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

AMENDED APPENDIX TO APPELLANT'S OPENING BRIEF

Volume 3 of 5 – Pages AA 0501-750

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I would note that under the insurance policy, there is a $10,000 retention. The limit of my client's obligation, therefore, would be $5,000, unless there is ultimately a judgment in excess of policy limits. And yet, Judge Hascheff's position would potentially result in my client having a legal obligation well in excess of that $5,000. That excess exposure, according to his position, is entirely within his control, based on decisions he unilaterally makes based on facts and legal advice that he insists he can keep secret from my client. Again, if you have authority in support of this extraordinary position, I am more than happy to review and evaluate that authority with my client.

In addition, Judge Hascheff deemed it necessary and prudent to have counsel in connection with his role as a percipient witness and with respect to legal advice about how best to approach the malpractice claim and litigation. He is well experienced lawyer. My client is not a lawyer and has no legal training. Her interests in obtaining legal advice are greater than, not less than Judge Hascheff's. Judge Hascheff's counsel has made it clear that his duty is to Judge Hascheff and that his discussions and the advice he gave Judge Hascheff is confidential. Thus, it is, necessarily, of no value to my client.

If she is responsible for the legal fees Judge Hascheff incurs to obtain such advice, he is, necessarily, equally responsible for fees that she incurs in connection with these matters. To date, she has incurred approximately $5,600 in fees simply to try to obtain the basic information we have repeatedly requested. Any claim Judge Hascheff has should, therefore, be offset by one-half of her fees.

Thus, while it appears entirely possible that we may have to litigate the parties' respective rights and obligations under the language of the MSA you drafted, we do not have to litigate the issue of the fees directly related to the malpractice action as opposed to the fees your client made a strategic decision to incur as a percipient witness in a collateral lawsuit.

If litigation becomes necessary, I will, among other things, request that the Court allow me to conduct discovery with respect to when Mr. Hascheff knew or should have known of the facts on which the underlying malpractice claim is premised. The complaint in the malpractice action reflects that Judge Hascheff's attorney client relationship with the plaintiffs ended before the MSA was signed and Decree entered. The potential conflict issues noted above necessarily existed at the time the work was done. The discovery, necessarily, will focus on whether Judge Hascheff knew or should have known there was a potential risk of a malpractice claim that he did not disclose contrary to paragraph 29 of the MSA.

Should Judge Hascheff decide that finding resolution makes more sense than litigation, I might suggest that his demands on my client be stayed until the malpractice action is finally resolved and the total sums in dispute can be identified. If he believes that litigation of the issue noted above are in his best interest, so be it, my client is prepared to defend herself and seek to recover the legal fees she has and will incur.

WOODBURN AND WEDGE

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. If you have any questions please do not hesitate to ask.

Sincerely,

Dictated but not read

Shawn B Meador, Esq.

Cc: L. Hascheff

F I L E D
Electronically
DV13-00656
2020-12-18 12:09:47 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8211811 : sacordag

EXHIBIT 3

WOODBURN AND WEDGE

June 11, 2020

VIA EMAIL & REGULAR USPS MAIL

todd@toddltorvinenlaw.com

Law Office of Todd L. Torvinen
Todd Torvinen, Esq.
232 Court Street
Reno, NV 89501

Re: Hascheff

Dear Mr. Torvinen:

To assure the accuracy of our motion, I need the following information and documents:

1. To know the current status of the malpractice action;
2. To know the current status of the underlying lawsuit among the Jacsick siblings;
3. A copy of the "multi-page subpoena" referenced in paragraph 2 of Mr. Alexander's declaration that allowed him to speculate that the subpoena could lead to a malpractice action, given that there could only be a meaningful risk of malpractice liability if documents in the file reflected that the work Judge Hascheff did or the advice he gave was in breach of his professional obligations and duties to his clients – if those documents showed he did nothing wrong there would be no basis for such an opinion;
4. To know what documents or other information sought by that subpoena were such that they clearly reflected that they were attempting to undermine "his estate plan and advice which could lead to a malpractice action" as set forth in paragraph 3 of Mr. Alexander's declaration;
5. What facts, circumstances, and written documents led Mr. Alexander to conclude that Judge Hascheff was at risk of a multi-million dollar claim against him;
6. Whether Mr. Alexander still opines that Judge Hascheff is at risk of a multi-million dollar judgement in excess of policy limits.

7. Copies of the written conflict waivers that Judge Hascheff obtained when he was, at least according to the malpractice complaint, simultaneously representing multiple clients with potentially conflicting interests.

Sincerely,

Dictated not read

Shawn B Meador, Esq.

F I L E D
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DV13-00656
2021-01-04 03:09:10 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8229137

EVIDENTIARY HEARING

DECEMBER 21, 2020
HONORABLE SANDRA A. UNSWORTH
DEPT. NO. 12
C. COVINGTON (Clerk)
C. EISENBERG SUNSHINE REPORTING (Recording)

Hearing conducted by Zoom video conferencing.

Plaintiff, Pierre Hascheff, was present represented by Todd L. Torvinen, Esq.
Defendant, Lynda Hascheff, was present represented by Shawn B. Meador, Esq.
Dept. 12 Court Law Clerk, J. Asmar, was present.

This hearing was held remotely because of the closure of the courthouse at 1 South Sierra Street, Reno, Washoe County, Nevada due to the National and Local emergency caused by COVID-19. The Court and all the participants appeared by simultaneous audiovisual transmission. The Court was physically located in Reno, Washoe County, Nevada, which was the site of the court session.

The Court noted there are two motions currently pending before the Court. Ms. Hascheff filed a motion related to a motion for clarification or a declaratory relief regarding the terms of the MSA or Decree filed June 16, 2020 and Judge Hascheff filed a motion for an order to show cause filed July 8, 2020.

Pltf. Exhibit A was marked and admitted with no objection.
Pltf. Exhibit B was marked and admitted over objection.
Pltf. Exhibits C-E were marked and admitted with no objection.
Pltf. Exhibit F was marked and admitted over objection.
Pltf. Exhibits G and H were marked and admitted with no objection.
Pltf. Exhibit I was marked and admitted.
Pltf. Exhibit J was marked and objected to.

Deft. Exhibits 1-16 were marked and admitted with no objections.

Pltf. Exhibits A-J were filed on December 17, 2020 as Notice of Exhibits.
Deft. Exhibits 1-16 were filed on December 17, 2020 as Lynda L. Hascheff Notice of Hearing Witnesses and Exhibits.

Counsel Torvinen stated he has no objections with Deft. Exhibits 1-15.

Counsel Meador stated the language of the indemnity agreement states that if Judge Hascheff is sued for malpractice, Ms. Hascheff is obligated to indemnify him of half the cost of any defense of that action. The issue is what expenses did Judge Hascheff incur in the defense of the malpractice action filed against him. Judge Hascheff states he received a 41 page subpoena that led him to believe he was going to be sued for malpractice. Deft. Exhibit 14 discussed. He cannot see anything that would lead him to believe that a malpractice threat was made against Judge Hascheff. Discussed the Jaksick lawsuit. A request for Judge Hascheff's file does not mean he was being sued. Deft. Exhibit 15 discussed. Ms. Hascheff is being asked to pay for expenses without knowing if it was for a defense for a malpractice action. Discussed the Jaksick lawsuit further. The language of the indemnity agreement states it has to be a defense of that action and not related to that action. They don't know if any of the bills for which Judge Hascheff seeks indemnity were actually in defense of the malpractice action filed by Todd Jaksick. Judge Hascheff insists Ms. Hascheff just rely on him and at the same time he says he has no fiduciary duty to her. If Ms. Hascheff is to rely on him he must have some corresponding duty to protect

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her. He does not protect her by keeping all of this a secret. He asked for information and was told they were not entitled to the information. Discussed Deft. Exhibit 8.

Court Reporter, C. Eisenberg, disclosed that Todd Alexander who was mentioned by Mr. Meador is her husband's partner. (Neither counsel had any objections).

Counsel Meador discussed Pltf. Exhibit E which is his Deft. Exhibit 7. Pltf. Exhibit D and Deft. Exhibit 4 are the same. Discussed bill which was redacted. He is entitled to know that the fees that his client is being asked to indemnify him are in defense of a malpractice action. Discussed the Jaksick lawsuit further. He doesn't know if Judge Hascheff continued practice in his private practice after he took the bench. The report that he referenced that put Todd Jaksick on notice was produced by someone he doesn't know in December 2018 but was not part of the file. It was a litigation document.

Counsel Torvinen stated he doesn't have an objection to Deft. Exhibit 16. Discussed Deft. Exhibit 16. Discussed Deft. Exhibit 2. Judge Hascheff tried to comply. Judge Hascheff was seeking indemnity for a total of $11,008 so $5504 by June 2 without filing a pleading. Both parties' interests were aligned. If you look back at the bills, this matter is related to the risk related to the underlying matter. The underlying matter has to be determined first. Discussed why some of the stuff is redacted for confidentiality. Judge Hascheff has done everything that he can to answer questions. It's a simple indemnity clause. Judge Hascheff was willing to accept terms for payment by Ms. Hascheff. Pltf. Exhibits H and I discussed. Judge Hascheff made a payment to Lemons Grundy on December 18, 2019 of $6400. Less than 30 days later, on January 15, 2020 Judge Hascheff wrote a handwritten note to Ms. Hascheff saying she owes him money (Deft. Exhibit 1). Judge Hascheff is following the agreement exactly. Judge Hascheff was served with the subpoena in July 2018. Judge Hascheff provided Ms. Hascheff notice in January 2020. Judge Hascheff was sued for malpractice December 30, 2018 and he provided notice in January 2020. About $600 were the fees related to the malpractice action, however most of the $11,000 from the bills were incurred after the filing of the complaint. The complaint was immediately stayed. Judge Hascheff took the bench in 2013. Deft. Exhibit 16 discussed.

Counsel Meador discussed Deft. Exhibit 1. Judge Hascheff does not say when he was sued, by whom he was sued, or for what he was sued. He also does not state that the action was stayed and the ongoing bills are in the collateral matter. The bill does not make any sense at all. He demands payment of $5200.90. The bills reflect two payments paid by Judge Hascheff for a total of $2000. Deft. Exhibit 15 discussed. Judge Hascheff states all he has to do is show proof of payment. He received copies of those checks showing proof of payment on December 9, 2020.

Counsel Torvinen discussed Deft. Exhibit 15. Allied World is the malpractice carrier. The Allied payment shows all of the payments except for one totaling $11,008. Discussed payments.

(Recess taken from 10:13 a.m. until 10:23 a.m.)

Counsel Meador disclosed that his law firm has offered employment to the Dept. 12 Law Clerk. (Mr. Torvinen did not object). He is not stipulating to any of Pltf. Exhibits. Pltf. Exhibit I discussed.

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Counsel Torvinen discussed Pltf. Exhibit H. (Mr. Torvinen agrees that Mr. Meador did not receive the checks until December 9, 2020). Discussed Pltf. Exhibit I. It is the same as Deft. Exhibit 15.

Counsel Meador discussed Deft. Exhibit 16. There is no evidence that Judge Hascheff prepared the second amendment or that he was present when it was signed or that Mr. Jaksick lacked competence. Judge Hascheff keeps arguing that Ms. Hascheff is responsible for bills related to a malpractice claim. They have no proof that the bills were for a malpractice action. Judge Hascheff says they are not entitled to know and are expected to just pay the bill. Mr. Alexander's affidavit was received after April 10, 2020. Deft. Exhibit 9 discussed. He was told he was not allowed to know the basis of Mr. Alexander's statement. He is also being told that Mr. Alexander's communication with opposing counsel who sued Judge Hascheff are all attorney client privilege.

Counsel Torvinen stated they asked for redacted bills and that is what Ms. Hascheff got. Conversations with opposing counsel may be confidential and not attorney client privilege. Deft. Exhibit 13 discussed.

(Judge Hascheff was sworn to testify).

Judge Hascheff stated the subpoena came in July and it was a blanket request for all of his files. Discussed the Jaksick case (Mr. Meador objected. *The Court stated it will weigh the testimony accordingly*). The malpractice action was filed. Testified to why he thinks the complaint was filed. As the bills started to pile up, he then decided it was appropriate to provide notice. The case did not heat up until January the following year. At first he was going to just eat the bills and then in March or April 2019 he thought it was fair to split it with Ms. Hascheff. He was not provided the bill from Lemons Grundy and Eisenberg on a monthly basis. Ultimately he got the large bill of $6351.80. All the bills refer to Allied World Insurance but he paid those bills. He was deposed in January and February 2019. He did testify at the trial and was represented during his testimony. His concern was that he didn't know how it was going to turn. He didn't know who was going to sue him. Ultimately he needed counsel. He was sued in December 2018 for malpractice. He provided notice of the suit in January 2020. **Counsel Meador questioned Judge Hascheff.** Deft. Exhibit 15 discussed. The first day of his deposition was in September 2018 before he was sued. The entry for November 17, 2018 reflects his deposition of November 2018 before he was sued for malpractice. The January 24, 2019 bill discussed. Everything that was redacted was privilege and should not be disclosed. His interests are the same as Ms. Hascheff's interests. Both of them are responsible under the indemnity agreement. He and Mr. Torvinen looked at them and decided what should be redacted. Based on his discussions with Mr. Alexander they knew what could be disclosed and what shouldn't. Mr. Alexander looked at other people's testimony to see what he might be asked. Deft. Exhibits 3 and 14 discussed. Testified to why he thought he was going to be sued for malpractice. He did not produce the documents, the Jaksicks did because they had the documents and he did not. He doesn't know which ones they produced and which ones they put under privilege law. Deft. Exhibits 16, 9, and 8 discussed. The lawsuit was tried in February 2019. The jury came back on legal claims within a week. The date of Todd Alexander's affidavit was April 2020. Deft. Exhibits 7, 5 and 4 discussed. Pltf. Exhibit D discussed. **Counsel Torvinen questioned Judge Hascheff.** Pltf. Exhibits A, B, C, E, F, G, and J discussed. Deft. Exhibits 14 and 16 discussed. **The Court questioned Judge Hascheff.** He received the subpoena sometime in July of the underlying litigation. The subpoena led him to believe that there was a possibility of the malpractice lawsuit. When he was served, he retained

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counsel. He called his malpractice insurance carrier shortly after getting the subpoena. He later found out his deductible was $10,000. At first, he was going to absorb the cost himself so that is why he didn't provide notice until January 2020 when he decided they should split the cost. As the process proceeded he realized the lawsuit could turn into a reality.

THE COURT ORDERED: This matter is taken under submission.

Court shall prepare the order.

Code #4185

SUNSHINE REPORTING SERVICES
151 Country Estates Circle
Reno, Nevada 89511
775-323-3411

IN THE FAMILY DIVISION OF THE

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

HONORABLE SANDRA UNSWORTH, DISTRICT JUDGE

-oOo-

PIERRE A. HASCHEFF,

Plaintiff,

vs.

LYNDA HASCHEFF,

Defendant.

_____/

Case No. DV13-00656

Dept. 12

*** SEALED ***

TRANSCRIPT OF PROCEEDINGS

EVIDENTIARY HEARING

December 21, 2020

Reno, Nevada

REPORTED BY: CONSTANCE S. EISENBERG, CCR #142, RMR, CRR

Job No. 702570

ALL APPEARANCES VIA ZOOM VIDEOCONFERENCE:

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775-688-3088
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Also present:

PIERRE HASCHEFF
LYNDA HASCHEFF

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MONDAY, DECEMBER 21, 2020, RENO, NEVADA, 9:10 A.M.

-oOo-

THE COURT: Good morning. We are present on Case Number DV13-00656 in the matter of Hascheff versus Hascheff. This is the time and place set for oral argument related to two motions that are currently pending before the Court.

One is a motion that had been filed by Ms. Hascheff related to a motion for clarification or declaratory relief regarding the terms of the MSA and the decree that had been filed on June 16th of 2020.

And the second is for a motion for an order to show cause or in the alternative to enforce the court orders that were filed on July 8th of 2020.

Counsel, may I have the appearances, please?

Mr. Meador, you are muted.

MR. MEADOR: I apologize, Your Honor.

THE COURT: Please don't.

MR. MEADOR: Shawn Meador on behalf of the moving party, Lynda Hascheff, who is present with us this morning as well.

THE COURT: Thank you.

MR. TORVINEN: Todd Torvinen here on behalf of Pierre Hascheff, seated to my left. He should be in the picture. Yes.

THE COURT: He is. He is.

As you are all aware, this matter is proceeding by means of simultaneous audio/video transmission due to the continued

closure of the courthouses in Washoe County.

I'm located in Washoe County which makes up the site of today's court session.

Ms. Eisenberg is our court reporter. And if either party should desire a copy of the transcript or a portion thereof they would make arrangements with her directly through Sunshine Court Reporting, arrange for and pay for the transcript or a portion thereof.

Seeing as we have competing motions through counsel, how would you like to proceed?

MR. TORVINEN: Your Honor, we have a couple of preliminary matters. May I be heard?

First off all, I should apologize to Mr. Meador. I find this time extraordinarily challenging and it's difficult for me, but that's all I'll say.

Mr. Meador previously asked me about his exhibits. I have no objection to any of the exhibits, and -- of his exhibits, save and except for the last one, which I believe is 16.

The 1 through 15 are in, as far as I'm concerned.

THE COURT: All right. Madam Clerk 1 through 15 will be admitted.

(Exhibits 1 through 15 admitted into evidence.)

THE COURT: Exhibit 16, do we want to talk about that at this point in time?

MR. TORVINEN: I don't know. I don't -- Mr. Meador is

muted again, I think.

There we go.

MR. MEADOR: Fine. But if we don't mute ourselves, we start getting feedback, through our computers, to one another.

Your Honor, perhaps I'm a little confused about what Your Honor expects today. I had read your original motion as being a hearing with respect to the motion that my client filed because that motion has to be determined before a contempt motion could be heard.

THE COURT: I would concur.

MR. MEADOR: At the status call a couple of weeks ago, I understood that you anticipated an evidentiary hearing rather than oral argument.

I had been anticipating oral argument. At that status conference I understood you to be requesting an evidentiary hearing. So I'm prepared to either examine witnesses and do it that way or to make oral argument, whichever you prefer.

I believe that Ms. Hascheff's motion was first filed and is necessary to determine before Judge Hascheff's motion could be determined.

THE COURT: I would concur that Ms. Hascheff's motion is first in line.

I would also say that the Court specifically stated to you at the status hearing that if we did proceed forward with the contempt motion after the other motion, that that would have to be

by an evidentiary aspect.

So if I wasn't clear enough at the status conference, my apologies. You are not incorrect. We ordered this to talk about how do we mesh and meld the issues related with the MSA, with the notice requirements contained in other portions of it, 35.2, versus what transpired in Section -- at 30 point -- Section 37, as compared to the indemnity portions that are contained within Section 40.

