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IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY SCHOOL
DISTRICT,

Appellant.

vs.

LAS VEGAS REVIEW-JOURNAL,

Respondent.

Supreme Court No. 75534

District Court No. A750151
District Court Dept. No. XVI
Electronically Filed
Sep 07 2018 12:00 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APELLANT’S OPENING BRIEF

Appeal from Eighth Judicial District Court, Clark County, Findings of Fact
and Conclusions of Law and Order

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 3. Whether the district court erred when it did not provide CCSD immunity to LVRJ’s request for attorney’s fees and cost pursuant to NRS 239.0123

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19	<u>Swaner v. Union Mortg. Co.,</u>	
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Black’s Law Dictionary, 867 (10th ed. 2014)18

1 **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

- 2 1) Whether the district court erred by construing NRS 239.011(2) in
3 isolation to award attorney fees and costs.
4
5 2) Whether the district court erred when it declined to consider
6 legislative history pertaining to NRS 239.012 on the basis that NRS
7 239.011(2) was unambiguous and clear.
8
9 3) Whether the district court erred when it did not provide CCSD
10 immunity to LVRJ’s request for attorney’s fees and cost pursuant to
11 NRS 239.012.
12

13 **STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT**

14 This is an appeal from a decision by Eighth Judicial District Court,
15 Judge Timothy C. Williams presiding, granting attorney’s fees and costs to
16 LVRJ pursuant to NRS 239.011(2), only, while declining to consider the
17 good faith exception to awarding of damages under NRS 239.012. The
18 District Court refused to consider NRS 239.012 based on that court’s
19 determination there was no ambiguity between the two statutes. Appellant’s
20 App. V 1066, 1069 & 1153. This Court should reverse the award of attorney
21 fees in this matter for the following reasons:
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25 The District Court erred by construing NRS 239.011(2) in isolation to
26 award attorney fees and costs. Rather than read the entire statutory
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1 framework of Nevada Revised Statutes Chapter 239 as a whole, the District
2 Court relied upon a single provision in NRS 239.011(2) to award fees and
3 costs to LVRJ: “If the requester prevails, the requester is entitled to recover
4 his or her costs and reasonable attorney’s fees in the proceeding from the
5 governmental entity whose officer has custody of the book or record.” In
6 relying solely on NRS 239.011(2), the District Court avoided construing the
7 preceding statutory provision in tandem with the conflicting subsequent
8 provision in NRS 239.012: “A public officer or employee who acts in good
9 faith in disclosing or refusing to disclose information **and the employer** of
10 the public officer or employee are immune from liability for damages, either
11 to the requester or to the person whom the information concerns.”
12 (emphasis added). As a matter of law, multiple statutory provisions within a
13 statutory scheme must be construed together. *See S. Nev. Homebuilders v.*
14 *Clark Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). If the multiple
15 statutory provisions within a statutory scheme conflict with each other, an
16 ambiguity is created such that the legislative history must be consulted. *See*
17 *e.g., Nuleaf CLV Dispensary, LLC v. State, Dep’t of Health and Human*
18 *Servs.*, 134 Nev. Adv. Op. no. 17, at *8 Mar. 29, 2018). Therefore, the
19 Court should first conclude that the District Court’s analysis of NRS
20 239.011(2), to the exclusion of NRS 239.012, was incomplete.
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1 Second, the District Court erred by concluding that NRS 239.012 does
2 not provide immunity to CCSD from LVRJ's requested attorney fees and
3 costs. The plain meaning of "damages" in NRS 239.012 encompasses the
4 terms "attorney's fees" and "costs" in NRS 239.011(2), such that CCSD is
5 immune from LVRJ's requested attorney fees and costs. *See* BLACK'S LAW
6 DICTIONARY, 471 (10th ed. 2014) (defining "damages" as "[m]oney claimed
7 by, or ordered to be paid to, a person as compensation for loss or injury").
8 The Legislature intended to provide immunity to governmental entities for a
9 good faith refusal to disclose information requested under the NPRA. *See*
10 NRS 239.012. Thus, the District Court erred by ignoring the stated purpose
11 of this statute. *See McKay v. Bd. Of Sup'rs of Carson City*, 102 Nev. 644,
12 648, 730 P.2d 438, 441 (1986). Since the construction of NRS 239.011(2)
13 together with NRS 239.012 creates an ambiguity, the legislative history must
14 be consulted for the Legislature's intent. Nevertheless, even if there was no
15 ambiguity, as held by the District Court, this Court has previously ruled that
16 it may look beyond the plain language of a statute because "ambiguity is not
17 always a prerequisite to using extrinsic aids." *A.J. v. The Eighth Judicial*
18 *District Court et al*, 133 Nev., Adv. Opin. 28 (June 1, 2017) at 7-8 (citing
19 2A Norman J. Singer & Shambie Singer, *Statutes and Statutory*
20 *Construction* § 48:1, at 554 (7th ed. 2014)). "The plain meaning rule . . . is
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1 not to be used to thwart or distort the intent of [the Legislature] by excluding
2 from consideration enlightening material from the legislative history. *Id.* at
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4 8 (citing 2A Norman J. Singer & Shambie Singer, *Statutes and Statutory*
5 *Construction* § 48:1, at 555-56 (7th ed. 2014)). As the United State Supreme
6 Court declared, “even the most basic general principles of statutory
7 construction must yield to clear contrary evidence of legislative intent.” *A.J.*
8 at 8 (citing *Nat’l R.R. Passenger Corp v. Nat’l Ass’n of R.R. Passengers*,
9 414 U.S. 453, 458 (1974)). “And courts even have concluded that statutory
10 interpretation necessarily begins with consideration of the legislative history
11 to uncover any indication of legislative intent.” 2A *Statutes and Statutory*
12 *Construction, supra*, 48:1, at 556 (internal quotation marks omitted). As
13 such, this Court should consider the Legislature’s intent in enacting NRS
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17 239.012.

18 “[T]his court determines the Legislature’s intent by evaluating the
19 legislative history and construing the statute in a manner that conforms to
20 reason and public policy.” *A.J.* at 8 (citing *Great Basin Water Network v.*
21 *Taylor*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010)).
22
23

24 In the legislative discussion for Assembly Bill 365 (1993), the
25 language of what is now codified as NRS 239.011 and NRS 239.012 is
26 discussed at length, where the following observation was made: “Court costs
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28

1 and attorneys' fees were granted only when it was a denial of what was
2 clearly a public record [bad faith]." *Assembly Committee on Government*
3 *Affairs Minutes: Hearing on AB 365 Before the Assembly Committee on*
4 *Government Affairs*, 1993 67th Sess. May 3, 1993 (Ande Englemen of the
5 Nevada Press Association speaking). Appellant's App. IV 879. Therefore,
6 the Court should conclude that CCSD is immune from LVRJ's requested
7 attorney fees and costs based upon NRS 239.012 as it has already been
8 ordered by the District Court that CCSD did not act in bad faith in this case.
9 Appellant's App. V 1158 &1159.

13 STANDARDS OF REVIEW

14 **A. STANDARDS FOR CONSTRUING STATUTES.**

15 This Court reviews questions of law de novo. *See Birth Mother v.*
16 *Adoptive Parents*, 118 Nev. 972, 974, 59 P.3d 1233, 1235 (2002). Statutory
17 interpretation is a question of law that this Court reviews de novo. *Id.* When
18 the Legislature has addressed a matter with "imperfect clarity," it becomes
19 the responsibility of this Court to discern the law. *See Baron v. Dist. Ct.*, 95
20 Nev. 646, 648, 600 P.2d 1192, 1193-1194 (1979). Given an ambiguous
21 statute, this Court must interpret the statute "in light of the policy and the
22 spirit of the law, and the interpretation should avoid absurd results." *Hunt v.*
23 *Warden*, 111 Nev. 1284, 1285, 903 P.2d 826, 827 (1995).

1 **B. STANDARDS FOR REVIEWING AWARDS OF**
2 **ATTORNEY FEES AND COSTS.**

3 When an attorney fees matter implicates questions of law, the proper
4 review is de novo. *See In re Estate and Trust of Rose Miller*, 125 Nev. 550,
5 553, 216 P.3d 239, 241 (2009). Statutes permitting the recovery of costs are
6 to be strictly construed because they are in derogation of the common law.
7
8 *See Gibellini v. Klindt*, 110 Nev. 1201, 1205, 885 P.2d 540, 543 (1994).

9
10 **FACTUAL AND PROCEDURAL BACKGROUND**

11 On March 1, 2017, LVRJ filed an amended petition for writ of
12 mandamus relative to its public records request dated February 10, 2017,
13 wherein LVRJ sought 15 distinct categories of records from CCSD.
14 Appellant’s App. I 001-061. All but one of the categories of records were
15 eventually resolved by the parties through preliminary orders of the District
16 Court. The outstanding category was LVRJ’s request for production of
17 investigative materials from CCSD’s Office of Diversity and Affirmative
18 Action (“ODAA”) relative to investigations of alleged discrimination by
19 Trustee Kevin Child against CCSD employees. The sole issue of whether or
20 not the ODAA investigative file was a public record was argued before the
21 District Court on June 27, 2017. Appellant’s App. V 1050-1105. On July
22 11, 2017, the District Court ordered CCSD to turn over the ODAA
23 investigative file with minimal redactions consistent with a prior order.
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1 Appellant's App. I 81. Thereafter, CCSD appealed the District Court Order
2 to produce records to this Court. The production of the ODAA's
3 investigative file is currently pending before this Court under Case No.
4 73525.
5

6 Following CCSD's appeal of the District Court's Order to produce
7 records, LVRJ filed its Motion for Attorney's Fees and Cost and Motion to
8 find CCSD in Bad Faith on October 3, 2017. Appellant's App. IV 684-705.
9 CCSD opposed each motion separately and LVRJ replied and supplemented
10 to which CCSD opposed the supplement, as well. Appellant's App. IV 708-
11 746; 747-947; V 948-985; 1023-1030; 1031-1040 & 1040-1049. CCSD's
12 opposition to the motion for fees was based upon, among other arguments,
13 NRS 239.012 and its bad faith requirement provided immunity for both the
14 employees **and** their employer if the employee acted in good faith in
15 denying a records request. Appellant's App. IV 755-764. CCSD also
16 highlighted the legislative history supporting CCSD's position, which the
17 District Court refused to consider at hearing stating the court need not
18 consider the legislative history because there was no ambiguity between
19 NRS 239.011 and 239.012. Appellant's App. IV 755-764 & V 1066, 1069
20 & 1153. Eventually, LVRJ's motions were heard by the District Court on
21 January 4, 2018. Appellant's App. V 1050-1105. The District Court
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1 granted all requested fees and costs via its Order filed on March 22, 2018.
2 Appellant's App. V 1140-1159. The District Court also denied LVRJ's
3 motion to find CCSD acted in bad faith in the same Order. Appellant's App.
4 V 1159. CCSD timely filed its appeal on April 2, 2018. Appellant's App.
5 V 1176-1198.
6

7 LEGAL ARGUMENT

8 **A. THE DISTRICT COURT ERRED BY CONSTRUING NRS** 9 **239.011(2) IN ISOLATION TO AWARD ATTORNEY FEES** 10 **AND COSTS TO LVRJ.**

11
12 The District Court erred by construing NRS 239.011(2) in isolation to
13 award attorney fees and costs to LVRJ. The District Court relied upon a
14 single provision in NRS 239.011(2) to award attorney fees and costs to
15 LVRJ: "If the requester prevails, the requester is entitled to recover his or
16 her costs and reasonable attorney's fees in the proceeding from the
17 governmental entity whose officer has custody of the book or record."
18 However, the District Court avoided construing this statutory provision with
19 the conflicting provision in NRS 239.012: "A public officer or employee
20 who acts in good faith in disclosing or refusing to disclose information **and**
21 **the employer** of the public officer or employee are immune from liability
22 for damages, either to the requester or to the person whom the information
23 concerns." (emphasis added).
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1 Therefore, the Court should conclude that the District Court’s analysis
2 of NRS 239.011(2), to the exclusion of NRS 239.012, was incomplete.
3

4 **1. Multiple Statutory Provisions Within a Statutory Scheme**
5 **Must Be Constructed Together.**

6 As a matter of law, multiple statutory provisions, within a statutory
7 scheme must be construed together. *See S. Nev. Homebuilders v. Clark*
8 *Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). The Legislature’s intent
9 is the primary consideration when interpreting an ambiguous statute. *See*
10 *Cleghorn v. Hess*, 109 Nev. 544, 548, 853 P.2d 1260, 1262 (1993). When
11 construing an ambiguous statutory provision, this Court determines the
12 meaning of the words used in a statute by examining the context and the
13 spirit of the law or the causes which induced the legislature to enact it. *See*
14 *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007). In conducting
15 this statutory analysis, “[t]he entire subject matter and policy may be
16 involved as an interpretive aid.” *Id.* Accordingly, this Court will consider
17 “the statute’s multiple legislative provisions as a whole.” *Id.*
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22 Courts have a duty to construe statutes as a whole, so that all
23 provisions are considered together and, to the extent practicable, reconciled
24 and harmonized. *Id.*; *S. Nev. Homebuilders v. Clark Cnty.*, 121 Nev. 446,
25 449, 117 P.3d 171, 173 (2005). In addition, this Court will not render any
26 part of the statute meaningless, and will not read the statute’s language so as
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1 to produce absurd or unreasonable results. *See Leven*, 123 Nev. At 405, 168
2 P.3d at 716. Therefore, it was error for the District Court to interpret NRS
3 239.011(2) in isolation.
4

5 **2. Conflicting Statutory Provisions Within a Statutory Scheme**
6 **Create an Ambiguity, Such that the Legislative History**
7 **Must be Consulted.**

8 If the multiple statutory provisions within a statutory scheme conflict
9 with each other, an ambiguity is created, such that the legislative history
10 must be consulted. *See e.g., Nuleaf CLV Dispensary, LLC v. State, Dep't of*
11 *Health and Human Servs.*, 134 Nev. Adv. Op. No. 17, at *8 (Mar. 29, 2018);
12 *S. Nev. Homebuilders v. Clark Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173
13 (2005) (stating that the provisions of a statutory scheme must be considered
14 together, reconciled, and harmonized); *Salas v. Allstate Rent-A-Car, Inc.*,
15 116 Nev. 1165, 1168, 14 P.3d 511, 514 (2000) (courts must look to the
16 entire statutory scheme for legislative intent). In other words, ambiguity in
17 statutory provisions is not only created by competing interpretations of the
18 same statutory provision. *See In re Candelaria*, 126 Nev. 408, 411, 245 P.3d
19 518, 520 (2010). Aside from *Nuleaf* decided by this Court, several federal
20 courts have reached the same conclusion regarding ambiguity in construing
21 multiple statutory provisions together. *See e.g., Herrera-Castillo v. Holder*,
22 573 F.3d 1004, 1007 (10th Cir. 2009) (holding that a statute is ambiguous
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1 where “applying the statute’s plain language would render [a specific
2 statutory provision] a nullity”); *Mora v. Mukasey*, 550 F.3d 231, 237-238
3 (2d Cir. 2008) (same); *United States v. Heckenliable*, 446 F.3d 1048, 1051
4 (10th Cir. 2006) (rejecting an interpretation that would render a statute “a
5 nullity in a majority of the states” and explaining that a court’s
6 “interpretation must give practical effect to Congress’s intent, rather than
7 frustrate it”).
8

9
10 When multiple statutory provisions within a particular statutory
11 scheme create an ambiguity, as in the instant case, courts should look to the
12 legislative history to determine the intent for guidance in interpreting the
13 multiple statutory provisions. *See, E.g., United States v. Manning*, 526 F.3d
14 611, (10th Cir. 2008) (considering the reasons that a particular member of
15 Congress introduced the original legislative proposal); *United States v.*
16 *Craig*, 181 F.3d 1124, 1127 (9th Cir. 1999) (looking to an act’s legislative
17 history, including House floor statements from several members of
18 Congress, and the underlying genesis of the act, in determining the
19 appropriate interpretation). Since NRS 239.012 creates ambiguity in how
20 NRS 239.011(2) is interpreted, the District Court erred by ignoring and,
21 thus, rendering NRS 239.012 meaningless. Therefore, this Court should
22 consider both statutory provisions together, including the legislative history
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1 to conclude that CCSD is immune from LVRJ’s requested attorney fees and
2 costs.
3

4 **B. THE DISTRICT COURT ERRED BY CONCLUDING THAT**
5 **NRS 239.012 DOES NOT PROVIDE IMMUNITY TO CCSD**
6 **FROM LVRJ’S REQUESTED ATTORNEY FEES AND**
7 **COSTS.**

8 The District Court erred by concluding that NRS 239.012 does not
9 provide immunity to CCSD from LVRJ’s requested attorney fees and costs.

10 1. **The Plain Language of NRS 239.012 Creates an Exception**
11 **to NRS 239.011(2).**

12 The Plain meaning of “damages” in NRS 239.012 encompasses the
13 terms “attorney’s fees” and “costs” in NRS 239.011(2), such that CCSD is
14 immune from LVRJ’s requested attorney fees and costs. *See* BLACK’S LAW
15 DICTIONARY, 471 (10th ed. 2014) (defining “damages” as “[m]oney claimed
16 by, or ordered to be paid to, a person as compensation for loss or injury”).
17 Otherwise, NRS 239.012 would become a nullity. That is, what other
18 “damages” could a requester, such as LVRJ, possibly seek under NRS
19 Chapter 239? “‘Damages’ is a broad term and includes special as well as
20 general damages.” *Taylor v. Neill*, 80 Idaho 90, 94, 326 P.2d 391, 393
21 (1958) (citing 25 C.J.S. DAMAGES, § 2). Courts have determined that the
22 term “damages” must include “fees.” For instance, under a statute that
23 permitted a mortgagor to recover “damages” from a mortgagee who refused
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1 to discharge a mortgage, the Supreme Court of Utah considered the law of
2 several other states then concluded that “damages” must include attorney
3 fees. *See Swaner v. Union Mortg. Co.*, 99 Utah 298, 305, 105 P.2d 342, 345-
4 346 (1940). In *State ex rel. O’Sullivan v. Dist. Ct.*, 127 Mont. 32, 35, 256
5 P.2d 1076, 1078 (1953), the Montana Supreme Court held that with regard
6 to a petition for a writ of mandamus, a statute entitling the petitioner to
7 damages necessarily included the fees incurred. Therefore, based upon the
8 plain language of the term “damages” in NRS 239.012 and the terms “costs”
9 and “attorney’s fees” in NRS 239.011(2), the Court should determine that
10 CCSD is immune from LVRJ’s requested award of attorney fees and costs.
11 Any other construction of these terms would violate the rules of statutory
12 construction by ignoring NRS 239.012, making it a nullity.
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17 Indeed, Nevada law recognizes that “damages” may specifically
18 encompass attorney fees in certain circumstances, even though the American
19 Rule generally requires each party to pay his own fees unless a statute, rule,
20 or contract provides otherwise. *See Sandy Valley Assocs. V. sky Ranch*
21 *Estates Owners Ass’n*, 117 Nev. 948, 957-958, 35 P.3d 964, 970 (2001),
22 *clarified by Horgan V. Felton*, 123 Nev. 577, 584, 170 P.3d 982, 986 (2007).
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24 Nevada has also established that where equitable relief is sought, just as in
25 this case, an award of attorney fees is proper if awarded as an item of
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1 damages. *See Von Ehrensmann v. Lee*, 98 Nev. 335, 337-338, 647 P.2d 377,
2 378 (1982). Accordingly, “damages” and “attorney fees” are not mutually
3 exclusive legal concepts.
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5 Other states addressing this issue in the context of public records laws,
6 have ruled that even a public entity that reasonably refuses, in good faith, to
7 honor a public records request, is not required to pay attorney fees and costs
8 if it is later determined that the records sought were, in fact, public records.
9 *See B&S Utilities, Inc. v. Bakerville-Donovan, Inc.*, 988 So.2d 17, 23 (Fla.
10 1st DCA 2008) (concluding that a private engineering firm did not
11 unlawfully refuse to permit inspection and, therefore, was not subject to an
12 award of fees and costs); *Putnam Cnty. Humane Soc’y, Inc. v. Wooward*,
13 740 So.2d 1238 (Fla. 5th DCA 1999) (attorney fees were inappropriate where
14 a party acted on a good faith belief that it was not subject to public records
15 law); *Com., Cabinet for Health and Fam. Servs. V. Lexington H-L Servs.,*
16 *Inc.*, 382 S.W.3d 875, 882 (Ky. App. 2012) (refusal to provide records based
17 upon a good faith claim of exemption, later found to be incorrect, is
18 insufficient to establish a violation of open records law); *KPNX-TV v. Sup.*
19 *Court ex rel Cnty. Of Yuma*, 905 P.2d 598, 603 (Az. App. D1 1995)
20 (requesting party not entitled to attorney fees under public records law when
21 state had good faith basis to deny public access to crime scene and
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1 surveillance camera videotapes); *Althouse v. Palm Beach Cnty. Sheriff's*
2 *Office*, 92 So.3d 899, 901 (Fla. 4th DCA 2012) (noting a good faith exception
3 to attorney fees provision in public records law); *Friedmann v. Corrections*
4 *Corp. of Am.*, 310 S.W.3d 366, 380-381 (Tenn. App. 2009) (requesting party
5 not entitled to attorney fees when responding party acted in good faith in
6 refusing to disclose records).
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9 “[S]tatutes permitting the recovery of costs are to be strictly construed
10 because they are in derogation of the common law.” *Bobby Berosini, Ltd. V.*
11 *People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971 P.2d
12 383, 385 (1998). Awarding fees is also in derogation of the common law,
13 under the American Rule. Thus, it follows that any statutory scheme
14 allowing for an award of attorney fees must be construed narrowly, against
15 attorney fees. *See Hardisty v. Astrue*, 592 F.3d 1072, 1077 (9th Cir. 2010). At
16 the same time, “[w]aivers of immunity,” of course, “must be construed
17 strictly in favor of the sovereign, and not enlarged[d]...beyond what the
18 language requires.” *Id.* (citing *Ruckelshaus v. Sierra Club*, 463 U.S. 680,
19 685-686 (1983)). The Legislature intended to provide immunity to
20 governmental entities for good faith refusal to disclose information
21 requested under the NPRA. *See* NRS 239.012. By definition, “immunity” is
22 “[a]ny exemption from a duty, liability, or service of process; esp., such an
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1 exemption granted to a public official or governmental unit.” BLACK’S LAW
2 DICTIONARY, 867 (10th ed. 2014). Thus, the District Court erred by ignoring
3 the stated purpose of NRS 239.012. *See McKay v. Bd. Of Sup’rs of Carson*
4 *City*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986).

6 2. **The Legislative History Clarifies that the Legislature**
7 **Intended for Governmental Entities, Like CCSD, to Enjoy**
8 **Immunity from Attorney Fees and Costs for Good Faith**
9 **Refusals to Provide Requested Information Under the**
10 **NPRA.**

11 Since the construction of NRS 239.011(2) together with NRS 239.012
12 creates an ambiguity, the legislative history must be consulted to determine
13 the Legislature’s intent. Even without an ambiguity, the District Court erred
14 when it refused to consider the legislative history as this Court looks beyond
15 the plain language of a statute because “ambiguity is not always a
16 prerequisite to using extrinsic aids.” *A.J. v. The Eighth Judicial District*
17 *Court et al*, 133 Nev., Adv. Opin. 28 at 7-8 (June 1, 2017) (citing 2A
18 Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* §
19 48:1, at 554 (7th ed. 2014)). “The plain meaning rule . . . is not to be used to
20 thwart or distort the intent of [the Legislature] by excluding from
21 consideration enlightening material from the legislative” history. *Id.* at 8
22 (citing 2A Norman J. Singer & Shambie Singer, *Statutes and Statutory*
23 *Construction* § 48:1, at 555-56 (7th ed. 2014)). As the United State Supreme
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1 Court declared, “even the most basic general principles of statutory
2 construction must yield to clear contrary evidence of legislative intent.” *A.J.*
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4 at 8 (citing *Nat’l R.R. Passenger Corp v. Nat’l Ass’n of R.R. Passengers*,
5 414 U.S. 453, 458 (1974)). “And courts even have concluded that statutory
6 interpretation necessarily begins with consideration of the legislative history
7 to uncover any indication of legislative intent.” *2A Statutes and Statutory*
8 *Construction, supra*, 48:1, at 556 (internal quotation marks omitted).
9

10 In reviewing the legislative history for Assembly Bill 365 (1993)
11 (“A.B. 365”) on May 3, 2003, the language of what is now codified as NRS
12 239.011 and NRS 239.012 is discussed at length. Prior to the legislative
13 session, the Legislative Counsel Bureau (“LCB”) published a bulletin that
14 explained the overhaul of the NPRA. Appellant’s App. IV 800-837. The
15 bulletin fully explained the benefits of the writ process, the purpose of the
16 fee and cost-shifting provision, and the purpose of the immunity provision.
17 *Id.* The subcommittee recommended repealing the criminal penalty and
18 enacting legislation to provide an appeal process to the courts and allow the
19 requester to recover court costs and fees if the requester prevails:
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24 Testimony before the subcommittee and discussions in the
25 advisory committee meeting raised the issue of whether
26 criminal penalties are appropriate in public records cases....

27 One option suggested during the course of the hearings was that
28 the criminal penalties should be replaced with civil penalties.

1 As discussed in the section on access to records, the
2 subcommittee elected to establish an expedited procedure in
3 court that grants attorneys fees and court costs to a requesting
4 party that prevails. Because of this provision, the subcommittee
5 determined not to recommend civil penalties, and to repeal the
6 criminal penalties. Therefore, the subcommittee recommended
7 that the Legislature:

8
9 Repeal the existing criminal penalty relative to the failure to
10 disclose a public record. (BDR 19-393)

11 Enact legislation that prescribes the procedures for direct appeal
12 to a court of law seeking an order compelling access and giving
13 such proceedings priority on the court's calendar. Provide for
14 court costs and attorneys' fees if the requester prevails. (BDR
15 19-393) (also discussed in Section IV regarding access.)

16 Appellant's App. IV 836-837. As a result of the complexity associated with
17 modern public records and the sensitive information contained within the
18 records, the subcommittee determined a good faith standard for liability was
19 appropriate:

20 Because of the complexity associated with modern public
21 records and the sensitive information that is contained in some
22 records, the subcommittee determined a need for a liability
23 standard that could be applied to the actions of government
24 employees. The subcommittee elected to base the standard on
25 "good faith." Therefore, the subcommittee recommended the
26 following:

27 Enact legislation providing that governmental entities and
28 employees are immune from suit and liability if they act in
good faith in disclosing or refusing to disclose information
(BDR 19-393).

1 Appellant's App. IV 837. The preamble of the bill further supports a finding
2 of immunity from attorney fees and costs:
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4 AN ACT relating to public information; substituting civil
5 enforcement of access to public books and records for a
6 criminal penalty for denial of access; conferring immunity upon
7 public officers and employees for certain actions in good faith;
8 and providing other matters properly relating thereto.

9 Appellant's App. IV 842. Third, the portion of the bill that provides
10 immunity to governmental entities immediately follows the portion of the
11 bill that provides for the civil writ process and for attorney fees. In other
12 words, in the same bill, the two provisions appear back-to-back:

13 **Sec. 2.** If a request for inspection or copying of a public book or
14 record open to inspection and copying is denied, the requester
15 may apply to the district court in the county in which the book
16 or record is located for an order permitting him to inspect or
17 copy it. The court shall give this matter priority over other civil
18 matters to which priority is not given by other statutes. If the
19 requester prevails, he is entitled to recover his costs and
20 reasonable attorney's fees in the proceeding from the agency
21 whose officer has custody of the book or record. [Now codified
22 at NRS 239.011].

23 **Sec. 3.** A public officer or employee who acts in good faith in
24 disclosing or refusing to disclose information and his employer
25 are immune from liability for damages, either to the requester
26 or to the person whom the information concerns. [Now codified
27 at NRS 239.012].

28 Appellant's App. IV 842. While these provisions are now under separate
statutes, it is important for the Court to recognize that the provisions were,
nonetheless, part of the same bill. At the time A.B. 365 was enacted, there

1 were several other bills before the Legislature that also pertained to the
2 overhaul of the LPRA. If the statutes were wholly unrelated, and damages
3 did not encompass attorney fees and costs, there would be no reason to draft
4 and enact these statutes through the same bill.
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6 The conversation on the good faith exception continually overlaps
7 with the discussion on what is now NRS 239.011. Ande Englemen of the
8 Nevada Englemen of the Nevada Press Association stated:
9

10 Taxpayers were also paying the fees for the agency Mr. Bennett
11 observed. The question was, should the taxpayers, in general,
12 have to cover those costs when the suit might be rather
13 frivolous. Ms. Engleman noted the bill did not grant court costs
14 and attorneys' fees if a suit was over a record everyone had
thought to be confidential.

15 *Court costs and attorneys' fees were granted only when it was*
16 *a denial of what was clearly a public record [bad faith].*
17 Therefore, she did not think there would be frivolous lawsuits.

18 Appellant's App. IV 879. (*Assembly Committee on Government Affairs*
19 *Minutes: Hearing on AB 365 Before the Assembly Committee on*
20 *Government Affairs, 1993 67th Sess. May 3, 1993 (emphasis added)*)).
21

22 The Legislative history certainly demonstrates that the replacement of
23 the criminal penalty with an award of fees and costs to the requester is
24 specifically exempted in cases of good faith. This approach is fair, and it is
25 consistent with other fee-shifting provisions in the law. A major exception
26 under the American Rule for the recovery of attorney fees is bad faith. *See*
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1 e.g., NRS 7.085 (permitting award of fees when an attorney acts in bad
2 faith); NRS 18.010(2)(b) (permitting award of fees when a litigant acts in
3 bad faith); *see also* NRCPC 68 and *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d
4 268 (1983) (granting courts the discretion to award fees when a party rejects
5 an offer of judgment, but only after balancing the relative good faith of the
6 parties). Certainly, the harmonization of these statutes requires the Court to
7 look to the 1993 legislative history of both of these statutes, which supports
8 the Coroner's reading of these statutes together. *See Nuleaf CLV Dispensary,*
9 *LLC*, 134 Nev. Adv. Op. No. 17, at *8. Therefore, the Court should
10 determine that the CCSD is immune from LVRJ's requested attorney fees
11 and costs based upon NRS 239.012, as well as the legislative history.
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CONCLUSION

CCSD asks this Court to determine NRS 239.011(2) cannot be construed in isolation. When NRS 239.011(2) is construed with NRS 239.012, along with the legislative history, the Court should determine NRS 239.012 provides immunity to CCSD from LVRJ’s requested attorney fees and costs since LVRJ’s motion to find CCSD in Bad Faith in refusing to disclose information has already been denied by the District Court. App. Appendix V 1159.

Respectfully submitted, this 7th day of September, 2018.

/s/Adam Honey
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1 Procedure, in particular NRAP 28(e)(1), which requires every
2 assertion in the brief regarding matters in the record to be supported
3 by a reference to the page and volume number, if any, of the transcript
4 or appendix where the matter relied on is to be found. I understand
5 that I may be subject to sanctions in the event that the accompanying
6 brief is not in conformity with the requirements of the Nevada Rules
7 of Appellate Procedure.
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AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the Social Security Number of any person.

Respectfully submitted, this 7th day of September, 2018.

/s/Adam Honey

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