Case No. 87237

In the Supreme Court of Nevada

TRUDI LEE LYTLE, and JOHN ALLEN LYTLE, as trustees of the LYTLE TRUST,

Appellants,

vs.

SEPTEMBER TRUST, DATED MARCH 23, 1972; GERRY R. ZOBRIST and JOLIN G. ZOBRIST, as trustees of the GERRY R. ZOBRIST AND JOLIN G. ZOBRIST FAMILY TRUST; RAYNALDO G. SANDOVAL and JULIE MARIE SANDOVAL GEGEN, as trustees of the RAYNALDO G. AND EVELYN A. SANDOVAL JOINT LIVING AND DEVOLUTION TRUST DATED MAY 27, 1992; DENNIS A. GEGEN and JULIE S. GEGEN, husband and wife, as joint tenants,

Respondents.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable TIMOTHY C. WILLIAMS, District Judge
District Court Case No. A-16-747800-C,
consolidated with A-17-765372-C

APPELLANTS' OPENING BRIEF

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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.

Appellants Trudi Lee Lytle and John Allen Lytle are individuals.

Dan R. Waite of Lewis Roca Rothgerber Christie, LLP represented appellants in the district court. Mr. Waite, Daniel F. Polsenberg, and Abraham G. Smith of Lewis Roca Rothgerber Christie, LLP represent appellants before this Court.

Dated this 8th day of April, 2024.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/Abraham G. Smith*
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JURISDICTION

Trudi Lee Lytle and John Allen Lytle appeal an order awarding attorney fees on remand. NRAP 3A(b)(8). Counsel for respondents served notice of entry of the fee award on August 18, 2023, and the Lytles timely appealed on September 1, 2023. (10 App. 2297; 10 App. 2321.)

ROUTING STATEMENT

This Court ordinarily transfers appeals from post-judgment orders to the Court of Appeals. NRAP 17(b)(7). The Court of Appeals is well-equipped to handle the straightforward issue here. But as counsel have located no case in the nation where a party was ordered to pay another party windfall fees—beyond those billed or incurred—without evidence that the attorney *ever* charges those fees on the open market, only the Supreme Court could cut the unique path for Nevada necessary to sustain the judgment. NRAP 17(a)(11), (12).

ISSUE PRESENTED

May a district court award attorney fees to a party above the billed amount where the billed amount is reasonable and there is no evidence the billed amount represents a discounted rate?

STATEMENT OF THE CASE

This is an appeal from an award of attorney fees by the Honorable Timothy C. Williams, District Judge of the Eighth Judicial District Court, Clark County. The sole issue for appeal is whether the district court acted within its discretion to award "higher than the billed amount" (10 App. 2302:20) absent evidence that the attorney billed at a discounted rate.

STATEMENT OF FACTS

A. The Lytles Get a Judgment But Are Limited in Enforcing It

Defendants–appellants Trudi and John Lytle, as trustees of the Lytle Trust, own a lot in the Rosemere Estates Property Owners Association. *Lytle v. September Tr., dated March 23, 1972*, Nos. 81689,84538, 523 P.3d 532 (Table), 2022 WL 18540656, at *1 (Nev. Dec. 29, 2022) (*Lytle II*). They won hard-fought judgments of more than $1.4 million against the association. *Id.* But the district court enjoined them from "recording and enforcing" those judgments against the homes of individual property owners or "taking any action in the future directly against" them. *See id.* (1 App. 53:11-19.)

B. The District Court Holds the Lytles in Contempt

The Lytles sought the appointment of a receiver over the association who could issue special assessments against the property owners to satisfy the Lytles' judgments. *Lytle II*, 2022 WL 18540656, at *1. (3 App. 657, ¶ 10(q).) Considering this to violate the injunction, the district court held the Lytles in contempt and assessed a $500 penalty for each violation. *Lytle II*, 2022 WL 18540656, at *1. (1 App. 84:9-12.)

This Court denied writ relief. *Lytle II*, 2022 WL 18540656, at *2.

C. This Court Upholds an Initial Award of Fees Actually Incurred

The district court also awarded attorney fees to the four plaintiff property owners, respondents here. *Id.* at *1. (6 App. 1327.) The property owners, all represented by Christensen James & Martin, sought $149,403.20, representing the firm's time at $260 an hour—the amount actually billed to its clients.[1] (1 App. 96, 195, 225; 2 App. 255, 285,

[1] Four attorneys—lead counsel Wesley J. Smith, along with Laura J. Wolff, Daryl E. Martin, and Kevin B. Christensen—each billed at the same $260 hourly rate. (2 App. 297 ¶ 13(a).) Although Mr. Smith's declaration does not mention Mr. Martin, his initials "DEM" appear as a billing attorney in the invoices. (*E.g.*, 1 App. 170, 174, 177.)

5/26/20 Plaintiffs' Motion for Attorney's Fees and Costs, at 10, Ex. 6a-6d; 2 App. 297, 299, ¶ 13(a), (e), 5/26/20 Declaration of Counsel in Support of Plaintiffs' Motion for Attorney's Fees and Costs, at 4, 6, ¶ 13(a), (e).) The district court, after cutting clerical work and fees incurred in the receivership action, awarded $76,304.67. (6 App. 1327, 1335-36; 6 App. 1427-28.)

This Court upheld that award. *Lytle II*, 2022 WL 18540656, at *2.

D. The District Court Gives the Property Owners Fees Beyond What They Paid

1. The Property Owners Seek Fees

After *Lytle II*, the property owners sought further fees "for work performed in this matter from May 1, 2020, through April 30, 2023," which included defending the contempt order and prior fee award on appeal. (8 App. 1782:21-1783:1.)

This time, billing records showed that Christensen James & Martin[2] billed its clients $100,082.56 at $265 an hour. (8 App. 1826, 1843,

[2] The same four attorneys—Mr. Smith, Ms. Wolff, Mr. Martin, and Mr. Christensen—again billed at identical rates. (*See* 8 App. 1816 for a page with entries by all four attorneys.) The rate increase from $260 to $265

1860, 1877 ($25,020.64 each for Gegen, September Trust, Sandoval Trust, and Zobrist Trust); *see also* 8 App. 1801, ¶ 5.) But, applying what they called a "lodestar analysis," the property owners asked for $144,694—a more than 40% markup. (8 App. 1783, 1798; 9 App. 2115 (adjusted).)

Attorney	Proposed Rate	Markup from $265/hr
Welsey J. Smith	$425	60.4%
Laura J. Wolff	$325	22.6%
Daryl E. Martin	$450	69.8%
Kevin B. Christensen	$475	79.2%

The property owners asserted several bases for the fees, among them NRS 18.010(2)(b) and EDCR 7.60, arguing that following the May 2018 injunction, "there was no basis for the Lytle Trust to pursue further review by the Supreme Court." (8 App. 1790:22-23.)[3] According to the property owners, the Lytles' position was unreasonable and subject to sanction "for multiplying the proceedings without cause or for failing to comply with the 2018 [injunction] Order." (8 App. 1791:1-2, 1791:5-7.)

appears to begin in March 2021. (8 App. 1813.)

[3] The fees from the Lytles' appeal of the injunction had already been ordered. (6 App. 1427-28.)

As to the penalty markup, the property owners argued that the "prevailing market rates in the relevant community" would not be reflected in "the actual rates charged" in the arm's-length agreement with their attorney. (8 App. 1795:14-15.) In the accompanying declaration, counsel conceded the punitive, deterrent aim of the enhanced award:

> The Plaintiffs are respectfully seeking this Court's Order awarding the full amount of the fees claimed, in the hope that a substantial fee award will help deter the Lytle Trust from continuing to engage in unreasonable, harassing, frivolous, and vexatious behavior, both in and out of court, that directly violates existing court directives and orders.

(8 App. 1807:16-20.)

At no point in the motion or reply do the property owners suggest that Christensen James & Martin took the case at a discounted rate, or that there was an issue with ability to pay or access to justice that artificially depressed the firm's rate.

2. The Lytles Oppose

The Lytles opposed. (9 App. 2014-15.) Among other things, they argued that fees could not be awarded under NRS 18.010(2)(b) because the judge in the receivership action had rejected that very argument, a determination that merited deference. (*Id.*) In addition, this Court,

while upholding the contempt order, conceded that "nothing in the plain text of the May 2018 Order prohibited [the Lytles] from seeking the appointment of a receiver over the Association." (9 App. 2017:8-9 & 9 App. 2052, n.4 (quoting *Lytle II*, 2022 WL 18540656, at *2 n.4).)

EDCR 7.60 did not support fees as a sanction, either, because "EDCR 7.60(b) does not authorize attorney fees in excess of those authorized by NRS 22.100(3)." (9 App. 2020 (quoting *Detwiler v. Eighth Judicial Dist. Court*, 137 Nev. 202, 214 n.8, 486 P.3d 710, 721 n.8 (2021)).) For contempt, fees are limited to those "directly caused by the particular failure or refusal to comply," consistent with NRS 18.010. (*Id.* (quoting *Detwiler*, 137 Nev. at 214, 486 P.3d at 721).)

The Lytles also argued that the property owners had no basis for a punitive "upward adjustment" to the $265 hourly rate they and their counsel freely negotiated and actually paid. (9 App. 2020.) The Lytles observed that the $265 hourly rate was nearly identical to the one they had presented as "the reasonable hourly rate for their counsel, and already approved by this Court as reasonable in this case." (*Id.* at 2022:9-12.)[4] In fact, there was no evidence that counsel has ever charged any

[4] An attorney representing other property owners not part of this appeal

client more than $265 an hour. (*Id.* at 2022:12-18.) Instead of relying on statements about other attorneys in other cases, Mr. Smith could have simply noted in his declaration that his firm regularly charged other clients more and was discounting the customary rate only for the property owners here. (*Id.* at 2022:18.) The Lytles noted that the requested enhancement "impermissibly works a windfall to Plaintiffs' counsel": "deterrence is already factored in by the award of attorney fees in the first place," and any opprobrium of the Lytles' conduct relating to the underlying contempt had already been resolved in prior fee awards. (*Id.* at 2024:26-2025:1 (quoting *Lumen View Tech. LLC v. Findthebest.com, Inc.*, 811 F.3d 479, 484-85 (Fed. Cir. 2016); *id.* at 2025:24-2026:5.)

Finally, the Lytles analyzed the cases cited in the property owners' brief and noted that they supported enhanced fees only in "rare and exceptional" cases. (*Id.* at 2020:1-24, 2026:16-2028:28.)

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sought just $180-$200 per hour—her actual billed rate—even though she has about four years more experience than respondents' counsel here. (9 App. 2024:11-15; 7 App. 1542.)

3. The District Court on Its Own Raises Issues of Access to Justice

At oral argument on the motion, the district court appeared to grasp the difference between cases taken on a contingency—"if they don't win they don't get paid"; "the lawyer takes the hit"—and those taken at an agreed-upon hourly rate—"if the client doesn't prevail, they're out of that money." (10 App. 2253:1-8.) For lawyers charging by the hour, the district court recognized, the plaintiff should not recover a windfall:

> I don't think the fee award necessarily should be a windfall, if you understand—and what I mean by that is, like here whatever the hourly rate is, it is what it is.
>
> But why should the adverse party, even if they lose, have to pay the add-on? See what I mean? Because its' not—that's not actually what was incurred.

(10 App. 2253:10-16.)

The district court also expressed concern that the Lytles were "real people" who would be liable for their opponents' fees, on top of their own. (10 App. 2256:9-12.) He contrasted this case with one involving an insurance company that may allocate resources towards anticipated attorney fees, both the insured's and "potentially the adverse party's claim." (*Id.* at 2256:1-8.)

Toward the end of the hearing, the district court mused for the first time about "access to justice," an issue never raised in the briefs or in the property owners' oral argument:

> [I]s there a distinction between taking a case at a lesser rate, a distinction without meaning when you look at the contingency fee case.
>
> And what I mean by that is, is that basically access to justice issue? But I thought about that; right? Because that's why lawyers take contingencies because they get paid down the road and so on and so on.
>
> And sometimes they win, sometimes we lose. And similarly, maybe lawyers take cases at a reduced rate because clients can't typically afford to pay a lawyer 450 an hour, 550 an hour. But if they were limited to the fees that were paid up to that time versus what's reasonable in the market place, you know?

(10 App. 2279:25-2280:11.)

4. The District Court Grants Fees, Finding that Counsel Charged Below-Market Rates

On August 18, 2023, the district court entered an order awarding the property owners undisputed costs and $143,528.91—nearly all of their requested fees. (10 App. 2303:10-11.)

The district court based its award on NRS 22.100, which the Lytles conceded was appropriate, and on § 25 of the CC&Rs, which allows an

award of fees against the losing party "in such amount as may be fixed by the court in such proceeding." (10 App. 2302, ¶¶ 2-4; *see also* 9 App. 2045, at § 25.)

The district court did not accept the property owners' invitation to impose fees under NRS 18.010(2)(b) or EDCR 7.60, and in fact specifically ruled that "the Court does not find that NRS 18.010(2)(b) is a sound basis for an award of fees." (10 App. 2302, ¶ 2.)[5]

On the amount, the entirety of the district court's analysis consists of a finding that counsel billed at a "below-market" rate:

> 5. "After a court has determined that attorney's fees are appropriate[,] it then must multiply the number of hours reasonably spent on the case by a reasonable hourly rate to reach what is termed the lodestar amount." *Herbst v. Humana Health Ins.*, 105 Nev. 586, 590, 781 P.2d 762, 764 (1989).
>
> 6. Defendants argue that the amount of fees requested by Plaintiffs should be reduced because they are calculated at a higher hourly rate than the actual billed rate. The Court finds that the rates billed by Plaintiffs' counsel to the Plaintiffs are below-market. Further, the Court finds that the reasonable value of the service provided by Plaintiffs' counsel is aligned with the requested rate. As a result, the Court finds

[5] This is a contrast from the prior fee award, which though limited to actual fees incurred, was based not just on § 25 of the CC&Rs and NRS 22.100(3), but also on NRS 18.010(2)(b). (6 App. 1334, ¶ 6; 6 App. 1426, ¶ 9.)

> that the requested fees, although higher than the billed amount, are a proper calculation of the number of hours reasonably spent multiplied by a reasonable hourly rate and shall be awarded pursuant to NRS 22.100 and the original CC&Rs.

(10 App. 2302, ¶¶ 5-6.)

The district court expressly directed the award to the property owners as clients, not to their counsel. (10 App. 2303:10-11 ("*Plaintiffs* shall be awarded $143,528.91 in attorney's fees" (emphasis added)); *id.* at 2304:7-8 (directing payment to the firm's client trust account).)

5. The Lytles Appeal

On September 1, 2023, the Lytles appealed the fee award. (10 App. 2321.)[6]

6. The District Court Notes that Its Award Was Based on Access to Justice

A couple months after the award, the district court underscored that "the salient points" of the fee award "really do focus on access to

[6] The Lytles also appealed a separate fee award in favor of other property owners (10 App. 2343), but that award did not exceed actual fees incurred (10 App. 2287), and the Lytles have resolved that issue and dismissed that appeal. (*See Lytle v. Disman*, Dkt. No. 87323, Doc. Nos. 23-33106, 23-33153.)

justice." (10 App. 2393:4-5.) He considered that the property owners' counsel had "probably" taken the case at "less than the market rate," causing a loss or at best breaking even after firm overhead:

> [L]awyers should be able to take a case. And when they take a case, they shouldn't have to bear the loss necessarily of that case.
>
> And here is my point: Under the facts of this case I realize that plaintiff's counsel, as far as the rate charged was probably less than the market rate. I get that. But just as important, too, they have to charge something in order to keep the doors open of their practice; right?
>
> But just as important too, and I think of critical import would be this, that if lawyers weren't willing to take cases where they potentially would just break even based upon the time they put in the case, they could—that would shut the doors of people having access to justice.
>
> And that's why I did what I did in this case. And I realize that. Just as important, too, my—my ultimate decision as far as the plaintiff's fee award was based upon the value of the service— . . . what it would cost to prosecute or defend a case such as that.

(10 App. 2393:11-2394:2.)

In fact, although the property owners' counsel had waived the opportunity to show that he had taken this case at a reduced fee, the district court assumed just that:

> These cases are extremely expensive to prosecute and defend; right? And so, if the courthouse doors are shut because of economic reasons, there's no justice, right? . . .
>
> * * *
>
> . . . I realize we have pro bono. But, you know, pro bono, you don't get paid at all and it's a loss. But there has to be some intermediate step where young lawyers' law firms can take cases on that require hourly, but they shouldn't have to do it at a loss. They can do it where they can keep their doors open. And if they prevail, they should get what their time is worth.
>
> That's how I see it, you know? And read that to the Supreme Court or the Court of Appeals.

(10 App. 2394:10-12, 2394:22-2395:4.)

That last remark was not flippant. "I hope the Supreme Court considers my thoughts," the court concluded. (10 App. 2396:25-2397:1.)

We hope you do, too.

SUMMARY OF THE ARGUMENT

Under the American rule, parties usually pay their own way in court. Fee-shifting thus already constitutes a penalty. *See, e.g.*, NRCP 68(f). The district court here rejected sanctions under NRS 18.010(2)(b) and EDCR 7.60. In these circumstances, a merely compensatory

attorney fee is punishment enough. Anything else is an impermissible windfall.

In "rare and exceptional" cases, an attorney fee may exceed the amount actually charged to the client. These are the true "access to justice" cases described by the district court, as when the lawyer provides services for free or a reduced rate.

But however right the district court might have been in principle, he was wrong in application here. He forgot or disregarded that the property owners' counsel here did not discount his rate; there was no record evidence that he charged any clients, in any case, more than he charged the property owners here.

This Court should reverse.

ARGUMENT

Standard of Review: "Although a district court's decision regarding an award of attorney fees is generally reviewed for an abuse of discretion, where, as here, the decision implicates a question of law, the appropriate standard of review is de novo." *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 82, 319 P.3d 606, 616 (2014) (citing *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006)). Here, the

district court's decision rests either on a legal determination that parties are entitled to windfall fees beyond what they paid in an arm's-length fee agreement (*de novo* review), or on a factual determination—without evidence—that counsel in fact reduced his customary rate for this case (an abuse of discretion).

I.

THE DISTRICT COURT ERRED IN AWARDING FEES NOT ACTUALLY INCURRED

A. Fee-Shifting Should Not Create Windfalls or a Double Penalty

A loser in litigation must suffer the stripes of the judgment—paying (or not getting paid) money, or having to do (or not do) some other act—and pay the winner's litigation costs, but generally nothing more. "Nevada follows the American rule that attorney fees may not be awarded absent a statute, rule, or contract authorizing such award." *Thomas*, 122 Nev. at 90, 127 P.3d at 1063.

This default rule indicates that when *any* fees are shifted from the winner to the loser, that already operates as a penalty against the loser. Rule 68 makes this explicit: attorney fees count among the "penalties"

for rejecting an offer of judgment. NRCP 68(f); *see also Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 414, 132 P.3d 1022, 1025 (2006) (referring to the "penalty provisions of NRCP 68(f)"). Excess fees, then constitute a *double* penalty against the loser—and a windfall to the prevailing party. *See White v. Ed Miller & Sons, Inc.*, 457 F. Supp. 148, 155 (D. Neb. 1978) ("[I]t will not do that the fees are punitive or awarded as a penalty against defendant, nor should the fees be a windfall for plaintiff's counsel.").

Although we will shortly discuss distinctions among fee-shifting statutes, one principle threads through them all: "in no event should the fees awarded amount to a windfall for the prevailing party." *Crescent Publ'g Grp., Inc. v. Playboy Enters., Inc.*, 246 F.3d 142, 151 (2d Cir. 2001); *accord Blum v. Stenson*, 465 U.S. 886, 897 (1984) ("a reasonable attorney's fee is one that is adequate to attract competent counsel, but . . . that does not produce windfalls to attorneys") (cleaned up). Fee-shifting statutes "were not designed as a form of economic relief to improve the financial lot of attorneys." *Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air*, 478 U.S. 546, 565 (1986) (*Delaware*

Valley I); *City of Burlington v. Dague*, 505 U.S. 557, 563 (1992) (same); *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010) (same).

Nevada's appellate courts frequently warn district courts against double recovery. In *Davis v. Beling*, for instance, this Court held that the parties' contract allowed fees to a prevailing party, but because the prevailing parties had already received fees under the offer-of-judgment rule, the district court needed to "ensure that [they] do not receive a double recovery of attorney fees." 128 Nev. 301, 322 n.9, 278 P.3d 501, 516 n.9 (2012). Similarly, in *Eivazi v. Eivazi*, the Court of Appeals directed the district court to "consider only those fees incurred in connection with" the motion for which fees were sought and to excise "any fees that were already addressed in prior court orders." 139 Nev., Adv. Op. 44, 537 P.3d 476, 493 (Ct. App. 2023).

B. Any Fee Award Must Account for Fees Counsel Actually Charged

Apart from the law of the case established by this Court's prior orders, this Court has never described how to assess the reasonableness of a fee request in a contempt proceeding.

In a "lodestar" analysis, the requested fee must "be calculated according to the prevailing market rates in the relevant community, considering the fees charged by lawyers of reasonably comparable skill, experience, and reputation." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 607 n.29, 172 P.3d 131, 137 n.28 (2007) (citing *Blum*, 465 U.S. at 896 n.11). "[T]he burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum*, 465 U.S. at 896 n.11.

"Prevailing market rate" is a fiction, even within these parameters. *King v. Greenblatt*, 560 F.2d 1024, 1027 (1st Cir. 1977) ("The 'normal' per hour rate in a locale is itself an artificial construct."). And "[t]he type of services rendered by lawyers, as well as their experience, skill and reputation, varies extensively—even within a law firm." *Blum*, 465 U.S. at 895 n.11.

"[H]ighly relevant proof of the prevailing community rate" is "the actual rate that applicant's counsel can command on the market." *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522

F.3d 182, 188 (2d Cir. 2008) (quoting *Bebchick v. Wash. Area Metro. Transit Comm'n*, 805 F.2d 396, 404 (D.C. Cir. 1986)). Indeed, "[t]he attorney's actual billing rate for comparable work is 'presumptively appropriate' to use as the market rate." *Id.* at 193 (quoting *People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 90 F.3d 1307, 1310 (7th Cir. 1996)); *cf. also Crescent Publ'g*, 246 F.3d at 151 ("[F]or prevailing parties with private counsel, the actual billing arrangement is a significant, though not necessarily controlling, factor in determining what fee is 'reasonable.'").

C. Any Fee Award Must Account for the Kind of Case

While pure windfalls are never permissible, whether and when an award can exceed the fees actually incurred depends on the text and purpose of the statute supporting the fee request. The fee-shifting statute in civil-rights cases, for instance, requires only a "reasonable attorney's fee"—not necessarily capped by the prevailing party's fee agreement with counsel. But in contempt cases, the court may shift to the loser only reasonable fees actually incurred.

1. Fees in Civil-Rights Cases

a. PRIVATE ATTORNEYS GENERAL ARE NEEDED TO PROTECT CIVIL RIGHTS

Private parties ordinarily engage in litigation to settle private disputes, as the parties here have done. Civil-rights litigation serves a higher purpose, vindicating important statutory and constitutional rights—often against the weight of the state—that cannot solely be valued monetarily. In the context of Title II to the Civil Rights Act of 1964, litigation is in some sense "private in form only": a plaintiff securing an injunction "does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968). And so "[i]f successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Id.*

b. § 1988 ALLOWS A REASONABLE FEE

Congress therefore provided a remedy. Fees in federal civil-rights actions are governed by 42 U.S.C. § 1988(b): "the court, in its discretion,

may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost . . . ."

In *Blum v. Stenson*, the U.S. Supreme Court held that "'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." 465 U.S. at 895–96. The Court did not analyze whether the rates sought by the legal-aid society "were out of line with the 'prevailing market rate' for private counsel of comparable experience, skill, and reputation" because the losing party, a state agency, waived that argument. *Id.* at 892 n.5. In any case, the rates were what the attorneys actually billed. *Id.* at n.4.

The text of § 1988 indicates that "*a* reasonable" fee is the only requirement; it need not be both reasonable and actually incurred. While recognizing that "an enhanced award may be justified in some cases of exceptional success," the Court rejected an enhancement in *Blum*. *Id.* at 898. Despite the purported "complexity of the litigation, the novelty of the issues, the high quality of representation, the 'great benefit' to the class, and the 'riskiness' of the law suit," the "fully compensatory fee" was enough. *Id.* at 898, 901.

c. CIVIL-RIGHTS CASES AWARD FEES DIRECTLY TO THE ATTORNEY

One of the reasons fee awards in § 1988 can exceed a fee agreement is that those fees "go directly to the attorneys," rather than "to the prevailing party." *Video-Cinema Films, Inc. v. Cable News Network, Inc.*, 98 CIV.7128 BSJ, 2004 WL 213032, at *5 (S.D.N.Y. Feb. 3, 2004). This stands in contrast to most statutory or contractual fees, which are awarded to the party. In *Video-Cinema Films, Inc.*, a copyright case in which both CNN and ABC prevailed, the court held that "awarding more than CNN paid pursuant to the fee agreement here would amount to a windfall for CNN and a penalty against Plaintiff." *Id.* Similarly, where ABC used in-house attorneys, the lodestar calculation was properly based on the "actual imputed costs of in-house counsel's time"; a rate based on "current market rates" for CNN's outside counsel "would amount to a windfall for ABC" by awarding it more than it actually incurred. *Id.* at *6 (capitalization removed). "The policy concerns that weigh in favor of awarding fees to attorneys who take Section 1988 cases—i.e., providing an incentive to these attorneys by paying them at the prevailing rate rather than the rate that their clients can afford to pay—are absent here." *Id.* at *5.

2. Clean Air Act

Similar to § 1988, the Clean Air Act provides that "in any action" to enforce the Act the court "may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." 42 U.S.C. § 7604(d).

In justifying "[a] strong presumption that the lodestar figure—the product of reasonable hours times a reasonable rate—represents a 'reasonable' fee," the U.S. Supreme Court turned to the statute's purpose:

> These statutes were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws. Hence, if plaintiffs, such as Delaware Valley, find it possible to engage a lawyer based on the statutory assurance that he will be paid a "reasonable fee," the purpose behind the fee-shifting statute has been satisfied.

Delaware Valley I, 478 U.S. at 565. The Court rejected an increased award based on counsel's "superior" performance and "outstanding result." *Id.* at 566. Adjusting the usual hourly rate to account for success risks "double counting." *Id.*

The Court later confirmed that an enhancement based on counsel's risk in taking the case was also inappropriate. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) (*Delaware Valley II*). Indeed, as other courts had noted, the risk of losing is greatest when the opponent's position is most reasonable; a "contingency factor" creates "a perverse penalty for those least culpable." *Id.* at 711 (cleaned up). A plurality of the Court—later adopted by a full majority—held that an increase based on the risk of not prevailing "would result not in a 'reasonable' attorney's fee, but in a windfall for an attorney who prevailed in a difficult case." *Id.* at 726–27 (opinion of White, J., Rehnquist, C.J., and Powell and Scalia, JJ.).[7]

3. The Copyright Act Likewise Permits Prevailing Rates But Not Windfalls

The Copyright Act contains language nearly identical to § 1988: "the court may also award a reasonable attorney's fee to the prevailing party as part of the costs." 17 U.S.C. § 505.

[7] In *City of Burlington v. Dague*, 505 U.S. 557, 567 (1992), the Court formally adopted Justice White's position in *Delaware Valley II*.

As just noted, in copyright cases, courts have cautiously declined to "declare a per se rule that the actual billing arrangement places a ceiling on the amount the prevailing party can recover." *Crescent Publ'g Grp.*, 246 F.3d at 150–51.

But now outside the civil-rights context, courts must stand vigilant against windfalls or penalties: "the absence of a penalty beyond the punitive or deterrent policies taken into consideration in the decision to award fees in the first instance." *Id.* So "the actual billing arrangement is a significant, though not necessarily controlling, factor in determining what fee is 'reasonable.'" *Id.* And "in no event should the fees awarded amount to a windfall for the prevailing party." *Id.*

4. "Incurred" Caps Reimbursement at Actual Fees

In contrast to both civil-rights and copyright cases, fees under Rule 37(a)(5) for a motion to compel are limited to "reasonable expenses *incurred* in making the motion, including attorney's fees." NRCP 37(a)(5)(A) (emphasis added). Courts interpreting the identical federal rule have noted this contrast with § 1988, and note that the qualifier

"incurred" limits the fee under the lodestar method to a pure reimbursement:

> Congress intended that all defendants in civil rights cases covered by Section 1988 pay a reasonable fee to all prevailing plaintiffs regardless of what the plaintiff is contracted to pay his or her counsel. *Blanchard v. Bergeron*, 489 U.S. 87, 93-94 (1989). In contrast, the language of Rule 37(a)(5) indicates that the award of attorney fees should be in the form of a reimbursement . . . .

Nelson v. Ricoh, USA, CV 17-11390, 2018 WL 6728392, at *3 (E.D. Mich. Mar. 1, 2018).

5. Fees for Contempt Are Limited to the Prevailing Party's "Actual Loss"

NRS 22.010(3), the fee-shifting statute in contempt cases, also includes this separate "incurred" requirement:

> [T]he court may require the person to pay to the party seeking to enforce the writ, order, rule or process the reasonable expenses, including, without limitation, attorney's fees, *incurred by the party as a result of the contempt*.

NRS 22.100(3) (emphasis added). In *Detwiler v. Eighth Judicial District Court*, this Court underscored the independent textual weight of this final restrictive clause:

> [T]he statute's text provides significant guidance. The fees must not only be "reasonable"—which implicates our usual attorney fee reasonableness analysis, *see Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349-50, 455 P.2d 31, 33 (1969)—but must also be incurred "as a result of the contempt." NRS 22.100(3).

137 Nev. at 213–14, 486 P.3d at 721. *Detwiler* focused on chronology, holding that fees incurred before the contempt could not be "a result of the contempt." *Id.* When it comes to amount, the result should be the same: fees never incurred (because counsel did not bill them) cannot be "a result of the contempt." A fee award under NRS 22.100(3) "must be limited to that party's actual loss." *Guadagna v. Eighth Judicial Dist.*, No. 81618, 137 Nev. 912, 483 P.3d 1118 (Table), 2021 WL 1186750, at *1 (Mar. 21, 2021) (citing *Dep't of Indus. Relations, Div. of Indus. Ins. Regulation v. Albanese*, 112 Nev. 851, 856, 919 P.2d 1067, 1071 (1996)).

D. The CC&Rs Also Require a Reasonable Fee

Section 25 of the CC&Rs allows an award of attorney fees "in such amount as may be fixed by the court in such proceeding." (9 App. 2045, at § 25.)

The parties do not dispute that "fixed by the court" entails scrutiny for reasonableness. This Court interpreted similar language in the

fee-shifting statute for construction defect—attorney fees "must be approved by the court"—to likewise "require the court to determine the reasonableness of the requested fees." *Shuette v. Beazer Homes Holdings Corp.,* 121 Nev. 837, 863–65, 124 P.3d 530, 548–49 (2005) (quoting NRS 40.655(2)).[8]

E. The Reasonable Fee Here Is What Counsel Actually Charged

Here, the $265 hourly rate Christensen James & Martin actually billed its clients is the presumptive reasonable rate. The property owners produced no evidence to justify this extreme markup.

1. This Court Previously Affirmed the Firm's $260 Hourly Rate as Reasonable

For one, this Court upheld prior fee awards from the same counsel at a nearly identical rate of $260 an hour. *Lytle v. September Tr., Dated March 23, 1972*, 136 Nev. 843, 458 P.3d 361 (Table), 2020 WL 1033050, at *3 (Mar. 2, 2020) (*Lytle I*); *Lytle II*, 2022 WL 18540656, at *2.

[8] The fee provision was repealed in 2015. *See* 2015 Nev. Stat. 16, Ch. 2, AB 125, § 15.

Regardless of whether this creates law of the case,[9] it does show that the property owners previously believed they were entitled to fees only at the hourly rates actually billed.

2. The Property Owners' Stated Basis for a Markup Was Nixed

What changed?

Mr. Smith's declaration accompanying the motion offers a clue: the property owners "hope that a substantial fee award will help deter the Lytle Trust from continuing to engage in unreasonable, harassing, frivolous, and vexatious behavior, both in and out of court, that directly violates existing court directives and orders." (8 App. 1807:16-20.)

But this describes a sanction under NRS 18.010(2)(b), which the district court rightly rejected. Even if the Lytles' conduct constituting the *contempt* was vexatious within the meaning of NRS 18.010(2)(b),[10]

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[9] The reasonableness of the hourly rate was not litigated in those appeals.

[10] Because the Lytles never challenged NRS 22.100(3) as a basis for fees, if the contempt were upheld, this Court never reached the alternative grounds of the district court's order, including NRS 18.010(2)(b). *See Paulos v. FCH1, LLC*, 136 Nev. 18, 24, 456 P.3d 589, 594 (2020) (applying RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. o (1982) and holding that an alternative ground not considered on appeal does not create

merely seeking appellate *review* of the contempt order was not. In fact, this Court noted that, contrary to the property owners' contention, the Lytles were not prohibited from seeking the appointment of a receiver over the association. *Lytle II*, 2022 WL 18540656, at *2 n.4. Nor did this Court assess penalties under NRAP 38, the rule governing frivolous appeals.

This notion of punishment and deterrence for vexatious litigation undergirded counsel's request for a markup of more than 40%. When the district court rejected that punitive rationale, the basis for excess fees crumbled with it.

3. The Fees Counsel Actually Billed Is an Appropriate Lodestar

The best evidence of the market rate—"what counsel would likely charge as a reasonable fee to the prevailing litigants" *Milene Music, Inc. v. Gotauco*, 551 F. Supp. 1288, 1298 (D.R.I. 1982)—is the $265 hourly rate counsel actually charged. (8 App. 1826, 1843, 1860, 1877

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issue preclusion).

($25,020.64 each for Gegen, September Trust, Sandoval Trust, and Zobrist Trust); *see also* 8 App. 1801, ¶ 5.)

The contrary "evidence" was a string cite of state and federal district-court cases upholding fee awards in the range of $300 to $550 for partners and $225 to $400 for associates. (8 App. 1797 & n.6.) At first glance, this might appear to establish an overall market rate in the Las Vegas legal community, disregarding *Cuzze*'s other elements necessary to narrow the pool to "lawyers of reasonably comparable skill, experience, and reputation." *Cuzze*, 123 Nev. at 607 n.29, 172 P.3d at 137 n.28 (citing *Blum*, 465 U.S. at 896 n.11). But it is even worse than that. The cited cases necessarily conducted a lodestar analysis for the particular attorneys in that case, taking into account the unique factors of skill, experience, and reputation. Indeed, we get a hint that the "similarly situated attorneys" in one case are those "who practice commercial litigation and construction law" with similar skills. (*Id.* n.6 (citing *T&R Constr. Group v. Estrada*, Case No. A-18-779975-C, 2020 Nev. Dist. LEXIS 2190, *24-25 (8th Jud. Dist. Ct., Clark County, Nev., Oct. 8, 2020)).) Our case, of course, involves CC&Rs, not construction law.

4. Co-Defendants' Counsel Establishes an Appropriate Lodestar

Even if we could not trust the fee that the property owners' counsel fetches on the open market as an indicator of the market rate, here we have a direct comparator in co-defendants' counsel, Christina Wang. Ms. Wang litigated these same issues alongside Mr. Smith; the chief difference is that she has about four years more experience than Mr. Smith. Yet she charged an appropriate $190 blended hourly rate, less than half of Mr. Smith's proposed "market" rate.

5. The Contempt Statute and CC&Rs Do Not Permit an Award of Fees Not Incurred

In addition, the district court disregarded that the property owners' requested enhanced fees were not "incurred . . . as a result of the contempt." NRS 22.100(3). Those fees were never incurred at all.

Nor did the property owners' counsel establish that, in responding to the Lytles' appeal at $265 an hour, he was unable to take work at a higher rate. *Cf. In re Arbitration Between United Pub. Workers, AFSCME, Local 646 & Dep't of Transp.*, 487 P.3d 302, 307 (Haw. 2021) (*In re Union Arbitration*) (state could show it "incurred" fees for salaried

government attorneys because they were "not available for other work"). He presented no evidence that he charged anyone a higher rate so as to render the $265 hourly rate a loss.

Under the circumstances, the only reasonable fee is, at most, the law firm's actual charges—$100,082.56 at $265 an hour. As § 25 of the CC&Rs does not permit an unreasonable fee, *see Shuette,* 121 Nev. at 863–65, 124 P.3d at 548–49, it cannot save the district court's order, either. The district court's conclusion that this rate is "below-market" misinterprets the applicable standards for fees under NRS 22.100(3) and the CC&Rs and lacks substantial evidence. (10 App. 2302, ¶¶ 5-6.)

This Court should reverse.

II.

THE DISTRICT COURT IMPROPERLY RELIED ON "ACCESS TO JUSTICE"

Normally, because a written order supersedes a prior oral ruling, the district court's oral pronouncements provide thin gruel for appeal. *Rust v. Clark Cnty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987). But here, the district court expounded on the written order,

specifically inviting this Court to consider the true rationale behind bland façade of "below-market" rates.

The district court considered this an "access to justice" case and posited, without evidence, that this case "probably" fell into the purgatory of cases taken on a substantially reduced fee.[11] (10 App. 2393:11-2394:2.) The property owners, whose burden it was to prove that they had done so here, waived this issue by not raising it in their briefs (or, indeed, even pressing it at oral argument when the district court *sua sponte* raised it).

And even if this had been such a case, the district court's order would not have remedied the access-to-justice barrier, as none of the fees here are awarded to counsel.

A. Fees Awards Can Address Barriers to Access to Justice

1. Pro Bono Counsel Can Get Fees

Nonprofit legal services organizations and *pro bono* counsel may use fee-shifting statutes to receive reasonable compensation. *Miller v.*

[11] Under RPC 6.1(a)(2)(i) and (3)(i), services "at no fee or substantially reduced fee" both qualify as *pro bono*.

Wilfong, 121 Nev. 619, 622–23, 119 P.3d 727, 729–30 (2005). They do not negotiate an arm's-length fee agreement with their clients, so they must establish a lodestar without relying on such an agreement. *Id.*

Critically, because the client has not paid legal fees, the award is to counsel, not the client. *Id.* at 622, 119 P.3d at 729 ("[t]he court also awarded Wilfong's *counsel* $3,000 in attorney fees" (emphasis added)).[12] Were it otherwise, the attorney would not receive compensation, and the client would receive a windfall.

2. Civil-Rights Awards Can Sometimes Exceed a Reduced Fee Actually Charged

As noted, this is the procedure in civil-rights cases. *Video-Cinema Films*, 2004 WL 213032, at *5.

Precisely because these cases *do* present the access-to-justice issues that concerned the district court, we more frequently see counsel offering their services for free or substantially reduced rates.

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[12] This appears to be the most precise formulation. Later, the opinion states that the district court "award[ed] *Wilfong* $3,000 in attorney fees," *id.* at 624, 119 P.3d at 731 (emphasis added), but the statute under which the Court ultimately upheld fees does not appear to mandate payment to the client. *See* NRS 126.171 ("The court may order reasonable fees of counsel . . . to be paid by the parties.").

In *Barjon v. Dalton*, a case on which the property owners rely (8 App. 1795:20-21), the civil-rights plaintiffs paid just $1 to their counsel. 132 F.3d 496, 500 (9th Cir. 1997). Because this plainly was not the attorney's "customary hourly rate," ascertaining a reasonable award was more complicated. *Id.* The corollary is that when the fee does represent the attorney's customary rate, calculating a reasonable award is simpler.

B. The District Court Improperly Speculated that the Property Owners Faced Barriers to "Access to Justice"

Here, of course, the property owners presented no evidence that their counsel charged an unusually low rate and then requested an award at the higher customary rate. Quite the opposite: counsel charged their customary rate but now request a rate far higher than customarily (or ever) charged.

Tellingly, the property owners have never contended otherwise. They did not raise *Miller v. Wilfong* or access to justice in their motion, the Lytles posited that counsel did not charge anyone a higher rate than $265 an hour (9 App. 2022), and the property owners did not dispute this in reply. Even at oral argument, when the district court raised

"access to justice" *sua sponte*, Mr. Smith—to his credit—did not claim that the concept applied here. (10 App. 2279:25-2280:11.)

After the written order, the district court made clear the enhanced fee was based on "access to justice." (10 App. 2393:4-5.) He speculated that the property owners' counsel had "probably" taken the case at "less than the market rate," charging just enough "to keep the doors open of their practice." (10 App. 2393:11-2394:2.) The district court assumed that this was far less than the actual "cost to prosecute or defend a case such as that." (10 App. 2393:11-2394:2.)

But with the burden on the property owners, they would have needed to submit evidence that they were impecunious or that their counsel was indeed taking this case at a loss or at a break-even reduced rate. For not one of these propositions do we have an iota of proof.

By the district court's own admission, this assumption propped up its finding that billed charges represented a "below-market" rate. It is understandable, if the district court sincerely believed the facts to be as he stated, that he would want to award a higher fee to break down this financial barricade to the courthouse. But this belief belies reality and the record.

C. The Fee Award Would Not Remove Any Barrier to Justice

If it were so, the remedy would be to make the property owner's *counsel* whole by awarding him the fees above reimbursement he supposedly would have charged but for his *pro bono* service.

Here, however, the property owners also presented no evidence that their counsel will receive any fees. Unlike in *Wilfong*, the award goes directly to the property owners. And unlike some *pro bono* arrangements where the parties agree that the attorney will keep any fees awarded, *e.g.*, *In re Union Arbitration*, 487 P.3d at 307, the evidence here is that the firm is only accepting what its clients have already paid: the $265 an hour. (8 App. 1801, ¶ 5.)

Circling back to where we started, the district court's order does nothing to "ensure that the [property owners] do not receive a double recovery of attorney fees." *Davis*, 128 Nev. at 322 n.9, 278 P.3d at 516 n.9. In fact, it ensures that they receive the windfall.

CONCLUSION

Access to justice is a real issue—one that undersigned counsel take seriously. We need more *pro bono* lawyers, more lawyers willing to protect constitutional and other civil rights without certainty of success,

more lawyers willing to take cases at substantially reduced rates. It is a real issue, but it is not an issue for the property owners in this case. Instead, we have "real people" (10 App. 2256:9-12)—the Lytles—being ordered to bear not just their opponents' actual fees but a double penalty based on what the district court only imagined were their counsel's losses.

As no authority supports awarding more than the fees actually incurred, this Court should reverse the judgment.

Dated this 8th day of April, 2024.

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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 complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 7,592 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 8th day of April, 2024.

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I certify that on April 8, 2024, I submitted the foregoing APPELLANTS' OPENING BRIEF for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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