Whether or not you'd agree that that was important for us to have other information, as you encircle it, we cannot take parole evidence, so we should be discussing the notice aspect related -- contained in the totality of the agreement.

Mr. Torvinen appears to be arguing that these sections need to be interpreted separate, completely separate and apart from the others; whereas you're arguing that there's some basic notice requirements in this.

So I would like to proceed, counsel. And I delineated specifically what I'm looking for in my order, so please -- and Mr. Torvinen, I appreciate your hearing statement did address those issues, so I appreciate that as well.

So, Mr. Meador.

MR. MEADOR: Yes, Your Honor. Thank you.

So, Your Honor, the language of the indemnity agreement, that Judge Hascheff has argued in his brief must be interpreted strictly, states that my client -- that if Judge Hascheff is sued

for malpractice my client is obligated to pay -- to indemnify him for half the cost of any defense of that action.

And so the issue is what, what bills, what expenses did Judge Hascheff incur in the defense of the malpractice action that was sued -- filed against him.

Now he tells us that in July of 2018 he received a 41-page subpoena that led him to believe that he could be sued for malpractice.

If you review the 41-page subpoena, which is my Exhibit 14, you will see that what was requested were Mr. Hascheff's entire files related to the work he did for the Jaksick family, for Todd Jaksick, for Sam Jaksick, the estate planning and for certain business work.

They set it -- they used 41 pages to ask for his entire file. But as I review it, I don't see a single document that was requested that he would not have been obligated to produce if they had simply asked him for his entire file on these matters.

So from my perspective, reading that exhibit, I cannot see anything that would lead me to believe that a malpractice threat was made against Pierre Hascheff.

To the contrary, the reality is that the Jaksick children were in litigation regarding their father's estate.

It strikes me as completely absolutely normal and to be expected that the lawyers in that litigation would request the lawyer's file.

The request for that file does not suggest that they're going to sue the lawyer.

Judge Hascheff then hired counsel to represent him. He met with his counsel. And the first thing his counsel did after meeting with Judge Hascheff was call Kent Robison, who was Todd Jaksick's lawyer. And I get this from the billing statements, from Todd Alexander's billing statements that were admitted as Exhibit 15.

Now I've repeatedly requested information about communications with Mr. Robison and about Mr. Jaksick's -- or I mean Mr. -- Judge Hascheff's communications with his lawyer and their communications with Todd Jaksick's lawyer.

I was repeatedly told that it was confidential or protected by the attorney-client privilege.

Todd Alexander, Judge Hascheff's lawyer, specifically stated that their communications with Todd Jaksick's lawyer were protected by the attorney-client privilege, or were confidential.

I'm unaware of any bases on which they could claim it was protected by the attorney-client privilege or that they were confidential; but we're being asked, my client is being asked to pay those charges without having any idea what was discussed in that joint meeting, and without this Court knowing whether there was anything -- what was discussed at that meeting, or whether what was discussed at that meeting was a defense of a malpractice action that had not been filed or threatened.

Then the major charges reflected on the bill are for Judge Hascheff's deposition. The billings reflect that Pierre Hascheff's lawyer and Todd Jaksick's lawyers communicated about preparing Judge Hascheff for that deposition, two days of deposition. It's undisputed my client was not aware of any of this, was not advised of this, her opinion was not sought.

Then in December of 2018, Todd Jaksick files a lawsuit, a malpractice claim against Judge Hascheff.

In his complaint he said that he did not discover facts that would lead him to believe there was a potential malpractice action until December of 2018.

So Judge Hascheff claims he knew it in July when he got subpoenaed. Todd Hascheff says he didn't know it until December, and yet they were having all these communications in the meantime.

In his complaint he did not say that anything in Judge Hascheff's testimony at deposition made him aware of a potential malpractice claim. He didn't say any of the documents produced pursuant to the subpoena made him believe that there was a potential malpractice claim.

Rather, he said there was some expert report that he thought was full of errors and inaccuracies and mistakes that he received in December that led him to believe there might be malpractice.

But in his complaint, Todd Jaksick, in suing Pierre Hascheff, stated that the plaintiffs were aware of the defendant

Pierre Hascheff's substantial efforts to protect Sam Jaksick and his heirs and beneficiaries and believes that Pierre Hascheff proceeded at all times in good faith and with best interest of the plaintiffs and Sam Jaksick as his first priority.

It clearly was not a threatening complaint.

It was simply if, if something happens in the underlying litigation and I get stuck, I may come after you, Lyn.

That action was then immediately stayed. No work was done in the malpractice action.

Now it's also interesting to note that the 41-page subpoena that was served on Pierre Hascheff that he claims put him on notice that he would be sued for malpractice, was not served on him by Todd Jaksick. It was served on him by Wendy Jaksick. And to the best of my knowledge, from the limited records that have been produced, I don't see any evidence that Pierre Hascheff ever represented Wendy Jaksick. Therefore, under the Charleson v. Hardesty case, Wendy Jaksick would not even have standing to sue Pierre Hascheff for malpractice.

So Judge Hascheff's claim necessarily has to be that when Wendy Jaksick, who was unhappy with the estate plan and alleged that her brother mishandled his duties as trustee after her father's death, served a subpoena on Pierre Hascheff, Judge Hascheff knew that at some unknown point in the future Todd Jaksick would sue him for malpractice.

After they immediately stayed the malpractice action so

that no fees are incurred whatsoever, they start getting prepared for trial. And to get prepared for trial, Judge Hascheff and his lawyer meet with Kent Robison, Todd Jaksick's lawyer. They spent a lot of time with the very lawyer suing him for malpractice to prepare him for his testimony. And yet we're not allowed to know what they spoke about.

And in those bills there are about -- one bill like for 875, another for a thousand bucks, that are completely redacted. Neither my client nor this Court are allowed to know what those fees were even incurred for, and yet my client is expected to pay half of them.

It strikes me that under Judge Hascheff's interpretation of the indemnity language, a dishonest husband could seek legal advice on a real estate transaction and write the letter -- write the lawyer a check for a thousand bucks, and send that check to his former wife and say this falls within the indemnity clause and you owe me five hundred bucks.

And under the argument that Judge Hascheff has made in correspondence to me that are in the exhibits that counsel stipulated to and that are in the briefs that Judge Hascheff filed, the wife would have absolutely no right to any information whatsoever, that all she's entitled to is a copy of the check that he paid a bill.

And that can't possibly be, because the language of the indemnity clause is that it has to be in the defense of a

malpractice action, that if Pierre is sued, excuse me, if Judge Hascheff is sued, any defense of that action is covered.

So there has to be at a minimum some proof that the fees for which Judge Hascheff seeks indemnity were actually defense of that action.

Now there's a lot of correspondence from -- from Judge Hascheff, from his -- and from both of his lawyers, that talk about bills related to a malpractice action, and yet that's not the language of the indemnity agreement.

The language of the indemnity agreement is that it has to be the defense of that action, not related to that action.

And we don't know, we don't know at all whether any of the bills for which Judge Hascheff seeks indemnity were actually in defense of the malpractice action filed by Todd Jaksick.

Now Judge Hascheff insists that my client is simply obligated to rely on him; at the same time, however, he insists that he has no fiduciary duty to her.

If my client is obligated to rely on him, he necessarily must have some corresponding duty to protect her. He doesn't protect her by keeping all of this secret.

She cannot possibly know, based on the information that he provided, whether these fees were incurred in the defense of a malpractice action or to help his client, Todd Jaksick. She can't know that nor can this Court.

I repeatedly requested the information on behalf of my

client and was told repeatedly we were not entitled to the information, that there was nothing my client could do, even if she was given the information.

And it strikes me that, among other possible things, one thing she could have done if the information had been provided at the time when Judge Hascheff decided to retain counsel, was to evaluate the underlying facts and circumstances and make an agreement with her former husband that, yes, it's reasonable to incur these fees even though you haven't been sued.

Even after I became involved and requested information, if Judge Hascheff had elected to provide the information, I would have been able to evaluate that information with my client. And if that information provided reflected that the bills for which Judge Hascheff seeks indemnity were in the defense of a malpractice action, none of these fees and none of this motion practice would have been necessary.

My client acted in complete good faith to come to this Court to say what are my obligations under this contract?

In correspondence directly with Judge Hascheff and in correspondence with his lawyer, I specifically and repeatedly noted that my client would pay, would honor her obligation to pay half of the fees incurred in any defense of the action.

The dispute was just simply what fees fell within that -- that definition, within the language of the indemnity clause.

Now in his trial statement Judge Hascheff insists that it is my client's obligation to prove that he acted in bad faith, or in some other nefarious way.

And while I disagree with that analysis, if his analysis is true, it would make it even more imperative that he produce the documents under 37 that we requested because those would be the very documents she would need to honor her obligation that he insists that she has.

He comes to this Court and says she is not entitled to any information about what happened, but it's her burden to prove what happened, a fundamental denial of due process at a minimum but direct violation of paragraph 37.

So in my correspondence with Mr. Torvinen, dated June 2nd, 2020, which is my Exhibit 8, I outlined what my client's position was and what it would take to resolve the issue; and that if the issue was not resolved we would file the motion to -- motion for declaratory relief. So I believe that we have complied with the 10-day written notice requirement of 35.2.

In Mr. Torvinen's letter to me, and I'll have to find the date of it, I believe 5/29/30, Exhibit 7 -- but I'll have to clarify that -- he told me that Judge Hascheff had complied with the 10-day notice requirements in his email of March -- now I've lost the date. I'll get it for you in the exhibit.

But in that email, what Judge Hascheff said was that if she did not pay up, he would enforce the agreement. He didn't

threaten in that email, that Todd Torvinen referred to, he did not state that he would file -- seek to hold her in contempt of court.

So I believe we complied with the language and he did not. And I apologize, I've got in my examination outline, I have the exact exhibits and pages, and I don't have that off the top of my head.

So it's our position that it is true that my client has an obligation to indemnify Pierre Hascheff for the expenses he incurred in defense of malpractice action. I just simply have no evidence that any of the fees for which he seeks indemnity were in defense of that action, and it would be unreasonable to require my client to simply, and this Court, to simply rely on Judge Hascheff to be the sole determiner of whether they do or do not fall within an indemnity.

Thank you, Your Honor.

THE REPORTER: Excuse me, Judge.

(The reporter made a disclosure pursuant to subsection 2 of NAC 656.310 regarding Todd Alexander.)

MR. MEADOR: It is your husband's partner.

And I have no objection, Your Honor.

THE COURT: Mr. Torvinen?

Mr. Torvinen, let's first deal with Ms. Eisenberg's issue here that she has.

You are not on mute, but we can't hear you.

MR. MEADOR: Judge, if I may, while counsel is working

on his technical issue, may I give you the citations on the 10-day notice?

THE COURT: Yes.

MR. MEADOR: Mr. Torvinen's letter is his Exhibit E, his letter of May --

MR. TORVINEN: The rain in Spain falls mainly on the plain.

I don't know, it got turned down. Okay.

THE COURT: Here you are. There you are.

MR. TORVINEN: I'm sorry, Your Honor. Somehow it automatically shut down the volume. I apologize for that.

THE COURT: So do you have any objection to Ms. Eisenberg being our reporter?

MR. TORVINEN: No. And we're not going to call Mr. Alexander as a witness anyway. His affidavit is in evidence.

THE COURT: All right.

And you were relating back, Mr. Meador.

MR. MEADOR: Yes, Your Honor. Mr. Torvinen's letter is Exhibit E, which is my Exhibit 7, in which he stated that Judge Hascheff's email dated March 1, 2020, is his 10-day notice.

In Judge Hascheff's email of March 1, which is his Exhibit D and in my Exhibit 4, he states we can avoid this action by her simply making the payment referenced above within 10 days, if the payment is not made within this 10 day, "I will proceed accordingly."

I don't think "I will proceed accordingly" complies with the obligation to specifically indicate the nature of the action would be a contempt motion.

Thank you, Your Honor.

THE COURT: Before we proceed over to Mr. Torvinen, hence the reason I wasn't as clear as you may have liked, is it not necessary for us to hear from Judge Hascheff about why he perceived the 41-page subpoena to be the threat of malpractice?

MR. MEADOR: I believe it would have been at the appropriate time. I don't -- I think it would be a complete denial of due process for him to come in and share information today that he refused to share when I requested it.

MR. TORVINEN: Your Honor, may I be heard?

THE COURT: Yes.

MR. TORVINEN: Should I start my argument? What do you want me to do, Your Honor?

THE COURT: Well, I will let you be heard, sir, but you can hear what my question is, is why is that not in fact important in this particular case?

So please recognize --

MR. TORVINEN: Well, it is, Your Honor.

THE COURT: Let me ask a couple more questions of Mr. Meador at this point in time.

Mr. Meador, you alluded to the fact that this billing was redacted. And it is. It is clearly redacted to the point we

don't even know -- it doesn't even -- telephone call with, and the rest of it redacted, the entire section of that is redacted. I mean everything from that, whatever it is that we look to, for example LH 96 on 9/18 of 2018, we have two things that are redacted out in totality.

We don't know whether or not it's 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.

But isn't this different in that you can clearly see from the work that was done above on that page and the work that is referenced in the other pages, that it is all related to the issues that arose from the 41-page subpoena?

MR. MEADOR: I don't know that.

THE COURT: Well, you know it's not a real estate transaction that he called up and asked about, don't you?

MR. MEADOR: I -- I'm not going to speculate and I don't believe this Court can speculate either.

THE COURT: But the bills themselves relate to what was occurring related with the 41 pages and him being a witness, correct?

MR. MEADOR: I don't know that because I don't know what he was asked in his deposition. And I don't know what they talked about in preparation for his deposition.

THE COURT: What part of Rule 40 or Subsection 40 states

that you are entitled to every aspect of the malpractice claim?

MR. MEADOR: I'm entitled to know that the fees for which my client is being asked to indemnify him are in the defense of a malpractice action.

Wendy Jaksick did not sue him for malpractice. She wouldn't even have standing to sue him for malpractice. So her asking him questions about the estate planning and business transactions does not to me demonstrate that it was the defense of a malpractice action.

Part of her claims were that Todd Jaksick in his role as successor trustee breached his fiduciary duty to her.

Now, I don't know -- by that time Judge Hascheff was on the bench. I don't know if he continued to engage in private practice of law after he took the bench.

The second amendment to the trust about which Wendy Jaksick specifically complained was executed after Judge Hascheff took the bench. And I don't know -- again, I don't know if he continued to engage in private practice of law in the execution of that second amendment that Wendy claimed her father either didn't sign or that he lacked capacity.

But those are not allegations that Judge Hascheff committed -- either of those -- are allegations that Judge Hascheff committed malpractice.

Just because a lawyer is asked for his file does not suggest that he committed malpractice.

And we don't know what allegation of malpractice has been asserted. What are we told that he allegedly did wrong?

THE COURT: The report that you referenced, do you have any clue whether it was contained within his file?

MR. MEADOR: No, the report that I referenced, if we're talking about the same report that put Todd Jaksick on notice, was produced by someone, I don't know who -- I assume Wendy -- in December of 2018, but was not prepared by -- it was not part of the file, no. It was a litigation document.

THE COURT: Thank you.

Ms. Hascheff, this is still a courtroom. Please remove the gum from your mouth.

Mr. Torvinen?

MR. TORVINEN: All right, Your Honor. I guess, first of all, I don't have any objection to Exhibit 16, because therein lies the answer to Mr. Meador's rhetorical question, essentially, "Where's the beef?"

And the beef is here. And this was in -- there's a pleading he has here, it's the first document under Exhibit 16, and it's Wendy Jaksick's opposition to some accounting filed by Todd Jaksick, I guess, but it goes way beyond that.

And on the second page, they are talking about setting aside the second amendment and restatement of the trust agreement of Sam Jaksick which was prepared and executed in the year of 2012.

It was prepared by my client, Pierre Jaksick. It was prepared by my client and executed by my client, Pierre Jaksick, prior to him taking the bench in 2013.

And so in this -- let's see. It's paragraph 4. I guess the bottom is LH 000113.

So Wendy disputes the validity of the second amendment restatement.

She goes on to say that Sam Jaksick didn't possess the requisite mental capacity and, further, that he was subject to undue influence.

And that -- you know, I can't necessarily disagree with Mr. Meador about the subpoena, but you combine this in 17 with the subpoena, they are trying to set aside the estate plan that was drafted by Mr. Hascheff. And if you're going to set aside the estate plan, then you are talking about malpractice issues.

And so this was known early on and, in fact, answered by the document that's provided by opposing counsel, so I guess all these exhibits are in evidence now.

So Mr. Alexander's affidavit is now in evidence also, and I think in the admitted evidence that would be -- have you seen that affidavit, Your Honor?

THE COURT: I have.

MR. TORVINEN: It's under Exhibit 2 in opposing counsel's exhibits.

THE COURT: Okay.

MR. MEADOR: Your Honor, I haven't offered it for the entire exhibit, I think there are parts of it that are inadmissible.

MR. TORVINEN: I thought it was in. We can call him.

MR. MEADOR: You didn't ask. I offered to speak to you about it, Counsel. You didn't offer to take me up about that offer.

MR. TORVINEN: I'm sorry.

THE COURT: Well, we admitted the document, Mr. Meador. So now do you --

MR. MEADOR: There are parts of document I believe are completely inadmissible. I had to offer it because I didn't know how you would rule on it and there were parts of it I may need because I thought we were having an evidentiary hearing.

MR. TORVINEN: Your Honor, you can't have it both ways. Either it's in or it's not. I mean, I don't understand this.

It came over in the exhibit book and it's offered. There's no -- there's no, in any of the correspondence from Mr. Meador --

THE COURT: Well, Mr. Alexander is in the waiting room, so do we want to just clear this up at this moment?

MR. MEADOR: The parts, Your Honor, of his affidavit that I believe are inadmissible and inappropriate are where he offers broad general conclusions and characterizations without providing any factual backup for those; that it's fundamentally

unfair and unreasonable to require my client simply to turn over your job to Todd Alexander.

MR. TORVINEN: Your Honor -- and this goes to -- I'm sorry, either it's in or it's not. And I'm not planning on calling him as a witness because it's in.

We had this discussion at the status conference. But this goes back to my client's main complaint here is that he did back flips to try to comply with the request. And it was a basic rope-a-dope defense designed to never pay a cent.

So they raised the bar and they asked him for, you know, his payments and a copy of the policy and other documents. And he got them to, in this particular case, Ms. Hascheff's sister, the next day, February 5, 2020.

And then she asked for some additional documents. He got those to her. And then the bar got raised again, and now was -- and in all fairness to her, she asked for -- both she and Mr. Meador asked for redacted billing statements.

