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## Pub. Employees' Ret. Sys. of Nev. v. Gitter, 133 Nev. Adv. Op. 18 (Apr. 27, 2017).

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## STATUTORY INTERPRETATION

### **Summary**

The Court determined that: 1) Nevada's general slayer statutes apply to the Public Employees' Retirement Act ("PERS Act") for purposes of determining a survivor's benefits, 2) the Public Retirement System ("PERS") is not exempt from paying prejudgment and post-judgment interest, 3) the district court had discretion to award up to \$1,500 in reasonable costs under NRS 18.005(5) for a nontestifying expert consultant, and 4) the district court's award of attorney fees under NRS 7.085 and 18.010 was inappropriate and warranted reversal.

### **Background**

In 2009, Kristine Jo Freshman, a Clark County School District and a PERS member for 24 years, was killed by her husband, Walter Freshman. Walter pleaded guilty and was adjudicated of second degree murder the following year. Prior to her death, Kristine had designated her daughter, Shae E. Gitter, as her survivor beneficiary. In 2011, Gitter applied to obtain PERS survivor benefits. However, PERS denied Gitter's application. PERS stated that it denied the claim based on two statutes: NRS 286.671 and 286.669. PERS explained that NRS 286.671 mandates that only a PERS member's spouse or minor children are eligible to receive benefits in the case of a member who was married at the time of death, but NRS 286.669 makes any spouse who is convicted of the murder or voluntary manslaughter of a PERS member ineligible to receive benefits.

Gitter and Kristine's estate obtained copies of Kristine's PERS records and filed suit seeking to collect PERS survivor benefits. The district court granted Gitter partial summary judgment and declared that NRS Chapter 41B (Nevada's slayer statutes) apply to NRS Chapter 286 (the PERS Act). As such, when determining survivor benefits, the court deems as predeceased a PERS member's spouse who has been convicted of murdering the PERS member. Additionally, PERS must consider the PERS member as being unmarried at the time of death. Following the court's decision, the parties stipulated to an amount of \$203,321.76 for back payments owed by PERS. Gitter filed a subsequent motion seeking prejudgment and post-judgment interest. The district court granted Gitter's motion and ordered PERS to pay interest under NRS 99.040(1)(a).

Gitter also filed a memorandum of costs that included \$5,000 in expert witness fees for a financial consultant. The district court determined that Nevada law was unclear regarding whether fees in excess of \$5,000 could be recovered for nontestifying experts. Consequently, the district court limited costs to \$1,500 for the expert witness costs under NRS 18.005(5).

Additionally, Gitter filed a motion for attorney fees under NRS 7.085 and 18.010 for \$96,272.50. Gitter argued that PERS and its counsel continually took unreasonable positions throughout the course of litigation that were not supported by Nevada law. The district court granted Gitter attorney fees stating PERS acted unreasonably and vexatiously.

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<sup>1</sup> By Scott Cardenas

## Discussion

### *Nevada's slayer statutes are applicable to the PERS Act*

The PERS Act allows a survivor beneficiary to collect benefits only “if the member is unmarried on the date of the member’s death.”<sup>2</sup> If the PERS member is married, then the payments go to the member’s spouse and any minor children.<sup>3</sup> However, under the PERS slayer statute, a person cannot collect benefits if they are convicted of the murder or voluntary manslaughter of the PERS member.<sup>4</sup> Similarly, Nevada’s slayer statute mandates “that a killer cannot profit from his or her wrong.”<sup>5</sup> Further, under the Nevada slayer statute treats that a killer as if they predeceased the decedent and the killer forfeits any benefit.<sup>6</sup> The Court gave deference to PERS in its argument that Gitter could not be the beneficiary since Kristen was married when she was killed and Nevada law barred payments to Walter.

### *Standard of review*

PERS challenged the district court’s order granting partial summary judgment on Gitter’s claim for declaratory relief. The Court reviews a district court’s order granting summary judgment de novo.<sup>7</sup> Moreover, questions of statutory construction are questions of law reviewed de novo.<sup>8</sup>

### *Gitter is entitled to PERS survivor benefits because Nevada’s slayer statutes are applicable to the PERS Act*

The Court began by laying the framework for how it would interpret the two statutes at issue in this case. The Court applies the plain language of a statute when the statute’s language is plain and its meaning is clear.<sup>9</sup> It will only turn to legislative history when the statute’s language is ambiguous.<sup>10</sup> Moreover, in interpreting a statute, the Court will not render any part of a statute meaningless or in a way that would produce absurd results.<sup>11</sup> Rather, the Court will interpret a statute or rule in harmony with other statutes or rules whenever possible.<sup>12</sup>

NRS Chapter 41B, the slayer statutes, apply to governing instruments, such as “[a]ny public or private plan or system that entitles a person to the payment or transfer of any property, interest or benefit, including, without limitation, a plan or system that involves . . . [p]ension benefits, retirement benefits or other similar benefits.”<sup>13</sup> PERS is such a governing instrument. This finding does not render the PERS slayer statute meaningless because this provision applies

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<sup>2</sup> NEV. REV. STAT. 286.6767(1) (2015).

<sup>3</sup> See NEV. REV. STAT 286.673, 286.674-.6766 (2015).

<sup>4</sup> NEV. REV. STAT 286.669 (2015).

<sup>5</sup> NEV. REV. STAT 41B.200(1) (2015).

<sup>6</sup> NEV. REV. STAT 41B.310(3) (2015).

<sup>7</sup> Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

<sup>8</sup> Davis v. Beling, 128 Nev. 301, 314, 278 P.3d 501, 510 (2012).

<sup>9</sup> Leven v. Frey, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007).

<sup>10</sup> Las Vegas Dev. Assocs., LLC v. Eighth Judicial Dist. Court, 130 Nev., Adv. Op. 37, 325 P.3d 1259, 1262 (2014).

<sup>11</sup> Leven, 123 Nev. at 405, 168 P.3d at 716.

<sup>12</sup> Watson Rounds, P.C. v. Eighth Judicial Dist. Court, 131 Nev., Adv. Op. 79, 358 P.3d 228, 232 (2015).

<sup>13</sup> NEV. REV. STAT 41B.090(9)(a) (2015).

to prevent Walter from receiving benefits.<sup>14</sup> However, NRS 41B.310 also applies to treat Walter as if he predeceased Kristine. Moreover, NRS 41B.310(3) is not directed solely at the spousal benefit, and does not abrogate the rights of a nonkiller. Therefore, Gitter has her own rights under the PERS Act to claim benefits.

#### *Deference to PERS*

PERS may be given deference in interpreting the PERS Act, however, it is not entitled to deference in interpreting other generally applicable statutes such as NRS Chapter 41B, the slayer statutes.<sup>15</sup> Accordingly, the Court refused to defer to PERS in interpreting how NRS Chapter 41B applies to the PERS Act.

#### *Interest should have been awarded under NRS 17.130*

##### *Standard of Review*

Whether the statutes that allow prejudgment and post-judgment interest apply is a question of law that the Court reviews de novo.<sup>16</sup>

##### *PERS is not exempted from paying interest*

Prejudgment and post-judgment interest may be awarded when a statute allows. Here, both are allowed under NRS 99.040 and 17.130 and PERS failed to point to a statute that prohibited the district court from awarding interest under the circumstances in this case. The PERS Act need not expressly provide for the payment of prejudgment or post-judgment interest.

##### *PERS must pay interest pursuant to NRS 17.130*

A party can obtain interest, pursuant to NRS 99.040(1)(a), for cases where an express or implied contract exists. On the other hand, NRS 17.130(2) provides for interest on any judgment when there is no interest rate provided by contract or otherwise by law, or specified by the judgment. Here, the district court erred in concluding that Gitter's survivor benefits constituted money due in a contract case because PERS's obligation to pay survivor benefits is statutory, not contractual. Moreover, the designation form identifying beneficiaries is not a contract. Accordingly, the Court reversed the district court's award of interest under NRS 99.040(1)(a) and remanded with instructions for the district court to award interest to Gitter under NRS 17.130.

#### *Gitter is entitled to \$1,500 in costs for expert fees under NRS 18.005(5)*

##### *Standard of Review*

The Court reviews awards of costs for an abuse of discretion.<sup>17</sup>

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<sup>14</sup> NEV. REV. STAT 286.669 (2015).

<sup>15</sup> See, e.g., Meridian Gold Co. v. State ex rel. Dep't of Taxation, 119 Nev. 630, 635, 81 P.3d 516, 519 (2003)

<sup>16</sup> See Kerala Props., Inc. v. Familian, 122 Nev. 601, 604 (2006).

<sup>17</sup> Logan v. Abe, 350 P.3d 1139, 1144 (2015).

*The district court did not abuse its discretion in awarding costs to Gitter for expert fees under NRS 18.005(5)*

Under NRS 18.020(3), a prevailing party may recover costs against any adverse party against whom a judgment is rendered in an action for money and damages where the plaintiff seeks recovery of more than \$2,500. Further, under NRS 18.005(5), costs include reasonable fees for up to five expert witness but cannot exceed \$1,500 for each witness unless the court concludes that the witness's testimony necessitated a larger fee. Nevada law requires an expert to testify in order to recover more than \$1,500 in expert fees. However, NRS 18.005 does not require that the expert testify to collect fees less than \$1,500. Moreover, the district court in this case found the fees to be reasonable. Therefore, the district court did not abuse its discretion when it awarded \$1,500 for Gitter's expert consultant under NRS 18.005(5).

The Court then went on to clarify the law regarding expert witness fees under NRS 18.005(5). Under NRS 18.005(5), an expert witness who does not testify can only recover costs equal to or less than \$1,500. Further, in cases where an expert acts only as a consultant and does not testify, the district court may award \$1,500 or less, but only if it finds such costs constitute "reasonable fees" under NRS 18.005(5).

*No attorney fees are warranted under NRS 7.085 or 18.010*

Counsel for PERS petitioned the Court for a writ of mandamus directing the district court to vacate its order awarding attorney fees after it found PERS's counsel jointly and severally liable for attorney fees under NRS 7.085. A writ of mandamus is available in order to compel an act the law requires or to control an unwarranted exercise of discretion. Moreover, it is available when there is no other adequate remedy at law.<sup>18</sup> Petitioners had no other way to challenge the district court's order making them liable for over \$95,000 in attorney fees, and the Court exercised its discretion to consider the petition. Ultimately, the Court found that the district court abused its discretion in awarding attorney fees.

*Standard of review*

The Court reviews a district court's order awarding attorney fees for an abuse of discretion.

*The district court abused its discretion by awarding attorney fees under NRS 7.085 and 18.010*

NRS 18.101 allows a district court to order an award of attorney fees to a prevailing party if the district court finds that an opposing party's claim or defense was brought or maintained with no reasonable grounds or to harass. Moreover, under NRS 7.085(1) a district court can hold an attorney personally liable for attorney fees and costs when the attorney unreasonably and vexatiously causes a civil action or proceeding to extend. A district court abuses its discretion when it orders an award of attorney fees without including sufficient reasoning and findings to support such a conclusion. Here, the district court's order does not demonstrate that PERS maintained a defense that was not well-grounded in fact or law, that petitioners acted unreasonably

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<sup>18</sup> NEV. REV. STAT 34.170 (2015).

or vexatiously, or that the defense was without reasonable grounds. To the contrary, PERS's defenses were based on novel and arguable issues of law. Therefore, the district court abused its discretion. Accordingly, the Court granted the petition and reversed the attorney fees award under NRS 7.085(1) and 18.010(2)(b).

### **Conclusion**

NRS Chapter 41B applies to the PERS Act. Therefore, Gitter is entitled to survivor benefits and the district court's judgment was affirmed. Moreover, Gitter is entitled to prejudgment and post-judgment interest under NRS 17.130, however, the portion of the district court's order awarding interest under NRS 99.040(1)(a) was vacated, and remanded with instructions to award interest under NRS 17.130 because the case was a statutory, non-contractual matter. Further, the district court's order of costs under NRS 18.005(5) was affirmed because Nevada allows up to \$1,500 in costs for nontestifying expert consultants. Finally, the district court's award of attorney fees was unwarranted under NRS 7.085(1) and 18.010(2)(b). Accordingly, the order awarding attorney fees against PERS was reversed, and the petition to issue a writ of mandamus instructing the district court to vacate its order was granted.