

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD A. HUNTER

APPELLANT,

vs.

WILLIAM GANG,,

Respondent.

Electronically Filed  
Aug 14 2013 03:34 p.m.

Tracie K. Lindeman  
Clerk of Supreme Court

Supreme Court Case No.: 59691

Dist. Court Case No.: A-09-604877-C

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## **CORPORATE DISCLOSURE STATEMENT**

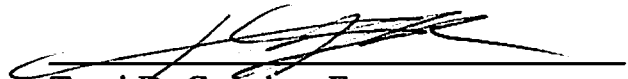
Appellant Richard A. Hunter, Inc. through his undersigned counsel, states

Richard A. Hunter is an individual, rather than a corporate entity.

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Appellant Richard A Hunter , through his counsel of record, respectfully submits his Opening Brief .

## **INTRODUCTION**

***“No good deed goes unpunished.”***

This appeal provides yet another sad example of the above truism. The facts here present the extraordinary situation wherein a defendant was granted leave by the plaintiff to delay filing an answer during settlement negotiations between the parties, but thereafter successfully sought dismissal of the complaint for failure to prosecute based on that delay. Thus, the “failure to prosecute” purportedly perpetrated by the plaintiff consisted of *not seeking a default judgment*. In other words, Appellant Richard Hunter was punished by the District Court for permitting Respondent William Gang to avoid filing an answer during settlement negotiations, and thereafter, while Hunter suffered from ill health, from affording Gang every opportunity to have the matter decided on the merits, rather than obtaining a default due to Gang’s failure to answer the complaint. Even more remarkable than this ironic injustice is the fact that this motion to dismiss was granted less than two years after the complaint had been filed, contrary to the express provisions of NRCP 41(e).

The District Court’s abuse of discretion was aggravated by the entry of an order which purported to make a litany of factual findings regarding the merits of the claim, even though the only evidence existing in the case at that point consisted of the *Verified Complaint* – which document assuredly did not support the District Court’s factual findings. The final touch on the manifest abuse of discretion displayed herein was the District

Court's award of attorneys' fees in favor of the Gang, in which the District Court, once against acting without any evidence presented to it, purported to find that the action was frivolous. In fact, to date, the *only* evidence submitted by the defendant in this entire matter consists of a declaration by counsel attesting to the amount of attorneys' fees, and the invoices for such fees, both submitted post-judgment.

Because the judgment is contrary to the express provisions of NRCP 41(e), and because both the judgment and the attorney fee and cost award are unsupported by any evidence in the record, the judgment and award of fees and costs must be reversed.

### **JURISDICTIONAL STATEMENT**

This Court has jurisdiction pursuant to NRCP 3A(b)(1). This is an appeal of Findings of Facts and Conclusions of Law entered by on November 7, 2011, and for which notice of the entry of the order was dated October 8, 2011, and also an appeal from the Order Granting William Gang Attorneys' Fees and Costs, entered on January 26, 2012, for which a Notice of Entry of Order was filed on August 13, 2013. The original Notice of Appeal was filed on November 16, 2011, and the Amended Notice of Appeal was filed on August 13, 2013.

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

- I. The District Court grossly abused its discretion in dismissing a case for want of prosecution when fewer than two years had passed since the Complaint had been filed.
- II. The District Court abused its discretion by making factual findings and conclusions of law unsupported by any evidence in the record.



- III. The District Court abused its discretion by awarding attorneys' fees in the absence of evidence to support the award.
- IV. The District Court abused its discretion in awarding costs on the basis of an inappropriately entered judgment. .

### **STATEMENT OF THE CASE**

This is an appeal from a final judgment dismissing an adverse possession claim for failure to prosecute, and from an award of costs and attorneys' fees purportedly based on a conclusion that the action was frivolous.

### **STATEMENT OF THE FACTS**

On December 7, 2009, Appellant Richard Hunter filed a *verified* complaint, asserting claims to quiet title and for adverse possession, and seeking injunctive and declaratory relief regarding an easement or n action to quiet title to a slim *portion* of a parcel of real property ("Property") that had been recently acquired by Respondent William Gang. **Verified Complaint, A. 1**, The Property consists of a vacant lot next to Hunter's property, which is located at 9500 Pinon Drive, Clark County, Nevada, "about halfway in between Pahrump and Las Vegas. *Id.* at 2, ¶¶ 1-2; 30:11-12. With the knowledge of Gang's predecessor in interest, Hunter constructed a berm on the Property in 1983, in order to prevent further damage to Hunter's property caused by flooding from run-off from the Property. *Id.*, at 3-4, ¶¶ 4-12. Hunter sought to quiet title as to the portion of the Property on which the berm is located. *Id.*, at 3, ¶¶ 13-17. Since 1983, Hunter continuously maintained the berm, without objection from Gang's predecessor in interest. *Id.*,

at ¶ 11. Gang was aware of the term prior to obtaining ownership of the Property. *Id.* at ¶ 12.

Gang's first "responsive" pleading was his Motion to Dismiss for Want of prosecution, filed September 13, 2011. *Motion to Dismiss*, A. 14. As Gang himself acknowledged, following the filing of the quiet title action, *he* requested Hunter's agreement to a delay in filing an answer during the pendency of settlement negotiations. *Id.* at 16, 3:9. However, Gang did not file an answer even after a period of time during which he claimed negotiations had ended. In his Motion, Gang claimed that settlement discussions "broke down over a year ago" (*i.e.*, at some time before September 13, 2010), and that Hunter became unresponsive for extended periods of time." *Id.* at 3:11-12. The few allegations made in the Motion were directed at the purported lack of progress in the case, but were unsupported by any affidavit or other evidence. *Id.* Beyond the claim of a lack of responsiveness, and Gang's express acknowledgement of his understanding that Hunter was suffering from illness, there were no allegations regarding any conduct by Hunter. *Id.* The Motion did not disclose that Gang's counsel had prepared an answer; thus, other than a continuation of settlement negotiations, the reason for his failure to file it are unknown. *Gang's Counsel's Billing Entries for Feb. 9, 2010; Feb. 26, 2010; September 22, 2010*, A. 78,79, 81.

Hunter opposed the Motion, noting that dismissal of a Complaint less than two years old was not authorized by NRCP 41(e). *Opposition to Motion to Dismiss*, A. 21. Hunter confirmed that there had been an agreement that no answer need be filed while the parties engaged in settlement negotiations. Additionally, Hunter submitted an affidavit from his wife to explain his periods of unresponsiveness. *Affidavit of Marguerite Hunter*, A. 26. Mrs. Hunter testified that Hunter had suffered severe health problems during the pendency of the case,

including heart problems, pneumonia, dangerously high blood pressure, and mini-strokes that caused temporary blindness. *Id.*

A hearing was held on September 13, 2011. **A. 29.** During the hearing, which lasted nine minutes, Gang's counsel acknowledged awareness of Hunter's health issues. **Transcript, A. 30:7-9.** Gang's counsel acknowledged that no answer or counterclaim had been filed. In fact, he specifically stated, "Mr. Gang needs a shot to file his counterclaim and we need to move forward . . . ." *Id.* at **31: 24-25.** Hunter's counsel pointed out that nothing had prevented Gang from filing or counterclaim, or otherwise moving the case forward. *Id.* at **33:3-4.**

Even though 1) the Motion was brought only a year and one half after the complaint had been filed; 2) Gang acknowledged that he himself was responsible for the initial delay in responding and that he had never filed an answer and or any counterclaims; and 3) Gang acknowledged Hunter's health problems, the Court granted the motion. *Id.* at **7:3-4.** The Court made no oral findings in granting the Motion. Indeed, the Court's only comments during the hearing did not relate to the issue of a purported lack of prosecution, but instead, an apparent disagreement with the well-established legal principals of adverse possession. *Id.* at **4:23-6:3.**

Even though the Motion before the district court had not briefed the merits, and no evidence had ever been submitted, Gang's counsel submitted an order that purported to make extensive factual findings and conclusions of laws regarding the merits of the claims. **Order, I. A. 36.** The District Court executed the order, thereby purporting to make factual findings for which no evidence had ever been presented to it. *Id.* Indeed, the Court's ruling essentially purports to have granted summary judgment, even though no motion for summary judgment was filed by Gang, briefed by the parties, or argued to the District Court. Hunter never had any opportunity to present evidence in support of his claims or to refute the contentions made by Gang in the submitted order.

