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
Jan 26 2024 02:04 PM
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S AMENDED OPENING BRIEF

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Docket 86976 Document 2024-03139

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of the Court may evaluable possible disqualifications or recusal.

Appellant Pierre Hascheff is a natural person and not an entity. Appellant was represented by retained counsel Stephen Kent, Esq. and John Springgate, Esq. before the District Court, and represented by retained counsel Fennemore Craig, P.C. in this appeal.

Dated this 26th day of January, 2024.

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NRAP 17 ROUTING STATEMENT

This case is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(7) because it is an appeal from a post-judgment order awarding attorney's fees in a civil case.

Dated this 26th day of January, 2024.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to NRAP 3A(b)(8), because this appeal arises from a post-judgment order in a civil case, awarding attorney fees. The order awarding attorney fees was entered on June 12, 2023, and Appellant filed his notice of appeal on July 11, 2023.

Dated this 26th day of January, 2024.

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STATEMENT OF THE ISSUES

1. Whether the District Court erred in awarding attorney fees to Respondent/Cross-Appellant Lynda Hascheff ("Lynda") where:

   a. Appellant/Cross Respondent Pierre Hascheff ("Pierre") was the prevailing party, not Lynda; and

   b. the fees sought by and awarded to Lynda were unreasonable?

2. Whether the District Court erred in interpreting the indemnification provision of the parties' agreement to exclude certain legal fees incurred by Pierre in defense of a legal malpractice action?

STATEMENT OF THE CASE

This is the second appeal between Pierre and Lynda concerning the scope of the indemnification provision contained in their marital settlement agreement (the "MSA"). Under the MSA, Lynda must indemnify Pierre, an attorney, for half of any fees he incurs in defense of a malpractice claim arising from his representation of a client during their marriage.

In the first appeal, this Court reversed the district court's finding that Lynda was not required to indemnify Pierre for ***any*** of the fees he incurred in defense of a malpractice claim filed against him in 2018 (the "Malpractice Action"). This Court rejected Lynda's argument that Pierre forfeited or otherwise waived his right to seek indemnity under the MSA by failing to promptly notify Lynda of the Malpractice

Action because this Court found that the MSA did not include any such notification requirements. Because the Malpractice Action was the product of related, collateral litigation between Pierre's former clients (the "Collateral Litigation"), this Court remanded this matter to the district court to determine what fees were incurred by Pierre in defense of the Malpractice Action.

Accepting Lynda's argument that the MSA was ambiguous, this Court expressly instructed the district court to resolve any ambiguity in the MSA as to what fees related to the Collateral Litigation were "in defense" of the Malpractice Action. This Court also instructed the district court to determine who was a prevailing party for purposes of the parties' contractual fee provision in the MSA.

On remand, the district court rejected Lynda's argument that most she was obligated to indemnify Pierre was $147.50, one half of $295.00 she claimed was the only amount incurred in defense of the Malpractice Action. Instead, it found that Lynda must pay to Pierre $1,147.00, one half of $2,295.00. In reaching this amount, the district court declined to find that fees incurred in defense of Pierre's trial testimony in the Collateral Action were in defense of the Malpractice Action, despite the fact that Pierre testified after the Malpractice Action was filed and on matters which are the directly related to and subject of various claims against him in the Malpractice Action.

The district court also refused to permit Pierre to brief the issue of whether he, as opposed to Lynda, was a prevailing party. Lynda repeatedly argued that she was a prevailing party because she had a technical de minimis victory on her declaratory relief motion, i.e., in that she did obtain declaratory relief. It was, not, however, the declaratory relief Lynda wanted. Lynda never disputed she was contractually obligated to indemnify Pierre for ***a*** malpractice claim under the MSA, but Lynda argued she was not obligated to indemnify Pierre for ***this*** Malpractice Action (including any corresponding adverse judgment). While Pierre's competing motion was not the one granted, Pierre successfully defeated Lynda's waiver and forfeiture argument underlying her motion.

Prior to the first appeal, the district court had found that neither Lynda nor Pierre were prevailing parties for purposes of an attorney fee award. And, in its order awarding fees, the district court found that Lynda had lost the appeal. But, despite Lynda having received a far worse result following the appeal, and despite Lynda losing every argument she raised, the district court found that Lynda was a prevailing party and awarded her fees in the $46,675.00. This Court is now asked to determine in this appeal what changed between the district court's first order finding that Lynda was not a prevailing party despite having initially achieved her desired outcome, to the district court's second order, in which Lynda was found to

have "prevailed" despite having lost all of her arguments, losing the relief she sought, and Pierre having obtained the relief he sought.

STATEMENT OF THE FACTS

I. THE MSA

During their divorce, Lynda and Pierre agreed that Lynda would indemnify Pierre for half of any malpractice claim arising from legal representation he provided during the parties' marriage. 4 Appellant's Appendix ("AA") 828 ("In the event Husband is sued for malpractice, Wife agrees to indemnify Husband for one half (1/2) the costs of any defense and judgment."); *see also id.* (releasing all "interspousal obligations . . . except Wife's obligation to defend and indemnify Husband for any malpractice claims").

Relevant to this appeal is Paragraph 40 of the MSA, which 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 the 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, actin 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 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.

Id. (emphasis added).

Prior to divorce, Pierre's law practice was the sole source of community income, from which the community benefitted. 4 AA 785. In Paragraph 24 of the MSA, Lynda recognized that any unknown, future obligation arising from Pierre's income benefitting the community would be a joint community obligation for which she was jointly liable. 1 AA 194. And, in Paragraph 38, Lynda and Pierre released each other from all "interspousal obligations . . . except [Lynda's] obligation to defend and indemnify [Pierre] for any malpractice claims." *Id.* at 198.

