.

Plaintiffs are not prevailing parties on the class claims they sought to bring. The *Murray* class should have been decertified after *Dubric* resolved the claims of nearly every class member. At that point, changed circumstances made continued class action treatment improper. *Green v. Obledo*, 624 P.2d 256, 269 (Cal. 1981) (discussing

federal Rule 23 procedures). The attorney fees award should be vacated accordingly.

Alternatively, the award should be vacated because the district court disregarded this Court's express instruction to hold an evidentiary hearing. Without such a hearing, the district court's ruling and attorney fee award was premature.

Even if some of the fees from the district court proceedings were recoverable, plaintiffs cannot recover for the attorney fees they incurred on appeal. Such fees are not available under the MWA. And if they were, plaintiffs should have sought them from this Court, not the district court. Because it was not asked, this Court declined to do so.

Assuming that attorney fees are recoverable here, the district court's award was still outrageous. It should be reduced in proportion to the limited claims on which plaintiffs had any success. Alternatively, it should be reduced by an award of sanction against plaintiffs for their egregious disregard for the district court's stay order while *Dubric* was pending.

ARGUMENT[9]

The MWA's proponents expressly rejected arguments that its fee-shifting clause would be used to enrich plaintiffs' attorneys at the expense of employers acting in mistaken good faith. *See* Min. Ass'y Committee on Commerce and Labor, 29 (Apr. 7, 2021) (testimony of Assemblyman Lynn Hettrick that MWA should "help people who need to make more money and who are honest, hardworking people who I have the utmost respect for . . . but we don't need to help the attorneys"); *id.* at 31 (testimony of Chairperson Barbara Buckley that the MWA was not intended to be "prone to attorneys"). Plaintiffs would prove otherwise, and the record is rife with iterative briefing that plaintiffs' counsel undertook despite minimal benefit to the class he purports to represent. (*Compare* 12 App. 2811 *with* 17 App. 4202 *and*

[9] **Standard of Review:** Generally, "[a]n award of attorney fees is reviewed for an abuse of discretion." *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016). But "when an attorney fees matter implicates questions of law"—such as the determination of prevailing-party status—"the proper review is de novo." *145 E. Harmon II Tr. v. Residences at MGM Grand – Tower A Owners' Ass'n*, 136 Nev. 115, 118, 460 P.3d 455, 457 (2020) (cleaned up) (reviewing de novo fee award based on contested prevailing-party status).

16 App. 3934 (raising, for the third time, the same arguments for apportionment of costs approximating $11.48 against each plaintiff).) While defendants successfully settled *Dubric*'s claims with nearly every member of the *Murray* class (which was brought by different counsel), *Murray* drags on. But *Dubric*'s resolution of nearly every *Murray* class member's claim has laid bare the motivation for *Murray* counsel's continued barratry: to inflate the attorney fee award he insists he is entitled to.

For his prosecution of an action seeking an average of $1,012.62 in recovery for each class member,[10] plaintiffs' counsel demanded and the district court awarded 534.5 times that average recovery in attorney fees. The MWA does not authorize such an award, and it should be reversed. If the Court disagrees, the award is, at least, unreasonable, in which case this Court should vacate the fee award and remand with instructions that (1) appellate fees are not available and (2) any fee award must be reduced in proportion to plaintiffs' multiple losses in *Murray I*. Finally, even if this Court disagrees on the prior points, the

[10]This is the average of the "Total 10/8/2010-12/31/2015 Shortage" listed in column "G" of Exhibit 1 to the order modifying final judgment.

award must be recalculated for offset by sanctions that the district court abused its discretion in denying.

I.

ATTORNEY FEES ARE NOT AVAILABLE HERE

A. Plaintiffs Are Not Prevailing Parties

The MWA mandates an award of reasonable attorney fees to "an employee who prevails in any action to enforce this section." Nev. Const. art. 15, § 16. Plaintiffs represent that they were successful on most of the claims they brought. But plaintiffs did not "prevail" within the meaning of the MWA for all the reasons that follow.

1. The Class Should Have Been Decertified After Dubric*, Which Destroyed Numerosity*

Certification is appropriate only where "(1) the class is so numerous that joinder of all members is impracticable [numerosity]; (2) there are questions of law or fact common to the class [commonality]; (3) the claims for defenses of the representative parties are typical of the claims or defenses of the class [typicality]; and (4) the representative parties will fairly and adequately protect the interests of the class [adequacy]." *Sargeant v. Henderson Taxi*, 133 Nev. 196, 199, 394 P.3d 1215, 1219 (2017) (quoting NRCP 23(a)). "A necessary

corollary to certification is the court's duty to monitor the litigation to ensure that the requisites are maintained throughout the case." *In re Pac. Sunwear of Cal., Inc.*, No. 16-10882(LSS), 2016 WL 4250681, at *13 (Bankr. D. Del. Aug. 8, 2016). Courts should decertify whenever the class fails any of these four requirements during the action. *See* 3 *Newberg and Rubenstein on Class Actions* § 7:38 (6th ed.) (collecting cases); *see also In re Pac. Sunwear*, 2016 WL 4250681, at *13.

a. PLAINTIFFS WHO DID NOT OPT-OUT OF THE *DUBRIC* SETTLEMENT CAN NO LONGER BE CERTIFIED AS PART OF THE *MURRAY* CLASS

Dubric reached a signed settlement. The settlement extinguished the right to proceed with duplicative claims. (*See generally* 22 App. 5262.)

