IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case Nos.: 87354

FORE STARS, LTD., A NEVADA LIMITED LIABILITY COMPANY; 180 LAND CO., LLC, A NEVADA LIMITED LIABILITY COMPANY; SEVENTY ACRES, LLC, A NEVADA LIMITED LIABILITY COMPANY,

Appellants,

v.

DANIEL OMERZA, DARREN BRESEE, and STEVE CARIA,

Respondents.

Appeal From the Eighth Judicial District Court,
In and for the County of Clark
The Honorable Richard F. Scotti & The Honorable Crystal Eller, Presiding
District Court Case No.: A-18-771224-C

RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

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

Respondents Daniel Omerza, Darren Bresee, and Steve Caria are individuals, so there is no parent corporation or any publicly held company that owns 10% of the party's stock.

DATED this 29th day of April, 2024.

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I. ROUTING STATEMENT

This appeal stems from a series of appeals that have come before this Court concerning the underlying anti-SLAPP case and is the second appeal from the district court's award of attorneys' fees under the anti-SLAPP statutes. In Supreme Court Case No. 76273, this Court considered the denial of the Defendants/Respondents Daniel Omerza, Darren Bresee, and Steve Caria's ("Residents") anti-SLAPP motion. This Court reversed and remanded for further proceedings below. In consolidated Supreme Court Case Nos. 82338 and 82880, this Court considered the granting of the Residents' anti-SLAPP motion following remand and granting of the Residents' request for attorneys' fees. This Court affirmed the district court's order granting the anti-SLAPP motion and remanded the attorneys' fees order for the district court to consider and make the appropriate findings under the *Brunzell*[1] factors.

The district court has now again awarded the Residents' request for attorneys' fees and supplemental request for attorneys' fees. This appeal concerns, in part, this Court's prior decision and remand order concerning the attorneys' fees award. Therefore, the Residents believe this case remains appropriate for decision by this Court.

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[1] *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

II. STATEMENT OF THE CASE

This is an appeal of the district court's orders granting the Residents' motion for attorneys' fees ("First Fee Motion") and supplemental motion for attorneys' fees ("Second Fee Motion," together with the First Fee Motion, "Fee Motions") under the anti-SLAPP statute, NRS 41.635 *et seq.*, and the district court's order denying the Landowner's motion for reconsideration.

Despite the long procedural history of this case, the issues before this Court on appeal are simple. The first issue is whether the district court erred in finding that the Residents, who prevailed on their anti-SLAPP motion, are entitled to recover attorneys' fees under NRS 41.670. Plaintiffs/Appellants Fore Stars, Ltd.; 180 Land Co., LLC; and Seventy Acres, LLC (collectively, "Landowners") have waived any challenges to the Residents' entitlement to fees by failing to raise any in opposing the First Fee Motion. The Landowners' attempt to raise this new argument is further improper because it is beyond the scope of this Court's remand order following the Landowner's first appeal of the district court's order granting the First Fee Motion. This Court instructed the district court to consider the reasonableness of the Residents' requested fees under *Brunzell*. Any argument about the Residents' right to fees under the mandatory fees provision does not concern the reasonableness of the amount of fees awarded, and thus should not be considered on appeal.

The second issue is whether the district court abused its discretion in finding

that the Residents' requested attorneys' fees were reasonable under *Brunzell*. The district court followed this Court's direction on remand, making detailed findings under *Brunzell* before awarding the Residents' fees under NRS 41.670. Because substantial evidence supports those findings, the district court's orders awarding the Residents attorneys' fees should be affirmed in full.

III. OBJECTION TO APPELLANT'S STATEMENT OF FACTS

NRAP 28(a)(8) requires that an appellant's brief contain "a statement of facts ***relevant to the issues submitted for review***." (emphasis added). Rather than focusing on the relevant facts for this appeal, the Landowners rehash their baseless allegations from their complaint as if they are established facts. All of the "facts" set out in the first six pages of the Landowner's "Statement of Case," which are repeatedly raised throughout the Opening Brief, merely refer to the Landowner's complaint. AOB at 1-6 (citing 1 APP 0001-0095). Not only are these purported "facts" irrelevant to this appeal, this Court has already been found that they are unsubstantiated.

On December 10, 2020, the district court found that the Landowners had failed to present any admissible evidence to satisfy their burden on the second prong of the anti-SLAAP analysis. *Cf. Omerza v. Fore Stars, Ltd*, No. 76273, 2020 WL 406783, at *3 (Nev. Jan. 23, 2020) (unpublished disposition) (providing that a plaintiff "must demonstrate that the claim is supported by a prima facie showing of facts that, if

true, would support a favorable judgment" by "point[ing] to competent, admissible evidence"). On remand, after the district court allowed the Landowners some limited discovery, and the Landowners still failed to meet their *prima facie* evidentiary burden, the district court granted the Residents' anti-SLAPP motion and entered its findings of fact, conclusions of law, and order. 9 APP 1260-1272. The Landowners appealed again, and this Court affirmed the district court's order granting the anti-SLAPP motion. This Court expressly found that the Landowners "did not show with prima facie evidence an agreement to accomplish an unlawful objective for the purpose of harming appellants, and that appellants suffered damages as a result, which are necessary elements of their conspiracy claim." *Fore Stars, Ltd. v. Omerza*, Nos. 82338, 82880, 2022 WL 1301754, at *1 (Nev. Apr. 29, 2022) (unpublished disposition). Consequently, the allegations in the Landowners' complaint and the underlying dispute have already been found to be unsupported and are not at issue in this appeal. The district court's findings that were affirmed by this Court are therefore the established facts on appeal. *See generally Wyman v. State*, 125 Nev. 592, 600, 217 P.3d 572, 578 (2009) (recognizing that "the lower court's factual findings are generally binding on appeal").

Since the Landowners' attempt to rewrite the factual history is improper and irrelevant to this appeal, the Residents request that the Court strike or disregard these "facts."

IV. COUNTER-STATEMENT OF RELEVANT FACTS AND PROCEDURAL BACKGROUND

The facts underlying the Landowners' claims, which they improperly included in their Opening Brief, need not be rehashed here. Not only are they disputed, the key facts have no evidentiary support. In any event, the facts about what purportedly occurred ***before*** this lawsuit was filed have no bearing on what happened ***during*** the litigation—which is all that is at issue when determining whether the requested attorneys' fees are reasonable. Instead, the relevant background for this Court's consideration on appeal is the multi-year fight over the Residents' right to recover fees under the mandatory fee-shifting statute – NRS 41.670.

A. This Court Reverses the District Court's Order Denying the Residents' Anti-SLAPP Motion.

In 2018, the Landowners sued the Residents for their grass roots effort to gather written statements to present to the Las Vegas City Council before its consideration of the Landowners' requested modification to a master plan and the City's general plan. 1 APP 0001-0095. In response to the Landowners' claims, the Residents filed an anti-SLAPP motion, 2 APP 0163-0197, which the district court denied. 2 APP 0163-0197, 4 APP 0524-0537. The Residents appealed and this Court reversed, determining that the Residents' communications were good-faith communications in furtherance of their right to free speech in connection with an

issue of public concern, thereby satisfying their burden under the first step of the anti-SLAPP analysis. This Court remanded for the district court to determine the Landowners' request for discovery under NRS 41.660(4). *See generally Omerza*, 2020 WL 406783.

B. Upon Remand, the District Court Allowed Limited Discovery.

Under this Court's directive on remand, the district court considered the Landowners request for, and allowed, limited discovery on the Landowners' burden on the second step of the anti-SLAPP analysis. 6 APP 0753. Further increasing the costs of litigation, the Landowners attempted to defy the scope of the remand order, seeking excessive discovery and attempting to relitigate the first prong of the anti-SLAPP analysis. 6 APP 0731-0737. The Landowners requested depositions, requests for production of documents, and requests for admission through which they would "be able to ask the Defendants what documents they are relying on, what information they are relying on, or if that information was provided to them by third persons." 6 APP 0789.

The Landowners' efforts to demand broad discovery required significant court intervention. After the district court first permitted limited discovery via a minute order, 6 APP 0749, which was later clarified, 6 APP0753, the Landowners still propounded overbroad discovery beyond the scope authorized by the district court and NRS 41.660(4). This required the Residents to seek a protective order.

6 APP 0754-0799. The district court withdrew its prior minute orders and issued a protective order to confirm the limited nature of the permitted discovery. 6 APP 0822-0829.

The Landowners claim that the Residents did not properly respond to the discovery requests. AOB at 40. Yet the record does not reflect that the Landowners ever moved to compel—because they never did so. Instead, it was the Landowners that served overbroad and inappropriate discovery requests, requiring Residents' counsel to engage in additional work.

C. This Court Affirmed the District Court's Subsequent Order Granting the Residents' Anti-SLAPP Motion, but Reversed and Remanded the Attorneys' Fees Award for the District Court to Consider the *Brunzell* Factors.