Also relevant to this appeal is Paragraph 35 of the MSA, the parties' contractual fee provision, which provides:

> 35.1 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.
>
> 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 10 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.

*Id.*197.[1]

[1] The district court previously found that both parties complied with MSA ¶ 35.2, and this finding was affirmed by this Court in the first appeal.

II. THE COLLATERAL LITIGATION AND MALPRACTICE ACTION

Pierre was a practicing attorney until January 2013. In 2018, litigation arose concerning the estate and assets of one of Pierre's former clients, Samuel Jaksick. Specifically, Samuel Jaksick's daughter, Wendy Jaksick ("Wendy") sued her brother Todd Jaksick ("Todd"), who, both during and after Samuel's lifetime, was the trustee of certain trusts and a manager of certain entities that were drafted and/or created by Pierre during his time in private practice. 1 AA 41-46.

Because Wendy's allegations made it apparent that Pierre may be sued for malpractice, Pierre retained independent counsel after he was named as a witness in the Collateral Litigation. Pierre was correct, as Todd filed the Malpractice Action against Pierre on December 26, 2018. *Id.* at 237-242. Specifically, Todd alleges that Pierre breached his duty to Todd by: (1) drafting an indemnification agreement under which Todd could be personally indemnified by his father's trust of which both Stan and Wendy were beneficiaries, and of which Todd was a trustee, without informing Todd of the inherent conflict of interest; and (2) negligently advising Todd in the creation, management and investment of certain assets and entities, which had resulted in the claims against Todd by Wendy. *Id.* This litigation was stayed pending the outcome of the Collateral Litigation. After Todd filed the Malpractice Action, Pierre extensively testified as a witness at trial in the Collateral Litigation in February 2019. 4 AA 895-900.

III. THE FIRST APPEAL

A. Lynda Argued She Did Not Have to Indemnify Pierre Any of the Fees He Incurred in Defense of the Malpractice Action.

In January 2020, Pierre notified Lynda of the Collateral Litigation and Malpractice Action, and requested that she indemnify him for half of his incurred fees and costs under MSA ¶ 40. 2 AA 284. Lynda conceded she was generally contractually obligated to pay Pierre, but argued that she did not have to indemnify Pierre for the Malpractice Action because of his delay in notifying her, which she claimed was a breach of various duties Pierre allegedly owed to her under the MSA. 1 AA 159-172. Lynda further refused to pay Pierre unless he agreed to provide her information protected by the attorney-client and/or common interest privilege. 1 AA 13-26.

After Pierre provided Lynda with all the information he could ethically disclose, as well as all of her requested documents, including redacted billing entries, within one day of her request, Lynda filed a motion for declaratory relief. *Id.* She specifically conceded that she was generally obligated to indemnify Pierre under MSA ¶ 40, but argued that she was not required to indemnify Pierre for ***any*** of the fees related to the Malpractice Action. *Id.* Lynda raised ten bases which she claimed absolved her of her contractual obligation due to Pierre's failure to provide prior notice: (1) laches, (2) collateral estoppel, (3) waiver, (4) breach of MSA ¶ 37, (5) secrecy, (6) lack of transparency, (7) selective enforcement of the MSA, (8) fraud,

(9) breach of the implied covenant of good faith and fair dealing, and (10) breach of fiduciary duty. *Id.*

Pierre filed a competing motion for an order to show cause why Lynda should not be held in contempt. 1 AA 103-117. He correctly argued that the MSA did not create a duty to notify Lynda, that he did not violate any implied covenant of good faith or fair dealing or breach a fiduciary duty, and that the full disclosure without redactions in the billing entries (which were limited) requested by Lynda to "verify" his claims was all protected by the attorney-client and/or common interest privilege. *Id.*

At the hearing, Lynda again conceded that she was generally obligated to reimburse Pierre under MSA ¶ 40. 3 AA 526 ("So it's our position that it is true that my client [Lynda] has an obligation to indemnify Pierre Hascheff for the expenses he incurred in defense of the malpractice action."). Lynda explained she did not need clarification on the scope of MSA ¶ 40, but was instead seeking declaratory relief that Lynda was not obligated to pay Pierre ***any*** fees related to the Malpractice Action because she had "no evidence that any of the fees for which he seeks were in defense of that action." *See id.* Lynda further argued that Pierre's failure to promptly notify Lynda and to provide Lynda with her requested unredacted billing entries waived any right Pierre had to seek payment of the fees under MSA ¶ 40. *Id.* at 523-526.

The district court granted Lynda's request for declaratory relief, and found that Lynda was not obligated to pay Pierre for any fees because (1) Pierre's request was barred by laches, and (2) Pierre had not provided sufficient proof that the fees were incurred in defense of the Malpractice Action. 3 AA 622-636. Notably, however, the district court concluded that neither Pierre nor Lynda was a "prevailing party" entitled to fees under the MSA. *Id.* at 635.