The *Dubric* plaintiffs agreed to release A Cab, its officers, directors, and related entities from all "Settled Claims." By the agreements' terms, settled claims include the claims at issue in *Dubric* as well as any that "could have been asserted, inferred, implied, included or connected in any way with, any of the allegations in [*Dubric*]." (*Id.* at 5266, 5267, 5276–77 ¶¶ 2.19, 13.2, 13.3.) This necessarily includes any fees associated with the settling plaintiffs'

claims.

Even plaintiffs do not seriously dispute that claims by the same plaintiffs, against the same defendants, for the same minimum wage violations are not factually or legally joined or linked together. *See* Merriam-Webster.com CONNECTED (https://www.merriam-webster.com/dictionary/connected). Without question the *Murray II* claims are at least "connected . . . with" those in *Dubric*.

b. THIS COURT'S SUBJECT MATTER JURISDICTION IN *DUBRIC* IS IRRELEVANT BECAUSE A CAB CAN RAISE A SEPARATE ENFORCEMENT ACTION IN *MURRAY*

In the trial court, plaintiffs suggested that *Dubric* could not impact their recovery. Plaintiffs argued that this Court lacked "subject matter jurisdiction" over the *Murray I* claims when it affirmed the settlement in *Dubric*. (22 App. 5305–06.) The district court appears to have accepted that argument, refusing to modify the *Murray* class to exclude plaintiffs who released their claims in *Dubric*. (22 App. 5351.) This missed the mark.[11]

[11]Plaintiffs also suggest that equity somehow bars appellant's enforcement of the *Dubric* settlement. It cites no authority for the principle. Nor is it clear how equity affects appellant's "legally

Even if this Court's remand order had been final, the district court's "[l]ack of competent jurisdiction to adjudicate [the *Murray*] cause of action [in *Dubric*] . . . [did] not divest [the district] court of the power to enforce a settlement agreement arising from [*Dubric*]." *Step Plan Servs.*, 12 A.3d at 417; *see also* 15A C.J.S. *Compromise & Settlement* § 78.

A Cab had a legally protectable interest in the *Dubric* settlement. *Step Plan Servs.*, 12 A.3d at 422. A Cab could ask the district court to enforce that right in an independent action, including via *Murray II*. *See Amantiad v. Odum*, 90 Haw. 152, 159, 977 P.2d 160, 167 (1999) (noting that a settlement agreement may be enforced by bringing an independent action). And the existence of that defense by A Cab—one unique to settling plaintiffs—should have excluded settling plaintiffs from the *Murray* class. *Zenith Lab'ys, Inc. v. Carter-Wallace, Inc.*, 530 F.2d 508, 512 (3d Cir. 1976) (holding that class with members with unique defenses could not be certified).

---

enforceable interest" in the settlement. *Step Plan Servs., Inc. v. Koresko*, 12 A.3d 401, 422 (Pa. Super. Ct. 2010).

c. THIS COURT'S REMAND ORDER WAS NOT FINAL JUDGMENT AND THE CLASS COULD BE DECERTIFIED EVEN IF IT WAS FINAL

Plaintiffs alternatively suggest that *Dubric* has no impact because the *Murray* class had already received a "final judgment" that could not be modified. (22 App. 5305–06.)

A class should be decertified—even after the issuance of a final judgment—where it is clear there exist changed circumstances making continued class action treatment improper. *Green v. Obledo*, 624 P.2d 256, 269 (Cal. 1981) (discussing federal Rule 23 procedures); *see* MICHEL HUGHES ET AL., 6A FED. PROC., L. ED. § 12:299 (2023 Supp.) (noting that class may be decertified after trial).

In any case, after this Court's remand in *Murray I*, there was no longer a final judgment. "[A] judgment that reverses and remands in part . . . is not a final judgment on appeal against the appellant, as it fails to dispose of all issues and all parties." 5 MCDONALD & CARLSON TEX. CIV. PRAC. § 30:50 (2d. ed.); *see*, *e.g.*, *Wakefield v. Gov't Emps. Ins. Co.*, 260 La. 286, 255 So. 2d 771 (1972) (noting that judgment was not final because the appellate court's judgment had the "effect of a partial remand"). And, following that reversal and remand, the effect of any

underlying district court judgment ceases as well. *See United States v. Lacey*, 982 F.2d 410, 412 (10th Cir. 1992); *Disher v. Citigroup Glob. Markets, Inc.*, 486 F. Supp. 2d 790 (S.D. Ill. 2007) (noting general rule "that reversal of a judgment leaves the parties in the same position as if the judgment had never been entered"); *see also* 36 C.J.S. *Federal Courts* § 739 (noting that the effect of an order of reversal "is to nullify [the underlying judgment] completely and to leave the cause standing as if it had never been rendered").