After discovery, the district court allowed supplemental briefing on the Residents' anti-SLAPP motion. 7 APP 0830-1257. True to form, unhappy with this Court's affirmance on the first prong, and without regard to the increased costs they were causing, the Landowners spent almost their entire brief rearguing what had been decided on appeal and was not part of the remand order. 7 APP 0830-0849. That Landowners expressly argued that the issue resolved by this Court—that the Residents' met their prong-one burden—was to be reconsidered by the district court on remand. *See, e.g.*, 7 APP 0845 ("This court [the district court] should determine that there is evidence to the contrary and that Defendants cannot meet their burden in prong one."). The Landowners dedicated less than a page of their brief to arguing

that they had sufficient evidence to meet their burden under prong two of the anti-SLAPP analysis. 7 APP 0845.

The district court granted the Residents' anti-SLAPP motion. 9 APP 1260-1272. In so doing, the district court found that the Landowners failed to meet their burden on the second prong. 9 APP 1260-1272. Noting that this Court already determined that the Landowners had not met their burden in their prior briefing, the district court considered whether the Landowners "offered any new evidence or legal argument in an attempt to meet their burden on remand." 9 APP 1268. The district court found that the Landowners did not offer any admissible evidence to support their civil conspiracy claim or that it suffered any damages. 9 APP 1268-1270. The Landowners moved for reconsideration, which the district court denied. 9 APP 1302-1356, 11 APP 1592, 1597-1604. The Landowners then appealed the district court's order.

D. The District Court Granted the Residents' First Fee Motion Under NRS 41.670.

The Residents then moved for attorneys' fees under NRS 41.670. 9 APP 1357-1420; Suppl. App. 001-064. The First Fee Motion requested an award of hourly fees of just over $350,000 (based on a lodestar analysis) and an enhancement of an equal amount because the Residents' counsel handled the defense on a contingency basis. 9 APP 1357-1374; Suppl. App. 001-064.

The Landowners opposed the request, claiming the fees sought were

unreasonable. 10 APP 1478-1507; AOB at 8-9 (confirming that the Landowners only objected to the reasonableness of the requested fees). While the Landowners lamented that "the Defendants have not paid any legal fees, but instead, the firm representing them, a firm headed by co-conspirator Frank Schreck,[2] is representing them on a contingency fee basis," 10 APP 1479; 1482; 1489-1491, they never claimed that this should preclude the Residents from recovering *any* fees under NRS 41.670. The district granted the Residents' First Fee Motion, awarding them $363,244.00 under NRS 41.670 ("First Fee Order"). 9 APP 1415-1620. The Landowners appealed this order as well. 11 APP 1640-1650.

E. This Court Affirmed the Order Granting the Anti-SLAPP Motion and Remanded the Order Awarding Fees for the District Court to Conduct the Required Analysis Under *Brunzell*.

Relevant to the instant appeal, in their appeal of the attorneys' fee award, the Landowners again raised the purported impropriety of the Residents' counsels' defense of the case on a contingency basis. Appellants' Opening Brief in Consolidated Case Nos. 82338, 82880, at 48-49 (filed on Oct. 11, 2021). But they did not argue that the Residents had no right to recover *any* fees under NRS 41.670 as a result of their contingency fee agreement with their counsel.

[2] The Landowners incessant defamatory attacks on Mr. Schreck as a "co-conspirator" (and much worse) is worthy of comment and admonishment by this Court, particularly since this Court has already determined that there is no evidence of any illicit conspiracy.

This Court affirmed the order granting the Residents' anti-SLAPP motion and remanded the First Fee Order with instructions. In remanding the attorneys' fee award, this Court determined that the district court "abused its discretion by awarding attorneys fees without making the required findings." *Fore Stars, Ltd.*, 2022 WL 1301754, at *2. This Court instructed the district court on remand "to consider the *Brunzell* factors and make the necessary findings to support the fee award." *Id.* In a footnote, this Court confirmed that it had considered and concluded that all of the Landowners' other arguments were either not raised on appeal or did not warrant additional relief. *Id.* at *2 n.7.

F. On Remand, the District Court Again Awarded the Residents' Attorneys' Fees, Entering an Order that Sufficiently Addressed the *Brunzell* Factors.

Upon remand, but without the need for any additional briefing, the district court entered its order granting the Residents' First Fee Motion, engaging in a comprehensive analysis of the *Brunzell* factors ("Second Fee Order"). 11 APP 1657-1666. Faced with another loss, the Landowners moved for reconsideration of the Second Fee Order. 11 APP 1667-1865. While briefing on the motion for reconsideration was ongoing, the Landowners appealed the Second Fee Order. 13 APP 1876-1888. That appeal was later dismissed given the pending reconsideration motion. 15 APP 2113-2114.

Later, the district court entered its order denying the Landowners' motion for

reconsideration, confirming its award of attorneys' fees to the Residents in the amount of $363,244.00 ("Reconsideration Order"). 15 APP 2115-2125. The Landowners then initiated the instant appeal. 15 APP 2140-2152.

G. The District Court Properly Granted the Residents' Second Fee Motion.

The Residents moved for additional attorneys' fees for the work performed since their First Fee Motion. 13 APP 1896-1908. The district court granted the Second Fee Motion, awarding the Residents an additional $43,620.50 in attorneys' fees ("Supplemental Fee Order," together with the Second Fee Order and Reconsideration Order, "Fee Orders"). 15 APP 2126-2139. Like its Second Fee Order, the district court's Supplemental Fee Order fully analyzed the *Brunzell* factors when it awarded the Residents' additional fees under NRS 41.670. 15 APP 2126-2139.

The Landowners amended their notice of appeal to include the Supplemental Fee Order. 15 APP 2153-2179.

V. SUMMARY OF THE ARGUMENT

The Residents prevailed on their anti-SLAPP motion, as affirmed by this Court. NRS 41.670 required the district court to award the Residents' reasonable attorneys' fees and costs as the prevailing defendants. This Court has confirmed that the Residents are entitled to the statutory fees, remanding only the issue of the reasonableness of the fees awarded under *Brunzell* for the district court to consider.

And that is precisely what the district court did. The district court properly found, after conducting a thorough analysis of the *Brunzell* factors, that the Residents' requested fees were reasonable.

But on remand before the district court and in this appeal, the Landowners attempt to raise a new argument that the Residents are not entitled to recover *any* statutory fees because they have not "incurred" attorneys' fees since their counsel defended them on a contingency basis. While the Landowners attempt to raise this as part of the *Brunzell* analysis, this entitlement argument does not go to the *reasonableness* of the *amount* of fees awarded. It has no place in this appeal. The Residents prevailed and they are entitled to recover reasonable attorneys' fees.

As to the only true issue before this Court—the reasonableness of the attorneys' fees awarded—the Landowners have not shown that the district court abused its discretion. The Residents' requested fees were supported by substantial evidence[3] and the Fee Orders thoroughly addressed the *Brunzell* factors before awarding the Residents attorneys' fees.

Because the district court conducted the required *Brunzell* analysis, as this Court directed, and substantial evidence supports the fees awarded, this Court should affirm the Fee Orders.

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[3] "[E]vidence that a reasonable mind might accept as adequate to support a conclusion." *Winchell v. Schiff*, 124 Nev. 938, 944, 193 P.3d 946, 950 (2008).

VI. LEGAL ARGUMENT

A. The Landowners' Entitlement Argument is Waived as It Was Raised for the First Time After This Court Entered Its Remand Order Limiting the Scope of the District Court's Review to the *Brunzell* Factors.

In their opposition to the Residents' First Fee Motion, the Landowners argued that "the [Residents] have not paid any legal fees, but instead, the firm representing them, a firm headed by co-conspirator Frank Schreck, is representing them on a contingency fee basis." 10 APP 1479; 1482; 1489; 1491. The Landowners, however, did not argue or ask the district court to deny the Residents' attorneys' fees because they "ha[d] not paid any legal fees" due to their contingency fee agreement with their counsel and thus were not entitled to recover *any* fees under NRS 41.670.[4] Instead, the Landowners argued that no lodestar enhancement should be applied and the requested fees were unreasonable. 10 APP 1482. Because they did not contest the Residents' ability to recover *any* attorneys' fees under NRS 41.670 initially to the district court in opposing the First Fee Motion, the Landowners waived any right to raise it on appeal. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (confirming that a point not urged below "is deemed to have been waived and will not be considered on appeal").

[4] The Landowners only claimed that *no* fees should be awarded under NRS 41.670 because the fees requested were "unreasonably inflated in a brazen and transparent (the only thing transparent about their billing) attempt to get revenge on [the Landowners]." 10 APP 1479.

Presumably realizing that they had waived this argument in their initial appeal of the attorneys' fee award, the Landowners did not explicitly ask this Court to reverse the First Fee Order based on the Residents' purported inability to collect any fees due to the contingent nature of the fee agreement with their counsel. The Landowners only challenged the reasonableness of the fees awarded, lamenting that the nature of the contingency agreement "cast[s] serious doubts on the reasonableness" of the requested fees. *See* Appellants' Opening Brief in Consolidated Case Nos. 82338, 82880, at 47-53 (filed Oct. 11, 2021); Appellants' Reply Brief in Consolidated Case Nos. 82338, 82880, at 21-25 (filed Jan. 24, 2022).

Then, when faced with the same attorneys' fees at issue in the First Fee Motion and appeal, the Landowners changed tactics in their motion for reconsideration of the district court's Second Fee Order. Despite that remand was limited to addressing the *Brunzell* factors, the Landowners argued for the first time that *no* fees should be awarded "in the absence of a written contingency agreement" and because the Residents have not "incurred" any fees. 12 APP 1672-1674, 13 APP 1891-1892. The Landowners doubled-down on this waived argument in opposing the Residents' Second Fee Motion. 13 APP 1911, 1914-1916, 1919-1920.