The Order was entered On November 7, 2011, and the Notice of Appeal was filed on November 17, 2011. *Notice of Appeal*, A. 51. Gang filed a memorandum of costs on November 17, and on November 28, 2011, he filed his Motion for Attorneys' Fees. A. 46-50, 59-84. Gang based his claim for fees on NRS 18.010(2)(b), claiming that Hunter's action had been frivolous. *Motion for Attorneys' Fees*, I A. 89-91. Even though the Motion made an assortment of allegations against Hunter, the only evidence offered to support the Motion for Fees were the invoices from Gang's counsel and the accompanying declaration to support the charges within. *Id.* at 70-84. The invoices included the following billings entries relevant here:

08/05/10 TSH

**Review and analyze voice message from opposing attorney regarding matter. Telephone call and leave voice message with opposing attorney returning call. Telephone conference with opposing attorney regarding status, settlement, and further legal action.** Strategize regarding [redaction]

08/10/10 TSH

Review and analyze [redaction] from client regarding [redaction]  
**Prepare correspondence to opposing attorney regarding encroaching argument, regarding settlement offer, and regarding interference with contractual relations argument.**

08/12/10 AGM

**Review and revise correspondence to opposing attorney;** office conference.

08/13/10 TSH

Review and analyze voice message from client regarding [redaction]  
**Review and revise correspondence to opposing attorney regarding settlement, encroaching analysis, intentional interference allegations, and status.** Finalize correspondence to opposing attorney.

08/25/10 AGM

Office conference; **review email to Ferrario.**

08/25/10 TSH

Review and analyze correspondence from client regarding [redacted]  
**Make revisions and forward correspondence to opposing attorney.** Prepare correspondence to client regarding [redaction]

09/21/10 TSH

**Review and analyze correspondence from opposing attorney regarding settlement status. Review prior settlement correspondence for potential settlement alternatives. Prepare correspondence to client regarding [redaction]**

09/22/10 TSH

Review and analyze voice message from client. Telephone calls and leave voice messages for client. Telephone conference with client. Additional telephone conference with client regarding **Prepare correspondence to opposing attorney regarding telephone conference with discussion of counteroffer and status of matter prior to response to complaint.**

09/29/10 TSH

Review and analyze correspondence from client regarding [redaction] **Prepare correspondence to opposing attorney regarding further developments and discussing same in relation to matter, further litigation, and settlement.**

10/29/10 TSH

**Prepare correspondence to opposing attorney regarding status, settlement, and failure to respond and receipt of previous correspondence.** Prepare correspondence to client providing update regarding status of matter.

11/12/10 TSH

**Prepare correspondence to opposing attorney regarding status of review of settlement offers.** Prepare correspondence to client providing update.

12/03/10 TSH

**Review and analyze correspondence from opposing attorney regarding status of plaintiff and settlement.** Prepare correspondence to client providing update. **Prepare correspondence to opposing attorney inquiring regarding further update.**

01/12/11 TSH

Research court docket to follow up regarding any filings not served, potential case reassignment, and orders from court or discovery. **Confirm status of response and correspondence from opposing attorney.**

03/23/11 TSH

**Prepare further correspondence to opposing attorney regarding status matter, outlook, prior negotiations, and resolution.**

04/25/11 TSH

Review and analyze correspondence from client regarding status of matter. Research court docket to determine whether any further filings have taken place. Prepare correspondence to client regarding status.

**Prepare correspondence to opposing attorney regarding status, options, and moving forward.**

07/27/11 TSH

**Prepare correspondence to opposing attorney in follow up to conference at court, contact with Hunter, and action in case.**

08/01/11 TSH

**Prepare correspondence to opposing attorney following up regarding status of matter and outlook. Prepare correspondence to client regarding [redaction]**

08/02/11 TSH

**Review and analyze correspondence from opposing attorney regarding discussions with client. Prepare correspondence to client regarding [redaction] Further preparation of motion to dismiss.**

*Id.* at 79-81(emphasis added). As can be seen, the billings by counsel belied Gang's previous claim that settlement negotiations had concluded more than one year prior to the filing of the September 13, 2011 Motion to Dismiss. As shown, Gang's counsel billed for time related to such negotiations until shortly before the month before the filing of the motion. Hunter pointed out this factual discrepancy in its opposition to the Motion for fees, arguing that Hunter was judicially estopped from claiming such fees. **Opposition to Motion for Attorneys' Fees, A. 91-94** Hunter also pointed out that there was no evidentiary basis from which to find that the action had been frivolous. *Id.* at 90-91.