B. Lynda Loses the First Appeal.

Pierre appealed the district court's order in Appeal No. 82626, and Lynda cross-appealed the denial of her request for attorney fees. *See* Appeal No. 82626; *see also* 3 AA 637 – 4 AA 784. On appeal, Lynda continued to concede that she was generally obligated to indemnify Pierre under MSA ¶ 40 for the defense of ***a*** malpractice action, but argued that she was ***not*** required to pay Pierre ***any*** fees incurred in defense of the ***this*** Malpractice Action (or any corresponding adverse judgment) because (1) Pierre did not demonstrate that any of the fees incurred fell within MSA ¶ 40, (2) Pierre was dilatory in his demand and violated a duty to notify, (3) Lynda was not required to compensate Pierre for fees incurred in his capacity as a witness, and (4) Pierre's request was barred by various equitable remedies (i.e. laches). *See* 3 AA 693 – 4 AA 784; Respondent/Cross-Appellant's Answering Brief on Appeal and Opening Brief on Cross-Appeal (Appeal No. 82626), at pp. 2, 4, 7-8, 11, 35, 13, 15-16, 18-21, 22-24, 29-30, 34-44; *see also* Reply Brief on Cross-Appeal

(Appeal No. 82626) at pp. 1-2, 4-5, 8-10. Lynda then argued that she should have been awarded attorney fees because she was the prevailing party below, in light of the district court's finding that Lynda owed Pierre nothing. *Id.*

Noting that Lynda did not need clarification as to the scope of MSA ¶ 40 in general, this Court addressed Lynda's argument that "she should not be required to reimburse any fees and costs in the malpractice case as [Pierre] had failed to timely notify her of it," as Lynda's motion for declaratory relief was solely based upon this argument. 4 AA 788-789. This Court rejected Lynda's argument and found that "Pierre was not required to notify Lynda as to the existence of the pending malpractice action against him before seeking indemnification." *Id.* at 794. This Court further found that equitable remedies did not apply to this contractual indemnification issue. *Id*. Thus, it reversed the district court's order applying laches against Pierre's claim. *Id.* at 794-795.

This Court then interpreted MSA ¶ 40 as requiring the actual filing of a malpractice lawsuit against Pierre as a condition precedent before the indemnity obligation could arise. *Id.* at 793. It remanded this matter to the district court to determine what fees incurred after the filing of the Malpractice Action fell within the scope of MSA ¶ 40. *Id.* at 795-796. Recognizing that there may be ambiguity in MSA ¶ 40 as to what fees may be considered in "defense" of the Malpractice

Action, this Court expressly instructed the district court to issue findings on the question of ambiguity. *Id.*

Finally, this Court ordered the district court to make a determination on remand as to "which party is the prevailing party, and then consider an award of reasonable attorney fees and costs in accordance with MSA 35.1." *Id.*

IV. PROCEEDINGS ON REMAND

A. The District Court Makes a Determination on Ambiguity, as Ordered by This Court.

On remand, Pierre noted that this Court's ruling resulted in ambiguity as to whether fees incurred in defense of Pierre's trial testimony in the Collateral Litigation fell within MSA ¶ 40. 4 AA 895-900. Prior to the appeal, the district court and Pierre both interpreted MSA ¶ 40 as covering all fees incurred by Pierre for both the Collateral Litigation and the Malpractice Action. 3 AA 632. This Court's holding that no fees incurred prior to the filing of the Malpractice Action were recoverable left open the question of what, if any, fees incurred in defense of the Collateral Litigation were also in defense of the Malpractice Action after it was filed. 4 AA 795.

In addition to being ordered to consider this question by this Court, the district court found that there was "good cause" to have Pierre and Lynda brief the ambiguity in MSA ¶ 40. *Id.* at 856.

Pursuant to the district court's order approving the parties' confidentiality agreement, Pierre filed unredacted billing invoices subject to a confidentiality agreement. *Id.* at 858-894. These invoices showed a total of $12,973.10 in fees and costs incurred by Pierre. *Id.* Of that amount, $9,373.10 were incurred after the Malpractice Action was filed, of which Pierre's malpractice carrier paid $2,500. *Id.*

In Pierre's brief on the ambiguity in MSA ¶ 40, Pierre argued that fees incurred in defense of his testimony in the Collateral Litigation trial fell within MSA ¶ 40. *Id.* at 895-900. This testimony occurred after Todd filed the Malpractice Action against Pierre, and concerned many of Todd's allegations. *Id.* at 896-897. Because it was a sworn statement under oath, this testimony would be admissible against Pierre in the Malpractice Action. *Id.*

As an alternative argument, Pierre reduced his sought fees to those entries that specifically referenced the Malpractice Action. *Id.* These totaled $3,895.00. *Id.* Relevant to this appeal, were two specific time entries for February 21, 2019 and February 22, 2019. *Id.* at 873-874. The February 21, 2019 entry was for $700.00 and stated "Plan and prepare Pierre Hascheff trial testimony in lawsuit between beneficiaries; review deposition transcript; review complaint; review correspondence." *Id.* at 873. The February 22, 2019 entry was for $775.00 and stated "Review/analyze expert disclosures in underlying trust case in preparation for client's trial testimony." *Id.* at 874.

Lynda, of course, disagreed. *Id.* at 901-905. She once again argued that she was not required to pay ***any*** of the fees because, according to Lynda, all of the incurred fees related to the Collateral Litigation and not the Malpractice Action. *Id.* Lynda argued that Pierre could only recover $295.00, which means that the most Lynda would have to pay is $147.50. *Id.* at 903-904. Lynda's rationale was that the Malpractice Action was stayed and, therefore, the only fees Lynda had to pay were those related to the physical staying of that lawsuit. *See id.*

Looking at the fees incurred by Pierre after the date the Malpractice Action was filed, the district court provided an itemized list of the fees it found fell within MSA ¶ 40. *Id.* at 930-939. Excluded from this list were the February 21 and 22 entries. *Id.* at 932-933. Had the district court included the two February entries, the total amount ultimately awarded would have been more than the offer of judgment Pierre had previously served on Lynda. 5 AA 1036.