The Landowners had every opportunity to raise their baseless entitlement argument and challenge the Residents' ability to collect fees under NRS 41.670 when it opposed the First Fee Motion. They failed to do so. The Landowners cannot

now contest the Residents' right to recover fees under NRS 41.670 after failing to raise it below.[5] *See Recontrust Co. v. Zhang*, 130 Nev. 1, 9, 317 P.3d 814, 819

[5] To the extent that the Landowners claim they did challenge the Residents' entitlement to fees under NRS 41.670 in opposing the first fees motion and in the initial appeal of the fees order, the law-of-the-case doctrine still precludes these arguments in this appeal.

"The law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." *Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quotation marks and citation omitted); *Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010) (providing that for the doctrine to apply, this Court must have actually address[ed] and decide[d] the issue explicitly or by necessary implication"). If the Landowners raised their entitlement argument in the initial appeal, this Court necessarily rejected this argument when it remanded the order granting the Residents' motion for attorneys' fees only on the reasonableness of the amount—not entitlement. *Fore Stars, Ltd.*, 2022 WL 1301754, at *2. This Court determined that the district court "abused its discretion by awarding attorneys fees without making the required findings," instructing the district court on remand "to consider the *Brunzell* factors and make the necessary findings to support the fee award." *Id.* The remand order did not direct the district court to reconsider the Residents' ability to collect fees under NRS 41.670. This Court confirmed that it rejected all the Landowners' other arguments when it stated in a footnote that it had considered and concluded that all of the Landowners' other arguments were either not raised on appeal or did not warrant additional relief. *Id.* at *2 n.7.

This appeal is about the same attorneys' fees at issue in the prior appeal. Thus, if the Landowners contend they are raising the same arguments previously raised based on these same facts, then these arguments have been rejected. Thus, the law of the case controls that the Residents are entitled to recover attorneys' fees as the prevailing defendants under NRS 41.670. *See Dictor*, 126 Nev. at 44, 223 P.3d at 334; *SFR Invs. Pool 1, LLC v. Bank of Am., N.A.*, No. 78736, 2020 WL 5637518, at *1 (Sept. 18, 2020) (unpublished disposition). Even if the Landowners' argument regarding entitlement is more developed in the instant appeal, the doctrine still forecloses the Landowners' attempt at a second bite at the apple. *See Hall*, 91 Nev. at 316, 535 P.2d at 799 ("The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings.").

(2014) ("'[A] question that could have been but was not raised on one appeal cannot be resurrected on a later appeal to the same court in the same case.'" (quoting Wright, Miller & Cooper, 18B Fed. Prac. & Proc. Juris. § 4478.6 (3d ed.)); *see also, e.g.*, *Jimenez v. Franklin*, 680 F.3d 1096, 1100 (9th Cir. 2012) ("Defendants knew everything they needed to know about their joint and several liability for the attorney fee award at the time of the prior appeal. If they wanted to challenge the joint and several liability, they should have done so at that time. They did not, so the challenge has been waived."); *United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996) ("A party cannot use the accident of a remand to raise in a second appeal an issue that he could just as well have raised in the first appeal because the remand did not affect it."); *Munoz v. Imperial Cnty.*, 667 F.2d 811, 817 (9th Cir. 1982) ("We need not and do not consider a new contention that could have been but was not raised on the prior appeal."); *Nw. Indiana Tel. Co. v. F.C.C.*, 872 F.2d 465, 470 (D.C. Cir. 1989) ("It is elementary that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand. This widely-accepted rule … prevents the 'bizarre result' that 'a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost.'" (citations omitted)).

The Landowners have thus waived their entitlement argument and the scope of this appeal is limited to the reasonableness of the fees awarded under *Brunzell*.

B. The Scope of Remand was Limited to the Reasonableness of the Fees Awarded Under *Brunzell*.

Since the Landowners only challenged the First Fee Motion and First Fee Order based on the reasonableness of the fees requested, this Court remanded only as to reasonableness, directing the district court to consider the *Brunzell* factors. *Fore Stars, Ltd.*, 2022 WL 1301754, at *2. Consequently, the scope of remand was, and this appeal is limited to, whether the district court conducted the proper *Brunzell* analysis, as this Court directed.[6] *State v. Eighth Jud. Dist. Ct.*, No. 86007, 2023 WL 6781265, at *1 (Nev. Oct. 12, 2023) (unpublished disposition) (recognizing that "after a remand with instructions, the district court must 'enter judgment in conformity with the order of the appellate court, and that order is decisive of the character of the judgment to which the appellant is entitled' and, further, that the district court may not reopen the facts, accept new arguments, or retry the case" (quoting *Butler v. Superior Ct.*, 104 Cal. App. 4th 979, 982 (2002)); 5 C.J.S. Appeal and Error § 1009 ("When an appellate court reverses and remands the cause with a specific mandate, the only proper issue on a second appeal is whether the trial court's order is in accord with the mandate."). The Landowners' post-remand entitlement argument is beyond the scope of remand, and thus should not be considered by this

[6] The district court correctly concluded in denying the Landowners' motion for reconsideration of the fee award that this Court "remanded this matter to the District Court for the sole purpose of considering the *Brunzell* factors in granting Defendants' request for attorney's fees." 15 APP 2119.

Court.

C. Even if this Court Were to Consider the Landowners' Post-Remand Entitlement Argument, This Argument Still Fails.

Following the American Rule, Nevada allows for attorneys' fees to be awarded only where "a statute, rule, or contract authorizes shifting them from one party to another." *Las Vegas Rev.-J. v. Clark Cnty. Off. of the Coroner/Med. Exam'r*, 138 Nev. __, __, 521 P.3d 1169, 1173 (2022). In the anti-SLAPP context, if a special motion to dismiss is granted, NRS 41.670 provides that the district court "shall award reasonable costs and attorney's fees to the person against whom the action was brought." NRS 41.670(1)(a). By its own language, an award of attorneys' fees under NRS 41.670 is mandatory. *See Goudge v. State*, 128 Nev. 548, 553, 287 P.3d 301, 304 (2012) ("The use of the word 'shall' in [a] statute divests the district court of judicial discretion."). And this Court's prior decisions confirm that a prevailing defendant is ***entitled*** to an award of attorneys' fees. *See, e.g., Byrd v. Hall Jaffe & Clayton, LLP*, Nos. 84827, 85422, 2023 WL 3406582, at *1 (Nev. May, 11 2023) (unpublished disposition) (concluding that "the district court did not abuse its discretion in awarding HJC attorney fees ***as required*** by NRS 41.670(1)(a)" (emphasis added)); *Smith v. Zilverberg*, 137 Nev. 65, 73, 481 P.3d 1222, 1231 (2021) (concluding "that [the legislature] intended to permit a prevailing defendant to recover all reasonable fees and costs" under NRS 41.670(1)(a)); *LHF Prods., Inc. v. Kabala*, No. 2:16-CV-02028-JAD-NJK, 2019 WL 7403960, at *5 (D. Nev. Dec. 31,

2019), *aff'd sub nom.*, 848 F. App'x 802 (9th Cir. 2021) (stating that "it appears that an award for attorney's fees under NRS §41.670(1)(a), like under California's anti-SLAPP statute, is mandatory"). Thus, the district court did not err in awarding attorneys' fees to the Residents under NRS 41.670.

1. NRS 41.670 does not require that a prevailing defendant have "incurred" fees to be awarded fees.

It is basic tenant of statutory interpretation that "[w]hen construing a statute, this court looks to the words in the statute to determine the plain meaning of the statute, and this court will not look beyond the express language unless it is clear that the plain meaning was not intended." *Hernandez v. Bennett-Haron*, 128 Nev. 580, 595, 287 P.3d 305, 315 (2012). This Court cannot change or add language to a statute; it must give effect to the language used in the statute. *Seaborn v. First Jud. Dist. Ct.*, 55 Nev. 206, 29 P.2d 500, 503 (1934) (confirming that "courts have no authority to eliminate language used in a statute or to change its obvious meaning, but are bound to give effect where possible to all the language used").

The Landowners claim that the district court erred by awarding fees under NRS 41.670 without "determin[ing] whether the attorney's fees it was awarding had been paid or actually incurred by the prevailing party." AOB at 18. But NRS 41.670(1)(a) imposes no such requirement. The statute is clear on its face that if the district court grants a special motion to dismiss, it "shall award reasonable costs and attorney's fees to the person against whom the action was brought." NRS

41.670(1)(a). The Landowners' argument tries to add the word "incurred" to this statute. Doing so would impose a limitation not otherwise included in the statute, which would change the meaning of the statute beyond its plain terms. That is not this Court's job. *See Holiday Ret. Corp. v. State, DIR*, 128 Nev. 150, 154, 274 P.3d 759, 761 (2012) ("It is the prerogative of the Legislature, not this court, to change or rewrite a statute.").