So they got those on May 29th along with the affidavit. And the idea behind the affidavit is to address their concerns about the nexus between the underlying trust action and malpractice, and to address their concerns about this not being in good faith.

Well, this is Mr. Hascheff's lawyer. And so I guess what they are saying is he's lying in the affidavit and it's not in good faith. And my client's seeking indemnity of, by the way,

$11,008 total. So it's 5504, which is shocking, by -- by June 2, I think Mr. Meador referred to a letter that is now in evidence, somewhere in his exhibit binder -- without filing a pleading. They already incurred $5,600 in attorney's fees for a $5500 claim at max, in which both of these parties' interests were aligned, because she doesn't want to pay. I can't imagine Ms. Haschef would want to pay any more than she had to, and neither did my client.

And it turns out the retention was 10,000 bucks. And then the adjuster agreed to some payment of -- and I think it's in the pleadings -- there's $2500 that Allied provided for the subpoena.

But all told, out of pocket, my client paid 11,008 bucks.

And prior to all the billings being done he first requested 4600 bucks. It hasn't changed very much from that, Your Honor.

And I might add, as the law indicates, in the absence of a specific notice provision or indemnity, all you've got to do, if you are the indemnitee, is give the indemnitor notice of the claim.

And further, as pointed out in the case law that I gave you, particularly in Transamerica case, which in essence says hey, indemnitee, if you got to go sue the indemnitor for your indemnification, well, it's not much of an indemnification, is it?

You are entitled to attorney's fees. But you shouldn't have to do this.

And frankly, and you can hear from my client if you want, but Mrs. Hascheff specifically agreed to this provision and specifically agreed to purchase the tail malpractice policy for this purpose.

And to sit here and argue that there's no nexus or we don't know what the nexus is, is just more rope-a-dope, because when, after I sent this letter, which is in exhibit -- which is an exhibit dated May 29, 2020, to Mr. Meador, and included the affidavit for Mr. Alexander and included the redacted billing records which they requested before, then the bar went up again.

And they wanted to know if there were conflict waivers that he got all the family members to sign. I mean that has nothing to do with the price of tea in China.

And so it's clear, and I think you were spot on, if you look back at the bills and the stuff that's not redacted, it's clear that this matter is related to the risk created by the underlying trust matter. And we all know -- I'm not a malpractice lawyer, it's out of my pay grade -- but goodness gracious, the underlying matter has to be determined first, but that doesn't mean there's not malpractice risk. And that's exactly what happened here.

And in fact, as an officer of the court, I'll just let you know, it's my understanding that -- I think it's Stan Jaksick

took this matter up on appeal to Supreme Court -- Judge Hardy made decisions with regard to the equitable claims. There were legal claims that were decided by the jury and then the equitable claims were later decided fairly recently because the pleadings we filed last, what, June and July, Judge Hardy still had not made decisions. You can hear from my client if you want about this, but Judge Hardy still had not made decisions on the equitable claims. But he did. And now apparently it has been appealed to the Nevada Supreme Court. So my client still has risk in those underlying matters.

And if you would like to hear from him about this, I think that paragraph 40 is simple. I looked at this MSA last night, did an electronic search. There is no requirement or notice for indemnification. Why? Because it's a classic indemnification clause. You deserve indemnification for one-half. It has nothing to do with any fiduciary duties.

And frankly, if you look at -- and counsel was fair in his criticism here -- every contract carries a general duty of good faith and fair dealing. But in this context, as we pointed out to you in the case law, good faith and fair dealing simply means that you are not going to be dishonest and try to collect for a slip and fall, right? Let's say my client was sued for a slip and fall that happened in 2019. That's the duty of good faith and fair dealing, is you can't try to do that. That's a dishonest act if you try to get indemnification for that.

Well, this is clearly not related to that and nor was it ever. And every time that my client tried to address concerns either through me or directly, the bar was raised again; hence, rope-a-dope.

And I don't think -- what the crazy part about this is, economically, is this direct evidence relevant? I don't know. Marginally. But goodness gracious, it was always between 4600 and 5500 bucks. It was never more than that, half. And Ms. Hascheff had to have spent 15- or $20,000 in attorney's fees at this point, but my client is not in to me that deep.

But my goodness, it's the tail waging the dog. And Mr. Meador also addressed fiduciary duty of -- I happen to read the footnote in William versus Walden, last night. Footnote four, which says, in general, the fiduciary duty of one spouse towards the other ends when the complaint is filed. There are exceptions.

What are the exceptions? Well, if you have a boomer. Well, what's a boomer? In estate planning circles a boomer is a big old asset or big ol' claim that is not disclosed.

Well, that's not what this is. In both Cook, cited by Mr. Meador, and Williams versus Walden, you had a husband with a law practice who either didn't put it on the schedule or arm-twisted his soon to be former spouse by accepting a zero for it, clearly a violation of fiduciary duty that would extend beyond the date of the filing complaint.

That is not the deal here. These parties were

essentially limited to the retention policy which Lynda Hascheff agreed should be put in place, because my client did high end estate planning and, you know, if there is a boomer, he needed protection. They both needed protection for that.

Did they know what the claim was? No. No idea when this agreement was done.

So, again, you can hear from my client if you want. I don't know if we need to call Mr. Alexander, but -- one thing I did forget to say to you is this. Some of the things -- and you can hear from my client about this, the redactions for confidentiality were concerns for my client because the matter is still up and it's on appeal now.

If one of the opposing parties or one of the Jaksicks that took this thing up on appeal got ahold of some of that stuff, it could be detrimental to my client. And I know that's shooting yourself in the foot but it's a valid concern.

And frankly, if you look at the tone of the pleadings, and certainly the emails, they accuse my client of being a bully, of violating fiduciary duty, of not dealing in good faith with regard to this claim.

THE COURT: Wait a minute. Whose pleadings -- wait.

MR. TORVINEN: Certainly the motion for clarification accuses my client of being a bully.

THE COURT: All right.

MR. TORVINEN: It does. I think it's the second or

third page.

THE COURT: Okay.

MR. TORVINEN: And I might add --

THE COURT: Wait just -- I'm getting lost between whether we must have --

MR. TORVINEN: No, no --

THE COURT: -- the other action with this action. So okay.

MR. TORVINEN: Yeah. And then the correspondence from Ms. Hascheff's sister accused my client of being a bully. And I'm trying to remember, I'm not sure whether Mr. Meador did or not, but, you know, but be that as it may, my client has done everything he can within reason to answer the questions here, and this clause is clear and the law is clear about indemnity.

And this is not a boomer, Your Honor. There was no funny business that went on here, no trying to hide the ball, none of the stuff that would trigger an analysis under Williams versus Walden or Cook versus Cook. That's not this case. It's a simple indemnity clause.

And the reason it was done that way and drafted that way and is -- you know, there are other clauses later in the marital settlement agreement that talk about undiscovered debts or omitted debts and omitted assets of being community obligations. This was not written that way on purpose. It's a simple indemnity clause, and it doesn't require the same amount of notice for that very

reason.

And so we're sitting here now incurring these extraordinary attorney's fees for a $5500 claim that should have been paid a long time ago, and for which my client was willing to accept terms, you know, payment over a period of time to make it easier for Ms. Hascheff. It's just ridiculous that we're still sitting here doing this.

So if you want to hear from my client I'm more than happy to call him as a witness.

THE COURT: Well, when we get to the cost benefit analysis the Court can tend to agree with you the cost benefit of this case isn't in place; but that's not the reality. The issue that we have to deal with is the issue related to the claims that are before me. Whether or not they were reasonably brought is another question, and reasonable under whether or not the cost benefit analysis made it appropriate for them to bring the claims.

That's your entire -- that's a personal decision. That's a decision that Ms. Hascheff made, a decision to bring this case in order not to pay the $5500. It was important enough to her to go that direction. I find no flaw in that.

Do I find a flaw in the thinking that potentially she spent more to avoid this, that's her choice. That gets to be her choice.

Can you please tell me why your client did not have an obligation to provide some notice in this case when it was a

collateral matter. It wasn't -- it wasn't a malpractice. He hadn't been sued for malpractice. He had been served a subpoena, and that started this train rolling.

Why did he feel that he didn't have to provide any notice of that?

MR. TORVINEN: Well, I'll answer it this way, Your Honor. And Mr. Meador hasn't indicated what of my exhibits are in or not, but we provided the statements which talk about the billings and the payments. I think they are under H and I in my exhibit book.

But here's -- if you just look at the dates. My client made the largest payment to Lemons Grundy in, in or about, or I know the exact date, on December 18, 2019, he paid almost 6400 bucks. Before that he paid up several small payments that total 4,000 bucks. So that's December of 19th.

He makes a $6400 payment. Less than 30 days later -- now this is indemnity. It's indemnity, Your Honor. Less than 30 days later, on January 15th --

THE COURT: Hold for one. Wait. Wait. Wait.

MR. TORVINEN: I'm sorry.

THE COURT: No, I wanted to find out where Ms. Hascheff went.

Thank you. Please proceed.

MS. HASCHEFF: I'm sorry, I had to grab a tissue for my allergies. My apologies.

THE COURT: Please proceed.

MR. TORVINEN: Okay. So he makes the big payment of the bulk of the bill on December 18th, 2019.

Less than 30 days later, on January 15, 2020, there's a handwritten note, I think it's in Mr. -- in opposing counsel's exhibit binder at -- yeah, it's 1.

Less than 30 days later he writes the handwritten note, you know, you owe me this much as part of the indemnification, right? A friendly note, just try to resolve this.

And so my client, I would tell you, is following the letter exactly of the terms of the indemnification clause in the MSA.

Now, no, perhaps he could have notified a few months earlier when he was making the smaller payments, but indemnification is indemnification. Indemnification means you indemnify me. And when he made the biggest payment he pretty much gave almost immediate notice to -- after he made that payment.

And so I hope that answers your question, because it follows the agreement to a T. And the economics makes sense. And the economics of that payment reflect when he gave notice.

And that's his position, Your Honor.

THE COURT: He was served with the subpoena when?

MR. TORVINEN: June of -- July of '18, I believe.

THE COURT: And he provided notice in January of '20?

MR. TORVINEN: Correct.

THE COURT: He was sued for malpractice when?

MR. TORVINEN: December -- if I recall correctly, I believe it was December 30th, 2018.

THE COURT: And he provided notice in January of 2020.

MR. TORVINEN: Correct.

THE COURT: What fees were extended related to the malpractice itself?

MR. TORVINEN: Pardon? I didn't hear that.

THE COURT: What fees did he extend related to the malpractice action?

MR. TORVINEN: Well, my client informs me about $600.

However, most of the $11,000, if I recall correctly from the bills, was incurred after the date of the filing of the complaint. I think. Most of it.

I haven't -- I did a schedule at one point. Most of the -- the vast majority of it is, after the filing of the complaint by Todd Jaksick on December 30, 2018.

THE COURT: So most of the money was incurred after the filing of the complaint?

MR. TORVINEN: Correct.

THE COURT: And the complaint was immediately stayed.

MR. TORVINEN: As it would have to be, reason being the underlying action has to be resolved, like in any malpractice action.

THE COURT: Okay. And --

MR. TORVINEN: I mean this is -- Your Honor, may I? You know, again, it's out of my pay grade, I don't do any of this stuff. But from my examination of this case, it's not rocket science to appreciate the fact that the underlying action has to be resolved prior to any, you know, going forward on a malpractice action. Because the facts -- the facts and the findings in the underlying actions drive that.

THE COURT: And the report that led to the filing of the malpractice action, was it contained within the file?

MR. TORVINEN: I don't know. You mean produced? Or you mean my client's file?

THE COURT: Yes. Was it in the file that was the subject of the 41-page subpoena?

MR. TORVINEN: It shouldn't have been because that came in later.

My client took the bench in '13.

THE COURT: So you concur with Mr. Meador that the report came from a collateral third party?

MR. TORVINEN: It did. It appears that that's the case.

THE COURT: Okay.

MR. TORVINEN: But, you know, Your Honor, any -- any -- I mean, look, Stan Jaksick or Todd Jaksick is not a lawyer. But anybody standing in my client's shoes -- and, again, this is proven by the 2017 pleading filed by, which is Mr. Meador's exhibit. I agree, it should come in evidence, 16, they're trying

to set aside the second amendment restatement that my client did in 2012.

You combine that with the 41-page subpoena and you know there's malpractice issues brewing. It's not rocket science.

THE COURT: Well, Mr. Alexander is present. I understand Mr. Meador's concerns related to this declaration.

I also understand Mr. Torvinen's concerns that when you say that at exhibits submitted and admitted into Court, I don't know why we should be limiting it. So I think I want to hear from Mr. Alexander, and I may also want to hear from Judge Hascheff.

I know you are not going to be happy with that, Mr. Meador, but that's just the reality. I'm going to flesh out this file as best I can. So I --

MR. MEADOR: May I make a few comments in response first?

THE COURT: Yes.

MR. MEADOR: Okay. The first, I would ask you to look at Exhibit 1, which was Judge Hascheff's notice.

THE COURT: Uh-huh.

MR. MEADOR: You will note first that he doesn't say when he was sued, by whom he was sued, for what he was sued; nor does he indicate -- he states that the bills are ongoing, but doesn't state that the action was stayed and the ongoing bills are in the collateral matter, doesn't even refer to a collateral matter.

If you then turn over to, a couple of pages, to the bill he sent from Lemons, Grundy & Eisenberg, it does not make any sense whatsoever. He demands payment of 50 -- $5,200.90. And yet if you look at the bills, they reflect two payments by Mr. Hascheff totaling $2,000. And nowhere -- you know, it's difficult for me to understand that.

Then if you look at --

THE COURT: Which -- you were on what would be marked as LH 3?

MR. TORVINEN: Your Honor, it's Exhibit 15, I think Mr. Meador is referring to.

MR. MEADOR: LH 2 and 3.

THE COURT: Okay. Thank you.

MR. MEADOR: I see two payments from PAH Limited. I don't see $10,000 of payments reflected.

If you look at -- Judge Hascheff's argument is that all he has to do is provide proof of payment, that's it. That's his only obligation.

I got copies of those checks showing proof of payment on December 9th, 2020. And it's not --

THE COURT: Who is Allied World? Is that the malpractice carrier?

MR. TORVINEN: Yes.

Your Honor, may I refer you to Exhibit 15?

THE COURT: So in the statement from Lemons and Grundy,

it shows that there was a payment made in the amount of a thousand dollars on 10/18. And then in 003 it shows a payment made in the amount of a thousand dollars from Pierre Hascheff on 4/8 of '19, and then on 5/16. So $3,000 total seems to have been paid by Mr. Hascheff according to the billing statement he sent in January. Is that what you are referring to, Mr. Meador?

MR. MEADOR: Yes, and that I actually got those checks. His argument is, all I'm entitled to is proof of a payment. I got that proof December 9th, 2020. That's when I got copies of those checks.

MR. TORVINEN: Your Honor, I take exception to that. If you turn to Mr. Meador's Exhibit 15, this was produced on May 29th.

THE COURT: Okay. I'm looking at 15.

MR. TORVINEN: The first page is LH 000091.

THE COURT: Yes.

MR. TORVINEN: The payment record. There's the Allied payment that shows all of the payments, except for one $653 payment that's later back there, but that totals the 11,008 bucks. If you look at those, total number is four, there are four $1,000 payments, and then this nearly $6400 payment that he made on December 18th, 2019.

And then later there's a -- he made a later, sometime last spring, another $653 payment.

THE COURT: If you look at that final billing that you

say says 6,000, it says "Thank you Pierre Hascheff, Allied World Insurance Company." So who paid that bill?

MR. TORVINEN: What exhibit are you under, Your Honor?

THE COURT: I'm under 91.

MR. TORVINEN: Okay.

THE COURT: So this statement again says that your client paid $3,000, which is the same thing that it says that he paid back in January when he sent his little handwritten note.

And the last payment is 6,000 whatever, I can't quite read it, 6351, I think -- that that says "Thank you Pierre Hascheff, Allied World Insurance Company."

MR. TORVINEN: Yeah, that's miscoded, because there's proof -- if you look back, I think it's back at -- it's just miscoded.

So if you look back -- hang on. Can you bear with me a moment, Your Honor?

THE COURT: I sure can.

MR. TORVINEN: Hang on. Hang on. I'll find it.

THE COURT: Let's take a couple-minute break right here so Mr. Torvinen can find that and we'll come back. Be back in 10 minutes.

MR. TORVINEN: Okay. All right.

(A recess was taken.)

THE COURT: We are back on the record in DV13-00656.

So Mr. Torvinen --

MR. MEADOR: Your Honor, may I interrupt?

THE COURT: Yes.

MR. MEADOR: I just noticed and thought it might be worth commenting on that your law clerk is participating today.

THE COURT: Yes.

MR. MEADOR: I didn't really notice that, and it might be appropriate to advise people that our firm has made an offer of employment to your law clerk to start, I believe, in the fall of this -- well, the upcoming year, next year.

THE COURT: Thank you for noting that, yes. And be aware that we're very conscientious and very careful about that, and the work in this case will be done by the Court, not by the law clerk. He'll help me but the final decision will be written by the Court, he'll be assisting, but we are very careful and conscientious in that regard.

Mr. Torvinen, are you aware -- is that acceptable to you?

MR. TORVINEN: I was not aware of that. Yes, Your Honor. I was not aware.

THE COURT: And is that acceptable, that the Court will be making the final determinations in this case?

MR. TORVINEN: Yes, Your Honor.

THE COURT: Thank you.

MR. MEADOR: At the appropriate time I would like to finish my response to Mr. Torvinen's argument, Your Honor.

MR. TORVINEN: Well, I got stuck, didn't I?

You were asking me to find something for you and I found it.

THE COURT: Okay. Thank you. So tell me where it's at, sir.

MR. TORVINEN: Well, I guess we should explore -- Mr. Meador, do you have any objection to any of our exhibits?

MR. MEADOR: I'm not stipulating to any of them since you wouldn't communicate with me about the issue.

MR. TORVINEN: Well, I'm sorry, I'm just not in a good place so I apologize for that, but I'm trying to move the process along now, so please help me.

THE COURT: So Mr. Meador is not stipulating. What exhibit did you want to deal with?

MR. TORVINEN: Okay. It's our H.

THE COURT: Okay. Mr. Meador, please take a look at H and see whether or not you can agree to H.

MR. MEADOR: These are the bills I got December 9th, Your Honor.

MR. TORVINEN: Your Honor, I tried to see if there was going to be any issue with this at the status conference. And so now apparently there is.

Mr. Meador told you he didn't think there would be, at the status conference.

THE COURT: Okay. Here's my question, is -- Mr. Meador,

do you have an objection to this exhibit coming in as long as Mr. Torvinen agrees that you didn't receive it until December 9th?

MR. MEADOR: No, Your Honor, I don't.

THE COURT: Mr. Torvinen, do you agree that he received it December 9th?

MR. TORVINEN: The checks, yes. That's under Exhibit H, yes.

THE COURT: Okay. Then Exhibit H will be admitted with the acknowledgment that it was received by opposing counsel on December 9th.

(Exhibit H was admitted into evidence.)

THE COURT: All right. And that check does reveal that there had been a payment, and that payment was made in the amount of 6351.80, and that was paid by Mr. Hascheff, or Judge Hascheff.

MR. TORVINEN: Then if you go to the next page, Your Honor, there's the follow-up. In fact, I told you, I think I said it was $654, it's actually $648, is check number 2493. Do you see that?

THE COURT: Yes.

MR. TORVINEN: And so just to reiterate, this billing statement, though, that's under I, and I think Mr. Meador put this in, it was in his exhibits too, that was received on May 29th.

THE COURT: Your Exhibit I?

MR. TORVINEN: Correct.

THE COURT: Okay. And which is --

MR. TORVINEN: This is the same thing that Mr. Meador, I think -- I didn't look at it in great detail -- but he also put this in evidence, the billing statements, along with the billing summary sheet, which is the first piece of paper under Exhibit I. I think. Let meet go back and look at it.

THE COURT: Mr. Meador, is this Exhibit I the same as your Exhibit 15?

MR. MEADOR: I believe so, Your Honor, unless there's been some change that I didn't notice.

MR. TORVINEN: No, it's the same. It's the same. It sure looks like to me. I can count the number of pages.

THE COURT: Well, I mean, I can see the first page is the same, but the question becomes is -- and I went to the last page, and it's the same as your last page.

MR. TORVINEN: All right.

THE COURT: So this is already in, in 15. So it's already in on one side. I have no problem with it coming in on the other, so I is in.

(Exhibit I was admitted into evidence.)

THE COURT: And I reflects the payments through the 648.10, but doesn't reflect the $648; correct?

MR. TORVINEN: It does not.

THE COURT: Thank you.

MR. MEADOR: And I can't tell who it reflects made the 6351 payment.

MR. TORVINEN: I'm sorry, I didn't hear that.

MR. MEADOR: From the billing statement I can't tell who made the payment.

MR. TORVINEN: Which one?

MR. MEADOR: The one that's --

THE COURT: There's a large payment here that's unclear to the Court as it is -- I think Mr. Meador is saying this -- if you go back to page 1 of this exhibit, which is 91 or the beginning of the first page of your exhibit, sir, when it talks about the total payments that had been made, the final payment is a transaction that occurred in December of 2019, and said there was a payment for 6,000 -- and, again, I should have reading glasses on -- something, 351.80, that that was made. It says "Thank You Pierre Hascheff Allied World Insurance Company."

So I don't know from this document, and that's why I had asked you, from this document it looks more that the insurance carrier paid the 6300, as compared to Judge Hascheff paying the 6300. And that's the difference, but that's just looking at it.

So Mr. Meador's comment is he didn't have proof until December 9th of this year that your client is the one who made the payment as compared to a DNB insurance carrier that made the payment.

MR. TORVINEN: Well, it says on the bottom, at the bottom of each of those coding entries, it says if Allied made it or -- so, for instance, three of them say PAH Limited. If you

look at -- I think it's under I.

THE COURT: And what -- what page are you looking at, sir?

MR. TORVINEN: I'm looking at I -- if you go to our I or their, let's see, their, opposing party's 15, they are both tiny.

THE COURT: Okay. And you are asking me to look at -- you're expecting everyone to look at the billing code to see whether or not the code was different?

MR. TORVINEN: Well, no, not the code. It says -- so, for instance, the first payment that Mr. Hascheff made on -- shit, that -- shoot, excuse the French -- shoot, the copy is small. I think it's 4/8 of '19 and it's a thousand dollars. It says "Thank You PAH Limited." Do you see that, Your Honor?

THE COURT: Yes.

MR. TORVINEN: Right. So that --

THE COURT: Do you see on the last transaction? Do you see on the last transaction where --

MR. TORVINEN: Yeah, but it says Pierre Hascheff not Allied World, so it was made by him personally.

THE COURT: But it also says Allied World Insurance Company.

MR. TORVINEN: Well, do you want to hear from my client about this, Your Honor? Again, I tried to bring this up so we weren't going to have an issue with it, and here we are having an issue with it.

THE COURT: I get it, but I can see what Mr. Meador is saying is he asked you for the cancelled checks, and he got them on December 9th.

MR. TORVINEN: He didn't ask -- I'm not sure he asked for the cancelled checks. I thought that was proof of payment. I don't remember. And that's why I brought that up so we wouldn't have this issue, and I got him the cancelled checks.

THE COURT: Can I even ask --

MR. TORVINEN: And I got them in December.

THE COURT: That's okay. I'm going to ask this question.

Your client makes a request with his handwritten note, your Exhibit 1, for 5290.

MR. TORVINEN: Right.

THE COURT: That's $5,200.90. Okay?

It lists there that there's $11,851.80 less 1400, which I don't know what the less 1400 is for, to get to $10,401.80. So she should pay $5,200.90.

The exhibits that you've produced without the $650, show that your client made $3,000 worth of payments. And now you've shown that he's actually made a payment in the amount of -- what, again, was that third check?

MR. TORVINEN: It was 6,351 bucks but I'll double-check it.

THE COURT: Okay.

MR. TORVINEN: $6351.80.

THE COURT: Okay. So that means that the total that your client paid was $9,351.80. Okay?

And if I divide that by two, that would be 4675.50. How do you get that exhibit number in this handwritten note to be $5,200 that you are --

MR. TORVINEN: My client made an error. Later on, I think Mr. Meador would admit this, when we started doing this, exchanging emails, and then my letter of, I think it's May 29th, asked for the 4651 or thereabouts, the number you just mentioned.

There was a mistake.

THE COURT: Do you have any other preliminary comments to make, Mr. Meador, before we hear from Mr. -- current Judge Hascheff?

MR. MEADOR: Yes, Your Honor, a couple. The first, just trying to respond to the arguments that Mr. Torvinen made in his response to my opening argument.

The first is that the Wendy Jaksick document, which I believe is Exhibit 16, reflects that she's trying to set aside the estate plan and, therefore, that somehow tells us there's an allegation of malpractice. And yet, her specific allegation was that her father lacked testamentary capacity, not that there was malpractice.

We don't even have evidence before us that Judge Hascheff prepared the second amendment or that he was present when

it was signed, or that there was any actual evidence that Mr. Jaksick lacked competence.

Then Mr. Torvinen argued that the parties' interests are aligned, and yet insists that my client isn't entitled to the information because of the attorney-client privilege.

And, you know, the fundamental obligation here, the obligation we're talking about, is: Is Mr. Hascheff, is Judge Hascheff liable for conduct that happened during the marriage, a community debt.

So he says she's liable for this community obligation. We're divorced now, but the event that we're talking about took place during the marriage, and our interests about that are present, existing and equal, and our interests are aligned, but I get to keep that confidential from her, all the facts about it.

And there's no authority for that position I'm aware of, and yet it's in all of the emails from Judge Hascheff, all of the correspondence from Mr. Torvinen and from Mr. Alexander, that she's not -- she's expected to pay the bill but she's not entitled to know what the bill is for.

Mr. Alexander's bills reflect over $3,000 of analysis/strategy that my client is expected to pay for that she has absolutely no clue what it was for.

I would say -- I would note that --

THE COURT: By what authority is she supposed to be provided with notice of the nature of the claim?

MR. MEADOR: Excuse me, Your Honor?

THE COURT: Well, you're saying she had no notice of what they are talking about, she had no notice of what the strategy was.

Where is the authority that, if this is in preparation for a malpractice claim; because let's be frank, it says "or related claim." I mean, let's be clear --

MR. MEADOR: It doesn't, Your Honor. That was my next point. They keep arguing that she's responsible fors bills related to a malpractice claim. That is not the language.

They've insisted that the language has to be strictly interpreted. It does not other us the word "related" anywhere. It says "in defense of." She's entitled --

THE COURT: Well, "the warranting party" -- "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 the result of the claim, action or proceeding, including attorney's fees and costs and expenses incurred in defending or responding to such action."

MR. MEADOR: Right. And we have no proof that these bills were for that purpose.

I don't know if this was actually Judge Hascheff defending a malpractice action, particularly when it had not even been filed or threatened, or whether it was about helping Todd Jaksick, his client, against Todd's sister, Wendy. I don't know

that and we don't have evidence in this file to reflect that.

And we don't have it because Judge Hascheff insists we're not entitled to it. We just have to silently accept what he says and pay the bill.

It's that, the issue of the dishonest husband saying here's the check, you have no right to follow up to get underlying information to see if this check is really within the indemnity or not.

THE COURT: Well, when were you provided with Mr. Alexander's affidavit?

MR. MEADOR: And so Mr. Alexander then has become the judge and jury in this case and he's allowed to do broad general characterizations.

THE COURT: That's not the question I asked you, Mr. Meador. You received Mr. Alexander's affidavit sometime after April 10th of 2020.

MR. MEADOR: And if you look at my Exhibit 9, I asked for the specific basis on which he made those conclusions and characterizations, and I was told it was none of my business.

THE COURT: Clarifying timelines here.

MR. MEADOR: Right. So my Exhibit 9 --

THE COURT: I see it. I looked at it, it's been admitted, and you do ask for that.

MR. MEADOR: And I had also asked that in other correspondence with Mr. Torvinen, was told I'm not allowed to know

the basis of Mr. Alexander's statement.

And I have good reason to question Mr. Alexander since he claims that his discussions with Kent Robison, Todd Jaksick's lawyer who sued Judge Hascheff, are protected by the attorney-client privilege. How could that be, that your communications with opposing counsel, who sued you?

Now he hadn't sued the time of some of them, but he had at times -- the January, February conversations with Mr. Robison were all after Mr. Robison had sued Judge Hascheff for malpractice. On what basis could that possibly be covered by, protected by attorney-client privilege? And yet that's what I'm told. That's what I had to deal with.

THE COURT: Mr. Torvinen, that's a good question. How does the conversation between opposing counsel -- I mean if there is bills to --

MR. TORVINEN: Your Honor, I did address this. And, you know, they asked for redacted bills, they got redacted bills. Right?

So first it was the policy and the payments, then redacted bills that were produced. And then the recurring theme was there's no nexus between this underlying action of malpractice. So then my client obtained the affidavit from Mr. Alexander. And then the rope-a-dope started again and they changed the bar one more time.

THE COURT: You are not answering my question, sir.

MR. TORVINEN: Okay. Ask again, Your Honor.

THE COURT: My question is, how are conversations between opposing counsel attorney-client privilege?

MR. TORVINEN: Well, they may be confidential, they may not be attorney-client privilege. And I did address this directly, is because the matter is still up on appeal and pending -- and this goes back -- they may be confidential.

This goes back to the issue -- and Mr. Meador keeps saying, well, it's a community debt, blah-blah-blah. Well, Your Honor, if I may point you to Exhibit 13. I briefly mentioned this before, that's the MSA. And Mr. Meador, opposing counsel, put this into the record. It's in as an exhibit.

Are you there, Your Honor?

THE COURT: Yes.

MR. TORVINEN: Would you go to page 39.

THE COURT: Yes.

MR. TORVINEN: Those are omitted debts. That is not what this provision is being operated under. It's not under 24. It just isn't, right? That's not what it's under. It's not under omitted debts. It's not saying it's a community obligation. It's an indemnity clause for this very reason.

And, frankly, as part of -- you know, there's retention of 10,000 bucks here plus a little more exposure because Allied agreed to pay part of the subpoena costs.

That's why it's drafted as an indemnity clause and not

under omitted debts or treated that way, so we don't have to have this discussion about notice and delving into the underlying claim and all that stuff.

It's simply an indemnity clause, which actually ironically protects Ms. Hascheff. It protects her, which is maddening here. It's 5500 bucks. It's not a boomer, Your Honor.

It protects her. The agreement to buy this tail policy and the retention is part of that policy to which she agreed and is part the indemnity clause protects her.

And my client, frankly, has done back flips to try to address their concerns.

Pardon?

THE COURT: "In the event husband is sued for malpractice, wife agrees to defend and indemnify husband for one-half of the costs of any defense and judgment."

Now, how does that get us back to he gets served a subpoena and he runs to an attorney because he believes that the Jaksicks are ultimately going to serve him, or that Todd Jaksick is ultimately going to sue him for malpractice?

MR. TORVINEN: Because in no malpractice action where there's -- where there are a collateral case going on that will be determinative of whether or not there's a malpractice claim, in none of those cases would a claim necessarily be filed until the underlying action is resolved.

And that's -- we put this in many of our pleadings, Your

Honor. It defies common sense. It's just there's no way, although they --

THE COURT: Does the actual language of your indemnity clause say that in the event that the husband is sued or may be sued for malpractice, is there anywhere that says that there's a collateral action that she's supposed to defend him against?

MR. TORVINEN: Not directly, no, but -- but I would say that, again, the malpractice action was dependent upon the underlying trust litigation.

That's where the exposure came from. The exposure didn't come from just a malpractice complaint. The exposure came from Wendy Jaksick saying this estate plan is all botched up, Pierre.

MR. MEADOR: That's not what she said.

MR. TORVINEN: Well, that's what she's essentially -- I'm paraphrasing.

MR. MEADOR: She said her father lacked testamentary capacity.

THE COURT: Whoa, whoa, whoa. Stop, Mr. Meador.

MR. TORVINEN: Do you want to hear from my client?

THE COURT: Wendy Jaksick is not the client; correct?

MR. TORVINEN: Correct.

THE COURT: Thank you.

I did tell you I would hear from your client, so yes.

MR. TORVINEN: You want him sworn?

THE COURT: Of course.

MR. TORVINEN: Okay. Do you want to the swear him in?

PIERRE HASCHEFF

called as a witness, having been duly sworn,

testified as follows:

MR. MEADOR: Your Honor, may I make an objection to Judge Hascheff offering any facts or testimony that he refused to share in response to my multiple requests for information.

THE COURT: You may object because I don't know what he has refused to share, so you may object as we go along.

MR. MEADOR: Thank you, Your Honor.

MR. TORVINEN: So -- go ahead.

THE COURT: Go ahead.

THE WITNESS: So, Your Honor, is there any particular place you want me to start? Or do you want me to kind of start from the beginning and try to address each one of these concerns?

MR. MEADOR: I object to a narrative, Your Honor.

MR. TORVINEN: And we won't do a narrative.

Your Honor. My client is asking you what you want him to focus on. I can start at beginning of the exhibit book with the emails and get them into evidence. What would you like to hear?

THE COURT: I've explained to you that I want to hear

why there was no notice provided, that if he believed that the subpoena itself in 2018 was going to result in a malpractice action being filed and he expected to be indemnified, how come he didn't provide notice.

MR. TORVINEN: Okay.

DIRECT EXAMINATION

BY MR. TORVINEN:

Q You have the judge's question. Yes.

A And I will address that. We actually mentioned this in some of the pleadings.

So here comes the subpoena in July. So we don't know what to expect, but it's a blanket request for all of my files, basically.

But the thrust of it was that Wendy Jaksick was accusing Todd Jaksick of manipulating the estate, to the point -- I mean that's one of the allegations -- to the point that somehow in my conversations and advice with Sam Jaksick, that somehow I was taking advantage of Sam, and that Wendy --

MR. MEADOR: Your Honor, I object and move to strike. I requested the basis on which the affidavit gave notice and was not provided with this information.

THE COURT: Is that true, Mr. Torvinen?

MR. TORVINEN: Your Honor, no -- that's correct, except that it's part of the additional raising the bar every time we

tried to address an issue, and we just threw up our hands. I'm sorry.

MR. MEADOR: Your Honor, that representation that counsel repeatedly makes is not accurate, as you'll be able to see from the exhibits, particularly the early emails that I sent and that Mr. Alexander's affidavit was obtained long before I had sent Mr. Torvinen an email outlining the information I needed. So it was not a response to any alleged raising of the bar.

MR. TORVINEN: Well, Your Honor, I can address that. There was a letter that came back a few days later after that affidavit and the bills went over there. There was more -- it raised the bar again. It was only a few days. It's in Mr. Meador's exhibit binder. You can draw your own conclusions.

THE COURT: I want to hear from Judge Hascheff over objection of Mr. Meador.

Mr. Meador, I note your objection. I recognize your objection. And the Court will weigh the testimony accordingly.

Judge, please proceed.

THE WITNESS: All right. So there was a concern at the time the subpoena came in, and proof of that ultimately is that malpractice action was filed.

THE COURT: It was a concern by you, sir?

THE WITNESS: Me, personally?

THE COURT: Yes.

THE WITNESS: Yes. There's a lot of dynamics in this

family, and as proof, they mentioned eventually a complaint was filed.

The testimony that I gave in the deposition and at trial was primarily my advice to Sam Jaksick, Wendy Jaksick's attempt to invalidate the second amendment that I prepared, that I did not provide correct advice to Sam that somehow cost Wendy Jaksick, for her to receive less.

With respect to Todd Jaksick, especially since this case is on appeal, to the extent that I would have provided him with wrong advice and Wendy was able to prove that, whether it be Todd or Sam -- and these are all allegations of course, that -- that then he relying on my advice may have caused him some exposure. That's why I think he filed the complaint. All right?

MR. MEADOR: Your Honor, do I have a continuing objection?

THE COURT: You have a continuing objection, especially related to statements by Judge Hascheff that this is why he thinks the complaint was filed.

THE WITNESS: All right. So yes, there was a concern. And as I mentioned in the pleadings, I was just going to eat it, you know. I wasn't -- I just thought, you know, it's probably going to be more trouble than it's worth.

And then as the bills started to pile up, I thought at that point it would be appropriate to provide the notice. Keeping in mind, the subpoena came in, in July, and nothing really

happened for months, months and months. It really did not heat up until January of the following year.

And so when it became apparent to me that it was going to be -- we were going to exhaust the money before the deductible, we're going to exhaust the deductible, then I thought in fairness, as I indicated in my letter in July, that -- that in fairness, I thought we should split it.

And that's why.

THE COURT: So you felt that in 2019, in fairness, you should split it?

THE WITNESS: In February, when I got the bill, yes. Sometime in March or April, and February -- I mean March or April, I thought, yeah, at that time I've gotten bills now, I think we should split it.

THE COURT: Were you not provided with the bills on a monthly basis from Lemons, Grundy & Eisenberg?

THE WITNESS: No. No. In fact, that's why you see the payments of a thousand dollars from my LLCs, because I wasn't getting a bill. So that's why I started just paying it because I knew I owed something. And then ultimately I got the bill, the large bill, the 6351.80. And I did pay that.

If you note, all of the -- all of the invoices refer to Allied World Insurance, because they're the insurance company. Whether they made the payment or whether I made the payment, they all refer to Allied World Insurance.

So when you see "Thank you PAH Limited," or "Thank you Pierre Hascheff," they all have the same Allied World designation under it, the same thing with Allied, but I paid those bills.

THE COURT: And the report that Todd Jaksick refers to in the malpractice claim was not contained within your file?

THE WITNESS: I can't tell you for sure what that is all referring to. There were several expert reports in the underlying litigation. I don't know what they're referring -- I don't believe it's in my file. Very seldom -- the only expert reports we would have would be appraisers, so I don't think it was in my file.

THE COURT: Okay. And when were you deposed?

THE WITNESS: I believe I was deposed in January -- let me look at the bills. I think I was deposed in January and February.

MR. TORVINEN: Of what year?

THE WITNESS: In 2019.

THE COURT: And did you testify at the trial?

THE WITNESS: Yes.

THE COURT: Were you represented during your testimony?

THE WITNESS: Yes.

My concern, obviously, Judge, was you just don't know how these things are going to turn.

I mean, we're having conversations with Mr. Jaksick's lawyer. I don't know if he's going to sue me. Or the real

threat, I think, is from Wendy.

So ultimately I needed counsel to make sure that I would have the right guidance, we would not do anything that created a problem in a mal- -- in a malpractice action.

Obviously, the underlying case, in my opinion, the collateral case, was extremely important. We were able to -- which I believe we did, in the underlying trust litigation -- close down any of those allegations, the collateral estoppel and res judicata in any subsequent malpractice actions. That was really the litmus test for us to put up our defense, not for me to go in blind and without counsel.

THE COURT: You were sued for malpractice in December of 2018.

THE WITNESS: Correct.

THE COURT: And you provided notice of that suit in January of 2020.

THE WITNESS: Correct.

THE COURT: Okay. Mr. Torvinen, do you have questions for your client?

MR. TORVINEN: I don't, Your Honor, except to point out to you, I think in a broad and general sense, the affidavit of Mr. Alexander is entirely consistent with what my client just told you. There's more detail, no question, but it's completely consistent.

THE COURT: Okay. Well, we're talking about -- we're

not in argument. I asked you had if you had any questions.

MR. TORVINEN: I understand. I don't have any further questions.

THE COURT: Mr. Meador, do you have questions?

MR. MEADOR: Yes, I do. Thank you.

CROSS-EXAMINATION

BY MR. MEADOR:

Q Judge Hascheff, you just testified that there were really no bills until 2019 and your deposition was in 2019.

Will you please turn to Exhibit 15, and your bill for September of 2018?

MR. TORVINEN: Counsel, can you point him to a page number?

MR. MEADOR: LH 96.

THE WITNESS: So I don't recall that being my testimony but, 96, did you say?

BY MR. MEADOR:

Q LH 96. The entry for September 14th, 2018.

A Okay. September 14, 2018.

I have it.

Q Does that refresh your recollection that the first day of your deposition was in September of '18, before you were sued?

A Looks like it, yes.

Q And then what was my client charged for, that you

redacted?

A I couldn't tell you.

Q And then turn to LH 100. The entry for November 17th of 2018. Does that refresh your recollection that your deposition was in November of 2018, before you were sued for malpractice?

A That's what the entry indicates, yes.

Q And if you turn to 103, there's a bill for $825 on January 24th, 2019. What was that for?

A I can't recall what it was for, but everything that was redacted we believe were privileged, should not be disclosed.

Q And you and you alone get to make that decision?

A No.

Q And turn to 104. Or, excuse me, 105. On February 20th, a bill for $1,175. What was that for?

A Again, it was a privileged communication, I couldn't tell you.

Q What's the basis of the privilege?

A This was something I had in conversation with my attorney.

Q And do you contend that this is, that your interests are identical to my client's interests?

A Yes, they are.

Q And that they arise out of the same potential liability for your action during the marriage?

A We're both responsible in the indemnity agreement, so

yes, if a judgment is entered against me, she's going to have to pay half.

Q Turn to page 106. On February 22nd there's an entry for $775. What was that for?

A It was a privileged communication.

Q And what's the nature of the privilege?

A All I can tell you is we looked at that entry, we determined it to be privileged and confidential. As you notice, all of the --

Q I didn't ask you any other question. I asked you the basis of the privilege. We don't even know if you were talking to your counsel.

So what's the basis of the privilege for that one?

A I believe I've told you that Mr. Torvinen and I looked at these entries and made a determination those were privileged communications.

Q And did you provide a privilege log?

A Excuse me?

Q Did you provide a privilege log?

MR. TORVINEN: Your Honor, I object. That's -- it's irrelevant. Attorney-client communications are privileged. Everybody knows that.

MR. MEADOR: We don't even know if it's an attorney client privilege -- client communication, Your Honor.

BY MR. MEADOR:

Q Judge Hascheff, if you look at the entries for 2/24, your lawyer was meeting with Kent Robison, Todd Jaksick's lawyer, to prepare for your testimony; correct?

A That's correct.

Q And this is after he sued you?

A Correct.

Q And yet your lawyer tells me I'm not entitled to know what you spoke with Mr. Robison about, doesn't he?

A Well, there were a lot of things that were discussed, a lot of --

Q Turn to 107.

A Okay.

Q Do you see an entry L 120, analysis/strategy?

A Yes.

Q How much were you charged for analysis/strategy?

A In total?

Q Yeah. What does it say?

A $3,350.

Q And it's your position my client has absolutely no right to know what that analysis or strategy were, she just has to write a check for half the bill?

A Well, we produced -- you asked me --

Q Would you please answer my question, sir.

A Yes, we provided the information.

Q Now, please turn to Exhibit 3.

THE COURT: Could you hold for one second.

MR. MEADOR: Sure.

THE COURT: Judge, you and Mr. Torvinen decided what would be redacted?

THE WITNESS: Yes.

THE COURT: So it wasn't decided between you and Mr. Alexander what would be redacted?

THE WITNESS: Well, Mr. -- if I recall correctly, he may have been involved in part. Based on my discussions with him -- again, I don't want to do anything to waive the privilege -- based on my many discussions with him, we knew what was sensible, what could be disclosed.

THE COURT: From -- these billing records relate that someone sat in for the trial, that didn't even relate to your testimony?

THE WITNESS: Sorry, Judge?

MR. TORVINEN: Can you be specific, Your Honor?

THE COURT: At 105, or at 106.

MR. TORVINEN: Okay. Would you ask my client the question again?

THE COURT: Review and analyze trial testimony of other witnesses in the Jaksick trial in preparation of that trial.

So they're reviewing other people's testimony and you're being charged for that, as part of a malpractice suit?

THE WITNESS: Are you talking about the entry that's

dated February 5th, 2019?

THE COURT: It would have been February 21st, and it's on 106. Review and analyze testimony of other witnesses in Jaksick trial in preparation of your trial testimony.

THE WITNESS: Correct.

That's my understanding, that Mr. Alexander looked at the testimony of some of the other witnesses and how that may impact my testimony, the questions I might be asked.

THE COURT: Okay. Thank you. Please proceed.

BY MR. MEADOR:

Q And on that same February 22nd, Judge Hascheff, your lawyer appeared to sit through your testimony, even though he would have no ability to ask you questions or object to questions; correct?

A I don't know about that, but he would have no --

Q Well, you weren't a party to that action, were you?

A I was a witness.

Q Are witnesses' lawyers allowed to ask them questions at a trial that they're not a party to?

A No, but he can converse with the other parties.

Q Thank you.

A He can converse with the other parties.

Q Now please turn to Exhibit 3, and the page LH 8.

A All right.

Q And please read paragraph 18 to yourself and let us know

when you've had a chance to do so.

A I've read it.

Q So does that refresh your recollection that the expert report that gave -- that Todd Jaksick claimed gave him notice was not part of your file?

A I do not believe that expert report was part of my file.

Q Thank you.

And would you please turn to Exhibit 14?

A Okay.

Q Show me, identify for me the paragraph in which Wendy Jaksick accused you of malpractice.

MR. TORVINEN: Your Honor, that was never my client's testimony, nor was it my argument.

It was actually under Exhibit 16. That misstates what I said. It was under 16. He's pointing my client to the subpoena.

MR. MEADOR: Yes, I want to know what paragraph of the subpoena --

THE COURT: It's cross-examination and I'm going to allow the question.

THE WITNESS: And you can appreciate, Mr. Meador, when you look at the documents, that they were --

MR. MEADOR: Would you please just answer my question, please. I want the paragraph number.

THE WITNESS: You want me to read the whole thing all over again?

BY MR. MEADOR:

Q I want you to tell me which paragraph reflects that Wendy Jaksick was accusing you of malpractice. I believe that is what --

MR. TORVINEN: Your Honor, that's --

MR. MEADOR: -- you just testified to.

MR. TORVINEN: Your Honor, my client testified or he said, I think, if I recall correctly, that it was the totality of this thing, not a specific --

MR. MEADOR: I would ask that counsel not testify for his client.

MR. TORVINEN: I'm not. It's mischaracterizing.

THE COURT: Okay. Whoa. Whoa.

Judge Hascheff, you answer his question if you know the answer.

THE WITNESS: I do know the answer.

All of these entities are intertwined with the estate plan. The SS LTD was a subject of concern. Jaksick family entities, same thing, all part of the estate planning. Entities were set up. There's a big picture here, about how we structured. The big picture was the estate plan, and all of these entities fit into that estate plan. All right?

It was also -- part of the estate planning was Jaksicks were in trouble because of the recession, and they had a huge amount of real estate holdings, all of which were subject to that.

So in order to do credit protection as part of the estate plan, many of these entities were set up, specifically the Tahoe property which we referred to on page 16, the indemnification agreement, part of the estate plan, SSJ part of the estate plan.

They wouldn't be asking for these unless, and as it proved up in Exhibit 16, where she was making this claim that the second amendment was invalid, and my advice was right in the middle of that. And also --

BY MR. MEADOR:

Q Let's go there.

What document did Wendy Jaksick's lawyers ask for as part of their 41-page exhibit that you would not have produced, you would not have been required to produce if they had simply asked you in one page to produce your entire file?

MR. TORVINEN: Objection. Why is this relevant? It's not relevant.

MR. MEADOR: It is relevant.

MR. TORVINEN: What -- it's not relevant.

THE COURT: Mr. Torvinen, it was his argument that this was, the subpoena itself, was a request for Judge Hascheff's file, and that that did not in itself raise the red flag that this was subjecting Judge Hascheff to malpractice.

MR. TORVINEN: Okay. Well, my --

THE COURT: I would like to hear the answer,

Mr. Torvinen.

MR. TORVINEN: Okay.

THE WITNESS: Mr. Meador, do you want to repeat the question?

BY MR. MEADOR:

Q What document did Wendy Jaksick's lawyers request in this 41-page subpoena that you would not have been required to produce if she had simply asked you to produce all of your files related to the Jaksicks?

A So presumably in -- we didn't produce these documents, the Jaksicks did, because the Jaksicks had the documents, I did not.

So I don't know which ones they produced and which ones they put on a privilege log.

Q Well, that was not responsive to my question, Your Honor.

A When you look at -- when you look at all of these requests about how they didn't share assets equally, on page 17, how they wanted all of those documents, there are some documents in here --

MR. TORVINEN: Well, just specifically read that.

THE WITNESS: Pardon?

MR. TORVINEN: Read that.

THE COURT: Okay. So, Mr. Torvinen, you don't get to advise your client --

MR. TORVINEN: I understand.

THE COURT: -- how to testify when he's on the witness stand.

MR. TORVINEN: I'll come back to it.

THE COURT: You can go back to it.

The question was, is what would not have been -- you would have had to produce, but you said the Jaksicks produced this, Judge.

THE WITNESS: Correct. They did.

THE COURT: You said you didn't have any of these documents.

So if you didn't have any of these documents, why did the subpoena itself make you believe that you were going to be sued for malpractice?

THE WITNESS: For the things or the matters that I just mentioned. All right? All of these documents, the majority of this documents define the estate plan.

The dispute in the underlying litigation was about the second amendment primarily. That's what I was deposed on and that's what I've testified.

All of these documents, the thrust of all of these documents would show, as indicated on page 17, about why she did not share equally in many of the assets that were subject to the estate plan, the Tahoe property for one, LLCs for others, that she was not -- she was not in any of the business entities, including

the Tahoe property, all of which were part of my estate plan.

So she would not be asking for these documents and asking for the second amendment to be set aside unless she was coming after me or one of the --

MR. MEADOR: Objection, move to strike. It's speculation.

THE WITNESS: Well, you asked me. This was the testimony.

BY MR. MEADOR:

Q No, I asked what document you would be required to produce that would be different than if she had served a simpler subpoena.

A And I told you --

THE COURT: All right. All right. Move on, Mr. Meador.

THE WITNESS: -- they were --

MR. MEADOR: Thank you.

THE COURT: Judge -- Judge, we're just going to move on.

THE WITNESS: Okay.

BY MR. MEADOR:

Q Please turn to Exhibit 16, and identify for me the paragraph in which Wendy Jaksick accused you of malpractice.

A I don't believe you're going to find any specific reference to malpractice. However, this is what the whole purpose of the underlying litigation was.

MR. MEADOR: Objection. Move to strike.

THE WITNESS: I advised the client -- I was cross-examined --

MR. TORVINEN: My client answered the question. He's answering.

THE WITNESS: I was cross-examined on this over and over.

THE COURT: And he doesn't -- stop, because there's an objection pending. And he knows the rules. He doesn't get to keep talking when there's an objection pending.

He says that this was nonresponsive and at this point in time the Court is inclined to strike that as being nonresponsive.

All right.

BY MR. MEADOR:

Q Would you please look at paragraph 4 on page 113. Read it to yourself.

A All right.

Q And what was Wendy Jaksick's specific complaint about the second amendment?

A There were many. It was invalid. He didn't have the requisite mental capacity, among others.

Q Well, would you read it out loud then since we seem to disagree.

A All right.

MR. TORVINEN: Objection, Your Honor. There's no reason to read it out loud. You can read it. It's in evidence.

MR. MEADOR: Thank you.

THE COURT: It is in evidence.

MR. MEADOR: I was just confused by the answer, "a lot of things," when there didn't seem to be a lot of things.

MR. TORVINEN: Well, I'd move to strike that. My client answered that about the subpoena, all the other entities.

THE COURT: Well, first of all, that didn't make sense to me, Mr. Torvinen.

Paragraph 4 states that he challenges the validity based upon the fact that he did not possess the requisite mental capacity, or that it was executed as a result of undue influence.

MR. TORVINEN: Right.

THE COURT: It doesn't state that subsection, or the new 2, the third amendment that was dated, that it was improperly drafted, it doesn't say that.

MR. TORVINEN: Right.

THE COURT: What it says is that they didn't lack the capacity or that he was unduly influenced. That's what it says.

MR. TORVINEN: Correct.

THE COURT: That's what --

MR. TORVINEN: And -- but to answer your question, Your Honor --

THE COURT: No, no, no, you don't get to answer my question, Mr. Torvinen.

MR. TORVINEN: Well, I'm trying to point you to the

documents.

THE COURT: Mr. Torvinen, during your redirect of your client --

MR. TORVINEN: Okay. Fair enough.

THE COURT: -- or in your first questioning, because you chose to let the Court question him instead of you questioning him, I'll let you flesh that out --

MR. TORVINEN: Okay.

THE COURT: -- but you're not going to testify for him.

MR. TORVINEN: Fair enough.

BY MR. MEADOR:

Q Judge Hascheff, would you turn to page -- or to Exhibit 9.

A All right.

Q Just read it to yourself and let me know when you've had an opportunity to do so.

A All right.

Q And you took the position that you had no obligation to provide me with this information, correct?

A No, that's not correct.

Q When did you provide me with information about the current status of the malpractice action?

A It was in an email. We told you it was stayed.

Q Well, it was stayed in December of 2018. This is a letter, June 11th, 2020. Did you respond to my request of June

11th to tell me the status of that action?

A The status of the action did not change.

Q And did you respond to paragraph 2?

A We didn't know at the time. I think Mr. Torvinen had told you in May that the equitable claims were stayed, excuse me, the equitable claims were pending.

THE COURT: Mr. Torvinen, could you quit talking to your client while he's --

MR. TORVINEN: I didn't. I wasn't. I didn't say a word to him. I was just looking at the -- at the exhibit. I was not -- I didn't say a word.

THE COURT: Thank you.

BY MR. MEADOR:

Q Look at paragraph 4. You would agree that you never provided me with this information, wouldn't you?

A That's correct, we did not provide you with that information.

Q And the same is true with respect to paragraph 5?

A Again, having that discussion, there was a concern that that would lead to --

Q I just asked you if you responded to my request.

A No, because it was privileged.

Q And paragraph 6, you didn't respond to that either?

A Privileged.

Q And 7, you didn't respond to that either?

A Privileged.

Q Turn to paragraph 8 -- or Exhibit 8.

A All right.

Q You've seen this letter before, haven't you?

A Yes.

Q And, again, it was me requesting the very same information, isn't it?

A What specific information are you referring to?

Q Well, for example, if you look at the first full paragraph on the second page, the basis on which your lawyer made broad general characterizations and conclusions.

A Okay. Again, we had pending equitable claims. You have to understand when he -- we did this affidavit, this was early on. Early on, we did not know. We suspected, based on Wendy's claims, when she asked for $70 million in the lawsuit, that that would morph into a malpractice claim.

Q When was the lawsuit tried?

A If I recall correctly it was in February of 2019.

Q It was actually -- right. And when was the decision rendered?

A That -- well, the jury came back on the legal claims, I think, within two weeks.

Q And the date of Todd Alexander's affidavit about which I'm asking you questions is dated what?

A What exhibit is that?

THE COURT: April of 2020. Come on, let's move along.

MR. MEADOR: Thank you.

BY MR. MEADOR:

Q Now, I notified you in an email and I notified your lawyer in this letter that my client was prepared to pay her half of the costs of defense, correct?

A Are you talking about the underlying malpractice action?

Q Yes. She said she would pay her half of that. Our dispute was what was covered and what was not covered, right?

A No, it was more than that.

Q Well, look at the second page of paragraph -- of Exhibit 9, the last paragraph.

MR. TORVINEN: Are you referring to Exhibit 8, Counsel?

MR. MEADOR: Yes, I'm sorry, I'm still on 8. I apologize, LH 22.

BY MR. MEADOR:

Q And that's the same thing I told you in an email when we were emailing each other directly, isn't it?

A Yeah, among other things.

Q Now turn to the last page of Exhibit 8.