The District Court ruled on the motion without a hearing. *Fee Order, A. 176.* The District Court granted the entirety of fees and costs requested, purporting to find that the action had been frivolous. *Id.* The District Court did not address Hunter's objections to the claimed fees. *Id.*

Gang did not file a notice of entry of order following the issuance of that order. On August 13, 2013, such a notice was filed on behalf of Hunter, and the Notice of Appeal was amended to include the attorneys fee order on the same date. A177-180; 181-183.

The one volume Appendix in this appeal contains *every* document filed in the district court, yet consists of a total of 183 pages, including the transcript of the only hearing that took place in this matter. Of those 183 pages, only 28 pages existed in the record *prior to* the District Court's dismissal of the Complaint for a failure to prosecute. Significantly absent from the entire record, and thus, from the Appendix, is any evidence to support the assorted findings purportedly made by the District Court. The one evidence regarding the merits of the action that exists in this matter consists of the Verified Complaint. **A. 1.** The only evidence presented by Gang in the entire matter consists only of the declaration of his counsel, attesting to the validity of the invoices for attorneys' fees, plus those invoices; such evidence does not relate to the merits of the action. **I. A. 70-85.**

### **SUMMARY OF THE ARGUMENT**

The District Court erred by granting the motion to dismiss for failure to prosecute, as a district court's discretion to dismiss on such grounds is limited to cases that have been on the docket for more than two years. Furthermore, where the delay was instigated at Respondent's request and continued due to poor health of a party, it was an abuse of discretion to grant the motion here.

The factual findings and conclusions of law entered on the merits of the action must be reversed, as there is no evidence in the record to support such findings. Similarly, there is no evidence in the record to support the claim that the action was frivolous or brought for the purposes of harassment. Accordingly, the order granting attorneys' fees must be reversed. Because the determination that Gang was a prevailing party was based on an improperly entered order, the grant of costs must likewise be reversed.

## **STANDARD OF REVIEW**

This Court reviews both a dismissal for want of prosecution, and an award of attorney's fees, for an abuse of discretion. *Volpert v. Papagna*, 85 Nev. 437, 440, 456 P.2d 848, 850 (1969); *Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005). A District Court abuses its discretion if its "decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

A district court's factual findings are reviewed for clear error. *Pink v. Busch*, 100 Nev. 684, 688, 691 P.2d 456, 459 (1984). Where there is no evidence in support of the lower court's findings, they are clearly erroneous and may be reversed. *Burroughs Corp. v. Century Steel Inc.*, 99 Nev. 464, 470, 664 P.2d 354, 358 (1983).

## **LEGAL ARGUMENT**

The District Court abused its discretion in rendering each of its decisions, and moreover, committed clear error in entering factual findings for which there is absolutely no support in the record. The District Court dismissed this action for want of prosecution less than two years after the complaint had been filed, even though the rule permits such dismissals only after two years have passed. Additionally, the District Court purported to enter factual findings addressing the merits of the matter, despite the total absence of evidence to support such findings. Finally, the District Court again entered factual findings that could not be supported by the record, purporting to find that the action was frivolous. Because the District Court's orders were the product of abuses of discretion, the judgment and award of fees and costs must be reversed.

### **I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DISMISSING A CASE FOR WANT OF PROSECUTION WHEN**



**FEWER THAN TWO YEARS HAD PASSED SINCE THE COMPLAINT HAD BEEN FILED AND THE DEFENDANT HIMSELF INITIATED THE DELAY.**

The District Court abused its discretion in dismissing the action. In dismissing the action prior to the expiration of two years from the date of filing, the District Court improperly applied NRCP 41(e). While review for abuse of discretion is ordinarily deferential, deference is not owed to legal error. *AA Primo Builders, LLC v. Washington*, 245 P.3d 1190, 1197 (Nev. 2010).

A district court's wide deference to dismiss a case under NRCP 41(e) is expressly limited to circumstances where a case has been on the docket for at least two years. NRCP 41(e) ("The court may in its discretion dismiss any action for want of prosecution on motion of any party or on the court's own motion and after due notice to the parties, whenever plaintiff has failed for 2 years after action is filed to bring such action to trial. . . ."); *Dubin v. Harrell*, 79 Nev. 467, 471, 386 P.2d 729, 731 (1963) ("Should less than five, but more than two, years pass, the court in its discretion may dismiss the case.").

Here, the Complaint was filed in December 2009. Gang's motion was filed in August 2011. The complaint was dismissed in November 2011. Accordingly, pursuant to NRCP 41(e), the District Court had no discretion to dismiss this case.

Furthermore, even if the order had been entered more than two years after the complaint was filed, dismissal would *still* have constituted an abuse of discretion. The policy served by this Rule 41(e) is that "once suit is commenced, it must be carried forward with reasonable diligence unless circumstances exist which excuse delay." *Volpert v. Papagna*, 85 Nev. At 440, 456 P.2d at 850 (internal quotations omitted). Here, the circumstances excusing delay were undisputed.

Gang admitted that *he* was responsible for the delay for more than a year, as the delay in filing an answer was made at his request. Moreover, Gang must be held responsible for the entirety of the delay, as the next action required in the matter was the filing of *his* answer. The *only* action that Hunter could have taken would have been to seek a default judgment. Thus, the dismissal here was granted because Hunter agreed to allow Gang to avoid filing an answer during extensive settlement negotiations, and because those settlement negotiations were interrupted at times due to Hunter's serious health conditions. The result was that Gang was continuously afforded an opportunity; otherwise, he would have been facing default. "[W]hen delays in prosecution are to a great extent due to the defendant's own procurement it would be an injustice to allow the defendant to impute laches." *Jacobs v. Halloran* 551 Pa. 350, 356, 710 A.2d 1098, 1102 (1998) (recognizing equitable nature of remedy of dismissal for non-prosecution in overturning presumption of laches resulting from delay in prosecution).

Furthermore, the *unrefuted* evidence in the record shows that Hunter suffered severe health problems, including heart problems, a series of mini-strokes that temporarily deprived him of his eyesight, pneumonia, and dangerously high blood pressure. A. 26. So far from contradicting such evidence, Gang confirmed his own understanding that Hunter suffering from health problems. A. 29:7-9, (Gang's counsel stated at the hearing, "Your Honor, first of all, we are very sympathetic to Mr. Hunter's medical conditions, we are aware of those, and we wish him nothing but well."). A district court abuses its discretion in granting dismissal for lack of prosecution, where the delay was caused by the plaintiff's ill health. *Jarva v. U.S.*, 280 F.2d 892, 895 (9<sup>th</sup> Cir. 1960) (reversing dismissal, calling a requirement that a hospitalized plaintiff be forced to trial at risk of dismissal "grossly unfair"); see also, *Hevner v. Village East Towers, Inc.*, 293 Fed.Appx. 56, 58, 2008 WL 4280070, 2 (2d Cir. 2008) (finding court abused its

discretion in failing to consider plaintiff's disability in dismissing for failure to prosecute).

The District Court acted outside its discretion in dismissing a case that had been filed less than two years prior to the motion, and moreover, because any delay in prosecution was caused first by Gang, and then by Hunter's severe health problems, this Court should reverse the judgment.

## **II. THE DISTRICT COURT ABUSED ITS DISCRETION BY MAKING FACTUAL FINDINGS AND CONCLUSIONS OF LAW UNSUPPORTED BY ANY EVIDENCE IN THE RECORD.**

Nothing in the record supports the bulk of the factual findings or legal conclusions made by the District Court. A district court's findings of fact will be reversed as an abuse of discretion when they are clearly erroneous or unsupported by substantial evidence. *NOLM, LLC v. County of Clark*, 120 Nev. 736, 739, 100 P.3d 658, 660–61 (2004). In *Todkill v. Todkill*, the Supreme Court reversed the district court's finding regarding a claimed gift from husband to wife, due to a lack of evidence supporting that finding. The Court stated :

Just as the findings of the trial court will be sustained on the appellate level if they are supported by substantial evidence, . . . they will be reversed if they are not.

*Todkill v. Todkill*, 88 Nev. 231, 238, 495 P.2d 629, 633 (1972). Similarly, in *Verheyden v. Verheyden*, the Supreme Court reversed the award of an interest in a home to one spouse, stating, “[G]iven the absence of substantial evidence in the record to support the trial court's award to Camille of an interest in William's house on Santa Barbara Street, we are compelled to reverse.” *Verheyden v. Verheyden*, 104 Nev. 342, 345, 757 P.2d 1328, 1330 - 1331 (1988). And in *Roberts Roof & Floor, Inc. v. Ford Wholesale Co.*, 84 Nev. 298, 300, 440 P.2d 124, 125 (1968), the Supreme Court reversed the judgment where there was no evidence to support

the district court's factual findings.

Here, the District Court purported to make the following factual findings:

1. Gang is the owner of 20.47 acres of real property described in the office of the Clark County Assessor as: Land Division 93-92, Lot 2, 920819:570—APN 174-20-303-002 (“Gang Property”).
2. The Hunter Family Trust is the owner of 2.65 acres of real property described in the office of the Clark County Assessor as: 9500 Pinion Dr., Unincorporated County, Lot 1 & Vac. Rd., Sec 20 Twp 22 Rng 58—APN 174-20-402-004 (“Hunter Property”).
3. The subject properties are located in the community of Mountain Springs, which is located off of Highway 160 in the Spring Mountains between Las Vegas and Pahrump.
4. The north side of the Hunter Property borders the south side of the Gang Property.
5. Hunter built his home on the Hunter Property within eight inches of the property line between the Hunter Property and Gang Property.
6. Hunter landscaped on the Gang Property, which landscape includes trees, shrubs, and a watering system complete with sprinklers for the landscape (hereinafter referred to as the “Encroachment”). In essence, Hunter created a back yard for himself on property he did not own.
7. The Encroachment encompasses an area on the Gang Property of approximately 200’ by 40’.
8. On December 4, 2009, Hunter filed this suit against Gang alleging claims for quiet title, injunctive relief, adverse possession, and declaratory relief to attempt to obtain title to the Encroachment.

9. Other than filing the Complaint, Hunter has not taken any action.

10. Hunter gave Gang an extension to respond to the suit while the parties discussed a potential resolution. The discussions, however, broke down over a year ago. After that point, Hunter became, for the most part, unresponsive for extended periods of time while the Gang Property remained encumbered by this legal action which was filed for no apparent reason other than to force a settlement favorable to Hunter.

11. Due to the suit, the Gang Property has now been encumbered for almost two years—while property values in Clark County have continued to decrease.

12. The Encroachment on the Gang Property was part of a pattern of encroachment by Hunter, who also constructed a building and other improvements on Forest Service land that borders the Hunter Property to the west. The Forest Service required Hunter to remove the structure and improvements.

13. Hunter also landscaped on the Forest Service land, as he did on the Gang Property, and with the same disregard for ownership and property rights.

14. Even as this lawsuit was pending, Hunter continued to disregard Gang's property rights, staging a construction project for the Hunter Property on Gang's property.

15. During the project, Hunter dug a trench utilizing the Gang Property and installed a 24" diameter drainage pipe, a portion of which appears to be on the Gang Property.

16. Hunter's landscape, watering system, and drainage pipe all sit on the Gang Property.

17. Gang never authorized Hunter to landscape, install a watering system, or install a drainage pipe on the Gang Property.

**Order, A. 36-38.** However, as may be seen by reviewing the entirety of the District Court record reproduced in the single volume of the Appendix, there is no evidence whatsoever upon which Paragraphs 2- 7; 9, the final sentence of Paragraph 10, or Paragraphs 11-17 could have been based. *Indeed, the only instance in which these purported “facts” appear in the record is in the Order itself.*

A court commits clear error in rendering factual conclusions unsupported by any evidence presented to it. Given the lack of *any* evidence to support the factual findings, and the conclusions of law that stem from such findings, this Court must reverse this judgment.

**III. THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING GANG HIS ATTORNEYS FEES PURSUANT TO NRS 18.010 WHERE THERE WAS NO EVIDENCE TO SUPPORT THE CONCLUSION THAT THE ACTION WAS FRIVOLOUS OR BROUGHT FOR PURPOSES OF HARASSMENT.**

The District Court abused its discretion in granting attorneys' fees. In order to award attorneys' fees pursuant to NRS 18.010(2)(a), the Court must find that the claim action was filed without reasonable ground or to harass the prevailing party. “To support such an award, however, there must be evidence in the record supporting the proposition that the complaint was brought without reasonable grounds or to harass the other party.” *Kahn v. Morse & Mowbray*, 121 Nev. 464, 479, 117 P.3d 227, 238 (2005) (reversing award of fees where no evidence supported finding that claim was frivolous). A District Court abuses its discretion if it makes such a finding in the absence of evidence to support that finding. *Miller v. Jones*, 114 Nev. 1291, 1300, 970 P.2d 571, 577 (1998).

In *Miller v. Jones*, the District Court awarded fees on the basis of a its finding that the claims was frivolous. This Court held the District Court had abused its discretion in finding the claim frivolous, because the Complaint had stated a prima facie cause of action, and key factual allegations were supported by the evidence in the record.

Here, the District Court's finding that the claim was frivolous is similarly refuted by the record. Hunter's Verified Complaint stated prima facie causes of action for adverse possession of and/or to quiet title to an easement or irrevocable license over the Property. The key allegations therein—that Hunter constructed a berm on the Property in 1983, which berm has existed openly and continuously since then, have not been refuted by any evidence. Since Hunter's complaint was verified, the allegations therein constitute evidence in this matter. *See Vaile v. Eighth Judicial Dist. Ct.*, 118 Nev. 262, 272, 44 P.3d 506, 513 (2002) (acknowledging that verified complaint can serve as evidence).

Ironically, even the factual findings made by the District Court in its Order of dismissal do not contradict Hunter's key allegations. Thus, *nothing* in the record, not even the District Court's clearly erroneous factual findings, refutes the evidence of Hunter's key allegations. Accordingly, the record lacks any basis to support a finding that the Hunter's action was filed frivolously or for purposes of harassment.

#### **IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING GANG FEES AND COSTS AS THE PREVAILING PARTY.**

As shown above, the District Court's order of dismissal constituted an abuse of discretion, requiring reversal. Because the judgment entered in favor of Gang must be reversed, the award of fees and costs based on such judgment must also be

reversed. *AA Primo Builders, LLC v. Washington*, 245 P.3d at 1197 (where judgment that is predicate for award of costs is reversed, such award must also be reversed.)

### **CONCLUSION**

This Court should lift the punishment imposed upon Hunter, whose only crime consisted of continuously extending to Gang the opportunity to have the matter heard on the merits, rather than through a default judgment. The entry of judgment and award of fees and costs in this matter constitutes a shocking abuse of judicial discretion, in which there is not even a pretense that any evidence was presented to support the “factual” findings made in either order. Particularly given that Hunter’s inaction in this matter constituted refraining from obtaining a default judgment against Gang, the orders herein cannot be considered anything other than arbitrary and capricious. The Judgment and award of costs and fees must be reversed.

Respectfully submitted this 14th day of August 2013.

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## **CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32**

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 MS Word 2003 in Times New Roman 14.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 5051 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 14<sup>th</sup> day of August, 2013.

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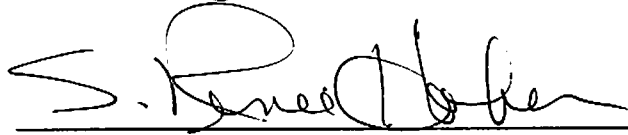
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## CERTIFICATE OF SERVICE

This is to certify that on August 14, 2013, a true and correct copy of the foregoing Opening Brief, was served by United States Mail, first class, on counsel of record for all parties to the action below in this matter, as follows:

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A handwritten signature in black ink, appearing to read "S. Renee Hohen", is written over a horizontal line.

An employee of GREENBERG TRAURIG