Critically, the anti-SLAPP statute includes the word "incurred" when referencing attorneys' fees, but ***in another subsection that applies in a different context than the one at issue here.*** Whereas NRS 41.670(1)(a) provides for mandatory award of reasonable attorneys' fees (without the "incurred" requirement) to a defendant who prevails on any anti-SLAPP motion, Subsection (2) is quite different. When a defendant files an anti-SLAPP motion that is denied and the district court determines the motion was frivolous or vexations, the plaintiff is entitled to fees, but only those "attorney's fees ***incurred*** in responding to the motion." NRS 41.670(2) (emphasis added). The legislative history of this statute demonstrates that this is no accident. In 2013, NRS 41.670 was first amended to allow a plaintiff who successfully ***resists*** an anti-SLAPP motion to recover attorneys' fees, but only if the district court determines the anti-SLAPP motion was frivolous or vexatious. S.B. 286, 2013 Leg., 77th Sess. (Nev. Mar. 15, 2013). In that amendment, the legislature explicitly included the "incurred" requirement to

that provision. The legislature did not amend Subsection 1(a) to include the same limitation. Thus, this Court "must presume that the inclusion or omission of these words from different parts of the statute was purposeful." *Knickmeyer v. State ex rel. Eighth Jud. Dist. Ct.*, 133 Nev. 675, 678–79, 408 P.3d 161, 165 (Nev. App. 2017).

In 2015, the Nevada legislature had another opportunity to add the word "incurred" when it considered revising the attorneys' fees provision in NRS 41.670(1)(a) had it wanted to. As introduced, Senate Bill 444 revised NRS 41.670(1)(a) to state that "[i]f the court determines that the plaintiff has not established prima facie evidence of each and every element of the claim except such elements that require proof of the subjective intent or knowledge of the defendant, ***the court shall*** dismiss the claim and ***award the defendant reasonable attorney's fees*** and costs ***incurred*** in bringing the special motion to dismiss." S.B. 444, 2015 Leg., 78th Sess. (Nev. Mar. 23, 2015) (as introduced before the Committee on Judiciary) (emphasis added). This revision, however, was deleted by Assembly Amendment 861 to S.B. 444. *See* Assemb. Amendment No. 861 to S.B. 444 (First Reprint), 2015 Leg., 78th Sess. (Nev. May 19, 2015).[7]

The legislature's decision not to include the term "incurred" in NRS

[7] Available at https://www.leg.state.nv.us/App/NELIS/REL/78th2015/Bill/2121/Text.

41.670(1)(a), despite having the opportunity to do so, demonstrates that the legislature did not intend to limit a prevailing defendant's recovery of statutory fees to only those specifically "incurred." *See Szydel v. Markman*, 121 Nev. 453, 460, 117 P.3d 200, 205 (2005) (recognizing that the legislature's decision not to change certain provisions while changing others indicates that it did not want to change those provisions). Thus, this Court should not interpret NRS 41.670(1)(a) as though it includes the word "incurred," as the Landowners request.

2. The Landowners' interpretation of NRS 41.670 would conflict with the policy behind its enactment.

The Landowners' contention that no prevailing defendant can recover attorneys' fees if they do not prove they actually "incurred" fees conflicts with the very purpose of the mandatory fee-shifting statute. As this Court has explained, "[t]he purpose of Nevada's anti-SLAPP statutes" is to "filter out unmeritorious claims in an effort to protect citizens from costly retaliatory lawsuits arising from their right to free speech under both the Nevada and Federal Constitutions.'" (quotation marks and citation omitted)). *Smith*, 137 Nev. at 73, 481 P.3d at 1230. "To further these important purposes, the anti-SLAPP statutes provide immunity from civil liability for claims against protected speech." *Id.* at 73, 481 P.3d at 1231; *Sanson v. Bulen*, No. 82393, 2022 WL 1301751, at *1 (Nev. Apr. 29, 2022) (unpublished disposition) (recognizing "the anti-SLAPP statutes' goal of deterring litigants from filing meritless SLAPP suits in the future"). In line with these goals,

this Court confirmed "that [the legislature] intended to permit a prevailing defendant to recover ***all*** reasonable fees and costs" under NRS 41.670(1)(a) from the start of the litigation. *Smith*, 137 Nev. at 73, 481 P.3d at 1230 (emphasis added). Limiting NRS 41.670(1)(a) to only those prevailing defendants that have fronted the costs of their defense would stifle the purpose of "provid[ing] immunity from civil liability for claims against protected speech." *Id.* at 73, 481 P.3d at 1231.

Such a bar to fees would have expansive consequences that contradict public policy. For example, requiring a party to have paid fees to recover fees under NRS 41.670 would foreclose awarding fees to a party represented by pro bono counsel. "To impose the burden of the cost of litigation on those who volunteer their services, when the other party has the means to pay attorney fees, would be unjust." *Miller v. Wilfong*, 121 Nev. 619, 622-23, 626, 119 P.3d 727, 730, 732 (2005) (concluding that "attorney fee awards to pro bono counsel are proper, provided that a legal basis exists and the proper factors are applied to support an award"); *see also Zamora v. Auto Gallery, Inc.*, No. 2:12-CV-01357-APG-CW, 2015 WL 627994, at *1 (D. Nev. Feb. 12, 2015) ("Nevada law permits me to award attorneys' fees to pro bono counsel.").

In light of these policy interests, it would be improper to limit the award of fees under NRS 41.670(1)(a) to only those defendants exercising their free speech

rights that can front their defense costs.[8] *See, e.g.*, *Smith & Wesson Brands, Inc. v. SW N. Am., Inc.*, No. 2:22-CV-1773-JCM-EJY, 2023 WL 4350582, at *3 (D. Nev. July 5, 2023) ("Anti-SLAPP statutes are designed 'to compensate a defendant for the expense of responding to a SLAPP suit. To this end, the provision is broadly construed so as to effectuate the legislative purpose of reimbursing the prevailing defendant for expenses incurred in extracting herself from a baseless lawsuit.'" (citation omitted)); *see also, e.g.*, *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986), *supplemented*, 483 U.S. 711 (1987) (recognizing "the rationale behind the usual fee-shifting statute" is to "enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws"); *Fields v. Elected Offs. Ret. Plan*, 459 P.3d 503, 506 (Ariz. Ct. App. 2020) (recognizing that "a contingent fee agreement to surrender any fee-shift award represents the only economic option—shifting the risk and expense of litigation to counsel" where parties seek to pursue

[8] Other states have confirmed that the purpose of their state's anti-SLAPP fee-shifting statutes are intended to secure representation to deter the burden of litigation expenses in the defense of the right to free speech. *See, e.g.*, *Ketchum v. Moses*, 17 P.3d 735, 741 (Cal. 4th 2001) (awarding fees despite contingency representation after recognizing that California's analogous fee-shifting provision was "intended to discourage such strategic lawsuits against public participation by imposing the litigation costs on the party seeking to 'chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.'" (citation omitted)).

public interest litigation with no claims for damages).

3. The bar against awarding attorney litigants fees does not apply.

Given that the plain terms of NRS 41.670 do not require that a prevailing defendant have "incurred" fees to be awarded fees, the Landowners resort to claiming that this Court's case law imposes such a requirement. The Landowners cite three cases for this contention. AOB at 20-23. None of them support imposing such a requirement here. Instead, they all concern the generally accepted bar to awarding fees to attorneys representing themselves or their law firms, which does not apply as the Residents are not attorneys representing themselves.

In *Sellers v. Fourth Jud. Dist. Ct.*, this Court considered whether an attorney litigant in justice court could recover prevailing party fees under NRS 69.030.[9] 119 Nev. 256, 258-59, 71 P.3d 495, 497 (2003), as corrected (July 9, 2003). In that context, the Court determined that, to "give effect to the Legislature's clear intent that the prevailing party in justice's court be reimbursed by the losing party for out-of-pocket costs incurred to prosecute the suit," all pro per litigants, whether an attorney or not, "be obligated to pay attorney fees as a prerequisite for an award of prevailing party attorney fees." *Id.* at 259, 71 P.3d at 498. Similarly, in *Frank*

[9] NRS 69.030 provides that "[t]he prevailing party in any civil action at law in the justice courts of this State shall receive, in addition to the costs of court as now allowed by law, a reasonable attorney fee. The attorney fee shall be fixed by the justice and taxed as costs against the losing party."

Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd., this Court held that "attorneys who represent themselves in litigation generally may not recover attorney fees for doing so." 124 Nev. 1206, 1221, 197 P.3d 1051, 1061 (2008) (concerning offer of judgment fees); *Dezzani v. Kern & Assocs., Ltd.*, 134 Nev. 61, 71, 412 P.3d 56, 63 (2018) (concluding that "attorneys representing themselves or their law firms cannot recover attorney fees because those fees are not actually incurred").

The Landowners deduce from these cases that "a prevailing party litigant has actually paid or incurred an obligation to pay attorney's fees" to be awarded fees under a fee-shifting statute, and that "[n]othing indicates a similar interpretation should not be applied to NRS 41.670(a)(1)." AOB at 22-23. None of these cases, however, concern comparable statutory fee provisions to NRS 41.670 that were enacted to promote important social policies. *Smith*, 137 Nev. at 73, 481 P.3d at 1231 (confirming the purpose of the anti-SLAPP statutes are to "provide immunity from civil liability for claims against protected speech"); *John v. Douglas Cnty. Sch. Dist.*, 125 Nev. 746, 753, 219 P.3d 1276, 1281 (2009), *superseded by statute on other grounds, as recognized in Shapiro v. Welt*, 133 Nev. 5, 37, 389 P.3d 262, 266 (2017) ("Nevada's anti-SLAPP statute is predicated on protecting 'well-meaning citizens who petition [the] government and then find themselves hit with retaliatory suits known as SLAPP[ ] [suits].'" (citation omitted)). Nothing in these cases suggest that this narrow bar should be extended beyond the context of attorney

litigants. The Landowners fail to point to a single Nevada case outside the narrow attorney-litigant context in which a party represented by counsel must prove that it has paid or "incurred" fees to be awarded fees under a mandatory fee-shifting statute.