That is the whole point of a reversal and remand. The remand requires further proceedings to reach a corrected judgment in the district court that conforms to this Court's instructions.

In sum, the *Murray* class was still subject to decertification when *Murray II* was being decided. The district court should have considered the effect of A Cab's unique defenses against the settling plaintiffs and excluded them from the class.

d. WITHOUT THE SETTLING PLAINTIFFS, THE *MURRAY* CLASS DOES NOT MEET THE NUMEROSITY REQUIREMENT

Just four *Murray* class members were not party to the *Dubric* judgment: Michael Murray, Michael Reno, Michael Sargeant, and

Richard Clark. Clark settled his claim against A Cab via the USDOL consent judgment. (*See* 12 App. 2803.) Now, just three claimants in *Murray* remain. (*See* 21 App. 5228.)

With just three plaintiffs, joinder is practicable.[12] Rubenstein, *supra* at § 3:12 ("As a general guideline, however, a class that encompasses fewer than 20 members will likely not be certified absent other indications of impracticability of joinder." (collecting cases)); Mary Kay Kane, 7A FED. PRAC. & PROC. CIV. (Wright & Miller) § 1762 (4th ed.); *see*, *e.g.*, *Smith v. City of Joliet*, No. 93 C 3401, 1995 WL 336999, at *3 (N.D. Ill. May 31, 1995) (decertifying class of seven individuals for failure to satisfy numerosity requirement). The district court should have granted A Cab's motion to amend the class and decertified it accordingly.

e. DECERTIFICATION OF THE CLASS REQUIRES THAT THE ATTORNEY FEE AWARD BE VACATED

Decertification is "tantamount to dismissal." *Culver v. City of Milwaukee*, 277 F.3d 908, 915 (7th Cir. 2002). Thus any award of

[12] The class should be alternatively decertified because the named plaintiffs do not represent the interests of the class as a whole. Nearly every other plaintiff has settled and released their claims. Plaintiffs refuse to do the same.

attorney fees to the class attorney should be vacated following decertification. *See*, *e.g.*, *Frye v. Baptist Mem'l Hosp., Inc.*, 507 F. App'x 506, 508 (6th Cir. 2012) (holding that party who successfully obtained decertification was prevailing for attorney fee purposes); *Marlo v. United Parcel Serv., Inc.*, No. CV-0304336-DDP-RZX, 2009 WL 10669458, at *8 (C.D. Cal. Aug. 12, 2009), *aff'd sub nom. Marlo v. United Parcel Serv.*, 453 F. App'x 682 (9th Cir. 2011) (reducing award of attorney fees by amounts time spent representing subsequently decertified class).

In sum, the district court abused its discretion by refusing to decertify the *Murray* class and vacate the prior award of attorney fees to plaintiffs. This Court should reverse the orders amending the class and modifying the judgment, and vacate the award of attorney fees. Plaintiffs are no longer prevailing within the MWA's meaning because the "class" they purport to represent does not exist.[13]

[13] To the extent that this Court thinks Murray, or any individual plaintiff, could be a prevailing party on his individual claim, despite the overall failure of the class action, his award should be proportionally reduced by the drastic constriction in the size of the class. *See infra* at Part II.

B. No Party Can Prevail Before Final Judgment, and Final Judgment Cannot Issue Here Without an Evidentiary Hearing

Alternatively, plaintiffs are not prevailing because they have not yet obtained a final judgment that complies with this Court's mandate. *See Las Vegas Review-Journal v. City of Henderson*, 137 Nev. 766, 769, 500 P.3d 1271, 1276 (2021) ("Generally, an action must have proceeded to final judgment for a party to have prevailed.") "[A] final judgment . . . disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs." *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000)

There are multiple issues remaining for this Court's future consideration beyond attorney fees and costs in *Murray II*. Plaintiffs have not yet identified the appropriate defendant: A Cab is just one member of a series LLC. Instead, without having named any of appellant's sibling LLCs, and even in the absence of any alter ego finding, plaintiffs seek to recover against all of them, without regard for any corporate formalities. *Contra Abbott Laboratories v. CVS Pharmacy, Inc.*, 290 F.3d 854, 858 (7th Cir. 2002). ("[T]hat a judgment

binds one corporation does not allow a court to adjudicate claims against its shareholders, subsidiaries, or other juridically distinct entities.").

Seven of appellant's siblings filed claims of exemption from plaintiffs' claims. (20 App. 4999.) The district court failed to resolve them before purporting to reach a final judgment in *Murray I*. So this Court remanded to the district court to hold an evidentiary hearing as to the propriety of appellant's organization. *Murray I*, 137 Nev. at 824, 501 P.3d at 978.

This instruction from this Court was incorporated into the remittitur to the district court: "When a reviewing court determines the issues on appeal and reverses the judgment specifically directing the lower court with respect to particular issues, the trial court has no discretion to interpret the reviewing court's order; rather, it is bound to specifically carry out the reviewing court's instructions." *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 263–64, 71 P.3d 1258, 1260 (2003); *see also Estate of Adams ex rel. Adams v. Fallini*, 132 Nev. 814, 818, 386 P.3d 621, 624 (2016). Yet here, despite its obligation to hold an evidentiary hearing in compliance with this Court's mandate,

the district court has not done so. *See Krysl v. Treasurer of Missouri*, 615 S.W.3d 843, 848 (Mo. Ct. App. 2020) (holding that the district court must follow instructions on remand).