A We just had a dispute as to what the indemnity covered.

Q I agree.

A I thought everything and you thought it was a couple of hundred dollars.

Q And turn to the last paragraph of Exhibit 8 and tell me

what part, what information you did not receive pursuant to 35.2 that you needed to receive in order to respond.

Can you share with the Court what you are looking at.

A It's section 35.2. I understand the question, you want to know what information --

Q I understood your argument to be that I didn't comply with 35.2. I want to know what information you believe you didn't receive that you needed.

A 35.2 indicates that if a party wants their attorney's fees they're going to have provide the other party at least 10 days prior notice, then meet the requirements which are one, two, three, four.

So we did that multiple times, I believe a total of five or six times, we kept -- as you kept asking for more information, we kept providing it. And I can give you the dates when we gave you 10 days notice.

Q She actually kept asking for the same information, didn't she?

A Pardon me?

Q What she did was continue to ask for the same information because you continued to refuse to produce it.

A That's not true.

Q Okay. Well, the judge will read the exhibits and I'll trust her judgment.

But I'm asking you about if you claim that my client did

not comply with paragraph 35.2.

A I don't -- if you are asking me, I believe collectively the answer is no. You may have sent something and we missed it but I don't recall you ever sending a letter providing 10 days notice to cure.

Q Are you looking at Exhibit 8?

A Yes.

Q Page 4?

A Yes.

Q Where it says pursuant to paragraph 35.2?

A Correct.

Q Okay. I'll move on.

Now, look at Exhibit 7. This is a letter from your lawyer, correct?

A Correct.

Q You've seen this letter before?

A Correct.

Q And he insists that you sent me an email on March 1, 2020. Correct?

A Sent you an email?

Q The bottom of the first page. He refers to your email of March 1st, correct?

A Correct.

Q And then turn over to the next page, the last paragraph. What remedy does your lawyer on your behalf state that he will

seek?

A Is he will seek enforcement of the MSA.

Q Does he say that he'll sue my client for contempt or file a contempt motion against her?

MR. TORVINEN: Your Honor, that statement is misleading. It's pled in the alternative.

MR. MEADOR: Your Honor, I would ask that counsel either make an objection or not.

MR. TORVINEN: It's misleading. It's pled in the alternative, Your Honor. It's misleading. Go back and look at the pleading. It's pled in the alternative.

BY MR. MEADOR:

Q My question is whether your lawyer told me that he would be filing a motion to hold my client in contempt in this letter.

I'll move on since it's admitted.

Will you turn to Exhibit D.

THE COURT: This would be in Mr. Torvinen's exhibits?

MR. MEADOR: Yes, thank you.

THE COURT: Are you stipulating to the admission of D?

MR. MEADOR: I'll stipulate to the admission of D.

THE COURT: Okay. Thank you.

(Exhibit D admitted into evidence.)

BY MR. MEADOR:

Q Judge Hascheff, this is the email to which your lawyer referred in Exhibit 7; correct?

A I believe so.

Q And, again, you state in your email, "I intend to enforce," correct?

A You want to direct me to what paragraph?

Q Well, it's all one paragraph.

THE COURT: It's a single paragraph document.

BY MR. MEADOR:

Q It's about one, two, three, four, five -- five or six lines down. "I intend to enforce the settlement agreement." That was your language?

A Yes, that's what I said.

Q And can you show me where you gave her notice that you were going to seek to have her held in contempt of court?

MR. TORVINEN: Objection, it's irrelevant, Your Honor. It's irrelevant. It was pled in the alternative. It's irrelevant. What difference does it make?

THE COURT: You have notice requirements. You were trying to have the decree enforced.

MR. TORVINEN: Correct.

THE COURT: What's good for the goose is good for the gander. It's not irrelevant.

MR. TORVINEN: The objection is it's in compliance with 35.2, which says he gets attorney's fees if he's got to enforce. It's irrelevant. The contempt is irrelevant.

THE COURT: Most people who are found in contempt, sir,

do not find it irrelevant.

MR. TORVINEN: But it's pled in the alternative, Your Honor.

THE COURT: So are you acknowledging at this moment, sir, that you do not have a basis to bring contempt because you didn't provide notice?

MR. TORVINEN: No, I am not.

THE COURT: All right. Then I'm going to allow the question to be asked, Mr. Torvinen.

MR. TORVINEN: Okay.

THE COURT: And I don't find it irrelevant.

If you have a requirement for notice and you didn't provide notice of contempt, then you do have a basis to enforce but not to have her held in contempt.

MR. TORVINEN: And it's pled in the alternative.

THE COURT: And it is still part of what it has -- you're not understanding.

MR. TORVINEN: I am understanding.

THE COURT: There are differences between contempt and enforcement, sir.

Please proceed, Mr. Meador.

MR. MEADOR: Court's indulgence, Your Honor.

THE COURT: Of course.

MR. MEADOR: Your Honor, I won't ask him about that. It's in the file and you can review it in terms of documents that

I had requested and information I had requested, to move things on.

BY MR. MEADOR:

Q And finally, Judge, will you please look at Exhibit 5.

A Okay.

Q This email is in response to my email of about March 4th or 3rd, isn't it?

A It is in response to an email, yes.

Q And if you turn to LH 16, you advise me that your only duty was to advise my client that you had been sued and to provide proof of payment. That's all you had to do?

A Could you repeat the question?

Q I'll move on.

Would you look at -- actually, Your Honor, I'll just ask you to look at 4 in terms of being able to see that we consistently --

MR. TORVINEN: Objection, this is argument.

BY MR. MEADOR:

Q -- asked for the same information.

MR. TORVINEN: Objection, argument.

BY MR. MEADOR:

Q Then, Judge, please turn to Exhibit 4. Specifically, LH 13. Do you recall receiving this email?

A Yes, I do.

Q And then if you look at Exhibit 5, this is your

response.

Excuse me. That's not true.

Then look at the next page, March 3rd, my response to you. You received this email?

MR. TORVINEN: Under exhibit -- under Exhibit 5, or 4?

THE COURT: Exhibit 4.

BY MR. MEADOR:

Q Under 4, LH 14.

MR. TORVINEN: I got it.

BY MR. MEADOR:

Q You received this email from me, Judge?

A Yes.

Q Thank you.

MR. MEADOR: I have no other questions, Your Honor.

THE COURT: Mr. Torvinen.

MR. TORVINEN: Your Honor, may I proceed? I just need to get our exhibits into evidence.

THE COURT: Mr. Torvinen, what is on your desk that moves and it looks more like a flag, as if you were expecting food to be delivered?

MR. TORVINEN: Oh, that's a -- it's Christmas card and it has nasty words about the Christmas of 2020 because of the corona virus.

THE COURT: Okay. Well, it's really --

MR. TORVINEN: Is it bugging you?

THE COURT: Yes, it's impeding my ability to --

MR. TORVINEN: I'm sorry, Your Honor. It's gone now.

THE COURT: Thank you. At times, when you talk to your client, it looked like you would duck behind it, and I didn't know what was happening.

MR. TORVINEN: I can assure you it wasn't intentional hide the lawyer, talk to the client.

THE COURT: All right. Thank you very much.

REDIRECT EXAMINATION

BY MR. TORVINEN:

Q Okay. Mr. Hascheff, would you go to Exhibit A. Thank you.

What's Exhibit A?

A Exhibit A is the initial communication I had with Ms. Hascheff.

Q And is it different than the exhibit, the corresponding exhibit placed by Ms. Hascheff?

A It's just missing two pages.

Q What pages?

A One, the letter, a copy of the letter which was addressed to her, as well as Mr. Alexander's letter dated October 23rd. Those were included in with the cover letter that I sent you.

Q And you sent this. This is your handwriting?

A Yes.

MR. TORVINEN: Move to admit, Your Honor.

MR. MEADOR: No objection.

THE COURT: It's admitted.

(Exhibit A was admitted into evidence.)

BY MR. TORVINEN:

Q What's under B, what is this?

A Okay. B. Okay. That is the email I sent to Lucy Mason. She had made -- on January 24 or 26, I had provided her some information concerning the claim. She followed up with a letter on February 4th, which is part of this exhibit. And then what exhibit -- this first page shows that I delivered everything she requested except --

MR. MEADOR: Objection, testifying from a document that's not admitted.

BY MR. TORVINEN:

Q Well, what does the email say?

A The email says --

MR. MEADOR: Object. Prior consistent statement is hearsay and inadmissible.

MR. TORVINEN: He can testify to what he told -- is this your statement?

THE WITNESS: Yes.

MR. TORVINEN: It's your statement.

MR. MEADOR: He can't offer that statement for the truth

of that statement. It's hearsay. It's a prior consistent statement.

BY MR. TORVINEN:

Q Then I'll follow up.

What did you send, what, to your recollection, what did you send Lucy Mason?

A Everything that she asked for in her email to me on February 4th, which included correspondence with the adjuster, endorsement number five, correspondence, copy of the policy, correspondence, subpoena -- I don't even think she asked for that but I sent it anyway -- complaint, copy of the cancelled check.

Q What cancelled check?

A The amount of $6,351.80.

Q And where was that in this exhibit? It's not -- they're not numbered. It's about halfway through it, isn't it?

A Correct, it's not.

MR. TORVINEN: Your Honor, you were asking about that earlier.

THE WITNESS: And then the Jaksick complaint.

BY MR. TORVINEN:

Q Well, wait, wait. Let's back up.

How much is the check for?

A $6,351.80.

Q And you provided Ms. Mason a copy of that?

A Correct, plus the Lemons Grundy invoice that showed

payments that we provided.

Q And so you sent this email on February 5 in response to a request from Ms. Mason?

A Yeah, everything she asked for on February 4th, I had to her by February 5th.

Q You responded within the next day?

A Correct, in January.

Q And go a few pages back. Did she respond to your email on February 11th?

MR. MEADOR: My objection still stands, Your Honor.

THE COURT: I don't even know where we're at and what we're talking about. The first one was his own -- so February 11th appears to be --

MR. TORVINEN: That's further back, Your Honor.

THE COURT: So you're asserting this is an email string between --

MR. TORVINEN: Correct.

THE COURT: -- and Mr. Hascheff, and Judge Hascheff.

MR. TORVINEN: Correct. And you can see the reliability which gets at the hearsay rule, that my client responded to the first email asking for X number of documents, and it's in the email from Ms. Mason. It's the chain.

BY MR. TORVINEN:

Q What is this set of emails, what are these?

A These emails show that whenever they provided or asked

me for information I provided it. The only thing I didn't provide were what we perceived to be attorney-client narratives, and then eventually those were redacted and sent to Mr. Meador.

Q Did, in this chain, did Ms. Mason ask you to provide redacted bills, do you recall?

A She said we could resolve any concern about attorney-client privilege by redacting the narratives, which we did.

Q Would you go back to the part of this chain, the email from her dated February 11, 2020?

A Yes.

Q Would you look at the second paragraph?

A Yes.

Q Read that, please.

A As you acknowledge, no fees are being incurred.

Q Well, doesn't she ask you for redacted bills in this paragraph? About 10 lines down, the "I am entirely" -- do you see that?

MR. MEADOR: Your Honor, it either has to be admitted or not before he can ask questions --

THE COURT: Yes.

MR. MEADOR: -- about an email from --

THE COURT: I'm just going to admit it over objection.

MR. TORVINEN: Okay. Let's just admit it. Fine.

THE COURT: I'm admitting it over objection. And I'm

also admitting it even though it isn't complete.

(Exhibit B was admitted into evidence.)

THE COURT: Let's be realistic. On several of the pages, there are "tap to download information." I have no clue what information was included in the "tap to download."

MR. TORVINEN: Where are you referring, Your Honor? Just so I understand what you're saying.

THE COURT: Okay. Because the pages aren't numbered, it makes it difficult.

All right. Let's go. Exhibit B, page 1, 2, 3, 4. It says February 5th, to Lucy Mason from Pierre Hascheff. And there's a PDF and it's there. I don't know what's in that PDF. I have no clue.

THE WITNESS: That was the subpoena.

THE COURT: I have no clue what it is. You could tell me what you want to tell me. I have no clue.

BY MR. TORVINEN:

Q Okay. Well, let us back up. What was in -- it says PDF --

THE COURT: No. No. No. No. No. No. You either have to give me it to me -- you go to the next one, the next one that says PDF, it says Jaksick complaint. I don't know whose handwriting that is, I don't have a clue about that. So I don't know what's been submitted or given back to her from this.

You state that it is everything that's of importance.

The only thing that I can tell is that these -- it's an email string between them, but what was actually provided, I have no clue.

MR. TORVINEN: Well, my client testified to that, Your Honor.

THE COURT: Okay. I still have no clue. It's not part of that email. The email doesn't tell me that.

THE WITNESS: Although, Judge, I said on February 3rd, do you have everything that you need? She did not object, saying I didn't get all the things that I requested. The only thing she objected to was the fact that I did not want to provide attorney-client privileged narrative. There was no objection that she did not --

THE COURT: Okay. Okay. I'm not here to argue with you. I've admitted Exhibit B over objection and I'll read to it figure out what it is.

BY MR. TORVINEN:

Q Okay. Did you later provide redacted bills?

A Yes.

Q To whom?

A You did. I provided them to you. You provided them to Mr. Meador.

Q Okay. So let's go to Exhibit C. What is C?

A This is my, I believe, my first communication with Mr. Meador. This is where I correct the original amount that I

had in January.

Q To what?

A To 4675.90, which there was an error in January. I also corrected it to Lucy, in my emails with her.

MR. TORVINEN: I move to admit this one Your Honor. This is C.

THE COURT: I believe C is already in.

MR. TORVINEN: I thought it was D. It's C?

THE COURT: It's in now, if there's no objection, Mr. Meador.

MR. TORVINEN: Okay. D is in I think, right? D is in?

THE COURT: Mr. Meador, do you have any objection related to C?

MR. MEADOR: I have no objection to C.

THE COURT: Thank you. It's in.

(Exhibit C was admitted into evidence.)

MR. TORVINEN: Okay. Sorry, Your Honor. D is in?

THE COURT: Ms. Covington, is D in?

THE CLERK: Yes, Your Honor. D is in with no objection.

THE COURT: Thank you.

MR. TORVINEN: This is also in Mr. Meador's binder. I -- just to keep it clean -- I offer E.

THE COURT: Mr. Meador?

MR. MEADOR: I believe E is the same as my 7, so no objection.

THE COURT: It's in.

(Exhibit E was admitted into evidence.)

BY MR. TORVINEN:

Q What's F, Mr. Hascheff?

A That was the complaint that I sent on the 24th.

Q To whom?

A Lucy Mason. She wanted a copy.

Q Is this an email string with Lucy?

A Yes.

Q What -- between what dates?

A January 24th, and then on January 29th, I sent her a copy of a page, the MSA, requiring -- it was based on Section 40.

MR. TORVINEN: I move to admit this.

THE COURT: Mr. Meador?

MR. MEADOR: I don't know -- "Here you go, please let me know when I expect payment. Hope all is well." I have no way of knowing what that's about at all. So I do not stipulate. I object, that it's a prior consistent statement, according to his statement.

MR. TORVINEN: Prior consistent statement?

MR. MEADOR: Yeah.

BY MR. TORVINEN:

Q What are you asking Ms. Mason in this email?

A So what I provided her was -- I didn't know if she had a copy of the MSA so I provided her with a copy of the relevant

page.

THE COURT: Okay. I'm not going to admit this one because in this particular case it says -- it says that he sent the complaint again, and that's what he just testified to, that he sent the complaint --

MR. TORVINEN: Well, this is a repeat of the email that's already in.

THE COURT: Whoa. No, it is not, sir.

MR. TORVINEN: I'll go back and look at it.

THE COURT: Because they repeat that there's no reason and there's no -- he says he's attached the MSA, and there's no attachment from the MSA. So it's not even consistent with what he's testifying to.

MR. TORVINEN: Well, if you go to the second page of this email, go under -- it's under F.

THE WITNESS: Okay.

BY MR. TORVINEN:

Q Okay. What did you write to Ms. Mason on the bottom of this page? It's under -- right here. I think it's the next page. That's missing a page. Oh, there it is right there. You've got it.

A So I told her --

THE COURT: No, I'd like to get the "here you go" in. Now you're telling me this is part of a string and the string is different than you've got it in B. It's a completely different

string. How do I know which is right?

MR. TORVINEN: Well, I can ask my client. Let me look.

THE COURT: Because the first page is already in as part of B and the second is "Please let Lynda know I dropped your check in the mail," so --

MR. TORVINEN: Right, but this has the two additional January entries. That's it, Your Honor. They aren't in the other string. That's all.

Are they?

THE WITNESS: Yeah, so --

THE COURT: So now you're telling me that the first string that you gave me is not consistent, and this is an inaccurate string, that it's interrupted.

MR. TORVINEN: Hang on. Let me look.

THE COURT: I mean, you don't piecemeal the -- are you cherry picking?

MR. TORVINEN: I hope not.

THE COURT: Well, it sure feels that way, because if you weren't and this required the other string, it should have been part of Exhibit B.

MR. TORVINEN: Bear with me.

Yeah, Your Honor, my client will address that.

THE WITNESS: So this is offered really for two different purposes. In B, that was to try to show that we timely provided all information she requested, except the narrative.

This should be, I believe, our Exhibit 6 to the hearing. So this was offered to show the additional information that was going to her, that we had previously provided information to Lucy Mason.

That's why you see the 24th email in F as well as you see the --

MR. TORVINEN: Does that answer your question, Your Honor?

THE COURT: I'm going to admit it over Mr. Meador's objection. But I'm going to advise you, Counsel, that it shows me that Exhibit B is an incomplete document.

Move on.

(Exhibit F was admitted into evidence.)

MR. TORVINEN: All right.

BY MR. TORVINEN:

Q G?

MR. MEADOR: Is it already admitted as 3, Your Honor?

MR. TORVINEN: Is G already in? I know -- I think H, I and J are in, I think.

THE COURT: Ms. Covington, can you confirm that?

THE CLERK: Your Honor, I do not show -- G is not admitted yet. I just show that H and I are admitted.

MR. TORVINEN: Okay. So I move to admit G.

THE COURT: And it's the same document you have, isn't that, Mr. Meador?

MR. MEADOR: Yes, Your Honor. No objection.

(Exhibit G was admitted into evidence.)

MR. TORVINEN: And then move to admit J.

MR. MEADOR: I object to J being offered for the truth.

MR. TORVINEN: I don't know what Your Honor already objected -- I already objected to the objection, because it's a piecemeal job after offering the whole thing.

MR. MEADOR: I never offered it once. I put in it my exhibit binder at a time when I thought we were going to have an evidentiary hearing, in case the Court ruled against my motion in limine and found that it's appropriate for Mr. Alexander to offer conclusions and characterizations while keeping the basis --

MR. TORVINEN: Well, I think it's in evidence, isn't it?