Nevada case law instead supports that, outside the attorney-litigant scenario, a prevailing party need not have paid fees to their counsel to be awarded statutory attorneys' fees. For example, where a party is represented pro bono and has not paid fees to their counsel, this Court has held that "a party is not precluded from recovering attorney fees solely because his or her counsel served in a pro bono capacity." *Miller*, 121 Nev. at 622, 119 P.3d at 729; *see, e.g.*, *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 559-560, 429 P.3d 664, 671-672 (Nev. App. 2018) (stating that "attorney fees are permissible in pro bono cases, where there are likewise no billing statements"). Similarly, the Nevada Court of Appeals has recognized that fees are recoverable when an attorney risks not being paid at all through contingency arrangements. *O'Connell*, 134 Nev. at 559, 429 P.3d at 671.

The instant situation also differs from the attorney-litigant context because unlike an attorney representing themselves or their firm, the Residents would have had to retain defense counsel had their current counsel not agreed to represent them under a contingency arrangement. The Residents should not be punished by being denied the mandatory attorneys' fee award because they found and negotiated with counsel whereby counsel would be paid for their work upon a successful defense.

Indeed, this case clearly demonstrates why. The purpose of the anti-SLAPP statute is allow defendant "to obtain an early and expeditious resolution of a meritless claim for relief that is based on protected activity." *Panik v. TMM, Inc.*, 139 Nev. __, __, 538 P.3d 1149, 1151 (2023). Here, Landowners—wealthy developers—have managed to prevent the expeditious resolution of this case by committing substantial sums to incessant efforts (including improper discovery, meritless reconsideration motions, and more) to bludgeon the Residents into submission. Few defendants could muster the financial resources to stand their principled (and righteous) First Amendment ground. That the Residents might not have been able to finance their anti-SLAPP defense (or did not have to commit their retirement savings or investment success to doing so) should not inure to the benefit of the Landowners. Otherwise, defendants of limited means will be left with no choice but to succumb to the threats of wealthy plaintiffs who do not care about the merits of their case, but only intend to bully their critics into surrendering their First Amendment rights. Nor should the Residents' counsel be penalized for taking the risk associated with defending the Residents' on a contingent basis. They should not be forced to work on a pro bono basis ***to the benefit of the Landowners.***

Accordingly, this Court should not extend the narrow bar to recovery of statutory fees for attorney litigants to require that a prevailing defendant represented by counsel prove they have paid fees to be awarded fees under NRS 41.670.

4. Requiring that a party must "incur" fees to be awarded fees under a fee-shifting statute diverges from the majority of courts faced with similar issues.

This Court has not yet considered whether a prevailing defendant must have "incurred" or paid their counsel's fees to recover fees under NRS 41.670(1)(a). But the courts that have considered this issue under their state's SLAPP fee statutes have overwhelmingly rejected such a requirement.[10] *See, e.g.*, *Accuardi v. Fredericks*, No. 3:13-CV-01825-ST, 2014 WL 1618357, at *4 (D. Or. Apr. 22, 2014) (confirming that prevailing defendant represented by counsel "on a pro bono basis without compensation and to only seek payment of fees from [plaintiff] as the prevailing party through the fee-shifting statute," where no contingent fee agreement existed, was entitled to fees under Oregon's anti-SLAPP fees statute (Or. Rev. Stat. 31.152(3))); *Sobel v. Kent*, 2008 WL 3824801, at *3 (Cal. Ct. App. Aug. 18, 2008)

[10] Courts have also rejected imposing such a requirement in the anti-SLAPP context when the prevailing defendant has no legal obligation to pay its counsel's fees where a third party has paid such fees. *See*, *e.g.*, *Polay v. McMahon*, 10 N.E.3d 1122, 1131 (Mass. 2014) (citing cases) (confirming that prevailing defendant "is entitled to attorney's fees notwithstanding that his insurer paid for his defense" under Massachusetts's anti-SLAPP fees statute (Mass. Gen. Laws ch. 231, § 59H)); *Poulard v. Lauth*, 793 N.E.2d 1120, 1125 (Ind. Ct. App. 2003) ("We believe the legislative purpose of the attorney's fees provision of the anti-SLAPP statute is not advanced by allowing the award of attorney's fees to only those parties who have directly incurred that expense and are obliged to pay it, and by denying the award of fees to those litigants whose fees are paid by insurers or other non-parties."); *Macias v. Hartwell*, 55 Cal. App. 4th 669, 675 (1997) ("Appellant cites no authority, and we have found none, that a defendant who successfully brings an anti-SLAPP motion is barred from recovering fees if the fees were paid by a third party.").

(stating that "the fact that Akers incurred no fees to Kent for making the anti-SLAPP motion does not obviate an entitlement to fees that the statute would otherwise confer on Akers"); *Ketchum*, 17 P.3d at 741 (confirming that the mandatory anti-SLAPP fees provision under Cal. Civ. Proc. Code §425.16(c)(1) "encourages private representation in SLAPP cases, including situations when a SLAPP defendant is unable to afford fees or the lack of potential monetary damages precludes a standard contingency fee arrangement").[11]

Outside the SLAPP context, many courts have faced the question of whether a party must have "incurred" fees to be awarded fees under other fee-shifting statutes. Overwhelmingly, these courts have held that no such requirement exists as

[11] The Landowners contend that this Court should not rely on "California's jurisprudence on attorney's fees under its anti-SLAPP law" because of the purported "material differences between Nevada and California precedents as they relate to an award of attorney fees." AOB at 29-30. While Nevada and California's statutes differ as to whether an anti-SLAPP motion must be granted for fees to be awarded, *Padda v. Hendrick*, No. 78534, 2020 WL 1903191, at *2 (Nev. Apr. 16, 2020) (unpublished disposition) (cited on AOB at 29), they do not materially differ as relevant to the instant issues. *Compare* NRS 41.670(1)(a) ("If the court grants a special motion to dismiss … [t]he court shall award reasonable costs and attorney's fees to the person against whom the action was brought") *with* Cal. Civ. Proc. Code §425.16(c)(1) ("[A] prevailing defendant on a special motion to strike shall be entitled to recover that defendant's attorney's fees and costs."). Thus, this Court should look to California's extensive case law on this issue, which support that no fees to have been incurred to be awarded fees under NRS 41.670(1)(a). *See Shapiro*, 133 Nev. at 39, 389 P.3d at 268 (confirming that this Court "look[s] to California law for guidance" where "California's and Nevada's anti-SLAPP 'statutes are similar in purpose and language'" (citation omitted)).

a party need not have paid or be legally obligated to pay their counsel to be awarded statutory fees. *See, e.g., Ed A. Wilson, Inc. v. Gen. Servs. Admin.*, 126 F.3d 1406, 1409 (Fed. Cir. 1997) ("Generally, 'awards of attorneys' fees where otherwise authorized are not obviated by the fact that individual plaintiffs are not obligated to compensate their counsel. The presence of an attorney-client relationship suffices to entitle prevailing litigants to receive fee awards.'" (citation omitted)); *Barrios v. Diamond Cont. Servs., Inc.*, 461 F. App'x 571, 572–73 (9th Cir. 2011) (confirming that "Title VII's fee-shifting provision does not 'regulate what plaintiffs may or may not promise to pay their attorneys if they lose or if they win'" and thus the party's contingency fee agreement with counsel did not preclude a statutory fee award); *Lolley v. Campbell*, 48 P.3d 1128, 1131 (Cal. 4th 2002), as modified (Sept. 25, 2002) (stating that "in cases involving a variety of statutory fee-shifting provisions, California courts have routinely awarded fees to compensate for legal work performed on behalf of a party pursuant to an attorney-client relationship, although the party did not have a personal obligation to pay for such services out of his or her own assets.") (citing cases)).

Even where statutory fees provisions specifically award fees that have been "incurred," courts have confirmed that "incurred" does not literally mean that the client has paid or is legally obligated to pay fees for statutory fees to be awarded. For example, the United States District Court for the District of Nevada considered

whether a pro bono plaintiff can "'incur' fees under the False Claims Act fees provision, which provides that a party 'shall ... receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs[.]'" *United States ex rel. Ellis v. Jing Shu Zheng*, No. 2:16-CV-01447-APG-NJK, 2019 WL 3502880, at *1 (D. Nev. July 31, 2019) (quoting 31 U.S.C. § 3730(d)(2)). Referencing other cases in which the Ninth Circuit has confirmed that a pro bono plaintiff can "incur" fees under other fee-shifting statutes, that court held that fees had been incurred because Nevada Legal Services could "'seek and collect attorneys' fees in addition to any relief it seeks for'" the plaintiff as part of their attorney-client relationship arrangement. *Id.* (citing cases); *see also, e.g.*, *In re: Moon*, No. 13-BK-12466-MKN, 2021 WL 62630, at *4 (B.A.P. 9th Cir. Jan. 7, 2021) (citing cases) ("The Supreme Court and the Ninth Circuit Court of Appeals have held under other federal fee-shifting statutes that attorney's fees and costs are 'incurred' even when the plaintiff is not personally liable for them. This is true whether counsel is representing the plaintiff on a contingent fee basis or *pro bono publico*."); *Cuellar v. Joyce*, 603 F.3d 1142, 1143 (9th Cir. 2010) (confirming that pro bono plaintiff was entitled to "necessary expenses incurred by or on behalf of the petitioner, including … legal fees" under 22 U.S.C. §9007(b)(3): "[f]ee awards serve in part to deter frivolous litigation"); *Osprey Pac. Corp. v. United States*, 42 Fed. Cl. 740, 742, *appeal dismissed*, 215 F.3d 1344 (Fed. Cir. 1999) (providing that

obligations under contingency fee agreements are "actually incurred" for purposes of URA's fees statute); *Gotro v. R & B Realty Grp.*, 69 F.3d 1485, 1488 (9th Cir. 1995) (stating that "Congress' choice of the words 'actual expenses incurred'" in 28 U.S.C. § 1447 "do not limit the district court's discretion to award attorneys' fees to a contingency fee litigant"); *Phillips v. Gen. Servs. Admin.*, 924 F.2d 1577, 1583 (Fed. Cir. 1991) ("[T]o be 'incurred' within the meaning of a fee shifting statute, there must also be an express or implied agreement that the fee award will be paid over to the legal representative"); *Watford v. Heckler*, 765 F.2d 1562, 1565, 1567 n.6 (11th Cir. 1985) (stating that "in light of the act's legislative history and for reasons of public policy, plaintiffs who are represented without charge are not generally precluded from an award of attorneys' fees under the EAJA," which allows prevailing parties to recover fees "incurred by that party in any civil action").

As the foregoing cases demonstrate, many courts do not require that a party have paid or be obligated to pay their counsel's fees to be awarded fees under fee-shifting statutes. Nor should this Court.

The only case that the Landowners cite to support their claim that other states "require attorney's fees to be actually incurred before they are paid to a prevailing SLAPP defendant" is *Cruz v. Van Sickle*, 452 S.W.3d 503 (Tex. App. 2014). AOB

at 24.[12] While the Texas appellate court concluded in *Cruz* that the prevailing defendants were not entitled to fees under Texas' anti-SLAPP fees statute because they "did not incur any attorney's fees" as their counsel represented them pro bono, *id.* at 525, the Landowners conveniently fail to inform this Court that this decision was based on the explicit requirement in the statute that a prevailing defendant "shall" be awarded "court costs and reasonable attorney's fees ***incurred*** in defending against the legal action." Tex. Civ. Prac. & Rem. Code §27.009(a)(1) (emphasis

[12] The other cases cited by the Landowners concerning other fee-shifting statutes, AOB at 25, are distinguishable because they all concern statutes or contract provisions that expressly limit fee awards to those fees "incurred" or "actually incurred." *United States v. Paisley*, 957 F.2d 1161, 1164 (4th Cir. 1992) (denying fees under EAJA, which limits fees to those "incurred by that party in any civil action," to a "claimant with a legally enforceable right to full indemnification of attorney fees from a solvent third party" because the purpose of the fees provision to avoid the deterring effect that fees may have on a party's ability to litigate claims or defenses against the government would not be achieved); *S.E.C. v. Comserv Corp.*, 908 F.2d 1407, 1415–16 (8th Cir. 1990) (denying fees under EAJA because burden of fees would not have deterred litigation as third party was responsible for counsel's fees); *United States v. 122.00 Acres of Land, More or Less, Located in Koochiching Cnty., Minn.*, 856 F.2d 56, 58 (8th Cir. 1988) (reversing fee award under Relocation Act, which only allowed a property owner to be reimbursed for fees "actually incurred" in condemnation proceeding); *Andre v. City of W. Sacramento*, 92 Cal. App. 4th 532, 534 (2001) (denying fees where statute limited fees to those "actually incurred"); *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Est. Fund*, 68 A.3d 665, 683 (Del. 2013) (finding no fees were permitted under contractual fee provision limiting fees to fees that have been "incurred"); *Matter of Est. of Camacho*, 400 P.3d 605, 611 (Haw. Ct. App. 2017), *as amended* (Nov. 9, 2017) (concluding no fees permitted to personal representative where statute limited recoverable fees to those "incurred"); *Marshall v. Cooper & Elliott*, 82 N.E.3d 1205, 1213 (Ohio App. 2017) (finding no fee award was appropriate under statute limiting recoverable fees to those "incurred").

added). The *Cruz* court determined that because the statute specifically included the word "incurred," it "must give effect to the language used by the legislature and it is not [the court's] place to substitute our view of public policy for that of the legislature." *Cruz*, 452 S.W.3d at 524 ("The legislature has chosen to treat movants and respondents differently regarding the recovery of attorney's fees under the Act.").

Unlike Texas' anti-SLAPP fees statute that explicitly requires that fees have been "incurred" to be awarded, no such language exists in NRS 41.670(1)(a). Thus, just as the Texas appellate court "must give effect to the language used by the legislature," *id.*, this Court must too give effect—not add—to the language used by the legislature in drafting NRS 41.670. *See Holiday Ret. Corp.*, 128 Nev. at 154, 274 P.3d at 761; *Seaborn*, 55 Nev. 206, 29 P.2d at 503.

D. The Enforceability of the Contingency Agreement Between the Residents and Their Counsel Does Not Affect the Residents' Entitlement to Fees Under NRS 41.670.

The Landowners claim that no statutory fees can be awarded because the Residents have "failed to provide any written contingency fee agreement supporting their entitlement to an award of attorneys' fees" and their counsel cannot recover fees in the absence of a written contingency fee agreement in "violation of" NRPC 1.5(c). AOB at 32-36. This argument fails for three reasons.

First, the Landowners do not cite to a single authority for their proposition

that the Residents must produce a written contingency agreement to be awarded fees under the mandatory fee-shifting statute. AOB at 35. That is because there is no such requirement under Nevada law.

Second, the Landowners are not parties to, nor are affected by the fee agreement between the Residents and their counsel. The cases cited by the Landowners concern disputes over collecting fees for representation *between* an attorney and client. AOB at 33 (citing *Marquis & Aurbach v. Eighth Jud. Dist. Ct.*, 122 Nev. 1147, 1150, 146 P.3d 1130, 1133 (2006) (vacating fee award sought by firm for representing client because the contingency fee agreement between them was unenforceable); *Gonzales v. Campbell & Williams*, No. 81318, 2021 WL 4988154, at *1-3 (Nev. Oct. 26, 2021) (unpublished disposition) (concerning dispute between law firm and client who claimed "he did not have an 'independent agreement'" with firm)). Unlike those cases, this matter does not concern the enforceability of a fee agreement between the Residents and their counsel.

The other cases cited by the Landowners are also inapplicable as they concern allowing fees to counsel that was disqualified because of a conflict of interest with representing the other party where no consent was obtained. AOB at 32-33 (citing *Frank Settelmeyer & Sons, Inc.*, 124 Nev. at 1217, 197 P.3d at 1059 (concerning dispute between client and counsel as to whether counsel should be barred from recovering fees because they were disqualified because of an alleged conflict of

interest by representing the client company and its majority shareholder); *Hawkins v. Eighth Jud. Dist. Ct.*, 133 Nev. 900, 902, 407 P.3d 766, 769 (2017) (concerning whether sanctions for discovery violations can be awarded against Hawkins and to a disqualified law firm for work performed while violating "its duty of loyalty to" Hawkins, a former client)). These cases concern whether fees can be awarded when attorney-client relationships existed between counsel and two parties that may constitute as a conflict of interest in violation of the rules of professional conduct. There is no alleged attorney-client relationship between the Residents' counsel and the Landowners, or similar conflict of interest or disqualification. Nor is this a dispute between the Residents and their counsel.

The nature of the Residents and their counsel's fee agreement is of no consequence to the Landowners. And any hypothetical dispute over the enforceability of the contingency fee agreement is between the Residents and their counsel and does not affect that the Landowners are statutorily obligated to pay the Residents' attorneys' fees under NRS 41.670. *See, e.g., Hernandez v. New Rogers Pontiac, Inc.*, 773 N.E.2d 77, 81 (Ill. App. 2002) (rejecting argument that counsel's work is "made void by his failure to reduce the [contingency] fee agreement to writing" because any such violation is inapplicable when counsel's fees "were paid by" the opposing party pursuant to a fee-shifting statute and not under the contingency agreement).

Third, the contingency agreement between the Residents and their counsel is irrelevant and need not be produced to support an award of fees because the Residents did not seek to recover contingency fees under NRS 41.670.