The district court's decision in *Murray II* was therefore in error because it failed to follow this Court's mandate. "Rather than leaving the [district court] with nothing to do on remand other than execute judgment, [this Court's] order instructed the [district court] to hold an evidentiary hearing." *L. W. v. Jersey City Bd. of Educ.*, 824 F. App'x 108, 111 (3d Cir. 2020) (finding that such an order was not a final judgment). The district court did not do so. Until that evidentiary hearing is held, and the propriety of A Cab's organization decided, any award to plaintiffs is improper and in violation of this Court's mandate. *See id.*

C. Plaintiffs Were Not Entitled to Attorney Fees on Appeal

The district court also erred by awarding additional fees incurred on appeal.

Other than NRAP 38(b), "[t]here is no provision in the statutes authorizing the district court to award attorney fees incurred on appeal." *Bd. of Gallery of History, Inc. v. Datecs Corp.*, 116 Nev. 286,

288, 994 P.2d 1149, 1150 (2021). NRAP 38(b) was neither applicable[14] nor argued as a basis for appellate fees here. Instead plaintiffs sought appellate fees under the MWA, arguing that "[i]t is self-evident that the MWA requires an award of attorney[ ] fees for successfully defending an employee's judgment on appeal."

But without language or case law supporting what is "self-evident" to plaintiffs, this summary assessment was insufficient for the district court to award relief at all. *Edwards v. Emperor's Garden Rest.*, 122 New 317, 330 n. 38, 130 P.3d 1280, 1288 n. 38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). And the MWA does not allow for such an award, in any case.[15] The district

---

[14]NRAP 38(b) limitedly allows an award of appellate fees against a party who has frivolously misused the appeals process. *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1356, 971 P.2d 383, 388 (1998); *see also* 52 A.L.R.2d 863 (collecting cases) ("Under normal circumstances, attorney fees on appeal are only awarded when the appellate court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation."). Appellant's appeal was not frivolous or unreasonable. Indeed, it was granted in part.

[15] This Court's review of the statutory requirements for granting attorney fees is de novo. *In re Est. & Living Tr. of Miller*, 125 Nev. 550, 552–53, 216 P.3d 239, 241 (2009).

court's award of attorney fees pursuant to the MWA was an abuse of discretion.

1. The MWA's Language Does Not Support an Award of Appellate Fees

The district court relied on the MWA's supposed authorization of awards "'in any action' to enforce the [MWA]" in awarding appellate fees. (22 App. 5380.) This analysis took the relevant phrase out of its explanatory context.

The MWA indeed provides that: "An employee who prevails in *any action* to enforce this section shall be awarded his or her reasonable attorney's fees and costs." Nev. Const. Art. 15, § 16(B) (emphasis added). But the phrase "any action" is informed by the list that precedes it. *Young Elec. Sign Co. v. Erwin Elec. Co.*, 86 Nev. 822, 825, 477 P.2d 864, 866 (1970) ("Where a general term in a statute follows specific words of a like nature, it takes its meaning from those specific words and is presumed to embrace the kind of things designated by the specific words."). That list includes actions "brought for . . . back pay, damages, reinstatement or injunctive relief." *Id.*

Attorney fees are only available under the MWA for actions similar to those brought for monetary damages and related equitable

relief. Notably absent from the list is any reference to an appellate action, belying plaintiffs' suggestion that appellate fees are encompassed therein.

Plaintiffs would flip this principle of ordinary interpretation on its head, arguing that because "there is nothing in the MWA's language suggesting" that appellate fees are *not* available, appellate fees are. (13 App. 3304.) That is plainly incorrect under this Court's precedent. In Nevada appellate attorney fees are not recoverable unless the relevant fee-shifting statute "explicitly authorize[s] attorney's fees on appeal." *Bobby Berosini*, 114 Nev. at 1357, 971 P.2d at 388; *see also Tulelake Horseradish, Inc. v. Santa Margarita Ranch, LLC*, 132 Nev. 1038 (2016); *Datecs Corp.*, 116 Nev. at 288, 994 P.2d at 1150. As explained above, "any action" does not give such "explicit" authorization here.

This makes sense under well-established principles of statutory construction. If a fee-shifting provision does not expressly mention appellate fees, NRAP 38(b) "comes closer to addressing the very problem posed by the case at hand [whether attorney fees are available from an appeal]." NRAP 38(b) therefore controls over any provision in the MWA that might generally suggest otherwise. Antonin Scalia &

Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183 (2012); *see Williams v. State Dep't of Corr.*, 133 Nev. 594, 601, 402 P.3d 1260, 1265 (2017) (citing *Reading Law*'s discussion of this canon favorably); *Piroozi v. Eighth Jud. Dist. Ct.*, 131 Nev. 1004, 1009, 363 P.3d 1168, 1172 (2015) ("Where a general and a special statute, each relating to the same subject, . . . conflict . . . the special statute controls." (internal quotation marks omitted)).