MR. MEADOR: -- of those conclusions secret.

MR. TORVINEN: Well, it's in evidence, right?

THE COURT: It has been admitted --

MR. TORVINEN: Forget it.

THE COURT: -- by stipulation.

And the Court recognizes that Mr. Alexander had been in the waiting room -- he is no longer in our waiting room, which I don't blame him. He has not been called to discuss it and he does have -- the objection has been stated repeatedly that Mr. Alexander's affidavit is, one, after the fact, and two, has broad-based statements contained within it.

The Court is smart enough to analyze this particular

situation.

MR. TORVINEN: Do you want me to call Mr. Alexander, Your Honor? We can get him on the phone. Do you want to hear from him?

THE COURT: You're going to be done in about 5 minutes.

MR. TORVINEN: Okay. Well --

THE COURT: Because I have a judges' meeting at noon that I can't miss.

BY MR. TORVINEN:

Q Okay. Would you go to Exhibit 15? Mr. Meador examined you about this. I think that's the subpoena, isn't it?

THE COURT: No.

MR. TORVINEN: See what's 15.

No, go to 14. Go to 14.

Sorry, Your Honor, I miss -- I wrote down the wrong exhibit.

BY MR. TORVINEN:

Q And go to page 17.

A Okay.

Q Now, you started to answer this. What about the specificity on page 17 alerted you to malpractice risk?

A Well, again, all of these files are under the umbrella of estate planning. Tahoe property, the LLC, all creditor protections, estate planning advice --

Q But isn't she asking you specifically on there for

changes in the percentages of the beneficiary interests?

MR. MEADOR: Objection, leading, Your Honor.

THE COURT: It is leading.

BY MR. TORVINEN:

Q Is she asking for changes, information about changes in the beneficial distribution interests?

MR. MEADOR: It's still leading.

BY MR. TORVINEN:

Q I said, is she asking -- or, what on there, is there any information on there where there's a request for beneficial changes?

A She indicates that they --

MR. MEADOR: Leading.

THE WITNESS: -- want all documents relating to Sam Jaksick's intentions, that they would not be treated or benefit equally in relation to the Tahoe property.

And then throughout the subpoena she talks about other investments, other LLCs, all of which were owned by the trust.

BY MR. TORVINEN:

Q Okay. Go to Exhibit 16.

THE COURT: Mr. Meador, I recognize your objection. And I allowed the answer in this particular case even though it was leading.

MR. MEADOR: And nonresponsive.

MR. TORVINEN: In the interest of time, Your Honor, I

apologize. In interest of time --

THE COURT: It was nonresponsive as well. It was nonresponsive as well, so yes, you're correct.

MR. TORVINEN: Okay.

THE COURT: And it was also speculative. So if you want to get all the way in, I recognize all the flaws with the answer that I received.

BY MR. TORVINEN:

Q Let's see.

Oh, go to page two of that, Exhibit 16.

A Yes.

Q Mr. Meador questioned you about that. Remember, he had you read photograph four of this, right?

A Yes. Yes.

Q Why did that mean there was malpractice exposure?

A Well, that means that my advice --

THE COURT: Whoa. Whoa. Whoa. Whoa. That's, even without the -- that calls for complete speculation.

BY MR. TORVINEN:

Q Okay. That paragraph talks about setting aside the second amendment restatement, does it not?

A It does.

MR. MEADOR: Leading, move to strike.

BY MR. TORVINEN:

Q Okay. What does that paragraph do?

A Wendy attacks the validity of the second amendment.

Q And how was she attacking that validity?

A Because in that document particularly she did not get as much of the estate that she thought she should get.

Q What document are you talking about?

A The second amendment.

MR. MEADOR: I object and move to strike. That's nonresponsive to his question about paragraph 4.

THE COURT: It was nonresponsive, so I sustain the objection.

BY MR. TORVINEN:

Q Okay. What caused you concern about paragraph 4?

A Well, if I'm the author of the second amendment, I prepared it, and I did it in a way where Sam Jaksick was not competent, then I shouldn't have allowed him to execute the document. These are just a few of her complaints. There were many more.

Q Can you think of any off the top of your head?

MR. MEADOR: I object. I object, Your Honor.

MR. TORVINEN: What's wrong with that, Your Honor?

MR. MEADOR: I specifically, repeatedly requested for this information over and over again. And it's absolutely a denial of due process to allow him to testify here today about information he refused to give me.

MR. TORVINEN: You asked about this paragraph.

MR. MEADOR: Yes. And you can ask him about Sam Jaksick's competence.

THE COURT: No, you can ask about anything that is contained within this document, because that's what's been submitted to me. That's what's --

MR. MEADOR: Well, he's on redirect, and I only asked him about one paragraph.

MR. TORVINEN: Paragraph 4.

BY MR. TORVINEN:

Q Okay. Go ahead.

A So Wendy disputed the validity of the second amendment because she argued that his signature was fraudulent. Fraud -- he didn't execute the second amendment; therefore, it was invalid.

THE COURT: Where does it say in there that the signature was fraudulent?

THE WITNESS: He did not execute the document.

MR. TORVINEN: It says that, Your Honor.

THE COURT: All right.

THE WITNESS: Obviously, my knowledge of the underlying litigation and also that the grantor executed the document at a time when he did not possess the requisite mental capacity, and based on the three grounds that she put here, executed the documents as a result of undue influence.

So if I'm part of this process, I'm the author of the second amendment, then this is being laid right at my doorstep,

because if these things are true, then I would be sued for malpractice.

THE COURT: Let me ask you one question, Judge.

When did you first learn that this lawsuit had been filed?

THE WITNESS: Which one?

THE COURT: The lawsuit that's subject in 16, PR17-0446.

THE WITNESS: You mean the underlying litigation?

THE COURT: The underlying litigation, sir. When did you first learn of it?

THE WITNESS: Yeah, I can't recall. I mean, obviously, I received the subpoena so I was aware that there was some litigation. I know it was early on in the litigation, but I had a receiver -- I received the subpoena, there's a caption, there's a case number, it was sometime in July.

THE COURT: So you didn't know about the underlying action from October of '17 until you received the subpoena?

THE WITNESS: No.

THE COURT: No knowledge at all?

THE WITNESS: I don't recall. It was the subpoena that came out of nowhere.

THE COURT: Okay. And you have testified to this Court that the subpoena is what led you to believe that you were going to be sued for malpractice, correct?

THE WITNESS: I thought there was a possibility, yes.

THE COURT: You have not testified that the underlying complaint, which is where the subpoena came from, was the basis for why you believed you were going to be sued for malpractice; is that correct?

THE WITNESS: The underlying complaint?

THE COURT: Well, when you got served with the subpoena, didn't you go look for the complaint or find out what was going on?

THE DEFENDANT: No.

THE COURT: No.

THE WITNESS: I turned it over to -- I retained counsel after I reviewed the subpoena. I did not have the documents that were in Jaksick's possession. So then I immediately went to counsel to basically respond on my behalf.

THE COURT: So you're testifying here today that when you saw this, this document, and you've been asked to look at paragraph 4 repeatedly of this document, that this document led you to believe that you were going to be sued for malpractice?

THE WITNESS: No. I didn't even -- I didn't know this document existed.

THE COURT: All right.

THE WITNESS: This is well after.

THE COURT: It was the subpoena that led you to believe that you were being sued for malpractice?

THE WITNESS: I'm sorry, could you repeat that, Judge.

THE COURT: It was the subpoena that led you to believe that you were being sued for malpractice?

THE WITNESS: I thought, yes, it would be a possibility.

THE COURT: And you retained counsel immediately.

THE WITNESS: Shortly thereafter.

THE COURT: Where's the document that says you notified your malpractice carrier immediately?

THE WITNESS: That's how I got my attorney.

THE COURT: Where's the document that said you notified your malpractice counsel -- carrier immediately?

THE WITNESS: I called them up.

THE COURT: Okay. And what day did you call them up on, sir?

THE WITNESS: Probably shortly after I got the subpoena.

THE COURT: And you well knew that your deductible was $10,000.

THE WITNESS: I came to learn that later, yes.

THE COURT: You didn't look at your malpractice each and every year when you signed up for it, about what your deductible was going to be?

THE WITNESS: This was tail coverage so I didn't look at it. I just knew I had protection for five years.

THE COURT: Right. So you've now purchased a tail coverage. It's $10,000. You've called your malpractice carrier. They've directed you to Lemons, but you didn't think that it was

appropriate to notify your wife, your ex-wife?

THE WITNESS: Like I said, Judge, I was --

THE REPORTER: I didn't hear the answer.

THE WITNESS: I said I -- my initial intent was, for one, I have a subpoena, I'm obviously concerned. I then had several discussions with my lawyer about the possible exposure to a malpractice claim. I thought I would just take care of it.

MR. MEADOR: Objection and move to strike. He can't tell what he had discussions with his counsel about after insisting that I'm not allowed to know what he had discussions about.

MR. TORVINEN: Your Honor, that's not inconsistent. He said there was risk. That's all he testified to.

THE COURT: I'm going to allow it.

MR. TORVINEN: Consistent with what he testified to before.

THE COURT: Hush.

MR. TORVINEN: Okay. I will.

THE COURT: So you had conversations with your attorney that there's risk.

THE WITNESS: Potential risk.

THE COURT: And you still didn't notify your ex-wife?

MR. TORVINEN: Your Honor, may I object to the Court? I mean, that's not what the indemnity clause is there for, it's a different clause.

THE COURT: My question isn't about the indemnity clause and I don't want to hear from you.

I want to confirm that he didn't think it was necessary to provide notice until January of 2020.

THE WITNESS: And part of that, Judge, was -- which you can appreciate, this is kind of a moving -- yes, I was concerned. Any lawyer would be concerned whether any allegation of malpractice has merit or not.

It was the process proceeded that it became apparent that there may -- it could turn out to be a reality. I was just cautious and obtained counsel to make sure someone would be representing my interest in the event that I would have to have conversation with Todd Jaksick's lawyer, or any other lawyer.

THE COURT: You were deposed in '18 and you testified in '19, and you waited almost a year later before you provided notice and a demand for payment.

THE WITNESS: The timeline is correct.

THE COURT: Thank you.

THE WITNESS: I didn't notify her until January when I made the decision that it would be fair for us to split it.

THE COURT: Unless I have something specific at this point in time, counsel, I am late for a judges' meeting.

MR. TORVINEN: Okay. I'm done, Your Honor.

THE COURT: Mr. Meador?

MR. MEADOR: Nothing more, Your Honor.

MR. TORVINEN: My client wants me to ask you about a continuance.

We need more time for what? They're all in.

THE COURT: Well, all but --

MR. TORVINEN: Well, it's in under Mr. Meador's package. That's the affidavit.

THE COURT: It's in, but it's in under a different fashion, yes. Yes.

MR. TORVINEN: No, we're done.

THE COURT: Okay. All right. Thank you. You'll have my decision early January. We'll be in recess.

(The proceedings concluded at 12:08 p.m.)

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STATE OF NEVADA)
) ss.
WASHOE COUNTY)

I, CONSTANCE S. EISENBERG, an Official Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, DO HEREBY CERTIFY:

That I appeared via Zoom videoconference in Department 12 of the above-entitled Court on December 21, 2020, and took verbatim stenotype notes of the proceedings had upon the matter captioned within, and thereafter transcribed them into typewriting as herein appears;

That I am not a relative nor an employee of any of the parties, nor am I financially or otherwise interested in this action;

That the foregoing transcript, consisting of pages 1 through 112, is a full, true and correct transcription of my stenotype notes of said proceedings.

DATED: At Reno, Nevada, this 23rd day of February, 2021.

/s/Constance S. Eisenberg

CONSTANCE S. EISENBERG
CCR #142, RMR, CRR

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IN THE FAMILY DIVISION

OF THE SECOND JUDICIAL DISTRICT COURT 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

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 Court considers two motions for purposes of this Order.

First, before this Court is Defendant Lynda Haschеff's ("Ms. Haschеff") Motion for Clarification or Declaratory Relief Regarding Terms of MSA and Decree ("MSA Motion") filed on June 16, 2020. Plaintiff Pierre A. Haschеff filed an Opposition to Motion for Clarification or Declaratory Relief Regarding Terms of MSA and Decree ("Opposition to MSA Motion") on July 6, 2020. Ms. Haschеff then filed a Reply in Support of Motion for Clarification or Declaratory Relief Regarding Terms of MSA and Decree ("Reply to MSA Motion") on July 13, 2020, and the matter was submitted thereafter.

Second, before this Court is Judge Haschеff's ("Judge Haschеff") Motion for Order to Show Cause, or in the Alternative, to Enforce the Court's Orders ("OSC Motion") filed on July 8, 2020. Ms. Haschеff filed an Opposition to Motion for Order to Show Cause, or in the Alternative, to Enforce the Court's Orders ("Opposition to OSC Motion") filed on July 17, 2020. Judge Haschеff

then filed a Reply to Opposition to Motion for Order to Show Cause, or in the Alternative, to Enforce the Court's Orders ("Reply to OSC Motion"), and the matter was submitted thereafter. On December 21, 2020, the Court heard argument from the parties regarding the MSA Motion and OSC Motion.

On September 30, 2013, Ms. Hascheff and Judge Hascheff entered into a Marital Settlement Agreement ("MSA") that was approved, adopted, merged and incorporated into the Decree of Divorce ("Decree") on November 15, 2013. Specifically, the MSA contains an indemnification clause in the event of a malpractice claim against Judge Hascheff ("MSA § 40").

A. Motion for Clarification or Declaratory Relief Regarding Terms of MSA and Decree

In her MSA Motion, Ms. Hascheff asks this Court to enter an Order clarifying MSA § 40 that she is only responsible for fees incurred in a malpractice action against Judge Hascheff, 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 a collateral trust action. Moreover, Ms. Hascheff asks that Judge Hascheff be obligated to pay the fees and costs Ms. Hascheff incurred in connection with her attempts to obtain information, respond to his demands and engage in motion practice to establish her rights and obligations.

Ms. Hascheff contends on January 15, 2020, Judge Hascheff sent her an undated letter demanding that she indemnify him for legal fees and costs incurred in connection with him being sued by a client in an on-going malpractice action. Judge Hascheff warned Ms. Hascheff that he would be sending additional invoices he received. Upon investigation Ms. Hascheff learned that in January 2020, the malpractice action had been stayed and that Judge Hascheff incurred limited fees related to the malpractice action. Judge Hascheff sought indemnification from Ms. Hascheff for fees and costs incurred in his role as a percipient witness in a collateral trust action to which he was not a named party. Ms. Hascheff asserts the language in MSA § 40, by its clear, express, and unambiguous terms, does not require Ms. Hascheff to indemnify Judge Hascheff's legal fees and costs he elected to incur as a percipient witness. Ms. Hascheff contends Judge Hascheff did not have the right to make the decision to protect his interests as a percipient witness, and then demand that she finance his decision, without fully advising her of the circumstances and gaining her agreement and consent in advance.

Ms. Hascheff alleges on December 26, 2018, Judge Hascheff was sued for malpractice by his former client, Todd Jaksick, individually and as trustee of two trusts. Ms. Hascheff claims Judge Hascheff made the deliberate decision not to notify her despite the potential financial risk to her pursuant to MSA § 40, but rather waited for over a year, until January 15, 2020, to inform her of this suit. Ms. Hascheff asserts Judge Hascheff and his former client eventually entered an agreement to stay the malpractice action until the collateral trust action was resolved.

Ms. Hascheff posits MSA § 40 does not require her to finance Judge Hascheff's litigation choices to become a percipient witness in a lawsuit to which he was not a party. Ms. Hascheff states if Judge Hascheff believed it would be "helpful" or "prudent" for him to have counsel to assist him as a percipient witness, he had an obligation to consult with her before incurring the expenses and to advise her of the underlying facts of the collateral trust action, along with the litigation risks and why retention of counsel would be appropriate so that she could make an informed decision about whether to share in the costs.

In his Opposition to MSA Motion, Judge Hascheff highlights MSA § 40 must be read in conjunction with the entire section, and MSA § 40 unambiguously indicates that 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 the other party at his or her sole expense must defend the other against said claim, action or proceeding. Judge Hascheff asserts MSA § 40 requires a party must 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's fees, costs and expenses incurred in defending or responding to such action. Judge Hascheff also notes as a subset and part of that all-encompassing language providing a full defense and complete unconditional indemnification a provision was added that in the event said claim, action or proceeding, involved a malpractice action whether or not well-founded, it obligated the other party to pay only one-half the defense costs and indemnify only one-half of any judgment if any, entered against said party.

Judge Hascheff maintains MSA § 40 does not include a notice provision. Judge Hascheff maintains it was critical to defend the claims in the collateral trust action as these claims would

likely become res judicata and collateral estoppel defenses in the malpractice action and his efforts in the collateral trust action could eliminate Ms. Hascheff being required to pay one-half of the likely much higher defense costs and the judgment in the malpractice action. Judge Hascheff claims he needed to engage counsel early to address and cut off any possible claims arising out of or determined in the collateral trust litigation. Judge Hascheff contends his decision should not be subject to question by Ms. Hascheff under the circumstances. Judge Hascheff alleges he did not keep the potential for a malpractice claim secret from Ms. Hascheff. Yet, he did not notify her of the malpractice filing as he believed that the collateral trust action would be resolved, and the malpractice action filed in December 2018 would eventually be dismissed.

Judge Hascheff contends the fact that Allied World insurance company picked up the defense and paid defense fees of $2,500 in the collateral trust action, although not required under his insurance policy, conclusively shows that Judge Hascheff's involvement in the collateral trust action primarily involved potential malpractice claims.

Judge Hascheff asserts it is not uncommon for an indemnitee to remain involved for several years in the underlying trust litigation and then once litigation is concluded and the damages are ascertained; then and only then will the indemnitee notify the indemnitor of the obligation to pay said damages. Therefore, Judge Hascheff claims he did not breach his fiduciary duty, if any, by waiting to inform Ms. Hascheff of the malpractice action until after the jury decided the legal claims in the underlying trust litigation.

Judge Hascheff also argues Ms. Hascheff has violated Section 35 ("MSA § 35") which clearly provides that any party intending to bring an action or proceeding to enforce the MSA shall not be entitled to recover attorney's fees and costs unless she first gives the other party at least 10 days written notice before filing the action or proceeding.

In her Reply to MSA Motion, Ms. Hascheff emphasizes a strict interpretation of MSA § 40 does not cover Judge Hascheff's incurred legal expenses. Ms. Hascheff states the indemnity language could have been written to say that she will indemnify Judge Hascheff for any fees and costs that he, in his sole and unilateral discretion, believe are reasonable, necessary, and related in any way to any potential malpractice action, but that is not the language his lawyer drafted, nor is it the agreement the parties signed. As a result, Ms. Hascheff states she contractually agreed to pay

half the costs of defense of the malpractice action, which in this case was immediately stayed with no fees incurred.