The district court rejected Lynda's argument that this amount only totaled $295, and instead found that $2,295.00 of Pierre's fees fell within MSA ¶ 40.[2] 4 AA 933. Thus, Lynda was ordered to reimburse Pierre $1,147.50. *Id.* at 937.

B. The Prevailing Party Confusion.

On remand, Lynda repeatedly argued that she was a prevailing party because she sought declaratory relief, and she got declaratory relief. *Id.* at 805-808; 920-

[2] This number is $1,475.00 less than what Pierre requested.

924. But, ***the declaratory relief Lynda obtained was not the declaratory relief she sought***. *See id.* at 933. To the contrary, it was the exact opposite. Lynda, who had consistently conceded she had a general obligation to indemnify Pierre, sought a declaratory judgment that she was ***not*** obligated to pay Pierre for the Malpractice Action. 1 AA 133-134. She lost that argument. 4 AA 785-796.

Concerned that Lynda's position that a *de minimis* victory could convey prevailing party status was incorrect, Pierre sought leave to brief the issue. *Id.* at 912-915. Pierre also intended to address NRS 18.010(2)(a), which conveyed prevailing party status on Pierre because he obtained a judgment for less than $20,000. Thus, even if Lynda was the prevailing party under the MSA, Pierre's fees should be used as a set off against her fees under NRS 18.010(2)(a). Unfortunately, the district court declined to permit additional briefing on this issue. *Id.* at 925-929.

The district court then, quite confusingly, found that Lynda was the prevailing party. *Id.* at 935. It reasoned that because it "granted" Lynda's declaratory relief, and denied Pierre's competing motion, Pierre had "lost." *Id.* at 934-935. This rationale overlooked that Lynda did not obtain the declaratory relief she sought, and that Pierre, whose motion may not have been granted, nevertheless achieved the purpose for which he filed it – to enforce the MSA against Lynda such that she had to indemnify Pierre. 1 AA 103-118.

Even more confusingly, the district court expressly declined to award 1112. And, it found that Pierre had unnecessarily increased the costs of litigation by briefing the ambiguity issue. 5 AA 113. This finding overlooked that ***this Court*** expressly ordered the district court to address ambiguity on remand, and that the district court had previously found that a request to brief ambiguity was supported by "good cause." *See* 4 AA 856. The district court ordered Lynda to file a *Wilfong* affidavit. *Id.* at 937-938.

C. The District Court Awards an Unreasonable Amount of Fees to Lynda.

Lynda initially sought $83,245 in fees. *Id.* at 940-1019. Pierre objected to Lynda's requested fees because the fees (1) included $30,000 from the prior divorce which were unrelated to this dispute, (2) seemed unreasonable in amount given the amount in controversy, (3) were for work performed with Lynda's sister Lucy, an unlicensed attorney who expressly represented she was not representing Lynda in this matter and/or acting as her attorney, and (4) were for other work unrelated to this litigation. 5 AA 1020-1091.

As noted above, the district court declined to award Lynda fees incurred in her prior appeal because she did not prevail on appeal. *Id.* at 1112. It declined to

otherwise reduce the fees sought by Lynda,[3] however, and awarded her $46,675. *Id.* at 1116. This appeal follows.

SUMMARY OF THE ARGUMENT

The district court erred in determining that Lynda was a prevailing party entitled to an award of attorney fees. Under Nevada law, a "prevailing party" is one who succeeds on a significant issue that achieves some of the benefit of bringing suit. *Hornwood v. Smith's Food King No. 1,* 105 Nev. 188, 192, 772 P.2d 1284, 1287 (1989) (quoting *Women's Fed. Sav. & Loan Ass'n v. Nev. Nat'l Bank,* 623 F. Supp. 469, 470 (D. Nev. 1985)). The issue in this appeal is what constitutes sufficient success on a significant issue so as to convey prevailing party status.

Sufficient success occurs when a party obtains actual relief on the merits of their claim that materially alters the relationship between the parties by modifying the behavior of the other party in a manner that materially benefits the party seeking fees. *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992). This requires more than a technical, de minimis victory. *Texas State Teachers Association v. Garland Independent Sch. Dist.*, 489 U.S. 782, 792 (1989).

Here, Pierre, not Lynda, is the prevailing party who obtained a judgment that resulted in a material alteration in the parties' relationship that benefitted Pierre.

[3] Lynda voluntarily withdrew her request for $30,000 incurred in the prior divorce action and these fees were not awarded.

Lynda sought declaratory relief that she was ***not*** required to indemnify Pierre for the Malpractice Action. Pierre successfully opposed Lynda's position, such that she had to indemnify Pierre for some, if not all, of the Malpractice Action fees. The fact that Lynda obtained declaratory relief was merely a technical de minimis victory because Lynda did not obtain the declaratory relief that she sought in bringing her motion, i.e., that she was not obligated to indemnify Pierre. Accordingly, the district court erred in finding that Lynda, who lost on all of her major theories, was the prevailing party.

Should this Court disagree, the district court erred in refusing to recognize Pierre's statutory right to attorney fees under NRS 18.010(2)(a) as a set-off against the fees awarded Lynda. And, the district court abused its discretion in awarding an unreasonable amount of fees to Lynda for (1) unsuccessful legal theories, (2) excessive fees, (3) time billed to Lynda's sister Lucy, an unlicensed attorney who does not represent Lynda, and (4) for advice on matters not at issue in this litigation.

The district court also erred in interpreting MSA ¶ 40 to exclude fees incurred by Pierre that were in defense of the Malpractice Action, but concerned testimony in the Collateral Litigation. Specifically, Pierre testified as a witness at the trial in the Collateral Litigation after the Malpractice Action was filed and on topics which were the subject of the Malpractice Action. Because Pierre's trial testimony will be admissible against him in the Malpractice Action, these fees were incurred in

"defense" of the Malpractice Action. MSA ¶ 40 does not contain a bright-line limitation that restricts indemnification to the docketed Malpractice Action, and interposing such a limitation is an impermissible red-line of the parties' contract.

Should this Court disagree, the district court erred in concluding two fee entries from February 2019 were not in defense of the Malpractice Action, and should be additionally reversed on this basis.

ARGUMENT

I. THE DISTRICT COURT ERRED IN AWARDING ATTORNEY FEES TO LYNDA, RATHER THAN TO PIERRE.

The district court erred in its order awarding fees because Pierre, not Lynda, is the "prevailing party." This Court reviews a district court's determination of whether a litigant is a prevailing party entitled to attorney fees de novo. *145 E. Harmon II Tr. v. Residences at MGM Grand – Tower A. Owners' Ass'n,* 136 Nev. 115, 118, 460 P.3d 455, 457 (2020). Because the definition of "prevailing party" requires Lynda to have obtained a declaratory judgment that modified Pierre's behavior for Lynda's benefit, Pierre, not Lynda is the prevailing party as it was Pierre who benefitted from the district court's order. The district court further erred when it declined to recognize that Pierre's entitlement to fees under NRS 18.010(2)(a) should have operated as a set-off to Lynda's fees.

A. A "Prevailing Party" Must Obtain a Judgment that Alters the Other Party's Behavior to Their Benefit, not Their Detriment.

The MSA does not define the phrase "prevailing party." *See* 1 AA 187-204. When a contractual term is undefined, this Court applies the plain meaning of the term. *Love v. Love*, 114 Nev. 572, 580, 959 P.2d 523, 529 (1998).[4] The plain meaning of "prevailing party for attorney's fee purposes" is the party who "'succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing the suit.'" *Hornwood v. Smith's Food King No. 1,* 105 Nev. 188, 192, 772 P.2d 1284, 1287 (1989) (quoting *Women's Fed. Sav. & Loan Ass'n v. Nev. Nat'l Bank,* 623 F. Supp. 469, 470 (D. Nev. 1985)).

The specific issue in this appeal, which this Court has not yet addressed, is what constitutes sufficient "success on a significant issue" as to convey prevailing party status.[5] However, this exact issue is explicitly addressed in the body of federal case law from which this Court adopted its definition of prevailing party. This Court's definition of "prevailing party" comes from *Women's Federal Savings &*

[4] This Court's jurisprudence defining "prevailing party" under NRS 18.010(2) governs the determination of who constitutes a prevailing party in this case. *See, e.g., McKnight v. 12th & Div., Props. LLC,* 709 F. Supp. 653, 655 (M.D. Tenn. 2010) (holding that contractual provisions awarding fees which use, but do not define, the phrase "prevailing party" are interpreted according to case law defining that statutory term); *Am. Power Prod., Inc. v. CSK Auto, Inc.*, 396 P.3d 600, 604 (Ariz. 2017) (holding that a contract which does not define "prevailing party" will be interpreted according the common law definition of the statutory term); *Santisas v. Goodin*, 951 P.2d 399 (1998) (applying California's statutory definition of "prevailing party" to the interpretation of that undefined term in a contract).

[5] A published opinion on this issue would be beneficial to practitioners in this state, as prevailing party status is frequently litigated.

Loan Association v. Nevada National Bank, 623 F. Supp. 469 (1985). *See Hornwood,* 105 Nev. 192 at 772 P.2d at 1287 (quoting *Women's Fed. Sav. & Loan Ass'n,* 623 F. Supp. at 470); *see also Valley Elec. Ass'n v. Overfield,* 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005) (same). The court in *Women's Federal Savings & Loan Association* adopted its definition from the United States Supreme Court's opinion in *Hensley v. Eckerhart,* 461 U.S. 424 (1983). *See Women's Fed. Sav. & Loan Ass'n,* 624 F. Supp. at 470 (quoting *Hensley,* 461 U.S. at 433); *see also Hensley,* 461 at 433 (holding that the a prevailing is the party who "succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.").

Hensley and its progeny clarify that success on a significant issue is only sufficient to convey prevailing party status when the "success" the fee applicant obtains results in a material alteration in the legal status between itself and the opposing party. After *Hensley,* the Supreme Court rejected the argument that a technical victory on the merits of a declaratory relief was sufficient to convey prevailing party status**.** *Rhodes v. Stewart,* 488 U.S. 1, 3-4 (1988). Because the declaratory relief awarded did not, in any manner, affect the behavior of the defendant towards the plaintiff, the Supreme Court reasoned that the plaintiff was not a prevailing party because the plaintiff did not obtain a judgment that "affects the behavior of the defendant towards the plaintiff." *Id.*

Building upon *Rhodes,* the Supreme Court further explained that, "at a minimum, to be considered a prevailing party . . . the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Texas State Teachers Association v. Garland Independent Sch. Dist.,* 489 U.S. 782, 792 (1989). Otherwise, "a technical victory may be so insignificant . . . as to be insufficient to support prevailing party status." *Id.*

Then, in *Farrar v. Hobby*, 506 U.S. 103 (1992), the Supreme Court further clarified what it meant by "success on a significant issue:"

> Whatever relief the plaintiffs secures ***must directly benefit him*** at the time of the judgment or settlement. Otherwise the judgment or settlement cannot be said to affect the behavior of the defendant towards to the plaintiff. . . .In short, a plaintiff 'prevails' when actual relief on the merits of his claim ***materially alters*** the legal relationship between the parties by modifying the defendant's behavior in a way that ***directly benefits the plaintiff***."

Id. at 111-12 (emphasis added) (internal citations omitted).

This Court should adopt the Supreme Court's guidance as to what constitutes success on a significant issue that will convey prevailing party status, as *Hensley*, and its progeny, are the genesis for this Court's definition of prevailing party. *See Hornwood v. Smith's Food King No. 1*, 105 Nev. 188, 192, 772 P.2d 1284, 1287 (1989) (citing to *Hensley*).[6]

[6] *See also Sack v. Tomlin,* 110 Nev. 204, 214, 871 P.2d 298, 305 (1994) (citing to *Hensley*); *LVMPD v. Blackjack Bonding,* 131 Nev. 80, 90, 343 P.3d 608, 615 (Nev. 2015). This Court has also cited *Hensley's* progeny with approval. *See Univ. of Nevada v. Tarkanian*, 110 Nev. 581, 589, 879 P.2d 1180, 1185 (1994) (citing to *Farrar v. Hobby,* 506 U.S. 103 (1992)).

B. Pierre, Not Lynda, is the Prevailing Party.

Pierre, not Lynda, is the party who obtained a judgment that resulted in a material alteration in the parties' relationship that benefitted Pierre. Lynda sought declaratory relief that she was ***not*** required to indemnify Pierre for the Malpractice Action. 1 AA 13-67; 1 A 133-147; 2 AA 486 – 3 AA 505; 3 AA 693 – 4 AA 766. Pierre successfully opposed Lynda's position, and brought a competing motion whose purpose was to enforce the MSA against Lynda such that she had to indemnify Pierre for some, if not all, of the Malpractice Action fees. 1 AA 68-132; *see also* a AA 454-485.

The fact that Pierre's motion was not granted does not negate his prevailing party status. A "prevailing party" can be the defending party. *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005) (holding that the term "prevailing party" encompasses "defendants"). Nevada has long recognized that a party does not need to prevail on an affirmative claim, but instead may be a prevailing party because they successfully defended against a claim by a plaintiff. *Nev. N. Ry. Co. v. Ninth Jud. Dist. Ct.,* 51 Nev. 201, 205, 273 P. 177, 178 (1929). Here, Pierre successfully defeated Lynda's position that she was not required to pay Pierre anything because he allegedly waived his rights and was collaterally estopped from seeking indemnity.

Similarly, Pierre's prevailing party status is not negated by the fact that the district court did not order Lynda to indemnify Pierre for every fee incurred. A prevailing party does not need to succeed on every issue. *MB Am. Inc. v. Alaska Pac. Leasing*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (Nev. 2016); *see also Kenyon-Noble Lumber Co. v. Dependent Foundations, Inc.*, 432 P.3d 133, 139 (Mont. 2018) ("In a situation involving a contractual award of fees, when a defendant counterclaims and succeeds in having the plaintiff's claims totally denied but recovers only a portion of the relief demanded in the counterclaims, the defendant is entitled to attorney fees and costs."). A party can prevail even if the damages they are awarded are "significantly less" than the damages they sought. *Golightly & Vannah, PLLC v. TJ Allen, LLC,* 132 Nev. 416, 422, 373 P.3d 103, 107 (Nev. 2016). The purpose of Pierre's defense against Lynda's motion, and Pierre's competing motion, was to enforce the MSA against Lynda. 1 AA 68-132. He succeeded on that issue.

In contrast, Lynda's victory was a *de minimis* technical victory of the type rejected by the Supreme Court in both *Rhodes* and *Texas State Teachers Association. See Rhodes*, 488 U.S. at 3-4; *Texas State Teachers Association*, 489 U.S. 782 at 792. Lynda never disputed that she was contractually obligated to indemnify Pierre for ***a*** malpractice action, and Lynda never argued that she did not understand the meaning of the MSA. *See* 1 AA 13-67. Lynda's actual argument was that, notwithstanding

this conceded contractual obligation, Lynda was not obligated to pay Pierre for ***this*** Malpractice Action. *Id.*; 1 AA 133-158; 2 AA 486 – 3 AA 505; 3 AA 693 – 4 AA 784. Her argument was based on seven notice-related claims (laches, collateral estoppel, waiver, breach of Section 37, fraud, breach of the implied covenant of good faith, and breach of fiduciary duty) and three claims asserting that Pierre had failed to demonstrate the claimed fees were actually incurred in defense of the Malpractice Action (secrecy, transparency, and selective enforcement). *See id.* Lynda lost on these bases on appeal4 AA 785-796, and the district court recognized this fact. 5 AA 1116.

The fact that Lynda obtained declaratory relief was merely a technical de minimis victory because Lynda did not obtain the declaratory relief that she sought in bringing her motion, i.e., that she was not obligated to indemnify Pierre. To the contrary, Lynda was not only ordered to indemnify Pierre for the Malpractice Action, but was also ordered to pay fees she argued were not properly incurred in defense of the Malpractice Action. *See* 4 AA 902-903 (arguing only $295 was incurred in defense of the Malpractice Action); 4 AA 932-933 (district court's finding that $2,295 was incurred in defense of the Malpractice Action). It was Pierre, not Lynda, who beneficially altered the parties' legal relationship as Lynda went from refusing to pay Pierre anything to having to pay him something. Accordingly,

Pierre is the prevailing party under the MSA and this Court should reverse the district court's order.

C. Alternatively, Pierre's Fees are a Set-Off to Lynda's.

The district court further erred in not recognizing that Pierre's statutory entitlement to fees should be an offset against any award to Lynda under contract. When a party recovers a judgment for less than $20,000, as Pierre did here, they are statutorily entitled to an award of their attorney fees and costs. NRS 18.010(2)(a).

As other jurisdictions recognize, there may be multiple prevailing parties when the basis for fees arise in separate arenas. *See, e.g., Frog Creek Partners, LLC v. Vance Brown, Inc.*, 141 Cal. Rptr. 3d 834, 856 (Ct. App. 2012) ("Where multiple contracts are involved in one lawsuit, and each contract provides an independent entitlement to fees, it is necessary to determine the prevailing party under each contract."). Thus, even if this Court disagrees and finds that Lynda is a prevailing party under the parties' contract, Pierre was also a prevailing party pursuant to statute, and his fee should operate as a set-off to any award to Lynda.

D. The District Court Abused its Discretion by Awarding an Unreasonable Amount of Fees.

Should this Court disagree, it should still reverse the district court's order because the district court abused its discretion in awarding Lynda attorney fees in an unreasonable amount. *Berkson v. LePome*, 126 Nev. 492, 504, 245 P.3d 560, 568 (2010) (the amount of fees awarded is reviewed for an abuse of discretion). Being

declared a prevailing party only "brings the plaintiff across the statutory threshold," as the party still must demonstrate that their requested fees are reasonable. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *see also Brunzell v. Golden Gate Nat'l Bank,* 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) (holding that fees must be "reasonable"); MSA 35.1 (same). In order to be reasonable, the fees must be of the type that are properly billed to client; otherwise, "[h]ours that are not properly billed to one's client also are not properly billed to one's adversary." *Hensley*, 461 U.S. at 433-34.

First, Lynda should not have been awarded fees on unsuccessful legal theories. This Court has previously recognized that legal fees are not appropriately awarded for unsuccessful legal theories or claims. *Tarkanian v. Nat'l Collegiate Athletic Ass'n,* 103 Nev. 331, 342, 741 P.2d 1345, 1352 (1987) (reversed on other grounds). In *Tarkanian,* the plaintiff obtained an initial judgment in its favor which was then reversed on appeal. *Id.* at 342. The plaintiff again prevailed on remand, but this Court held that the plaintiff could not recover fees for the initial trial which was reversed on appeal and unsuccessful. *Id.* This Court affirmed its decision in *Tarkanian* in *Univ. of Nev. v. Tarkanian*, 110 Nev. 581, 879 P.2d 1180 (1994), in which this Court again approved of the removal of the fees incurred by the plaintiff for its unsuccessful first trial from the amount awarded. *Id.* at 596, 879 P.2d at 1189.

This Court's decisions in *Tarkanian* are consistent with *Hensley,* in which the Supreme Court similarly held that time spent on unsuccessful legal theories should

not be awarded for legal fees. 461 U.S. at 435, 440. As the Supreme Court explained in *Hensley*, "the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee," because "work on an unsuccessful claim cannot be deemed to have been expended in pursuit of the ultimate result achieved." *Id.* at 435, 440. Where a party "has achieved only limited or partial success, the product of hours reasonably expended on the litigation as a whole times . . . may be an excessive amount." *Id.* at 436.

The district court correctly recognized this when it declined to award Lynda her fees for her unsuccessful appeal. 5 AA 1116. But, it did not separate out the fees for time spent litigating Lynda's unsuccessful theories in district court related to laches, notice, secrecy, transparency, selective enforcement, collateral estoppel, waiver, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, and failure to demonstrate that the fees incurred were in defense of the Malpractice Action. *Id.* at 1105-1117.

Moreover, the amount of fees in relation to the amount at issue for Lynda is not reasonable. As this Court has recognized, the district court should consider "the number of hours reasonably spent on the case by a reasonable hourly rate." *Herbst v. Humana Health Ins. Of Nev.*, 105 Nev. 586, 590, 781 P.2d 762, 764 (1989). Here, Lynda's total liability wound up being approximately $1,147.50 dollars. 4 AA 932-933. Yet, she amassed nearly $50,000 in attorney fees because she (1) refused to

recognize the existence of attorney-client and/or common interest privileges, (2) refused to enter into Pierre's offered confidentiality agreements (presumably so she should continue to argue Pierre was being "secretive" and not "transparent"), (3) she refused an offer of judgment which wound up being almost exactly spot on, and (4) refused to mediate this dispute. 4 AA 801-804; 5 AA 1029-1031, 1036-1037. These hours are not hours "reasonably" spent on this case.

Second, the district court should have discounted the fees awarded for Lynda being billed for her counsel's communications with Lynda's sister, Lucy Mason. These amounted to approximately $32,785 in fees of the total approximate $53,000. 5 AA 1042. Lucy Mason expressly disavowed that she was representing Lynda ("I am helping Lynda as her sister, not as an attorney."). These amounts were not properly billed to Lynda, and certainly should not be billed to Pierre.

Finally, the district court awarded fees to Lynda for advice given to her concerning alimony. 5 AA 1029-1031. Alimony was not an issue in this litigation, and Pierre should have to pay for such advice. Therefore, the district court abused its discretion in awarding an unreasonable amount of fees.

II. THE DISTRICT COURT ERRED IN DETERMINING THAT CERTAIN OF PIERRE'S FEES ARE NOT "IN DEFENSE" OF MALPRACTICE ACTION

A. Fees Incurred In Defense of Pierre's Trial Testimony in the Collateral Litigation are "in defense" of the Malpractice Action.

The district court erred in interpreting MSA ¶ 40 to exclude certain fees related to the defense of the Malpractice Action. Contract interpretation is a question of law that this Court reviews de novo. *Galardi v. Naples Polaris, LLC,* 129 Nev. 306, 309, 301 P.3d 364, 366 (2013). When examining a contract, "[the] court should ascertain the intention of the parties from the language employed as applied to the subject matter in view of the surrounding circumstances." *Mohr Park Manor v. Mohr,* 83 Nev. 107, 111, 424 P.2d 101, 105 (1967). "An interpretation which results in a fair and reasonable contract is preferable to one that results in a harsh and unreasonable contract." *Dickenson v. State, Dep't of Wildlife*, 110 Nev. 934, 937, 877 P.2d 1059, 1061 (1994).

Here, the district court interpreted MSA ¶ 40 as only applying to fees incurred in the actual, docketed Malpractice Action. 4 AA 183-184. It based its determination on language in this Court's prior order which stated that Pierre was not entitled to seek fees incurred in the Collateral Action when he had not yet been sued for malpractice. *See id.; see also* 4 AA 785-796 But, this Court went on to explain in its order that this determination was not a bright-line bar, and expressly instructed the district court to ascertain any ambiguity as to "which fees and costs are covered by the provision." *Id.* at 795-796.

Reading a limitation into MSA ¶ 40 that no fees incurred in the Collateral Litigation are recoverable, even if those fees are also in defense of the Malpractice

Action, violates the rules of contractual construction. Indeed, "the court should not revise a contract under the guise of construing it," and it certainly cannot "interpolate in a contract what the contract does not contain." *Traffic Control Servs., Inc. v. United Rentals, NW., Inc.*, 120 Nev. 168, 175-76, 87 P.3d 1054, 1059 (2004). MSA ¶ 40 does not contain any express limitation in its language, but instead states that Lynda must indemnify Pierre for any fees incurred in "defense" of a malpractice action.

An ambiguity in MSA ¶ 40 arises in the situation faced in this appeal, where Pierre was previously sued for malpractice, but testified in the Collateral Action on topics upon which he was sued in the Malpractice Action. Pierre's trial testimony in the Collateral Action is both relevant and admissible against him in the Malpractice Action. *See* NRS 51.035(3)(a) (prior testimony is admissible against a party).

Finding that attorney time incurred in defense of this testimony is not "in defense" of the Malpractice Action results in a harsh and unreasonable contract that does not benefit either Pierre or Lynda. When interpreting contracts, "an interpretation which results in a fair and reasonable contract is preferable to one that results in a harsh and unreasonable contract." *Shelton v. Shelton*, 119 Nev. 492, 497, 78 P.3d 507, 510 (2003) (internal quotations omitted). Because this testimony is admissible in the Malpractice Action, and concerns topics on which Pierre was sued

in the Malpractice Action, the suggestion that Pierre's counsel was not acting "in defense" of the Malpractice Action is simply inaccurate. Moreover, because a successful defense in the Malpractice Action limits Lynda's future liability for half of any judgment against Pierre, Pierre's interpretation also benefits Lynda.

When the rest of the MSA is read in conjunction with Paragraph 40, it is clear that Pierre's interpretation is consistent with the parties' intent. *See Rd. & Hwy. Builders v. N. Nev. Rebar*, 128 Nev. 384, 390, 284 P.3d 377, 380-81 (2012) (holding that a court must read a contract "as a whole and avoid[] negating any contractual provision"). Because Lynda and Pierre were married at the time Pierre represented the Jaksicks, his liability for alleged malpractice from that representation is a community debt. *See* NRS 123.220 (defining community property); *see also Randano v. Turk*, 86 Nev. 123, 132, 466 p.2d 218, 223-24 (1970) (explaining that the community is liable for debts arising from conduct during marriage). Paragraph 24 specifically provides that unknown or omitted debts, claims or obligations "including the cost of defending against it" are "a joint community obligation." 1 AA 194. And, Paragraph 38 releases Lynda and Pierre from any other "interspousal obligations . . . except Wife's obligation to defend and indemnify Husband for any malpractice claims." *Id.* at 198. The MSA makes it clear in three separate paragraphs that Lynda is to indemnify Pierre for his defense of malpractice actions,

and none of these paragraphs limits the indemnity to fees that only specifically reference the actual, docketed Malpractice Action.

B. Alternatively, the District Court Erred in Declining to Award Fees for the February 2019 Entries.

Should this Court disagree, the district court erred in reducing the two February 2019 entries. Under the district court's holding, any time spent reviewing a complaint was compensable. 4 AA 932-933. Yet, these two entries were excluded.

This is not harmless error. When an error affects a party's rights "so that, but for the alleged error, a different result might have been reached," it is not harmless. *Khoury Seastrand*, 132 Nev. 520, 539, 377 P.3d 81, 94 (Nev. 2016) (internal quotations omitted); *see also* NRCP 61.

Here, Pierre served an offer of judgment on Lynda for $1,400. 5 AA 1036-1037. Had those two entries been included, Pierre would have been entitled to fees under NRCP 68, which would have operated as an additional bases to set off Lynda's fees.[7] Accordingly, this Court should reverse the district court's order.

[7] And, for the reasons stated above, these entries should be recoverable under MSA ¶ 40 regardless because they clearly relate to Pierre's trial testimony and directly reference the Malpractice Action.

CONCLUSION

For the reasons set forth above, this Court should reverse the district court's order and remand this matter for the district court to enter an award of fees in favor of Pierre, the actual prevailing party.

Dated this 26th day of January, 2024.

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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 Microsoft Word 16 in 14 font and Times New Roman type.

2. I further certify that this Brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the Writ exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 8,080 words.

3. Finally, 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)(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

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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 26th day of January, 2024.

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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 e-filing system:

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