This Court had made clear that "in determining the amount of fees to award, the court is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount, including those based on a 'lodestar' amount ***or a contingency fee***." *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864, 124 P.3d 530, 549 (2005) (footnotes omitted) (emphasis added). Thus, a "contingency fee arrangement is irrelevant" when the district court opts to follow "the lodestar method to calculate attorney fees." *Rushfield v. Est. of Marvin By & Through Kovalcin*, No. 67922, 2016 WL 7109111, at *2 (Nev. Dec. 2, 2016) (unpublished disposition); *Cooke v. Gove*, 61 Nev. 55, 114 P.2d 87, 89 (1941) ("The reasonable value of the services is not augmented by the fact that they were to be performed gratuitously if not successful."); *see also O'Connell*, 134 Nev. at 558, 429 P.3d at 670 (confirming that "the Nevada Supreme Court upheld an attorney fees award based on 'the reasonable value' of the attorney's services, even though the case was taken on a contingency fee basis with no formal agreement").

The Residents moved for fees under lodestar – not a contingency fee. Employing the lodestar analysis, the district court appropriately awarded fees based on the Residents' counsel's reasonable value of their services, as supported by

substantial evidence. *See* Section VI.E., *infra*. Thus, the private contractual relationship between the Residents and their counsel is irrelevant to a fee award under NRS 41.670.

Moreover, the Landowners' argument that the Residents "may gain an unjustified windfall" unless they are required to turn over any fees awarded to counsel under their contingency fee agreement is a red herring. AOB at 26-28. They argue that counsel retained through a contingency agreement holds the right to collect fees thereunder and thus counsel is the true party seeking the statutory fees and not "'the person against whom the action was brought.'" AOB at 28 (quoting NRS 41.670(1)(a)). But the Landowners conflate the right to collect fees from the client under a contract with a party's right to recover statutory fees. Neither logic nor the cases they cite support this argument. It is true that in a dispute between a client and their counsel, counsel can pursue its contractual right to fees under a contingency agreement or for the reasonable value of their services. *See Flannery v. Prentice*, 26 Cal. 4th 572, 589-90 (2001) (concerning dispute between counsel and client, "attorney fees awarded pursuant to [a statute] belong, absent an enforceable agreement to the contrary, to the attorneys who labored to earn them") (cited on AOB at 28). But it is still the client that holds the right to collect statutory fees—regardless of its contractual relationship with its counsel. *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 268, 71 P.3d 1258, 1263 (2003) ("The statutes that

permit an allowance of attorney fees specifically state that such an award is recoverable by the prevailing party; thus, the client, not the attorney, is awarded the attorney fees."); *see also Lolley*, 48 P.3d at 1131 n.2 ("The right of a party to seek an award of statutory attorney fees is not equivalent to a right to retain such fees.") (cited on AOB at 28).

Thus, whether fees awarded to the Residents are actually paid to their counsel is irrelevant to the Residents' entitlement to the fees under NRS 41.670. *See Venegas v. Mitchell*, 495 U.S. 82, 90 (1990) (confirming that a fee-shifting statute "controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer").

E. The District Court Engaged in Proper *Brunzell* Analyses in the Fee Orders.

An award of attorneys' fees is reviewed for an abuse of discretion. *Smith*, 137 Nev. at 73, 481 P.3d at 1231. "An abuse of discretion exists where the district court's decision is 'arbitrary or capricious or if it exceeds the bounds of law or reason.'" *Lee v. Patin*, No. 83213, 2024 WL 238082, at *1 (Nev. Jan. 22, 2024) (unpublished disposition). Thus, "[s]o long as the district court considers the *Brunzell* factors, 'its award of attorney fees will be upheld if it is supported by substantial evidence.'" *Id.* at 74, 481 P.3d at 1231 (citation omitted). Substantial evidence simply means that there is "evidence that a reasonable mind might accept as adequate to support a conclusion." *Winchell*, 124 Nev. at 944, 193 P.3d at 950. Sufficient substantial

evidence in the context of a fee award may include the "billing logs for the work performed, as well as declarations supporting the reasonableness of the rates and the work performed." *Smith*, 137 Nev. at 74 n.9, 481 P.3d at 1231 n.9.

1. The district court's attorneys' fee awards were supported by substantial evidence.

In an attempt to revive its waived argument that the Residents cannot be awarded fees they did not "incur," the Landowners claim there was insufficient evidence before the district court. AOB at 37. They claim that no invoices "suggesting that a 'balance is due'" were submitted—only a declaration from counsel and "internally generated fee charts." AOB at 37. Tellingly, the Landowners cite to no authority that such invoices are required. That is because they are not. In fact, "Nevada law does not require billing records with every attorney fees request." *O'Connell*, 134 Nev. at 557, 429 P.3d at 670. "[T]he district court is not confined to authorizing an award of attorney fees exclusively from billing records or hourly statements" as such a requirement would be "too restrictive." *Id.* at 558, 429 P.3d at 671. The Landowners' suggestion that the Residents had to submit invoices that reflected that "a 'balance is due'" to be awarded attorneys' fees is contrary to Nevada law. AOB at 37.

Regardless, the billing records submitted by the Residents contain the same information as an invoice: the date, timekeeper, hours worked, hourly rate, total amount, and a detailed narrative of the work performed. 9 APP 1393-1420,

13 APP 1908; Suppl. App. 037-064.[13] These records coupled with the declarations from the Residents' counsel are sufficient for the district court to consider the reasonableness of the requested fees. 9 APP 1377-1378, 1393-1420; 13 APP 1905-1908; Suppl. App. 037-064. But even if that were not enough (it is), the district court made clear that it considered "the timeline, exhibits and information submitted by" the Residents and the record in analyzing the *Brunzell* factors. 11 APP 1663. Accordingly, the attorneys' fees awards were supported by substantial evidence. *Smith*, 137 Nev. at 74 n.9, 481 P.3d at 1231 n.9; *see also Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015) (confirming that this Court "will affirm an award that is supported by substantial evidence").

2. <u>The district court properly found that the character of the work performed supported the attorneys' fee awards.</u>

Again attempting to invade the *Brunzell* analysis with their waived and baseless entitlement argument, the Landowners claim that the fees awarded were not reasonable under the character of the work factor because of Mr. "Schreck's actions as a co-conspirator in this case." AOB at 38-39. To begin, the Landowners' repeated misrepresentations and mischaracterizations of Mr. Schreck as a co-conspirator

[13] The copy of the billing records attached to the Residents' First Fee Motion submitted in the Joint Appendix at 9 APP 1393-1420 are partially cut off because they are oriented in landscape. Accordingly, the Residents have submitted a Supplemental Appendix with the Residents' First Fee Motion with the complete billing records visible. Suppl. App. 001-064.

should be stricken or disregarded. The district court found, and this Court affirmed, that the Landowners failed to submit even prima facie evidence sufficient to support their conspiracy claim. 9 APP 1298-1330, 11 APP 1653-1654. Thus, the Landowners' contentions that Mr. Schreck "instigated" this case as "part of a plan" with the Residents to "sabotage development" plans of the Landowners are baseless and have no place in the *Brunzell* analysis. AOB at 38-39.

Besides this meritless argument and their waived argument about the nature of the contingency arrangement between the Residents and their counsel, the Landowners do not otherwise contest the character of the work performed. Nor could they. As the district court found, the character of the work was "extremely significant" as it concerned the defense of the Residents' First Amendment rights related to "issues that are of immense concern to this community." 11 APP 1662-1663; 15 APP 2132. The work performed also involved complex and intricate issues of law, including Nevada's anti-SLAPP laws, the absolute litigation privilege, and pertinent Unified Development Code provisions related to amending the City's General Plan and related proceedings. 9 APP 1368-1372. Accordingly, the district court did not abuse its discretion in finding that this *Brunzell* factor supported the requested fee awards.

3. The district court properly found that the work performed supported the fee awards.

The Landowners contend that the "district court ignored" the purported

disparity between their counsel's fees and the Residents' counsel's fees and that the "amount awarded … far exceeds" the fees awarded in anti-SLAPP cases. AOB at 39-41. These arguments were repeatedly raised before the district court in the Landowners' oppositions and motions for reconsideration. 10 APP 1491-1500, 12 APP 1676-1677, 13 APP 1892-1893, 14 APP 1912-1919. But the district court disagreed, finding that the hours spent on this case were reasonable.[14] Just because the Landowners do not like the district court's decision does not show that the district court "ignored" their arguments or abused its discretion.

The cases relied on by the Landowners to argue that the fee awards "far

[14] For the initial attorneys' fee award, the district court confirmed that the record and supporting fees evidence showed that "much of the required work was necessitated by [the Landowners'] litigation strategy in the matter." 11 APP 1663. The Landowners' own conduct throughout litigation "requir[ed] more legal work and corresponding increased fees" by the Residents' counsel. 11 APP 1663. Considering "all of the work performed in the case, including hundreds of pages of briefs, countless cites to legal authority, extensive research efforts, and more," the district court confirmed that "several hundred hours of attorney time were reasonably required to defend the case." 11 APP 1663.

Similarly, the district court, that was "directly familiar with all the work that was filed with this Court," confirmed that "[a]ll of the work [for the fees claimed in the supplemental fee motion] was necessitated by [the Landowners'] persistent pursuit of claims seeking damages of tens of millions of dollars in the Nevada Supreme Court—claims that [the] Court has confirmed lacked all merit." 15 APP 2132-2133. The billing records confirm that the hours requested by Residents' counsel was "very reasonable in light of the work performed," spending "less than 60 hours to resist a [two] motion[s] for reconsideration, draft a settlement conference statement, attend a mandatory settlement conference in person, [and] draft an appeal brief[.]" 15 APP 2132-2133.

exceed[]" awards in other anti-SLAPP cases are irrelevant as to the amount of fees *in this case*. AOB at 40. The fees awarded in these cases reflect the relatively minimal work required compared to the extensive work caused by the Landowners' litigation tactics here. For example, in *Smith*, this Court affirmed a fees award of $66,615.00 for work consisting of stipulating to a preliminary injunction, the anti-SLAPP briefing, and attorneys' fees briefing.[15] 137 Nev. at 73, 481 P.3d at 1231. The Residents' counsel, however, performed significant work related to the initial anti-SLAPP motion. This Court need only scan the 15 volumes and 2248 pages of the Appendix to assess the substantial written work product performed by the Residents' counsel, including: the Petition for Writ of Prohibition or Alternatively, Mandamus; the successful initial appeal; resisting the Landowners' improper attempt to conduct discovery during the appeal; the post-remand discovery motions; limited discovery post-remand; supplemental briefing on the anti-SLAPP motion; the First Fee Motion; the second successful appeal; the Second Fee Motion; and opposing several motions for reconsideration brought by the Landowners. A summary detailing the timeline for much of this work was included in the Residents'

[15] Order: (1) Granting Defendants' Motion for Attorney's Fees, Costs and Statutory Awards Pursuant To Nev. Rev. Stat. 41.670; (2) Granting Defendants' Motion to Dissolve Preliminary Injunction; and (3) Denying Plaintiff's Motion to Retax, *Smith v. Zilverberg*, No. A-19-798171-C, 2019 WL 12262750, at *1 (Nev. Dist. Ct. Dec. 20, 2019).

First Fee Motion. APP 1360-1364. As the district court confirmed, much of the work was necessitated by the Landowners' litigation efforts and that substantial evidence supported that the hours spent by the Residents' counsel to defend those efforts were reasonable. 11 APP 1663; 15 APP 2132-2133. It would be unreasonable to reduce the amount of fees awarded here simply because they exceed fee awards in simpler and more straightforward cases.

Moreover, the Landowners' comparison of the hours spent by their counsel versus the Residents' counsel is misleading. AOB at 39-40. ***First***, the Landowners tout that their counsel billed 481.5 hours as opposed to the "over 700 hours" spent by the Residents' counsel. AOB at 39. But this comparison does not reflect that the Landowners' litigation team was supplemented by an in-house counsel, Elizabeth Ham, who was "of record" in the case and participated substantively in the case, including by taking depositions.[16] 10 APP 1509-1574. There is no telling how many hours she spent on the case, which was not billed, that would be relevant to a comparative analysis. ***Second***, the Landowners' comparison is also flawed because it fails to consider that the Residents were often the movants below, and thus prepared both the motions and reply briefs, while the Landowners only prepared an

[16] This point has been raised by the Residents on several occasions in briefing on the fee issues. Why the Landowners continue to hide this fact is baffling. It also lacks candor to the Court.

opposition. ***Third***, the number of hours for Landowners' counsel (481.5 hours) only accounts for the work up to the First Fee Motion (December 2020), 10 APP 1497, 1509-1574, while the approximately 710 hours billed by the Residents' counsel accounts for the work performed up to their Second Fee Motion (November 2022), which includes the work performed on the second appeal and the Landowners baseless reconsideration motions. 13 APP 1896-1908. Thus, the Landowners' attempted comparison is meritless and does not establish that the district court abused its discretion.

4. The district court correctly found that the Residents' counsel's hourly rates were reasonable.

Without any legitimate argument to contest the district court's finding that the Residents' counsel's hourly rates were reasonable, the Landowners again lodge baseless accusations about Mr. Schreck to claim their rates are unreasonable "given that [they] were never billed to any of the Residents." AOB at 41-42. Again, even in the context of hourly rates, this argument fails.

To determine the reasonable fees under the lodestar analysis, the district court multiplies "the number of hours reasonably spent on the case by a reasonable hourly rate." *Herbst v. Humana Health Ins. of Nev., Inc.*, 105 Nev. 586, 590, 781 P.2d 762, 764 (1989). Typically, when determining whether an hourly rate is reasonable, court consider whether they align with "'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.29 (2007) (citation omitted); *Rushfield*, 2016 WL 7109111, at *2 (affirming award of fees where district court "found that the billable rates were within community standards"). Courts can also rely on their "familiarity with the lawyers involved in the litigation and the quality of their work" when assessing the reasonableness of hourly rates. *Katz v. Incline Vill. Gen. Improvement Dist.*, No. 71493, 2019 WL 6247743, at *3 (Nev. Nov. 21, 2019) (unpublished disposition).

Following the lodestar analysis, the district court appropriately found that the Residents' counsel's hourly rates were reasonable, based on its familiarity with rates charged for similar work in the community. *Id.*; 11 APP 1661-1662, 15 APP 2175-2176. Primary counsel Mitchell Langberg's hourly rate was $655 for the fees requested in the First Fee Motion and $700 for the fees requested in the Second Fee Motion. 11 APP 1661-1662; 15 APP 2175. Mr. Langberg has extensive experience in defamation and First Amendment litigation. 9 APP 1366; 13 APP 1900-1906. The bulk of the work was performed by attorneys billing at rates of $450-$485. 11 APP 1661-1662.[17]

[17] The Landowners make much ado about Mr. Schreck's hourly rate of $875. AOB at 41-43. Mr. Schreck, however, billed only 22.6 hours—only 3%—of the total hours billed. 9 APP 1367. His time was spent participating in initial client

As the district court found, these hourly rates are reasonable as the rates charged in "this community for complex or specialty litigation such as First Amendment and anti-SLAPP litigation." 15 APP 2175; *see, e.g.*, *Gunn v. Drage*, No. 20-16046, 2023 WL 3043651, at *2 (9th Cir. Apr. 21, 2023) (confirming Nevada District Court's finding that the hourly rates "requested—ranging between $525 and $675 per hour—were reasonable" for the Las Vegas market in anti-SLAPP case).[18] In fact, these hourly rates are not far off from the rates charged by the Landowners' counsel. For example, Landowners' primary counsel, Lisa Rasmussen, charged a "default billing rate" of $600/hour in 2020 and 2021.[19] 11 APP 1605-1607. The

interviews and providing facts regarding underlying court cases and City Council proceedings critical to the anti-SLAPP Motion.

[18] Even in cases not requiring counsel with specialized anti-SLAPP experience, courts have approved similar hourly rates as the Residents' counsel. *Union Pac. R.R. Co. v. Winecup Gamble, Inc.*, No. 3:17-CV-00477-LRH-CLB, 2023 WL 4052413, at *4 (D. Nev. June 16, 2023) (finding "hourly rates ranging from $400 to $650" were reasonable given the "experience of the attorneys" and "complexity of the case"); *Mayorga v. Ronaldo*, 656 F. Supp. 3d 1218, 1232 (D. Nev. 2023) (finding hourly rates of $850, $500, and $350 were "reasonable in this market and when considering the difficulties that this case presented and the complex legal questions it posed"); *Boca Park Marketplace Syndications Grp., LLC v. Ross Dress for Less, Inc.*, No. 2:16-CV-01197-RFB-BNW, 2020 WL 2892586, at *3 (D. Nev. May 31, 2020) (capping hourly rate at $750); *Crew-Jones v. State Farm Mut. Auto. Ins. Co.*, No. 2:11-CV-00203-GMN, 2012 WL 1947967, at *2 (D. Nev. May 30, 2012) (finding hourly rates of $750, $425, and $300 were reasonable).

[19] Ms. Rasmussen contends that "pursuant to negotiation with this/these clients, I have billed at a rate of $500 per hour." 11 APP 1606 (emphasis omitted). The decision to charge the Landowners a reduced fee does not change the fact that Ms. Rasmussen's default rate is only slightly less than Mr. Langberg's hourly rate.

Landowners' initial counsel billed at $595/hour. 10 APP 1509-1544.

The Landowners offer nothing to suggest that the district court abused its discretion in finding that the Residents' counsel's hourly rates were reasonable. The billing records, counsel's declaration, and the district court's familiarity with the rates charged in the community and the work performed by counsel was more than sufficient substantial evidence to support to district court's finding.

VII. CONCLUSION

NRS 41.670 is clear that the Residents are entitled to their reasonable attorneys' fees. The Landowners waived their argument contesting the Residents' right to fees under this mandatory fee-shifting statute. Even if they had not, the face of the statute, its legislative history, and the policy behind it confirm that a prevailing defendant need not have paid or "incurred" fees to be awarded statutory fees.

Thus, because the district court properly analyzed the *Brunzell* factors and found that substantial evidence supported the Residents' requested attorneys' fees, the Fee Orders should be affirmed in full. Further, the Residents should be awarded their fees for this appeal.

DATED this 29th day of April, 2024.

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NRAP 28.2 CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font Times New Roman.

I further certify that this brief complies with the page– or type–volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is 12,967 in length.

Finally, I hereby certify that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal.

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

DATED this 29th day of April, 2024.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and that on this 29th day of April, 2024, I electronically filed and served by electronic mail a true and correct copies of the above and foregoing **RESPONDENTS' ANSWERING BRIEF** properly addressed to the following:

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