Ms. Hascheff asserts had Judge Hascheff given her the common courtesy of promptly informing her of the circumstances, sharing with her the underlying facts and risks they faced, and consulting with her about the most appropriate way for them to jointly approach the problem, they may have been able to reach agreement to avoid this dispute and all of these fees.

B. Motion for Order to Show Cause, or in the Alternative, to Enforce the Court's Orders

In his OSC Motion, Judge Hascheff moves this Court: (1) To issue an order for Ms. Hascheff to show cause as to why she intentionally disobeyed the Decree; (2) To enforce the terms of the parties' incorporated MSA, and order the payment of the indemnification; and, (3) Order Ms. Hascheff pay Judge Hascheff's attorney fees and costs whether this matter proceeds as contempt, or as an order for enforcement upon affidavit from counsel.

Judge Hascheff asserts Ms. Hascheff chooses to willfully disobey the Decree and MSA by making "ill-advised and even nonsensical arguments" in her MSA Motion as a course of conduct to "'gain leverage and delay payment.'"

Judge Hascheff states in the event the Court determines Ms. Hascheff's actions do not rise to the level of contempt, the Court should enforce its orders by requiring Ms. Hascheff to pay the required one half indemnification amount to Judge Hascheff in the sum of $4,924.05 (plus a percentage of any later accrued and accruing fees and costs) pursuant to MSA § 40. Judge Hascheff further seeks an award of attorney's fees for this contempt motion pursuant to MSA § 35.

In her Opposition to OSC Motion, Ms. Hascheff contends there are no clear and unambiguous Orders of this Court that she has allegedly refused to honor. Ms. Hascheff emphasizes the dispute is whether the simple and unambiguous language of the parties' MSA and Decree requires Ms. Hascheff to pay the fees Judge Hascheff demands.

Ms. Hascheff asserts since the Decree does not clearly and unambiguously require her to pay those fees, Ms. Hascheff could not be held in contempt as a matter of law. Ms. Hascheff asserts if interpretation is required to obtain the result Judge Hascheff seeks, the language on which he relies cannot be so clear and unambiguous as to support a contempt motion - no matter how reasonable the requested interpretation. Ms. Hascheff claims since there is a dispute about the

meaning of their contract and the parties' respective rights and obligations, Ms. Hascheff, in good faith, sought clarification through her MSA Motion so that she would know exactly what her legal obligations are.

In his Reply to OSC Motion, Judge Hascheff maintains rather than resolving a dispute of approximately $5,000, Ms. Hascheff has embarked on an unfortunate litigation track where she undoubtedly already incurred fees in excess of $5,000, and likely will incur attorney's fees. Judge Hascheff contends Ms. Hascheff also unnecessarily caused him to incur substantial legal fees even though he had offered to accept minimal payments on his indemnification claim without interest and without incurring any legal fees.

Judge Hascheff posits Ms. Hascheff fails to cite any case where a court would distinguish between a contractual indemnity in an MSA from any other indemnity obligation, and a settlement agreement is construed as any other contract and governed by the principles of contract law. Judge Hascheff maintains Ms. Hascheff's assertion that she has no obligation to pay half the defense costs and/or indemnify until her conditions are met are not expressed in the MSA, and Ms. Hascheff's position that she has some "implied" right or "conditions precedent" to her obligation to pay is entirely inconsistent with the MSA or existing caselaw.

Law

A. Declaratory Relief Standard

A party must meet four elements before declaratory relief can be granted:

> 1) there must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination.

MB Am., Inc. v. Alaska Pac. Leasing, 132 Nev. Adv. Op. 8, 367 P.3d 1286, 1291 (2016). Moreover, any person whose rights, status, or other legal relations "are affected by a statute . . . may have determined any question of construction" of that statute. NRS 30.040(1); *Prudential Ins. Co. of Am. v. Ins. Comm'r*, 82 Nev. 1, 5, 409 P.2d 248, 250 (1966) (declaratory relief is available when

a controversy concerning the meaning of a statute arises). "Whether 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).

B. Interpretation of MSA Standard.

A settlement agreement, which is a contract, is governed by principles of contract law. *Mack v. Estate of Mack*, 125 Nev. 80, 95, 206 P.3d 98, 108 (2009). As such, a settlement agreement will not be an enforceable contract unless there is "an offer and acceptance, meeting of the minds, and consideration." *Id.* 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) (citing *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599, 603 (2005)). The court has no authority to alter the terms of an unambiguous contract. *Canfora*, 121 Nev. at 776, 121 P.3d at 603.

Whether a contract is ambiguous likewise presents a question of law. *Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013) (citing *Margrave v. Dermody Props.*, 110 Nev. 824, 827, 878 P.2d 291, 293 (1994)). A contract is ambiguous if its terms may reasonably be interpreted in more than one way, but ambiguity does not arise simply because the parties disagree on how to interpret their contract. *Id.* (citing *Anvui, L.L.C. v. G.L. Dragon, L.L.C.*, 123 Nev. 212, 215, 163 P.3d 405, 407 (2007); *Parman v. Petricciani*, 70 Nev. 427, 430–32, 272 P.2d 492, 493–94 (1954)).

Marital agreements are "enforceable unless unconscionable, obtained through fraud, misrepresentation, material nondisclosure or duress." *Furer v. Furer*, 126 Nev. 712, 367 P.3d 770 (2010) (citing *Sogg v. Nevada State Bank*, 108 Nev. 308, 312, 832 P.2d 781, 783–84 (1992)).

After merger, the district court may enforce the provisions of the divorce decree by using its contempt power. *Friedman v. Friedman*, 128 Nev. 897, 381 P.3d 613 (2012) (citing *Hildahl v. Hildahl*, 95 Nev. 657, 662–63, 601 P.2d 58, 61–62 (1979)). The district court may interpret the language of the divorce decree in order to resolve ambiguity. *Id.* (citing *Kishner v. Kishner*, 93 Nev. 220, 225, 562 P.2d 493, 496 (1977)).

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C. Interpretation of Indemnification Standard.

The scope of a contractual indemnity clause is determined by the contract and is generally interpreted like any contract. *George L. Brown Ins. v. Star Ins. Co.*, 126 Nev. 316, 323, 237 P.3d 92, 96 (2010).

Contractual indemnity is where, pursuant to a contractual provision, two parties agree one party will reimburse the other party for liability resulting from the former's work. *United Rentals Hwy. Techs. v. Wells Cargo*, 128 Nev. 666, 673, 289 P.3d 221, 226 (2012). Contracts purporting to indemnify a party against its own negligence will only be enforced if they clearly express such an intent, and a general provision indemnifying the indemnitee against "any and all claims" standing alone, is not sufficient. *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 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. *United Rentals Hwy. Techs. v. Wells Cargo*, 128 Nev. 666, 673, 289 P.3d 221, 226 (2012).

An indemnity clause imposing a duty to defend is construed under the same rules that govern other contracts. *United Rentals Hwy. Techs. v. Wells Cargo*, 128 Nev. 666, 676, 289 P.3d 221, 228 (2012). The duty to defend is broader than the duty to indemnify because it covers not just claims under which the indemnitor is liable, but also claims under which the indemnitor could be found liable. *Id.* Generally, a contractual promise to defend another against specified claims clearly connotes an obligation of active responsibility, from the outset, for the promisee's defense against such claims. *Id.* While the duty to defend is broad, it is not limitless. *Id.*

An indemnitee's duty, if any, to provide notice to an indemnitor arises from the express and unambiguous language of the indemnity agreement. *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1221 (5th Cir. 1986) (holding where an indemnity agreement does not require notice courts will not infer or insert a notice requirement as a condition precedent to a right to recover on the indemnitee contract); *Premier Corp. v. Economic Research and Analysts, Inc.*, 578 F. 2d 551, 554 (4th Cir. 1978) (holding notice is unnecessary unless the indemnity contract requires it).

D. Laches Standard.

Laches, an equitable doctrine, may be invoked when delay by one party prejudices the other party such that granting relief to the delaying party would be inequitable. *Besnilian v. Wilkinson*, 117 Nev. 519, 522, 25 P.3d 187, 189 (2001). However, to invoke laches, the party must show that the delay caused actual prejudice. *Id.*

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 v. Bigelow*, 105 Nev. 494, 496, 779 P.2d 85, 86 (1989). The condition of party asserting laches must become so changed that the party cannot be restored to their former state. *Id.* The applicability of the doctrine of laches turns upon peculiar facts of each case. *Id.*

If the elements of a laches defense are met, a court may dismiss an entire case, dismiss certain claims, or restrict the damages available to the plaintiff. *Morgan Hill Concerned Parents Ass'n v. California Dep't of Educ.*, 258 F. Supp. 3d 1114, 1132–33 (E.D. Cal. 2017) (citing *E.E.O.C. v. Timeless Investments, Inc.*, 734 F.Supp.2d 1035, 1067 (E.D. Cal. 2010)).

The Ninth Circuit has implicitly recognized a court's ability to raise the doctrine of laches *sua sponte*. *Id.* (citing *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (en banc)). A limitation on the *sua sponte* application of laches is in circumstances in which parties lack notice about an issue and are not given an opportunity to address it. *Morgan Hill Concerned Parents Ass'n*, 258 F. Supp. 3d at1133.

E. Order to Show Cause for Contempt of Court Standard.

Pursuant to NRS 22.030(2), if a contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit must be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the masters or arbitrators. The requirement of an affidavit is confirmed by case law, specifically requiring an affidavit must state facts specific enough to allow the Court to proceed to be submitted at the Contempt proceeding, which is necessary to give the court subject matter jurisdiction. *See Awad v. Wright*, 106 Nev. 407, 794 P.2d 713 (1990) (overruled on other grounds); *Philips v. Welch*, 12 Nev. 158 (1887); *Strait v. Williams*, 18 Nev. 430 (1884). Contempt statutes are to be strictly construed based upon the

criminal nature of a contempt proceeding. *Ex Parte Sweeney*, 18 Nev. 71 (1883).

The penalties for contempt include a monetary fine, not to exceed $500.00, or imprisonment, not to exceed 25 days, or both. *See* NRS 22.100(2). In addition to the penalties set forth above the Court may require the person to pay to the party seeking to enforce the writ, order, rule or process the reasonable expenses incurred by the party as a result of the contempt. *See* NRS 22.100(3).

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. District Court*, 120 Nev. 798, 809, 102 P.3d 41, 49 (2004). In order 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. District Court*, 102 Nev. 551, 559-60, 729 P.2d 1328, 1333-34 (1986).

F. Attorneys' Fees & Costs Award Standard.

NRS 18.010(2)(b) and NRCP 11 authorize the district court to grant an award of attorney fees as sanctions against a party who pursues a claim without reasonable ground. We have consistently recognized that "[t]he decision to award attorney fees is within the [district court's] sound discretion ... and will not be overturned absent a 'manifest abuse of discretion.'" *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330, 130 P.3d 1280, 1288 (2006).

NRS 18.010 also governs the instances in which attorney fees are awarded, and states the following:

> Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

NRS. 18.010(2)(b); *Capanna v. Orth*, 134 Nev. 888, 895, 432 P.3d 726, 734 (2018).

In making an award of fees, the Court also examines the reasonableness of attorneys' fees under the factors set forth in *Brunzell*:

> (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.

85 Nev. at 349, 455 P.2d at 33. Each of these factors must be given consideration. *Id.* 85 Nev. at 350, 455 P.2d at 33.

The district court's decision to award attorney fees is within its discretion and will not be disturbed on appeal absent a manifest abuse of discretion. *Capanna*, 134 Nev. at 895, 432 P.3d at 734 (2018).

NRS 18.020(3) provides costs must be allowed to a prevailing party against any adverse party against whom judgment is rendered in an action for the recovery of money or damages, where the plaintiff seeks to recover more than $2,500.

Order

The Court **GRANTS** Ms. Hascheff's MSA Motion. The Court is satisfied the legal fees incurred by Judge Hascheff as a witness in the collateral trust action and the stayed malpractice lawsuit where he is sued individually are encompassed by MSA § 40. The Court finds, as a matter of law, MSA § 40 does not contain express and unambiguous language requiring Judge Hascheff to have provided immediate notice of either the collateral trust action or the malpractice action to Ms. Hascheff. *Fontenot*, 791 F.2d at 1221; *Premier Corp.*, 578 F. 2d at 554. Furthermore, this Court is barred from undertaking equitable considerations regarding MSA § 40's contractual language. *United Rentals Hwy. Techs.*, 128 Nev. at 673, 289 P.3d at 226.

However, Judge Hascheff was not transparent about his request for indemnification. In January 2020, Judge Hascheff notified Ms. Hascheff he had been sued by a client for malpractice. He stated that the malpractice action was on-going and he inferred that he had incurred all of fees and costs he was requesting from Ms. Hascheff directly related to this malpractice suit. He was not transparent that he was seeking indemnification for fees and costs related to a collateral trust action.

When asked for an accounting of the fees and costs, Judge Hascheff failed to provide a complete and transparent accounting. In his email of March 1, 2020, Judge Hascheff changed the sum he was asking Ms. Hascheff to pay from $5,200.90, as previously demanded, to $4,675.90. *Compare MSA Motion*, Ex. 1 *with MSA Motion*, Ex. 4. This Court further notes Judge Hascheff's malpractice insurance company reimbursed only up to $2,500 indicating not all the expenses demanded by Judge Hascheff are related to the defense of the stayed malpractice action. Judge Hascheff and his counsel also noted on the record they unilaterally imposed redactions on the billing statements provided by Judge Hascheff's attorneys, thereby obfuscating the true amount owed by Ms. Hascheff.[1] Ms. Hascheff was told that these redactions, which resulted in fees in the amount $3,300, were privileged.

Judge Hascheff presumably authorized his counsel to attend portions of the collateral trust trial at times when he was not on the witness stand. Significant time was billed to prepare for meetings with attorneys in the collateral trust action, but efforts by Ms. Hascheff's counsel to communicate with counsel for the parties in the collateral trust action were ignored.

The only reference to the malpractice action are found in a billing statement dated December 10, 2019 and reflect that on July 1, 2019 Judge Hascheff was billed one tenth of an hour related to the review/analysis of correspondence regarding the state of action against Judge Hascheff. And on September 25, 2019, Judge Hascheff was billed three tenths of an hour for the review/analysis of a draft joint motion and stipulation to stay the malpractice proceedings. *Confidential Exhibit I.* As a result, this Court cannot in good conscience require Ms. Hascheff to pay the full amount demanded by Judge Hascheff based on Judge Hascheff's inconsistent and secretive criteria.

Most troubling to this Court is Judge Hascheff's response to this Court's question as to why he waited over a year to notify Ms. Hascheff of the potential malpractice claims against him. Judge Hascheff testified he had not notified Ms. Hascheff of the malpractice action or the

[1] Further issues of transparency revolve around the sum of money Judge Hascheff for his fees and costs as compared to what his malpractice carrier paid. The Court notes that the malpractice policy held by Judge Hascheff had a $10,000 deductible, yet in this case Judge Hascheff demanded that Ms. Hascheff pay a sum of less than one-half of the deductible. If Judge Hascheff's claim is correct that the malpractice carrier felt that defense of claims in the collateral trust action was actually defense of the malpractice action, why was his share of the defense a figure other than $10,000, the amount of the deductible?

collateral trust action as he planned on being solely responsible for the legal fees and costs associated therewith, without indemnification from Ms. Hascheff, until the fees and costs became too great.

The Court finds Judge Hascheff's conscious disregard and selective enforcement of MSA § 40 is comparable to a claim for laches. *Besnilian*, 117 Nev. 519, at 522, 25 P.3d at 189; *Bigelow*, 105 Nev. at 496, 779 P.2d at 86. This Court cautiously raises the doctrine of laches *sua sponte* as this Court provided notice to the parties it intended to inquire into the timeliness of Judge Hascheff's claims as one of the specific areas the Court wanted addressed at the hearing. *See Morgan Hill Concerned Parents Ass'n*, 258 F. Supp. 3d 1114, 1132–33.

Based on Judge Hascheff's testimony, the Court finds Ms. Hascheff has been prejudiced by Judge Hascheff's actions due to his deliberate delay in invoking his rights under MSA § 40. Although immediate notice is not explicitly required in MSA § 40, Judge Hascheff's delay prejudiced Ms. Hascheff. Ms. Hascheff was given no say in the fees and costs expended by Judge Hascheff in the collateral trust action. She was led to believe that the fee demand from Judge Hascheff was related solely to the malpractice claim and only after expending fees and costs for her own counsel did she learn that the lion's share of the demand was related to a collateral trust action. She was thwarted in her efforts to receive a complete bill for the services provided and at the hearing the Court learned that it was Judge Hascheff and his divorce counsel who decided the redacted portions of the bill statement she was provided. As such it is clear that Ms. Hascheff has been prejudiced by Judge Hascheff's actions to the point where granting Judge Hascheff's requested relief would be inequitable. *See Besnilian*, 117 Nev. 519, at 522, 25 P.3d at 189; *see also Bigelow*, 105 Nev. at 496, 779 P.2d at 86. The Court is convinced had Judge Hascheff exercised his rights and obligations under the MSA in a timely fashion and without obfuscation, Ms. Hascheff would not have been prejudiced and she would have been liable for her share of the fees and costs incurred for both the malpractice action and the collateral trust action.

This Court **DENIES** Judge Hascheff's OSC Motion. This Court finds Judge Hascheff was unable to make a *prima facie* showing Ms. Hascheff had the ability to comply with the parties' MSA, yet willfully violated her obligations. As discussed *supra*, Ms. Hascheff was not provided a clear accounting of her indemnification obligations, and Judge Hascheff chose to arbitrarily enforce

his rights under the MSA, thereby having his claims limited by laches. As a result, this Court denies the OSC Motion.

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.

GOOD CAUSE APPEARING, IT IS SO ORDERED

The MSA Motion is GRANTED.

The OSC Motion is DENIED.

IT IS FURTHER ORDERED an award for attorneys' fees and costs are DENIED.

DATED this 1st day of February, 2021.

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 1, 2021, 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., for LYNDA HASCHEFF
TODD TORVINEN, ESQ., for PIERRE HASCHEFF

_____
Judicial Assistant

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

Case No. 82626

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'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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Attorney for Respondent/Cross-Appellant

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:

Leonard Law, PC
Woodburn and Wedge

DATED December 15, 2021

LEONARD LAW, PC

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

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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).

[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

[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.

DATED December 15, 2021

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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. D-11-448756

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

[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

[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: