1 IN THE SUPREME COURT OF THE STATE OF NEVADA

PIERRE HASCHEFF, AN INDIVIDUAL, Appellant/Cross-Appellant, *vs*. LYNDA HASCHEFF, AN INDIVIDUAL, Respondent/Cross-Appellant.	Case No. 86976

Electronically Filed
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JURISDICTIONAL STATEMENT

The February 1, 2021 Order on appeal ("the Order") interpreted and declared the parties' respective rights and obligations under their Marital Settlement Agreement ("MSA"). The MSA was incorporated and merged into the parties' divorce decree entered on November 15, 2013. 1AA0080-81. As a result, the Order is a special order entered after final judgment. 4AA0711-0725. The Court has jurisdiction over the appeal and cross appeal under NRAP 3A(b)(8).

Notice of entry of the Order was filed on February 10, 2021. 4AA0726-0744. Appellant Pierre Hascheff filed his notice of appeal on March 10, 2021. 4AA0745-0746. Lynda Hascheff filed her notice of cross appeal on March 16, 2021. RA0001-0003.[1] The appeal and cross appeal were timely filed pursuant to NRAP 4(a)(1)-(2).

ROUTING STATEMENT

The appeal and cross appeal challenge a post-judgment order involving family law matters and are therefore presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(7) and NRAP 17(b)(10).

[1] Pierre's counsel never conferred with Lynda's counsel as required by NRAP 30(a) regarding a joint appendix and omitted Lynda's Notice of Appeal from the appendix that he filed. Lynda's Notice of Appeal is provided in Respondent's Appendix filed concurrently herewith. RA0001-0003.

ANSWERING BRIEF ON APPEAL

ISSUES ON APPEAL

1. Did the district court correctly conclude that Lynda had no indemnification obligation to Pierre under the facts presented because:
   a. Pierre failed to demonstrate that the money he demanded was Lynda's responsibility under the plain language of MSA §40;
   b. Pierre was dilatory in making the demand, evasive, and acted in bad faith to Lynda's prejudice, in violation of the further assurances clause in MSA §37; and
   c. Laches warranted declaratory relief in Lynda's favor?
2. Because Pierre was not the prevailing party and did not comply with the pre-filing conditions in MSA §35.2, did the district court correctly deny his request for fees?

STATEMENT OF THE CASE

The parties' MSA, which was incorporated into their final divorce decree in 2013, contained a provision (§40) whereby Lynda must indemnify Pierre for half the fees incurred for a "defense and judgment" should a legal malpractice action be filed against him. 1AA0072. In January 2020, Pierre invoked MSA §40 to demand that Lynda indemnify him for $5,200.90, plus further bills he said would be forthcoming, that he purportedly incurred to defend against a malpractice action.

1AA0101-0105. He provided no documentation of the work performed to show that his demand came within the ambit of MSA §40. 1AA0101-0105.

Lynda requested information to evaluate Pierre's demand. Pierre refused to provide descriptions of the tasks performed by his lawyer, claiming they were protected by the attorney-client privilege. 1AA0164. Pierre insisted that Lynda simply had to pay him the money he demanded based on his contention that MSA §40 applied. 1AA0164.

Because Pierre was unyielding, Lynda was compelled to retain a lawyer to obtain the information she needed and understand her rights and obligations. 1AA0117-0125, 0130-0136, 0168. After months of Pierre's stonewalling, on June 16, 2020, Lynda filed a Motion for Clarification or Declaratory Relief regarding Terms of MSA and Decree ("DR Motion"). 1AA0082-0136. In her DR Motion, Lynda requested declaratory relief related to MSA §40's indemnification provision. 1AA0082-0094. Lynda further requested that Pierre pay the costs and fees she incurred in connection with her attempts to obtain information, respond to his demands and engage in the motion practice to establish her rights and obligations. 1AA0094. Although interpretation of the MSA's indemnification provision was already being briefed in Lynda's DR Motion, Pierre filed a Motion for Order to Show Cause, or in the Alternative, to Enforce the Court's Orders,

seeking to have Lynda held in contempt of court for allegedly violating the MSA ("OSC Motion"). 1AA0176-0205.

Following briefing and a hearing, at which the district court accepted documentary evidence and Pierre testified, the district court issued its Order Granting Motion for Clarification or Declaratory Relief; Order Denying Motion for Order to Enforce and/or for an Order to Show Cause; Order Denying Request for Attorney's Fees and Costs ("the Order"). 4AA0711-0725.

Pierre appeals from the grant of the Lynda's DR Motion and denial of his OSC Motion. Lynda cross appeals from the portion of the Order that denied her request for fees and costs.

STATEMENT OF THE FACTS

A. The Marital Settlement Agreement

The parties were married for 23 years until Pierre filed for divorce from Lynda in 2013. 1AA0001-0004, 0061. Pierre is a former practicing lawyer who is now a judge in Reno Justice Court. 1AA0029-0030. Section 40 of the parties' MSA provided that Lynda must indemnify Pierre for "the costs of any defense and judgment" "in the event [Pierre] is sued for malpractice" related to his former law practice. MSA §40, 1AA0072.

Two additional terms of the MSA are pertinent to this appeal. First, MSA §37 contains a "further assurances" clause, which provides:

> Husband and Wife shall each execute and deliver promptly on request to the other any and all additional papers, documents, and other assurances, ***and shall do any and all acts and things reasonably necessary or proper to carry out their obligations under this Agreement***. If either party fails or refuses to comply with the requirements of this paragraph ***in a timely manner***, that party shall reimburse the other party for all expenses, including attorney fees and costs, incurred as a result of that failure, and shall indemnify the other for any loss or liability incurred as a result of the breach.

1AA0072 (emphases added).

Second, MSA §35.1 contains a prevailing party fee and cost clause:

> If either party to this Agreement brings an action or proceeding to enforce any provision of this Agreement, or to enforce any judgment or order made by a court in connection with this Agreement, the prevailing party in that action or proceeding shall be entitled to reasonable attorney fees and other reasonably necessary costs from the other party.

1AA0071. To qualify for such an award, the prevailing party who brings the action or proceeding to enforce the MSA must first give the other party at least 10 days written notice that specifies:

> (1) whether the subsequent action or proceeding is to enforce the original terms of the Agreement; (2) the reasons why the moving party believes the subsequent action or proceeding is necessary; (3) whether there is any action that the other party may take to avoid the necessity for the subsequent action or proceeding; and (4) a period of time within which the other party may avoid the action or proceeding by taking the specified action.

MSA §35.2, 1AA0071. The MSA was incorporated and merged into the parties' divorce decree entered on November 15, 2013. 1AA0080.

B. Pierre Made A Sizeable Monetary Demand Without Supporting Documentation To Show That Lynda Had Any Obligation To Pay It

Over six years after the parties divorced, on January 15, 2020, Lynda received an undated letter from Pierre demanding that she pay him $5,200.90 for legal fees he claimed to be incurring in an "on-going" malpractice action. 1AA0101. He provided portions of invoices from a law firm but omitted the time entries that described the work actually performed. 1AA0102-0104.

The invoices revealed that the work for which Pierre sought indemnification had commenced nearly a year and a half earlier in 2018. 1AA0102-0104. Pierre's January 15, 2020 demand was the first time Pierre had said anything to Lynda regarding any alleged malpractice claim. 1AA0101. The invoices also showed that part of the bill had been paid by Pierre's malpractice insurance carrier, but Pierre's demand to Lynda did not offset those amounts. 1AA0101-0104. In his demand letter, Pierre warned Lynda that he would be sending additional invoices as fees continue to accrue. 1AA0101.

C. Pierre Evaded Lynda's Attempts To Obtain Further Information And Never Provided Proof That The Fees He Sought Were Within The Scope Of MSA §40

Because Pierre is a lawyer and Lynda is not, to evaluate Pierre's demand, Lynda asked her sister, Lucy Mason, a former California lawyer, to review the demand and communicate with Pierre. 1AA0175; 2AA0404-0414. Ms. Mason

emailed Pierre on February 4, 2020, requesting the following documentation to assess his demand:

1. A copy of the insurance policy pursuant to which you have made a claim;
2. All correspondence with your insurance company and adjuster about the claim;
3. All detailed billings/invoices you have received to date from Lemons, Grundy or any other firm working on your behalf on this matter, including all time entries by attorneys working on the claim;
4. All proof of payment you claim you have made on any bills reflected in 3) above;
5. All relevant pleadings in this matter, including but not limited to your response to the complaint

1AA00175. She also noted that, although Pierre had known about the potential malpractice claim for over 16 months, he had failed to inform Lynda, which was a breach of his fiduciary duty. 1AA0175.

In response, Pierre provided a malpractice complaint and insurance policy but refused to provide the narratives of the time entries on his attorney's bills, asserting they "include attorney-client communications." 1AA0164. The complaint showed that Pierre was sued for malpractice on December 26, 2019 by his former client Todd Jaksick ("the Malpractice Action") just a few weeks before Pierre made his demand to Lynda, yet his demand to Lynda included fees that he supposedly incurred starting in September 2018. *Compare* 1AA0110 *to* 1AA0104. The Malpractice Action related to an estate plan that Pierre prepared for Todd's father, Sam Jaksick, and associated trust documents and agreements prepared for

Todd and his trusts. 1AA0110-0114. Todd had been sued by his siblings, Stanley Jaksick and Wendy Jaksick, regarding their father's estate ("the Jaksick Trust Action"). 1AA0110-0114.

Oddly, Todd's complaint alleges "Plaintiffs believe and allege herein that the Defendant proceeded at all times in good faith and with the best interests of the Plaintiffs and Samuel S. Jaksick, Jr. as his first priority." IAA0104. Nevertheless, Todd alleged, if he were deemed liable to his siblings, Pierre should be liable to him. IAA0114. Pierre email stated that "[t]he malpractice litigation is on hold until the underlying case is completed." IAA0164.

Pierre contended that his demand included fees that were billed starting in 2018 because he was subpoenaed in the Jaksick Trust Action as a percipient witness and asked to produce his file. IAA0164. According to Pierre, "there was a concern that a malpractice action would follow so I immediately retained a lawyer through the insurance company." IAA0164. He stated that he was deposed and testified at trial, and that "[m]y lawyer attended all sessions." IAA0164. Yet, Pierre never notified Lynda of these events when they were occurring, and hiding behind the attorney-client privilege, Pierre contended that Lynda had no right to know the services for which Pierre demanded she indemnify him. IAA0164; 4AA0696-0700. According to Pierre, he only had to "prove that I paid the bill" and that his ex-wife must simply trust his representation that the work performed was part of her

indemnity obligation. 1AA0164. He also reiterated that "[t]he litigation is continuing and the[re] will be more bills." 1AA0164.

After Ms. Mason was unsuccessful in obtaining the needed information from Pierre, Lynda retained lawyer Shawn Meador to assist her in assessing her indemnity obligation. On March 2, 2020, Mr. Meador emailed Pierre requesting unredacted invoices: "I need to determine what fees have actually been charged and paid, without contribution from insurance company, in the malpractice action that appears to be on hold. I cannot do that without seeing the actual bills and time entries." 1AA0168. He also requested correspondence Pierre and his counsel had with Todd Jaksick (the former client who sued Pierre) and Mr. Jaksick's counsel. 1AA0168. Pierre again refused, asserting the attorney-client privilege. 1AA0167.

In his response to Pierre, Mr. Meador stated:

> Lynda is prepared to honor her obligation to pay her share of the costs and fees incurred in the malpractice action that have not been covered by insurance. I do not have sufficient information on which to evaluate what she does or does not owe you at this time because you have objected to providing that information. Upon receipt of the requested documents and other information, I will evaluate your demands with Lynda and she will pay what she owes under the agreement your lawyer drafted.

1AA0119.

Pierre waited over six weeks before responding, at which time he informed Mr. Meador he had retained counsel. 1AA0121. Pierre again asserted attorney-client privilege as his basis for withholding the information Lynda requested.

1AA0121. Having been informed that Pierre was now represented by counsel, that same day (April 20, 2020), Mr. Meador emailed Pierre's lawyers pointing out why Pierre could not hide behind the attorney-client privilege yet demand that Lynda indemnify him based on his unsupported assertions that the fees he incurred were within the MSA §40 obligation:

> I have previously outlined the information I need to review in order to provide my client with thoughtful and informed advice. Judge Hascheff's insistence that my client must simply accept his demands and that she is not entitled to basic and fundamental information about the very fees he insists she must share, is not supported by the law or common sense. Upon receipt of the information I have requested I will be happy to review and evaluate Judge Hascheff's claims and demands in good faith and will respond promptly.
>
> * * *
>
> I continue to look forward to receipt of the information I have previously requested so that I can give my client appropriate advice.

1AA0124.

Another six weeks passed with no response. On May 29, 2020, Pierre's counsel delivered a letter to Mr. Meador that again provided redacted billing statements, rendering Lynda unable to evaluate Pierre's demand. 1AA0127-0128. He also provided a declaration from Todd Alexander, the lawyer representing Pierre related to the Jaksick Trust Action and Malpractice Action. 1AA0107-0108. Among other things, that declaration made clear that Mr. Alexander was solely representing Pierre's interests, not Lynda's. 1AA0107. Mr. Alexander also declared: "Any correspondence between Hascheff and my firm is protected by

attorney-client privilege and will not be produced. Similarly, any correspondence and all communications between my firm and Jaksicks' attorneys are also privileged and/or confidential and will not be produced." 1AA0108. In other words, Pierre asserted a privilege over the communications with his **adversary** in the Malpractice Action. 1AA0108.

Mr. Meador responded on June 2, 2020, pointing out that Pierre's lawyer failed to address any of the issues and concerns raised in the previous correspondence. 1AA0130-0133. He also noted that, because Mr. Alexander's declaration confirmed he was only protecting Pierre's interests, Lynda has no one protecting her from the risk that Todd Jaksick's malpractice claim might pose. 1AA0130-0131. Mr. Meador also raised a concern that Pierre appeared to have represented: (1) Todd Jaksick individually and as trustee and beneficiary of his father Sam's trust; (2) Sam Jaksick; (3) Sam's trust; and (4) Todd's family trust, presenting a web of potential conflicts for which Pierre may not have obtained written waivers. 1AA0131. If that were the case, Mr. Meador wrote, Pierre might have procured MSA §40 through fraud because he did not inform Lynda at the time she signed the MSA of this known professional negligence. 1AA0132.

Mr. Meador also observed that the insurance policy Pierre provided had a $10,000 deductible. 1AA0132. Yet Pierre's initial demand had exceeded Lynda's half of that, and Pierre repeatedly stated in his correspondence that she would be

responsible for additional bills in excess of that amount. 1AA0132; *see* 1AA0101; 1AA0164. Mr. Meador then reiterated:

> Ms. Hascheff remains prepared to pay her one-half of the total fees and expenses related to the malpractice action… However, I need to know what the fees and costs have been that are directly related to the malpractice action so that Ms. Hascheff can pay her share of the undisputed fees and costs.

1AA0131. Mr. Meador closed his letter with the following:

> Pursuant to paragraph 35.2 of the parties' MSA, if we have not been able to reach an agreement within ten days of the date of this letter my client will file a declaratory relief action so that the court can determine my client's liability under these facts. To assure there is no confusion, my client's position is that she is responsible for one-half of the fees and costs associated with the malpractice action, that she is not responsible for Judge Hascheff's fees and costs as a percipient witness and that if Judge Hascheff knew or should have known the facts on which the malpractice claim was premised, this part of their MSA was obtained by fraud.

1AA0133. Mr. Meador sent a follow-up letter on June 11, 2020, again asking for information, to which there was no response. 1AA0134-0135. As this correspondence shows, Lynda tried for months to get Pierre to be transparent about the basis of his indemnification demand, but Pierre repeatedly rebuffed her efforts, compelling Lynda to file the DR Motion on June 16, 2020. 1AA0082.

Importantly, in his opening brief, Pierre repeatedly mischaracterizes Lynda's attempts to get information as "refusing" to comply with MSA §40. AOB 2, 3, 16, 33, 34. This was the same assertion made by Pierre below and is patently false. 1AA0119; 1AA0124; 1AA0131. The record shows that the correspondence from

Lynda states persistently that she was prepared to perform her indemnity obligation once Pierre provided descriptions of the legal services for which he claimed she owed half. 1AA0118-0119, 0124-0125, 0130-0133, 0135-0136, 0168, 0175; 2AA0412-0413. In rejecting Pierre's request to have Lynda held in contempt of court, the district court readily saw through Pierre's fabrications. 4AA0721-0722.

Notably, the only reference to the record that Pierre can muster for his misrepresentation is the place in his OSC Motion where he perpetrated the same falsehood. AOB 16 ¶17, citing 1AA0178:21-23. This is not evidence. *See Phillips v. State*, 105 Nev. 631, 634, 782 P.2d 381, 383 (1989). It was also contradicted by Pierre himself, who acknowledged under oath at the hearing that Lynda's counsel had confirmed she **would** pay her half if Pierre demonstrated that the money he demanded was within the scope of the indemnity language. 4AA0670. Because Pierre's appeal is premised on a misrepresentation of the record, his arguments must be rejected.

D. Pierre Demanded Fees And Costs That Were Outside The Scope Of MSA §40 And That He Had Not Even Incurred

In the course of her investigation, Lynda learned that even though Pierre's January 2020 demand sought fees and costs starting in September 2018, no malpractice action was even filed until December 2019. 1AA0101-0105; 3AA0427-0432. Moreover, the malpractice suit was almost immediately stayed such that no fees were being incurred to defend against that action. 1AA0164.

The fees Pierre sought for work prior to December 26, 2019 related to a deposition subpoena Pierre received on July 31, 2018 in the Jaksick Trust Action. 3AA0482-0544. Pierre was not a party to the Jaksick Trust Action, and there is no evidence that a malpractice action against Pierre was threatened simply because his percipient witness testimony was sought. 4AA0658(68:11-17), 0659-0667(69:10-77:10). Pierre later testified as a percipient witness at trial in the Jaksick Trust Action. 4AA0658(68:16-17). No one contended in the Jaksick Trust Action that Pierre did anything wrong in his preparation of Sam's estate plan; rather the Jaksick Trust Action contended that Sam lacked capacity or that there was undue influence. 4AA0659-666(69:10-76:18). Nevertheless, Pierre chose to have a lawyer represent him in the Jaksick Trust Action, and his demand to Lynda included fees he incurred for that purpose. 1AA0107-0108; 3AA0528-0544.

As Lynda's counsel pointed out in his correspondence, the fees Pierre demanded were not incurred in the Malpractice Action, which had not even been filed at the time of the subpoena, deposition and trial in the Jaksick Trust Action, but rather arose out of Pierre's unilateral decision to retain a personal lawyer to represent him individually in his role as a percipient witness. 1AA0118, 0124; 3AA0528-0544. The lawyer Pierre retained insisted that he did not represent Lynda's interests but rather just Pierre's. 1AA0107. Moreover, the insurance company had paid some of the fees Pierre demanded. 1AA0104; 3AA0526.

E. The District Court Agreed With Lynda That Pierre Was "Not Transparent," Failed To Provide Documentation To Support His Demand, And "Ignored" Lynda's Requests For Information To Her Detriment

After Lynda filed the DR Motion, Pierre filed his OSC Motion asking the district court to hold Lynda in contempt of court. 1AA0176-205. The parties briefed both motions. 1AA0082-2AA0286. The district court held a hearing at which, in addition to hearing arguments from counsel, the district court considered documentary evidence from both sides and live testimony from Pierre. 4AA0591-0702. After taking the matter under submission, the district court issued an order that granted Lynda's DR Motion, denied Pierre's OSC Motion, and declined to award fees to Lynda pursuant to MSA §35.2, even though she was the prevailing party. 4AA0711-0725.

In the Order, the district court found "troubling" the fact that Pierre waited over a year to notify Lynda of the malpractice action. 4AA0722-0723. Regarding this and Pierre's conflicting positions as to whether Lynda was truly responsible for the fees he demanded, the district court found that Pierre "was not transparent about his request for indemnification" and failed to inform Lynda "that he was seeking indemnification for fees and costs related to a collateral trust action." 4AA0721-0722. The district court characterized Pierre's conduct as "conscious disregard and selective enforcement of MSA §40." 4AA0723.

The district court also found that Pierre "failed to provide a complete and transparent accounting" and was inconsistent in the amount that he demanded. 4AA0722. As noted by the district court, Pierre and his counsel "unilaterally imposed redactions" on his attorney's billing statements, "thereby obfuscating the true amount" of what would be within the scope of MSA §40. 4AA0722. The district court likewise found that Lynda's requests for information were "ignored." 4AA0722. In other words, Pierre not only belatedly demanded payment from Lynda, obstructing her ability to mitigate her financial exposure, but also failed to inform Lynda what the demanded payment was for. 4AA0721-0723.

F. Timeline Of Pertinent Events

To assist the Court, Lynda provides the following summary timeline of the events pertinent to this appeal:

Event	Date	Appendix Reference
Pierre closes his private law practice and becomes a justice of the peace.	January 2013	1AA0029, 0039
Pierre and Lynda divorce pursuant to the MSA, which contains a provision by which Lynda will indemnify Pierre for one half of a "defense and judgment" in a malpractice action.	November 15, 2013	1AA0072, 0079-0081
Wendy Jaksick sues her brother Todd regarding their father Sam's trust and estate (the "Jaksick Trust Action")	December 2017	1AA0112

Event	Date	Appendix Reference
As part of the Jaksick Trust Action, Wendy subpoenas Pierre for his file regarding Sam's estate plan and to sit for a deposition. Pierre does not notify Lynda.	July 2018	3AA0482-0544; 4AA0624, 0696-0700, 0704-0705
Pierre notifies the carrier of his tail malpractice policy and retains counsel to represent him as a witness in the Jaksick Trust Action but does not notify Lynda.	August 2018 (approx.)	4AA0698-0700
Pierre starts to incur fees related to his testimony in the Jaksick Trust Action but does not notify Lynda.	September 2018	1AA0104; 4AA0698-0700
Todd files the Malpractice Action against Pierre. Pierre does not notify Lynda.	December 26, 2018	1AA0110-0114
Todd and Pierre immediately stay the Malpractice Action. Pierre does not notify Lynda.		1AA0164
Pierre sends Lynda a handwritten letter demanding $5,200.90, which he contended she owed him under MSA §40. This was the first time Pierre informed Lynda of the Jaksick Trust Action or the Malpractice Action.	January 15, 2020	1AA0101-0105; 4AA0700
Pierre refuses to provide Lynda with descriptions of the legal tasks for which he demanded indemnification, as well as other information for Lynda to evaluate his demand, causing Lynda to retain an attorney and incur fees.	February-June 2020	1AA0117-0135, 0164
Lynda files her Declaratory Relief Motion asking the district court to determine the parties' relative rights and obligations related to the dispute and the MSA.	June 16, 2020	1AA0082-0136

Event	Date	Appendix Reference
Pierre files his Motion for Order to Show Cause asking the district court to hold Lynda in contempt of court for not acceding to his unsupported demand and forcing Lynda to incur additional fees to address the same issue already briefed in Lynda's DR Motion.	July 8, 2020	1AA0176-0205; 2AA0221-0231
The District Court grants Lynda's DR Motion and denies Pierre's OSC Motion but does not award Lynda her fees.	February 1, 2021	4AA0711-0725

SUMMARY OF THE ARGUMENT

Although the district court decided in Lynda's favor based on laches, the Court need not even reach that issue because the plain language of the MSA required the same result. The indemnification obligation in MSA §40 was limited to the "defense and judgment" in a malpractice action. Pierre failed to meet his burden to demonstrate that the sums he demanded from Lynda were incurred for that limited purpose and that he actually paid the amount he sought. To the contrary, Pierre readily acknowledged his demand exceeded that scope and amount.

Moreover, the record in this case clearly shows that Pierre did not comply with the "further assurances" clause found in MSA §37, which required him, when requested by Lynda, to promptly deliver "additional papers, documents, and other

assurances, and [to] do any and all acts and things reasonably necessary or proper" to allow Lynda "to carry out [her] obligations under this Agreement." The district court found that Pierre did the exact opposite: he delayed in responding to Lynda, was not transparent, and obfuscated the tasks for which he demanded fees. Having held a hearing at which the parties submitted documentary evidence and Pierre testified, the district court was in the best position to make these factual findings, and the Court should not disturb them on appeal.

Even should the Court look beyond the contract language, Pierre's conduct justified the application of laches. The record shows that Pierre's failure to timely inform Lynda of the malpractice action deprived her of the ability to mitigate her potential liability. His failure to timely provide the documents requested by Lynda or to disclose the information she needed to evaluate whether the sums he demanded were her obligation required Lynda to retain an attorney who ultimately had to seek and obtain declaratory relief because of Pierre's stonewalling. Whether laches is warranted in any particular case is fact specific, and the district court properly exercised its discretion to find that Pierre's conduct was grounds for laches.

Because Pierre did not prevail below and failed to satisfy the contractual prerequisites for a fee award under MSA §35.2, he cannot recover fees under the MSA. Rather, as discussed in the opening brief on cross appeal *infra*, Lynda

should recover her fees as the prevailing party pursuant to MSA §35.1 and for Pierre's violation of the further assurances clause in MSA §37. As a result, Lynda respectfully requests that the Court affirm the grant of her DR Motion but reverse and remand for the district court to award her fees and costs.

ARGUMENT

A. Standard Of Review

Contract interpretation and, specifically, the interpretation of a contractual indemnity clause, is a question of law that is reviewed *de novo*. *Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. 476, 481, 376 P.3d 151, 155 (2016); *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127 Nev. 331, 339, 255 P.3d 268, 274 (2011).

"[W]hether a determination is proper in an action for declaratory relief is a matter within the trial judge's discretion that will not be disturbed on appeal unless abused." *El Capitan Club v. Fireman's Fund Ins. Co.*, 89 Nev. 65, 68, 506 P.2d 426, 428 (1973). An appellate court will generally uphold a district court's rulings in a divorce matter "that were supported by substantial evidence and were otherwise free of a plainly appearing abuse of discretion." *Williams v. Waldman*, 108 Nev. 466, 471, 836 P.2d 614, 617 (1992).

"The appropriate standard of review of a determination of whether laches applies in a particular case is abuse of discretion." *In re Beaty*, 306 F.3d 914, 921

(9th Cir. 2002). "The operation of laches generally is a question of fact for the judge, and a judge's finding as to laches will not be overturned unless clearly erroneous." 30A C.J.S. Equity § 160.

An appellate court will not disturb a correct district court decision, even though the district court relied on erroneous reasons or did not address the correct reasons. *Dynamic Transit Co., v. Trans Pac. Ventures, Inc.*, 128 Nev. 755, 760 n.3, 291 P.3d 114, 117 n.3 (2012) (citing *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981)); *see also Ford v. Showboat Operating Co.*, 110 Nev. 752, 755–56, 877 P.2d 546, 548–49 (1994) (holding that a respondent may advance any argument in support of a judgment or order that is raised and supported by the record below even if the district court rejected the argument or did not consider it).

B. The MSA's Plain Language Warrants Affirmance Of Declaratory Relief In Lynda's Favor

1. MSA §40 Limits Lynda's Indemnification Obligation To Half The Costs of Any Defense And Judgment In A Malpractice Action, Not Collateral Costs Pierre Chose To Incur

Although the district court decided the matter based on laches, the Court need not even reach that issue and may affirm based on the plain language of the MSA. *See Ford*, 110 Nev. at 755–56, 877 P.2d at 548–49. "Generally, when a contract is clear on its face, it 'will be construed from the written language and enforced as written.'" *Buzz Stew, LLC v. City of N. Las Vegas*, 131 Nev. 1, 7, 341

P.3d 646, 650 (2015) (*quoting Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599, 603 (2005)). An indemnity clause must "be strictly construed" and enforced according to the terms stated within "the four corners of the contract." *Reyburn*, 127 Nev. at 339, 255 P.3d at 274, quoting *George L. Brown Ins. v. Star Ins. Co.*, 126 Nev. 316, 324-25, 237 P.3d 92, 97 (2010); *United Rentals Hwy. Techs. v. Wells Cargo*, 128 Nev. 666, 673, 289 P.3d 221, 226 (2012).

a. By Keeping Secret The Actual Tasks His Attorney Performed, Pierre Failed To Meet His Evidentiary Burden For Indemnification Under MSA §40

By using the attorney-client privilege as both a sword and shield, Pierre failed to demonstrate that the sums he demanded from Lynda were her indemnity obligation. The party who seeks to recover under a contract has the burden of proof to demonstrate that the performance demanded is required by the contract. *Forsyth v. Heward*, 41 Nev. 305, 170 P. 21, 24 (1918); *Ferguson v. Rutherford*, 7 Nev. 385, 390 (1872); *see Cont'l Cas. Co. v. Summerfield*, 87 Nev. 127, 131, 482 P.2d 308, 310 (1971).

Here, the plain language of MSA §40 indicates that Lynda was only obligated to indemnify Pierre once he was "sued for malpractice," and the scope of the indemnification was only for costs "of any defense and judgment." 1AA0072. In other words, to recover from Lynda under the indemnification provision of the MSA, it was Pierre's burden to demonstrate that: (1) he had been sued for

malpractice; and (2) the costs he sought to recover were incurred in defense of the malpractice action. 1AA0072. Pierre failed in both respects because nearly all the fees he demanded were incurred before the Malpractice Action was filed (when no one was accusing him of any wrongdoing), and he never disclosed descriptions of the actual services his attorney performed. 3AA0524-0544.

As the district court noted with dismay at the hearing:

> [The billing] is redacted to the point we don't even know – it doesn't even – telephone call with, and the rest is redacted, the entire section of that is redacted. I mean everything from that … we have two things that [are] redacted out in totality. We don't know whether or not it's [a] telephone call, whether it was an appearance, whether it was a review, whether it was a draft, we don't even know the simplistic aspect of what the work was.

4AA0610, *citing* 3AA0524-0544.

In his opening brief, Pierre contends that he was allowed to withhold privileged communications.[2] However, a party cannot use the privilege as both a sword and a shield. *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 133 Nev. 369, 381, 399 P.3d 334, 346 (2017). Having put the subject matter of his attorney's services at issue, Pierre waived the privilege as to what his attorney did. *Wardleigh v. Second Jud. Dist. Ct.*, 111 Nev. 345, 354, 891 P.2d 1180, 1186 (1995).

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[2] Notably, Pierre asserted the privilege over conversations he and his attorney had **with opposing counsel**. 1AA0108; 4AA0640-0641, 0654. These are not protected under NRS 49.095 or NRCP 26(b)(3).

Pierre's choice to keep secret the services his attorney performed necessarily meant either: (1) he failed to meet his burden of proof or (2) he waived the privilege and had to produce unredacted invoices in order to meet his burden of proof. *See Forsyth*, 41 Nev. at 305, 170 P. at 24; *Wynn*, 133 Nev. at 381, 399 P.3d at 346. He cannot have it both ways. *See id.* Because Pierre chose to hide behind the privilege, he failed to meet his evidentiary burden.

b. Fees Incurred In A Collateral Matter To Which Pierre Was Not A Party Are Not Lynda's Obligation

Disregarding the MSA's plain language, Pierre demanded from Lynda fees and costs he incurred in connection with his role as a percipient witness in a lawsuit to which he was not a named party. 1AA0101; 4AA0658(68:16-17). A plain language analysis leads to the unavoidable conclusion that a collateral suit does not qualify as the "defense and judgment" when Pierre is "sued for malpractice." 1AA0072.

At the time Pierre drafted MSA §40, he knew that a malpractice claim may be preceded by collateral litigation. Indeed, he argues in his opening brief that this is a common occurrence. AOB 12-15.[3] Given that Pierre contends collateral

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[3] It is unclear from the opening brief whether Pierre contends he had counsel represent him as a percipient witness in the Jaksick Trust Action based on his belief that issues decided in that action would be subject to issue and claim preclusion in a subsequent malpractice suit. AOB 15. Because Pierre is not a party or privy to the Jaksick Trust Action, however, he would not be barred from raising defenses in the Malpractice Action. 4AA0658(68:16-17).

litigation is to be expected, had he wished Lynda's indemnity obligation to encompass collateral matters that are outside an actual malpractice suit, he could have drafted the MSA with broader language. He chose not to, and a court cannot rewrite the contract to impose new obligations or include terms that the parties did not use. *See Griffin v. Old Republic Ins. Co.*, 122 Nev. 479, 483, 133 P.3d 251, 254 (2006).

That Pierre may have thought it "reasonable" and "prudent" to retain counsel to represent him as a percipient witness in the Jaksick Trust Action does not alter the plain language of the MSA. 1AA0072. To expand Lynda's indemnity obligation, Pierre would have to fully advise her of the circumstances, obtain her consent in advance, and execute a written amendment to the MSA for approval by the district court. *See Griffin*, 122 Nev. at 483, 133 P.3d at 254. Absent express authority in the MSA – which does not exist – Pierre could not make a unilateral decision to retain counsel for a collateral matter and then impose the resulting fees on Lynda. *See id.*

This is particularly so where, as here, MSA §40 requires Lynda to indemnify Pierre for Pierre's own negligence. An indemnification clause in which a party is indemnified for his own negligence must unequivocally express that intent and be strictly construed. *George L. Brown Ins.*, 126 Nev. at 324-25, 237 P.3d at 97; *Reyburn*, 127 Nev. at 339, 255 P.3d at 274. MSA §40 shows that the parties only

intended for Lynda to indemnify Pierre in the limited circumstances stated in the MSA: fees and costs incurred in the "defense and judgment" of a malpractice suit. 1AA0072. Strict construction of this language means the Court must limit the indemnity solely to that which the parties expressly stated in the MSA. *See Reyburn*, 127 Nev. at 339, 255 P.3d at 274. Contrary to Pierre's assertion (AOB 18), the indemnity was not "self-executing" to encompass everything and anything he wanted it to.

c. Lynda's Indemnity Obligation Does Not Include Fees And Costs Paid By The Malpractice Carrier

As he admitted in the district court, Pierre demanded more money from Lynda than his total potential liability. 2AA0235. A right of indemnity for damages only accrues when the indemnitee proves actual payment. *Jones v. Childs*, 8 Nev. 121, 125 (1872). This means an indemnitee cannot recover from the indemnitor more than the amount for which the indemnitee is liable. *See id.*

In his original demand, Pierre insisted that Lynda pay him $5,200.90 and that more bills would be forthcoming. 1AA0101. Pierre reiterated in his email to Ms. Mason that "the[re] will be more bills." IAA0164. In various correspondence, he vacillated on the actual amount of the demand, contending it was $4,675.90, then $4,924.05. 1AA0117; 1AA0154. But he indicated that the fees Lynda would have to pay would continue to accrue. 1AA0121, 0164.

Many months after making his demand, in a misleading effort to make Lynda look unreasonable for having filed the DR Motion, Pierre asserted in briefing below that because the tail insurance policy had a $10,000 deductible, the most Lynda would be obligated to pay him would be $5,000, even though his initial demand exceeded that amount. *Compare* 2AA0235 *to* 1AA0101. That was the first time Pierre informed Lynda that he believed there was a cap on her potential liability, and it contradicted the position he had taken in his earlier correspondence. 1AA0101, 0121, 0164; *see also* 4AA0698(108:15-17).

Moreover, in opposing Lynda's DR Motion, Pierre stated that the carrier of his malpractice tail policy "picked up the defense and paid defense fees in the trust litigation of $2500, although not required under the policy…." 1AA0144. The invoices confirm the malpractice carrier paid such fees, yet Pierre's demands did not offset the carrier's payments. 1AA0101-0105, 3AA0524-0544. As the district court correctly found, Pierre never provided a clear accounting of what he purportedly paid and what the carrier paid. 4AA0739. MSA §40 does not allow Pierre to recover a windfall from Lynda. *See Jones*, 8 Nev. at 125.

2. The MSA's Further Assurances Provision Obligated Pierre To Timely Inform Lynda Of A Malpractice Claim And Provide Her Information To Justify His Indemnity Demand

Declaratory relief in Lynda's favor can likewise be affirmed based on the plain language of the MSA's further assurances clause. MSA §37 required the parties to:

> ***do any and all acts and things reasonably necessary or proper to carry out their obligations under this Agreement***. If either party fails or refuses to comply with the requirements of this paragraph ***in a timely manner***, that party shall reimburse the other party for all expenses, including attorney fees and costs, incurred as a result of that failure, and shall indemnify the other for any loss or liability incurred as a result of the breach.

1AA0072 (emphases added). Generally, a further assurances clause requires a contracting party to take all such actions that are necessary to effectuate the core commitments in a contract. *See In re Winer Fam. Tr.*, No. 05-3394, 2006 WL 3779717, at *3 n.6 (3d Cir. Dec. 22, 2006) (characterizing purpose of further assurances clause as "ensur[ing] that the parties would not obstruct each other's efforts to comply with their specific obligations."). The breach of a further assurances clause constitutes a breach of contract. *See Blumberg Assocs. Worldwide, Inc. v. Brown & Brown of Conn.*, 84 A.3d 840, 855 (Conn. 2014).

Pierre's opening brief accuses the district court of writing a notice provision into the MSA that does not otherwise exist. AOB 20. Yet MSA §37 clearly obligated Pierre to "do any and all acts and things reasonably necessary or proper

to carry out [his] obligations" and for Lynda to carry out her obligations under the MSA. 1AA0072. The district court found that depriving Lynda of critical information that could affect her potential liability under MSA §40 for over a year, failing to be transparent, and engaging in delay tactics was improper and prejudicial. 4AA0721-0723.

Although the district court concluded that these facts gave rise to laches, the same facts demonstrate Pierre's breach of MSA §37 because the information withheld by Pierre was "reasonably necessary" for Lynda to evaluate her risk and liability. Having failed to comply with MSA §37, Pierre could not enforce MSA §40 against Lynda. *See Laguerre v. Nevada Sys. of Higher Educ.*, 837 F. Supp. 2d 1176, 1180 (D. Nev. 2011) (noting that, under Nevada law, a plaintiff's own performance under a contract is an essential element of a breach of contract claim).

In light of MSA §37, the cases Pierre cites for the supposed proposition that an indemnitee has no obligation to notify an indemnitor of a settlement are of no consequence. AOB 20-24. The only Nevada decision he cites is an unpublished disposition from 2013, which NRAP 36(c)(3) prohibits him from citing. AOB 23. That non-authoritative case, and the other cases to which Pierre points, do not have the facts that exist here: an indemnitee who seeks indemnification for his own negligence under a contract that strictly confines the indemnification obligation to limited circumstances and requires the indemnitee to "do any and all acts and

things reasonably necessary or proper" for the parties to carry out their contractual obligations. 1AA0072. Unlike in the cases cited by Pierre, this case does not involve a settling indemnitee; it involves an indemnitee who, for a year and half, intentionally kept secret from the indemnitor the facts and circumstances of a malpractice claim, thereby depriving her of the ability to mitigate her potential liability. This violated not only the language but also the spirit of MSA §37.

C. The District Court Correctly Applied Laches To Pierre's Prejudicial And Dilatory Conduct

Although this case can be decided in Lynda's favor based purely on the contract language, the facts as viewed and weighed by the district court also soundly supported the conclusion that laches warranted declaratory relief in Lynda's favor.

1. The District Court Could Recognize A Laches Defense In A Declaratory Relief Action

Pierre erroneously argues that the district court was barred from invoking laches in a contract action. AOB 29. This argument disregards that the matter involved declaratory relief to interpret the respective rights and obligations in the MSA (sought by Lynda) and for contempt proceedings (sought by Pierre). "[T]he declaratory judgment and injunctive remedies are equitable in nature and other equitable defenses may be interposed." *Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967), abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99, 105

(1977). “Declaratory and injunctive relief are equitable remedies and may thus be barred by laches.” *Sierra Club v. U.S. Dep't of Transp.*, 245 F. Supp. 2d 1109, 1114 (D. Nev. 2003); *see also Lincoln Benefit Life Co. v. Edwards*, 243 F.3d 457, 462 (8th Cir. 2001) (“A court of equity has inherent power to restore justice between contracting parties”); *Andersen, Meyer & Co. v. Fur & Wool Trading Co.*, 14 F.2d 586, 589 (9th Cir. 1926) (“As the subject-matter here involved belongs to the class of cases of which a court of equity has jurisdiction, the objection so made to the jurisdiction in equity because of an adequate remedy of law will be disregarded.”); *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 197 (2d Cir. 2019) (recognizing a laches defense to a case at law). Laches can apply to bar a request to hold a party in contempt. *See McGuffin v. Springfield Hous. Auth.*, 662 F. Supp. 1546, 1550 (C.D. Ill. 1987).

As these authorities demonstrate, the fact that the district court was tasked with interpreting a contract did not prevent it from invoking laches. *See id.*; *Abbott Labs.*, 387 U.S. at 155. While *Reyburn* has language that “[w]hen the duty to indemnify arises from contractual language it ***generally*** is not subject to equitable considerations,” the use of the word “generally” indicates that this is not a hard and fast rule. *See* 127 Nev. at 339, 255 P.3d at 274. Since the exception applies here to both declaratory relief and contempt proceedings, the district court properly

invoked laches to determine that Pierre's egregious conduct warranted declaratory relief in Lynda's favor. *See Abbott Labs.*, 387 U.S. at 155.

2. The Facts Found By The District Court Satisfy The Requirements For Laches

Having reviewed the evidence and observed Pierre's testimony, the district court was best situated to find that the facts presented a case for laches.

> Laches is an equitable doctrine which may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable. To determine whether a challenge is barred by the doctrine of laches, this court considers (1) whether the party inexcusably delayed bringing the challenge, (2) whether the party's inexcusable delay constitutes acquiescence to the condition the party is challenging, and (3) whether the inexcusable delay was prejudicial to others.

Miller v. Burk, 124 Nev. 579, 598, 188 P.3d 1112, 1125 (2008) (quoting *Building & Constr. Trades v. Public Works*, 108 Nev. 605, 610–11, 836 P.2d 633, 636–37 (1992)). "Applicability of the laches doctrine depends upon the particular facts of each case." *Carson City v. Price*, 113 Nev. 409, 412, 934 P.2d 1042, 1043 (1997), citing *Home Savings v. Bigelow*, 105 Nev. 494, 496, 779 P.2d 85, 86 (1989). As the trier of fact, "the district court is in the best position to adjudge the credibility of the witnesses and the evidence" and should not be second-guessed by the reviewing court. *State v. Rincon*, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006), quoting *State v. McKellips*, 118 Nev. 465, 469, 49 P.3d 655, 658 (2002).

As the district court correctly concluded, the facts here justified ruling against Pierre on the basis of laches. 4AA0719-0721. Pierre waited a year and a half before he first informed Lynda of a potential malpractice claim. 1AA0101; 4AA0698(110:14-17). He then withheld pertinent information from her, which prompted months of requests that he denied. 1AA0164-0165, 0175. Pierre's position was that his former wife had no choice but to trust him that the indemnity provision applied and send him a check simply because he demanded one. 1AA0164. Having reviewed the evidence and heard Pierre's testimony, the district court found his conduct "troubling," "not transparent," and incomplete and that Lynda was thereby prejudiced. 4AA0721-0723.

In his opening brief, Pierre erroneously contends that testimony from Lynda was needed for the district court to find she was prejudiced. AOB 40. The documentary evidence, however, speaks for itself. By keeping Lynda in the dark, notwithstanding Pierre's contention that the defense of the malpractice action was a joint obligation, Pierre deprived her of the opportunity to exercise what should have been her equal and equivalent right to participate in management of the litigation. 1AA0124.

Because Pierre's attorney said he represented Pierre's interests alone, Lynda could have retained her own counsel to observe the Jaksick Trust Action and evaluate whether it called into question the legal services provided by Pierre.

1AA0124, 00130-0131. Had she been given the opportunity to retain counsel, her lawyer could have observed Pierre's testimony in the Jaksick Trust Action for content and credibility, evaluated how Pierre's potential conflicts of interest related to the Jaksick family might constitute professional negligence, and participated in the strategy decisions that Pierre made unilaterally. 1AA0125, 00130-0131. Not being a lawyer, Lynda's interests in obtaining legal advice were greater than Pierre's. 1AA0132.

Pierre also contends the district court purportedly "misinterpreted [his] accounting of his fees and costs." AOB 39. Yet to back that up, he makes multiple assertions that lack any citation to the record whatsoever. AOB 40. Where he does cite the record for the proposition that he provided "a complete account substantiating his indemnity claim," his references actually undermine, rather than support, him. AOB 40. First, he cites portion of a bill from August 27, 2019 that purports to show some payments being made by "Allied World" and some by "PAH Limited LLC." AOB 40, citing 1AA0144. But Pierre's demand included fees that post-dated that time. 3AA523-0524. So, the portion of that bill was neither "complete" nor an "account[ing]." *See id.*

Second, Pierre pointed to a chart that his lawyer included in the Opposition to Lynda's DR Motion. AOB 40, citing 1APP0154. This is not evidence. *See Phillips*, 105 Nev. at 634, 782 P.2d at 383. Even if it were, the chart is plainly

wrong because, in it, Pierre claims fees incurred "after [the] malpractice suit" starting in January 2019 when Todd Jaksick's Malpractice Action was not filed until December 26, 2019, nearly a year later. *Compare id. to* 1AA0110. Given that this is the only thing to which Pierre could point for his supposed "accounting," the district court correctly found that it was inadequate. 4AA0722.

In sum, Pierre's delay and failure to provide basic and complete information precluded Lynda from mitigating her potential risk posed by Pierre's professional negligence. 1AA0124-0125. It materially impaired her from protecting herself against a potential judgment for which she might be 50% responsible. 1AA0125. It also precluded her from determining whether Pierre had procured MSA §40 through fraud because he knew of conflicts of interest among the Jaksick family members that he represented. IAA0131. The issue of prejudice is an issue of fact, and the district court was best positioned to make these factual findings and conclude that they give rise to laches. *See Las Vegas Metro. Police Dep't v. Coregis Ins. Co.*, 127 Nev. 548, 558, 256 P.3d 958, 965 (2011).

In an analogous case involving delay and obfuscation in notifying an indemnitor that his indemnity obligation might be triggered, thereby prejudicing the indemnitor's position, the Supreme Court invoked laches to conclude that "[i]t would … be inequitable to permit the [indemnitee] to proceed with its indemnity claim." *Erickson v. One Thirty-Three, Inc., & Assocs.*, 104 Nev. 755, 758, 766

P.2d 898, 900 (1988). The same is true here. Under the facts and circumstances, applying laches to enter declaratory relief in favor of Lynda was appropriate.

D. Pierre Breached The Covenant Of Good Faith And Fair Dealing Implied In The MSA And His Fiduciary Duty That Arises From It

Pierre's decision to withhold information from Lynda likewise breached the covenant of good faith and fair dealing implied in the MSA and his fiduciary obligation to act in good faith. A party to the contract who "deliberately contravenes the intention and spirit" of a contract breaches the implied covenant of good faith and fair dealing. *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226, 232, 808 P.2d 919, 922–23 (1991). "A 'confidential or fiduciary relationship' exists when one reposes a special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence." *Long v. Towne*, 98 Nev. 11, 13, 639 P.2d 528, 530 (1982). "A fiduciary relationship exists when one has the right to expect trust and confidence in the integrity and fidelity of another." *Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 700, 962 P.2d 596, 602 (1998), *opinion modified on denial of reh'g*, 115 Nev. 38, 979 P.2d 1286 (1999) (upholding jury instruction with this language). Even in the absence of a fiduciary relationship, fiduciary-like duties may arise "when one party gains the confidence of the other and purports to act or advise with the other's interests in mind." *Perry v. Jordan*, 111 Nev. 943, 947, 900 P.2d 335, 337-38 (1995).

Pierre had such duties to Lynda because of his advantaged and entrusted position regarding any malpractice claims. As between Pierre and Lynda, he had sole control over the events that might give rise to a malpractice action and whether he engaged in professional negligence. In other words, whether or not Lynda's indemnity obligation gets triggered turns on Pierre's adherence to his professional duties, over which Lynda had no control.

Moreover, Pierre held all the information related to: (1) how he practiced law; (2) potential liability for malpractice claims arising from his law practice, including those arising from any conflicts of interest;[4] (3) the Jaksick Trust Action proceedings; (4) the Malpractice Action filed by Todd Jaksick; (5) payments he allegedly made; and (6) coverage by the insurance carrier. Lynda was in the dark. Pierre alone would know if a malpractice action were threatened or filed. Given their unequal positions, Pierre had a duty to act in good faith to provide information to Lynda so she could evaluate her potential liability and take steps, if possible, to mitigate it. *See Perry*, 111 Nev. at 947, 900 P.2d at 337-38. He failed to do so.

---

[4] When reviewing the Malpractice Action complaint, Lynda learned of potential conflicts of interest among individuals in the Jaksick family. 1AA0110-0114. Lynda requested discovery below into whether Pierre had obtained conflict waivers so she could assess whether he failed to disclose critical information to her at the time §40 was included in their MSA. 1AA0092. Should the Court not simply affirm declaratory judgment in Lynda's favor, remand to the district court so that Lynda can investigate whether Pierre procured MSA §40 through fraud is warranted.

E. Pierre Is Not Entitled To His Fees In This Action Because He Was Not The Prevailing Party And Did Not Comply With MSA §35.2

As the losing party, Pierre was not entitled to fees under Section 35 of the MSA, which provides:

> If either party to this Agreement brings an action or proceeding to enforce any provision of this Agreement, or to enforce any judgment or order made by a court in connection with this Agreement, the prevailing party in that action or proceeding shall be entitled to reasonable attorney fees and other reasonably necessary costs from the other party.

1AA0071. Pierre lost below. 4AA0711-0725. As a result, the district court correctly denied his request for fees. *See id.* Pierre's argument that his fees and costs were part of Lynda's indemnity obligation is circular and contrary to the plain language of MSA §§35.2 and 40. 1AA0071-0072. If the fees and costs are not covered under a strict construction of the contract language, he cannot recover them.

The relief sought by Pierre was for the district court to hold Lynda in contempt of court. 1AA0176-0205. In seeking a contempt order, the moving party must make a *prima facie* showing that the non-moving had the ability to comply with the court order and that the violation of the order was willful. *Rodriguez v. Dist. Ct.*, 120 Nev. 798, 809, 102 P.3d 41, 49 (2004). For contempt to be found, the court order "must be clear and unambiguous, and must spell out the details of compliance in clear, specific, and unambiguous terms so that the person will

readily know exactly what duties or obligations are imposed on him." *Cunningham v. Dist. Ct.*, 102 Nev. 551, 559-60, 729 P.2d 1328, 1333-34 (1986). In his opening brief, Pierre does not even analyze the requirements for a contempt order or point to any error in the district court's conclusion that no contempt of court occurred, thereby waiving this argument. *See Bongiovi v. Sullivan*, 122 Nev. 556, 569 n.5, 138 P.3d 433, 443 n.5 (2006) (declining to consider issues not raised in appellant's opening brief). In light of this waiver, Pierre cannot be deemed the prevailing party.

Even had he prevailed, Pierre still could not recover his fees for this litigation because he failed to comply with the pre-filing conditions set forth in MSA §35.2.

> A party intending to bring an action or proceeding to enforce this Agreement shall not be entitled to recover attorney fees and costs under this provision unless he or she first gives the other party at least 10 days written notice before filing the action or proceeding. The written notice shall specify (1) whether the subsequent action or proceeding is to enforce the original terms of the Agreement; (2) the reasons why the moving party believes the subsequent action or proceeding is necessary; (3) whether there is any action that the other party may take to avoid the necessity for the subsequent action or proceeding; and (4) a period of time within which the other party may avoid the action or proceeding by taking the specified action. The first party shall not be entitled to attorney fees and costs if the other party takes the specified action within the time specified in the notice.

1AA0071. Pierre contends that his March 1, 2020 email gave the requisite notice. AOB 16-17. In that email, however, all Pierre said was if Lynda did not pay his

demand, he would "proceed accordingly." 1AA0117; 4AA0674(84:12-86:2). His lawyer's May 26, 2020 letter said Pierre would "seek enforcement of the MSA indemnity provision" after 10 days. 2AA0357. He did not say he would seek to have Lynda held in contempt of court, which is what he ultimately did. 1AA0117, 0176-0205. As a result, he did not comply with MSA §35.2, and even had he prevailed, could not recover litigation fees from Lynda. 1AA0071.

OPENING BRIEF ON CROSS APPEAL

ISSUE ON CROSS APPEAL

Did the district court abuse its discretion by denying Lynda's request for attorney's fees and costs where the plain language of the MSA provided that the party who prevails in a proceeding to enforce the MSA is entitled to reasonable fees and costs, and Lynda prevailed?

SUMMARY OF THE ARGUMENT

Lynda was the prevailing party and complied with the pre-filing obligations in MSA §35.2. Whether under MSA §35.1 or §37, she was entitled to recover the fees and costs she incurred to request information from Pierre, seek declaratory relief regarding the parties' respective rights, and defend against his attempt to have her held in contempt of court. The district court's failure to award her fees was an abuse of discretion.

ARGUMENT

A. Standard Of Review

Interpretation of a contract's prevailing party fee provision is reviewed *de novo*. *Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012). A district court's failure to provide rationale for denying a fee award under a contract is an abuse of discretion. *Lyon v. Walker Boudwin Constr. Co.*, 88 Nev. 646, 651, 503 P.2d 1219, 1221-22 (1972).

B. The Unambiguous Language Of The MSA Required An Award Of Fees And Costs To Lynda As The Prevailing Party

Because the district court ruled in Lynda's favor on the merits, the MSA required the district court to award Lynda the reasonable costs and fees she incurred in securing declaratory relief. Where the language of a contract is "clear and unambiguous" that "the prevailing party is entitled to attorney fees incurred in defense or prosecution of the action," the district court must award fees. *Davis v. Beling*, 128 Nev. 301, 322, 278 P.3d 501, 515 (2012). Refusal to award fees to the prevailing party under the clear terms of a contract is reversible error. *See Mackintosh v. California Fed. Sav. & Loan Ass'n*, 113 Nev. 393, 405-06, 935 P.2d 1154, 1162 (1997).

Here, the MSA has two provisions that warranted an award of fees and costs to Lynda. First, MSA §35.1 contains a prevailing party fee clause, which provides:

> If either party to this Agreement brings an action or proceeding to enforce any provision of this Agreement, or to enforce any judgment or order made by a court in connection with this Agreement, the prevailing party in that action or proceeding ***shall be entitled*** to reasonable attorney fees and other reasonably necessary costs from the other party.

1AA0071 (emphasis added). The word "shall" meant that an award of fees and costs to the prevailing party was not discretionary. *See Adkins v. Oppio*, 105 Nev. 34, 37, 769 P.2d 62, 64 (1989).

Second, MSA §37 also authorizes Lynda to recover fees, providing:

> If either party fails or refuses to comply with the requirements of [the further assurances requirement] ***in a timely manner***, that party shall reimburse the other party for all expenses, including attorney fees and costs, incurred as a result of that failure, and shall indemnify the other for any loss or liability incurred as a result of the breach.

Prior to seeking declaratory relief, Lynda's counsel sent correspondence that complied with MSA §35.2. 1AA0130-0133. In her DR Motion, Lynda noted that Pierre's evasiveness, obstinance and failure to provide her the information necessary to back up his demands forced her to incur significant legal fees and costs. 1AA0082-0136. She requested that the district court award such fees. 1AA0094.

The district court expressly found that Pierre failed to provide Lynda information in a timely manner that he should have provided. 4AA0723. The district court also expressly found that Lynda complied with the pre-filing

obligations found in MSA §35.2. The district court granted Lynda's DR Motion, making her the prevailing party. 4AA0711-0725.

Nevertheless, the district court failed to apply the MSA's plain language to award her fees. Instead, the district court's order inexplicably states:

> The Court DENIES the parties' respective requests for attorneys' fees and costs associated with the MSA Motion and OSC Motion. The Court notes MSA § 35 addresses the payment of future attorneys' fees and costs to a prevailing party upon providing, inter alia, at least 10-day written notice before filing an action or proceeding. This Court is assured both parties have satisfied their obligations under MSA § 35. See MSA Motion, Ex. 4-8. For example, counsel for Judge Hascheff and Ms. Hascheff undisputedly provided their MSA § 35 notices on May 29, 2020 and June 2, 2020, more than 10-days prior to the filing of the MSA Motion and OSC Motion. MSA Motion, Ex. 7-8. Further, the Court finds there was a reasonable basis for litigating the arguments presented by both parties in their respective motions. Therefore, the Court declines to award attorneys' fees and costs.

4AA0724.

Lynda incurred significant legal fees to have her lawyer repeatedly seek information that Pierre would not provide and to brief and argue the motion for declaratory relief and opposition to Pierre's OSC Motion. 1AA0132. Having ruled in Lynda's favor, the district judge should have awarded her fees and costs under the plain language of the MSA. Failure to do so, without any explanation why, was an abuse of discretion. *See Lyon v. Walker Boudwin Constr. Co.*, 88 Nev. 646, 651, 503 P.2d 1219, 1221-22 (1972). The district court could not rewrite the parties'

contract to remove the fees and costs provisions. *See Griffin*, 122 Nev. at 483, 133 P.3d at 254.

CONCLUSION

The district court's grant of declaratory relief in Lynda's favor should be affirmed based on the plain language of the MSA, the doctrine of laches, and Pierre's breach of the covenant of good faith and fair dealing and his fiduciary duty to timely inform Lynda of the malpractice action that was filed against him. As the prevailing party, Lynda was entitled to recover her fees and costs.

As a result, Lynda respectfully asks the Court to affirm that Lynda had no indemnification obligation to Pierre under these facts and reverse and remand to the district court to award Lynda the fees and costs she incurred related to this matter.

Should the Court reverse the district court's declaratory relief, Lynda requests that it remand for discovery into whether Pierre procured MSA §40 through fraud.

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.

DATED December 15, 2021

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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 2007 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 10,621 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and 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), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Leonard Law, PC, and that on December 15, 2021, a copy of the foregoing document was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). The following participants who are registered as E-Flex users will be served by the EFlex system upon filing. All others will be served by first-class mail.

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IN THE SUPREME COURT OF THE STATE OF NEVADA

PIERRE A. HASCHEFF,

Appellant/
Cross-Respondent,

vs.

LYNDA HASCHEFF,

Respondent/
Cross-Appellant.
______________________________/

Supreme Court No. 82626

District Court Case No. DV13-00656

Electronically Filed
Feb 14 2022 04:30 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

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NRAP 26.1 DISCLOSURE STATEMENT

The following law firms have lawyers who appeared on behalf of the Appellant/Cross-Respondent, Pierre A. Hascheff, or are expected to appear on his behalf in this Court:

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SUMMARY OF ARGUMENT

This Court, as a matter of law, can reverse the district court, based upon the undisputed facts contained in the record below and upon the legal authorities cited by Appellant Pierre A. Hascheff ("Pierre").

Based upon prevailing case law in this state and a majority of other states, the district court below determined that, without a specific notice provision contained in MSA §40, Pierre was not required to provide notice to Respondent Lynda Hascheff ("Lynda"). 4AA737, ll. 23-28; 4AA740, ll. 18-21; 4AA742, ll. 11-13. In fact, an indemnitee can litigate the underlying indemnified claim, and then after the litigation is concluded, simply notify the indemnitor of the results and seek to be indemnified for its costs and attorney's fees and any judgment entered against it, pursuant to the indemnity agreement. There is one limited exception that does not deny the indemnitee's right to indemnity, but does allow the indemnitor to contest the fees and costs should the indemnitee settle the matter without the involvement of the indemnitor. The policy behind the exception is that, because the indemnitor is responsible for one hundred percent of the fees and costs in most indemnity agreements, this provides a safeguard so that the indemnitee does not have a blank check requiring the indemnitor to pay its fees and costs, which may not be reasonable. This is not the case here, since Pierre

was responsible for one-half of the fees and costs, and therefore, he had a vested interest to make sure that they were not excessive.

The district court also determined that all of the fees and costs incurred by Pierre, both in the Malpractice Action and the underlying collateral trust action filed by Wendy Jaksick against Todd Jaksick (the "Collateral Action"), were within the scope of MSA §40 (4AA740, ll. 16-18); therefore, Lynda is required to pay one-half of those fees and costs. Finally, the district court also determined, as a matter of law, that whenever there is a contractual indemnity provision, a court may not deny a party's right to contractual indemnity by employing equitable remedies and/or principles. 4AA740, ll. 21-23. However, the district court erred in relying upon the equitable doctrine of laches in violation of this rule of law and should be reversed, as a matter of law, on this issue.

Even if the equitable remedy of laches were applicable, there was no evidence whatsoever in the record, taken as a whole, that the elements of the equitable doctrine of laches were met by Lynda. In fact, Lynda's attorney never put her on the stand to testify as to why she was prejudiced, or to testify that she met the other elements of the equitable doctrine of laches. Indeed, the only evidence in the record is Pierre's testimony (4AA646-700), which refutes all of the requisite elements for application of the equitable doctrine of laches. Pierre

testified that he notified Lynda within thirty (30) days after receiving an invoice from his attorney, which invoice included a majority of the fees in the underlying Collateral Action, and which prompted him to request reimbursement from Lynda (4AA650, ll. 9-21); and that so long as the previously-billed fees were a minor amount, Pierre simply intended to pay those himself (4AA649, ll. 16-25; 4AA650, ll. 1-8). Under no circumstances did Pierre unreasonably delay his request for indemnity, and he sought reimbursement shortly after he had paid the deductible amount of his malpractice policy. Without any evidence of the elements of laches, this Court, as a matter of law, can reverse the district court's determination and instruct the district court that the contractual indemnity provision is enforceable and that Lynda is required to indemnify him and to pay one-half of the fees and costs incurred by Pierre as the prevailing party in being forced to enforce the indemnity agreement, as discussed hereinbelow.

Lynda argues that Pierre breached MSA § 37 (the further assurances clause) because he failed, through limited redactions of the invoices, to provide privileged information and documents. To the contrary, Pierre provided all of the information and documents demanded by Lynda shortly after the demand was made. The evidence in the record on appeal shows that the district court somehow concluded, without any evidence, and without an *in camera* inspection of the

redacted entries, that failure to provide unredacted entries defeated Pierre's right to contractual indemnity. Under no circumstances did Pierre not timely provide everything that Lynda requested. Furthermore, Pierre was entitled, as a matter of law, to assert the attorney-client and/or common interest work product privilege. The district court mistakenly believed that, because Pierre was not a party to the underlying Collateral Action and Todd Jaksick sued him for malpractice, they were adversaries, and that no such privilege existed. In so doing, the district court committed an error that should be reversed by this Court, as more particularly described hereinbelow. Furthermore, the district court clearly misunderstood the malpractice insurance policy terms and the payments made by Pierre to the malpractice insurance company, which demonstrate that Pierre provided an accurate accounting, including canceled checks of his payments, that provided Lynda with all of the information she needed in order to indemnity and pay one-half of the incurred fees and costs. Even the district court confirmed that the redacted entries were clearly all related to the Collateral Action (4AA740, ll. 16-18), and that since Lynda argued she would pay fees and costs only incurred in the malpractice case, there was no reason for Lynda to see any of those redacted entries, all of which related to the Collateral Action which she refused to pay. In fact, the record clearly shows that the amount related to the Malpractice Action

was in the approximate sum of $648 (4AA625, ll. 9-17), which Lynda argued below she would pay, but refused to pay throughout the entire proceeding.

The district court, *sua sponte*, based its decision to deny express indemnity solely upon the equitable doctrine of laches and never once mentioned as a basis for its decision that MSA § 37 (the further assurances clause) somehow was breached. The record is clear that all of the information requested was timely provided, and that, therefore, there was no breach of MSA § 37. More importantly, as set forth hereinbelow, in order to breach MSA § 37, Lynda would be required to prove that there were express provisions in the MSA imposing an obligation upon Pierre to deliver certain documentation, and that after a demand by Lynda pursuant to MSA § 37--which did not occur here--Pierre failed timely to provide the necessary documents in order to satisfy the express contractual obligation, e.g., where a real estate agreement provides a seller warranty of title and the parties later determine after closing that the seller must execute and deliver a particular document pursuant to a further assurance covenant in order to satisfy that express warranty. This is not the case here. As set forth hereinbelow, a further assurances clause such as MSA §37 is a covenant and not a condition precedent to Pierre's right to exercise the indemnity provision contained in MSA §40. As such, under no circumstances can it be used to defeat Lynda's obligation

to indemnify Pierre pursuant to the contractual terms of MSA §40. At best, if the covenant were breached--and in this case it was not breached, based upon the clear record below--it would constitute a breach of a covenant, allowing Lynda to sue for damages, and it could not be used to obliterate Pierre's right to indemnity.

Finally, Pierre did not address the district court's ruling regarding contempt, because he does not intend to pursue this ruling.

APPELLANT'S REPLY BRIEF ON APPEAL

ARGUMENT

I

PIERRE'S RESPONSES TO THE ARGUMENTS RAISED BY LYNDA IN HER ANSWERING BRIEF ON APPEAL

A. MSA §40 was clear, requiring Lynda to pay one-half of all fees and costs incurred by Pierre without declaratory relief.

Lynda argues that the district court made the right decision without basing its decision on laches, because MSA §40 (the indemnity clause) does not include Collateral Action costs, and MSA §40 must be strictly construed and enforced in accordance with its terms in the MSA.

1. The district court reviewed the cases cited by Pierre and concluded correctly that the MSA (in particular, MSA §§38 and 40) included all fees for both

the Malpractice Action and the underlying Collateral Action. 4AA740, ll. 16-18. The district court also correctly determined that there was no requirement for advance notice of the Malpractice Action precluding Lynda's indemnity obligation (4AA737, ll. 23-28; 4AA740, ll. 18-21), *See,* AOB 21-26, and that contractual indemnity precluded a court from considering equitable remedies (4AA737, ll. 23-28; 4AA740, ll. 21-23), *See,* AOB 35-36, para. 12. Furthermore, the district court correctly did not find that Pierre breached any fiduciary duty or any implied covenant of good faith and fair dealing, or that he breached MSA §37. Contrary to Lynda's assertions, it also is important to note that Pierre did not draft the MSA; therefore, the MSA language should not be strictly construed against him. The MSA was a fully-negotiated document by both sides, and a substantial number of revisions were made to the MSA by Lynda's attorney. Furthermore, by reaching its decision, the district court also concluded that MSA §40 was self-executing and encompassed all fees and costs, pursuant to the caselaw cited by Pierre. 4AA740, ll. 16-18. *See,* AOB 22-23, para. 1. In reaching its decision, the district court accepted Pierre's argument--that a reading of the entire MSA §§40 and 38, and the MSA as a whole, demonstrated that MSA §40 already included any and all fees and costs resulting from any claims, actions, liabilities, proceedings, etc.; and that the last sentence of MSA §40, relating to the

Malpractice Action and claims, should not be read alone, but as a subset of MSA §40, and that it included all of Pierre's fees and costs, when reading MSA §40 in its entirety, especially in light of MSA §38, referring to claims. 4AA737, ll. 16-22; 4AA740, ll. 16-18.

2. Pierre met his burden by showing that he had been sued for malpractice and that the fees and costs incurred by him in the Collateral Action were in the defense of the Malpractice Action, and the district court agreed. 4AA740, ll. 16-18. The district court confirmed that Pierre provided all of the documents requested by Lynda; that he made it clear in his pleadings and authorities cited that he was entitled to the Collateral Action fees; that he also made it clear that, in the Collateral Action, he was being accused of wrongdoing, since that action accused one of the beneficiaries, Todd Jaksick, of being guilty of undue influence, and alleged that his father, Sam Jaksick, did not have the required capacity to execute his estate planning documents. Since Pierre drafted those documents and allowed the father, Sam Jaksick, to execute them under these alleged circumstances, would mean that he was a party to these misdeeds. As it turns out, Pierre was correct, because he was sued for malpractice before the Collateral Action went to trial.

3. The district court was mistaken when it noted that the redacted entries did not allow Lynda to determine whether an item was a telephone call, an

appearance, a review, or work that was done.[1] 4AA609, ll. 24-25; 4AA610, ll. 1-9. In any event, Lynda made it very clear that only the fees in the Malpractice Action were recoverable, and not the fees in the Collateral Action. A review of the billings provided to the district court and to Lynda, in which Pierre demanded reimbursement (2AA329-334; 2AA374-395), showed that $3,600 was incurred prior to the malpractice complaint filing on December 26, 2018, less $2,500 paid by the insurance company, leaving a balance of $1,100 incurred prior to that date. After the filing of the malpractice complaint, $8,900.10 in fees and costs were incurred and paid by Pierre, and approximately $648 of that $8,900.10 amount was incurred in the Malpractice Action. Since Lynda refused to pay anything related to the Collateral Action, those redacted entries were irrelevant, and failing to provide that information did not prejudice Lynda in any way. Although Lynda knew how much was incurred in the Malpractice Action, she refused to pay that amount, as well. A review of the billings provided to the district court and to Lynda also demonstrates that Pierre did deduct the insurance payments from his

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[1]However, the district court also noted that "you can clearly see from the work that was done…that it is all related to the issues that arose from the 41-page subpoena" (4AA610, ll. 10-13); that "the bills themselves relate to what was occurring related with the 41 pages and [Pierre] being a witness" (4AA610, ll. 19-21); and that MSA §40 does not state that Lynda is "entitled to every aspect of the malpractice claim" (4AA610, l. 25; 4AA611, l. 1).

indemnitee demand. All of this was explained in great detail to the district court below. 4AA628-638, 4AA 657-658, 4AA697-698. The district court simply failed to understand that the malpractice policy deductible would not apply until a malpractice complaint was filed, and only thereafter would the fees paid by Pierre be applied towards the $10,000 deductible. Thus, the $3,600 in fees incurred before that date would not apply towards the deductible. The insurance company paid $2,500 of that $3,600 amount, because they were concerned that a Malpractice Action would follow, even though they had no obligation to pay the $2,500, according to the policy. If either Lynda, or the district court for that matter, wanted to see the redacted entries, then they easily could have requested an *in camera* review, which they did not do. Whether Pierre provided unredacted entries related to the Collateral Action is irrelevant, because Lynda was not going to pay those fees and costs under any circumstances. Therefore, Pierre did provide an accurate accounting for his fees and costs to Lynda.

4. Lynda argues without any authority that, because Pierre was not a party or in privity with a party to the Collateral Action, he would not be barred from

raising any defenses in the Malpractice Action,[2] and therefore, he did not need an

[2]Lynda argues that Pierre's testimony in the Collateral Action could not operate as issue or claim preclusion in the subsequent Malpractice Action filed by Todd Jaksick. Lynda does not cite any authority for this proposition. *See,* RAB 24 n. 3.

In the interest of further promoting finality of litigation and judicial economy, this Court adopted the doctrine of nonmutual claim preclusion, meaning that a defendant may validly use claim preclusion as a defense by demonstrating that: (1) there has been a valid, final judgment in a previous action; (2) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first action; and (3) privity exists between the new defendant and the previous defendant or the defendant can demonstrate that he or she should have been included as a defendant in the prior suit and the plaintiff cannot provide a good reason for failing to include the new defendant in the previous action. *See, Weddell v. Sharp*, 131 Nev. 233, 240-41, 350 P.3d 80, 85 (2015).

In *Weddell, supra*, 131 Nev. at 237-38, 350 P.3d at 82-83, this Court concluded that privity did not exist between the mediators of a business dispute and a businessman under the "adequate representation" analysis, because the businessman did not purport to represent the mediators' interest during the prior declaratory relief action between him and a former business partner, for purposes of a claim preclusion determination in the former business partner's subsequent action against the mediators seeking damages for the mediators' alleged breaches of contract, fiduciary duty, and obligations of good faith and fair dealing.

In *Weddell, supra*, 131 Nev. at 241-42, 350 P.3d at 85, this Court determined that the purpose of nonmutual claim preclusion generally is the same as that of claim preclusion, i.e., to obtain finality by preventing a party from filing another suit that is based upon the same set of facts that were present in the initial suit. The Court concluded that the former business partner lacked a good reason for not asserting his claims against the mediators of the business dispute in the partner's prior declaratory relief action, where the business partner's current claims in the subsequent action against the mediators clearly could have been

brought in the earlier prior declaratory judgment case. 131 Nev. at 242, 350 P.3d at 85.

In the present case, when Wendy Jaksick sued Todd Jaksick in the underlying Collateral Action for fraud jurats by Todd Jaksick in the preparation of Sam Jaksick's estate plan, including lack of capacity, Todd Jaksick could have cross-claimed against Pierre, because Pierre was the attorney who drafted Sam Jaksick's estate plan. Todd Jaksick's subsequent action is based upon the same claims that were brought against Todd Jaksick in the first action, and a valid final judgment in the previous action was rendered by the jury in favor of Todd Jaksick. Therefore, this favorable result, where Todd Jaksick defeated Wendy Jaksick's claims for documents, wherein Wendy Jaksick argued that she was deprived of her fair share of her father's estate based upon Todd Jaksick's misconduct, which necessarily would involve Pierre. *See, Harris v. County of Orange*, 682 F.3d 1126, 1132-33 (9th Cir. 2012) (in certain limited circumstances a nonparty in privity with a party may be bound by a judgment because he was adequately represented by someone with the same interests who was a party to the lawsuit); *see also, Taylor v. Sturgell*, 553 U.S. 880, 894, 12 S.Ct. 2161, 2172-73, 171 L.Ed.2d 155 (2008); *Pedrina v. Chun*, 906 F.Supp. 1377 (D. Haw. 1995), *aff'd, Pedrina v. Chun*, 97 F.3d 1296 (9th Cir. 1996), *cert. den. sub nom, Wong v. Han Kuk Chun*, 520 U.S. 1268, 117 S.Ct. 2441, 138 L.Ed.2d 201 (1997).

In *Pedrina, supra*, 906 F.Supp. at 1399-1400, the court noted that the doctrine of claim preclusion requires that the parties to a second action must be the same as, or in privity with, the parties to a first action; that whether sufficient privity exists to bind a nonparty to a judgment is determined under the circumstances of each case; and that the party asserting claim preclusion must demonstrate that the interests of the nonparty were adequately represented and that the nonparty's rights were afforded proper protection in the prior action. The court concluded that, under the doctrine of claim preclusion, where a party to a prior action shared identical or substantially similar interests with a nonparty, or was attempting to vindicate the same rights, and stood in the same position as the nonparty, the rights and interests of the nonparty could be adequately represented and protected, and the prior judgment could be given preclusive effect in a subsequent action involving the nonparty. In reaching its conclusion, the court followed the transactional view of the Restatement (Second) of Judgments, §24

attorney. RAB 24 n. 3. First, this is not true. But more importantly, he was sued by Todd Jaksick on December 26, 2018, before the trial, and it was important that his testimony confirm that his estate planning provided to Sam Jaksick, the father, was not tainted by undue influence or lack of capacity. Significantly, the fees were incurred in defending his work, which would foreclose any attempt to sue him for malpractice. After the Collateral Action concluded, the jury found in favor of Todd Jaksick and against Wendy Jaksick, the beneficiary contesting Pierre's drafting of the estate planning documents. Therefore, there arguably would be no reason for Todd Jaksick to pursue his Malpractice Action against Pierre.

5. An indemnification clause where a party is indemnified for his own negligence must unequivocally express that intent and be strictly construed.

(1982), in determining whether the same claim is sought to be asserted in a subsequent action and may be barred by claim preclusion, i.e., the courts will look to whether the claim arising out of the same transaction or same series of connected transactions out of which the first action arose, in order to determine whether the same claim is being asserted in the same action. Accordingly, a plaintiff cannot avoid a claim preclusion defense merely by alleging conduct that was not alleged in his prior action or by pleading new legal theories. All claims arising from a single injury must be raised in a single action or they will be barred by res judicata; and this is true even if some claims arise under state law and some arise under federal law; and even if such claims and defenses were voluntarily withdrawn, if a final judgment is rendered on the remainder of the case. 906 F.Supp. at 1400-01.

4AA737, ll. 6-12. When Lynda agreed to indemnify Pierre for his costs and fees incurred relating to a malpractice claim, which by definition includes his negligence, he met that standard. It would be absurd to define malpractice to include his negligence, when everyone knows what malpractice claims entail. It also would be absurd, because the malpractice sentence in MSA §40 simply is a subset of the entire MSA §40, which included any and all claims and fees associated therewith. *See also*, MSA §38, which excludes malpractice claims from the release of claims. The malpractice sentence was included in MSA §40 to make clear that all claims including the negligence of Pierre, i.e., all malpractice, would be reimbursed one-half by Lynda.

B. The district court incorrectly found that the facts justified the equitable doctrine of laches.

After reviewing the documentary evidence and Pierre's testimony, the district court initially made the correct decision. 4AA740, ll. 16-22. Based upon the contractual provisions of the MSA, a court is precluded from employing equitable principles to defeat a contractual right to indemnity. The district court then inconsistently (4AA737, ll. 12-15) resorted to an application of the equitable doctrine of laches (4AA740-742).

Laches is an equitable doctrine that may be invoked when delay by one party

works to the disadvantage of the other party, causing a change of circumstances that would make the grant of relief to the delaying party inequitable. 4AA738, ll. 3-11. When invoking the equitable doctrine of laches, the district court considers: (1) whether the party inexcusably delayed bringing the challenge; (2) whether the party's inexcusable delay constituted acquiescence to the condition the party is challenging; and (3) whether the inexcusable delay was prejudicial to the other party. *See, Building and Const. Trades Council of Northern Nevada v. State ex rel. Public Works Bd.*, 108 Nev. 605, 610-11, 836 P.2d 633, 636-37 (1992).

In invoking the equitable doctrine of laches, the district court relied upon the same set of erroneous facts, which are not supported by the record, and upon which Lynda relies as the basis for all of her arguments, i.e., that Pierre waited twelve months before he told Lynda the malpractice claim was filed (4AA741, ll. 22-23); that he kept her in the dark (4AA740, ll. 24-28; 4AA741, ll. 19-21); that he withheld pertinent information after several months of requests (4AA741, ll. 1-2; 4AA742, ll. 9-11); that he thereby deprived her of the opportunity to exercise what could have been her equal and equivalent right to participate in the management of the litigation (even though the defense of the Collateral Action was not a joint obligation); that because Pierre's attorney represented his interest alone (4AA741, ll. 4-9), she could have retained her own lawyer to observe the Collateral Action

and evaluate whether it called into question the competency of legal services provided by him (RAB 33); that her attorney could have observed his testimony for content and credibility (RAB 34); that her attorney could have evaluated his potential conflicts of interest (which might have constituted professional negligence) and participated in the strategy decisions (RAB 34); and that, not being an attorney, her interest in obtaining legal advice was greater than his (RAB 34). However, based upon the record, taken as a whole, the district court could not have concluded that Pierre's conduct was troubling, not transparent, and incomplete, and that Lynda was prejudiced.

Lynda has not cited one case where an indemnitor has the right, as a precondition to her obligation to indemnify under a contractual indemnity, to determine whether the indemnitee was negligent, before she is required to indemnify. Every contractual indemnity case allows the indemnitee to litigate the underlying negligence claim, and whether the indemnitee is negligent or not, the indemnitor is required to indemnify. Indeed, that is precisely what Lynda agreed to do, i.e., if Pierre were sued for malpractice, or if a claim were "made against him," then Lynda agreed to pay one-half of the defense costs and fees. Although the indemnitee can tender the defense of the underlying claim to the indemnitor, this is at the option of the indemnitee, and there was no requirement in the contractual

indemnity to allow her to manage Pierre's defense or to participate in the underlying Collateral Action. There simply is no authority allowing an indemnitor to second guess whether potential conflicts of interest exist or to participate in strategies made by Pierre and his lawyers, which certainly would have provided Lynda with access to sensitive attorney-client discussions. By definition, malpractice includes Pierre's potential negligence for which Lynda agreed to indemnify him, i.e., any claims made relating to a potential Malpractice Action. In essence, Lynda's argument demands that Pierre provide her with all of his attorney's files with privileged information, and with all correspondence and files between his attorney and Todd Jaksick's attorney, and only then will she decide whether or not Pierre was or was not negligent; and if he was, then she has no obligation to indemnify him. Not only would this violate the terms of the MSA, but Lynda cannot cite one case that supports this position in Nevada or other jurisdictions.

Pierre correctly contends that the district court misunderstood and misinterpreted his accounting for his fees and costs. 4AA741, ll. 4-10, 25-28. The documents he filed with the district court (2AA329-334; 2AA374-395) demonstrate why he demanded the amounts he did. There was no dispute that a mistake was made in the initial accounting, but it was corrected immediately, both

in the documents and by his testimony, and his attorney walked the district court through the exhibits justifying his monetary claim. 4AA628-638, 4AA657-658, 4AA697-698. The district court simply failed to understand that the malpractice policy deductible would not apply until a complaint was filed, and only thereafter would the fees paid by Pierre be applied towards the $10,000 deductible. Thus, the $3,600 in fees incurred before that date would not apply towards the deductible. The insurance company paid $2,500 of that $3,600 amount, because they were concerned that a Malpractice Action would follow, even though they had no obligation to pay the $2,500, according to the policy. If either Lynda, or the district court for that matter, wanted to see the redacted entries, then they easily could have requested an *in camera* review, which they did not do. Whether Pierre waived the privilege or not is irrelevant, because Lynda was not going to pay those fees and costs anyway.

A review of the record shows that the district court, in fact, was confused. By the district court's questions, it is clear that the district court ultimately came to the wrong conclusion, i.e., that Pierre was not transparent. As explained hereinabove, Pierre ultimately provided all documents demanded by Lynda and all of the evidence to substantiate his indemnity claim, and under no circumstances did he intentionally refuse to provide an accounting to substantiate his indemnity

claim. Pierre never took the position that the indemnification created fiduciary duties. To the contrary, the parties were adverse; therefore, there could be no trust relationship between the two. There could be no community estate after the divorce was final. What Pierre did say was that he was responsible for one-half of the costs and fees, and for one-half of the judgment, if any; that he had a vested interest in protecting both parties against a multi-million dollar judgment, in the event that the underlying Collateral Action did not go well for Todd Jaksick; that Pierre was involved in structuring Sam Jaksick's estate; and that any claims of undue influence or lack of mental capacity that involved Todd Jaksick, necessarily would involve him, assuming that Todd Jaksick had been found responsible for participating in any such claims. Thus, even if Lynda had received unredacted entries, a copy of Pierre's attorney's file, and the files of Todd Jaksick's attorney, Lynda has not demonstrated what advantage she would have received or how she would not have been prejudiced, including participating in the underlying action. At the end of the day, Lynda is required to indemnify Pierre for any and all defense costs related to a malpractice claim. To suggest that Pierre either knew that he might be sued over six years after the settlement agreement, or that MSA §40 was procured by fraud, borders on foolishness. Pierre testified (and it is undisputed in the record) that he had no idea that he would be sued six years ago

when the MSA was signed, especially in light of the fact that he never was sued for malpractice during the 30 years that he practiced law. MSA §40 was drafted for one purpose, and one purpose only. If Pierre was sued for malpractice after the parties equally divided all of the assets and income, which resulted entirely from his law practice, including his law office assets, then both parties would be equally responsible for the defense costs and a judgment, if any, in protecting those separate assets. In fact, it was a clawback provision, and that is why both parties agreed to pay for tail coverage insurance equally in the MSA, so that both parties would have insurance protection and equally share in the deductible defense costs, with all other costs being paid by the malpractice insurance company.

Contrary to Lynda's assertion (RAB 35-36), the *Erickson v. One Thirty-Three, Inc., & Assocs.*, 104 Nev. 755, 766 P.2d 898 (1988), case is not a similar case. That case involved much different facts. The indemnitee misled the indemnitor and failed to pursue its claims for over five years, resulting in an NRCP 41(e) dismissal. It also involved an equitable indemnity, not a contractual indemnity, as in this case.

C. Pierre did not breach either the implied covenant of good faith and fair dealing, or any fiduciary duty.

These issues were repeatedly briefed before the district court, and nowhere in the record or in the decision did the district court find that Pierre breached the implied covenant of good faith and fair dealing, or any fiduciary duty, or that he failed to act in good faith. *See,* AOB 28-31, paras. 1-6. The district court based its decision entirely upon laches -- the failure to notify Lynda for a period of almost twelve months after the Malpractice Action was filed. 4AA741, ll. 22-24. The district court did not find that there was any evidence that Lynda had a confidential or fiduciary relationship with Pierre, either before or after he made his indemnity claim. Nor was there any evidence that he tried to gain her confidence, or to act or advise her accordingly with her interest in mind. In fact, the record shows exactly the opposite. Once Pierre made his claim for indemnity, Lynda immediately contested his right to indemnity. The record also shows that he provided her, her sister Lucy Mason (who is a lawyer), and her counsel with all of the documentation that they requested, and more, except for approximately $3,000 in redacted attorney invoice entries, all of which related to the Collateral Action fees, which she refused to pay under any circumstances. Given the fact that the district court found in favor of Pierre on these two issues, the district court's findings should not be disturbed on appeal. There is nothing in the record on appeal that Pierre withheld information, but rather that he timely provided the

information they requested. Pierre did not have any entrusted position with Lynda regarding malpractice claims. Lynda again argues that her indemnity obligation is not triggered if Pierre is found either to have committed malpractice or was negligent somehow in his advice. RAB 37. However, this is not a precondition to Lynda's indemnity obligation, and the express language of MSA §§40 and 38 requires her to indemnify him, even if he was negligent. There was no unequal bargaining position, and Pierre acted in good faith to provide Lynda with the information she requested so that she could evaluate her responsibility under the MSA. It is true that Pierre was in the best position to defend any potential malpractice claims, since Lynda did not participate in any decisions in the Collateral Action. Only he could best defend himself based upon the work that he did, and thankfully the jury agreed with his estate planning advice, because it resulted in a favorable decision for Todd Jacksick based upon his testimony. Pierre also notified Lynda within twelve months of the filing of the Malpractice Action, even though he was not required to do so, and even though there was no notice provision in the MSA. Thus, in accordance with the majority view, including Nevada, the district court found that Pierre had no notice requirement under the MSA (4AA740, ll. 16-22); yet strangely, the district court used this twelve-month delay to impose upon him the equitable remedy of laches (4AA741,

ll. 22-24). That is why this Court should reverse the district court's decision, as a matter of law, given the legal authorities cited with respect to contractual indemnities (4AA737, ll. 2-28); the fact that no notice was required (4AA740, ll. 16-22), even though Pierre did provide notice within twelve months; and the fact that the district court based its decision solely upon his failure to provide notice within the twelve-month period (4AA741, ll. 22-24). There is nothing in the record below that Pierre intentionally withheld critical information, or any information, that would allow Lynda to determine her liability under MSA §40.

Pierre respectfully disagrees that Lynda has met the requirements for the remedy of laches. First and foremost, laches is an equitable doctrine, and the district court found that equitable remedies do not apply in contractual indemnity cases, as provided by the legal authorities above. 4AA740, ll. 21-23. Nevertheless, the district court invoked an equitable remedy.

As noted hereinabove, in order to invoke the equitable doctrine of laches, the court must consider: (1) whether the party inexcusably delayed bringing the challenge; (2) whether the party's inexcusable delay constituted acquiescence to the condition the party is challenging; and (3) whether the inexcusable delay was prejudicial to the other party. *See, Miller v. Burk*, 124 Nev. 579, 598, 188 P.3d 1112, 1125 (2008); *Building and Const. Trades Council of Northern Nevada v.*

State ex rel. Public Works Bd., 108 Nev. 605, 610-11, 836 P.2d 633, 636-37 (1992). The delay must be unreasonable to support a laches defense. *See, Moseley v. Eighth Judicial Dist. Court, ex rel. County of Clark*, 124 Nev. 654, 659 n. 6, 188 P.3d 1136, 1140 n. 6 (2008). Laches is more than a mere delay seeking to enforce one's rights. There must be a change in condition of the party asserting laches and it must become so changed that he cannot be restored to his former state, and "[e]specially strong circumstances must exist to sustain the defense when the statute of limitations has not run." *See, Home Sav. Ass'n v. Bigelow*, 105 Nev. 494, 496, 779 P.2d 85, 86 (1988), *quoting, Lanigir v. Arden*, 82 Nev. 28, 36, 409 P.2d 891, 896 (1966).

In the present case, Lynda's counsel simply speculates and only provides hypotheticals as to why the redacted statements might have caused her prejudice, including not knowing of the Malpractice Action until twelve months after the case was filed. RAB 33-34. Speculative statements cannot, as a matter of law, satisfy the "especially strong circumstances" necessary to employ the defense of laches over the applicable statute of limitations. Especially strong circumstances do not exist here.

To allow Lynda to receive the benefit of a laches defense, foreclosing Pierre's right to his contractual indemnity forever, would produce a windfall to

Lynda and an inequitable result. *See, Hanns v. Hanns*, 246 Or. 282, 309, 423 P.2d 499, 513 (1967) (to deny defendants a windfall which would result if their claim of laches were sustained is not the kind of prejudice which impels courts exercising equity powers to deny relief which is otherwise appropriate).

Laches is an equitable defense that prevents a party who, "with full knowledge of the facts, acquiesces in a transaction and sleeps upon his rights." *See, Morgan Hill Concerned Parents Association v. California Department of Education*, 258 F.Supp.3d 1114, 1132 (E.D. Cal. 2017). Although a court may raise the doctrine of laches *sua sponte*, there are limitations in doing so. For example, a court cannot *sua sponte* raise the doctrine of laches under circumstances in which the parties lacked notice about an issue and were not given an opportunity to address it. *See, Morgan Hill Concerned Parents Association, supra; In re Panther Mountain Land Development, LLC*, 686 F.3d 916, 928 (8th Cir. 2012) (reversing a Bankruptcy Court's *sua sponte* application of the doctrine of laches, because the Debtor did not introduce evidence concerning the reasonableness of the Bank's delay; the Bank was not on notice that the Bankruptcy Court intended to *sua sponte* apply the doctrine of laches; and as such, the Bank had no reason to present evidence to justify its delay); *Foster Poultry Farms, Inc. v. Sun Trust Bank*, 377 Fed.Appx. 665, 669-70 (9th Cir. 2010)

(unpublished decision) (the District Court could not not *sua sponte* apply the doctrine of laches, where the defendant never pleaded laches and the pretrial order did not put plaintiff on notice that laches would be an issue at trial).

Application of the equitable doctrine of laches depends upon a close evaluation of the particular facts in a given case. *See, Home Sav. Ass'n, supra*, 105 Nev. at 496, 779 P.2d at 86, *citing, Miller v. Walser*, 42 Nev. 497, 181 P. 437 (1919); *Morgan Hill Concerned Parents Association, supra*, 258 F.Supp.3d at 1133. Generally speaking, relevant delay is the period from when plaintiff knew or should have known of the alleged offending conduct. *See, Morgan Hill Concerned Parents Association, supra*, 258 F.Supp.3d at 1133, *citing, Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 952 (9th Cir. 2001).

In the present case, Pierre reasonably believed that, under Nevada caselaw and the caselaw in a majority of other jurisdictions, and without an express notice requirement contained in MSA §40, he had no obligation to notify Lynda of the Malpractice Action, and that he could litigate the Collateral Action and the Malpractice Action all the way up through settlement without providing notice. There is no way that he, or anyone else for that matter, was on notice that waiting twelve months to notify Lynda (well within the statute of limitation) would result in a permanent denial of his indemnity claim. In addition, Pierre testified that he

thought that the Collateral Action would be resolved expeditiously with a minimum amount of fees and costs incurred, but once he received a bill for over $6,000, he realized that the Collateral Action would continue with additional fees incurred; and therefore, he notified Lynda shortly thereafter. 4AA650, ll. 9-21. Unlike in *Morgan Hill Concerned Parents Association, supra*, 258 F.Supp.3d at 1133, where the plaintiffs did not adequately justify their delay in their motion for sanctions, including their brief, offering no reason for their delay, Pierre provided a reasonable explanation for why he waited approximately twelve months. 4AA650, ll. 9-21. Furthermore, in *Morgan Hill Concerned Parents Association, supra*, 258 F.Supp.3d at 1133, the California Department of Education was prejudiced because the plaintiff's motion relied upon known behavior for over 2 1/2 years before they filed their motion, and it was specifically shown that the Department's ability to defend itself was placed in jeopardy.

Similarly, in order successfully to establish laches, a party must show that there was inexcusable delay in the assertion of a known right and that the party has been prejudiced. *See, E.E.O.C. v. Timeless Investments, Inc.*, 734 F.Supp.2d 1035, 1067 (E.D. Cal. 2010), *citing, O'Donnell v. Vencor, Inc.*, 466 F.3d 1104, 1112 (9th Cir. 2006). Although Pierre knew that he had a right to indemnity, he did not know that, without an express notice provision, he would be required to

provide immediate notice of the filing of the Malpractice Action (not to mention that a twelve-month delay is not unreasonable). No length of time is considered per se unreasonable; rather, the court must consider the reasons or causes of the delay. *See, E.E.O.C., supra*, 734 F.Supp.2d at 1067.

With respect to prejudice, the courts recognize evidentiary and expectations-based prejudice. Expectations-based prejudice occurs when a defendant has taken action or suffered consequences that it would not have, if the plaintiff had brought the lawsuit promptly. Evidentiary prejudice includes such things as lost, stale, or degraded evidence, or witnesses whose memories have faded, or who have died. *See, E.E.O.C., supra*, 734 F.Supp.2d at 1067; *Grand Canyon Trust v. Tucson Elec. Power Co.*, 391 F.3d 979, 988 (9th Cir. 2004). For a laches defense based upon evidentiary prejudice, it must be shown that the evidence would have been relevant to one or more essential issues in the dispute between the parties. *See, E.E.O.C., supra*, 734 F.Supp.2d at 1067, *citing, Vineberg v. Bissonnette*, 548 F.3d 50, 58 (1st Cir. 2008).

In the present case, Lynda did not take any action or suffer any consequences by Pierre's waiting twelve months to notify her of the Malpractice Action. Lynda's position, that she could have retained her own attorney to determine whether Pierre was negligent, has absolutely no bearing upon this case,

because she was responsible to indemnify Pierre even if he were negligent. Lynda has not shown any evidentiary prejudice, because there has not been any lost, stale, or degraded evidence; and no witnesses' memories have faded; and no witnesses have died, who are relevant to one or more essential issues in the parties' dispute over the indemnity obligation in MSA §40. Furthermore, unlike the E.E.O.C. in *E.E.O.C., supra*, 734 F.Supp.2d at 1067, who waited four years, during which time one of the witnesses died, Pierre did offer an explanation as to why he waited. Furthermore, assuming that the defense of laches was proven, the court in *E.E.O.C., supra*, 734 F.Supp.2d at 1072, also found that a proper remedy would be to preclude compensatory relief. In the present case, as in *E.E.O.C., supra*, 734 F.Supp.2d at 1072, the district court simply could have precluded Pierre from receiving the fees that were redacted, which would have reduced Lynda's indemnity obligation by $1,500, i.e., one-half of the $3,000 entries that were redacted.

Under the circumstances of the present case, the cases cited by Lynda (RAB 30-35) and the district court (4AA738, ll. 2-19; 4AA742, ll. 4- 24) favor Pierre's position. They do not help Lynda's position that the remedy of laches was appropriately invoked. Even if the elements of laches were met--they were not--the district court could have restricted the damages available to Pierre, rather than

dismissing his entire case and permanently depriving him of his right to indemnity. *See, E.E.O.C., supra*, 734 F.Supp.2d at 1072; *Carson City v. Price*, 113 Nev. 409, 412, 934 P.2d 1042, 1043 (1997) (the court again finding that the condition of a party asserting laches must become so changed that the party cannot be restored to its former position), *citing, Home Sav. Ass'n, supra*, 105 Nev. at 496, 779 P.2d at 86. Lynda did not spend any money or take any action during the twelve-month period that would have caused a material disadvantage to her.

Lynda cites *Erickson, supra*, 104 Nev. 755, 766 P.2d 898 (1988) (RAB 35-36); however, that case was decided because plaintiff therein failed to prosecute the action for over five years, and therefore, the complaint was dismissed under NRCP 41(e). Although the court found that the dismissal also was justified under the doctrine of laches, plaintiff's case was dismissed pursuant to the five-year mandatory dismissal under NRCP 41(e), not to mention that the facts in that case are much different than the facts in this case.

Lynda cites several cases wherein a party therein filed a motion for declaratory judgment, and therefore, the court retained the right to impose equitable defenses. *See, Abbott Laboratories v. Gardner*, 387 U.S. 136, 155, 87 S.Ct. 1507, 1519, 718 L.Ed.2d 681 (1967), *abrogated on other grounds by, Califano v. Sanders*, 430 U.S. 99, 105, 97 S.Ct. 980, 984, 51 L.Ed.2d 192 (1977);

Lincoln Benefit Life Co. v. Edwards, 243 F.3d 457, 462 (8th Cir. 2001). However, none of those cases involved a contractual indemnity, which under Nevada law does not allow equitable defenses to be invoked, including the defense of laches.

Lynda also cites *Andersen, Meyer & Co. v. Fur & Wool Trading Co.*, 14 F.2d 586, 589 (9th Cir. 1926); however, this case involved a dispute over some furs, and its facts are not applicable to the present case.

Lynda also cites *Building and Const. Trades Council of Northern Nevada, supra*, 108 Nev. at 610-11, 836 P.2d at 636-37. In this case, this Court found that especially strong circumstances must exist to sustain a defense of laches when the statute of limitations has not run. However, the Court determined that, because there was a significant change in position by the contractor who was completing the project, and the trade council knew that that work had begun on the project, the trade council did not take immediate legal action to stop the work pending resolution of the dispute. Furthermore, the Court found that had it rescinded the contractor's contract, which the trade council requested, it would have required rebuilding, and the consequent delay would have increased project costs and could have resulted in a withdrawal of the Federal grant, establishing the required prejudice in the record. In the present case, unlike in *Building and Const. Trades Council of Northern Nevada, supra*, there was no prejudice to Lynda in the

record below, only speculation by her attorney; however, attorney statements are not evidence, and Lynda did not testify.

Lynda also cites *McGuffin v. Springfield Housing Authority*, 662 F.Supp 1546, 1550 (C.D. Ill. 1987). In this case, the court agreed that laches did not apply when the plaintiff therein filed a motion for order to show cause why the defendant therein should not be held in civil contempt of the court's lawful decree. However, because the show cause petition was filed within the two-year statute of limitation, the court concluded that there was no inexcusable delay.

Lynda also cites *Phillips v. State*, 105 Nev. 631, 634, 782 P.2d 381, 383 (1989). In this case, the Court determined that it can rule only upon matters contained within the record, and that facts and mere allegations contained in a brief are not evidence and are not part of the record. However, without Lynda's testimony at the time of trial as to any of the elements of the defense of laches, the district court could not possibly have just assumed that there was a change in her position, that she was prejudiced, or that any of the elements of a laches defense had been met.

Lynda also cites *Sierra Club v. U.S. Dept. of Transp.*, 245 F.Supp.2d 1109, 1114-15 (D. Nev. 2003). However, this case also is inapplicable, because it involved a special laches standard uniquely employed in environmental litigation,

because the plaintiff in environmental litigation cases is not the only victim of the alleged environmental damage, but the public at large also may be a victim. In any event, the court denied the governmental defendants' converted motion for summary judgment premised upon the doctrine of laches.

Lynda also cites *Zuckerman v. Metropolitan Museum of Art*, 928 F.3d 186, 197 (2d Cir. 2019). In that case, the court did invoke the equitable defense of laches in favor of the defendant therein. In *Zuckerman, supra*, 928 F.3d at 189, the court was confronted with a statute of limitation that had not run that was enacted by Congress. Plaintiff argued that laches could not be invoked to bar her legal relief. The court concluded that the applicable statute of limitation necessarily reflected the Congressional decision that the timelines of claims is better judged on the basis of a generally hard and fast rule rather than a case-specific judicial determination of the facts that occur when a laches defense is asserted. More specifically, Plaintiff argued that the statute of limitation precluded the defense of laches asserted by defendant. 928 F.3d at 195-96. The court noted that, unlike a mechanical application of the statute of limitation, a laches defense requires careful analysis of the respective positions of the parties. The court reviewed the legislative history of the federal act and the statute of limitation, and concluded, contrary to the plaintiff's arguments, that Congress did

intend that the laches defense remain viable with respect to otherwise covered claims by the Act. The original version did not, but the Senate amendment removed any reference precluding the availability of equitable defenses and the doctrine of laches; therefore, the court could apply the defense. Unlike the fact in *Zuckerman, supra*, those facts do not exist in the present case, especially since the plaintiff in Zuckerman waited over 70 years between the sale of the painting in 1938 and her demand for its return in 2010. 928 F.3d at 193. In *Zuckerman, supra*, plaintiff was well aware that the painting her grand uncle sold eventually was placed in a museum that had maintained the painting since 1952. 928 F.3d at 189. The court concluded that the fact that it is well established that an appellate court may affirm on any basis for which there is a record sufficient to permit conclusions of law, including grounds upon which district court did not rely, did not apply, because there was no evidence in the record below from any testimony whatsoever that the elements of laches had been met. 928 F.3d at 193, *citing, Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 584 (2d Cir. 2000).

II

PIERRE WAS JUSTIFIED IN REDACTING BILLING ENTRIES THAT WERE PRIVILEGED

The district court erred in finding that Pierre was late in making his demand

for indemnity (4AA741, ll. 22-24; 4AA742, ll. 9-11), was evasive (4A740, ll. 24-28; 4AA741, ll. 1-4, 22-28; 4AA742, ll. 1-3), and should have provided Lynda with his attorney's file, and with unredacted entries and communications between Pierre's lawyer and Todd Jaksick's lawyer (4AA741, ll. 1-10). Surprisingly, the district court made uncharacteristic comments about Pierre that not only were unwarranted, but were completely contrary to the facts that it had before it when it made its decision. The district court itself commented that Lynda was not entitled to every entry on the billing statements (4AA610, l. 25; 4AA611, l. 1), that it was clear from the billing statements that the redacted time entries related solely to attorney's fees and costs in the Collateral Action (4AA610, ll. 10-13), and that it was clear what those entries were related to, especially in light of the fact that Lynda refused to pay any fees related to the Collateral Action (4AA610, ll. 19-21); therefore, Lynda's request for the unredacted entries was unwarranted, and yet the district court, after making those statements, used the redacted entries to find that Pierre was not transparent.

The district court in its decision did not rely upon Pierre's breaching MSA §37. Pierre provided all of the documentation requested by Lynda; therefore, he could not have breached MSA §37. Under no circumstances would MSA §37 have been breached by his failing to provide his attorney's file and

communications with himself. Nor could he have breached MSA §37 by requiring his attorney to provide communications between himself and Todd Jaksick's attorney, pursuant to the common interest work product doctrine. The fact that he was not a party to the Collateral Action, upon which the district court relied, is of no consequence, because this privilege applies not only actual parties but to potential parties who may be sued in the future. Thus, he is protected from disclosure to third parties outside of the common interest he shared with Lynda, since the disclosure to Lynda could constitute a waiver. The district court erred by not conducting an *in camera* review to determine whether the redacted entries qualified for the joint defense work product privilege.

Finally, Lynda provided no support for her conclusions and other suppositions that she needed to see the entries in order to determine whether those fees related to the Malpractice Action, which they clearly did not, by a simple review of the dates and times of the redacted entries. Lynda also did not provide any evidence to the district court that she had a substantial need for the redacted entries in the preparation of her case, and that she was unable without undue hardship to obtain the substantial equivalent of such evidence by other means. *See, Wardleigh v. Second Judicial District Court in and for County of Washoe*, 111 Nev. 345, 891 P.2d 1180 (1995); *see also, Canarelli v. Eighth Judicial*

District Court in and for County of Clark, 136 Nev. 247, 464 P.3d 114 (2020). The burden of showing undue hardship and substantial need rests with the party seeking to discover the information, and an assertion will not suffice. In fact, in *Wardleigh, supra*, 111 Nev. at 359, 891 P.2d at 1188-89, this Court stated that the parties could have obtained the information from other sources, for example, from individuals other than the attorney, such as the 74 original homeowners, by taking their depositions, because they may have possessed the evidence the party sought. *Wardleigh* provides some insight as to just how difficult it is for a party to discover protected work product and the legal files of the attorney.

McLane Food Service, Inc. v. Ready Pac Produce, Inc., 2012 WL 1981559 (D. N.J., June 1, 2012) (unpublished decision), is a persuasive case in relation to the facts in this matter. First, the court found that the common interest doctrine is treated as a de facto privilege. It enables two separate attorneys for separate clients facing a common litigation opponent to exchange privileged information and attorney work product, in order adequately to prepare a defense without either waiving the privilege. The court cited Restatement (Third) of the Law Governing Lawyers, §76, which provides that the common interest doctrine applies in litigated or non-litigated matters, and the information exchanged is privileged against all third parties. 2012 WL 1981559, at *4. The court determined that the

doctrine applied even if all of the interests were not the same or identical. In fact, the common interest doctrine applied even though the parties were adverse to each other, were aggressively fighting each other, and had sued each other. The court stated that the majority of courts had held the common interest privilege can apply even if the clients are in conflict on some or most points, and even if a judgment is rendered against a codefendant who *is* exchanging information and will vigorously pursue its claim against the other exchanging codefendant. 2012 WL 1981559, at *5-6. In this case again, the court conducted an *in camera* review to determine if exchanged communications fell within the common interest privilege and determined that the privilege applied even if the codefendants' exchange of information may also have served another purpose in addition to a common legal interest. After reviewing such exchanges, the court determined that the plaintiff provided no support for its conclusion other than its speculation. 1981559, at *7.

In the present case, the district court somehow concluded that, because Pierre was not a party and was sued by Todd Jaksick, the common interest work product privilege did not apply, even though Pierre testified that the common opponent was Wendy Jaksick (4AA651, ll. 20-25; 4AA652, ll. 1-11), because she sent the subpoena to Pierre, sued Todd Jaksick, and alleged that Todd Jaksick and Pierre drafted the estate planning documents in order to deprive her of her

legitimate share of the estate of her father (4AA648, ll. 19-25; 4AA649, ll. 1-13).

Lynda made no showing on the record of a substantial need for the redacted entries or for Judge Hacheff's attorney's files and communications between himself and Todd Jaksick's attorney. Nor did she demonstrate that she would suffer undue hardship to obtain the substantial equivalent by other means. *See, U.S. v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1302 (D.C. Cir. 1980).

For the common interest work product doctrine to apply, litigation need not already have been commenced or even imminent; rather, potential litigation must be a real possibility at the time the documents in question are prepared, and the court must pay close attention to the special protection afforded to opinion work product. *See, Eden Isle Marina, Inc. v. U.S.*, 89 Fed.Cl. 480, 505 (2009).

The common interest privilege applies even though the party receiving it is a non-party to any anticipated or pending litigation, where one of the parties was a litigant and the other party was a potential target of litigation. *See, King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, 2011 WL 2623306, at *3 (E.D. Pa., July 5, 2011) (unpublished decision).

In *Wynn Resorts, Limited v. Eighth Judicial District Court in and for County of Clark*, 133 Nev. 369, 370, 384, 399 P.2d 334, 338, 347-48 (2017), this Court joined the majority of courts in determining that the work product common

interest doctrine applied, adopting the "because of" test to determine whether materials were prepared in anticipation of litigation. This Court held that the prospect of litigation was sufficient to protect the communications, even if the documents were created in order to assist with a business decision, not just a common legal interest. 133 Nev. at 384, 399 P.2d at 348. The court is required to look at the totality of the circumstances, which requires the court to look to the context of the communication and content of the document to determine whether the privilege applies. 133 Nev. at 384-85, 399 P.2d at 348. This Court remanded the case back to the district court in order to make this determination.

In the present case, the district court did not engage in any analysis, but erroneously concluded without any authority that Pierre was not transparent, simply because he redacted what he perceived to be information protected by the common interest doctrine; furthermore, the district court reached its conclusions even though it noted that Lynda refused to pay for any fees related to the Collateral Action and, therefore, that there was no need to review whether the redacted entries were related to the Collateral Action and not to the Malpractice Action.

A court must make a communication-by-communication assessment of whether the exception applies to determine whether probable cause exists to

believe that each of the relations between the attorneys meets the common interest doctrine requirements, and therefore, an *in camera* review was required, which the district court did not perform in this case. *See, In re 2015-2016 Jefferson County Grand Jury*, 410 P.3d 53, 61-62 (Colo. 2018).

Similarly, communications do not cease to be protected for the purpose of receiving legal services just because the recipient intended to use the fruits of the legal services to guide its business relationships with customers. *See, U.S. v. BDO Seidman, LLP*, 492 F.3d 806, 817 (7th Cir. 2007). The court also noted that the privileged status of communications falling within the common interest doctrine cannot be waived without the consent of all of the parties. Thus, even if one of the parties voluntarily disclosed information in response to an IRS subpoena, the disclosure did not waive the other party's right to claim the privilege.

In the present case, the district court obviously did not understand the privilege, and placed Pierre in a position where he could not waive communications between his attorney and Todd Jaksick's attorney. In addition, the district court completely failed to take into consideration Pierre's testimony and concern (4AA651, ll. 20-25; 4AA652, ll. 1-11) that the real threat justifying the joint communications would likely come from Wendy Jaksick, who sued her brother, Todd Jaksick, in the Collateral Action. The district court failed to

consider carefully the content of the communications themselves, and to trust Pierre and his attorneys on those areas, even though Pierre's attorney, Todd Alexander, submitted an affidavit (2AA396-398) stating that the communications were protected by the common interest work product doctrine. Therefore, Pierre is a protected party within the common interest joint representation. *See, In re Teleglobe Communications Corp.*, 493 F.3d 345 (3d Cir. 2007).

In any event, the district court's failure to conduct an *in camera* review was fatal to its conclusions; furthermore, the district court did not consider that Pierre potentially might be a defendant in a future action, and that he would waive the privilege if he disclosed his attorney's file and joint communications with Todd Jaksick's attorney, because it would substantially increase the opportunities for potential adversaries to obtain that information. *See, Cotter v. Eighth Judicial District Court in and for Clark County*, 134 Nev. 247, 251, 416 P.3d 228, 232 (2018).

Finally, the district court failed to consider the decision in *Katz v. Incline Village General Improvement District*, 452 P.3d 411, 2019 WL 6247743 (decided November 21, 2019) (unpublished decision), wherein this Court held that the opposing party is not entitled to receive all of the attorney's entries when awarding attorney's fees against the adverse party; rather, the district court could have

reviewed the time expended and fees contained in the redacted entries in order to determine whether the amount was reasonable, given the circumstances of the underlying Collateral Action. Pierre testified in a deposition for two days and at trial for an additional two days. The fees charged by his attorney and his law firm were more than reasonable, and the district court could have awarded him his fees, given the fact that the district court concluded that MSA §40 included all of his fees in the Collateral Action.

For all of the above-stated reasons, the district court erred, as a matter of law, and based its decision upon its erroneous finding that Pierre was not transparent when he withheld the narrative in the redacted billing entries, which clearly were privileged under the common interest work product doctrine. At the end of the day, those communications may not qualify wholesale for the common interest privilege, but the district court had no basis or idea whether they were or not when it ruled against Pierre.

It was clear from the record below that the district court misunderstood the common interest work product doctrine. 4AA657, ll. 3-25; 4AA658, ll. 1-9. The district court erroneously questioned Mr. Alexander's charges, even for unredacted billing entries, because it did not understand why he did not ask any questions during the proceeding. 4AA658, ll. 3-9. In addition, the district court

reached this unilateral conclusion, even though Mr. Alexander's affidavit (2AA396-398) was in evidence (4AA690, ll. 3-25; 4AA691, ll. 1-8) and stated under penalty of perjury that the fees were related to the Malpractice Action (2AA398, ll. 11-12); that they were necessary, particularly in light of the fact that the Collateral Action was still pending (2AA397, ll. 23-28); and that it was critical not to waive the attorney-client interest work product privilege, in the event that Wendy Jaksick filed suit against Pierre after the appeal of the Collateral Action was concluded (4AA397, ll. 16-21).

Lynda argued that Wendy Jaksick did not have standing to sue Pierre (4AA602, ll. 10-18) at a time when she had absolutely no factual or legal basis to make this argument, and even though Pierre testified that the real threat of a malpractice suit would likely come from Wendy Jaksick (4AA651, ll. 20-25; 4AA652, ll. 1-11), based upon his professional dealings with the family, and the fact that Wendy Jacksick was unhappy with the estate plan prepared by Pierre (4AA648, ll. 19-25; 4AA649, ll. 1-13).

Both the subpoena in the underlying trust litigation and Wendy Jaksick's claim to set aside the second trust amendment clearly related to a potential malpractice claim against Pierre (4AA612-613; 4AA617, ll. 16-25; 4AA618, ll. 1-10; 4AA626, ll. 21-25; 4AA627, ll. 1-4), not only because his attorney, Todd

Alexander, confirmed this in his affidavit (2AA396-398), but also because Pierre's testimony confirmed that Wendy Jaksick's claims might result in a malpractice claim against him (4AA648, ll. 19-25; 4AA649, ll. 1-13; 4AA651, ll. 20-25; 4AA652, ll. 1-11). Lynda attempted to argue that the subpoena in the underlying trust litigation and the Collateral Action did not threaten Pierre with a potential malpractice claim (4AA599, ll. 9-20; 4AA600, ll. 1-2) and that the subpoena was not related to a Malpractice Action (4AA611, ll. 12-25), irrespective of Todd Alexander's affidavit (2AA396-398) stating otherwise (4AA613, ll. 8-18).

In addition to making its finding on transparency based upon the written billing entries (4AA740, ll. 24-28; 4AA741, ll. 1-21), the district court became confused regarding Pierre's accounting and did not understand the amounts paid by the malpractice insurance carrier (4AA741, ll. 4-10, 25-28). The district court made this erroneous finding in arriving at its decision that Pierre was not transparent (4AA741, ll. 1-2) and selectively enforced MSA §40 (4AA742, ll. 4-5). The district court came to this conclusion even though, during his testimony, Pierre explained his accounting (4AA628-638, 4AA657-658, 4AA697-698), and also included a chart of his accounting several times in his pleadings and legal arguments (1APP144, ll. 10-21; 1APP154, ll. 1-24). Finally, the district court also was confused with the order and presentation of Pierre's exhibits. 4AA689-690.

III

PIERRE DID NOT BREACH MSA §37

Lynda argues that Pierre breached MSA §37 because he was stonewalling and evasive in providing information, and because he acted in bad faith. RAB 42.

Lynda reaches this conclusion not because Pierre did not timely provide all of the documentation and information she requested, but rather because each time he provided documentation, she continued to ask for additional documentation. Pierre finally stopped when Lynda requested a copy of his attorney's file and joint communications between his attorney and Todd Jaksick's attorney, which were protected by the common interest work product doctrine. Lynda received everything she requested within a matter of days after her request. Pierre eventually sent over all of the billing entries from his attorney, except for those entries that he and his attorney believed to be protected by the common interest work product doctrine. Those entries were redacted, based upon Lynda's request through her sister, Lucy Mason (who also was an attorney). 4AA667-670. Once the redacted entries were received as requested, Lynda backtracked and demanded to see those entries, arguing that she needed to know whether the entries were related to the Malpractice Action. When they were not produced, Lynda argued that she was prejudiced as a result. 4AA605, ll. 1-16; 4AA639-641; 4AA670, ll.

4-24. Lynda made this argument even though she was very clear that she would not pay any fees related to the Collateral Action Transcript. 4AA605; 4AA607, ll. 7-14. The record was clear that Pierre, in fact, was transparent, and that he immediately complied with all of Lynda's documentation requests; therefore, contrary to Lynda's arguments, Pierre did not breach MSA §37 and the further assurances clause. 4AA615, ll. 6-25; 4AA646, ll. 8-12; 4AA667-670; 4AA671, ll. 4-8; 4AA684, ll. 4-25; 4AA686, ll. 4-25, 4AA687, l. 1.

Even the district court correctly noted that the redacted entries clearly demonstrated that they related to the subpoena Collateral Action only, and that there really was no reason to demand unredacted entries if Lynda was not willing to pay any fees related to the Collateral Action transcript. 4AA599, ll. 23-25; 4AA610-611; 4AA617.

The district court further confirmed that a majority of the fees were incurred after the malpractice was filed on December 26, 2018 (4AA624-626) and therefore were related in great part to Pierre's defense of his estate planning advice in the Collateral Action. Therefore, Pierre did not breach MSA §37 (the further assurances clause).

Alternatively, Lynda misinterprets MSA §37 as an obligation independent from the MSA taken as a whole. Once again, Lynda attempts to rewrite the MSA

in a manner similar to what she attempted to do by inserting a notice provision in MSA §40, in order to create a provision and/or obligation that was not expressly inserted in the MSA by the parties. The MSA does not contain any obligation for Pierre to turn over either his attorney's file, his privileged communications between himself and his attorney, and/or his privileged communications between his attorney and Todd Jaksick's attorney. MSA §37 is a further assurances clause or covenant which is used by the parties to effectuate the intent and written provisions of the agreement when not all matters were identified in the agreement. For example, if the seller expressly represents that it has good title to the real estate, and after the closing it is determined that there is some assignment or defect in title, then in furtherance of the express warranty the seller would be obligated to execute the necessary documents in order to convey good title. A further assurances clause cannot be used to create an obligation that does not exist in the contract.

The case of *In re Winer Family Trust*, 2006 WL 3779717, at *3 n. 6 (3d Cir., Dec. 22, 2006) (unpublished decision),[3] is instructive. In that case, the Trust

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[3]FRAP 32.1 provides:

"A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

filed suit against Smithfield, claiming Smithfield's forbearance agreement required it to sell back its shares of Pinnacle. The district court determined that the forbearance agreement did not create any obligation upon Smithfield to sell its Pinnacle shares back to shareholders. The express language of the agreement imposed no duty upon Smithfield that could be breached by refusal to sell back the shares, because the agreement only provided that Smithfield was to facilitate a proposed merger. Therefore, Pennsylvania law was that, when a written contract was clear and unequivocal, its meaning must be determined by its contents alone. The agreement contained several obligations and terms between the parties, but it contained no language that Smithfield was obligated to sell its shares. In other words, if the Trust wanted such an obligation in the agreement, then it should have been included it in the agreement. Pinnacle then argued that the further assurances clause, wherein the parties agreed to cooperate with each other and execute and deliver all such other instruments and take all such action as either party might reasonably request from time to time, required Smithfield to sell its stock, in order to effectuate the transactions provided for in the contract. The contract set forth a

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"(i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and

"(ii) issued on or after January 1, 2007."

number of specific obligations for both parties, and the further assurances clause ensured that the parties would not obstruct each other's efforts to comply with their specific obligations. However, the clause did not impose a duty upon Smithfield to sell its stock.

In the present case, Lynda attempts to rewrite the contract by saying that MSA §37 required Pierre to deliver unredacted attorney billing entries, a copy of his attorney's malpractice file, and his communications with Todd Jaksick's attorneys, and that when he did not, he breached MSA §37. Pierre delivered all of the requested documentation, and he did nothing otherwise to breach MSA §37. Furthermore, as indicated in *In re Winer Family Trust, supra*, there was nothing in the MSA that specifically required Pierre to deliver the above-mentioned documentation. If Lynda wanted access to those documents, then she should have inserted that express obligation in the MSA.

Similarly, *Pride Acquisitions, LLC v. Osagie*, 2014 WL 4843688, at *5-7 (D.Conn., Sept. 29, 2014) (unpublished decision), also is instructive on the same issue and the legal meaning of a further assurances clause. The further assurance covenant requires a party to cooperate fully in the correction of any closing documents so that all documents will be accurately described in the agreement. The provision is a safety valve. For example, if the contract contains an error such

as a failure to provide a precise legal description of the land or other warranty by the party, the provision operates to ensure that the parties execute future agreements necessary to effectuate the present agreement. It can be used to address a step which inadvertently was not included, in order to consummate the transaction, where there may be a post-closing discovery that the transfer of real estate requires the consent of a party or the assignment of a permit or license to effectuate a promise in the agreement. In other words, you cannot use a further assurance clause to rewrite terms that are not included in the agreement. Furthermore, even if the court were to assume that there was a breach of duty under a further assurance clause, it would have to be a material breach to be actionable.

Even if Pierre arguably breached MSA §37, he provided all the documents requested by Lynda, except for privileged documents, and it certainly would not be a material breach, especially in light of the fact that the redacted entries clearly showed that those fees were related to the Collateral Action which Lynda refused to pay in the first instance. *See, One Hundred Pearl Ltd. v. Vantage Securities, Inc.*, 1995 WL 117609, at *2 (S.D.N.Y., March 16, 1995) (unpublished decision) (the court determined that the party's claim that the covenant of further assurances was breached would be dismissed, because it was premised upon a breach of an

express covenant in the transaction agreement, and the party did not adequately allege what express covenant in the agreement caused the further assurances covenant to apply). Similarly, in the present case, Lynda cannot interpret MSA §37 as a condition precedent to Pierre's right to insist on his express contractual indemnity in MSA §40 and thereby defeat said right.

For all of the above-stated reasons, the Court can find, as a matter of law, that Lynda cannot rewrite MSA §37 to include obligations that do not exist in the MSA. Even if there were express covenants requiring Pierre to deliver certain documents, he delivered all of the documents that Lynda demanded, except privileged communications; furthermore, MSA §37 is simply a covenant that was not materially breached by Pierre, and it is not a condition precedent to Lynda's obligation to indemnify.

In order to find a breach of the covenant for further assurances, a majority of courts require that the party must show that it is tied to an express warranty or covenant in the agreement. *See, Tran v. Hall*, 34 Va. Cir. 157, 1994 WL 1031233 (1994) (unpublished decision) (defendants conveyed property by general warranty deed, and plaintiffs claimed that at the time the deeds were executed, the defendant did not have good title to a portion of the property, consistent with the warranty/covenants of title, and therefore, that a covenant for future assurances

required the defendant to take all such reasonable action to perfect good title consistent with the express warranty); *Werner v. Wheeler*, 127 N.Y.S. 158, 142 A.D. 358 (1911) (the further assurances covenant is in the nature of agreement to complete any further conveyance necessary to vest in the covenantee the title intended to be conveyed which could have been, but was not, conveyed by the deed containing the covenant, and usually is enforced by compelling an action for specific performance); *Martin v. Floyd*, 282 S.C. 47, 317 S.E.2d 133 (1984) (purchasers filed an action against the seller for breach of covenants in a general warranty deed; a covenant for further assurances in a general warranty deed contemplates that the grantor will on demand perform all necessary of the warranty of title); *Kite v. Pittman*, 278 S.W. 830 (Mo.App. 1926) (purchaser alleged that the statutory covenants in a warranty deed included that the property was free and clear of all lawful claims, and when the plaintiff notified the defendant that there was a tenant in possession holding under a lease, the defendant breached not only the express warranty but the covenant of further assurances, when it failed to take any steps to place the plaintiff in possession in compliance with the covenants contained in the warranty deed); *Spiegel v. Seaman*, 160 N.J.Super. 471, 390 A.2d 639 (N.J.Super 1978) (a warranty deed contains five covenants, and a breach occurs when the grantee shows that the

grantor had less than the quality and quantity he was supposed to receive under said conveyance, and the further assurance covenant requires the grantor to execute such instruments or to perform such acts as required in the future to make the title good title, citing 6 Powell, Real Property (1977 rev.), § 905, at 268.14).

If Lynda wanted any proof or documentation in addition to proof of payment as a condition precedent to her obligation to indemnify, then she should have inserted this provision in MSA §40, but she did not. Now realizing that she failed to include this language, she cannot now use MSA §37 as a back door obligation to remedy her failure.

APPELLANT'S ANSWERING BRIEF ON CROSS-APPEAL

ARGUMENT

I

PIERRE IS ENTITLED TO HIS FEES AND COSTS AS THE PREVAILING PARTY

It is clear from the record below and from the district court's findings and conclusions in its February 1, 2021, Order that: (1) all of Pierre's fees, including his fees and costs incurred in the Collateral Action, were reimbursable under MSA §§40 and 38 (4AA740, ll. 16-18); (2) by its specific terms, MSA §40 did not contain or require any advance notice as a precondition to Lynda's indemnity

obligation (4AA737, ll. 23-28; 4AA740, ll. 18-21); (3) the unambiguous contractual indemnity provisions of the MSA precluded the district court from considering the equitable doctrine of laches (4AA740, ll. 21-23); (4) the district court did not find that Pierre had any fiduciary, trust, or confidential relationship with Lynda, or that he breached any such non-existent duties (4AA740-742); and (5) the district court did not find that Pierre breached any implied covenant of good faith and fair dealing (4AA740-742).

However, after making all of these factual findings in favor of Pierre, the district court, *sua sponte*, and without Lynda making any claim for laches, decided solely upon the basis that a twelve-month delay in notifying Lynda of the Malpractice Action, and without any evidence of prejudice, constituted laches. 4AA740-742.

Similarly, just because the district court did not understand and/or misinterpreted Pierre's accounting, it could not have relied upon this mistake in finding that he was not transparent and/or evasive; and even if this were the case, the district court's misinterpretation of this fact was not a proper basis for the district court to impose upon him the equitable remedy of laches.

Since issues of law are within the Court's purview, this Court can, as a matter of law, reverse the district court's decision upon the issue of Pierre's fees

and costs, find in his favor as the prevailing party, and remand this matter to the district court for its determination of a proper award of his costs and fees upon proper proof. The district court already properly found that Pierre provided the required notice pursuant to MSA §35.2, not just once, but on several occasions. 4AA743, ll. 4-10. Contrary to Lynda's assertions, rather than simply working together collaboratively to determine what Lynda owed under MSA §40, the record clearly shows that, from the very beginning, she refused to pay anything, arguing that she had no obligation whatsoever, because Pierre breached his fiduciary duties and the implied covenant of good faith and fair dealing. 2AA243-245; RAB 36-37. Furthermore, even after he provided her with the documentation that she requested, she continued to demand additional documentation that was neither necessary nor relevant to fulfill her obligations under the MSA, causing Pierre to incur unnecessary fees, all of which could have been avoided.

In her Answering Brief, RAB 38-40, and her Opening Brief on Cross-Appeal, AOB 40-44, Lynda argues that Pierre is not entitled to his fees because he was not the prevailing party and did not comply with MSA §35.2, and because she was the prevailing party and the district court erred in not awarding her fees and costs pursuant to MSA §35.2.

The following three critical legal issues were before the district court: (1)

by its specific terms, the contractual indemnity provision did not require Pierre to provide any prior notice to Lynda as a condition precedent to his right to indemnity under MSA §40; (2) all of the fees incurred by Pierre, both in the underlying Collateral Action and the Malpractice Action, were included and reimbursable pursuant to the MSA; and (3) a court is precluded from applying equitable remedies to defeat a right to contractual indemnity, and equitable remedies can be considered only in the event that an equitable right to indemnity arises. Lynda opposed all three of these legal claims by Pierre without citing any legal authority to the contrary, while Pierre cited substantial legal authority for all such legal issues and claims.

To the contrary, Lynda argued to the district court that Pierre was required to give notice (1AA85, ll. 10-15, 18-20); that MSA §40 only included fees and costs in the Malpractice Action (1AA83, ll. 23-28; 1AA84, ll. 9-15; 1AA88, ll. 16-20); and that Pierre was collaterally estopped from exercising his right to indemnity (1AA89, ll. 9-15). The district court found in favor of Pierre on all three significant legal issues and ruled against Lynda on all three significant legal issues. 4AA737, ll. 23-28; 4AA740, ll. 16-21. Lynda did not succeed on any of her legal issues in the district court. Lynda never argued that Pierre was precluded from exercising his right to contractual indemnity because of the equitable

doctrine of laches. To the contrary, this issue was raised *sua sponte* by the district court. 4AA742, ll. 4-9. Therefore, Lynda cannot even argue that she succeeded on that issue; indeed, she did not succeed on any of her claims.

A party may be a prevailing party entitled to recover attorney's fees and costs if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing its claims. *See, LVMPD v. Blackjack Bonding*, 131 Nev. 80, 90, 343 P.3d 608, 615 (2015); *Valley Electric Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005); *see also, Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 1940, 76 L.Ed.2d 40 (1983) (to be a prevailing party, a plaintiff need succeed on only some of his claims for relief); *Davis v. Beling*, 128 Nev. 301, 322, 278 P.3d 501, 515-16 (2012) (where an agreement provides an award of attorney's fees to the prevailing party, parties prevail if they succeed on any substantial aspect of the case). Determining whether attorney's fees should be awarded requires the court to inquire into the actual circumstances of the case, rather than a hypothetical set of facts favoring the party's averments. *See, Baldonado v Wynn Las Vegas, LLC*, 124 Nev. 951, 967-68, 194 P.3d 96, 106-07 (2008); *see also, Weston v. Cushing*, 45 Vt. 531, 537 (Vt. 1868) (the court determined that the plaintiff was a prevailing party because he prevailed on the main issue in the case, although not to the full extent of his claims, and although

he received less than his initial claim, it was more than the amount the defendants claimed he should recover).

More importantly, once a party satisfies the definition of a prevailing party, a court has no discretion to deny a fee award to the prevailing party. *See, University of Nevada v. Tarkanian,* 110 Nev. 581, 590, 879 P.2d 1180, 1186 (1994) (once a prevailing party is determined by succeeding on the issues, the court cannot deny the attorney's fees to be awarded to such party, but only can determine whether the amount of the fees claimed is reasonable).

In the present case, the district court failed to award attorney's fees to Pierre after he succeeded on all of his claims, while Lynda did not succeed on any of her claims. 4AA743, ll. 3-12. Lynda never argued or even claimed that the remedy of laches applied in this case. Rather, Lynda argued that Pierre was required to provide notice and to provide his attorney's file and attorney-client communications; that failure to do so breached his fiduciary duty and the covenant of good faith and fair dealing; and that, therefore, Pierre was not entitled to exercise his right of indemnity. The district court did not find that Pierre owed any fiduciary duty to Lynda or that Pierre breached the implied covenant of good faith and fair dealing. As such, the district court found against Lynda's claims in this regard.

Therefore, as a matter of law, this Court can reverse the district court's decision; find on the record that Pierre is the prevailing party; instruct the district court to award attorney's fees and costs to Pierre; and determine whether the attorney's fees and costs are reasonable, after allowing Pierre to file a motion and memorandum of his fees and costs.

CONCLUSION

This Court should uphold the district court's prior findings and conclusions of law as demonstrated above, and should reverse the district court's decision erroneously applying the doctrine of laches, solely upon the basis that Pierre did not notify Lynda sooner than twelve months after the filing of the Malpractice Action, which as a matter of law, the district court could not apply, given its prior findings and conclusions.

In addition, as a matter of law, this Court also can find that Pierre was the prevailing party, and that he is entitled to his costs and attorney's fees, given the district court's finding that he complied with MSA §35. Upon remand, the Court can require appropriate proof of such costs and fees.

The district court concluded that Pierre did not breach MSA §37 and that he provided all documentation requested by Lynda for her to pay one-half of his costs and fees in both the Collateral and Malpractice Actions. Thus, as a matter of law,

the Court can determine that Pierre was justified, under the attorney-client privilege and the common interest work product privilege, in redacting certain privileged billing entries; and that the district court erred in finding that he was not transparent in failing to provide unredacted billing entries, a copy of his attorney's file, and joint defense communications between his attorney and Todd Jaksick's attorney. Alternatively, this Court could remand the case in order for the district court to conduct an *in camera* inspection.

AFFIRMATION

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

DATED this14th day of February, 2022.

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CERTIFICATE OF COMPLIANCE

1. 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 Word Perfect X4 in Arial Font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 2(e)(2)(A)(i), because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced and contains 13,482 words.

3. Finally, I hereby certify that I have read this appellate brief, and 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 every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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 14th day of February, 2022.

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Nevada Rules of Appellate Procedure, I hereby certify that I am an employee of Kent Law and that on this date, I served a true and correct copy of the attached document as follows:

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DATED this _14th day of February, 2022.

Sam Baker

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

Case No. 82626

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Elizabeth A. Brown
Clerk of Supreme Court

PIERRE A. HASCHEFF,

Appellant/Cross-Respondent,

vs.

LYNDA L. HASCHEFF,

Respondent/Cross-Appellant.

Appeal From Special Order Entered After Final Judgment
Second Judicial District Court Case No. DV13-00656

RESPONDENT/CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

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NRAP 26.1 DISCLOSURE STATEMENT

The following law firms have lawyers who appeared on behalf of the Respondent/Cross-Appellant Lynda Hascheff or are expected to appear on her behalf in this Court:

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INTRODUCTION

Pierre's answering brief on cross appeal agrees with Lynda's analysis of the applicable law: Because the parties' marital settlement agreement ("MSA") contained a prevailing party fee provision, the district court abused its discretion by declining to award fees. Pierre does not dispute that Lynda satisfied the contract's pre-filing obligations before she filed her Motion for Clarification or Declaratory Relief Regarding Terms of MSA and Decree ("DR Motion"). As a result, should the Court affirm the declaratory relief entered in Lynda's favor, Pierre concedes she should be awarded her fees under either MSA §35.1 or MSA §37.

Pierre's only arguments against Lynda's cross appeal are that either he *was* the prevailing party or *should have been* the prevailing party. Both contentions should be rejected. First, in that Pierre obtained none of the relief he sought and appealed the district court's order, it is clear he lost. By contrast, Lynda secured the declaratory relief she sought and successfully fended off Pierre's efforts to have her held in contempt of court. The fact that the district court decided in her favor on a different basis than the theories Lynda advanced does not deprive her of prevailing party status. The district court granted her DR Motion; she won.

Pierre's brief presents no basis to reverse the declaratory relief granted to Lynda. He did not – and cannot – overcome the district court's damning findings, which documented Pierre's persistent misdeeds that prevented Lynda from

determining whether the money he demanded fell within the scope of MSA §40's indemnity language. He also did not – and cannot – overcome the unequivocal law that prohibits him from using the attorney-client privilege as a sword and a shield. By keeping his attorney's tasks a secret, he failed to meet his burden to show that the fees he chose to incur were Lynda's obligation.

For the reasons set forth in Lynda's answering brief on the merits, the Court should affirm the declaratory relief entered in Lynda's favor. And because she prevailed below and should prevail on appeal, the MSA entitles Lynda to fees. Accordingly, Lynda respectfully requests that the Court direct the district court to award her fees.

ARGUMENT

A. Having Obtained The Declaratory Relief She Sought, Lynda Is The Prevailing Party And Entitled To Fees

Contrary to Pierre's contention, because the district court granted Lynda's DR Motion, she is the prevailing party entitled to fees under the MSA. The winning party in a declaratory relief action is the "prevailing party" for the purpose of a fee award. *See MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. 78, 89, 367 P.3d 1286, 1292–93 (2016). Other courts deem a party who successfully obtains a declaratory judgment to be the prevailing party for the purposes of awarding fees. *See Lefemine v. Wideman*, 568 U.S. 1, 4 (2012) (awarding fees under 42 U.S.C. §1988); *Rosenfeld v. S. Pac. Co.*, 519 F.2d 527, 529 (9th Cir. 1975) (awarding fees

under 42 U.S.C. §2000e-5(k)); *Owner-Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co. (AZ)*, 612 F. App'x 409, 411 (9th Cir. 2015) (awarding fees under 49 U.S.C. §14704(e)); *Montes v. Thornburgh*, 919 F.2d 531, 538 (9th Cir. 1990) (awarding fees under 28 U.S.C. §2412).

This matter involved Lynda's Motion for Clarification or Declaratory Relief Regarding Terms of MSA and Decree. IAA0082. In that DR Motion, Lynda asked the Court to determine "the parties' respective rights and obligations pursuant to their marital settlement agreement." IAA0083-0088. The district court granted Lynda's DR Motion and provided the declaratory relief she sought. 4AA0721-0724. In so doing, the district court described Pierre's conduct as "troubling" and "not transparent." 4AA0721-0722. The district court found that Pierre "failed to provide a complete and transparent accounting," "unilaterally imposed redactions on the billing statements … thereby obfuscating" their content, used "inconsistent and secretive criteria" for his redactions, and exhibited "conscious disregard and selective enforcement of MSA §40" to Lynda's prejudice.[1] 4AA0721-0723.

[1] Notwithstanding these findings, Pierre ironically accuses Lynda of not acting "collaboratively" and doubles down on his false assertion that Lynda purportedly "refused to pay anything." Cross AB at 56 (citing only his own briefing below). The record is clear that Lynda repeatedly informed Pierre she was prepared to perform her indemnity obligation if Pierre could demonstrate that she owed half the costs for the legal services he chose to incur. 1AA0118-0119, 0124-0125, 0130-0133, 0135-0136, 0168, 0175; 2AA0412-0413. He failed to do so.

Because of Pierre's misconduct, the district court found that Lynda could not comply with any alleged obligations she might have had under the MSA and therefore concluded it would be inequitable for the district court to order that she do so. 4AA0721-0724. Having heard the testimony and reviewed the evidence, the district court was in the best position to make these findings and conclude that they gave rise to laches. *See Las Vegas Metro. Police Dep't v. Coregis Ins. Co.*, 127 Nev. 548, 558, 256 P.3d 958, 965 (2011).

The relief that Pierre sought in the district court was a Motion for Order to Show Cause, or in the Alternative, to Enforce the Court's Orders ("OSC Motion"), in which he asked the district court to hold Lynda in contempt of court and order Lynda to indemnify him and pay his fees and costs. IAA0187. The district court denied all the relief Pierre sought, concluding that he "was unable to make a *prima facie* showing Ms. Hascheff had the ability to comply with the parties' MSA, yet willfully violated her obligations." 4AA0723. Pierre concedes in his brief that he failed to meet the standard to obtain a contempt order and has abandoned that argument on appeal. RAB at 6.

The record is clear that Lynda prevailed and Pierre lost. 4AA0721-0724. As a result, she is entitled to fees under the plain language of the MSA. 1AA0072.

B. Lynda Did Not Have To Win On The Legal Theories She Advanced To Be The Prevailing Party Entitled To Fees

Simply because the district court might have applied a different legal theory than the ones advanced by Lynda does not alter the fact that the district court granted her DR Motion and entered declaratory relief in her favor, making her the prevailing party. "A party prevails if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit." *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 90, 343 P.3d 608, 615 (2015) (internal quotation marks omitted). "To be a prevailing party, a party need not succeed on every issue." *Id.*; *see Univ. of Nevada v. Tarkanian*, 110 Nev. 581, 596, 879 P.2d 1180, 1189 (1994) (affirming fee award under either a "limited success" analysis, or viewing the plaintiff "as having prevailed on his claim despite some adverse rulings"); *Huerta v. Rogich*, Case No. 67595, 132 Nev. 981, 2016 WL 3432539 at *1 (June 20, 2016) (unpublished disposition) (affirming fee award to party that obtained summary judgment even though it did not "refut[e] the factual and legal basis for appellants' claims"); *ParksA Am., Inc. v. Harper*, Case No. 132 Nev. 1015, 2016 WL 4082312 at *2 (July 28, 2016) (unpublished disposition) (affirming fee award pursuant to contract's prevailing party provision even though plaintiffs prevailed on a different legal theory).

Having had her DR Motion granted and obtaining declaratory relief that she was not responsible for indemnifying Pierre due to Pierre's misconduct, Lynda

clearly satisfied the prevailing party standard. *See Las Vegas Metro. Police*, 131 Nev. At 90, 343 P.3d at 615. The fact that the district court's Order was based on a different legal theory than the ones advanced by Lynda was immaterial. *See id.* As a result, the district court's failure to award her fees under these circumstances was an abuse of discretion. *See id.*

C. Having Filed His Appeal And Argued For Substantive Reversal Of The District Court's Order, Pierre Acknowledges He Was Not The Prevailing Party

Oddly, Pierre's response to Lynda's cross appeal largely consists of an argument that he supposedly prevailed below. Cross AB at 55-60. Had Pierre actually been the prevailing party, however, he would not have filed an appeal requesting reversal of the district court's Order and challenging the denial of his OSC Motion and the grant of Lynda's DR Motion. Pierre filed the appeal because he **did not** prevail on the merits in the district court. Pierre cannot manufacture a win out of thin air when his own actions confirm he lost.

The fact that the district court may have made some factual findings in his favor did not render Pierre the prevailing party because they conferred no benefit to him and failed to create the outcome he sought. *See Las Vegas Metro. Police*, 131 Nev. at 90, 343 P.3d at 615. The district court denied his OSC Motion, rejected his request to have Lynda held in contempt, and failed to award him any of the money he demanded from Lynda. 4AA0721-0724. Given this result, he

cannot be deemed the "prevailing party." *See Las Vegas Metro. Police*, 131 Nev. at 90, 343 P.3d at 615.

D. Pierre Does Not Dispute That The Plain Language Of The MSA Required That Fees Be Awarded To The Prevailing Party And That Lynda Complied With The MSA's Pre-Filing Requirements

In arguing that "once a party satisfies the definition of a prevailing party, a court has no discretion to deny a fee award to the prevailing party," Pierre concedes that should the Court affirm the declaratory relief in Lynda's favor, the MSA mandates a fee award to Lynda. Cross AB at 59. Where the language of a contract is "clear and unambiguous" that "the prevailing party is entitled to attorney fees incurred in defense or prosecution of the action," the district court must award fees. *Davis v. Beling*, 128 Nev. 301, 322, 278 P.3d 501, 515 (2012). Refusal to award fees to the prevailing party under the clear terms of a contract is reversible error. *See Mackintosh v. California Fed. Sav. & Loan Ass'n*, 113 Nev. 393, 405-06, 935 P.2d 1154, 1162 (1997). Pierre agrees with Lynda's analysis. Cross AB at 59.

In addition to agreeing with Lynda on the law, Pierre does not dispute that, should Lynda prevail on the merits, fees should be awarded to her under either MSA §35.1 or MSA §37. His answering brief on cross appeal was silent on this point, thereby conceding it. *See Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating party's failure to respond to an argument as a

concession that the argument is meritorious); *Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (treating failure to respond to an argument as a confession of error). Pierre likewise does not dispute that Lynda's counsel sent correspondence that complied with the pre-filing requirements in MSA §35.2. 1AA0130-0133. In light of these concessions, should the Court conclude that the district court correctly entered declaratory relief in Lynda's favor, Pierre's brief supports the conclusion that a fee award to Lynda is required.

E. Rearguing The Merits Does Not Transform Pierre From The Losing Party Into The Prevailing Party

Rather than address the points raised in Lynda's cross appeal, Pierre simply regurgitates his arguments as to why he thinks he should have succeeded on the merits. These arguments offer nothing new and, to the contrary, suffer from fatal legal shortcomings that the district court properly rejected.

As Lynda thoroughly addressed in her answering brief on appeal, Pierre failed to meet his burden of proving that the money he demanded from Lynda was within the scope of MSA §40. 1AA0072. Having put the subject matter of his attorney's services at issue, Pierre waived the privilege as to what his attorney did and could not keep that hidden from Lynda while simultaneously demanding she pay for it. *See Wardleigh v. Second Jud. Dist. Ct.*, 111 Nev. 345, 354, 891 P.2d 1180, 1186 (1995). Lynda had no other means of obtaining this information, and the law is clear that Pierre could not use the attorney-client privilege as both a

sword and a shield. *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 133 Nev. 369, 381, 399 P.3d 334, 346 (2017). As a result, the *in camera* review he now requests is improper. Cross AB at 60.

Moreover, fees related to a collateral action were not for the "defense and judgment" in litigation in which Pierre was "sued for malpractice." 1AA0072. Pierre's entreaty to the Court to contravene the MSA's plain language should be rejected, particularly because the Court must strictly construe the indemnity clause against Pierre. *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127 Nev. 331, 339, 255 P.3d 268, 274 (2011). Pierre could not force Lynda to pay for fees he chose to incur and that were outside the scope of the indemnity. *See id.* Pierre also could not demand indemnification for fees he did not even pay. *See Jones v. Childs*, 8 Nev. 121, 125 (1872). Pierre simply did not prove that the fees he demanded from Lynda were within the ambit of MSA §40.

Pierre does not dispute that MSA §37 required the parties to:

> ***do any and all acts and things reasonably necessary or proper to carry out their obligations under this Agreement***. If either party fails or refuses to comply with the requirements of this paragraph ***in a timely manner***, that party shall reimburse the other party for all expenses, including attorney fees and costs, incurred as a result of that failure, and shall indemnify the other for any loss or liability incurred as a result of the breach.

1AA0072 (emphases added). While this language does not include the word "notice," it certainly requires Pierre to take the steps "necessary and proper" for

Lynda to satisfy her obligations under the MSA. *Id.* Failing to timely inform Lynda of any threatened or actual malpractice action, making unsupported demands, keeping secret the information Lynda needed to determine if his demands were encompassed by MSA §40, and threatening contempt ran afoul the further assurances language in MSA §37. 1AA0072. Pierre either breached this express provision, the implied covenant of good faith and fair dealing that exists in the MSA, or his fiduciary duties that arise from it. *Perry v. Jordan*, 111 Nev. 943, 947, 900 P.2d 335, 337-38 (1995); *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226, 232, 808 P.2d 919, 922–23 (1991).

The district court made extensive findings that detailed Pierre's wrongdoings. Whether under contract or equitable principles, the district court reached the correct result to grant declaratory relief to Lynda and deny Pierre's motion to have her held in contempt. As a result, declaratory relief in Lynda's favor should be affirmed, and as the prevailing party, Lynda should be awarded her fees and costs.

CONCLUSION

Because Lynda obtained the declaratory relief she sought and Pierre failed in his efforts to have Lynda held in contempt of court, Lynda was the prevailing party. Pierre agrees that the MSA requires that fees be awarded to the prevailing party in this action, and the district court abused its discretion in declining to award

such fees. As a result, Lynda respectfully requests that the Court affirm the declaratory relief issued in her favor, reverse the denial of fees, and remand to the district court for Lynda to submit documentation in support of the fees she has incurred in this matter.

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.

DATED March 7, 2021

LEONARD LAW, PC

By: /s/ Debbie Leonard
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Attorney for Respondent/
Cross-Appellant

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 2007 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 2,566 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and 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), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED March 7, 2021

LEONARD LAW, PC

By: /s/ Debbie Leonard

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Leonard Law, PC, and that on March 7, 2021, a copy of the foregoing document was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). The following participants who are registered as E-Flex users will be served by the EFlex system upon filing. All others will be served by first-class mail.

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Clerk of the Court
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IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PIERRE A. HASCHEFF,
Appellant/Cross-Respondent,
vs.
LYNDA HASCHEFF,
Respondent/Cross-Appellant.

No. 82626-COA

FILED
JUN 29 2022
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [signature] DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Pierre A. Hascheff appeals from a district court order granting a motion for clarification or declaratory relief, thereby denying his motion for an order to enforce and/or for an order to show cause and request for indemnification of attorney fees and costs as provided for in a decree of divorce, as well as attorney fees and costs for having to move to enforce the indemnification provision. Lynda Hascheff cross-appeals from the district court's order denying her request for attorney fees and costs as she prevailed on her motion. Second Judicial District Court, Family Court Division, Washoe County; Sandra A. Unsworth, Judge.

The parties were married in 1990.[1] Throughout the marriage, Pierre was an attorney while Lynda was primarily a stay-at-home mother. In April 2013, Pierre filed a complaint for divorce; that same year, he was elected as a Justice of the Peace for Reno Justice Court. In September 2013, the parties reached a Marital Settlement Agreement (MSA) that resolved the issues of their divorce and was ratified, merged, and incorporated in the decree of divorce. The MSA included an "Indemnity and Hold Harmless"

[1]We do not recount the facts except as necessary for our disposition.

22-20567

provision set forth in § 40.[2] Relevant here is the part of that provision that states "[i]n the event Husband is sued for malpractice, Wife agrees to defend and indemnify Husband for one half (1/2) the costs of any defense[3] and judgment. Husband may purchase tail coverages of which Wife shall pay one half (1/2) of such costs."[4] The MSA also included a provision that if

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[2]MSA § 40 in its entirety provides that

> Except for the obligations contained in or expressly arising out of this Agreement, each party warrants to the other that he or she has not incurred, and shall not incur, any liability or obligation for which the other party is, or may be, liable. Except as may be expressly provided in this Agreement, if any claim, action, or proceeding, whether or not well founded, shall later be brought seeking to hold one party liable on account of any alleged debt, liability, act, or omission of the other, the warranting party shall, at his or her sole expense, defend the other against the claim, action, or proceeding. The warranting party shall also indemnify the other and hold him or her harmless against any loss or liability that he or she may incur as a result of the claim, action, or proceeding, including attorney fees, costs, and expenses incurred in defending or responding to any such action. In the event Husband is sued for malpractice, Wife agrees to defend and indemnify Husband for one half (1/2) the costs of any defense and judgment. Husband may purchase tail coverages of which Wife shall pay one half (1/2) of such costs.

[3]We note that the parties and the district court use "fees and costs" when referencing the obligation stemming from the indemnification provision, and therefore we use this terminology as well.

[4]We assume that the indemnification provision resulting from a possible future malpractice claim was agreed to in part because Pierre earned income as an attorney during the pendency of the marriage. *Cf.*

enforcement of the decree was necessary, the prevailing party in the lawsuit would be entitled to reasonable attorney fees and costs. Specifically, MSA § 35.1 provides that

> If either party brings an action or proceeding to enforce any provision of this Agreement, or to enforce any judgment or order made by a court in connection with this Agreement, the prevailing party in that action or proceeding shall be entitled to reasonable attorney fees and other reasonably necessary costs from the other party.

In July 2018, Pierre was subpoenaed as a witness in a trust litigation dispute between beneficiaries to testify regarding legal work he had previously performed as an attorney, including preparation of estate planning documents. Through his legal malpractice insurance carrier, Pierre retained counsel to represent his interests as a witness in the trust litigation in which he was not a party. Subsequently, in December 2018, Pierre's former client, a trustee in the trust litigation, filed a complaint for legal malpractice against Pierre. The malpractice case was subsequently stayed pending resolution of the collateral trust litigation.

In 2020, Pierre notified Lynda that he was seeking the reimbursement of fees and costs associated with his participation as a witness in the collateral trust litigation as well as the fees and costs that he had incurred as a party in the stayed legal malpractice case. Lynda did not pay Pierre, contending that she did not have to pay the fees and costs

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Culculoglu v. Culculoglu, No. 67781, 2016 WL 3185998, at *2 (Nev. June 6, 2016) (Order of Affirmance) (noting that a separate debt that was not incurred for the benefit of the community is not a community debt). The record also reflects that Lynda confirmed to Pierre that she would pay her half of the fees and costs in defending the malpractice action, if Pierre demonstrated that the reimbursement he demanded was within the scope of the indemnification language.

associated with Pierre being called as a witness in the trust litigation because Pierre had not been sued for malpractice in that action, and further that she should not be required to reimburse any fees and costs in the malpractice case as he had failed to timely notify her of it. Subsequently, Lynda filed a motion for clarification or declaratory relief, asserting her position based on the foregoing reasons and arguing that she should not be required to indemnify Pierre for his legal fees and costs. Pierre filed an opposition and a motion for an order to show cause, or in the alternative, to enforce the divorce decree. Both parties requested attorney fees and costs necessarily incurred to resolve the dispute.

After conducting an evidentiary hearing, the district court entered an order finding that while the fees and costs incurred by Pierre in both the collateral trust litigation and his legal malpractice case were covered by the "Indemnity and Hold Harmless" provision of the MSA § 40, Pierre was barred from recovering his fees and costs based on the doctrine of laches. Specifically, the court found that Pierre's "conscious disregard and selective enforcement" of the indemnification provision was comparable to a claim for laches, and Pierre's actions prejudiced Lynda as she was given no say in the fees and costs expended by Pierre in the underlying trust action. The district court denied both parties' requests for attorney fees and costs after resolving the matter. This appeal and cross-appeal followed.

On appeal, Pierre contends that the district court erred by applying the doctrine of laches to essentially re-write MSA § 40, as this section does not require Pierre to provide Lynda with advanced notice of a legal proceeding before seeking indemnification, and that Lynda was obligated to indemnify him. Pierre also argues that there was no evidence of prejudice or harm to Lynda from any alleged delay in seeking indemnification from her. Lynda contends, as she did below, that Pierre's

request was not timely, and he was not transparent in seeking fees and costs thus depriving her of the opportunity to exercise her equal and equivalent right to manage the litigation. Lynda also cross-appeals from the district court's denial of her attorney fees and costs request for having to file a motion to resolve the dispute.[5]

Indemnification for fees and costs incurred in the collateral trust litigation

We first consider the district court's denial of Pierre's request for indemnification for the fees and costs he incurred to protect his interests as a percipient witness in the collateral trust litigation. Although the district court determined that he was entitled to indemnification for these fees and costs under MSA § 40, the court ultimately denied his request. In denying Pierre's request, the court correctly recognized that the indemnification provision at issue did not require that Lynda be notified of the litigation by a certain time. However, the court also determined that the delay in notifying Lynda of the trust litigation adversely affected her because she was "given no say in the fees and costs expended by [Pierre] in the collateral trust action." The court also found that Pierre's lack of transparency about the amount of fees and costs he incurred, along with his failure to provide accurate, unredacted billing records, as well as the total amount of the financial obligation incurred, precluded recovery. Pierre argues that he supplied the district court with supporting information and if the court had concerns, it could have conducted an in camera review of the billing records.

This court reviews a district court's order resolving a request for declaratory relief de novo. *Nevadans for Nev. v. Beers*, 122 Nev. 930, 942,

[5]Based on our disposition we need not address the merits of Lynda's cross-appeal as the district court will necessarily be required to address each party's request for attorney fees and costs on remand.

142 P.3d 339, 347 (2006). Further, the interpretation of an agreement-based divorce decree presents a question of law, *see Shelton v. Shelton*, 119 Nev. 492, 497, 78 P.3d 507, 510 (2003), and we also review questions of law de novo, *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 606, 5 P.3d 1043, 1048, (2000). When interpreting an agreement, this court must avoid rewriting the terms to encompass more than what was intended by the parties. *See Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 226 (2009) (holding that the appellate court will not rewrite parties' contracts), *overruled on other grounds by Romano v. Romano*, 138 Nev., Adv. Op. 1, 501 P.3d 980, 984 (2022); *see also Reno Club, Inc. v. Young Inv. Co.*, 64 Nev. 312, 323, 182 P.2d 1011, 1016 (1947) ("This would be virtually creating a new contract for the parties, which they have not created or intended themselves, and which, under well-settled rules of construction, the court has no power to do."); *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 518, 286 P.3d 249, 258 (2012) ("When interpreting a written agreement between parties, this court is not at liberty, either to disregard words used by the parties . . . or to insert words which the parties have not made use of." (internal quotation marks omitted)).

First, we disagree that MSA § 40 allows for indemnification for legal fees and costs incurred by Pierre while acting in his professional capacity in all circumstances, including testifying as a percipient witness in collateral litigation. Under the relevant provision of MSA § 40, Pierre must first be sued for malpractice before he can seek indemnification for his legal fees and costs. Thus, the condition precedent for Pierre to seek indemnification under § 40 for fees and costs incurred in his professional capacity requires that he be sued for malpractice. *See Cain v. Price*, 134 Nev. 193, 195, 415 P.3d 25, 28-29 (2018) (noting that a condition precedent is an event that must occur before the promisor becomes obligated to

perform); *cf. Gonzalez v. Gonzalez*, No. 82011-COA, 2022 WL 213845 (Nev. Ct. App. Jan. 4, 2022) (Order of Affirmance) (concluding that the plain language of the decree did not place a condition precedent that the wife must satisfy before receiving real property). As Pierre was not sued as a party in the collateral trust litigation, he is precluded from seeking indemnification from Lynda for his decision to retain counsel to represent his interests as a witness. As Lynda aptly points out, the indemnification provision *could* have been written to include indemnification for legal representation in cases where he was not named as a party. As written, however, MSA § 40 does not contemplate indemnification where Pierre testifies as a witness in collateral litigation. Simply, the plain language of this section supports that Pierre must first be sued for malpractice before seeking indemnification for his legal fees and costs and those legal fees and costs must arise from the malpractice action only.

Second, it appears from the district court's order the court may have relied on the language contained in the first part of MSA § 40 to conclude that Pierre could seek indemnification for fees and costs incurred in the collateral trust litigation. Generally, the first part of MSA § 40 contemplates that each party to the agreement warrants that he or she has not incurred or shall not incur a liability or obligation or future liability or obligation for which the other party is or may be liable. And, if the other party is sued for such obligation, the warranting party will defend, indemnify and hold harmless that party for any losses incurred. In essence, this part of MSA § 40 contemplates where the party who did not incur the obligation is sued for it, that party is entitled to indemnification from the other party who warranted that no such liability or obligation existed when the MSA was signed.

This case does not involve the factual scenario where Pierre was sued for an obligation incurred by Lynda that she had failed to disclose or warrant did not exist thereby entitling him to seek indemnification from her. Instead, it was Pierre who incurred the obligation by hiring a lawyer to defend his interests in testifying as a percipient witness in the collateral trust litigation for which he is now seeking indemnification from Lynda. It should be noted that Pierre's obligation is not a shared or mutual obligation for which both parties could ultimately be liable as contemplated by the first part of § 40. Lynda could never have incurred the obligation of attorney fees and costs incurred in the trust litigation on her own or in place of Pierre. Indeed, Lynda, a nonlawyer who did not retain counsel, could never have been sued by the attorney representing Pierre in the collateral trust litigation to collect the fees and costs owed by Pierre. Further, Pierre by signing the MSA, warranted that he would not seek indemnification from Lynda for any obligation he incurred post-divorce, other than for malpractice suits, as discussed herein. Therefore, the first part of the "Indemnification and Hold Harmless" provision in MSA § 40 as written does not permit indemnification from Lynda for the fees and costs incurred in the collateral trust litigation. Further, because Pierre was not sued for malpractice in that litigation, he is not entitled to seek indemnification under the second part of § 40.

In this case, we need not decide whether the district court erred in its evaluation of Pierre's request for fees and costs in the collateral trust litigation, including by not conducting an in camera review, because the court reached the correct result by denying his request. We therefore affirm this part of district court's order. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (holding that we

will affirm the district court if it reaches the correct result, even if for the wrong reason).

Indemnification for fees and costs related to the malpractice action

We next address the district court's denial of indemnification for the fees and costs incurred by Pierre in the malpractice action based on laches. We review the court's application of the doctrine of laches for abuse of discretion. *See Radecki v. Bank of New York Mellon as Tr. for Certificateholders of CWABS Inc., Asset-Backed Certificates, Series 2006-BC5*, No. 80892-COA, 2021 WL 2328355, at *1 (Nev. Ct. App. June 4, 2021) (Order of Affirmance). The doctrine of laches is an equitable remedy and appropriately applied where (1) there was an inexcusable delay in seeking action, (2) an implied waiver arose from the petitioner's conduct leading up to the legal action, and (3) the respondent has been prejudiced by the delay.[6] *Bldg. & Constr. Trades Council of N. Nev. v. State,* 108 Nev. 605, 611, 836 P.2d 633, 637 (1992). Whether laches applies "depends upon the particular facts of each case." *Carson City v. Price,* 113 Nev. 409, 412, 934 P.2d 1042, 1043 (1997). "Laches is more than mere delay in seeking to enforce one's rights, it is delay that works a disadvantage to another." *Home Sav. Ass'n*

[6]The Nevada Supreme Court has recognized that the doctrine of laches applies when a party is prejudiced by a delay in notification such that the party is placed in a changed position to the party's detriment. *See, e.g., Kancilia v. Claymore & Dirk Ltd. P'ship,* No. 61116, 2014 WL 3731862 *2 (Nev. Jul. 24, 2014) (Order of Affirmance) (concluding that the application of laches was appropriate where, as a result of the appellant's delay in filing suit, the respondents destroyed documents and were prejudiced in their ability to present evidence supporting their position that otherwise would have been available); *see also Nationstar Mortg. LLC v. W. Sunset 2050 Tr.,* No. 79271, 2020 WL 6742725 *1 (Nev. Nov. 13, 2020) (Order of Affirmance) (holding that a party's failure to produce evidence until two months before trial constituted sufficient prejudice to support the district court's application of laches).

v. Bigelow, 105 Nev. 494, 496, 779 P.2d 85, 86 (1989). "The condition of the party asserting laches must become so changed that he cannot be restored to his former state." *Id.*

As discussed above, under the plain language of the indemnification provision, Pierre was not required to notify Lynda as to the existence of the pending malpractice claim against him before seeking indemnification. The district court acknowledged in its order that the party's indemnification provision did not contain "express and unambiguous language requiring [Pierre] to have provided immediate notice of . . . the malpractice action to [Lynda]." The court further recognized that it was "barred from undertaking equitable considerations regarding MSA § 40's contractual language." *See, e.g., Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127 Nev. 331, 339, 255 P.3d 268, 274 (2011) ("When the duty to indemnify arises from contractual language, it generally is not subject to equitable considerations; rather, it is enforced in accordance with the terms of the contracting parties' agreement."). Nevertheless, the court applied the doctrine of laches to deny Pierre's request for indemnification in the malpractice action. While we are uncertain as to the current status of the malpractice case, it was previously stayed pending resolution of the collateral trust litigation. Because of this, plus the undisputed language in MSA § 40 that does not require immediate notification of the action, Lynda is unable to demonstrate the necessary legal prejudice resulting from any alleged delay in notification to support the application of the doctrine of laches. We conclude therefore that the district court abused its discretion in applying laches to grant Lynda's motion and deny Pierre's request for indemnification in the malpractice action. *Radecki*, 2021 WL 2328355, at *2.

On remand, the district court must necessarily determine whether the fees and costs incurred in the malpractice action are covered by the indemnification provision. In doing so, the district court must make specific factual findings supporting how the court reached its determination. *See Wilford v. Wilford*, 101 Nev. 212, 215, 699 P.2d 105, 107 (1985) ("The district court . . . is required to make specific findings of fact sufficient to indicate the basis for its ultimate conclusions."). Further, insofar as the indemnification provision contains ambiguous terms such that it is unclear which fees and costs are covered by the provision, the district court is required "to clarify the meaning of a disputed term in an agreement-based decree" and "must consider the intent of the parties in entering into the agreement." *Mizrachi v. Mizrachi*, 132 Nev. 666, 677, 385 P.3d 982, 989 (Ct. App. 2016). "And in doing so, the court may look to the record as a whole and the surrounding circumstances to interpret the parties' intent." *Id.* If the words of a contract are ambiguous, the court will consider "parol or extrinsic evidence" to determine the intent of the parties. *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913-14, 193 P.3d 536, 544-45 (2008). The district court must make these determinations in the first instance. *See Ryan's Express Transp. Servs. Inc. v. Amador State Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance.").

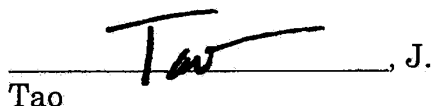
The district court must consider an award of attorney fees and costs in accordance with MSA § 35.1

Finally, the district court failed to apply MSA § 35.1 when it denied both parties an award of attorney fees and costs in bringing their respective motions regarding enforcement of the indemnification provision. Because the district court already concluded that the parties complied with

the specific provisions in advance of being able to request attorney fees and costs, on remand the court may only need to determine which party is the prevailing party, and then consider an award of reasonable attorney fees and costs in accordance with the MSA § 35.1.[7] Therefore, we

ORDER the judgment of the district court AFFIRMED IN PART, REVERSED IN PART, and REMAND this matter to the district court for proceedings consistent with this order.[8]

_______________, C.J.
Gibbons



_______________, J.
Tao

_______________, J.
Bulla

cc: Hon. Sandra A. Unsworth, District Judge, Family Court Division
Melissa Mangiaracina, Settlement Judge
Gordon & Rees Scully Mansukhani LLP/Reno
Leonard Law, PC
Washoe District Court Clerk

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[7]We note that MSA § 35.2 sets forth certain requirements that the parties must comply with prior to requesting fees and costs for having to move to enforce a provision of the MSA. It appears that the district court considered this, and in its order, the court found that both parties had complied with MSA § 35.2 and satisfied their obligations. Although on appeal it appears that each party continues to dispute whether MSA § 35.2 was complied with by the other, the district court summarily denied both parties' requests for fees and costs without making specific findings regarding compliance. Therefore, the court may need to revisit this issue on remand when considering an award under § 35.1.

[8]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given our disposition of this appeal.

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CODE:

IN THE FAMILY DIVISION

OF THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

PIERRE A. HASCHEFF,

Plaintiff,

vs.

LYNDA HASCHEFF,

Defendant.

____/

Case No. DV13-00656

Dept. No. 12

ORDER SETTING STATUS HEARING

On June 29, 2022, the Court of Appeals of the State of Nevada entered its Order Affirming in Part, Reversing in Part, and Remanding.

Based on the foregoing, the Court **ORDERS** counsel and the parties to appear at a one-half hour audio/visual status hearing to be held on Wednesday, September 28, 2022 at 11:30 a.m., pursuant to the Administrative Order entered March 16, 2020, and Nevada Supreme Court Rule Part IX-B. Details for the meeting are attached hereto as **Exhibit "1."** Upon joining the audio/visual hearing, you will be placed on a "hold" in a virtual waiting room. Please remain on hold until the Court commences the hearing.

Pursuant to Administrative Order 2020-02(A), the parties are reminded these are formal proceedings and shall be conducted with proper decorum, and appropriate attire is required.

It is further **ORDERED** that counsel submit a brief, two-page statement on how they believe the matter should proceed and what they believe the outstanding issues are. The statement shall be filed no less than 48 hours prior to the status hearing.

GOOD CAUSE APPEARING, IT IS SO ORDERED that an audio/visual status hearing shall take place September 28, 2022 at 11:30 a.m.

Dated: August 12, 2022

Sandra A. Unsworth
District Judge

DV13-00656

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court in and for the County of Washoe, and that on August 12, 2022, I deposited in the county mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, or via e-filing, a true copy of the foregoing document addressed as follows:

ELECTRONIC FILING:

SHAWN MEADOR, ESQ.
STEPHEN KENT, ESQ.

Judicial Assistant

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EXHIBIT "1"

Department 12 is inviting you to a scheduled Zoom meeting.

Topic: DV13-00656 HASCHEFF HASCHEFF
Time: Sep 28, 2022 11:30 AM Pacific Time (US and Canada)

Join Zoom Meeting
https://washoecourts.zoom.us/j/89793000177?pwd=UkFoMFRqQTdtVE9wMmtOeWhSMk9BZz09

Meeting ID: 897 9300 0177
Passcode: 157324
One tap mobile
+16699006833,,89793000177#,,,,*157324# US (San Jose)
+17193594580,,89793000177#,,,,*157324# US

Dial by your location
+1 669 900 6833 US (San Jose)
+1 719 359 4580 US
+1 253 215 8782 US (Tacoma)
+1 346 248 7799 US (Houston)
+1 669 444 9171 US
+1 309 205 3325 US
+1 312 626 6799 US (Chicago)
+1 386 347 5053 US
+1 564 217 2000 US
+1 646 931 3860 US
+1 929 205 6099 US (New York)
+1 301 715 8592 US (Washington DC)
888 788 0099 US Toll-free
877 853 5247 US Toll-free
Meeting ID: 897 9300 0177
Passcode: 157324
Find your local number: https://washoecourts.zoom.us/u/keD0mUuzH7

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Alicia L. Lerud
Clerk of the Court
Transaction # 9280312

STEPHEN S. KENT, ESQ.
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Telephone: (775) 467-2601
Facsimile: (775) 460-4901
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Attorneys for Plaintiff,
PIERRE A. HASCHEFF

IN THE FAMILY DIVISION

OF THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

PIERRE A. HASCHEFF,

Plaintiff,

vs.

LYNDA HASCHEFF,

Defendant.

Case No. DV13-00656

Dept. No.: 12

BRIEF RE: OUTSTANDING ISSUES

Pursuant to the Court's August 12, 2002, Order, Plaintiff, PIERRE HASCHEFF, by and through his undersigned counsel, STEPHEN S. KENT, ESQ., of GORDON REES SCULLY MANSUKHANI, LLP., submits the following brief regarding outstanding issues.

ISSUES ON REMAND

Plaintiff, Pierre Hascheff, believes the issues remaining for the District Courts determination are those stated in the Court of Appeals June 29, 2022, decision:

1. **Determine Fees and Costs Owed Under Indemnity Provisions of Marital Settlement Agreement (Decision, Page 11)**

"On remand, the district court must necessarily determine whether the fees and costs incurred in the malpractice action are covered by the indemnification provision. In doing so, the district court must make specific factual findings

supporting how the court reached its determination. *See Wilford v. Wilford*, 101 Nev. 212, 215, 699 P.2d 105, 107 (1985) ("The district court . . . is required to make specific findings of fact sufficient to indicate the basis for its ultimate conclusions.") Further, insofar as the indemnification provision contains ambiguous terms such that it is unclear which fees and costs are covered by the provision, the district court is required "to clarify the meaning of a disputed term in an agreement-based decree" and "must consider the intent of the parties in entering into the agreement." *Mizrachi v. Mizrachi*, 132 Nev. 666, 677, 385 P.3d 982, 989 (Ct. App. 2016). "And in doing so, the court may look to the record as a whole and the surrounding circumstances to interpret the parties' intent." *Id.* if he words of a contract are ambiguous, the court will consider "parol or extrinsic evidence" to determine the intent of he parties. *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913-14, 193 P.3d 536, 544-45 (2008). The district court must make these determinations in the first instance. *See Ryan's Express Transp. Servs. Inc. v. Amador State Lines, Inc.*, 128 Nev. 289,299, 279 9.3d 166, 172 (2012) ("An appellate Court is not particularly well-suited to make factual determinations in the first instance.")

2. Consider an award of Fees and Costs (Decision pages 11-12)

Finally, the district court failed to apply MSA § 35.1 when it denied both parties an award of attorney fees and costs in bringing their respective motions regarding enforcement of the indemnification provision. Because the district court already concluded that the parties complied with the specific provisions in advance of being able to request attorney fees and costs, on remand the court may only need to determine which party is the prevailing party, and then consider an award of reasonable attorney fees and costs in accordance with the MSA § 35.1.

In summary, on remand the appellate court required the district court to determine 2 issues:

(1) what fees and costs incurred and related to the malpractice action are covered by the indemnification provision. The court is required to make specific findings to support its determination. In addition if section 40 of the MSA is unclear as to what fees and costs are covered by section 40 the court must (a) clarify the meaning of the disputed term and (B) consider the party's intent at the time they entered into the MSA allowing the court to review the whole record and surrounding circumstances i.e. parole evidence to determine the parties intent and (2) award fees to the prevailing party pursuant to MSA section 35.1 given the fact that the district court already determined that both parties complied with MSA section 35.2

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///

MEDIATION

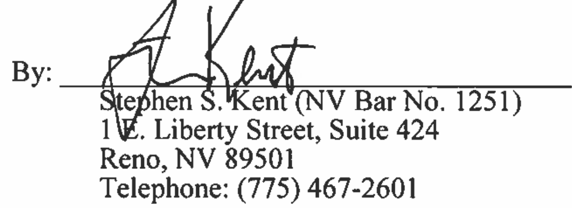
The Court has suggested a mediation with Senior Judge Deborah Schumacher. Plaintiff Pierre Hascheff is agreeable to Judge Schumacher conducting a mediation.

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.

DATED: Sept. 26, 2022.

GORDON REES SCULLY MANSUKHANI



By: ______________________
Stephen S. Kent (NV Bar No. 1251)
1 E. Liberty Street, Suite 424
Reno, NV 89501
Telephone: (775) 467-2601

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to Nevada Rules of Civil Procedure, Rule 5(b), I hereby certify that I am an employee of Gordon Rees Scully Mansukhani,LLP and that on this date, I served a true and correct copy of the attached document(s) as follows:

____ By placing the document(s) in a sealed envelope with first-class U.S. postage prepaid, and depositing it for mailing with the U.S. Postal Service in Reno, Nevada addressed to the person at the address listed below.

_X_ By electronic service. By filing the document with the court's electronic filing system which serves counsel listed below electronically.

____ By personally delivering the document(s) listed above, addressed to the person at the address as set forth below.

____ By Federal Express.

____ By facsimile

____ By electronic mail.

Shawn Meador, Esq.
Woodburn and Wedge
6100 Neil Road, Suite 500
Reno, NV 89505

DATED this 26 day of September, 2022.

Sam Baker
Sam Baker

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Alicia L. Lerud
Clerk of the Court
Transaction # 9280355

SHAWN B MEADOR
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smeador@woodburnandwedge.com

IN THE FAMILY DIVISION

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

PIERRE A. HASCHEFF,

Plaintiff,

v.

LYNDA L. HASCHEFF,

Defendant.

CASE NO. DV13-00656

DEPT. NO. 12

STATUS CONFERENCE STATEMENT

1 The issues are: 1) what are the total fees in the malpractice action that were not
2 covered by insurance; 2) what discovery is necessary; and 3) how should the issue of the
3 prevailing party fee award be addressed.
4 Lynda tried to resolve the dispute without litigation. Pierre's choices unreasonably
5 forced her to incur fees at every step of the proceeding. She could not even tell what she
6 owed based on his inconsistent claims. This Court found that he failed to provide a complete
7 and transparent accounting and that his claims were inconsistent and secretive.
8 Pierre then filed an entirely unnecessary contempt motion. Lynda had not refused to
9 pay what she owed; she appropriately sought clarification of what she owed. The issues were
10 briefed in her Motion for Clarification. Pierre's contempt motion forced her to incur yet more
11 fees to address the issues again. He then appealed this court's decision forcing her to incur
12 yet more fees. He did not prevail before this court or on appeal.
13 Lynda's position before and throughout this litigation has been that she is responsible
14 for one half of the fees in the malpractice action that were not covered by insurance but is not
15 responsible for fees in the Jaksick trust litigation. See, e.g., Motion for Clarification filed
16 June 16, 2020, at p. 12, lns. 24-28 and Exhibits 4, 5, 6, and 7 (at pp. 2 and 4 of Exh. 7); Reply
17 In support of Motion for Clarification[1] filed July 13, 2020, at p. 2, lns. 25-29 and p. 9, lns. 4-
18 6; Opposition to Motion for Order to Show Cause filed July 17, 2020, at p. 2, lns. 24-26.
19 Pierre demanded indemnification for fees incurred in both actions. He refused to
20 provide documents distinguishing the fees incurred in each action. He argued that Lynda's
21 positions were "ill-advised and non-sensical." The Court of Appeals disagreed.
22 The Nevada Court of Appeals held: "we disagree that MSA § 40 allows for
23 indemnification for legal fees and costs incurred by Pierre . . . in collateral litigation." Order
24 at p. 6. "As Pierre was not sued as a party in the collateral trust litigation, he is precluded
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[1] She also argued that Mr. Hascheff waived his right to recover fees in the collateral trust matter. This court, *sua sponte,* adopted a latches analysis.

WOODBURN AND WEDGE
6100 Neil Road, Suite 500
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Tel: (775) 688-3000

from seeking indemnification from Lynda for his decision to retain counsel to represent his interests as a witness." Order at p. 7. "MSA § 40 does not contemplate indemnification where Pierre testifies as a witness in collateral litigation . . . ." Order at p. 7. "**Pierre must first be sued for malpractice before seeking indemnification for his legal fees and costs and those legal fees and costs must arise from the malpractice action only**." Order at p. 7 (emphasis added). The trial court reached the correct result by denying Pierre's request for indemnification of fees incurred in the collateral action. Order at p. 8.

Lynda is the prevailing party. The Court of Appeals decision parallels the position she took before and throughout this litigation. She is also the prevailing party in connection with Pierre's contempt motion and his appeal. He must bear the consequences of his choices.

Pierre should be required to provide documents clearly reflecting the fees he incurred in the malpractice action only. This Court may be called upon to evaluate whether the insurance payments should be applied to the malpractice action or the collateral matter.

Lynda is the prevailing party. The appropriate procedure for her to present her request for fees is through a standard Wilfong affidavit.

Affirmation Pursuant to NRS 239B.030

The undersigned affirms that this document does not contain the personal information of any party.

DATED this 26th day of September, 2022.

WOODBURN AND WEDGE

By [signature] #14555
Shawn B. Meador
Attorneys for Defendant
Lynda L. Hascheff

WOODBURN AND WEDGE
6100 Neil Road, Suite 500
Reno, NV 89511
Tel: (775) 688-3000

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law offices of Woodburn and Wedge, 6100 Neil Rd., Suite 500, Reno, Nevada 89511, that I am over the age of 18 years, and that I served the foregoing document(s) described as:

STATUS CONFERENCE STATEMENT

on the party set forth below by:

____ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage prepaid, following ordinary business practices.

____ Personal delivery.

_X__ Second Judicial E flex

____ Federal Express or other overnight delivery.

addressed as follows:

X Stephen S. Kent
Kent Law, PLLC
201 West Liberty Street, Suite 320
Reno, NV 89501

The undersigned affirms that this document contains no social security numbers

Dated this 26 day of September, 2022.

Kelly Albright

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Alicia L. Lerud
Clerk of the Court
Transaction # 9282788

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STEPHEN S. KENT, ESQ.
Nevada State Bar No. 1251
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Attorneys for Plaintiff,
PIERRE A. HASCHEFF

IN THE FAMILY DIVISION

OF THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

PIERRE A. HASCHEFF,

Plaintiff,

vs.

LYNDA HASCHEFF,

Defendant.

Case No. DV13-00656

Dept. No.: 12

MOTION TO STRIKE

Plaintiff, PIERRE HASCHEFF, by and through his undersigned counsel, STEPHEN S. KENT, ESQ., of GORDON REES SCULLY MANSUKHANI, LLP., pursuant to NRCP 12(f) submits this motion to strike defendant LYNDA HASCHEFF's September 26, 2022, "STATUS CONFERENCE STATEMENT".

INTRODUCTION

The Court's August 12, 2022, Order is clear – the parties were ordered to file a short brief regarding what issues are remaining for resolution. Instead, Defendant filed a brief arguing her entire case in violation of this Court's Order and included claimed settlement negotiations in violation of NRS 48.105, and false statements that she offered to pay the amount in dispute. Defendants brief should be stricken.

ARGUMENT

1. Defendant's Brief Violated This Court's Order

This courts August 12, 2022, Order was clear in ordering the parties: "submit a brief, two page statement on how they believe the matter should proceed and what they believe the outstanding issues are."

Instead, Defendant lists the outstanding issued then proceeds to argue her entire case claiming everything is the opposing party's fault with false statements and settlement discussions in violation of NRS 48.105.

Defendant's vitriolic, vehement brief belies her argument because it makes clear that at every turn and every opportunity Defendant has chosen to contest every issue and triviality.

Defendant flagrantly ignoring of this court's order puts plaintiff, who restrained from arguing his case in his brief, at a distinct disadvantage by following the court's order.

To avoid unbridled violation of orders and statutes, and halt this conduct, Defendant's brief should be stricken.

2. Defendant's False Discussion of The Parties Efforts to Compromise Violate NRS 48.105 and Should be Stricken

The rule NRS 48.105 excluding discussions of offers to compromise is well known and based on strong reasoning. The parties offers to compromise should not be admissible in any proceeding because it is irrelevant and it discourages settlement discussions.

In every e-mail and letter Defendant's counsel asserts the falsity that his client was always ready to indemnify Judge Hascheff. This of course is false and ignores Defendant's numerous arguments to the contrary that the indemnity should not and could not be enforced and the obvious fact that Defendant has chosen to litigate at every step. Confronted with this, Plaintiff has been forced to seek enforcement of the indemnity clause and has correctly established that he's entitled to indemnity.

Defendant should not be allowed to repeatedly violate NRS 48.105 or state obvious falsehoods.

Defendant's brief should be stricken because of her violation of NRS 48.105.

CONCLUSION

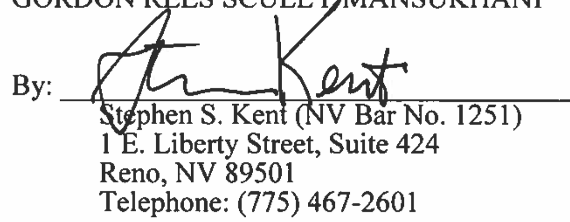
Defendant, Lynda Hascheff, violated this Court's Order and NRS 48.105 in her brief. Out of fairness and prevent this conduct and to ensure orderly proceedings, Defendant's September 26, 2022, brief should be stricken.

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.

DATED: September 27, 2022.

GORDON REES SCULLY MANSUKHANI



By: ______________________
Stephen S. Kent (NV Bar No. 1251)
1 E. Liberty Street, Suite 424
Reno, NV 89501
Telephone: (775) 467-2601

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to Nevada Rules of Civil Procedure, Rule 5(b), I hereby certify that I am an employee of Gordon Rees Scully Mansukhani,LLP and that on this date, I served a true and correct copy of the attached document(s) as follows:

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__X__ By electronic service. By filing the document with the court's electronic filing system which serves counsel listed below electronically.

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_____ By Federal Express.

_____ By facsimile

_____ By electronic mail.

Shawn Meador, Esq.
Woodburn and Wedge
6100 Neil Road, Suite 500
Reno, NV 89505

DATED this 27 day of September, 2022.

Sam Baker

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Alicia L. Lerud
Clerk of the Court
Transaction # 9287309

CODE

IN THE FAMILY DIVISION

OF THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

PIERRE A. HASCHEFF,

Plaintiff,

vs.

LYNDA HASCHEFF,

Defendant.
_______________________________________/

Case No. DV13-00656

Dept. No.12

ORDER AFTER STATUS HEARING

This matter came before the Court on September 28, 2022, by audio visual means pursuant to the Administrative Order entered March 16, 2020, and Nevada Supreme Court Rule Part IX-B. The hearing was set for a status hearing pursuant to the Order Setting Status Hearing entered August 12, 2022. Plaintiff, Pierre Hascheff, was present represented by Stephen Kent, Esq. Defendant, Lynda Hascheff, was present represented by Shawn B. Meador, Esq.

At the hearing, Mr. Kent stated the reimbursement of fees due to Mr. Hascheff by Ms. Hascheff will need to be determined. Mr. Kent stated paragraph 40 of the parties' Marital Settlement Agreement (MSA) entered September 30, 2013 is ambiguous with regard to recoverable fees. He stated there are other provisions in the MSA regarding the recovery of expenses and fees that may need to be addressed. He requested a hearing be set where testimony could be provided regarding the issues in this case. Mr. Kent offered to provide a copy of the unredacted invoices that reflect the fees incurred by Mr. Hascheff for both the collateral matter and the malpractice action to

the Court and Ms. Hascheff if a protective order could be entered regarding the confidentiality of the documents as there are other ongoing litigations that could be affected by those disclosures.

Mr. Meador argued a hearing would only cause delay and more legal fees for Ms. Hascheff and is not necessary to address the issues in the case. Mr. Meador stated he requested a copy of the unredacted invoices to determine the actual fees incurred by Mr. Hascheff directly related to the malpractice action that were not covered by insurance multiple times. He has not received those documents as of this hearing. He also stated a determination needs to be made on who the prevailing party was entitled to fees and he believes Ms. Hascheff was the prevailing party on all issues. Mr. Meador disagreed with Mr. Kent regarding the order of remand and stated paragraph 40 of the MSA was very clear and unambiguous in that any recoverable fees must arise from a malpractice action only and not any collateral actions. Mr. Meador did not object to signing a stipulation for a protective order in order to receive a copy of the unredacted invoices.

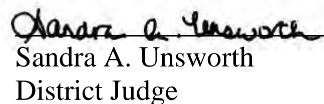
Based on the foregoing and good cause appearing, the Court enters the following Orders:

1. The parties shall file with the Court and exchange a copy of the unredacted invoices that reflect the fees incurred by Mr. Hascheff along with the signed stipulation related to the protective order to maintain the confidentiality of the unredacted invoices by October 12, 2022. If this cannot be completed by that date, counsel shall appear for a status hearing on October 12, 2022 by audio visual means. A Zoom link will be provided to counsel upon the status hearing being set.

2. Thereafter, Mr. Hascheff shall file with the Court a brief three-page statement no later than October 31, 2022, related to his claims of ambiguity of paragraph 40 of the MSA. Ms. Hascheff shall file her brief three-page response no later than two weeks thereafter. A reply shall not be filed and counsel shall submit their statements to the Court. Thereafter, the Court will then enter an order on how to proceed.

GOOD CAUSE APPEARING, IT IS SO ORDERED.

Dated this 29 day of September 2022.



Sandra A. Unsworth
District Judge

DV13-00656

1
2 **CERTIFICATE OF SERVICE**

3 Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court
4 in and for the County of Washoe, and that on September 29, 2022, I deposited in the county mailing
5 system for postage and mailing with the United States Postal Service in Reno, Nevada, or by e-
6 filing, a true copy of the foregoing document addressed as follows:

7 **ELECTRONIC FILING:**

8
9 **STEPHEN KENT, ESQ. for PIERRE HASCHEFF**
SHAWN MEADOR, ESQ. for LYNDA HASCHEFF

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12 Judicial Assistant

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Alicia L. Lerud
Clerk of the Court
Transaction # 9309373

2610
STEPHEN S. KENT, ESQ.
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Email: skent@grsm.com

Attorneys for Plaintiff,
PIERRE A. HASCHEFF

IN THE FAMILY DIVISION

OF THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

PIERRE A. HASCHEFF,

Plaintiff,

vs.

LYNDA HASCHEFF,

Defendant.

Case No. DV13-00656

Dept. No.: 12

NOTICE OF FILING INVOICES AND DECEMBER 26, 2018 COMPLAINT (CONFIDENTIAL)

Pursuant to the Court's September 29, 2002 order, the Plaintiff, PIERRE HASCHEFF, by and through his undersigned counsel, STEPHEN S. KENT, ESQ., of GORDON REES SCULLY MANSUKHANI, LLP., hereby files the attached confidential attorney-client privileged invoices and December 26, 2018, Complaint.

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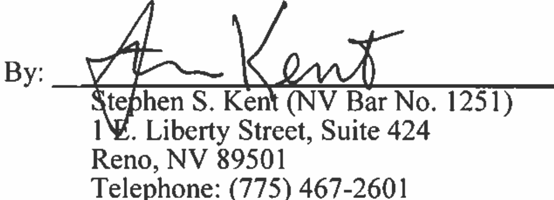
AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the document does not contain the social security number of any person.

DATED: October 12, 2022.

GORDON REES SCULLY MANSUKHANI

By: 

Stephen S. Kent (NV Bar No. 1251)
1 E. Liberty Street, Suite 424
Reno, NV 89501
Telephone: (775) 467-2601

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to Nevada Rules of Civil Procedure, Rule 5(b), I hereby certify that I am an employee of Gordon Rees Scully Mansukhani,LLP and that on this date, I served a true and correct copy of the attached document(s) as follows:

X By placing the document(s) in a sealed envelope with first-class U.S. postage prepaid, and depositing it for mailing with the U.S. Postal Service in Reno, Nevada addressed to the person at the address listed below.

X By electronic service. By filing the document with the court's electronic filing system which serves counsel listed below electronically.

___ By personally delivering the document(s) listed above, addressed to the person at the address as set forth below.

___ By Federal Express.

___ By facsimile

___ By electronic mail.

Shawn Meador, Esq.
Woodburn and Wedge
6100 Neil Road, Suite 500
Reno, NV 89505

DATED this 12th day of October, 2022.

Sam Baker

INDEX OF EXHIBITS

No.	Description
1.	Invoices
2.	December 26, 2018 Complaint

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Alicia L. Lerud
Clerk of the Court
Transaction # 9309373

Exhibit 1

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE

Exhibit 1

Pages AA 1427 to AA 1451 filed under Seal.

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Alicia L. Lerud
Clerk of the Court
Transaction # 9309373

Exhibit 2

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE

Exhibit 2

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LINDSAY L. LIDDELL, ESQ. – NSB #14079
lliddell@rssblaw.com
Robison, Sharp, Sullivan & Brust
71 Washington Street
Reno, Nevada 89503
Telephone: 775-329-3151
Facsimile: 775-329-7169
Attorneys for Todd B. Jaksick, Individually, and as Trustee of the Todd B. Jaksick Family Trust and as Trustee the TBJ Trust

REC'D & FILED
2018 DEC 26 PM 1:28
SUSAN MERRIWETHER CLERK
BY C. TORRES DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR CARSON CITY

TODD JAKSICK, Individually, and as Trustee of the Todd B. Jaksick Family Trust and as Trustee of the TBJ Trust,

Plaintiffs,

vs.

PIERRE HASCHEFF,

Defendant.

Case No. [illegible]

Dept. No. [illegible]

COMPLAINT

As and for their complaint against the Defendant, Plaintiffs allege as follows:

1. Todd Jaksick ("Todd") is a Trustee of the SSJ's Issue Trust ("Issue Trust").

2. Todd is a Trustee of the Todd B. Jaksick Family Trust and the TBJ Trust.

3. Todd is Co-Trustee of the Samuel S. Jaksick, Jr. Family Trust ("Sam's Family Trust").

4. Todd is a party to an Indemnification Agreement drafted for him by Defendant.

5. Todd is manager of Incline TSS LLC ("TSS"), a company that was devised by Defendant for the purpose of receiving title to a house located on Lake Shore Boulevard, Incline Village, Nevada ("the Lake Tahoe House").

6. The Todd B. Jaksick Family Trust is a 23% owner of TSS. Its interests and membership are being challenged as a result of Defendant's legal services.

1 7. The TBJ Trust is a 23% owner of TSS and its membership interest is being
2 challenged as a result of Defendant's legal services.
3 8. Defendant was an attorney, and as such, had a duty to use such skill, prudence, and
4 diligence as other members of his profession commonly possess and exercise.
5 9. As Plaintiffs' attorney, Defendant owed a duty to Plaintiffs to use skill, prudence,
6 and diligence as lawyers of ordinary skill and capacity possess in exercising and performing tasks
7 which they undertake.
8 10. Todd is Trustee of the Todd Jaksick Family Trust, a 23% owner of TSS, owner of
9 the Lake Tahoe House. As a result of Defendant's negligence, Todd has been sued in his capacity
10 as Trustee of the Todd Jaksick Family Trust.
11 11. Todd is Trustee of the TBJ Trust, a 23 % owner of TSS, owner of the Lake Tahoe
12 House. As a result of Defendant's negligence, Todd has been sued as Trustee of the TBJ Trust.
13 12. Todd is manager of various limited liability companies in which Sam's Family
14 Trust holds membership interests. As a result of the Defendant's negligence, Todd is being sued
15 in his capacity as manager of the various limited liability companies.
16 13. Defendant provided legal services to and for Todd and his father Samuel S. Jaksick
17 ("Sam") from 2007 through 2012.
18 14. Defendant's legal services, among others, included;
19 a. Drafting Todd's Indemnification Agreement;
20 b. Creating TSS for the purposes of having an option to buy the Lake Tahoe
21 House;
22 c. Drafting an option for TSS to acquire title to the Lake Tahoe House;
23 d. Drafting Sam's Second Amendment Trust, with Todd as a Co-Trustee and
24 beneficiary;
25 e. Facilitating TSS's exercise of the option it had to purchase the Lake Tahoe
26 House; and
27 f. Causing Todd's Family Trust and The TBJ Trust to be 23% owners of TSS.
28 15. Defendant's legal services provided to and for Todd, The TBJ Trust and Todd's

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1 Family Trust were done in a negligent and careless manner. Those legal services caused Todd to
2 be sued in Second Judicial District Court, Case No. PR17-0045 and Case No. PR17-0046 filed in
3 Washoe County, Nevada.

4 16. Defendant's negligent legal services have resulted and caused the Plaintiffs to
5 sustain substantial damages well in excess of $100,000. Stanley Jaksick and Wendy Jaksick have
6 both brought claims against Todd in Case No. PR17-00445 and Case No. PR17-00446.

7 17. As a proximate cause of Defendant's negligent and careless legal services provided
8 to and for Plaintiffs, Todd was sued in December of 2017 and February of 2018. Those lawsuits
9 were filed by beneficiaries of Sam's Family Trust and of The Issue Trust and the lawsuits gave
10 Todd first notice of the Defendant's negligence.

11 18. On December 17, 2018. expert reports were exchanged in the lawsuits filed by
12 Sam's daughter, Wendy. These reports first provided Todd, individually and as Trustee, with
13 actual notice of the Defendant's negligence. These reports appear to be based on misinformation
14 and wrongfully accusing Defendant of committing egregious and serious errors in performing
15 estate planning services for Samuel S Jaksick, Jr. Nonetheless, these reports gave Todd his first
16 actual notice of the alleged wrongdoing by the Defendant as follows:

17 a. The estate plan devised by Defendant was a bad one and subjected Todd to
18 lawsuits;

19 b. The Indemnification Agreement was poorly drafted and subjected Todd to
20 conflicts of interest;

21 c. The Lake Tahoe House documents were poorly devised and implemented
22 causing Todd to get sued; and

23 d. The Second Amendment was poorly drafted and implemented, causing
24 Todd to get sued.

25 19. Todd has been directly damaged by Defendant's negligence. The Plaintiffs also
26 contracted with Defendant requiring Defendant to provide competent legal advice and services.
27 Defendant breached the contracts.

28 20. Todd is entitled to be indemnified by Defendant for any sums he pays to Wendy

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1 and/or Stanley Jaksick in the litigation filed by Wendy and Stanley.

2 21. Todd is entitled to recover all fees and costs incurred in defending Wendy's and
3 Stanley's lawsuits.

4 22. Todd is entitled to recover fees and costs incurred in this case.

5 **FIRST CLAIM—NEGLIGENCE**

6 23. Plaintiffs incorporate all prior paragraphs and allegations.

7 24. Defendant and Plaintiffs had a lawyer/client relationship from 2007 to January
8 2013.

9 25. Defendant was engaged as Plaintiffs' counsel and attorney.

10 26. Defendant provided legal services for the Plaintiffs as described hereinabove.

11 27. The Todd B. Jaksick Family Trust is a 23% owner of TSS. Its interests and
12 membership are being challenged as a result of Defendant's legal services.

13 28. The TBJ Trust is a 23% owner of TSS and its membership interest is being
14 challenged as a result of Defendant's legal services.

15 29. Defendant breached his duty of care to the Plaintiffs as described hereinabove.

16 30. Defendant's breaches of duty constitute legal malpractice and professional
17 negligence.

18 31. Defendant's breaches of duties of care owed to the Plaintiffs, his malpractice and
19 his professional negligence as described herein above caused Plaintiffs to sustain damages in
20 excess of $15,000.

21 32. Plaintiffs are entitled to recover all damages caused by Defendant's breaches of
22 duties, negligence and malpractice, according to proof, in addition to attorney's fees incurred
23 herein.

24 33. Plaintiffs did not know of and did not have information to be aware of Defendant's
25 negligence, breaches of duties and of the malpractice until December of 2017.

26 **SECOND CLAIM—BREACH OF CONTRACT**

27 34. Plaintiffs incorporate all prior paragraphs and allegations.

28 35. Plaintiffs and Defendant entered into contracts described hereinabove, whereby

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Defendant was to and did provide legal services for Plaintiffs.

36. The contracts for professional services were supported by adequate consideration.

37. The contracts were breached by Defendant.

38. The Plaintiffs performed all aspects and requirements of the contracts.

39. As a result of Defendant's breaches of the contracts described hereinabove, Plaintiffs have sustained consequential damages in excess of $15,000 and are entitled to fees and costs.

THIRD CLAIM—INDEMNIFICATION

40. Plaintiffs incorporate herein all prior paragraphs and allegations.

41. Defendant's negligence and breaches of contract have caused Plaintiffs to be sued by Stanley Jaksick and Wendy Jaksick in Case Nos. PR17-00445 and PR17-00446.

42. Plaintiffs adamantly deny any wrongdoing regarding the issues raised in the lawsuits filed by Wendy and Stanley. Plaintiffs are aware of the Defendant's substantial efforts to protect Samuel S. Jaksick, Jr. and his heirs and beneficiaries, and Plaintiffs believe and allege herein that the Defendant proceeded at all times in good faith and with the best interests of the Plaintiffs and Samuel S. Jaksick, Jr. as his first priority. However, if Plaintiffs are found liable to Stanley and/or Wendy or should Plaintiffs, or any one of them, be required to pay in any way Stanley and/or Wendy, Plaintiffs are entitled to recover such amounts by way of indemnification from Defendant.

43. Plaintiffs have been obligated to and have paid legal fees for defending Wendy and Stanley's lawsuit in amounts in excess of $100,000. Plaintiffs are entitled to be indemnified for all fees and costs paid to date and for all fees and costs incurred in the future for defending Plaintiffs in the Wendy and Stanley lawsuits. This indemnification claim has therefore accrued.

WHEREFORE, Plaintiffs seek judgment as follows;

1. For consequential damages according to proof in excess of $15,000;
2. For indemnification of any and all sums Plaintiffs must pay Wendy and/or Stanley;
3. For fees and costs incurred in the Wendy and Stanley lawsuits;
4. For fees and costs incurred in this action; and

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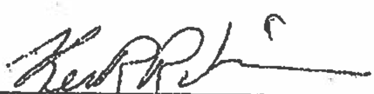
5. For such other relief as is appropriate under the circumstances.

DATED this 26th day of December 2018.

ROBISON, SHARP, SULLIVAN & BRUST
A Professional Corporation
71 Washington Street
Reno, Nevada 89503



KENT R. ROBISON
LINDSAY L. LIDDELL
Attorneys for Todd B. Jaksick, Individually, and as Trustee of the Todd B. Jaksick Family Trust and as Trustee of the TBJ Trust

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Attorneys for Plaintiff,
PIERRE A. HASCHEFF

IN THE FAMILY DIVISION

OF THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

PIERRE A. HASCHEFF, Plaintiff, vs. LYNDA HASCHEFF, Defendant.	Case No.: DV13-00656 Dept. No.: 12

BRIEF STATEMENT

Plaintiff, PIERRE HASCHEFF, by and through his undersigned counsel, JOHN SPRINGGATE, ESQ., SILVERMAN KATTELMAN SPRINGGATE, CHTD., hereby submits the following brief to the Court in accord with the Order After Status Hearing, September 29, 2022.

Factual Background.

On February 1, 2021, this Court issued its "Order Granting Motion for Clarification or Declaratory Relief; Denying Motion for Order to Enforce and/or for an Order to Show Cause; Order Denying Request for Attorney's Fees and Costs." (Hereafter the "District Court Order"). The matter was timely appealed, and cross appealed, and on June 29, 2022, the Court of Appeals issued its Order Affirming in Part, Reversing in Part, and Remanding. Thereafter, this Court issued, *inter alia*, an Order

after Status Hearing, which directed that the parties file with the Court, and exchange copies of, the unredacted invoices showing the fees incurred by Mr. Hascheff, together with a protective order, and that thereafter Mr. Hascheff would file a brief three page statement related to his claims of ambiguity, followed by a response, the Court to then enter an order on how to proceed. Order, September 29, 2022, page 2. The invoices have been filed under seal, pursuant to the Protective Order, provided to counsel, and this brief follows.

On remand, the Court of Appeals required the district court to determine two issues:

(1) what fees and costs incurred and related to the malpractice action are covered by the indemnification provision, and (2) consider an award of attorney's fees to the prevailing party pursuant to MSA Section 35.1, given the fact that the district court already determined that both parties complied with MSA Section 35.2. Opinion, fn 7, pg 12.

In determining which fees and costs are covered, the court must make specific findings to support its determination. In addition, if Section 40 of the MSA is unclear as to what fees and costs are covered by Section 40, the court must (a) clarify the meaning of the disputed term and (b) consider the parties' intent at the time they entered into the MSA.

1. What Fees and Costs were incurred and related to the malpractice action?

The unredacted billing invoices have been filed in camera for the court to review. The time entries and descriptions Mr. Hascheff contends relate to the malpractice action are highlighted. The summary of those fees (Ex 1) shows that a majority of the fees were incurred on or after December 26, 2018, the date the malpractice action was filed. The

Court of Appeals held that a condition precedent for Mr. Hascheff to seek indemnification was that he first be sued. Opinion, pg. 6. But what fees are then included? The scope of the fees must include more than professional representation of the client in court. It is undisputed that the joint defense/common interest work product privilege applied between Todd Jaksick ("TJ"), his lawyer, Pierre Hascheff, and Hascheff's attorney in the malpractice action. Although some of the fees and costs were incurred during the collateral litigation, where Hascheff was a witness, they are related to the malpractice action in addition to those fees incurred in the malpractice action itself. For example, preparation of Hascheff for testimony necessarily involves consideration of whether his statements as a witness would expose him to liability in the malpractice action. These matters are too interrelated to consider individually, and thus the Court must consider this interplay in resolving the ambiguity of what fees and costs apply.

For the common interest work product doctrine to apply, litigation need not already have been commenced or even imminent; rather, potential litigation must be a real possibility at the time the documents in question are prepared, and the court must pay close attention to the special protection afforded to opinion work product. *See, Eden Isle Marina, Inc. v. U.S.*, 89 Fed.Cl. 480, 505 (2009). Here, real litigation had occurred, and was not just a potential.

The common interest privilege applies even though the party receiving it is a non-party to any anticipated or pending litigation, where one of the parties was a litigant and the other party was a potential target of litigation. *See, King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, 2011 WL 2623306 at *3 (E.D. Pa. July 5, 2011) (unpublished decision).

In *Wynn Resorts, Limited v. Eighth Judicial District Court in and for County of Clark*, 133 Nev. 369, 370, 384, 399 P.2d 334, 338, 347-48 (2017), the Nevada Supreme Court joined the majority of courts in determining that the work product common interest doctrine applied, adopting the "because of" test to determine whether materials were prepared in anticipation of litigation. 133 Nev. at 384, 399 P.2d at 348. The court is required to look at the totality of the circumstances, which requires the court to look to the context of the communication and content of the document to determine whether the privilege applies. 133 Nev. at 84-85, 399 P.2d at 348.

The Appellate Court was also persuaded based on the respective parties' arguments regarding Section 38 of the MSA which refers to wife's obligation to defend and indemnify husband "for any malpractice claims" referring to Section 40 of the MSA. When both sections are read together, wife must pay for one half of the fees and costs related to "any defense" and judgment after husband is sued for malpractice. Therefore a majority of the fees incurred after December 30, 2018 should be included as within the scope of Section 40. The Appellate Court reasoning allowing the District Court to consider extrinsic evidence and the parties' intent results from the Court's obligation to interpret a contractual ambiguity, the argument Plaintiff made to this court, and the Appellate Court was persuaded by it.

It is also important to note that Section 24 of the MSA provides that Lynda Hascheff is responsible for the joint community obligations of which the marital community benefited during the marriage, and before the effective date of the MSA. The malpractice claim arose from the Plaintiff's law practice, which was the sole source of income during the marriage, and therefore a community obligation. Therefore, in addition to Section 40, Lynda Hascheff would be responsible for one half of the fees and

costs incurred related to all community claims, expenses or debts. Lynda Hascheff repeatedly argued that the malpractice claims and action were a joint community obligation. Even without Section 24 of the MSA, the case law clearly provides that both spouses are liable for community obligations even after divorce and their now separate property is subject to those obligations.

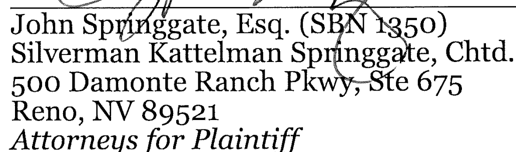
Therefore, the court can take additional evidence to determine that the "fees and costs" covered by the MSA section 40, and the MSA as a whole, include fees incurred after December 26, 2018, the date of the complaint, whether they are specifically denoted as relating to the malpractice claim in the billings. Of note, Mr. Hascheff did not prepare the invoices, his attorneys did, and not for purposes of collecting indemnity from his ex-wife. His recap of those applicable charges is attached hereto as Exhibit 1. Although the amounts are low, Hascheff was compelled to appeal due to the argument that he has "waived" indemnity, and given the possibility of future claims, could not leave that argument unchallenged.

Wherefore, following this brief, and Ms. Hascheff's, he requests that the Court set a brief hearing to argue the prevailing party, and resolve this action.

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.

DATED this 31st day of October, 2022.



John Springgate, Esq. (SBN 1350)
Silverman Kattelman Springgate, Chtd.
500 Damonte Ranch Pkwy, Ste 675
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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to Nevada Rules of Civil Procedure, Rule 5(b), I hereby certify that I am an employee of Silverman Kattelman Springgate, Chtd., and that on this date, I served a true and correct copy of the attached document(s) as follows:

____ By placing the document(s) in a sealed envelope with first-class U.S. postage prepaid, and depositing it for mailing with the U.S. Postal Service in Reno, Nevada addressed to the person at the address listed below.

_X_ By electronic service. By filing the document with the court's electronic filing system which serves counsel listed below electronically.

_____ By personally delivering the document(s) listed above, addressed to the person at the address as set forth below.

_____ By Federal Express.

_____ By facsimile

______ By electronic mail.

Shawn Meador, Esq.
Woodburn and Wedge
6100 Neil Road, Suite 500
Reno, NV 89505

DATED this __31__ day of October, 2022.

Olga Garcia

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IN THE FAMILY DIVISION

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

PIERRE A. HASCHEFF, Plaintiff, v. LYNDA L. HASCHEFF, Defendant.	CASE NO. DV13-00656 DEPT. NO. 12

BRIEF RE ALLEGED AMBIGUITY IN PARAGRAPH 40

In January of 2020, Pierre Hascheff ("Pierre"), whose daughter had not invited him to her recent wedding, sent his former wife, Lynda Hascheff ("Lynda"), a letter. He claimed he was incurring fees in an "on-going" malpractice action and demanded that she pay him $5,200.90 pursuant to § 40 of the MSA. He did not tell her the malpractice action had been filed a year earlier, that it was immediately stayed, that no fees were being incurred in that action, or that the fees he incurred were in the collateral action that started a year and a half earlier. See, Motion for Clarification filed June 16, 2020, at p. 10, and Exh. 1 thereto.

He later claimed, without explanation, that she owed him $4,675.90, and then claimed she owed him $6,363.40. Id. at Exh. 4 and 7. He refused to provide transparency or distinguish fees in the malpractice action from those in the collateral action. Pierre now claims fees "related" to the malpractice action total $3,195, demands $1,578 from Lynda, and takes no responsibility for the tens of thousands of dollars of fees his choices caused her to incur.

At the recent status conference, Pierre argued that § 40 of the MSA is ambiguous but obligates Lynda to indemnify him for fees incurred in the collateral action. This Court graciously afforded him the opportunity to file "a brief three-page statement . . . related to his claims of ambiguity of paragraph 40 of the MSA." See, Order After Status Hearing.

Pierre's Brief was filed in violation of this Court's Order and should be stricken. It exceeds the page limit and fails to identify any ambiguity in § 40. Instead, he offers a new theory to recover fees incurred in the collateral action[1] Section 40 does not obligate Lynda to indemnify Pierre for fees "related" to the malpractice action as he argues. The Order is clear. For the indemnification to apply "**Pierre must first be sued for malpractice . . . and those legal fees and costs must arise from the malpractice action only.**" (Emphasis added.)

The COA Order unambiguously holds that fees in the collateral action are not covered by § 40. The Appellate Court directed this court, on remand, to determine "whether the fees and costs **incurred in the malpractice action** are covered by the indemnification provision."

[1] Lynda's counsel demanded that he withdraw his non-complying brief. He failed to do so.

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(Emphasis added). Thus, any ambiguity in § 40 would be about whether all, or only part, of the fees incurred in the malpractice action are covered by § 40, not whether fees in the collateral action are covered. Pierre, once again, unreasonably forces Lynda to incur fees to address his claim that fees in the collateral action are covered by the indemnity clause.

The fees listed on Pierre's Exhibit 1 were not incurred in the malpractice action "only." They were in the collateral action, file (52-8603M), that was opened before the malpractice action was filed to address the subpoena and Pierre's deposition in the collateral action. See, Invoices for Sept. 2018. Pierre tacitly acknowledges the fees were incurred in the collateral action by arguing they "relate" to rather than being incurred in the malpractice action.

The fees on 9/18/18 were before the malpractice action was filed and are specifically precluded by the COA Order. Claimed violations of the NRCP do not create an independent cause of action. NRCP Rule 1.0A(d).

The fees on 1/24/19 arise out of expert reports in the collateral action. Pierre's counsel surely did not ask Mr. Robinson, plaintiff's counsel in the malpractice action, if those reports proved that Pierre committed malpractice. The fees on 2/20/19 arise out of the expert report in the collateral action in which Pierre was preparing to testify. See, entry 2/21/19. The $775 entry on 2/22/19 was specifically to prepare for Pierre's testimony in the collateral action.

These first four entries, primarily in January and February of 2019, total $2,900. They all arise out of, or at a minimum involve, Pierre's testimony in the collateral action. The invoices then show that in March and April 2019, Pierre's malpractice carrier paid $2,500 toward his fees. Pierre's position is that none of the malpractice carrier's payments covered the fees he claims relate to the malpractice action. Rather, he takes the position that all of the insurance payments relate to the collateral action and benefit him alone.

The time spent on 6/21/19 did nothing to defend Pierre in the malpractice action. If Lynda receives no benefit from the insurance payments, she should not be responsible for this fee. The entry on 7/1/19 is too vague to evaluate. It is unclear what the fees on 9/25/19 refer

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to since the malpractice action was stayed months earlier. If the entries Pierre relies on from June through September of 2019 were all covered, they total $295, one half of which is $147.50.

Pierre's argument, that § 40 covers fees he incurred in the collateral action because he claims they relate to the malpractice action, is contrary to the clear and unambiguous language of the COA Order. This Court may review the time entries he identified and determine which of those fees, if any, arise from the malpractice action "only" and determine Lynda's obligation pursuant to Section 40. That is the relief she sought in her Motion to Clarify. See, Lynda's Status Conference Statement filed herein on September 26, 2022.

Lynda respectfully requests that the Court establish the appropriate procedure to determine who is the prevailing party and the resulting fee award. See, Id.

Affirmation Pursuant to NRS 239B.030

The undersigned affirms that this document does not contain the personal information of any party.

DATED this 2nd day of November, 2022.

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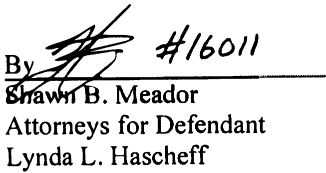

By ______
Shawn B. Meador
Attorneys for Defendant
Lynda L. Hascheff

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law offices of Woodburn and Wedge, 6100 Neil Rd., Suite 500, Reno, Nevada 89511, that I am over the age of 18 years, and that I served the foregoing document(s) described as:

BRIEF RE ALLEGED AMBIGUITY IN PARAGRAPH 40

on the party set forth below by:

____ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage prepaid, following ordinary business practices.

____ Personal delivery.

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____ Federal Express or other overnight delivery.

addressed as follows:

X John Springgate, Esq.

The undersigned affirms that this document contains no social security numbers

Dated this 2 day of November, 2022.

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IN THE FAMILY DIVISION

OF THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

PIERRE A. HASCHEFF,

Plaintiff,

vs.

LYNDA HASCHEFF,

Defendant.
____/

Case No. DV13-00656

Dept. No.12

ORDER REGARDING AMBIGUITY IN MSA § 40 AND REMAND

Presently before the Court is Plaintiff, Pierre A. Hascheff's ("Mr. Hascheff"), Brief Statement filed on October 31, 2022. Defendant, Lynda Hascheff ("Ms. Hascheff"), was served with the Brief Statement by eFlex on October 31, 2022 and filed her Brief Re Alleged Ambiguity in Paragraph 40 ("Response Brief") on November 2, 2022. The matter was submitted to the Court on November 3, 2022.

The parties were divorced pursuant to the Findings of Fact, Conclusions of Law and Decree of Divorce entered November 15, 2013, which ratified, approved, adopted, merged, and incorporated by reference the parties' Marital Settlement Agreement (MSA) filed on September 30, 2013. On February 1, 2021, the Court entered its Order Granting Motion for Clarification or Declaratory Relief; Order Denying Motion for Order to Enforce and/or for an Order to Show Cause; Order Denying Request for Attorneys' Fees and Costs. The matter was timely appealed by Mr. Hascheff and cross appealed by Ms. Hascheff. On June 29, 2022, the Nevada Court of

Appeals issued its Order Affirming in Part, Reversing in Part, and Remanding, which stated on remand the Court must: (1) determine whether the fees and costs incurred in the malpractice action are covered by the indemnification provision in MSA § 40; and (2) consider an award of attorney fees and costs in accordance with MSA § 35.1, including determining which party is the prevailing party.

The parties appeared before the Court on September 28, 2022 for a status hearing to determine how to proceed in this matter. Pursuant to the Order After Status Hearing entered September 29, 2022, Mr. Hascheff was ordered to file by October 31, 2022 a brief three-page statement related to his claims of ambiguity in MSA § 40, which he asserted at the hearing was ambiguous with regard to recoverable fees. Ms. Hascheff was ordered to file her three-page response within two weeks thereafter. The Order After Status Hearing states the Court will then enter an order on how to proceed.

In his Brief Statement,[1] Mr. Hascheff states in order to resolve the ambiguity of what fees and costs apply under MSA § 40 the Court must consider the interplay between the fees and costs incurred in the collateral action in which Mr. Hascheff was a witness and the fees incurred in the malpractice action as the common interest work product doctrine applies to the common work product produced for both actions.[2] Mr. Hascheff states, for example, the preparation of Mr. Hascheff for testimony in the collateral action necessarily involved considering whether his statements would expose him to liability in the malpractice action. Mr. Hascheff states the common interest work product doctrine applies even if litigation has not already been commenced and even if the party receiving the common interest privilege is a non-party to any pending litigation, where one of the parties was a litigant and the other party was a potential target of litigation. Mr. Hascheff argues the majority of fees incurred after the malpractice action commenced on December 30, 2018 should be included in the scope of MSA § 40 as Ms. Hascheff

[1] The Court considered only the first full three pages of the Brief Statement starting on page 1, line 22 and ending on page 4, line 22, as the statement was limited to three pages by the Court in its Order After Status Hearing. The Court notes the remaining pages would not have affected this decision as no other legal authority was cited past this point.

[2] This Court notes in reviewing all the Appellant pleadings, it is only in Appellant's Reply Brief on Appeal and Answering Brief on Cross-Appeal filed February 14, 2022 that the common interest work product doctrine was raised, and only as it related to asserting privilege regarding the redaction of billing invoices.

must pay for all of the fees and costs related to "any defense" and judgment after Mr. Hascheff is sued for malpractice. Mr. Hascheff notes the time entries related to the malpractice action have been highlighted in the unredacted billing invoices provided to the Court for in camera review and a summary of the fees is listed in the attached Exhibit 1.

In her Response Brief, Ms. Hascheff states the Brief Statement should be stricken as it violates the Court's Order by exceeding the three-page limit set and by failing to identify any ambiguity in MSA § 40. Ms. Hascheff states Mr. Hascheff instead offers a new theory to recover the fees incurred in the collateral action—that MSA § 40 obligates Ms. Hascheff to indemnify Mr. Hascheff for fees "related" to the malpractice action based upon the common interest work product doctrine. Ms. Hascheff asserts this argument is contrary to the unambiguous language of the appellate order, which states indemnification only applies once Mr. Hascheff is sued for malpractice and the legal fees and costs must arise only from the malpractice action. Ms. Hascheff states the appellate order clearly holds that fees in the collateral action are not covered by MSA § 40. Ms. Hascheff states the fees listed in Mr. Hascheff's Exhibit 1 were not incurred only in the malpractice action as the September 18, 2018 fees were incurred before the malpractice action was filed; the January 24, 2019 fees arise out of the expert reports in the collateral action; the February 20, 2019 fees also arise out of the expert report in the collateral action in which Mr. Hascheff was preparing to testify; the February 22, 2019 fees were to prepare for Mr. Hascheff's testimony in the collateral action; the June 21, 2019 fees did nothing to defend Mr. Hascheff in the malpractice action; the July 1, 2019 fee entry is too vague to evaluate; and the September 25, 2019 fees are unclear as the malpractice action was stayed months earlier. Ms. Hascheff states if the June through September 2019 fees were covered, they total only $295. Ms. Hascheff asserts the Court may review the time entries to determine what fees, if any, arise only from the malpractice action in order to determine Ms. Hascheff's obligation under MSA § 40. Ms. Hascheff notes this is the relief she sought in her Motion for Clarification or Declaratory Relief Regarding Terms of MSA and Decree filed June 16, 2020. Ms. Hascheff requests the Court establish the procedure to determine the prevailing party and the fee award.

///

Based on the foregoing and good cause appearing, the Court finds and orders as follows:

Law

A court has "inherent power to construe its judgments and decrees for the purpose of removing any ambiguity." *Kishner v. Kishner*, 93 Nev. 220, 225, 562 P.2d 493, 496 (1977). However, this inherent power does not apply to judgments and decrees that are not ambiguous. *Id.* The Nevada Supreme Court "has held that a provision 'is ambiguous if it is capable of more than one reasonable interpretation.'" *Mizrachi v. Mizrachi*, 132 Nev. 666, 674, 385 P.3d 982, 987 (2016) (quoting *In re Candelaria*, 126 Nev. 408, 411, 245 P.3d 518, 520 (2010)). Once a provision or term is determined to be ambiguous, the court must clarify the disputed term. *Id.* at 677, 385 P.3d at 989. The court "must consider the intent of the parties in entering the agreement" and "may look to the record as a whole and the surrounding circumstances to interpret the parties' intent." *Id*. Parol evidence, or extrinsic evidence, "is admissible for . . . ascertaining the true intentions and agreement of the parties when the written instrument is ambiguous." *M.C. Multi-Family Development, LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 914, 193 P.3d 536, 545 (quoting *State ex. rel. List v. Courtesy Motors*, 95 Nev. 103, 106-07, 590 P.2d 163, 165 (1977)) (alteration in original).

Orders

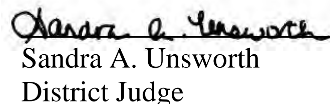
The Court finds Mr. Hascheff has failed to point to any specific ambiguous terms in § 40 of the parties' MSA and failed to describe how MSA § 40 is ambiguous, or capable of more than one reasonable interpretation. The Brief Statement appears to proceed by presuming there is ambiguity present in the provision rather than showing the presence of ambiguity in MSA § 40. Mr. Hascheff makes an argument that the scope of fees under MSA § 40 includes fees incurred in the collateral action due to the common interest work product doctrine and how closely related the work completed in the cases was for Mr. Hascheff's counsel. The Court finds this is not a reasonable interpretation of MSA § 40 given the law of this case. Specifically, the Nevada Court of Appeals found in the Order Affirming in Part, Reversing in Part, and Remanding that, Mr. Hascheff "is precluded from seeking indemnification from [Ms. Hascheff] for his decision to retain counsel to represent his interests as witness" in the collateral trust litigation as Mr. Hascheff was not sued as a

party in the collateral action. The Court of Appeals continued, stating, "the plain language of this section supports that [Mr. Hascheff] must first be sued for malpractice before seeking indemnification for his legal fees and costs and those legal fees and costs must arise from the malpractice action only" (emphasis added). Therefore, the Court finds Mr. Hascheff has failed to show MSA § 40 is ambiguous as to the scope of fees included under MSA § 40 or any other term in MSA § 40.[3] As the Court may only look to parol or extrinsic evidence to determine the intent of parties when clarifying an ambiguous term or provision, the Court may not look to such evidence in resolving the indemnification issue.

In considering how to proceed, the Court finds setting an additional hearing on this issue would be unnecessary and further increase attorney's fees, given an evidentiary hearing was already held on December 21, 2020. Accordingly, the Court shall proceed by taking the issue under advisement and determining whether the fees and costs incurred in the malpractice action are covered by the indemnification provision in MSA § 40 and the amount of any such fees and costs that must be indemnified by Ms. Hascheff based upon the existing evidence in the record, including the unredacted invoices provided pursuant to the Stipulated Protective Order. The determination shall issue in a separate order soon to be forthcoming. In the same forthcoming order, the Court will determine which party is the prevailing party under MSA § 35.1. The Court will then give the prevailing party leave to file a *Wilfong* affidavit and supporting billing statements to allow the Court to determine the reasonableness of the fees and costs requested and the amount of the award.

GOOD CAUSE APPEARING, IT IS SO ORDERED.

Dated this 8 day of December 2022.



Sandra A. Unsworth
District Judge

DV13-00656

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[3] The Court notes at one point Mr. Hascheff appears to have agreed that MSA § 40 lacks ambiguity as Mr. Hascheff wrote in an email dated April 20, 2020 to Ms. Hascheff's counsel, "[t]he terms of the indemnity in the agreement are clear and unambiguous." *See MSA Motion*, Ex. 5.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court in and for the County of Washoe, and that on September 29, 2022, I deposited in the county mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, or by e-filing, a true copy of the foregoing document addressed as follows:

ELECTRONIC FILING:

JOHN SPRINGGATE, ESQ. for PIERRE HASCHEFF
SHAWN MEADOR, ESQ. for LYNDA HASCHEFF

Judicial Assistant

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Alicia L. Lerud
Clerk of the Court
Transaction # 9427590 : adixon

Gary R. Silverman (NSB# 409) Michael V. Kattelman (NSB#6703),
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**IN THE FAMILY DIVISION
OF THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA IN
AND FOR THE COUNTY OF WASHOE**

PIERRE A. HASCHEFF,

Plaintiff,

vs.

LYNDA HASCHEFF,

Defendant.
_______________________/

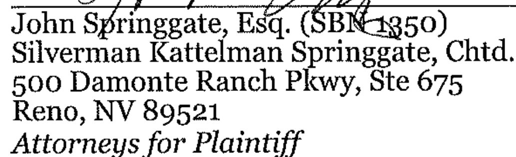
Case No. DV13-00656

Dept. No. 12

MOTION TO ALLOW BRIEFING ON PREVAILING PARTY

Comes now the Plaintiff, PIERRE HASCHEFF, by and through his undersigned counsel, JOHN SPRINGGATE, ESQ., SILVERMAN KATTELMAN SPRINGGATE, CHTD., and moves the Court for its Order allowing the parties to brief the issue of "prevailing party" under the Marital Settlement Agreement. This Motion is made and based upon the attached memorandum of Points and Authorities, and all the papers and pleadings on file in this action.

Dated this 27th day of December, 2022.



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POINTS AND AUTHORITIES

On remand in this matter, the Court of Appeals required the District Court to determine two issues: (1) what fees and costs incurred and related to the malpractice action are covered by the indemnification provision, and (2) consider an award of attorney's fees to the prevailing party pursuant to MSA Section 35.1, given the fact that the district court already determined that both parties complied with MSA Section 35.2. Opinion, fn 7, pg. 12.

The Court previously asked the parties for brief statements to address the issue of which fees and costs were incurred and related to the malpractice action. The parties submitted those statements, and the Court ruled in its Order of December 8 that the Court would take the matter under advisement and determine which of the fees and costs were related, taking into account the evidence submitted in the unredacted billings filed under seal. Of note, Mr. Hascheff has already indicated those which he thinks are related, as they are highlighted in the evidence submitted under seal.

The Court further indicated that in a further upcoming order, it would address which party was the "prevailing party" under MSA Sec. 35.1.

Mr. Hascheff submits that the issue of the prevailing party, in the context of the whole of this litigation, is an issue which would be assisted by briefing from the parties, even if that briefing is limited by the Court. To be fair, something more than 3 pages is suggested, the prior briefing schedule having been taken up in part by a recitation of the prior facts, which the Court apparently did not need, although it was helpful to counsel.

Were the parties to submit their briefs on the issue of "prevailing party," it would likely do three things: clarify the issues for the Court, use the parties' time instead of the

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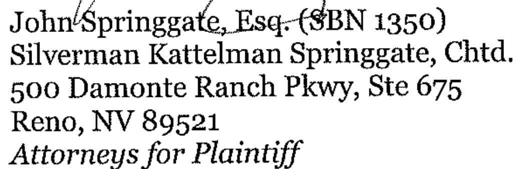
Court's, and prevent either party from claiming later that they were precluded from addressing an important issue, or that the Court overlooked an argument.

Wherefore, the Plaintiff requests that the Court hold its anticipated order on the prevailing party issue, and allow briefing by the parties, even simultaneous briefing, on that issue to fully flesh out the issues for decision. A hearing or oral argument is not requested, as that has already been requested, and implicitly denied. With knowledge of the parties and counsel for both sides, some opportunity to respond to the claims of the opponents would be appreciated, so simultaneous briefings are requested, with a short response to the claims of the opponent.

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.

DATED this 27th day of December, 2022.



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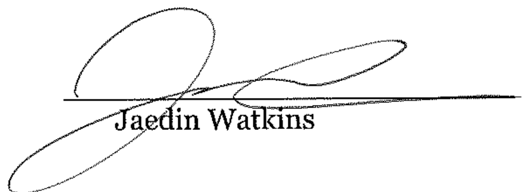
1
2 **CERTIFICATE OF SERVICE**

3 Pursuant to NRCP 5 (b), I hereby certify that I am an employee of Silverman,
4 Kattelman Springgate, Chtd, and on the date set forth below, I served a true copy of the
5 foregoing **MOTION TO ALLOW BRIEFING ON PREVAILING PARTY** on the
6 party(ies) identified below by:
7
8 _____ Placing an original or true copy thereof in a sealed envelope, postage
9 prepaid for collection and mailing in the United States Mail at Reno, Nevada
10 to
11 _____ Hand Delivery via Reno Carson Messenger Service
12 _____ Facsimile to the following numbers:
13 _____ Federal Express or other overnight delivery
14 _____ Reno Carson Messenger Service
15 _____ Certified Mail, Return receipt requested
16 _X_ Electronically, using Second Judicial District Court's ECF system
17 _____ Electronic mail to:
18 addressed to:
19
20 Shawn Meador, Esq.
Woodburn and Wedge
21 6100 Neil Road Suite 500
Reno, NV 89505
22
23 Dated this 21st day of December, 2022.
24
25 
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Clerk of the Court
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IN THE FAMILY DIVISION

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

PIERRE A. HASCHEFF,

Plaintiff,

v.

LYNDA L. HASCHEFF,

Defendant.

CASE NO. DV13-00656

DEPT. NO. 12

OPPOSITION TO MOTION TO ALLOW BRIEFING ON PREVAILING PARTY

This Court has already indicated that it has the ability to determine whether Pierre or Lynda Hascheff is the prevailing party in this action pursuant to which Pierre demanded that Lynda indemnify him for a sum in excess of $5,000. Pierre has not demonstrated that this Court lacks the ability to make that decision. Nor has he provided any prima facia showing that he can articulate an argument that has not been previously raised or about which this Court is not fully aware.

Pierre falsely suggests this Court previously "asked" for a brief statement to address the issue of fees and costs subject to the indemnity clause. Pierre's prior counsel requested the right to brief his tortured claim that the indemnity clause of the MSA is ambiguous in light

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of the COA Order.[1] Pierre then failed to comply with the Court's Order regarding that briefing and failed to make any cogent argument to support his claim the agreement is ambiguous.

This motion is simply part of the pattern of Pierre, represented by his third lawyer, wrongfully forcing his former wife to incur legal fees. That pattern has existed since the day Pierre first sent Lynda the misleading letter claiming that he was continuing to incur legal fees to defend an ongoing malpractice action. Thereafter, he refused to provide documents demonstrating what fees he had incurred in the malpractice action. Rather, he demanded she indemnify him for fees incurred in the collateral trust action. He forced Lynda to incur fees to respond to his Motion for Order to Show Cause in which he insisted she should be held in contempt of court for refusing his demand.

To this date, even after the COA order that defined the fees for which Pierre is entitled to indemnity, and this Court's Order following the briefing Pierre requested, he still refuses to identify the fees that arise directly out of the malpractice action as opposed to those he claims are related to the malpractice action.

Pierre's motion should be denied. He should be required to pay the fees Lynda has incurred in connection herewith.

In the alternative, if this Court determines that briefing on the issue of whether Pierre or Lynda is the prevailing party would be appropriate, Pierre should be obligated to pay the fees Lynda will incur for her counsel to prepare her prevailing party brief.

In his underlying Motion, Pierre complains about this Court's prior page limitation. He insists that to be fair to him, this Court should allow him more than three pages to brief the prevailing party issue. Assuming a minimum of three hours for Lynda's counsel to prepare a

[1] Pierre's current counsel did not participate in the status conference that led to the briefing so may not have been aware that Pierre's counsel insisted that he needed the opportunity to address the claimed ambiguity. Pierre did participate in that status conference.

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detailed prevailing party brief, at counsel's $450 hourly rate, Pierre should be required to advance Lynda the sum of $1,350 in fees if this Court believes briefing is necessary or appropriate.

Affirmation Pursuant to NRS 239B.030

The undersigned affirms that this document does not contain the personal information of any party.

DATED this 8 day of January 2023.

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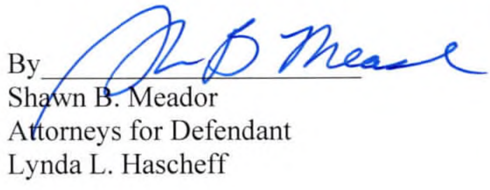

By
Shawn B. Meador
Attorneys for Defendant
Lynda L. Hascheff

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law offices of Woodburn and Wedge, 6100 Neil Rd., Suite 500, Reno, Nevada 89511, that I am over the age of 18 years, and that I served the foregoing document(s) described as:

NOTICE OF ENTRY OF ORDER

on the party set forth below by:

____ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage prepaid, following ordinary business practices.

____ Personal delivery.

_X__ Second Judicial E flex

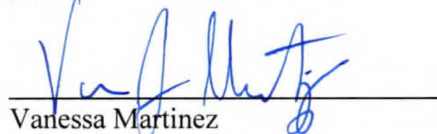
____ Federal Express or other overnight delivery.

addressed as follows:

X John Springgate, Esq.

The undersigned affirms that this document contains no social security numbers

Dated this ___ day of January, 2023.



Vanessa Martinez

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Clerk of the Court
Transaction # 9459745

Gary R. Silverman (NSB# 409) Michael V. Kattelman (NSB#6703),
John Springgate (NSB #1350), Alexander C. Morey (NSB#11216)
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Attorney for Plaintiff

**IN THE FAMILY DIVISION
OF THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA IN
AND FOR THE COUNTY OF WASHOE**

PIERRE A. HASCHEFF,

Plaintiff,

vs.

LYNDA HASCHEFF,

Defendant.
_______________________________/

Case No. DV13-00656

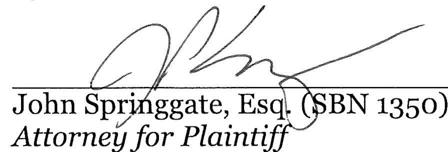
Dept. No. 12

REPLY ON MOTION TO ALLOW BRIEFING

ON THE ISSUE OF PREVAILING PARTY

Comes now the Plaintiff, PIERRE HASCHEFF, by and through his undersigned counsel, JOHN SPRINGGATE, ESQ., SILVERMAN KATTELMAN SPRINGGATE, CHTD., and enters his Reply on his Motion for an Order allowing the parties to brief the issue of "prevailing party" under the Marital Settlement Agreement. This Motion is made and based upon the attached memorandum of Points and Authorities, and all the papers and pleadings on file in this action.

Dated this 17th day of January, 2023.



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Attorney for Plaintiff

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POINTS AND AUTHORITIES

Mr. Hascheff filed his motion requesting briefing on the issue of "prevailing party," as that would be a significant issue for the Court to consider in an award of fees. Mr. Hascheff contended that allowing the parties to brief the issue, even in a cursory form, would clarify the issues for the Court, utilize the parties' time instead of the Court's, and preclude either party from claiming that some issue was overlooked in the decision, sparking even more litigation.

The Opposition raises no cogent argument against the request, save that it would cause both parties to spend more funds, which is certainly true, but as the Court has already invoked page limitations in its briefing, this is a relatively limited issue. Mr. Hascheff has submitted, under seal, the billings that are pertinent to this matter, and indicated the ones that he contends he should be compensated for under the terms of the Marital Settlement Agreement.

Under the remand from the Court of Appeals, this court must determine who the prevailing party is in the litigation, and then determine whether the fees to be awarded are reasonable given the context of the litigation. Ms. Hascheff made several legal claims during the District Court and appellate court proceedings which required Mr. Hascheff to respond to each, resulting in substantial amounts of legal fees being incurred by both parties. . The District Court and appellate court ruled against her on all of her legal claims, except that she was required to pay only those fees and costs incurred with respect to the malpractice action after it was filed on December 26, 2018.

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1 Her position at the outset of the District Court and appellate court litigation was
2 she was not obligated to pay any fees and costs, whether related to the malpractice
3 action or not. This position was rejected by the appellate court in their order. Ms.
4 Hascheff repeatedly argued in her pleadings that she did not owe any fees and costs in
5 her pleadings because Mr. Hascheff had "forfeited his indemnity rights" because: (1)
6 He failed to provide her timely notice (2) breached his fiduciary duties to her (3)
7 breached his covenant of good faith and fair dealing (4) waived and was collaterally
8 estopped from exercising his indemnity rights (5) the doctrine of laches and other
9 equitable remedies precluded his right to indemnity (6) he failed to provide privileged
10 communications and documents as a condition precedent to his right to indemnity, and
11 (7) he breached section 37 of the MSA by failing to provide notice of the malpractice
12 action.
13
14 Citations to the relevant portions of the pleadings and transcripts can be
15 provided, if the Court so directs.
16
17 None of those arguments were sustained on the appeal. The Court of Appeals did
18 rule that that she was required to pay only those fees and costs incurred with respect to
19 the malpractice action after it was filed on December 26, 2018. Only after the court
20 decided against her, that Mr. Hascheff did not forfeit his rights to indemnity, did she
21 agree that she should pay part of the fees and cost related to the malpractice action,
22 which amount is still an open question to be resolved by this court.
23
24 Mr. Hascheff took the position that this court must review all the time entries in
25 his attorneys invoices incurred after the malpractice action was filed on December 26,
26 2018 to determine what costs and fees were "related to" the malpractice action. Those
27 fees and costs have been provided to this court which are directly referenced in the
28

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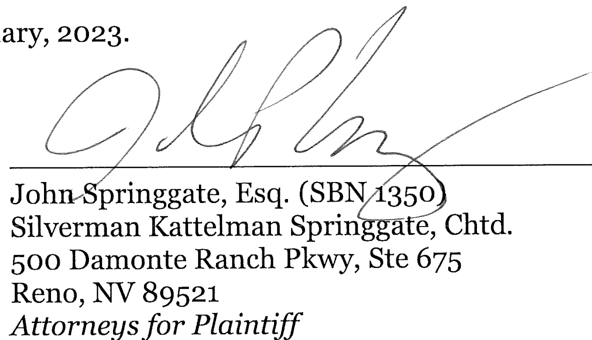
1 malpractice complaint, including referring to expert reports which called into question
2 whether Mr. Hascheff was negligent in his estate planning advice. Ms. Hascheff took the
3 position that she was responsible only for those fees related to staying the malpractice
4 action by Mr. Hascheff's attorney, in the amount of $295.
5
6 Wherefore, Plaintiff, Pierre Hascheff, seeks an order that would allow the parties
7 to expand upon and brief the issue of the "prevailing party," prior to the issuance of the
8 Court's order. As before, in the Motion itself, this need not be extensive, and may even
9 be simultaneous. In light of the amount of fees and costs claimed due by both parties
10 through the litigation, this additional amount seems reasonable.

11 **AFFIRMATION**

12 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the
13 preceding document does not contain the social security number of any person.
14 DATED this 17th day of January, 2023.

15



16
17 John Springgate, Esq. (SBN 1350)
18 Silverman Kattelman Springgate, Chtd.
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20 *Attorneys for Plaintiff*

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5 (b), I hereby certify that I am an employee of Silverman, Kattelman Springgate, Chtd, and on the date set forth below, I served a true copy of the foregoing **REPLY** on the party(ies) identified below by:

_____ Placing an original or true copy thereof in a sealed envelope, postage prepaid for collection and mailing in the United States Mail at Reno, Nevada to

_____ Hand Delivery via Reno Carson Messenger Service

_____ Facsimile to the following numbers:

_____ Federal Express or other overnight delivery

_____ Reno Carson Messenger Service

_____ Certified Mail, Return receipt requested

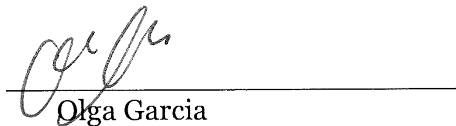
_X_ Electronically, using Second Judicial District Court's ECF system

_____ Electronic mail to:

addressed to:

Shawn Meador, Esq.
Woodburn and Wedge
6100 Neil Road Suite 500
Reno, NV 89505

Dated this 17 day of January, 2023.



Olga Garcia

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Clerk of the Court
Transaction # 9511771

CODE

IN THE FAMILY DIVISION

OF THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

PIERRE A. HASCHEFF,

Plaintiff,

vs.

LYNDA HASCHEFF,

Defendant.

_______________________________________/

Case No. DV13-00656

Dept. No. 12

ORDER DENYING MOTION TO ALLOW BRIEFING ON PREVAILING PARTY

Presently before the Court is Plaintiff, Pierre A. Hascheff's ("Judge Hascheff"), Motion to Allow Briefing on Prevailing Party ("Motion") filed December 27, 2022. Defendant, Lynda Hascheff ("Ms. Hascheff"), was served with the Motion by eFlex on December 27, 2022 and filed her Opposition to Motion to Allow Briefing on Prevailing Party ("Opposition") on January 9, 2023. Mr. Hascheff filed his Reply on Motion to Allow Briefing on the Issue of Prevailing Party ("Reply") on January 17, 2023 and then submitted the Motion to the Court for decision on January 18, 2023.

The parties were divorced pursuant to the Findings of Fact, Conclusions of Law and Decree of Divorce entered November 15, 2013, which ratified, approved, adopted, merged, and incorporated by reference the parties' Marital Settlement Agreement (MSA) filed on September 30, 2013. On February 1, 2021, the Court entered its Order Granting Motion for Clarification or

Declaratory Relief; Order Denying Motion for Order to Enforce and/or for an Order to Show Cause; Order Denying Request for Attorneys' Fees and Costs. The matter was timely appealed by Judge Hascheff and cross appealed by Ms. Hascheff. In the June 29, 2022 Order Affirming in Part, Reversing in Part, and Remanding, the Nevada Court of Appeals remanded two issues to this Court: (1) "whether the fees and costs incurred in the malpractice action are covered by the indemnification provision in [§ 40]" of the parties' MSA; and (2) determining which party is the prevailing party for the purposes of an award of attorney fees and costs in accordance with MSA § 35.1. The Court held a status hearing on September 28, 2022 to determine how to proceed with the remanded issues. Pursuant to the Order After Status Hearing entered September 29, 2022, the parties were ordered to: (1) file a copy of the unredacted invoices along with a proposed protective order; and (2) file brief three-page statements related to Judge Hascheff's claims of ambiguity in MSA § 40. In the Order Regarding Ambiguity in MSA § 40 and Remand entered December 8, 2022, the Court found Judge Hascheff had failed to show MSA § 40 is ambiguous. The Court stated it would take the remanded issues under advisement and issue a decision based upon the evidence in the record, including the unredacted invoices.

In the Motion, Judge Hascheff requests the Court enter an order allowing the parties to brief the issue of which party is the prevailing party under MSA § 35.1. Judge Hascheff states the Court previously asked the parties for brief statements on the issue of which fees and costs were incurred and related to the malpractice action. Judge Hascheff asserts limited briefing would assist the Court in determining which party is the prevailing party by clarifying the issues, using the parties' time instead of the Court's time, and preventing either party from later claiming they were precluded from addressing an important issue or that the Court overlooked an argument. Judge Hascheff requests simultaneous briefings of more than three pages in length, with a short response to address the claims of the other party.

In the Opposition, Ms. Hascheff states the Motion should be denied as the Court already indicated it has the ability to determine the prevailing party. Ms. Hascheff asserts the Motion fails to demonstrate the Court lacks this ability and fails to make a prima facie showing of an argument not previously raised. Ms. Hascheff notes the Court did not ask for the brief statements, but rather

Judge Hascheff's prior counsel requested such briefing based on his assertion that MSA § 40 is ambiguous. Ms. Hascheff asserts the Motion is part of a pattern of forcing Ms. Hascheff to unnecessarily incur legal fees and as such, Judge Hascheff should be required to pay her attorney's fees associated with the Opposition. Ms. Hascheff states if the Court determines additional briefing is appropriate, Judge Hascheff should be ordered to advance $1,350 in legal fees for Ms. Hascheff's attorney to prepare the brief.

In the Reply, Judge Hascheff states the Opposition provides no cogent argument against the request for limited briefing on the prevailing party issue, except that both parties will incur more legal fees. Judge Hascheff states the limited nature of the briefing would limit the fees incurred. Judge Hascheff asserts this Court and the Court of Appeals ruled against all of Ms. Hascheff's claims, except that she was required to pay only those fees and costs incurred in the malpractice action filed on December 26, 2018. Judge Hascheff alleges Ms. Hascheff's position at the outset of this litigation was that she was not obligated to pay any fees and costs, whether related to the malpractice action or note, because Judge Hascheff failed to timely provide notice, precluding his right to indemnity under the doctrine of laches, in addition to many other grounds. Judge Hascheff asserts Ms. Hascheff only agreed that she should pay part of the fees and costs incurred in the malpractice action after the Court of Appeals decided against her.

Based on the foregoing, the Court finds and orders as follows:

Order

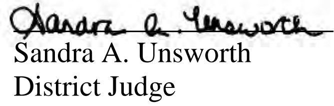
The Court **DENIES** the Motion. The purpose of the status hearing held on September 28, 2022 was to determine how to proceed with the two remanded issues. Judge Hascheff raised the issue of the alleged ambiguity in MSA § 40 and as a result, the Court ordered the parties to brief the issue. Neither party raised the need to brief the issue of prevailing party. In the Motion, Judge Hascheff provides no case law, statute, rules, or other legal authority in support of his request for briefing on the prevailing party issue. The only reasoning stated in the Motion as to why the Court needs the parties' assistance in determining prevailing party is that a party may later claim they were precluded from addressing an important issue or the Court might overlook an argument. The Court is not persuaded by this argument. As Judge Hascheff failed to request briefing on the

prevailing party issue at the September 28, 2022 status hearing and as this Court is capable of determining the prevailing party in this matter without the parties' assistance, the Court denies the request for further briefing.

If Ms. Hascheff wishes to pursue an award of attorney's fees, she may file a motion for attorney's fees, along with a *Wilfong* affidavit and supporting billing documentation, within 21 days of written notice of entry this Order in compliance with NRPC 54(d)(2).

GOOD CAUSE APPEARING, IT IS SO ORDERED.

Dated this 15 day of February, 2023.



Sandra A. Unsworth
District Judge

DV13-00656

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court in and for the County of Washoe, and that on February 15, 2023, I deposited in the county mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, or by e-filing, a true copy of the foregoing document addressed as follows:

ELECTRONIC FILING:

JOHN SPRINGGATE, ESQ. for PIERRE HASCHEFF
SHAWN MEADOR, ESQ. for LYNDA HASCHEFF

Judicial Assistant

F I L E D
Electronically
DV13-00656
2023-02-17 03:25:04 PM
Alicia L. Lerud
Clerk of the Court
Transaction # 9517398

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6 IN THE FAMILY DIVISION
7 OF THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
8 IN AND FOR THE COUNTY OF WASHOE
9
10 PIERRE A. HASCHEFF,
11 Plaintiff,
12 vs.
13 LYNDA HASCHEFF,
14 Defendant.
15 ____/

Case No. DV13-00656
Dept. No.12

16
17 **ORDER REGARDING INDEMNIFICATION OF FEES AND COSTS UNDER MSA § 40; ORDER REGARDING PREVAILING PARTY UNDER MSA § 35.1**

18 Presently before the Court are the issues remanded by the Nevada Court of Appeals in its
19 June 29, 2022 Order Affirming in Part, Reversing in Part, and Remanding. Specifically, this Court
20 must: (1) "necessarily determine whether the fees and costs incurred in the malpractice action are
21 covered by the indemnification provision in [§ 40]" of the parties' Marital Settlement Agreement
22 (MSA); and (2) "consider an award of attorney fees and costs in accordance with MSA § 35.1,"
23 including determining which party is the prevailing party.

24 The parties were divorced pursuant to the Findings of Fact, Conclusions of Law and Decree
25 of Divorce entered November 15, 2013, which ratified, approved, adopted, merged, and
26 incorporated by reference the parties' MSA filed on September 30, 2013. On February 1, 2021, the
27 Court entered its Order Granting Motion for Clarification or Declaratory Relief; Order Denying
28 Motion for Order to Enforce and/or for an Order to Show Cause; Order Denying Request for

Attorneys' Fees and Costs. The matter was timely appealed by Judge Hascheff and cross appealed by Ms. Hascheff. The two issues stated herein were remanded by the Court of Appeals. The Court held a status hearing on September 28, 2022 to determine how to proceed with the remanded issues. At the status hearing, counsel for the parties agreed to a protective order related to the unredacted invoices, and counsel for Judge Hascheff requested briefing related to alleged ambiguity in MSA § 40. At no time did either counsel express concern about the Court's ability to determine who was the prevailing party. Pursuant to the Order After Status Hearing entered September 29, 2022, the parties were ordered to: (1) file a copy of the unredacted invoices along with a proposed protective order; and (2) file brief three-page statements related to Judge Hascheff's claims of ambiguity in MSA § 40. Unredacted invoices were provided to the Court and parties pursuant to the Stipulated Protective Order filed October 13, 2022. In the Order Regarding Ambiguity in MSA § 40 and Remand entered December 8, 2022, the Court found Judge Hascheff had failed to show MSA § 40 is ambiguous. In the same Order, the Court stated it would take the remanded issues under advisement and issue a decision based upon the evidence in the record, including the unredacted invoices. On December 27, 2022, Judge Hascheff filed a Motion to Allow Briefing on Prevailing Party. The Court denied the Motion in the Order Denying Motion to Allow Briefing on Prevailing Party entered February 15, 2023.

The Court, having reconsidered the two issues remanded by the Court of Appeals based on upon the evidence in the record, including the exhibits and testimony from the evidentiary hearing on December 21, 2020 and the unredacted invoices provided pursuant to the Stipulated Protective Order, now finds and orders as follows:

A. Indemnification Under MSA § 40 for Legal Fees Incurred in the Malpractice Action.

MSA § 40 states:

> Except for the obligations contained in or expressly arising out of this Agreement, each party warrants to the other that he or she has not incurred, and shall not incur, any liability or obligation for which the other party is, or may be, liable. Except as may be expressly provided in this Agreement, if any claim, action, or proceeding, whether or not well founded, shall later be brought seeking to hold one party liable on account of any alleged debt, liability, act, or omission of the other, the warranting party shall, at his or her sole expense, defend the other against the claim, action, or proceeding. The warranting party shall

> also indemnify the other and hold him or her harmless against any loss or liability that he or she may incur as a result of the claim, action, or proceeding, including attorney fees, costs, and expenses incurred in defending or responding to any such action. **In the event Husband is sued for malpractice, Wife agrees to defend and indemnify Husband for one half (1/2) the costs of any defense and judgment[.]** Husband may purchase tail coverages of which Wife shall pay one half (1/2) of such costs. (emphasis added).

The Court of Appeals found in the Order Affirming in Part, Reversing in Part, and Remanding that Judge Hascheff "is precluded from seeking indemnification from [Ms. Hascheff] for his decision to retain counsel to represent his interests as witness" in the collateral trust action as he was not sued as a party in the collateral trust action. The Court of Appeals continued, stating "the plain language of this section supports that [Judge Hascheff] must first be sued for malpractice before seeking indemnification for his legal fees and costs and those legal fees and costs must arise from the malpractice action only" (emphasis added). The Court of Appeals did not consider whether this Court "erred in its evaluation of [Judge Hascheff's] request for fees and costs in the collateral trust litigation . . . because the court reached the correct result by denying his request." Therefore, this Court considers legal fees and costs incurred after the date Judge Hascheff was sued for malpractice and arising from the malpractice action only.

The Court finds Judge Hascheff was sued for malpractice on December 26, 2018, the date of the filing of the Complaint against Judge Hascheff by Todd Jaksick, which was admitted as Confidential Exhibit G at the evidentiary hearing on December 21, 2020. The malpractice case was stayed thereafter pending the resolution of the collateral trust action.

Based upon the unredacted invoices provided under the Stipulated Protective Order, the Court finds Judge Hascheff incurred legal fees as a result of the malpractice action on the following dates and in the following amounts:

a. January 24, 2019: $825.00

b. February 20, 2019: $1,175.00

c. June 21, 2019: $200.00

d. July 1, 2019: $20.00

e. September 25, 2019: $75.00[1]

As each time entry for the above dates references either the Complaint or the suit against Judge Hascheff or evaluating his potential liability and claimed damages in the malpractice suit, the Court finds these fees arose from the defense of the malpractice action. The Court did not include any fees charged to Judge Hascheff prior to the commencement of the malpractice suit[2] or fees charged for representation in the collateral trust litigation.[3] Pursuant to MSA § 40, Ms. Hascheff must indemnify Judge Hascheff for one-half of these legal fees, which total $2,295.00. Thus, Ms. Hascheff shall pay $1,147.50 to Judge Hascheff within 30 days of entry of this Order.

B. Prevailing Party Under MSA § 35.1.

MSA § 35.1 states:

> If either party to this Agreement brings an action or proceeding to enforce any provision of this Agreement, or to enforce any judgment or order made by a court in connection with this Agreement, the prevailing party in that action or proceeding shall be entitled to reasonable attorney fees and other reasonably necessary costs from the other party.

The Nevada Supreme Court has stated, "[a] party prevails if it succeeds on *any significant issue* in litigation which achieves some of the benefit it sought in bringing suit." *Las Vegas Review-Journal v. City of Henderson*, 137 Nev., Adv. Op. 81, 500 P.3d 1271, 1276 (2021) (quoting *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 90, 943 P.3d 608, 615 (2015)) (emphasis in original). A party does not need to succeed on every issue to be the prevailing party. *Las Vegas Metro. Police Dep't*, 131 Nev. at 90, 943 P.3d at 615.

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[1] Despite the parties advising the Court that the malpractice action was stayed almost immediately, this charge related to staying the proceedings occurred approximately nine months later.

[2] A fee of $125.00 was incurred on September 18, 2018 that appears to be related to concerns regarding malpractice but as it was incurred prior to the filing of the malpractice action and contemporaneously with issues related to Judge Hascheff's deposition in the collateral trust litigation, the Court finds Ms. Hascheff is not required to indemnify this fee under MSA § 40.

[3] As to a fee of $700.00 incurred on February 21, 2019 for 3.50 hours of time, the description of the charge references the review of a complaint, but it is unclear which case it refers to and how much time was spent on reviewing the complaint as compared to the five other tasks listed in the description that arise from the collateral trust litigation. Additionally, while Judge Hascheff asserted the February 21, 2019 fee should be indemnified in Exhibit 1 to his Brief Statement filed October 31, 2022, his monetary claim was listed as $0. As to a fee of $775.00 incurred on February 22, 2019, the description of the charge clearly indicates the charge was incurred in the collateral trust litigation.

The current litigation commenced on June 16, 2020 when Ms. Hascheff filed her Motion for Clarification or Declaratory Relief Regarding Terms of MSA and Decree ("Clarification Motion"). Judge Hascheff thereafter filed his Motion for Order to Show Cause, or in the Alternative, to Enforce the Court's Orders ("OSC Motion") on July 8, 2020.

In the Clarification Motion, Ms. Hascheff requested the "Court enter an Order clarifying that Ms. Hascheff is only responsible for fees incurred in the malpractice action and that she is not responsible for the fees or costs he chose to incur to have personal counsel protect his interests in connection with his role as a percipient witness in the [collateral trust litigation]." In the Clarification Motion, Ms. Hascheff asserts she has not refused to indemnify Judge Hascheff for malpractice fees covered by MSA § 40, only the fees he incurred in connection with his role as a percipient witness in the collateral trust litigation. Ms. Hascheff did raise other arguments, including that "Judge Hascheff should be equitably estopped from asserting such a claim based on his breach of fiduciary duty and his breach of the covenant of good faith and fair dealing," such as by keeping the malpractice action secret from Ms. Hascheff until January 15, 2020.

In the OSC Motion, Judge Hascheff requested the Court issue an order for Ms. Hascheff to show cause why she intentionally disobeys the MSA by refusing to indemnify Judge Hascheff for fees incurred after the filing of the malpractice complaint, or in the alternative enforce the MSA and order the payment of indemnification in the amount of $4,924.05.[4] In the OSC Motion, Judge Hascheff asserts MSA § 40 requires "the payment of all attorney fees and costs relating to the [collateral] trust litigation as it directly related to the malpractice action." Judge Hascheff states Ms. Hascheff seeks to delay payment and gain leverage with her Clarification Motion.

Both parties requested attorney's fees and costs in their respective Motions under MSA § 35.1.

In the Order Granting Motion for Clarification or Declaratory Relief; Order Denying Motion for Order to Enforce and/or for an Order to Show Cause; Order Denying Request for Attorneys' Fees and Costs entered February 1, 2021, the Court granted Ms. Hascheff's

[4] Prior to the filing of Ms. Hascheff's Clarification Motion and Judge Hascheff's OSC Motion, Judge Hascheff had requested $5,200. 90 on January 15, 2020 and then $4,675.90 on February 5, 2020 be indemnified by Ms. Hascheff.

Clarification Motion, denied Judge Hascheff's OSC Motion based on the doctrine of laches, and denied both parties' requests for awards of attorney's fees and costs. In the Order Affirming in Part, Reversing in Part, and Remanding, the Court of Appeals found this Court "abused its discretion in applying laches to grant [Ms. Hascheff's] motion and deny [Judge Hascheff's] request for indemnification in the malpractice action" and remanded the matter to this Court. On remand, the Court herein determined the amount Ms. Hascheff must indemnify Judge Hascheff under MSA § 40 for legal fees incurred in defense of the malpractice suit filed on December 26, 2018, specifically excluding fees incurred in the collateral trust litigation as required by the Court of Appeals.

Accordingly, the Court finds Ms. Hascheff is the prevailing party in this matter. Ms. Hascheff's Clarification Motion sought clarification from the Court regarding what fees she owed Judge Hascheff under MSA § 40 and asserted she is not required to indemnify fees arising from the collateral trust litigation. As the Court of Appeals held MSA § 40 only applies to fees and costs that arise from the malpractice action, this Court found herein Ms. Hascheff must indemnify Judge Hascheff for only those fees, which amount to $1,147.50. Thus, the Court finds Ms. Hascheff is the prevailing party as she received the predominate relief requested in her Clarification Motion.

In regard to Judge Hascheff's OSC Motion, the Court finds Ms. Hascheff did not willfully disobey the parties' MSA but properly sought clarification when the parties disagreed on what fees were covered by MSA § 40. The Court finds Ms. Hascheff could not have complied with the MSA without the Court's assistance as even this Court could not determine the proper amount of fees until provided with the unredacted invoices under the Stipulated Protective Order.[5] The Court further finds enforcement is unnecessary as Ms. Hascheff indicated in her Clarification Motion she is willing to pay the fees required under MSA § 40 but simply needed the Court to clarify what fees she is required to pay. Given that Ms. Hascheff's Clarification Motion indicates she is willing to indemnify the fees required under MSA § 40, it appears to this Court that the filing of Judge Hascheff's OSC Motion three weeks later was premature. Thus, the Court finds Judge Hascheff

[5] The Court notes the redacted invoices originally admitted into evidence at the December 21, 2020 evidentiary hearing as Plaintiff's Exhibit I and Defendant's Exhibit 15 feature redactions that obscure the descriptions of almost all of the charges actually related to the malpractice action.

has not prevailed on any significant issue in his OSC Motion as the use of the Court's contempt and enforcement powers are unnecessary and inappropriate under these circumstances.

C. Compliance with MSA § 35.2.

Although the Court previously found the parties complied with the notice requirements of MSA § 35.2, based upon footnote 7 in the Court of Appeal's Order Affirming in Part, Reversing in Part, and Remanding, this Court reanalyzes Ms. Hascheff's compliance with MSA § 35.2 and finds as follows:

MSA § 35.2 states:

> A party intending to bring an action or proceeding to enforce this Agreement shall not be entitled to recover attorney fees and costs under this provision unless he or she first gives the other party at least 10 [days] written notice before filing the action or proceeding. The written notice shall specify (1) whether the subsequent action or proceeding is to enforce the original terms of the Agreement; (2) the reasons why the moving party believes the subsequent action or proceeding is necessary; (3) whether there is any action that the other party may take to avoid the necessity for the subsequent action or proceeding; and (4) a period of time within which the other party may avoid the action or proceeding by taking the specified action. The first party shall not be entitled to attorney fees and costs if the other party takes the specified action within the time specified in the notice.

The Court finds Ms. Hascheff provided written notice to Judge Hascheff 14 days prior to filing her Clarification Motion on June 16, 2020 as evidenced by a letter dated June 2, 2020 from Ms. Hascheff's counsel to Judge Hascheff's counsel admitted as Defendant's Exhibit 8 at the evidentiary hearing on December 21, 2020. The letter states, among other things:

> Pursuant to paragraph 35.2 of the parties' MSA, if we have not been able to reach an agreement within ten days of the date of this letter my client will file a declaratory relief action so that the court can determine my client's liability under these facts. To assure there is no confusion, my client's position is that she is responsible for one-half of the fees and costs associated with the malpractice action, that she is not responsible for Judge Hascheff's fees and costs as a percipient witness.

Having found timely written notice was provided, the Court analyzes whether the letter met the four requirements of MSA § 35.2 as follows:

CERTIFICATE OF SERVICE

Pursuant to Rule 25(b) of the Nevada Rules of Appellate Procedure, I hereby certify that I am an employee of Fennemore Craig, P.C. and that on this date, I served a true and correct copy of the attached document through the Court's electronic filing system to the following registered users:

Debbie A. Leonard, Esq.
Nevada State Bar No. 8260
Leonard Law, PC
955 S. Virginia Street, Suite 220
Reno, Nevada 89502

Attorneys for Respondent/
Cross-Appellant

DATED this 16th day of November, 2023.

/s/ Diana L. Wheelen
An Employee of Fennemore Craig, P.C.