Nevada's common-law rule is likewise consistent in holding that attorney fees incurred on appeal are presumptively not recoverable. *Bobby Berosini*, 114 Nev. at 1357, 971 P.2d at 388; *see also Tulelake Horseradish, Inc. v. Santa Margarita Ranch, LLC*, 132 Nev. 1038 (2016); *Datecs Corp.*, 116 Nev. at 288, 994 P.2d at 1150. Again, in the absence of any clear intent that the MWA would abrogate that common law, it does not. *See Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 535, 245 P.3d 1149, 1154 (2010) ("In the enactment of a statute, the legislature will be presumed not to intend to overturn long-established principles of law, and the statute will be so construed unless an intention to do so plainly appears by express declaration or necessary implication." (internal quotation marks omitted)).

Simply put, if the MWA's fee-shifting clause was intended to reach appellate proceedings, the language needed to say so, explicitly. Without such an express statement, logic and canons of construction weigh against that result.

2. The Circuits Are Split as to Whether Appellate Fees Are Available Under the FLSA

Plaintiffs suggested in the court below that the MWA granted appellate fees because its federal counterpart, the FLSA, permits such an award. The FLSA "allow[s] a reasonable attorney's fee to be paid by the [FLSA] defendant" where the FLSA plaintiff prevails. 29 U.S.C.A. § 216(b); *see*, *e.g.*, *Montalvo v. Tower Life Bldg.*, 426 F.2d 1135, 1150 (5th Cir. 1970) (collecting cases). Courts in some circuits have interpreted that language to allow for the award of appellate fees. *See Saglimbene v. Venture Indus. Corp.*, 895 F.2d 1414 (6th Cir. 1990) (noting split in circuits and declining to award appellate fees); *Jimenez v. GLK Foods LLC*, No. 12-C-209, 2018 WL 11304531, at *1 (E.D. Wis. Apr. 19, 2018) (noting that the Seventh Circuit has not held that appellate fees are available under the FLSA); *cf.* 2 AGE DISCRIMINATION § 8:158 (2d ed.) (2023 Supp.) (discussing ADEA corollary and noting that there is "room for dispute" as to whether appellate fees are allowed because the section

"does not refer to appellate courts").

Some courts seem to understand Section 216(b) as having similar limitations as Rule 38, allowing such fees only where an appeal has been frivolously defended. *Stanley v. McDaniel*, 913 P.2d 76, 82 (Idaho Ct. App. 1996) (stating same and denying appellate attorney fees). And some courts reject appellate fees, whatever the circumstances. *Handler v. Thrasher*, 191 F.2d 120, 123 (10th Cir. 1951) (denying award of appellate attorney fees following successful appeal); *cf. Mays v. Midnite Dreams, Inc.*, 915 N.W.2d 71, 90 (Neb. 2018) (applying state law and denying appellate attorney fees); *Williams v. Corbett*, 205 Or. 69, 77, 286 P.2d 115, 118 (1955), *overruled on other grounds by Godell v. Johnson*, 244 Or. 587, 418 P.2d 505 (1966).

Plaintiffs cannot borrow from the FLSA gloss that federal courts have not decisively given. Until the FLSA's attorney fee section has been interpreted "nearly ubiquitous[ly]" so as to have "[a]ccquired . . . a technical legal sense," there is no clear meaning to impute to the MWA here. *Cf. Doe Dancer I v. La Fuente, Inc.*, 137 Nev. 20, 25, 481 P.3d 860, 867 (2021) (adopting the FLSA's definition of "employment" under the MWA because courts' application of that definition had been unanimous

for decades).

Nor are the cases plaintiffs favor persuasive such that this Court should opt to follow them. Courts that have allowed for an award of appellate fees under Section 216(b) have done so summarily, in reliance on cases that are, themselves, summary. *See*, *e.g.*, *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 948 (2d Cir. 1959) (awarding appellate fees without analysis). Given the rule's thin foundation, several jurisdictions have called the summary adoption of it into question, noting the absence of any language in Section 216(b) that would demand such a result. *Saglimbene*, 895 F.2d at 1414 (noting that Section 261(b) does not "expressly provide" for an award of appellate fees); *see also Jimenez*, 2018 WL 11304531, at *1 ("Section 216(b) neither expressly provides for the award of attorneys' fees and costs on appeal nor prohibits them.")

3. Even if Appellate Fees Were Available the District Court Lacked Authority to Award Them

If this Court decided to follow the federal precedent discussed above, ruling that appellate fees are allowable under the MWA, that same precedent forecloses the district court's award here. The precedent discussed above allows the *appellate* court to consider such an

award where the *appellate* court deems it appropriate. *Montalvo v. Tower Life Bldg.*, 426 F.2d 1135, 1150 (5th Cir. 1970). While the trial judge may be asked to assess the reasonable measure of such fees on remand, *Holtville Alfalfa Mills v. Wyatt*, 230 F.2d 398, 400 (9th Cir. 1955), it has no authority to allow the same fees in the first instance. *Patry v. Liberty Mobilehome Sales, Inc.*, 394 Mass. 270, 272, 475 N.E.2d 392, 394 (1985); *see also Jimenez*, 2018 WL 11304531, at *1 (holding that because the appellate court had not found the employee was entitled to appellate fees the district court could not make an award for the same).

When this Court declined to award attorney fees on appeal, the district court lost any opportunity to set their amount. The district court's award of appellate fees should be vacated.

4. Any Award of Appellate Fees Should Have Been Proportionally Reduced

Even if the MWA extends to fees on appeal, it does not extend to fees expended on defending an erroneous judgment. As already discussed, despite plaintiffs' protestations to the contrary, this Court rejected multiple points of plaintiffs' arguments in *Murray I*. That is, assuming that plaintiffs partially prevailed, the requested appellate

fees would need to be reduced because A Cab did likewise. To the extent that this Court agrees, remand to the district court for proportional reduction, as outlined immediately below, would be warranted.

II.

THE ATTORNEY FEE AWARD WAS UNREASONABLE BECAUSE IT WAS NOT PROPORTIONALLY REDUCED AS THE CLASS CONSTRICTED

The MWA only allows for an award of "reasonable" attorney fees. Nev. Const. art. XV, § 16(B). In *Murray I*, this Court held that in light of "the district court's improper tolling of the statute of limitations, the amount of the attorney fees must be reconsidered for reasonableness." *A Cab, LLC v. Murray*, 137 Nev. 805, 819, 501 P.3d 961, 975 (2021). Plaintiffs argued for a limited reading of these instructions on remand, suggesting that this Court only required the district court to determine "how the erroneous statute of limitations tolling decision impacted that award and the resulting appropriate modification."

The district court uncritically adopted this position, reducing the $568,071 award by approximately $26,800 (plaintiffs' counsel's hourly rate multiplied by the 70 hours plaintiffs' counsel purported to spend on

the issue). (22 App. 5347). This was an abuse of discretion *Cf. 553 Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993) (noting that award of attorney fees is generally left to the district court's discretion).

The district court was correct to exclude the hours expended on the statute of limitations issue from plaintiffs' counsel's attorney fees award: Because "work on an unsuccessful claim cannot be deemed to have been expended in pursuit of the ultimate result achieved, . . . no fee may be awarded for services on the unsuccessful claim." *Hensley*, 461 U.S. at 435 (internal quotation marks omitted). But *after* the time counsel spent on plaintiffs' unsuccessful claims was eliminated from consideration, the district court should have again reduced the award by an overall percentage reflecting "the degree of success enjoyed by the plaintiff." *Knussman v. Maryland*, 73 F. App'x 608, 613–14 (4th Cir. 2003); *cf. Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) (requiring that a court consider the result achieved in assessing the reasonableness of a fee).

The plaintiffs' ability to secure class certification is one factor in weighing their overall success. *See Barfield v. N.Y.C. Health & Hosps.*

Corp., 537 F.3d 132, 152 (2d Cir. 2008). Where, as here, the attempt at certification is "a flop[,]" the lodestar amount should be significantly reduced. *Koch v. Jerry W. Bailey Trucking, Inc.*, 51 F.4th 748, 757 (7th Cir. 2022). "Billable hours that would be appropriate for a sprawling class action" are not reasonable where "counsel represents only a fraction of the class members." *Id.*

There is no hard and fast rule for the overall reduction the district court should have made in light of plaintiffs' limited success. But what occurred here—no assessment of the quality and quantity of the relief plaintiffs' obtained, much less an additional reduction for their limited success—is reversible error. *See Carroll v. Blinken*, 105 F.3d 79, 81 (2d Cir.1997). *Cf. Barfield v. New York City Health & Hosps. Corp.*, 537 F.3d 132, 152 (2d Cir. 2008) (affirming 50 percent reduction in fees award where defendant had sought recovery for thousands of class members but obtained $1,744.50 in recovery); *Koch v. Jerry W. Bailey Trucking, Inc.*, 51 F.4th 748, 758 (7th Cir. 2022) (reducing lodestar by 45 percent where minimum wage class plaintiffs prevailed on only one-sixth of the claims); *Marez v. Saint-Gobain Containers, Inc.*, 688 F.3d 958, 966 (8th Cir. 2012) (upholding 50 percent reduction where plaintiff

was successful on one of two claims); *Kirby v. Roth*, 515 F. App'x 642 (8th Cir. 2013) (affirming 75% reduction in attorney fees based on plaintiffs' "limited success on the merits"); *Vasconcelo v. Miami Auto Max, Inc.*, 981 F.3d 934 (11th Cir. 2020) (affirming a roughly 60% reduction in plaintiff's attorney's fees based upon winning only $97.20 at trial).[16]

As laid out above, there was overlap in class membership between *Murray* and *Dubric* such that all settling plaintiffs in *Dubric* should have been excluded from the *Murray* class.[17] All these exclusions from the *Murray* class cabined plaintiffs' recovery: plaintiffs did not prevail in *Murray* on any claims that settled in *Dubric*, plaintiffs instead released their *Murray* claims. *Cf. Eberle v. State ex rel. Nell J. Redfield*

---

[16] At a minimum the attorney fee award should be reduced in proportion to the reduction in the judgment that this Court finds should have been required on remand. Even plaintiffs admit that this was *at least* a 34-percent reduction.

[17] If this Court disagrees that *Dubric* settling plaintiffs should be excluded from the *Murray* class, there are additional grounds to large numbers of claims. For instance, all class members who did not opt-out of A Cab's settlement with the Department of Labor should also be excluded. If the Court believes the award only needs to be reduced in proportion to those claims, remand to the district court is likely necessary.

Tr., 108 Nev. 587, 590, 836 P.2d 67, 69 (1992) (internal citations omitted) (finding neither party prevailed in an action terminated legislative amendment undertaken, while the case was on appeal).

Plaintiffs' counsel cannot be allowed to recover his entire fees for representing a class that, almost to a person, reached a successful settlement releasing the very claims he purports to bring on their behalf. Such an award would only incentivize plaintiffs' counsel to continue to bill hours on claims that are no longer cognizable, raising counsel's own fee without concern for the best interests of the class members. *See Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 679, 696 (M.D. Ala. 1988); *cf. Court Awarded Attorney Fees*, 108 F.R.D. 237, 248 (3d Cir. 1986) (task force report on curbing abuse of attorney fee requests where a settlement fund exists). Thus, the reduction in successful claims from nearly 900 to 3 should be proportionally reflected by a reduction in the reasonable hourly amount. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983); *cf. Rendon v. AT & T Techs.*, 883 F.2d 388, 399 (5th Cir. 1989) (approving 50% reduction in fee award because "only 26 of 150 class claimants" recovered in the action).

In sum, plaintiffs' ultimate success is necessarily limited: given

the *Dubric* settlement, less than 1% of *Murray* class members will be able to recover. *Id.* The total amount those three plaintiffs are owed is less than $12,000, a pittance compared to plaintiffs' complaint, which sought over $1 million and purported to represent a class of 889 plaintiffs. (16 App. 3935, .) The requested award should have been reduced in proportion to the limited success achieved. 151 A.L.R. Fed. 77 (Originally published in 1999). This Court should reverse the unreduced award and remand for proceedings consistent with this rule.

III.

ALTERNATIVELY, PLAINTIFFS SHOULD HAVE BEEN SANCTIONED, OFFSETTING THE ATTORNEY FEE AWARD

The district court stayed proceedings pending the *Dubric* appeal. While that stay was pending, plaintiffs filed a motion for turnover and two motions seeking to alter the prior award of costs. Defendants notified plaintiffs of their intent to seek sanctions in the form of attorney fees and costs if the motions were not withdrawn. When plaintiffs did not withdraw the motion, defendants did indeed move for sanctions.

The district court acknowledged that plaintiffs' motion practice in *Murray* had violated the court's stay order. But the district court

denied defendants' motion for sanctions. According to the court, sanctions were not available because (1) the violations were "harmless" and (2) the motions were not filed for an improper purpose. (*See* 22 App. 5390.) The first reason reflects the district court's erroneous view of the law, the second a clearly erroneous assessment of the evidence. In both instances, the district court abused its discretion. *Off. of Washoe Cnty. Dist. Atty. v. Second Jud. Dist. Ct.*, 116 Nev. 629, 636, 5 P.3d 562, 566 (2000); *cf. Yagman v. Republic Ins.*, 987 F.2d 622, 628 (9th Cir. 1993).

Rule 11 sanctions are available where an attorney files a motion without believing there is good legal ground to support it, and "for the express purpose of engendering delay and higher cost." *See St. Germain v. Bos. Popcorn Co.*, No. CV962404, 2000 WL 33170896, at *3 (Mass. Super. May 17, 2000), *aff'd*, 57 Mass. App. Ct. 1118, 786 N.E.2d 1254 (2003) (interpreting Massachusetts' Rule 11 equivalent). A party's intentional violation of a stay order is, likewise, sanctionable. So too, repeated challenges on frivolous issues over-litigate the case and misuse the resources of this Court. *Merritt v. Int'l Ass'n of Machinists & Aerospace Workers*, 613 F.3d 609, 629 (6th Cir. 2010) (granting Rule 11

sanctions based on plaintiff's "continued failure to refrain from pursuing meritless claims"). Sanctions for such over-litigation need to have enough sting to discourage that misuse. *See In re Att'y Fees in Yu v. Zhang*, 637 N.W.2d 754, 762 (Wis. 2001).

Here, a stay on the entire *Murray* action was imposed so that the impact of the then-pending *Dubric* decision could be assessed. (*See* 16 App. 3920.) Plaintiffs petitioned for writ relief in *Dubric*, asking that A Cab's stay be dissolved. At the same time, plaintiffs moved for a stay of their own—as to the costs awarded to A Cab—in the district court. The only substantive argument in the already needless motion to stay was a motion for offset or apportionment of those costs. (16 App. 3934.)

Plaintiffs' argument on this front was literal copy-and-paste from an identical motion for reconsideration. (17 App. 4204–08.) A different department of the district court had already rejected this argument, twice. (*Compare* 16 App. 3934 *with* 17 app. 4202.) There was no given justification for refiling this argument a third time.

Plaintiffs' repetitive litigation of arguments decided and rejected is sanctionable. *See*, *e.g.*, *Nugget Hydroelectric, L.P. v. Pac. Gas & Elec. Co.*, 981 F.2d 429, 439 (9th Cir. 1992) (affirming sanctions where second

motion . . . largely duplicated [the] first . . ., which earlier had been denied"); *Smith v. Ricks*, 31 F.3d 1478, 1488 (9th Cir. 1994), *cert. denied,* 514 U.S. 1035 (1995) (affirming sanctions where counsel "renoticed a motion that already had been denied); *Ramirez v. Fox Television Station, Inc.*, 998 F.2d 743 (9th Cir. 1993) (affirming sanctions for "identical set of papers [filed] on two different occasions during the litigation"). Plaintiffs' conscious disregard for the court's stay order was, likewise, improper. *See Nalder v. Eighth Jud. Dist. Ct.*, 136 Nev. 200, 208, 462 P.3d 677, 685 (2020). The fee award should be reduced to discourage him from doing the same in a future action. *Reyes v. Aqua Life Corp.*, 632 F. App'x 552, 558 (11th Cir. 2015) (reducing award of attorney fees by 85 percent as sanctions).

Plaintiffs insist that sanctions are unwarranted because appellant was not prejudiced by the overlitigation. The court posited that plaintiffs "presumably would have filed [the] motions after the lifting of the stay." (22 App. 5390.) But even in that context these entirely duplicative, procedurally improper, twice-rejected motions were sanctionable. 47 AM. JUR. PROOF OF FACTS 3d 241 (2023 Supp.) (noting that the timing of a filing may demonstrate an improper motive, such as

undue delay). Plaintiffs' frivolous filing prejudiced appellant by increasing the overall cost of litigating the matter.

In any case, Rule 11 does not require a showing of prejudice. *See Marcure v. Lynn*, 992 F.3d 625, 630 (7th Cir. 2021) (rejecting need for prejudice inquiry where uncorrected document is not withdrawn). "The focus of a district court's Rule 11 inquiry [should be] the reasonableness of the investigation and not whether the movant is prejudiced by his or her opponent's actions." *Bradgate Assocs., Inc. v. Fellows, Read & Assocs*., 999 F.2d 745, 752 (3d Cir. 1993). Even setting aside the prejudice to defendants, plaintiffs' over-litigation and frivolous motion practice prejudiced this state's courts by wasting their resources. *Cf. id.* ("To consider prejudice alone is to overlook the fundamental objective of Rule 11, which is to encourage the filing of documents that are well-grounded in both law and fact.").

Moreover, plaintiffs filed their unsupported motions in knowing violation of a stay order, and despite asking for a stay for themselves. Plaintiffs' bad faith is evident on its face. Nothing beyond their refusal to withdraw the violating documents is required. *Cf. Marcure*, 992 F.3d at 630. The district court abused its discretion by failing to award

sanctions offsetting the award of attorney fees.

CONCLUSION

The district court's award of attorney fees under the MWA was in error. Plaintiffs' class should have been decertified, and the prior award of fees—premised on their having prevailed in a class action—vacated. The district court's award of appellate fees under the MWA is doubly improper, there being no express provision in the law that authorizes it.

Alternatively, the award must be vacated and remand with instructions as to its additional reduction. The reduction should be proportional to the massive constriction in class following remand in *Murray* and settlement in *Dubric*.

In the second alternative, the district court should be instructed to impose sanctions against plaintiffs for violation of the stay, and the current fee award should be offset by that sanction.

Dated this 26th day of January, 2024.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*
DANIEL F. POLSENBERG (SBN 2376)
ABRAHAM G. SMITH (SBN 13,250)
LAUREN D. WIGGINTON (SBN 15,835)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

ESTHER C. RODRIGUEZ (SBN 6473)
RODRIGUEZ LAW OFFICES, P.C.
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
(702) 302-8400

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief exceeds the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 8,559 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 26th day of January, 2024.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*
DANIEL F. POLSENBERG (SBN 2376)
ABRAHAM G. SMITH (SBN 13,250)
LAUREN D. WIGGINTON (SBN 15,835)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

ESTHER C. RODRIGUEZ (SBN 6473)
RODRIGUEZ LAW OFFICES, P.C.
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
(702) 302-8400

Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that on the 26th day of January, 2024, I submitted the foregoing "Appellant's Opening Brief" for e- filing and service via the Court's eFlex electronic filing system. Electronic service of the forgoing documents shall be made upon all parties listed on the Master Service List.

LEON GREENBERG
RUTHANN DEVEREAUX-GONZALEZ
LEON GREENBERG
PROFESSIONAL CORPORATION
2965 South Jones Blvd., Suite E3
Las Vegas, Nevada 89146

CHRISTIAN GABROY
GABROY LAW OFFICES
170 S. Green Valley Parkway, Suite 280
Henderson, Nevada 89012

Attorneys for Respondents

/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP