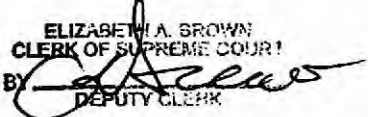


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JIMIACK IRREVOCABLE TRUST, BY
ITS TRUSTEES JOEL STOKES AND
SANDRA STOKES, A NEVADA TRUST,
Appellant,
vs.
BANK OF AMERICA, N.A., A
NATIONAL BANKING ASSOCIATION,
Respondent.

No. 82656-COA

FILED
MAY 26 2022
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL

Jimijack Irrevocable Trust (Jimijack) appeals from a post-judgment order awarding appellate attorney fees and costs in a quiet title action. Eighth Judicial District Court, Clark County; David M. Jones, Judge.

The district court entered summary judgment in favor of respondent Bank of America, N.A. (BOA), in the underlying quiet title action, and Jimijack appealed that decision, which this court affirmed in *Jimijack Irrevocable Trust v. Bank of America, N.A.*, No. 78939-COA, 2020 WL 6020386 (Nev. Ct. App. Oct. 9, 2020) (Order of Affirmance). Following issuance of the remittitur for that appeal, BOA moved the district court for an award of its appellate attorney fees and costs, primarily arguing that such relief was warranted under NRCP 68, which BOA maintained was applicable under *In re Estate & Living Trust of Miller*, which held that “the fee-shifting provisions in NRCP 68 and NRS 17.115 extend to fees incurred

on and after appeal.”¹ 125 Nev. 550, 555, 216 P.3d 239, 243 (2009). BOA also briefly argued in the alternative that an award of its appellate attorney fees and costs would be appropriate under NRS 18.010 and *In re Miller* because Jimijack brought and maintained its appeal without reasonable grounds and to harass BOA. We conclude that even though BOA’s motion below did not specifically reference subsection NRS 18.010(2)(b), BOA’s statements that the appeal was maintained without reasonable grounds and to harass would suggest that this is the subsection BOA considered in requesting its fees and costs. Jimijack opposed BOA’s motion, arguing, among other things, that BOA did not serve a valid offer of judgment for purposes of NRCP 68 and that *In re Miller* was inapplicable under the circumstances of the present case because its procedural posture was distinguishable.

The district court subsequently granted BOA’s motion for its appellate attorney fees and costs. In doing so, the district court initially agreed with Jimijack that BOA’s offer of judgment was invalid for purposes of NRCP 68. Nevertheless, the district court concluded that Jimijack unreasonably maintained this litigation through the appeal in Docket No. 78939-COA and that BOA was therefore entitled to recover its appellate attorney fees and costs under NRS 18.010(2)(b),² which it concluded applied under these circumstances pursuant to *In re Miller*. This appeal followed.

¹The Nevada Legislature repealed NRS 17.115 in 2015, see 2015 Nev. Stat., ch. 442, § 41, at 2569 (effective October 1, 2015), but later reenacted it in revised form as NRS 17.117. See 2019 Nev. Stat., ch. 57, § 1, at 274-75 (effective October 1, 2019).

²While the district court’s order relied on NRS 18.010(2)(b) to award attorney fees, the order did not identify a statutory basis for the costs award. But the minutes from the in-chambers hearing on BOA’s motion, which were transmitted to this court pursuant to NRAP 3(g), point to NRS 18.010(2) as the basis for the award. Cf. *Knox v. Dick*, 99 Nev. 514, 517, 665

This court generally reviews a district court's order granting attorney fees and costs for an abuse of discretion. *Smith v. Zilverberg*, 137 Nev., Adv. Op. 7, 481 P.3d 1222, 1230 (2021). However, we review such decisions de novo when they implicate questions of law, including matters of statutory interpretation. *Id.*

On appeal, Jimijack challenges the district court's reliance on NRS 18.010(2)(b) by asserting that the statute's express language only authorized the district court to award amounts that were incurred before the district court.³ Beginning with the award of attorney fees, Jimijack is correct that the award was improper, as NRS 18.010(2)(b) does not authorize an award of appellate attorney fees. *See Tulelake Horseradish, Inc. v. Santa Margarita Ranch, LLC*, No. 69305, 2016 WL 3433040, at *1 (Nev. June 20, 2016) (Order Affirming in Part, Reversing in Part and Remanding) (stating the same); *see also* NRAP 36(c)(3) (providing that post-2015 unpublished Nevada Supreme Court orders are citable for their persuasive value).⁴ Nor does NRS 18.010 authorize any award of costs,

P.2d 267, 269 (1983) (looking to district court minutes to interpret a summary judgment order in the absence of specific findings in the order). Given that BOA referenced NRS 18.010 in its underlying motion, we construe the district court's order as awarding costs under this statute.

³We are not persuaded by BOA's assertion that Jimijack waived this argument by failing to raise it below. A review of the record reveals that, to the extent BOA requested attorney fees and costs pursuant to NRS 18.010 below, it did so by scattering a few references to that statute and/or the language used therein in its motion for relief under NRCP 68 without providing any separate analysis related to NRS 18.010(2)(b). Given that BOA itself failed to develop this argument, we conclude that waiver does not apply.

⁴While BOA does not address *Tulelake* in its answering brief, it nonetheless disputes whether two of the cases that the supreme court cited in *Tulelake* to support its decision actually bar the district court from

regardless of whether they are incurred before the district court or an appellate court. See NRS 18.010(2) (authorizing the district court to “make an allowance of attorney fees to a prevailing party” under certain circumstances); see also *Smith v. Crown Fin. Servs. of Am.*, 111 Nev. 277, 287, 890 P.2d 769, 775 (1995) (observing that NRS 18.010(2)(b) does not authorize an award of costs). Thus, given the foregoing, we conclude that it was error for the district court to rely on NRS 18.010(2)(b) as a basis to award BOA the attorney fees and costs it previously incurred on appeal. See *Zilverberg*, 137 Nev., Adv. Op. 7, 481 P.3d at 1230.

Nevertheless, BOA argues that this court can affirm the award of attorney fees and costs it incurred on appeal pursuant to NRCP 68 and *In re Miller*, reasoning that the district court incorrectly concluded that its offer of judgment was invalid for purposes of NRCP 68. However, prior to the appeal in Docket No. 78939-COA, BOA brought a motion under NRCP 68 seeking the attorney fees and costs it had incurred before the district court, which the court denied on the basis that BOA’s offer of judgment was invalid for purposes of NRCP 68. And because BOA did not appeal that decision, it became the law of the case. See *Recontrust Co. v. Zhang*, 130 Nev. 1, 7-8, 317 P.3d 814, 818 (2014) (explaining that “[t]he-law-of-the-case doctrine refers to a family of rules embodying the general concept that a court involved in later phases of a lawsuit should not re-open questions

awarding appellate attorney fees under NRS 18.010(2)(b). See No. 69305, 2016 WL 3433040, at *1 (citing *Bd. of Gallery of History, Inc. v. Datecs Corp.*, 116 Nev. 286, 288, 994 P.2d 1149, 1150 (2000) (“There is no provision in [NRS 18.010(2)] authorizing the district court to award attorney fees incurred on appeal.”), and *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1356-57, 971 P.2d 383, 388 (1998) (concluding that NRS 18.010 does not entitle a party to attorney fees on appeal because the statute “does not explicitly authorize attorney’s fees on appeal”). In light of the supreme court’s treatment of these cases in *Tulelake*, we are not persuaded by BOA’s argument.

decided . . . by that court . . . in earlier phases” (internal quotation marks omitted) (citing *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995) (“[A] legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, [governs] future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time”)); cf *Verner v. Joufflas*, 95 Nev. 69, 70-71, 589 P.2d 1025, 1026 (1979) (concluding that a party who fails to appeal from an appealable order waives any right to challenge the order in later proceedings). Consequently, BOA’s assertion that the district court incorrectly concluded that its offer of judgment was invalid for purposes of NRCP 68 does not provide a basis for this court to affirm the order awarding BOA its appellate attorney fees and costs.

Thus, in light of the foregoing, we

ORDER the judgment of the district court REVERSED.⁵


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

⁵Given our resolution of this matter, we deny BOA’s NRAP 38(b) request for appellate attorney fees and costs.

cc: Hon. David M. Jones, District Judge
Hong & Hong
Akerman LLP/Las Vegas
Eighth District Court Clerk